Neutral Citation no. [2008] NIQB 14 | *Ref:* **STE7067**

Judgment: approved by the Court for handing down | *Delivered:* **08/02/08**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

____

IN THE MATTER OF AN APPLICATION BY
IM FOR JUDICIAL REVIEW

____

STEPHENS J

Introduction

[1] This is an application for judicial review challenging a number of decisions made by the Secretary of State for the Home Department. The decisions are as follows:

(a) On 7 November 2006 the Secretary of State declined to examine substantively the applicant's United Kingdom asylum application on the grounds that there was a safe third country to which the applicant could be sent, namely the Republic of Ireland, and that country had accepted, under the provisions of Council Regulation (EC) No 343/2003 ("the Dublin II Regulation"), that it was the state responsible for examining the application.

(b) On 19 December 2006 the Secretary of State decided that the removal of the applicant from the United Kingdom to the Republic of Ireland would not be a breach of his Human Rights under article 8 of the European Convention on Human Rights. The Secretary of State also certified under the provisions of paragraph 5(4) of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 that the applicant's human rights claim was clearly unfounded and that accordingly the applicant would not be entitled to appeal until after he had left the United Kingdom.

(c) On 7 February 2007 the Secretary of State decided against the applicant a further human rights claim under article 8 and again certified that it was clearly unfounded under paragraph 5(4) of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. This decision was revised by the Secretary of State on 24 May 2007 in light of the decision of the House of Lords in *Huang v. Secretary of State for the Home Department* [2007] 2 AC 167. Again the Secretary of State decided against the applicant's article 8 human rights claim and certified that it was clearly unfounded.

[2] By these proceedings the applicant seeks to challenge those decisions. The grounds on which the applicant relies are set out in his amended Order 53 statement and fall within three main headings:-

(a) That it was unlawful for the Secretary of State to have certified that the applicant's Article 8 claims were unfounded in that there was an arguable case.

(b) That the concessionary family ties policy applied by the Secretary of State in respect of the applicant was unlawful in that it required "a most exceptionally compelling case".

(c) That in deciding to remove the applicant to the Republic of Ireland in accordance with the provisions of the Dublin II Regulation, the Secretary of State had a discretion and that discretion required to be, but was not, exercised in accordance with the principles in Article 24(2) of the Charter of Fundamental Rights of the European Union, namely that in all actions relating to children the child's best interests must be a primary consideration.

[3] Ms Keegan QC and Mr Stockman appeared on behalf of the applicant, Mr Maguire QC and Ms Connolly appeared on behalf of the respondent. I am indebted to both sets of counsel for their careful preparation of the case and their well marshalled written and oral submissions.

The Facts

[4] The applicant, IM, 32 is a national of Burundi. On 15 March 2004 he arrived at Dublin Airport on a false South African passport in the name of Collen Isaiah Khumalo. He produced the false passport to the immigration authorities and claimed asylum in the Republic. He then lived in Dublin and was issued by the Department of Justice with a questionnaire booklet in relation to his asylum application. He did not complete the booklet and he maintains that he never received a request to attend an interview in relation

to his application for asylum or notification of a decision from the Department of Justice, Equality and Law Reform in the Republic of Ireland regarding that application.

[5] In May 2004, whilst living in Dublin, the applicant met LH, 43. They have since married and I will refer to her in this judgment as LM. She had lived in England as a couple with JW who unfortunately died in 1998. LM and JW had three children:-

(a) A now 17 years of age.

(b) M now 16 years of age.

(c) E now 10 years of age.

[6] At the time that LM met the applicant she lived with her three children in County Donegal. They had moved from England to County Westmeath in 1999. In 2000 they moved to County Donegal. In September 2001 LM began an undergraduate degree course at the University of Ulster in Coleraine. She completed that course in June 2004. The applicant and LM began a relationship shortly after they first met. LM acknowledges that at the time the relationship started she was aware of the applicant's "insecure immigration history". At the time that the relationship commenced the applicant and LM met at weekends as he still lived in Dublin and she and her children lived in County Donegal.

[7] The applicant lived in a hostel in Dublin but he states that he was experiencing problems with threats of violence motivated by racism. Accordingly in July 2004 the applicant decided to move to London. He crossed the border from the Republic of Ireland to Northern Ireland. He then travelled by boat to Stranraer, Scotland, where he was stopped by immigration officers. He was taken to Dungavel Immigration Removal Centre after which he was returned to Ireland on 20 July 2004. It is clear that by, at the latest, 20 July 2004 the applicant was fully aware that he needed permission to enter the United Kingdom and that if he did so without permission that he would be an illegal entrant. This is expressly acknowledged by the applicant and by LM in their affidavits in these proceedings. They both knew that when the applicant subsequently crossed the border from the Republic of Ireland into Northern Ireland that he did so illegally.

[8] Documents from the office of the Refugee Applications Commissioner in the Republic of Ireland state that the applicant was invited to attend an interview on 15 September 2004 in relation to his application to be declared a refugee under the Refugee Act 1996. The applicant denies all knowledge of that invitation or of the subsequent letters dated 21 September 2004 and 1

October 2004. The first of those letters informed the applicant that it would be recommended to the Minister for Justice, Equality and Law Reform that he should not be declared a refugee. The second was a letter from the Department of Justice, Equality and Law Reform on behalf of the Minister informing the applicant of the decision to refuse to declare him a refugee.

[9] In November 2004 the applicant moved to LM's house in County Donegal. By this stage she had embarked on a post graduate course at Queen's University Belfast and accordingly during the course of the week she lived in Belfast with her daughters A and E. The applicant stayed in her house in Donegal. Her son M was at a boarding school also in County Donegal. She returned at weekends to be with the applicant and M.

[10] In January 2005 the applicant and M moved to Belfast to live with LM and her daughters A and E. The applicant and LM acknowledge that they both then knew that when the applicant entered the United Kingdom he was entering illegally. The house in Donegal was sold.

[11] The applicant and LM both knew that they could not get married in Northern Ireland by virtue of his immigration status. The relevant provisions are contained in Section 23 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 and the Marriage (Northern Ireland) Order 2003. In May 2005 the applicant and LM travelled to County Donegal and were married. They then returned to Northern Ireland. Again they both knew that the applicant was entering Northern Ireland illegally.

[12] In October 2005 the applicant and LM went to Law Centre (NI) to obtain immigration advice and in February 2006 it is suggested that an application was lodged with the Home Office on behalf of the applicant for asylum.

[13] In April 2006 the applicant and LM's daughter, AM was born in Belfast. The applicant states that LM suffered from post natal depression and at that time he "foolishly became involved in another relationship". On 31 May 2006 LM found out that the applicant was having an affair and on 15 July 2006 she was concerned that the applicant was going to take away their daughter, AM. She rang the police who arrested the applicant and returned AM to LM. The applicant was interviewed by the Immigration Service on 16 July 2006. The applicant was then released on temporary admission "as there were no immigration officers available to escort him to the Republic of Ireland and the applicant only had verbal assurance that the authorities in the Republic of Ireland would accept him there".

[14] On 11 September 2006 the applicant made an asylum claim in the United Kingdom.

[15] On 26 October 2006 the Republic of Ireland accepted responsibility for the applicant's asylum claim under Article 16(1) of the Dublin II Regulation. On 7 November 2006 the applicant's United Kingdom asylum application was refused. The applicant was informed that the Republic of Ireland was to be the state responsible for the examination of his asylum claim and that he was returnable to the Republic of Ireland.

[16] On 3 November 2006 LM made a telephone call to the United Kingdom Immigration Service stating that she no longer supported her husband's application but on 6 November 2006 she rang to say that she did support that application. LM has sworn affidavits in these proceedings supporting the applicant and setting out in detail the circumstances of the family in Northern Ireland.

[17] The applicant and LM have lived in Northern Ireland since January 2005. The applicant states that he and his wife and her three children together with their own child have become very close. That in particular the applicant has assisted with the care of M who has faced a considerable number of difficulties. M attended a High School in Northern Ireland but was suspended in 2006. In November 2006 he was admitted to the outdoor behavioural health care programme run by ASPEN Achievement Academy in the United States of America. Since returning he still has behavioural difficulties. He attends a specialist school for children with substantial behavioural difficulties who by virtue of those difficulties cannot be taught in an ordinary school environment. The applicant and his wife state that all of their children have settled in Northern Ireland. LM has experienced the loss of her previous partner, JW and seen the impact of that loss on her children. She has grave concerns about the effect on the children if the family is separated by virtue of the applicant's removal to the Republic of Ireland. She has also seen the effects on her children of the moves from England to County Westmeath to County Donegal and then finally to Belfast. She has similar concerns about moving the entire family to the Republic of Ireland and those concerns are heightened by virtue of M's behavioural difficulties. In these proceedings LM has stated:-

> "7. I am very concerned about the effect which IM's removal from the UK would have on all my children. My eldest daughters, A and E, have settled well into their schools and are progressing well in their education. A is embarking on her A levels and such emotional disruption would have an enormous detrimental effect on her and possibly her future career. E calls IM "daddy". She is very close to my husband and to be separated from him would leave her feeling that she has again been abandoned. Furthermore, I would be devastated if he was to be

> removed and this would impact on my ability to provide essential parental support to my children at an extremely difficult time.
>
> 8. My youngest daughter AM is part African because of her father's ethnicity. I consider it an important part of her upbringing that she be given an awareness of African cultural values by her father and that he can provide a positive role model to her as she grows up as someone of mixed race in a predominantly white society.
>
> 9. It would not be possible for me to uproot my children and move to the Republic of Ireland. The instability that this would cause all of them would be immeasurable. My eldest children have been through very difficult experiences already in their short lives with the loss of their biological father and consistency and stability is essential for them to cope."

Legal framework in relation to the Secretary of State's Certificate that the applicant's Article 8 claims are clearly unfounded

[18] The effect of a Certificate under paragraph 3 of Schedule 5 of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 is that the applicant may not bring an immigration appeal. At paragraphs [6] to [15] inclusive of his judgment in an *application by Celal Surgula for Judicial Review* [2007] NIQB 177, Mr Justice Weatherup set out eight propositions in relation to the consideration of Certificates that a human rights claim under Article 8 of the Convention is "clearly unfounded". I agree with those propositions and will seek to apply them to the facts of this case.

[19] The question for the Secretary of State was whether the allegation by the applicant that there was a breach of his human rights was so clearly without substance that it was bound to fail. In an application for judicial review of the Secretary of State's decision to certify, the court is exercising a supervisory jurisdiction, involving most anxious scrutiny. In *R (on the application of Razgar) v. Secretary of State for the Home Department* [2004] 3 All ER 821 at paragraph [17] Lord Bingham stated:-

> "17. In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal. This

means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator. In a case where removal is resisted in reliance on article 8, these questions are likely to be:

> (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
>
> (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
>
> (3) If so, is such interference in accordance with the law?
>
> (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
>
> (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

[20] I seek to follow that five stage approach bearing in mind that the question three is likely to permit of an affirmative answer only and that question four will almost always fall to be answered affirmatively. The applicant has not sought to argue that the answers to questions three and four should be anything other than "yes". The dispute in this case has revolved around the answers to questions one, two and five.

[21] Lord Phillips in his judgment in *R (Mahmood) v. Secretary of State for the Home Department* [2001] 1 WLR 840 reviewed European jurisprudence in relation to Article 8 and Immigration Control. He cited with approval *Poku v. United Kingdom* (1996) 22 EHRRCD 94 and amongst others the following three passages in that case:-

(a) "However, the Commission notes that the state's obligation to admit to its territory aliens who are relatives of persons resident there will vary according to the circumstances of the case. The court has held that Article 8 does not impose a general obligation on States to respect the choice of residence of a married couple or to accept the non national spouse for settlement in that country (*Abdulaziz Cabales and Balkandali 7EHRR 471, 497-498, at paragraph 68).*"

(b) "Whether removal or exclusion of a family member from a contracting states [sic] is incompatible with the requirements of article 8 will depend on a number of factors: the extent to which family life is effectively ruptured, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them, whether there are factors of immigration control (e g history of breaches of immigration law) or considerations of public order (e g serious or persistent offences) weighing in favour of exclusion (see, e g Nos 9285/81, Dec 6.7.82, DR 29, p 205 and 11970/86, Dec 13.7.87 unpublished) …"

(c) "The Commission recalls however that Samuel Adjei and Ama Poku married in August 1994 when she had already been subject to immigration proceedings and a deportation order had been served. He must accordingly be taken to have been aware of her precarious immigration status and the probable consequential effects on his other family relationships by the enforcement of the deportation order. While his daughter Sarah may also claim that her family life is affected and cannot be said to be in the same position as her father, the Commission considers that her situation also flows from the choice exercised by her father rather from any direct interference by the state with her family relationships …"

[22] Lord Phillips then set out the following propositions from his review of the European jurisprudence:-

> "55. From these decisions I have drawn the following conclusions as to the approach of the Commission and the European Court of Human Rights to the potential conflict between the respect for family life and the enforcement of immigration controls. (1) A state has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations. (2) Article 8 does not impose on a state any general obligation to respect the choice of residence of a married couple. *(3) Removal or exclusion of one family member from a state where other members of the family are lawfully resident will not necessarily infringe article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involves a degree of hardship for some or all members of the family.* (4) Article 8 is likely to be violated by the expulsion of a member of a family that has been long established in a state if the circumstances are such that it is not reasonable to expect the other members of the family to follow that member expelled. *(5) Knowledge on the part of one spouse at the time of marriage that rights of residence of the other were precarious militates against a finding that an order excluding the latter spouse violates article 8.* (6) Whether interference with family rights is justified in the interests of controlling immigration will depend on (i) the facts of the particular case and (ii) the circumstances prevailing in the state whose action is impugned."

The respondent in the case before me emphasises conclusions (3) and (5) which I have italicized in the quotation from paragraph [55] of the judgment of Lord Phillips.

Decision in relation to the Secretary of State's Certificate that the applicant's Article 8 claims are clearly unfounded

[23] It was contended on behalf of the respondent that the answers to questions one and two as set out by Lord Bingham in *R (on the application of Razgar) v. Secretary of State for the Home Department* should be "no". There will no doubt be disruption to the applicant's family life if he is removed from Northern Ireland to the Republic. It was contended that in effect there was no interference by the respondent as the sole or overreaching cause of that disruption are the actions of the applicant and LM. That the position of the applicant flows from his and LM's decisions. That the position of the children flows from their decisions. I consider that those decisions and the results of

them are factors brought into account when considering issues of proportionality. I approach this case on the basis, without deciding, that the removal of the applicant is an interference with his right to respect for his family life. On that basis then it is clear that the minimum standard of interference has been attained so as to engage Article 8. The remaining issue is whether the interference is proportionate.

[24] I consider that the interference is proportionate and that the answer to question five is "yes". The legitimate public end sought to be achieved is the right of the United Kingdom to have a firm and orderly immigration policy. This has been recognised to be an important function of government in a modern democratic state. There is also a legitimate public end to be sought in discouraging deliberate breaches of the law. The applicant came to the Republic of Ireland on a false passport. He knew that he was launching himself into a precarious position in the Republic of Ireland and despite that knowledge he took no steps to regularise his situation. He didn't complete the questionnaire relating to his refugee application in the Republic. He missed an interview in relation to that application. I consider that he had an obligation to keep in contact with the Office of the Refugee Applications Commissioner in the Republic of Ireland and that if he had done so he would have been told about the date for the interview. I infer that the explanation for the applicant not receiving notification of the interview is that he changed address. If that is so then he should have given notification of his change of address to the Office of the Refugee Applications Commissioner. He acted not only with total disregard for the immigration laws in the Republic but also in relation to the immigration laws in the United Kingdom. He deliberately breached the immigration laws of the United Kingdom. In short there has been a history of breaches of the immigration laws of the Republic and of the United Kingdom. The situation in which he finds himself flows from the choices which he made and which LM made rather than any direct interference by the state with the family relationships. Those choices were made by the applicant and LM with full knowledge of their family circumstances. The upset caused to the children of LM by the loss of JW and by the moves that she and her children had made from England to County Westmeath to County Donegal were fully appreciated by her at the time of the proposed move from County Donegal to Northern Ireland. The responsibility for the decision to move to Northern Ireland, in the face of those difficulties and with knowledge of the precarious immigration position of the applicant, was the responsibility of the applicant and LM. The situation of the children flows from the decisions made by the applicant and LM.

[25] In arriving at that decision I also take into account that there are no insurmountable obstacles in the way of the family living in the Republic of Ireland. It would be reasonable for the rest of the family to follow the applicant to the Republic of Ireland though not necessarily immediately. There is clearly a need for assistance to be provided to M but there was never any suggestion

before me that that assistance could not be provided in the Republic of Ireland. There will no doubt be an element of disruption but with care this can be addressed by the applicant and his wife so that any move of the rest of the family to the Republic of Ireland is planned and timed to minimise disruption. The applicant could move to a part of the Republic within easy reach at weekends of the rest of his family and with indirect contact occurring during the rest of the week until they are able to join him.

[26] In the circumstances of the present case, where the applicant, illegally present in the United Kingdom, formed a relationship, married, had a child and is to be removed from the jurisdiction to a safe third country in accordance with the Dublin II Regulation, there is no lack of respect for family life and there is no breach of Article 8 of the Convention. Such a claim must clearly fail. Accordingly the Secretary of State was correct to certify that the applicant's human rights claim was clearly unfounded. The application for judicial review, in that respect, is dismissed.

Family Ties Policy

[27] On 22 July 2002 on behalf of the government Lord Filkin announced in Parliament a family ties policy on the exercise of discretion in safe third country cases where family ties to the United Kingdom are claimed. Under that policy where, as here, the applicant has an unmarried minor child in the United Kingdom the asylum claim would normally be considered substantively in the United Kingdom. However Lord Filkin also stated:-

> "The intention of the policy is to reunite members of an existing family unit who, through circumstances outside of their control, have become fragmented. However, we emphasise that where the relationship did not exist prior to the person's arrival to the United Kingdom, the policy would be applied only in the *most exceptionally compelling cases*." (Emphasis added)

[28] In this case the applicant's child was born after his arrival in the United Kingdom and therefore the family ties policy would only be applied if the case was most exceptionally compelling. The applicant accepts that he does not qualify for the grant of leave to remain in the United Kingdom under the family ties policy and that the policy has been correctly applied. However the applicant contends that the policy is unlawful because the test of the most exceptionally compelling cases is incompatible with his Article 8 Convention rights. The respondent accepts that in determining whether refusal of leave to remain in the United Kingdom is compatible with the applicant's Convention right to respect for his family life guaranteed by Sections 2, 3 and 6 and Article 8 in Schedule 1 to the Human Rights Act 1998 there is no legal test of exceptionality. In *Huang v. Secretary of State for the Home Department* [2007] 2

AC 167 Lord Bingham at paragraph [20] giving the opinion of the committee and referring to the question of proportionality stated:-

> "[20] In an article 8 case where this question is reached, the ultimate question for the appellate immigration authority is whether the refusal of leave to enter or remain, in circumstances where the life of the family cannot reasonably be expected to be enjoyed elsewhere, taking full account of all considerations weighing in favour of the refusal, prejudices the family life of the applicant in a manner sufficiently serious to amount to a breach of the fundamental right protected by article 8. If the answer to this question is affirmative, the refusal is unlawful and the authority must so decide. *It is not necessary that the appellate immigration authority, directing itself along the lines indicated in this opinion, need ask in addition whether the case meets a test of exceptionality*. The suggestion that it should is based on an observation of Lord Bingham in *Razgar*, para 20. He was there expressing an expectation, shared with the Immigration Appeal Tribunal, that the number of claimants not covered by the rules and supplementary directions but entitled to succeed under article 8 would be a very small minority. That is still his expectation. But he was not purporting to lay down a legal test."

[29] It is clear that an exceptionality test is not appropriate when considering Article 8 rights. However the respondent contends, and I hold, that the family ties policy is quite distinct from the applicant's Article 8 rights. It is a distinct and separate policy. It is legitimate, though in the event superfluous, to have separate immigration rules and administrative directions which apply a stricter test than is applicable under Article 8 provided that the Article 8 rights of the applicant are addressed and addressed correctly. I have held that the Article 8 rights have been correctly addressed in this case. However I would observe that to call the family ties policy a "concessionary" policy is inappropriate when, in respect of this case, it concedes nothing in addition to what would otherwise be the Article 8 rights of an applicant. It is also confusing to have such a policy which applies a separate and more stringent test than is applicable under Article 8. I was not informed of any reason why the respondent had a "concessionary policy" which applied a more stringent test than the applicant's Article 8 rights. I do not consider that the family ties policy is unlawful but it clearly adds nothing to this case and calls for change.

The Charter of Fundamental Rights of the European Union

[30] The respondent contends that the proposed removal of the applicant from the United Kingdom to the Republic of Ireland is in accordance with the Dublin II Regulation. This Regulation established the criteria and mechanisms for determining the Member State responsible for examining an asylum application. The applicant accepts that under the criteria laid down in the Dublin II Regulation the Republic of Ireland is responsible for examining his asylum application. However under Article 3(2) discretion is given to the United Kingdom. If that discretion is exercised by the United Kingdom then it may examine an application for asylum lodged with it even if such examination is not its responsibility under the criteria laid down in the Dublin II Regulation. If the United Kingdom exercised that discretion then it would be responsible for examining the applicant's asylum application and it would inform the Republic of Ireland that it had assumed the obligations associated with that responsibility. The applicant contends that the respondent in exercising that discretion has to exercise it in a way which accords with the Charter of Fundamental Rights of the European Union. The Charter set out a whole range of civil, political, social and economic rights of European citizens and all persons resident in the European Union. In particular the applicant contends that the discretion under Article 3(2) of the Dublin II Regulation has to be exercised in a manner which accords with Article 24(2) of the Charter of Fundamental Rights of the European Union. Article 24(2) provides:-

> "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration".

[31] In support of those contentions Ms Keegan referred to recital 15 of the recitals to the Dublin II Regulation. Recital 15 is in the following terms:-

> "The Regulation observes the fundamental rights and principles which are acknowledged in particular in the Charter of Fundamental Rights of the European Union. In particular, it seeks to ensure full observance of the right to asylum guaranteed by Article 18."

[32] Thus it is contended that the Regulation incorporates the Charter and any discretion exercised under the Regulation has to be exercised in a manner which accords with the provisions of the Charter. Specifically in this case in a manner which is in accord with Article 24(2) of the Charter.

[33] I consider that the Regulation did not seek to incorporate the Charter but rather it recited that in making the Regulation the Charter had been observed. Article 3(2) which provides the discretion to the Member States does not require that the discretion should be exercised in accordance with the

principles set out in the Charter. At the time that the Regulation was made the Charter had been proclaimed by the Commission, the European Parliament and the Council. It had also been politically approved by the Member States at the Nice European Council in December 2004. It was thereafter a part of a proposed constitutional treaty which was expected to be ratified in 2005 but was withdrawn after referendum in two Member States. The terms of the Charter have not been approved by the United Kingdom Parliament. In those circumstances I do not consider that a recital in the Regulation was meant to or did have the effect of requiring Member States when exercising discretion to comply with a Charter which itself had not been ratified.

[34] In addition I consider that Article 3(2) of the Dublin II Regulation is not concerned with the conferral of rights on individuals but rather the arrangement of rights between Member States. In *R (on the application of Lika) v. Secretary of State for the Home Department* (2002) EWCA Civ 1815 a question arose as to the enforceability of the Dublin Convention. This was a Treaty between all Member States of the European Communities for determining which States should be responsible for examining applications for asylum. It has been superseded by the Dublin II Regulation. In respect of the Dublin Convention Lord Justice Latham stated:-

> "20. There is no doubt that the provisions of the Dublin Convention are not incorporated into domestic law. In *ex parte Shefki Gashi* and *ex parte Artan Gjoka*, Collins J, when dealing with the argument that there had been delay in dealing with the applications which amounted to a breach of the requirement of the Dublin Convention that the application should be dealt with expeditiously said at paragraph 11:
>
> > "I have no doubt that these arguments must be rejected. While naturally the Dublin Convention has regard to the need for those seeking asylum to know their fate as soon as is reasonably possible, it is concerned with the allocation of responsibility for considering claims and caring for refugees. I am prepared to assume for the purposes of this judgment that the ratification by the government of a Treaty may create a legitimate expectation that its terms will be applied in dealing with an individual affected by it: see *R –v- SSHD ex parte Ahmed and Patel* [1998] INLR 570 at 583G per Lord Woolf MR and 592A per Hobhouse LJ. That will only be if there is nothing else to

> show how the Government will act and no statement of policy. Here the respondent has quite clearly indicated that he intends to make use of his powers under s. 2 of the 1996 Act and to apply the Dublin Convention accordingly. In any event, I cannot accept that an individual can have any rights or expectations under the Dublin Convention since it is concerned not to confer benefits on the individual but to ascertain which state should be responsible for dealing with his claim. It may confer benefits on him indirectly in as much as he will not be passed from one state to another and back again and thus ascertaining that responsibility will take less time than if there was no Dublin Convention."

> 21. This statement of principle was approved by Lord Phillips MR in *Zeqiri –v- SSHD* [2002] Imm AR 42 at para 49 where he said:
>
> > "… First and foremost, I agree with the conclusions of Collins J in *Artan Gjoka* and *Shefki Gashi*. The provisions as to time in the Dublin Convention are designed to govern the relationship between the parties to it, not to confer rights on applicants for asylum. In the second case, the Dublin Convention does not form part of our domestic law and cannot govern the manner in which the 1996 Act operates"

[35] The effect in domestic law of the distinction between the Dublin Convention, a Treaty, and the Dublin II Regulation was considered by Mr Justice Gillen in *Re Zhanje's application for judicial review* [2007] NIQB 14. At paragraph [9] he observed that a Treaty as a matter of English law only has an effect on the international plain whereas by contrast a Regulation is directly applicable in the legal system of the Member State. However he considered that Article 19 of the Dublin II Regulation did not confer rights on individuals:-

> "In my view the wording and purport of Regulation 19 is very clear. This Regulation is clearly aimed at determining responsibility between Member States and does not confer rights on individuals certainly.

> The wording of other Articles in this or other Regulations may lead to different conclusions."

[36] Article 3 of the Dublin II Regulation is in the following terms:-

> "1. Member States shall examine the application of any third country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.
>
> 2. By way of derogation from paragraph 1, 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 Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of or take back the applicant.
>
> 3. Any Member State shall retain the right, pursuant to its national laws, to send an asylum seeker to a third country, in compliance with the provisions of the Geneva Convention.
>
> 4. The asylum seeker shall be informed in writing in a language that he or she may reasonably be expected to understand regarding the application of this Regulation, its time limits and its effects.

[37] In this case I consider that Article 3(2) of the Dublin II Regulation gives discretion to Member States in their dealing with other Member States. No factor is set out which limits the exercise of the Member State's discretion. There is no requirement to involve the other Member State in the exercise of the discretion. There is no requirement to give reasons or to justify the exercise of the discretion to the other Member State. It is an unlimited discretion applicable as between Member States. It does not confer rights on individuals. There is a contrast in respect of the terms of Article 3(2) and Article 3(4).

Article 3(4) does not arise for decision in this case but its terms are consistent with rights being conferred on individuals.

[38] In conclusion in relation to this aspect of the case I do not consider that the respondent was obliged to exercise its discretion under Article 3(2) of the Dublin II Regulations in accordance with the Charter of Fundamental Rights of the European Union. I also consider that Article 3(2) is aimed at determining responsibility between Member States and does not confer rights on individuals.

Conclusion

[39] I am not satisfied that the applicant has established any of his grounds for Judicial Review. The application for Judicial Review is dismissed.