THE SUPREME COURT

Keane C.J., 81/03
Denham J.
Murray J.
McGuinness J.
Hardiman J.

Between:

D. Y.

Applicant/Respondent

and

THE MINISTER FOR JUSTICE EQUALITY AND LAW REFORM, THE REFUGEE APPLICATIONS COMMISSIONER and JAMES NICHOLSON, MEMBER OF THE REFUGEE APPEALS TRIBUNAL
Respondents/Appellants

JUDGMENT of Mr. Justice Hardiman delivered the 1st day of December, 2003.

On the 3rd November, 2000, the applicant arrived in Ireland and shortly afterwards made an application under s.8 of the Refugee Act, 1996 for a declaration that he is a refugee. In the course of his application he was asked whether he had claimed asylum in any of the countries he transited on his way to Ireland or in any other country. He replied "Yes. In Germany from April, 1998 to September, 2000." His complaint about the German decision was that it was "a largely arbitrary ('speculative') and typically German political decision on the right to asylum in general and towards Cameroonians in particular".

It transpired that the applicant had made an application for asylum in Germany on the 22nd April, 1998, which was refused. He appealed this decision unsuccessfully, the appeal being dismissed on the 11th May, 2000. It appears from this chronology that within six months of the final decision in Germany the applicant had made a further application for refugee status in this country.

Proceedings in Ireland.

On the 19th January, 2001, Ireland made a request to Germany for the purpose of having the asylum application made here determined in Germany, pursuant to certain provisions of the Dublin Convention. On the 8th May, 2001, Germany accepted responsibility for the applicant under

Article 8 of the Dublin Convention.

Accordingly, on the 11th May, 2001, the Refugee Applications Commissioner determined that the applicant's application for asylum should properly be examined in Germany. The applicant was notified of this by letter of the same date. This informed him that "The Refugee Applications Commissioner has determined that your application for refugee status is one which should properly be examined by Germany in line with the provisions of Article 8 of the Dublin Convention". The letter gave reasons for this decision.

The applicant then appealed this decision. On the 26th June, 2001, the third-named respondent, Mr. Nicholson, who was a member of the Refugee Appeals Tribunal affirmed the decision of the Refugee Appeals Commissioner. This decision said, in part:-

> "I find that the applicant has applied for asylum in Germany and I find that Germany, under Article 8 of the Dublin Convention, being the first member State in which the applicant lodged an application for asylum, is responsible for examining the applicant's application for asylum. I find that the decision of the Refugee Applications Commissioner is in conformity with the Dublin Convention (Implementation) Order, 2000 and I find that Germany is the member State responsible for accepting or taking back the applicant under Article 8 of the Dublin Convention and to deal with any matter or application in respect of the applicant's asylum. Accordingly, I affirm the original decision and dismiss this appeal".

The applicant then moved for relief by way of judicial review. The first ground advanced puts the nub of his case baldly:-

> "The second and third named respondents erred in law in concluding that the Dublin Convention 1990 applied to the applicant's case. The said Convention has no relevance to the case herein as the applicant's application has previously been determined in Germany".

This was the only ground argued in the High Court.

The applicant was successful before the High Court (Finlay Geoghegan J.) on a different and much narrower ground. In her

judgment of 18th December, 2002, the learned judge held that the decision of the Commissioner that the application should properly be examined by Germany, by reason of Article 8 of the Convention, was *intra vires*. She went on, however, to hold that:-

> "… The implicit decision that the applicant be transferred was based upon a request to Germany made pursuant to a provision of the Convention which has not been implemented in Ireland and relied upon Germany's acceptance of the request made to it pursuant to Article 10(1)(e) [of the Convention]."

She went on to find, in relation to the decision of Mr. Nicholson, that

> "Whilst no part of the reasoning of the third-named respondent is expressly dependent upon Article 10(1)(e), it is however predicated upon the *ultra vires* request made to Germany pursuant to Article 10(1)(e)."

But the learned trial judge had:

> "… already concluded that Article 10(1)(e) of the Dublin Convention obliges a member State to accept back into that State a person whose application for asylum it has previously refused as a distinct obligation and independently of any obligation to complete an examination of an application for asylum. Accordingly, it does not appear to me that the Oireachtas and the Minister for Justice in enacting s.22 of the Refugee Act, 1996 and the 2000 order made thereunder had implemented this provision in the State".

On this basis the High Court granted an order of *certiorari* of the decision of the third-named respondent upholding the decision of the second-named respondent to transfer the application of the applicant to Germany, and remitted the applicant's appeal to the Refugee Appeals Tribunal.

The High Court went on, pursuant to s.5(3)(a) of the Illegal Immigrants (Trafficking) Act, 2000 to grant leave to appeal and to certify that its decision involved points of law of exceptional public importance and that it was desirable in the public interest that an appeal should be taken to the Supreme Court. The points that were certified were:-

(i) Whether or not Article 10(1)(e) of the Dublin Convention has been incorporated into the law of the State and

(ii) Whether or not the second and third respondents had jurisdiction pursuant to the Dublin Convention (Implementation) Order 2000 (SI 343 of

2000) to make or uphold a decision that Germany be requested to take back the applicant pursuant to Article 10(1)(e) of the Dublin Convention.

Scope of Appeal.

Mr. O'Higgins S.C., for the appellants, who had not appeared in the High Court, was simply unable to tell us whether his argument was that advanced in that Court. Mr. Durcan S.C., for the respondent, who had appeared in the High Court, informed us quite frankly that while he naturally endorsed the High Court order, he did not necessarily adopt the approach of the learned High Court judge which had led to that result. He said that his argument in the Court below had been broader than that reflected in the judgment. He was not necessarily contending that Article 10(1)(e) had not been implemented in the State or that, even if that were so, it was dispositive of the present case. He says the approach of the learned High Court judge was not necessarily the correct one. He viewed the case as being about the implementation of the Convention in Irish law by means of the statutory instrument of 2000. He was not narrowly focussing on Article 10(1)(e), though that was an important part of his construction of Article 10 as a whole. Rather, he was saying that neither the Act of 1996 nor the Regulations of 2000 authorised the second and third named respondents to terminate their investigation of the applicant's application on the basis of the simple decision that Germany was the nation responsible for dealing with it. On a true construction of the Irish Statute and Regulations, he said, only the referral of an application to another Convention country *for examination* entitled Ireland to cease its examination of the application. This had not occurred here.

In the present case, neither party took exception to the others making arguments which went outside the scope of the points certified by the learned High Court judge. I would accordingly accept the arguments actually made. I would, however, expressly reserve my position, until the point arises in a case where it is contested, of the entitlement of either party to go beyond the points certified.

Intent of the subscribers to the Dublin Convention.

I entirely agree with the judgment of the Chief Justice on this topic. He said that he was:-

> *"... satisfied that it was clearly the intention of the framers of the Convention that, in a case such as the present, where an application for asylum made in another Member State has been rejected in that State and the applicant then arrives illegally in this State, he should be taken back to the State which has already dealt with his application. It would then be a matter for that*

> *State to decide, in accordance with its own laws, whether the applicant should be deported to his country of origin or permitted to remain on humanitarian grounds or on any other grounds which those laws would permit being invoked in his case".*

I did not understand either the judgment of the learned trial judge or the submissions of either party to express any other view of the intention of the framers of the Convention. But three separate views have been expressed as to the application of these principles to the present case. The appellants contend for the validity of the determinations of the second and third named appellants as being fully within their powers. The applicant/respondent says that the provisions of the Convention relied on simply have no application in the present circumstances because it is not simply possible to transmit his application for refugee status for examination in Germany, since that country has concluded its examination. The learned trial judge based her decision not on that broad ground, but on the basis that the request by the State to take charge of the applicant and admit him to its territory for the purpose of examining his case for asylum in accordance with Article 10(1)(e) of the Dublin Convention was invalid. Such request, she held, will normally be made pursuant to Article 10(1)(a) of the Dublin Convention.

Submissions in this Court.

For the appellants, Mr. Paul O'Higgins S.C. submitted that the learned trial judge had misinterpreted Article 10(1)(e). This provision, he said, describes the obligation not of the State, but of the other relevant State of whom a request may be made by us. Article 11(3) of the Dublin Convention (Implementation) Order 2000 implements this obligation, binding upon the State, into Irish law. The result of this, said Mr. O'Higgins, is that if the positions of Ireland and Germany in this case were reversed Ireland would be obliged to take back the alien by virtue of having thus implemented relevant provision of the Dublin Convention here. That is all this State can do: it cannot, and has not attempted to, produce Irish legislation which imposes an obligation on Germany. But, said Mr. O'Higgins, this State was entitled to call upon Germany to take charge of the applicant in pursuance of *Germany's* obligations under the Dublin Convention.

Mr. O'Higgins went on to direct submissions to the power of the Irish authorities following acceptance of Germany's responsibility by that country. He said that the ordinary power to deport, independently of any provision of the Act of 1996 or the Order of 2000, applied. There would be no need to invoke a specific power in either of these sources. This power, he said, was quite capable of being exercised in support of the underlying policy expressed in Article 3 of the Dublin Convention. Germany has accepted the responsibility of examining the application made by the

applicant in Ireland pursuant to Article 8 of the Dublin Convention. This, said Mr. O'Higgins, is a sufficient discharge of the State's obligations. He said that the word "application" applies equally to all applications made by the relevant person, including in this case the application made in Ireland. Germany is responsible for examining that application, and this was held to be so by the learned trial judge and is not the subject of appeal. The fact that Germany has already refused another application by the same person does not take away from this fundamental position. The orders which it is sought to quash do no more than determine that Germany is the appropriate country to examine the application. The learned trial judge fell into error in quashing the determination of the second and third named respondents on the basis that they contained an "implicit decision that the applicant be transferred [which] was based upon a request to Germany made pursuant to a provision of the Convention which has not been implemented in Ireland and relied upon Germany's acceptance of the request made to it pursuant to Article 10(1)(e)". She was, however, quite correct in holding that the decision of the same respondents that Germany was the country which would properly examine the application was *intra vires.*

Mr. O'Higgins said that any transfer of the applicant to Germany will not take place under the Convention, which did not require to be invoked in this regard. Once the application for asylum could lawfully be dealt with elsewhere the State was within its rights in deporting the applicant to the place where the application would be dealt with.

For the respondent, Mr. Gerard Durcan S.C. said that the Convention was simply irrelevant. Ireland was obliged by reason of its international obligations and specifically by reason of the Refugee Act, 1996 to examine the application which the applicant had made in this country for refugee status. There were only two exceptions to this obligation, firstly if the application is withdrawn and secondly if it is deemed to be withdrawn by virtue of the application being transferred to another State for examination pursuant to s.22(8) of the Act. Neither of these things had occurred here; therefore the State is obliged itself to examine the applicant's application.

Furthermore, Mr. Durcan contended, for the purposes of Article 10 of the Dublin Convention there is only one application. Germany has already examined this application: it has no jurisdiction to re-examine it. Mr. Durcan said that the entire case comes down to the proposition that, under the Convention, there could only be one application for refugee status as of right. It would have been open to the State, he said, to dismiss the application as manifestly unfounded pursuant to s.12 of the Act of 1996. But since this was not done, the application made in this country must be dealt with here.

Mr. Durcan said that he supported the Order granting *certiorari* of the decision of the second and third named respondents to transfer the application of the applicant to Germany on the basis that this decision necessarily implied that there was no obligation further to consider the application for refugee status here. Mr. Durcan said that the powers of the second named respondent were strictly confined by Article 3 of the Dublin Convention (Implementation) Order. There was simply nothing in that Article reflecting the obligation to "take back" under Article 10 of the Convention. Putting this another way, he said, there was nothing in Article 3 to reflect a power to cut off the examination of an application for refugee status other than in accordance with the provision of s.11.

The impugned decisions in context.

By Article 3 of the Dublin Convention (Implementation) Order 2000, once an application is made under Article 8 of the Refugee Act, 1996, as the applicant has done here, the Commissioner is required to determine whether the application:-

"(a) should in accordance with the provisions of Article 3(7) of the Dublin Convention be transferred to a convention country for examination,
(b) should in accordance with the provisions of Article 10(1)(d) of the Dublin Convention be transferred to a convention country for examination,
(c) should in accordance with the criteria set out in Articles 4 to 8 of the Dublin Convention (applied in the order in which they appear therein) be transferred to a convention country for examination, or
(d) should, in accordance with the criteria aforesaid or otherwise, be examined in the State." **(Emphasis added)**

The Refugee Applications Commissioner, by a decision communicated on the 11th May, 2001, informed the applicant that she had "determined that your application for refugee status is one which should properly be examined by Germany in line with the provisions of Article 8 of the Dublin Convention". The basis for this decision was that Germany was the first Member State in which the applicant had lodged an application for asylum, and that the appropriate authorities had agreed to his return under the Dublin Convention for the purpose of examining his application. The applicant appealed from this decision and the decision on the appeal was that of the third-named respondent Mr. Nicholson. He upheld the Commissioner's decision on the basis that the applicant had applied for asylum in Germany and that that country was, under Article 8 of the Dublin Convention, as the first Member State in which the applicant lodged an application for asylum, responsible for examining the applicant's application.

Accordingly, the decision of the Commissioner and of the Appeals Tribunal on appeal was a decision on a question which each of these bodies was obliged to address. The learned trial judge has held that these decisions were

intra vires. Indeed, she also appears to have thought that the decisions to the effect that the applicant's application should be transferred to Germany for examination correct in themselves. Speaking of the decision of Smyth J. in **Demeter & Ors. v. The Minister for Justice** (unreported, High Court, 26th July, 2002) she said:-

> "We agree that a person who previously made an application for asylum in another Member State which has been refused and who then makes an application for asylum in Ireland is an 'applicant for asylum' within the meaning of the Convention and the 2000 Order. Further, that if in accordance with Article 8 of the Dublin Convention the other Member State is responsible for the examination of the application for asylum then the Commissioner may determine under Article 3 of the 2000 Order that the application be transferred to that Member State and consequently to request the Member State to take charge or take back the applicant pursuant to Article 10 of the Dublin Convention".

I consider that, having regard to the terms of the Convention and the Implementation Order, both the impugned decisions were correct. However, they were quashed in the High Court on the basis that the learned trial judge found, in respect of the Commissioner's decision:-

> "In accordance with my above analysis of the Dublin Convention and the 2000 Order the decision made by the Commissioner as recorded in the letter of the 11th May, 2001 that the application should properly be examined by Germany under Article 8 is *intra vires*. However, the implicit decision that the applicant be transferred was based on a request to Germany made pursuant to a provision of the Convention which has not been implemented in Ireland and relied upon Germany's acceptance of the request made to it pursuant to Article 10(1)(e)".

Speaking of the decision of the third-named respondent, the learned trial judge held:-

> "The only reference in the decision of the third-named respondent to Article 10(1)(e) is a reference as part of the recital of facts to the formal request made to Germany under

> Article 10(1)(e) of the Dublin Convention on the 19th January, 2001. Whilst no part of the reasoning of the third-named respondent is expressly dependent upon Article 10(1)(e) it is however predicated upon the *ultra vires* request made to Germany pursuant to Article 10(1)(e)."

Accordingly, these two decisions have been quashed, not for any want of fair procedures or intrinsic error in them - they are in fact believed to be correct – but because they were 'predicated upon' an *ultra vires* request to Germany to examine the application for asylum, and to take back the applicant for the purpose of doing so, in discharge of its obligations under Article 10 of the Convention.

I do not consider that either of the impugned decisions can properly be regarded as containing an "implicit decision that the applicant may be transferred". If this applicant is to be transferred to Germany it will be following an exercise of the ministerial power of deportation. On the evidence in this case, this step has yet to be considered. Section 3 of the Immigration Act, 1999 sets out in subsection (2) various circumstances in which the Minister makes a deportation order. These include:
"(e) A person whose application for asylum has been transferred to a convention country for examination pursuant to s.22 of the Refugee Act, 1996."

Section 22 is the section authorising the giving effect to the Dublin Convention in Ireland.

Since any deportation of the applicant will arise as a result of a separate decision by a different authority to those who made the decisions impugned, I do not consider that a decision to transfer the applicant to Germany can properly be described as implicit in the decisions of either the second or the third-named respondent.

The request to Germany.

This request was made by an officer of the Refugee Applications Commission to a similar official in Germany by letter dated the 19th January, 2001. It was headed "Notice under Article 6(1) of the Dublin Convention (Implementation) Order 2000 and Article 11 of the Dublin Convention". It referred to the applicant's application for asylum in Ireland. It said:-

> "Pursuant to Article 6(1) of the Dublin Convention"

and went on:

> "…I hereby call upon you to take charge of the above-named applicant and admit him to your

> territory for the purpose of examining his case for asylum in accordance with Article 10(1)(e) of the Dublin Convention".

The German authorities replied by letter received on the 9th May, 2001 saying:-

> "Your request for takeover from the 19.01.2001 is met according to Article 8 Dublin Agreement. The Petitioner mentioned above will be accepted by the Federal Republic of Germany. An information concerning the modalities of transfer is enclosed".

The obligation which Germany was thus accepting was, pursuant to the wording of Article 8 of the Dublin Convention, an obligation to examine the application for asylum made by the applicant in Ireland on the 6th November, 2000.

Application of the Dublin Convention.

As noted above, the applicant adopted the position that the Dublin Convention did not apply to his circumstances at all. The basis on which it succeeded in the High Court, however, was a different one and one which in fact assumed the applicability of the Convention. He succeeded on the basis that the request had been made under Article 10(1)(e) instead of Article 10(1)(a). I propose however to examine both points, starting with the more general one.

The applicant has made an application for asylum in this country. By reason of the obligations assumed by the countries party to the Geneva Convention and to the Dublin Convention, he has a right to have this application dealt with. There is no exclusion of this right simply by reason of his having previously made one or more applications for asylum elsewhere. By Article 3(2) of the Dublin Convention his application is to be examined by a single Member State, and the identity of this State is to be determined in accordance with the criteria defined in the Convention. Such examination, by the following sub-Article, is to be dealt with in accordance with that country's national laws and international obligations. By the terms of the Implementation Order, quoted above, it is the responsibility of the Refugee Applications Commissioner to determine the State responsible for dealing with the application. This reflects the provisions of Article 3(4) of the Convention. That sub-Article also provides that on the determination that another country is responsible for dealing with the application Ireland is "relieved of its obligations, which are transferred to the Member State which

expresses willingness to examine the application".

The applicant however contends that because Germany has already examined an application for asylum by this applicant, made in 1998 and finally determined in 2000, it is *functus* in relation to any other application made by this person. In support of this contention Mr. Durcan made the arguments, summarised above, to the effect that under the Convention there can only be one application for refugee status in any single country in respect of any one applicant.

It will be observed, first, that this is clearly not the view of the German State. Furthermore, no authority in support of the contention from any convention country has been cited.

If there were merit in the applicant's broad contention, it would confer a right on an applicant to have his application finally rejected in any Member State and then to proceed to make a further application to another, quite contrary to the objective, set out in the recitals to the Dublin Convention, to "provide all applicants for asylum with a guarantee that their applications will be examined by one of the Member States…".

Applications for asylum by individuals in one State after another are quite common, as exemplified in **Demeter's** case. Each such application is a separate one which triggers (in a convention country) the obligation to consider it. But part of this consideration is a determination as to which convention country should assume responsibility for it. Accordingly, the very principle which allows the application to be made in the first place, despite the applicant's history, equally triggers the State's entitlement to request another State to take responsibility for it, and that other State's right to consent. Nor has the applicant established any legitimate expectation that Ireland will complete the examination of his application; he merely has the legitimate expectation that Ireland will act in accordance with its convention obligations and its own law. These entitle it, *inter alia*, to determine the State responsible for the examination of the application, and require it to consider and determine this issue before any other.

Mr. Durcan contended that Ireland could have investigated the application and found it manifestly unfounded pursuant to s.12(4)(i) of the Refugee Act, 1996. This defines a "manifestly unfounded application" *inter alia* as one "prior to which the applicant had made an application for a declaration or an application for recognition as a refugee in a State party to the Geneva Convention and the Commissioner is satisfied that his or her application was properly considered and rejected and the applicant has failed to show a material change of circumstances".

In my view there is no obligation on the State or on the Commissioner to review for propriety the procedures and considerations given to a particular application in another State with whom, according to the recitals of the Dublin Convention, we share a common humanitarian tradition and an objective of harmonisation of asylum policies. The Commissioner, bearing these objectives in mind, is in my view entitled to consider whether, under the terms of the Dublin Convention (which is more restricted in its area of operation than the Geneva Convention referred to in s.12(4)(i)), another Dublin Convention State has responsibility of examining the applicant's application. In this regard I agree with the judgment of Smyth J. in **Demeter.**

I would add that an examination by a Member State, responsible under the Dublin Convention, which assumes a summary or abbreviated form since there has already been an examination of a previous application by him in that country, continues to be an examination for the purposes of the Dublin Convention.

I am quite satisfied that there is no legal or factual aspect of this application which excludes it from the scope of the Dublin Convention and the Implementation Order and in particular that the final rejection of a previous application in the State otherwise responsible does not have this effect.

***Vires* to make the request to Germany.**

The High Court has held that Article 10(1)(e) of the Dublin Convention has not been implemented in the State and accordingly a "request to the other Member State may not be made pursuant to Article 10(1)(e)…". It is also held that, in any event, sub-paragraph (e) merely "imposes a separate and distinct obligation on the Member State to take back an alien whose application it has rejected and who is illegally in another Member State. It does not appear to envisage the transfer of an application for asylum".

Article 10 of the Dublin Convention sets out certain obligations of "the Member State responsible for examining an application for asylum". In the present case, this is not Ireland: it is Germany. Manifestly, no implementation into Irish law of any part of the Convention can, in and of itself, impose an obligation on Germany. This is so by reason of territorial limitations in the application of Irish laws contained in the Constitution and because of the existence of Germany as a separate sovereign State. Ireland did not invoke Article 10(1)(e) as the basis of its power or authority to make a request of Germany. It called upon Germany to assume responsibility in this particular case in accordance with *Germany's* obligations under Article 10(1)(e). This is an international obligation which, presumably, has been implemented in German law by an appropriate mechanism, or by operation of law.

Article 11(3) of the Implementation Order provides as follows:-

> "If, following the refusal of an application under s.17 of the Act the applicant concerned leaves the State and enters a convention country without the permission of that country, then, if the State receives a request from the convention country to readmit the applicant to the State, the Commissioner shall reply to the request within eight days of such receipt and if, he or she accedes to the request, shall notify the Minister, for the purposes of obtaining his or her consent (which shall not be unreasonably withheld) to readmit the applicant as soon as may be".

This is an implementation of Article 10(1)(e) in Irish law in respect of the only matter connected with it which Ireland is entitled to govern by its domestic law: acceptance in that law of *our* international obligation under Article 10(1)(e). It is for this reason that, if the positions of Ireland and Germany in this case were reversed, Ireland would be obliged to readmit the applicant. That is precisely the decision Germany has come to on the actual facts of the present case and no doubt that is a correct decision in German law. The contrary has not been contended.

The learned trial judge characterised the request to Germany as an *ultra vires* request by virtue of what she held to be the non-implementation in Irish law of Article 10(1)(e). I do not consider that that sub-Article was at any stage relied on as conferring *vires* to make the request. In the ordinary way, I do not consider that the State requires a specific legal power simply to make a request of another State. However, in so far as a request, legitimate under the terms of the Convention, must be shown in order to terminate Ireland's responsibility itself to examine the application, the provisions cited clearly on the face of the request of the 19th January, 2001 are Article 6(1) of the Implementation Order and Article 11 of the Convention. The latter provides:-

"(1) If a Member State with which an application for asylum has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible and in any case within the six months following the date on which the application was lodged, call upon the other Member State to take charge of the applicant".

In my view, the request of 19th January, 2001 reflects the wording of this

provision. Because the Commissioner has formed the opinion that Germany is responsible for examining the application the State may call on Germany to "take charge of the applicant". A decision about responsibility for examination of the application may thus give rise to an obligation to "take charge of" the applicant. Moreover, by the next paragraph of Article 11, if the request "that charge be taken" is not made within six months then "responsibility for examining the application for asylum shall rest with the State in which the application was lodged", i.e. in this case Ireland.

It appears to me that the *vires* conferred by Article 11(1) apply regardless of which of the provisions of Article 10 may be considered to apply to the case. Nor do I consider that any invocation of Article 10(1)(e) excludes or is inconsistent with an examination of an application for asylum taking place in the country invited to take charge, or take back, the applicant for asylum. All of the obligations set out in Article 10(1)(a) to (e) are obligations of the Member State "responsible for examining an application for asylum". The application in this case (as the letter of request makes clear) is the application made in Ireland on the 6th November, 2000. It is uncontested that Germany is properly responsible for examining this application. This position is unaltered by the fact that it has previously rejected another application. Article 10(1)(e) is no more than a statement of the obligation specifically in relation to a person whose application a Member State is responsible for examining, but who has previously made another application to that State and, after its rejection, travelled illegally to another Member State.

Accordingly, I consider that Ireland is entitled to transfer this application for examination in Germany. That being so, by virtue of s.22(8) of the Act of 1996 the application made here "shall be deemed to be withdrawn".

In my view, it is a misconstruction of Article 10 to regard the obligations set out in the various subparagraphs of 10(1), or any of them, as being necessarily exclusive of each other. Firstly, all the obligations arise only because the country on whom they devolve is the "country responsible for examining an application according to the criteria set out in this Convention". This applies to the obligation in subparagraph (e) as much to that in subparagraph (a).

Secondly, the circumstances of a particular person may trigger more than one of the Article 10 obligations. Here, the applicant would fall to be "taken back" under 10(1)(e) even if he made no application for refugee status in Ireland. But he did make such application and Germany is liable to examine it and to "take charge" of him for that purpose. However, since he has already been in Germany as an applicant for refugee status and was at that time "taken charge" of by Germany, to "take charge" of him now is also to

take him "back". It is meaningless on the present facts to distinguish the two phrases: in his case it is impossible to "take charge" of him without also "taking [him] back". The obligation to take him back is not terminated by the fact that the State invited to take him back has other obligations to him, and those other obligations are not avoided simply by taking him back.

Since Mr. Y. is required to be "taken back" and also to have his application examined in Germany, it follows that no one subparagraph of Article 10 wholly defines Germany's obligations. There is no reason why any single subparagraph should. Equally no exclusive group of subparagraphs will wholly define a country's obligations if, on the facts, other provisions also apply. Similarly, neither Article 11 nor Article 13 exclusively govern the procedural requirements of his case. But, in my view, the request which has been made of Germany meet the requirements of both Articles.

In my opinion the request of the 19th January, 2001 reflects the fact that Germany is obliged, without limitation of time, to take back this applicant under Article 10(1)(e). If he had not made an application for asylum in Ireland, that would exhaust Germany's obligations under the Convention. But he did make such an application. That separate fact triggers separate, but not inconsistent, obligations on the part of Germany which that country is quite willing to accept. Amongst these is the obligation, following a request under Article 11, to take charge of the applicant in pursuit of its obligations under 10(1)(a).

I accept that the distinction between the expressions "take charge of" and "take back" may be of great significance in a particular case. But on the facts of the present case, these phrases overlap in their only possible application to those facts.

The nub of the applicant's case is that Article 3(1) of the Implementation Order makes no express reference to the transfer of an applicant in circumstances where the other country concerned has already examined and rejected an earlier application. But it makes no reference to any special circumstances whatever even though each case will naturally present its own. The fact that there is no reference to the particular situation of a previous application having been rejected elsewhere, or to any other special set of circumstances simply illustrates that it is the receipt of an application for asylum here, without more, which triggers in every case the obligation to consider where the application should be examined. There is no exclusion of the Commissioner's duty to consider this on account of a previous application elsewhere or any other aspect of the applicant's history. But such factors may be crucial in considering which country should examine his current application.

It thus appears to me that both subparagraphs (a) and (b) on the one hand, and subparagraph (e) on the other of Article 10(1) are capable of applying to the applicant in this case, and no doubt in many other cases where multiple applications are made. But the balance of Article 10 provides for different modes of termination of the obligations referred to in (a) to (d) by comparison with the obligation referred to in subparagraph (e): the obligation under subparagraph (d) may be terminated in either way. No doubt for good reason, the framers of the Convention imposed no time limit on the responsibility of a State which has already rejected an application by the same person, but failed to deport him. Ireland, or any other State party to the Convention is fully entitled to make a request based, in part at least, on the indefinite obligation set out in subparagraph (e).

I am unable to agree with the learned trial judge that the obligation contained in Article 10(1)(e) of the Dublin Convention is a "distinct obligation independent of any obligation to complete an examination of an application for asylum". As already mentioned, the obligation at subparagraph (e) is an obligation of "the Member State responsible for examining an application for asylum according to the criteria set out in this Convention". In terms of the language of the Convention, the obligation is not grammatically or syntactically distinguished from the other obligations set out in the sub-Article. It is certainly true that the obligation in subparagraph (e) *may* arise in circumstances where none of the other obligations described in 10(1) are applicable to the facts of a particular case. But this does not mean that the subparagraph (e) obligation is different in it essential nature from the other obligations, so that if it arises, no other obligation arises. The obligations which arise under Article 10 depend entirely on the facts of the case. In any particular case, as many obligations will arise as are triggered by the facts.

Conclusion.

I consider the request made to Germany on the 19th January, 2001 to be a proper one, which there was power to make and which was duly acceded to by Germany. I would set aside the order of the High Court and substitute an order refusing the relief sought.

D.Y. v. Minister for Justice etc.