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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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2015/28565

IN THE MATTER OF AN APPLICATION BY RABIA SALIM NASER MOHAMED FOR JUDICIAL REVIEW

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MAGUIRE J

[1] The applicant is a Libyan national. He is now aged 29. His immigration history is not uncomplicated.

[2] In essence, the following chronology is relevant to these proceedings:

(i) The applicant left Libya in 2007 and travelled to Sweden where he claimed asylum in April 2007.

(ii) This claim failed in February 2008 and an appeal in respect of it was refused in November 2008.

(iii) In March 2009 the applicant absconded from the Swedish authorities.

(iv) Eventually the applicant was detected by the Swedish authorities and returned to Libya on 26 May 2009.

(v) The applicant returned to Sweden and on 28 April 2011 he again claimed asylum. He had, it appears, entered Sweden in possession of a valid Schengenvisa issued in Malta.

(vi) As the applicant was at this time the subject of an expulsion order, the Swedish authorities did not deal with his application.

(vii) Nor did they return the applicant to Libya.

(viii) The applicant stayed in Sweden to July 2011 and he claims that in August 2011 he returned to Libya.

(ix) He then, he says, travelled to Malta in December 2014.

(x) From there he alleges that he made his way to the United Kingdom and claimed asylum here.

(xi) In January 2015 the United Kingdom authorities asked Sweden, pursuant to the terms of the Dublin Convention, to deal with his case.

(xii) In the same month, the Swedish authorities agreed to do so.

(xiii) Consequently the applicant's asylum application was refused in the United Kingdom and was certified on safe third country grounds in February 2015.

(xiv) Removal directions were set for the applicant's removal to Sweden on 24 March 2015.

(xv) This judicial review began on 23 March 2015 and resulted in the United Kingdom authorities granting the applicant a stay of the removal pending the outcome of these proceedings.

The applicant's candour

[3] It appears that the applicant has not been frank with the court.

[4] In his solicitor's affidavit, which grounded his judicial review (and which enabled him to obtain a stay of his removal), he failed to refer to:

- His return to Sweden in 2011.

- His return from Sweden to Libya in the same year.

[5] At his asylum interview in the United Kingdom on 23 December 2013 he disclosed his asylum claim in Sweden in 2007 but failed to disclose the matters bullet pointed above.

[6] It therefore appears that the applicant's case was initially dealt with by the UK authorities without reference to the matters to which the court has just referred. Nonetheless the UK authorities requested the Swedish authorities to deal with the applicant's claim and they agreed to do so. Those authorities were, however, aware of the applicant's presence in Sweden in 2011, as is clear from a letter sent by them to the applicant's solicitor dated 25 August 2015. It is assumed that this information was also shared with the United Kingdom authorities.

[7] Belatedly the applicant swore an affidavit in these proceedings on 2 December 2016. For the first time he referred to the matters he had hitherto withheld. He has provided no explanation as to why he failed to disclose these matters to the court or to the UK authorities at his asylum interview.

The Dublin III Regulation

[8] It is not in dispute between the parties that the applicant's case falls to be considered in accordance with the terms of the Dublin III Regulation. This Regulation came into operation on 26 June 2013 and replaces the previous Dublin II Regulation which had applied from 18 February 2003.

[9] The Regulation deals with what is referred to as the Common European Asylum System. This aims to deal swiftly with the determination of which Member State is responsible for examining an individual's application for asylum. Where a third country national, like the applicant, has already had an established connection with one Member State (in this case Sweden) but later lodges an application for asylum in a second Member State (in this case the United Kingdom), it is necessary to determine which State is responsible for examining his claim for asylum. The criteria for determining this question are set out principally in Chapter III within the Dublin III Regulation.

[10] The following provisions of the Dublin III Regulation of importance to this case are as follows:

Article 7:

> "(1) The criteria for determining the Member State responsible shall be applied in the order in which they are set out in this Chapter.
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> (2) The Member State responsible in accordance with the criteria set out in this Chapter shall be determined on the basis of the situation obtaining when the applicant first lodged his or her application for international protection with a Member State".

Article 18:

> "(1) The Member State responsible under this Regulation shall be obliged to:
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> (a) take charge, under the conditions laid down in Articles 21, 22 and 29, of an applicant who has

lodged an application in a different Member State;

(b) take back, under the conditions laid down in Articles 23, 24, 25 and 29, an applicant whose application is under examination and who made an application in another Member State or who is on the territory of another Member State without a residence document;

(c) take back, under the conditions laid down in Articles 23, 24, 25 and 29, a third country national or a stateless person who has withdrawn the application under examination and made an application in another Member State or who is on the territory of another Member State without a residence document;

(d) take back, under the conditions laid down in Articles 23, 24, 25 and 29, a third country national or a stateless person whose application has been rejected and who made an application in another Member State or who is on the territory of another Member State without a residence document."

Article 19:

"(2) The obligations specified in Article 18(1) shall cease where the Member State responsible can establish, when requested to take charge or take back an applicant or another person as referred to in Article 18(1)(c) or (d), that the person concerned has left the territory of the Member States for at least three months, unless the person concerned is in possession of a valid residence document issued by the Member State responsible.

An application lodged after the period of absence referred to in the first subparagraph shall be regarded as a new application giving rise to a new procedure for determining the Member State responsible."

Article 27:

> "(1) The applicant or another person as referred to in Article 18(1)(c) or (d) shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal."

Karim v Migrationsverket Case – C 155/15[1]

[11] The applicant's case in these proceedings is dependent on the decision of the European Court of Justice (Grand Chamber) of 7 June 2016 in the above referred to case.

[12] The case of Karim bears significant similarities with the present case. In that case the applicant was a Syrian national. He had sought asylum in Slovenia in May 2013 but later applied for international protection in Sweden in March 2014. The Swedish authorities requested that the Slovenian authorities deal with the applicant's request. The Slovenian authorities agreed to do so. Mr Karim, however, making use of his Article 27 right to an effective remedy, sought to challenge the way in which the Swedish authorities had applied Article 19(2) of the Dublin III Regulation. It was argued on behalf of the applicant that in between the two applications for asylum he had left the territory of the Member States for a period of more than three months. Accordingly, it was submitted that his application for asylum in Sweden should be regarded as a new application giving rise to a new procedure for determining the Member State responsible.

[13] The Swedish decision-making authorities referred two issues to the European Court of Justice. The first of these related to whether the right to an effective remedy in Article 27 meant that an asylum applicant could him or herself challenge a transfer decision, notwithstanding that the decision had been agreed between the Member States concerned. The second issue, on the other hand, sought confirmation that the effect of Article 19 (2) was that where it applied and where the asylum applicant could show that he or she, having made an application in one Member State, had left the Member States for a period of at least three months, and had later made a fresh asylum claim in another Member State, this latter application was to be treated as a new application.

[14] In respect of those issues the court concluded as follows:

> "1. Article 19 (2) of Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection

[1] This decision was published at the same time as a sister decision, the case of Ghezelbash v Staatssecretaris van Veiligheid en Justitie [2016] 1 WLR 3969. The court has considered the ECJ's decision in this case as well as Advocate General Sharston's Opinion in it.

> lodged in one of the Member States by a third country national or a stateless person must be interpreted to the effect that that provision, in particular its second paragraph, is applicable to a third party national who, after having made a first application in a Member State, provides evidence that he left the territory of the Member States for a period of at least three months before making a new asylum application to another Member State.
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> 2. Article 27 (1)…read in the light of recital 19 thereof, must be interpreted to the effect that, in a situation such as that at issue in the main proceedings, an asylum applicant may, in an action challenging a transfer decision made in respect of him, invoke an infringement of the rule set out in the second paragraph of Article 19 (2) of that regulation".

[15] In making its decision in Karim the European Court of Justice followed the Opinion provided by Advocate General Sharpston. She had emphasised the significance of Recital 19 to the Regulation. This had explicitly stated that in order to guarantee effective protection of applicants' rights, legal safeguards and the right to an effective remedy in respect of decisions regarding transfers were to cover both the application of the Regulation and the legal and factual situation in the Member State to which the applicant might be transferred. This meant, the Advocate General held, that the applicant should be able to invoke the wrongful application of the criteria for transfer by way of appeal or review. The applicant should therefore be able, as in the present case, to seek a judicial opinion as to whether the decision to transfer him to another Member State for examination of his application for international protection was legally correct.

[16] In arriving at this view the Advocate General and later the European Court of Justice was deviating from the interpretation which in the past had applied to the Dublin II Regulation.

[17] In respect of the second issue, the Advocate General was clear that if an applicant had made an application for asylum in one Member State but then afterwards left the territory of the Member States for a period of at least three months and subsequently made an application in another Member State, this gave rise to a new application giving rise to a fresh procedure for determining the Member State responsible for dealing with it.

[18] The Opinion of the Advocate General in Karim has been the subject of some discussion in one domestic judicial review K v SSHD [2016] EWHC 1394 Admin. While the issue in that case was different to that in the present case, the approach of

the court was supportive of the analysis contained in it. The K case was dealt with before the European Court of Justice itself dealt with the matter in Karim.

The court's assessment

[19] In the light of the above, it seems to this court that the applicant is entitled to an effective remedy in connection with the transfer decision which has been made in respect of his UK asylum claim. The gravamen of that decision is to refuse his asylum application made in the United Kingdom and to transfer the case on safe third country grounds to Sweden. Under Karim, it seems to the court, he is entitled to a review of this decision which can be carried out by this court.

[20] It seems to the court that the applicant, if he can comply with the requirements of Article 19 (2), in the light of Karim, is entitled to make the argument that his application for asylum made in the United Kingdom is a new application which gives rise to a new procedure for determining the Member State responsible.

[21] The transfer decision made by the United Kingdom authorities appears firmly to be based on the proposition that Sweden is the Member State responsible for dealing with the applicant's asylum claim. However, if the applicant since his original asylum claim was dealt with in Sweden in 2007 had left the territory of the Member States for a period of at least three months, this will mean that a new application is now being put forward. The same would be true if the applicant made a valid asylum application in 2011 in Sweden but subsequently he had left the Member States, as he claims, for a period of at least three months.

Did the applicant return to Libya after his asylum claim had been dealt with in Sweden in 2007 for a period of at least three months?

[22] The answer to the above question is less than clear in the present case. As has already been noted, the applicant, while referring to making an asylum claim in Sweden in 2007, both in his asylum interview in the United Kingdom and in the context of these proceedings, failed, until recently, to make the case set out above. On the other hand, there is evidence to support the view that he in fact was expelled from Sweden to Libya on 26 March 2009. The records of the Swedish authorities appear to support this.

[23] On the balance of probability, the court will accept that he did indeed return to Libya after his 2007 asylum claim had been made and refused in Sweden. The court, moreover, in the absence of any evidence to the contrary, will accept that his period outside the Member States will have exceeded three months.

[24] The above does not resolve conclusively the factual situations which the court must take into account. There remains the question of whether it can be said that in 2011 the applicant made a second claim for asylum in Sweden. There seems to be no real doubt that while in Sweden at that time he did purport to assert such a claim but

it appears likely that it was not treated by the Swedish authorities as a valid claim. This was because he had been the subject of an expulsion from Sweden in 2009 and the expulsion order was still in force at this time. In these circumstances the court is inclined to the view that the better view is that in 2011 no valid asylum claim was made by the applicant while he was in Sweden at that time. Accordingly, the applicant's 2007 claim is to be viewed as the only valid asylum claim made by the applicant.

[25] The court declines to resolve the issue of whether the applicant, as he claims, returned again to Libya in August 2011 and then later left Libya in 2014 for Malta. While he maintains that this is what happened, the court has no corroborative evidence to support his account. In passing the court notes that if his account is correct and he returned to Sweden *via* Malta with a Maltese visa which could be used for entry to Sweden, this may introduce the question of whether the Member State which should deal with his application is Malta. The court expresses no view about this possibility.

Conclusion

[26] Subject to the issue of candour, referred to *supra,* the Court will grant an order of *certiorari* to quash the impugned decision in this case.

[27] The court has considered whether the applicant's non-disclosure should result in the court withholding any remedy which would otherwise be granted. It has decided that it will not take this step in this case while deprecating the failure of the applicant to disclose in full to the court all the circumstances surrounding his case.

[28] Before leaving the case, the court wishes to express its gratitude to Mr McQuitty BL, who represented the applicant, and Mr Henry BL, who represented the Home Office, for their economical and helpful oral and legal submissions.