

Neutral Citation No. 2005 IEHC 403
THE HIGH COURT
JUDICIAL REVIEW

[2005 No. 908 J.R.]

BETWEEN

EVELYN MAKUMBI

APPLICANT

AND

THE MINISTER FOR JUSTICE, EQUALITY AND LAW REFORM

RESPONDENT

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 15th day of November 2005.

The applicant is a national of Uganda, who is stated to have arrived in the State on the 16th March, 2005. On the 29th June, a transfer order was signed on behalf of the respondent pursuant to Article 7 of the Refugee Act 1996 (Section 22) Order 2003 requiring the applicant to leave the State and go to the United Kingdom pursuant to the provisions of Council Regulations (EC) No. 343/2003.

On the 22nd August, 2005, leave was granted by order of the High Court (MacMenamin J.) to apply by way of Judicial Review for a number of reliefs all of which are directed to preventing the transfer of the applicant to the United Kingdom pursuant to the said transfer order and requiring that the respondent determine the applicant's request to have her claim for asylum processed in Ireland. A notice of opposition was delivered in which it is contended *inter alia* that the respondent is obliged to give effect to the transfer order and has no discretion or power not to implement the transfer order or to revoke it or to consider the application to have the applicant's claim for asylum determined in this jurisdiction.

Factual background

The applicant made a claim for a declaration of refugee status in the State on the 18th March, 2005. She was fingerprinted by officials of the Refugee Applications Commissioner as part of that process. A EURODAC search was made and it was discovered that she had previously made an application for asylum in the United Kingdom on the 19th March, 2004.

On the 28th March, 2005, that applicant completed a questionnaire for the Refugee Applications Commissioner and in response to an express question stated that she had not previously made an application for refugee status elsewhere within the EU. The applicant produced a Ugandan identity card and stated that she had travelled on a Portuguese passport, purchased from an agent, through Kenya and Amsterdam to Dublin.

On the 10th May, 2005, an application was made to the U.K. authorities to take charge of the applicant in accordance with Article 16 (1) (c) of Council Regulation EC No. 343/2003) (the Council Regulation). The U.K. agreed on the 24th May, 2005, to take back the applicant in accordance with Article 16 (1)(e) of the Council Regulation.

On the 16th June, 2005, a letter was sent to the applicant containing the determination of the Refugee Applications Commissioner (the Commissioner) that". . . The United Kingdom is responsible pursuant to the provisions of Articles 13 and Article 16 (1)(e) of Council Regulation EC No. 343/2003 for dealing with your application for asylum." In that letter it was explained to the applicant that Article 16 (1)(e) of the Council Regulation provides that the Member State responsible for examining an application for asylum under the Regulation is obliged to take back a third country national whose application it has rejected and who is in the territory of another Member State without permission. The applicant was also informed that the respondent had been notified of the determination with a view to making arrangements for her transfer to the United Kingdom. She was also informed of her entitlement to appeal the determination to the Refugee Appeals Tribunal but that such appeal would not suspend her transfer to the United Kingdom.

An appeal was lodged on behalf of the applicant by the Refugee Legal Service to the Refugee Appeals Tribunal on the 7th July, 2005. This was determined against the applicant and the determination of the Refugee Applications Commissioner affirmed by decision of Mr. James Nicholson member of the Refugee Appeals Tribunal on the 18th July, 2005.

In the meantime on the 29th June, 2005, a transfer order requiring the applicant to leave the State and go to the United Kingdom pursuant to the Council Regulation was signed on behalf of the respondent. On the 8th July, 2005, the applicant was sent a letter from the Repatriation Unit of the Department of Justice, Equality and Law Reform pursuant of the provisions of art.7 (4) a of the Refugee Act 1996 (Section 22) Order 2003 ("the 2003 Order") requiring that she present herself to the Garda National Immigration Bureau at Burgh Quay, Dublin 2, on Monday the 18th July, to make arrangements for her removal to the United Kingdom not later than the 25th July, 2005. The applicant's solicitor states on affidavit that following receipt of the determination of the Refugee Applications Commissioner of the 16th June, 2005, a consultation was arranged with the applicant. At that stage it appears that the applicant disclosed to her legal advisors that she had made a previous application for refugee status in the United Kingdom in about October, 2000. Her instructions were that such application had been considered and rejected and that she was subsequently deported to Uganda. She also stated that following her return she was detained and tortured by the authorities in Uganda. She then stated that she fled once more and returned to the United Kingdom where she was detained and subsequently

deported. However, on arrival in Uganda she was refused leave to land on the basis that she had no documentation to prove her identity. She was then returned to the United Kingdom where she was informed she could make another claim for asylum which she did on the 19th March, 2004. She stated that fearing that she would ultimately be sent back to Uganda, she then fled to Ireland where she has remained. It is unclear from the facts stated in the affidavit whether she arrived in the State earlier than the 16th March, 2005. However, nothing turns on that in this application.

In July, 2005, the Refugee Legal Service was made aware by the applicant that she suffered from clinical depression and has a history of attempts to take her own life. Reports were obtained from Dr. Cliona McCullagh, area medical officer of the HSE at the Baleskin Medical Centre, and Dr. Anokwuru Andrew, of St. Brendan's Hospital, dated the 25th and 26th July, 2005, respectively. Dr. McCullagh's report states that the applicant is "a 26 year old woman from Uganda who I have been dealing with for several months now". She states that the applicant is attending the psychology service at Baleskin, attending a physiatrist in St. Brendan's Hospital and also attending Dr. Geary of the Rotunda hospital. She also expresses the view that the applicant is suffering from depression and that her deportation would "without question exacerbate that to a level where I would be concerned about her own safety, given her history of delivering self-harm in the past..." She enclosed the report of Dr. Andrew of the 26th July, 2005. The report of Dr. Andrew records that the applicant was referred to the assessment unit of St. Brendan's unit on the 28th June, 2005. A provisional diagnosis of depression was made, she was given medication and a subsequent appointment. At the subsequent appointment she appears to have been interviewed by Dr. Andrew. He records a brief history of her asylum attempts in the U.K., deportation, return to the U.K. and subsequent move to Ireland. He records an attempt to commit suicide whilst in the detention centre which was spotted and prevented and a history of another attempt three years ago by taking an overdose. He then states:

"All through the interview sessions, Evelyn made it clear that in the event that she is sent back to the U.K., she would definitely kill herself at the first opportunity that she gets. It is my professional opinion that this should not be taken lightly but with all the seriousness that it deserves. She has demonstrated most of the major symptoms of major depression and is therefore in need of psychiatric assistance. In addition she does have suicide ideations (sic) with a positive history of deliberate self-harm".

Dr. Andrew then sets out his medical assessment of her mental state during interview and the then current medication and concludes:

"Evelyn is clinically depressed with suicidal ideations (sic) and a strong positive history of deliberate self-harm. She is

mentally unwell and would benefit from psychiatric intervention.”

The initial arrangements with the U.K. authorities were to transfer the applicant on the 25th July, 2005. This was postponed on the intervention on the applicant’s behalf of the Irish Refugee Council. The reports of Dr. McCullagh and Dr. Andrew appear to have been forwarded initially by the Irish Refugee Council to the Dublin Convention Unit of the Refugee Application Commissioners Office. There were also e-mail exchanges between the Irish Refugee Council and the Repatriation Unit of the Department of Justice, Equality and Law Reform. On the 28th July a department official informed the Irish Refugee Council that the applicant would be transferred on the 2nd August. Permission was sought from Dr. Andrew to forward his report to the U.K. authorities so that they could make an assessment of the correct medical regime for the applicant. On the 28th July, the Refugee Legal Service wrote to the respondent setting out a summary of the applicant’s history, enclosing the reports of Dr. McCullagh and Dr. Andrew and then made the following submissions and requests:

“I would respectfully submit that the above mentioned medical reports disclosed that transferring my client to the United Kingdom would expose her to a real and serious danger of committing suicide and accordingly she is not in a fit state to travel. I would request, Minister, that you exercise your lawful discretion pursuant to Section 22 (7) of the Refugee Act 1996 (as amended) to revoke or amend the Transfer Order. It is further submitted that this is an appropriate case for the State to exercise its entitlement under Article 3.2 of Council Regulation 343/2003 to examine Ms. Makumbi application for asylum.”

This letter was received on behalf of the respondent on the 2nd August. In the meantime arrangements had been put in place on the 28th July for the applicant to be transferred to the United Kingdom on the 2nd August. Regrettably on the 31st July, the applicant took an overdose of sleeping tablets in an attempt to take her own life. She was admitted to St. Brendan’s Hospital and stated to have been attended by Dr. Serina Condon consultant psychiatrist at St. Brendan’s. Dr. Andrew is the SHO to Dr. Serina Condon. By letter of the 2nd August the respondent was informed of these events by the Refugee Legal Service and the request of the applicant to make her asylum claim in Ireland repeated.

The affidavit sworn on behalf of the respondent states that on the 2nd August, the repatriation unit of the Department informed the U.K. authorities that the applicant would not be transferred on that date as she had failed to present herself. A new date of the 16th August was scheduled. The applicant was discharged from St. Brendan’s on the 10th August, and attended Dr. McCullagh’s clinic at Baleskin. Dr. McCullagh furnished a

medical report of that date in which she expressed the view that the applicant “did not seem in any way improved and still demonstrates the symptoms of major depression. She is still in need of strong psychiatric assistance that she is receiving here in Dublin. It is my medical opinion that she may attempt suicide again if deported and the outcome for her may not be so favourable.”

On the 15th August, 2005, an application was made *ex parte* to the High Court and an order made (Dunne J.) restraining the respondent until after Monday the 22nd August, 2005, or further order from taking any steps to transfer the applicant to the United Kingdom. On the 22nd August, 2005, the High Court made an order, on consent, granting leave and without objection from the respondent, an order restraining the respondent, his servants or agents pending the trial of the action from taking any steps to transfer the applicant to the United Kingdom on foot of the Transfer Order signed on behalf of the respondent on the 29th June whilst the applicant remains a suicidal risk. On the 7th September, 2005, a statement of opposition and a verifying affidavit sworn on behalf of the respondent by an official of the repatriation unit of the Department were filed and delivered.

The respondent has not sought to dispute the medical evidence. Its gravity is expressly recognised by the deponent on behalf of the respondent. It is asserted that the respondent will advise the U.K. authorities of the applicant’s medical condition and has sought permission to send to them Dr. Andrews’ report

I am satisfied that the medical evidence presented to the respondent on 28th July and subsequently, *prima facie* indicates that there exists a real and substantial risk of suicide if the Transfer Order is implemented and in that sense a real and substantial risk to the life of the applicant. It is in the context of this finding of fact that the legal issues must be considered.

Issues

The reliefs in respect of which leave was granted include an order of *certiorari* of the transfer order signed on behalf of the respondent on the 29th June, 2005 (“the Transfer Order”). Counsel for the applicant, properly in my view, indicated at the outset of the hearing that he was not pursuing such relief. It is accepted that under the Council Regulation, the United Kingdom is the Member State of the E.U. responsible for the applicant. It is also accepted that the applicant’s medical condition was not disclosed to the authorities prior to the 29th June, 2005. The respondent was entitled on the facts as then disclosed to make the Transfer Order. The remaining substantive reliefs in respect of which leave was granted are:

- b) An injunction restraining the respondent from taking any steps to transfer the applicant to the United Kingdom while the applicant remains a suicide risk.
- c) Declaration that the decision of the Minister to transfer the applicant to the United Kingdom whilst she remains a suicide

risk is *ultra vires*, void and of no force or effect having regard to s.22 of the Refugee Act 1996 (as amended) and having regard to the provisions of Council Regulation (EC No. 343/2003).

d) An order of *mandamus* by way of application for judicial review compelling the respondent to consider the applicant's request to have her claim for asylum processed in Ireland.

Having regard to the grounds upon which leave was given; the notice of opposition and submissions made by counsel, the primary issue to be resolved on this application may be identified as follows. Where the respondent has made a transfer order pursuant to art.7 of the 2003 Order and is subsequently presented for the first time with medical and factual evidence which *prima facie* indicates a real and substantial risk of suicide by the applicant if the transfer order is implemented is the respondent, at minimum, under an obligation pursuant to Article 40.3 of the Constitution and/or ss.2 and 3 of the European Convention on Human Rights Act, 2003 to consider the new medical and factual evidence and determine whether or not to implement the transfer order?

The submission on behalf of the applicant is that at minimum such an obligation exists. On behalf of the respondent it is contended that no such obligation exists. This rather stark submission in the context of the uncontested medical evidence of the risk of suicide is made upon the basis that the respondent has no discretion or power not to implement the Transfer Order. It is asserted that he is bound by the terms of the Council Regulation to effect the transfer of the applicant to the United Kingdom and has no discretion not to transfer even on the facts herein. Further that as he has no discretion not to implement the Transfer Order he cannot be under any obligation to consider the medical evidence and decide whether or not to implement the Transfer Order.

The submissions made by the parties require consideration of the precise regulatory and statutory scheme.

Regulatory and Statutory Scheme

The Council Regulation in Article 1 states that it lays down the criteria and mechanisms by which the Member State responsible for examining an application for asylum is established. The general principle of the scheme of the Council Regulation as specified in Article 3.1 is that an application for asylum of a third country national who applies in a Member State shall be examined by a single Member State which is the Member State responsible in accordance with the criteria of the Council Regulation.

By way of derogation from the general principle, Article 3.2 provides that
“...each Member State may examine an application for asylum lodged with it by a third country national, even if such examination is not its responsibility under the criteria laid down in this Council Regulation. In such an event, the Member

State shall become the Member State responsible within the meaning of this Council Regulation and shall assume the obligations associated with that responsibility. . . .”

On the facts of this application it is agreed that, in accordance with the criteria of the Council Regulation, the United Kingdom is the Member State responsible for examining the applicant’s application for asylum. As such, it has obligations under Article 16 to “take charge of” or “take back” the applicant. It has agreed to take back the applicant under Article 16 (1) (e) of the Council Regulation. This provides that the Member State responsible for examining an application shall be obliged to

“(e) Take back under the conditions laid down in Article 20 a third country national whose application it has rejected and who is in the territory of another Member State without permission.”

The conditions in Article 20 referred to in Article 16 (1) (e) include Article 20 (1) (d)

“(d) A Member State which agrees to take back an asylum seeker shall be obliged to readmit that person to its territory. The transfer shall be carried out in accordance with the national laws of the requesting Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within 6 months of acceptance of the request that charge be taken by another Member State or of the decision on an appeal or review where there is suspensive effect.”

Article 20.2 provides that where a transfer does not take place within the 6 months time limit (or certain extensions which are not relevant to any issue herein) “responsibility shall lie with the Member State in which the application for asylum was lodged”. Hence, a failure to effect a transfer within 6 months may result in a change in the Member State responsible under the Council Regulation.

The Council Regulation has direct effect in Ireland. However, s.22 of the Act of 1996 authorises the respondent to make “such orders as appear to him . . . to be necessary or expedient for the purpose of giving effect” *inter alia* to the Council Regulation. Section 22 (2) provides that certain matters may be specified in an order made under s. 22 (1). The Minister made the Refugee Act 1996 (Section 22) Order 2003 (SI No. 423 of 2003) (“ the 2003 Order”) and one amending order namely the Refugee Act (Section 22) Amendment Order 2004 (SI No. 500 of 2004) under s.22 of the Act of 1996. The latter is not relevant to the issues herein.

In relation to a person, such as the applicant who has made an application for asylum in the State, under s. 8 of the Act of 1996, the scheme established by the 2003 Order for the purpose of giving effect to the Council Regulation involves the following essential steps:

- i. A determination by the Commissioner under art. 4 of the 2003 Order whether in accordance with the Council Regulation the application should be examined in the State.
- ii. Where a determination is made by the Commissioner that an applicant should be transferred to another Member State pursuant to the Council Regulation notification to that person in the form set out in the schedule to the 2003 Order and to the Minister.
- iii. An appeal on limited grounds only to the Refugee Appeals Tribunal against the determination of the Commissioner. The appeal is limited to the issue as to whether or not the Commissioner has properly established the Member State responsible for examination of the application in accordance with the criteria set out in chapter III of the Council Regulation.
- iv. The transfer of a person pursuant to a “transfer order” made under art. 7. Article 7 (1) provides:

“Subject to the subsequent provisions of this article, the Minister may by order (in this Order referred to as a “transfer order”), in the form set out in schedule 2 or a form to the like effect, require an applicant in respect of whom a determination under article 4 that he or she should be transferred to a Council Regulation country has been made, to leave the State on or before such date or within such period as may be specified in the order and to go to the relevant Council Regulation country.”

The remaining sub-paragraphs of article 7 provide for notification to the person in writing of the making of the transfer order; certain matters to be stated in such notice; authorisation to require the person to do certain matters for the purpose of ensuring his transfer and the power to arrest, detain and place a person on an aircraft ship etc. leaving the State.

Council Regulation and Discretion

The first issue is whether or not the respondent retains a discretion not to implement a transfer order made under article 7 (1) of the 2003 Order. Counsel for the respondent sought to rely upon the Council Regulation as precluding the existence of such a discretion. I have concluded that the Council Regulation does not preclude the existence of such a discretion if it exists under the national law of Ireland for the following reasons:

I have concluded that the scheme of the Council Regulation is to impose on the United Kingdom, as the responsible Member State, an obligation to take charge or take back the applicant and to readmit the applicant to its territory and gives to Ireland a right but not an obligation to transfer the applicant to the United Kingdom. My conclusion is based upon the following analysis. The United Kingdom is the Member State responsible for examining the

application for asylum of the applicant in accordance with the criteria of the Council Regulation. Hence, it is obliged to either take charge of or take back the applicant under Article 16 (1) of the Council Regulation. It has agreed to take back the applicant under Article 16 (1) (e) and hence must do so under the conditions in Article 20. Under Article 20 (1) (d) the United Kingdom is now obliged to readmit the applicant to its territory.

There is, however, no provision in the Council Regulation which obliges Ireland to transfer the applicant to the United Kingdom. It has a right to transfer the applicant. Article 20 (1) (d) specifies certain conditions under which the transfer shall take place and which include placing a limit on the time during which Ireland may exercise that right. If it fails to transfer the applicant within 6 months (or such extended period as may be applicable) then Ireland may become the Member State responsible and lose its right to transfer the applicant.

The conditions in Article 20 must be considered in conjunction with the derogation in Article 3.2 of the Council Regulation. This permits Ireland, by way of derogation from the principle of a single examination by the Member State responsible, to examine the applicant's application for asylum. Article 3.2 does not either specify or limit the time at which such decision may be made on behalf of Ireland. Article 3.2 expressly envisages that such decision might be taken after the Member State responsible has been requested to take charge or take back the applicant insofar as it obliges a Member State who make such a decision to inform "the Member State who has been requested to take charge or to take back the applicant".

Counsel for the respondent submitted that whilst Ireland has opted to exercise the permitted derogation in Article 3.2 that it has exclusively delegated to the Commissioner, by art.4 of the 2003 Order, the power to determine whether any particular application should be examined in Ireland. It was further submitted that once the Commissioner has determined that a particular application for asylum should not be examined in Ireland that Ireland then becomes obliged under the terms of the Council Regulation to transfer the applicant and hence the respondent has no discretion not to transfer.

The issue as to whether or not there has been a valid exclusive delegation to the Commissioner to determine whether an application for asylum should be examined in Ireland pursuant to the derogation permitted in Article 3.2 was not fully argued before me and as its resolution does not appear necessary to determine the issues herein, I wish to expressly reserve my position on the issue until it is fully argued and material. The determination of the Commissioner of herein of 16th June 2005 as notified to the applicant was that". . The United Kingdom is responsible pursuant to the provisions of Articles 13 and Article 16 (1)(e) of Council Regulation EC No. 343/2003 for dealing with your application for asylum." The same letter indicates an intention to transfer the applicant to the United Kingdom. Even if it were

assumed that this constituted a decision by the Commissioner not to examine the application in Ireland pursuant to Article 3.2 and that such determination had been validly delegated to her it does not appear to me to follow that Ireland is under an obligation to transfer the applicant.

Counsel for the respondent also sought to rely on the reference to “the obligation to transfer the applicant” in the notification to be given to an applicant under Article 19(1). That article only applies to a situation where a Member State has agreed to take charge in Article 16(1) (a) and does not apply to the applicant herein as the United Kingdom has agreed to take her back under Article 16(1) (e). Her potential transfer is in accordance with Article 20 and not Article 19. The equivalent notification provision in Article 20(1)(e) states;

“the requesting Member State shall notify the asylum seeker of the decision concerning his being taken back by the Member State responsible.”

The Council Regulation does not address either the person by whom or time at which differing decisions in the process within a Member State should be taken. As already stated there is nothing in the Council Regulation which expressly obliges Ireland to transfer the applicant as a person whom the United Kingdom has agreed to take back under Article 16(1) (e). On the contrary, the transfer is subject to a further mandatory condition in Article 20(1)(d) that “the transfer shall be carried out in accordance with the national law of the requesting State . . .”. A national authority, such as the respondent herein, seeking to transfer is subject to compliance with the relevant national law. If the national law of Ireland prohibits the carrying out of the transfer of a particular applicant (as is contended on behalf of the applicant herein) then it does not appear to me that there is anything in the Council Regulation which prevents the respondent determining, even at a late stage in the process, not to effect a transfer. Article 20(1)(d) expressly requires that the transfer be carried out in accordance with national law. My conclusion on the general scheme of the Council Regulation is similar to the view expressed by Clarke J in *Xayle (a minor) v. The Refugee Applications Commissioner* (Unreported, the High Court 10th December 2004). Counsel for the respondent submitted that the view expressed by Clarke J. was not based upon a full analysis of the Council Regulation. Nevertheless having carried out what appears to be a full analysis I reached the same conclusion.

Finally, the fact that the respondent has made a transfer order under art. 7 of the 2003 Order does not appear relevant to a consideration of the issue as to whether the Council Regulation precludes the existence of a discretion not to implement the Transfer Order. As already stated, the Council Regulation does not address either the person by whom or time at which differing decisions in the process within a Member State should be taken.

Accordingly, it appears to me that the issue of the existence of a discretion

in the respondent not to implement the Transfer Order made in respect of the applicant herein must be determined by considering the applicable Irish law.

Discretion under Irish Law

I am only considering the existence of such a discretion in the factual circumstances which pertain to this application. Essentially those are that subsequent to the making of the Transfer Order by the respondent both medical information has come available and events occurred which *prima facie* indicate that there is a real and substantial risk of suicide and in that sense a real and substantial risk to the life of the applicant if the Transfer Order is implemented.

Counsel for the respondent accepts that it is the respondent through his officials who remains responsible for the implementation of the Transfer Order.

Neither s. 22 of the Act of 1996 nor the 2003 Order contains an express provision imposing a duty on the respondent or any other person to implement a transfer order. The 2003 Order contains express powers to take different actions in relation to an applicant for the purpose of achieving the transfer of the person to another Member State pursuant to a transfer order. It appears to me by necessary implication, when the 2003 Order is construed for the purpose of giving effect to the Council Regulation there is both a power and duty on the respondent, through his officials or agents to implement a transfer order.

Insofar as the 2003 Order either gives powers to the respondent or imposes duties express or implied on the respondent there is a curious feature to be noted. It is the respondent himself who by making the 2003 Order has conferred those powers and duties on himself. He is authorised by the terms of s. 22 of the Act of 1996 to do so. In accordance with the well-known presumption of constitutionality as stated by Walsh J. in *East Donegal Cooperative v. the Attorney General* [1970] I.R. 317 such powers and duties must be both construed and carried out in accordance with the principles of constitutional justice. In that case at p. 341 Walsh J. stated:

“... the presumption of constitutionality carries with it not only the presumption that the constitutional interpretation and construction is the one intended by the Oireachtas but also that the Oireachtas intended that proceedings, procedures, discretions and adjudications which are permitted, provided for, or prescribed by an Act of the Oireachtas are to be conducted in accordance with the principles of constitutional justice. In such a case any departure from those principles would be restrained or corrected by the courts.”

The status of the applicant in the State may be relevant to what is required by the principles of constitutional justice in any dealings with her. The applicant has made an application for asylum under s. 8 (1) of the Refugee

Act 1996. Section 9 (2) of the Act of 1996 (as amended) gives her a statutory right to remain in the State until the occurrence of one of the events set out in that subsection. It is not clear to me in the regulatory and statutory scheme whether or not the applicant's right to remain in the State pursuant to s. 9(2) of the Act of 1996 has terminated. There is no evidence that any of the events set out in s. 9(2) (as amended) has occurred. However, the respondent has made a transfer order under art.7 of the 2003 Order. Neither counsel made submissions on the applicant's status in the State at the date of commencement of the proceedings. Even if the applicant no longer has a statutory right to remain in the State (which I am not holding) she is not a person without rights in the State. The Supreme Court so held in the Article 26 reference *In re the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360. The Court considered the nature of such rights of a person not entitled to be in the State and against whom a deportation order had been made in the context of the power of detention in s. 5 (1) of the Bill of 1999 (now the Illegal Immigrants (Trafficking) Act 2000). At p. 410 the court stated:

“It follows that a person who is not entitled to be in the State cannot enjoy constitutional rights which are coextensive with the constitutional rights of citizens and persons lawfully residing in the State. There would however, be a constitutional obligation to uphold the human rights of the person affected which are recognised, expressly or by implication, by the Constitution although they are not coextensive with the citizen's constitutional rights.”

At issue in this application is perhaps the most fundamental of such human rights, the right to life expressly recognised by the Constitution in Article 40.3.2.

Hence, even if the applicant is a person who is not now entitled to be in the State, the respondent in exercising the power or duty to implement the Transfer Order is obliged to uphold her right to life as guaranteed by Article 40.3.2. A constitutional interpretation of the powers which the respondent may confer on himself by s.22 of the Act of 1996 necessitates an implicit power not to implement a transfer order where the protection of the life of the person to whom it applies so requires. There is nothing in the wording of the 2003 Order which precludes such an implicit power. Hence, it appears to me that Article 7 of the 2003 Order must be construed as including not only an implicit power and duty to implement a transfer order but also an implicit power or discretion not to implement the transfer order, where the respect or protection of the right to life of a person to whom it relates so requires. Counsel for the applicant also relied upon Article 2 of the European Convention on Human Rights and Sections 2 and 3 of the European Convention on Human Rights Act 2003. Section 2 of the Act of 2003 requires this court in interpreting and applying any statutory provisions

(which includes a statutory instrument) to do so in a manner compatible with the State's obligations under the Convention provisions. This is subject to the rules of law relating to interpretation and application. Under s.3 of the Act of 2003 the respondent is obliged to perform his functions under the 2003 Order and Act of 1996 in a manner compatible with the State's obligations under the Convention provisions. I am satisfied that it would not be in breach of any rule of interpretation to construe the powers and/or duties of the respondent in relation to the implementation of a transfer order under the 2003 Order as including a discretion not to implement a transfer order where to do so would be in breach of the State's obligations under Article 2 of the Convention.

The supreme Court in *In re the Illegal Immigrants (Trafficking) Bill 1999* [2000] 2 I.R. 360 confirmed the right of an applicant for asylum to have decisions which affect him/her under the relevant statute taken in accordance with the principles of constitutional justice and fair procedures. As the respondent has power to decide not to implement a transfer order then constitutional justice requires that on the medical evidence presented on behalf of the applicant in the letters of 28th July, 2005, 2nd August, 2005, and report of Dr. McCullagh of 10th August, 2005, the respondent now consider and determine in the context of the applicant's rights under Article 40.3 of the Constitution and Article 2 of the European Convention on Human Rights whether the transfer order in respect of the applicant should be implemented.

In reaching the above conclusions I wish to make clear that I am not concluding that the medical evidence and facts pertaining to the applicant necessarily warrant a decision by the respondent to exercise the discretion which I have found to exist not to implement the Transfer Order. That is a matter for the respondent. To date the respondent has refused to consider the request made on behalf of the applicant not to implement the Transfer Order upon the basis that he has no discretion not to do so. The existence or not of that discretion and the respondents obligation to consider the application not to implement the Transfer Order are the only issues which I am deciding. It is open to the respondent to take such steps as he considers appropriate and consistent with constitutional justice and according fair procedures to the applicant to examine and test the evidence presented.

Revocation of Transfer Order

Counsel for the applicant submitted that the respondent has an express power of revocation of the Transfer Order under s. 22 (7) of the Act of 1996. Section 22 (1) of the Act of 1996 (insofar as relevant) (as amended by Section 7 (1) of the Immigration Act 2003) and s. 22 (7) provide:

“22- (1) the Minister may make such orders as appear to him or her to be necessary or expedient for the purpose of giving effect to

. . . .

(b) Council Regulation (EC) No. 343/2003

....

(7) the Minister may by order amend or revoke an order under this section (other than an order under subsection (6)) including an order under this subsection.”

The 2003 Order is made pursuant to s. 22(1). The Transfer Order made by the respondent in relation to the applicant is made pursuant to art. 7 of the 2003 Order.

Section 22 (2) of the Act of 1996, insofar as relevant to the transfer of a person, as distinct from an application for asylum to a Member State provides

“(2) without prejudice to the generality of subsection (1) an order under this section may

....

(f) provide that where an application has been transferred to a convention country for examination or to a safe third country the person concerned shall go to that convention country or to that safe third country,

.....

(i) specify the measures to be taken for the purpose of the removal of a person whose application has been transferred to a convention country or a safe third country from the State to that convention country or safe third country including, where necessary, the temporary detention or restraint of the person and ...”

Article 7 of the 2003 Order is made for the purpose of providing for the above matters. Article 7 (1) provides

“7-(1) subject to the subsequent provisions of this article, the Minister

may by order (in this Order referred to as ‘a transfer order’) in the form set out

in schedule 2 or a form to the like effect, require that an applicant in respect of whom a determination under Article 4 that he or she should be transferred to a Council Regulation country has been made, to leave the State on or before such date or within such period as may be specified in the order and to go to the relevant Council Regulation country.”

Section 22 of the Act of 1996 makes no reference to “a transfer order”. It is only a concept introduced by art. 7 of the 2003 Order. An order made under s. 22 of the Act of 1996 is a statutory instrument. A statutory instrument is defined in s. 1 of the Statutory Instruments Act 1947 as meaning “an order, Council Regulation, rule scheme or bylaw made in exercise of a power conferred by statute.” An order made under s. 22 comes within that definition.

The express power of revocation given to the Minister under s. 22 (7) relates to an order made under s. 22 i.e. a statutory instrument. An order made by the respondent under art. 7 (1) of the 2003 Order requiring a person such as the applicant to leave the State is not such an order. Hence the express power of revocation in s. 22 (7) does not apply to a transfer order made under art.7 (1) of the 2003 Order.

Counsel for the applicant in the alternative submitted that the Minister has by the necessary implication a power to revoke a transfer order made under art.7 (1) of the 2003 Order. He submits that the existence of such a power is confirmed by the terms of art. 8 (9) of the 2003 Order. Article 8 provides for an appeal against the determination by the Commissioner that a person should be transferred to a Council Regulation Country. Article 8 (1) requires, *inter alia* that where the Tribunal sets aside the determination of the Commissioner it shall send a copy of the decision to the Minister, the respondent herein. Article 8 (9) then provides

“(9) on receipt of a notice under paragraph (1) that the Tribunal has set aside the determination of the Commissioner, the Minister shall, where necessary, revoke the transfer order and arrangements will be made for the reception of the applicant into the State.”

The submission is that this article imposes on the respondent, in the circumstances described, the obligation to revoke the transfer order. It is submitted that unless the respondent already has an implicit power to revoke the Transfer Order the article could not impose on him an obligation to do so.

It is necessary to consider that submission in the context both of the scheme established by the Council Regulation as implemented by s. 22 of the Act of 1996 and the powers conferred on the respondent thereunder. There is nothing in either the Council Regulation or s. 22 of the Act of 1996 which precludes the Minister giving to himself a power to revoke a transfer order made under Article 7 (1) of the 2003 Order. As already pointed out s. 22 does not expressly provide for the making of transfer orders. It is one of the measures decided upon by the Minister for the purpose of removing a person from the State to a Council Regulation Country. I have already determined that the Minister retains a discretion to decide not to implement a transfer order. It does not necessarily follow that every decision not to implement would necessitate a decision to revoke a transfer order. For example, a

person might be very seriously but temporarily ill such that a decision might be made not to implement a transfer order for a period of say 2 weeks to permit recovery. In such an example if the 6 month period specified in Article 20 (1) (d) of the Council Regulation had not expired there could remain an intention to transfer the person once recovered. However, if the particular circumstances giving rise to the decision not to implement a transfer order are such that it is a permanent decision or indeed a decision not to implement for a period which is in excess of the period permitted by Article 20 of the Council Regulation then by necessary implication the respondent must have the power to revoke a transfer order made. Where the decision of the respondent is a permanent decision not to implement a transfer order then the revocation of a transfer order appears no more than the giving effect to that decision in the precise statutory scheme which the respondent has created by providing for transfer orders in the 2003 Order. It must follow, by necessary implication that he has the power to do this to regularise the applicant's position within the country. If not there would remain in being a transfer order which the respondent did not intend to implement.

Similarly, if the six month period expires under Article 20(1) (d) of the Council Regulation (and none of the circumstances which extend the time apply) without a transfer being effected (even without a decision not to implement) then under Article 20 (2) of the Council Regulation, Ireland becomes responsible for examination of the application for asylum. In such circumstances it again appears by necessary implication to regularise an applicant's position that the respondent must have the power to revoke a transfer order. If not there would continue to exist a meaningless transfer order as the State is no longer entitled to act upon it.

Further when a transfer order relates to a person, such as the applicant herein who has made an application for asylum in the State under s. 8 of the Act of 1996 such person has a statutory right to remain in the State in accordance with s. 9 of the Act of 1996. Constitutional justice would appear to require that such applicant should not have extant against him or her a transfer order either which it is not intended to implement or which the State is not entitled to implement by reason of the fact that it has become responsible for the applicant under Article 20 (2) of the Council Regulation. In such circumstances the applicant's right to constitutional justice and fair procedures appears to require by necessary implication the power to revoke a transfer order made under art. 7 (1) of the 2003 Order.

Accordingly I have concluded that by necessary implication to the express provisions of art.7 of the 2003 Order the respondent has an implicit power to revoke a transfer order either where there is a decision not to implement the transfer order or where under the Council Regulation Ireland has become responsible for the application for asylum.

Examination of Application for Asylum in State

The final relief sought on behalf the applicant is an order of *mandamus* compelling the respondent to consider the applicant's request to have her claim for asylum examined in Ireland.

On the facts herein a separate decision as to whether the applicant's application for asylum should be examined and processed in the State appears unnecessary for the following reasons. The applicant's request for such a decision is based on the same facts as her request not to implement the Transfer Order. It was not submitted that the applicant has any greater or differing legal entitlement to a decision in her favour on her request to examine her application for asylum in the State than on her request not to implement the transfer order. I have held that the applicant is now entitled, as a matter of constitutional justice, to have her request not to implement the Transfer Order by reason of the medical reports and facts to which they refer considered and determined by the respondent.

If following such consideration the respondent determines not to implement the Transfer Order then the applicant will not be transferred to the United Kingdom. The applicant will then be in the State as a person who has made an application for asylum under s. 8 of the Act of 1996 and who is not being transferred to the Member State responsible in accordance with the criteria of the Council Regulation. In such circumstances, without the necessity of any further decision by the respondent or indeed the Commissioner it appears that under the regulatory and statutory scheme created by the Council Regulation and Act of 1996 the applicant would then be a person with an outstanding application for a declaration of refugee status under s. 8 of the Act of 1996 which she is entitled to have processed and determined in accordance with the Act of 1996. Further, Ireland will at some point (not having transferred her within the time limit in Article 20) automatically become the Member State responsible without the necessity of any positive decision to examine the application pursuant to the permitted derogation in Article 3.2 of the Council Regulation.

If, however, following a consideration of the medical evidence and application not to implement the Transfer Order in accordance with the principles in this judgment the respondent decides to implement the Transfer Order then as already stated no submission was made that the respondent is obliged on some different ground to determine (if he has the power to do so which I am not holding) that her application for asylum be examined in the State.

Reliefs

Having regard to this judgment the reliefs I would propose granting are:

1. An injunction restraining the respondent from taking any steps to transfer the applicant to the United Kingdom pending the determination of the application made on the 28th July, 2005, not to implement the Transfer Order.
2. A declaration that the respondent has discretion not to implement the

Transfer Order made under article 7(1) of the Refugee Act 1996 (Section 22) Order 2003 (SI No. 423 of 2003) where to do so would be in breach of a right of the applicant protected by Article 40.3 of the Constitution or Article 2 of the European Convention on Human Rights.

3. A declaration that on the facts of this application constitutional justice requires that the respondent now consider and determine the request of the applicant not to implement the Transfer Order made in respect of her on 29th June 2005.

As these reliefs differ from the specific reliefs sought I will hear counsel on the proposed reliefs in the light of the judgment before finalising same.

Addendum

Having heard Counsel on the proposed reliefs I have determined that in lieu of that proposed at 2 above will be

A declaration that the respondent has discretion not to implement a transfer order made under article 7(1) of the Refugee Act 1996 (Section 22) Order 2003 (SI No. 423 of 2003).

I will also grant the following additional declaration

A declaration that the respondent has an implied statutory power to revoke a transfer order made under article 7(1) of the Refugee Act 1996 (Section 22) Order 2003 (SI No. 423 of 2003).