THE HIGH COURT

JUDICIAL REVIEW

[2017 No. 116 J.R.]

BETWEEN

M.A., S.A. AND A.Z. (A MINOR SUING BY HIS FATHER AND NEXT FRIEND M.A.) (BANGLADESH)

APPLICANTS

AND

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, THE ATTORNEY GENERAL AND IRELAND

RESPONDENTS

JUDGMENT of Mr. Justice Richard Humphreys delivered on the 8th day of November, 2017

1. This is a challenge to a transfer decision under the Dublin III regulation (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 lodged in one of the Member States by a third-country national or a stateless person). I have heard helpful submissions from Mr. Mark de Blacam S.C. (with Mr. Garry O'Halloran B.L.) for the applicants and Mr. David Conlan Smyth S.C. (with Ms. Sarah-Jane Hillery B.L.) for the respondents and I record my thanks to all of the lawyers involved for their assistance. The point of most general interest in the case relates to the implications for the Dublin system of the process of withdrawal of the UK from the European Union. However in the context of other issues arising I need to first outline some general context in relation to the implementation of art. 17 of the Dublin III regulation in Ireland.

2. The original State position as outlined in a letter in November, 2015 from the asylum policy division of the Department of Justice and Equality to the Legal Aid Board was that the discretion exercisable under art. 17 of the regulation is vested in the Refugee Applications Commissioner and that this was not a matter to be considered by the Refugee Appeals Tribunal at appeal stage. However, there was then a volte face in the State's posture and as of the 25th April, 2017 a different position was articulated in the context of proceedings in *U. v. Refugee Appeals Tribunal* [2017] IEHC 490 (see para. 5). The current State position is that the function under art. 17 is an executive discretion for the Minister alone. The State continues to maintain that there is no appeal in relation to any decision under the regulation.

Facts

3. The second named applicant came to the UK on a student visa in 2010. The first named applicant followed her on foot of a dependant visa in early 2011. The third named applicant was born in the UK in February, 2014. The parents renewed their visas on an annual basis until the second named applicant's college closed down and their visas were cancelled. They then came to Ireland and applied for asylum on the 12th January, 2016. The third named applicant was included in his mother's application. On the 7th April, 2016 a request was sent to the UK by the Refugee Applications Commissioner to take charge of the applications under the Dublin regulation. On the 1st May, 2016 the UK confirmed its agreement to do so. The applicants raised issues with the Commissioner in relation to the first named applicant's medical problems and also the fact that the third named applicant was under assessment by the HSE in relation to issues concerning autism.

4. The Commissioner recommended transfer to the UK and in that recommendation he considered whether art. 17 should be applied to the applicant's case and decided adversely to the applicants. The applicants then appealed the decision to transfer by notices of appeal to the International Protection Appeals Tribunal dated 14th June, 2016 and made written submissions which focussed primarily on art. 17. The transfer decisions were upheld by the tribunal on 10th January, 2017. The tribunal held that it had no jurisdiction to exercise discretion in relation to art. 17. It also rejected arguments relating to UK withdrawal from the European Union on the basis that it had to deal with the situation as it currently exists.

Relevant provisions of EU law

5. The most pertinent provisions of the Dublin III regulation are as follows:

> (i) Article 3(1) which provides that member states shall examine any application for international protection by a third country national or a stateless person who applies on the territory of any one of them including at the border in the transit zones. 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.
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> (ii) Article 6(1) which provides that the best interests of the child shall be a primary consideration for member states with respect to all procedures provided for in the regulation.
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> (iii) Article 17(1) which provides that by way of derogation from art. 3(1) each member state may decide to examine an application for international protection lodged with it by a third country national even if such examination is not its responsibility under the criteria laid down in this regulation.

Relevant provisions of national legislation

6. The relevant national legislation is the European Union (Dublin System) Regulations 2014 S.I. No. 525 of 2014. The most pertinent provisions are as follows:

> (i) One of the most crucial provisions for present purposes is reg. 2(2) which provides that a word or expression used in the regulations and also in the EU regulation should have the same meaning as in the EU regulation.
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> (ii) Regulation 6(1) provides that an applicant may appeal against transfer decision and reg. 6(9) goes on to say that the Tribunal shall make a decision either affirming or setting aside the transfer decision.

(iii) The term "*transfer decision*" is defined in reg. 2(1) as a decision by the Commissioner in accordance with the EU regulation to transfer an applicant where the State is the requesting member state and the requested member state has accepted to take charge of or to take back that applicant. It is not defined as to whether the transfer decision includes any implicit or explicit decision not to exercise the art. 17 discretion; thus there is no explicit appeal against a decision to exercise or not exercise that art. 17 function, although if one interpreted the regulations as conferring art. 17 jurisdiction on the Commissioner then an issue would arise as to how to interpret the scope of the appeal from the Commissioner to the Tribunal.

(iv) The other key provision for present purposes is reg. 3. Regulation 3(1) states that the Commissioner performs the functions of a determining, requesting and requested member state. Regulation 3(2) provides that the Minister performs the functions of a transferring member state. The phrase "*determining member state*" is referred to in the EU regulation in arts. 3(2), 5(1) and 20(4).

(v) Regulation 3(3) of the 2014 regulations provides that the Commissioner shall perform all functions under art. 6 of the EU regulation which in turn refers to the best interests of the child "*with respect to all procedures provided for in this Regulation*". It seems to me that this is a context in which "*all*" must mean "*all*" because otherwise the effective application of art. 6 will be impeded.

7. Mr. Conlan Smyth submits that the allocation of responsibility between national-decision makers is a matter of national law but that submission misunderstands the position. The issue is how the Minister has chosen to allocate responsibility given the terminology used in the 2014 regulations. Mr. Conlan Smyth submits that the art. 17 power could not have been conferred on anybody other than the Minister without primary legislation as it is an executive power and relies on the *U.* decision. Thus the logic of the argument is not only that the art. 17 function must stay with the Minister but that the position cannot be clarified or amended by further regulations. The State position seems then not so much one of having painting themselves into a corner but of having barricaded themselves into a corner. Even assuming *arguendo* without so deciding that there is some relevant limitation in terms of what can be done by statutory instrument, the regulations certainly could have been drafted so as to at least recognise where the art. 17 function lies. National law more broadly could have conferred the first instance decision function on anybody for the purposes of art. 17. It certainly could have conferred that function on the Minister (or, if you prefer, acknowledged the Minister's function) subject to an effective remedy. It certainly doesn't do that expressly. So while the choice of where the function lies is to be a matter of domestic law, the domestic law-maker has chosen to use EU terminology to allocate responsibility. Again the crucial provision is reg. 2(2) that words and expressions have the same meaning as in the EU regulation. Thus the determination of the meaning of the Irish regulations depends on the meaning of the EU regulation and depends on the first instance on the meaning of "*determining member state*" in the EU regulation and secondly on the issue of the scope of functions under art. 6.

8. The drafting of the regulations is unfortunately in my view very unclear and not readily reconcilable with what is now the stated official position, and the situation is crying out for express amendment. There is an urgency to the need for clarification because on an ongoing basis the Dublin system is simply not functioning in the manner envisaged by EU law given the regulations as currently worded. I would suggest that the Minister give serious consideration to making new regulations (or introducing legislation if that is preferred) specifying *expressly* who exercises the art. 17 discretion for the purpose of future applications, and providing for an appeal therefrom so that an effective remedy is provided; and so that the Dublin system (which has currently, it seems, ground to a halt in Ireland) can potentially function as required by EU law in relation to future cases. There does not appear to be any legal bar to providing an effective remedy under the EU regulation against a first instance decision under art. 17 by way of regulations under the European Communities Act, 1972. If as I think it does EU law requires such an effective remedy then such a requirement comes within the scope of the regulation-making power under the 1972 Act.

Reference of questions of EU law in the proceedings to the Court of Justice
9. Five questions of EU law arise in the proceedings and in circumstances which I will shortly outline I have decided to refer these questions to the Court of Justice. I will discuss each question in turn.

The first question – effect of UK withdrawal from the European Union.
10. The first question is: when dealing with transfer of a protection applicant under regulation 604/2013 to the UK, is a national decision-maker, in considering any issues arising in relation to the discretion under art. 17 and/or any issues of protection of fundamental rights in the UK, required to disregard circumstances as they stand at the time of such consideration in relation to the proposed withdrawal of the UK from the EU.

11. The proposed withdrawal of the United Kingdom from the European Union is not purely a political question; it is also a legal question. It is more or less accepted by Mr. Conlan Smyth that the withdrawal agreement would be subject to review by the Court of Justice. It seems to me highly unlikely that, given the indispensible role of the Court of Justice in ensuring the effective and uniform application of EU law, that Court would accept as compatible with the treaties any replacement arrangement for the Dublin system that included the UK but excluded a role for the Court of Justice itself (see the approach taken in Opinion 2/2013, 18th December, 2014, ECLI:EU:C:2014:2454, in relation to the ECHR). Thus it seems either the UK red line position regarding exclusion of the Court of Justice will not be arrived at or there may be a possibility of a withdrawal without an agreement. The latter scenario could potentially raise questions regarding the effective protection of rights post-withdrawal.

12. Admittedly UK withdrawal is not inevitable in the sense that an art. 50 notification can be withdrawn. It was conceded to the contrary by the UK government in *R. (Miller) v. Secretary of State for Exiting the European Union* [2017] UKSC 5 but that in my view is clearly a tactical concession without any basis in law. To take a more small-scale example (by way of analogy only and not intended to convey disapprobation), no judge would tell someone who had taken a poison that they had made their choice and were to be precluded from taking an antidote. It would be contrary to both the EU goal of closer union on the one hand and to the national sovereignty of the UK on the other to take the view that an art. 50 notification could not be withdrawn. However even accepting that as a possibility, the present case does raise the question as to whether the likely situation post-withdrawal is something that the national decision-maker is required to disregard until such time as it becomes an accomplished fact.

13. Recitals 13 and 14 and 19 of the EU regulation envisage protection of the rights of parties affected, including the best interest of the child, pursuant to the ECHR and the EU Charter. Charter rights obviously would fall away in the context of UK withdrawal. It is true that certain recent Irish authorities do not see this as an issue but those authorities do not deal with the type of discretionary situation arising here. *Minister for Justice and Equality v. O'Connor* [2017] IEHC 518 at para. 45 onwards dealt with the question of withdrawal in the EAW context but one factor there is the obligation to effect a transfer under the EAW process and the finding that the court would not be acting lawfully otherwise. Here however there is a fundamentally different situation which is that of a discretion to be exercised. In *North East Pylon Pressure Campaign v. An Bord Pleanála* [2017] IEHC 338 the question of the implications of withdrawal also arose but that was not an issue because that was a context where the UK had produced a policy

document clarifying its attitude to the development to which the proceedings related notwithstanding the proposed withdrawal. So it seems to me that neither of those cases addressed the situation here where there is a discretion to be exercised.

14. The applicants' position on this question is that the national decision-maker is obliged as part of its duty to protect rights and exercise a discretion to consider all circumstances including the likely position on UK withdrawal.

15. The respondents' position is that the decision-maker is not so entitled or at least not until we are closer to March 2019. It is argued that the applicants' submission is hypothetical and any question would be advisory. It seems to me that is not so. The issue is whether in the light of current facts or at least facts at the time of the decision the likely or possible situation on withdrawal should be disregarded. Mr. Conlan Smyth also argues that the tribunal did not refuse to engage with the withdrawal issue but that seems to me to be the effect of the summary rejection of the argument at para. 5.2 of the tribunal's decision and in particular the phrase that "*the Tribunal must deal with matters as they are at present".*

16. My proposed answer to the first question is that in exercising any discretion under regulation 604/2013 and in considering the likely protections of the rights of persons affected the decision maker should take into account all relevant circumstances and should not be precluded from taking into account the likely situation arising post-withdrawal in the light of the current state of the process of withdrawal of the UK from the European Union.

17. The relevance of this question in the present case is that the decision-maker declined to consider the merits of any argument in relation to withdrawal at all. If the applicants' contention is correct the tribunal should have considered the current state of play including any risks in relation to legal protection is likely to be afforded to the applicants arising on foot of the state of the withdrawal process.

The second question – whether "*determining member state*" includes state exercising art. 17 function
18. The second question is: does the concept of the "*determining member state*" in regulation 614/2013 include the role of the member state in exercising the power recognised or conferred by art. 17 of the regulation.

19. As a subsidiary to this heading Mr. de Blacam sought to raise issues about the degree of transparency of the art. 17 process but it seems to me that those matters are not pleaded.

20. The most pertinent authority from the Court of Justice is Case C-578/*16 C.K. v. Republika Slovenija* where the court says *inter alia* at para. 53 that: "*The discretion which [Article 17] allows the Member States is an integral part of the system for determining the Member State responsible developed by the EU legislature ('the Dublin system')",* citing *N. S. and Others v. Secretary of State for the Home Department,* C-411/10 and C-493/10, EU:C:2011:865 paras. 64 to 68.

21. The applicant submits that a determining member state must include the determination process under art. 17.

22. The respondent submits that it does not include the art. 17 process which is entirely distinct, it is argued. Reliance is placed on the judgment of O'Regan J. in *U.* but crucially the respondents acknowledge that this argument is not specifically dealt with in the *U.* case. Thus it seems to me that notwithstanding the doctrine of *stare decisis* (see *Irish Trust Bank v. Central Bank* [1976 -7] I.L.R.M. 50, In *Re Worldport Ireland Limited* [2005] IEHC 189, *Kadri v. Governor of Wheatfield Prison* [2012] IESC 27) the issue is to some extent open.

23. My answer to the proposed question is that based on *N.S.* and *C.K.* the concept of the determining member state must include the member state insofar as it is exercising functions under art. 17.

24. The relevance of the question to the proceedings is that it would follow that the Commissioner (now the International Protection Office) does have jurisdiction to determine art. 17 issues by virtue of the 2014 regulations as they are currently drafted. So it seems to me that resolution of the second question is determinative of this aspect of the proceedings.

The third question – whether art. 6 functions include the art. 17 process
25. The third question is: do the functions of a member state under art. 6 of regulation 604/2013 include the power recognised or conferred by art. 17 of the regulation.

26. The applicant says that such functions are included. Article 6 refers to "*all*" procedures. The applicants queried the word "*functions*" in the question but that is the term used in reg. 3 of the 2014 regulations so it appears to be the appropriate one for me to use here.

27. The respondent submits that there is no link between art. 6 and art. 17 and also says that art. 17 is not a procedure but an executive discretion. Mr. Conlan Smyth submits that no representations were made to the Minister so the question does not arise. That however is a question-begging submission because the determination of the interplay between arts. 6 and 17 is necessary in order to determine whether the Minister has jurisdiction at all given the Byzantine way the 2014 regulations are drafted. Again, O'Regan J. does not specifically deal with this argument in *U.* so *Irish Trust Bank* and *Worldport* are somewhat diluted in their application to this point.

28. My proposed answer to the question is that in the light of the approach in *N.S.* and *C.K.* the functions conferred by art. 6 of the regulation include the exercise of the discretion under art. 17.

29. The relevance of the question to the proceedings is that if the foregoing is the case it would follow that the Commissioner (now the International Protection Office) does have jurisdiction to deal with art. 17 (given the way the Irish regulations are worded). That would be an alternative basis to find for the applicants and indeed either an affirmative answer to either this question or the second question would suffice for the applicants to succeed on the art. 17 issue.

The fourth question - the issue of an effective remedy
30. The fourth question is: does the concept of an effective remedy apply to a first instance decision under art. 17 of regulation 604/2013 such that an appeal or equivalent remedy must be made available against such a decision and/or such that national legislation providing for an appellate procedure against a first instance decision under the regulation should be construed as encompassing an appeal from a decision under art. 17.

31. This question arises here because there was no appeal afforded from the Commissioner to the tribunal on the art. 17 question.

32. The applicants submit that they are entitled to an effective remedy against the art. 17 decision.

33. The respondents submit that art. 17 is an executive discretionary power separate from the transfer criteria. They submit that the national regulations provide that the only appeal is against a transfer decision not an art. 17 decision. They submit that no representations were made to the Minister so that the question does not arise. That appears to me to be a misconceived submission because here the Commissioner did exercise the art. 17 function and the tribunal held that no appeal lay.

34. My proposed answer is that by virtue of art. 27(1) of the regulation in the light of *C.K.* it follows that an effective remedy should apply to any first instance decision under art. 17. Accordingly the national legislation should be interpreted to allow such a remedy; thus the appeal against a transfer decision should impliedly be taken to include an appeal against a decision not to exercise any discretion to the contrary under art. 17.

35. The relevance of the question to the proceedings is that, if the foregoing is the case, it would follow that the tribunal had a jurisdiction to hear an appeal from the commissioners' decision not to apply art. 17 and erred in law in refusing to entertain such an appeal.

The fifth question - best interests of the child
36. The fifth question arising here is: does art. 20(3) of regulation 604/2013 have the effect that in the absence of any evidence to displace a presumption that it is in the best interests of a child to treat his or her situation as indissociable from that of the parents, the national decision maker is not required to consider such best interests separately from the parents as a discrete issue or as a starting point for consideration of whether the transfer should be take place.

37. The applicants' position in that the decision-maker is so required. The respondents' position is the decision-maker is not so required and that the interpretation of art. 20(3) is clear. O'Regan J. in *U. v. Refugee Appeals Tribunal (No. 2)* [2017] IEHC 613 does deal not with this argument expressly but seems rather to be dealing with a slightly different issue. She touches on the indissociability issue at para. 29 but not in the manner raised in this case.

38. My proposed answer is that art. 20(3) is designed not to require separate consideration of a child's position unless some reason is demonstrated not to associate the child's interests with those of the parents. Thus in the absence of positive evidence to displace the presumption of indissociability, there is no requirement to consider the best interests of the child as a separate or discrete issue or as a starting point.

39. The relevance of the question to the disposition to the case is that if my proposed answer is correct then no unlawfulness in the decision arises under this heading.

Request for the urgent procedure or alternatively the expedited procedure
40. It seems to me there are a number of reasons for seeking the urgent procedure in this case, as follows:

> (i) Firstly, the medical symptoms of autism in relation to the child make it preferable that the child's fate would be determined sooner rather than later.
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> (ii) Secondly, the Dublin regulation process itself requires expedition.
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> (iii) Further, the question relating to UK withdrawal is of general interest and has an inherent timescale rendering it appropriate to obtain the guidance of the Court of Justice well in advance of March, 2019.
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> (iv) Finally, there is the fact that a very large number of other cases in the High Court of Ireland Asylum List are depending on the resolution of the art. 17 issue, and accordingly the current (and indeed until the regulations are amended, the ongoing) body of Dublin system litigation cannot be meaningfully progressed without an answer to these questions.

41. If the Court of Justice considers that the urgent procedure is inappropriate I would request the expedited procedure for the same reasons. I note that the *C.K.* case was dealt with by way of the expedited procedure.

Order
42. For the foregoing reasons I will refer the following questions to the Court of Justice pursuant to art. 267 of the TFEU:

(i) when dealing with transfer of a protection applicant under regulation 604/2013 to the UK, is a national decision-maker, in considering any issues arising in relation to the discretion under art. 17 and/or any issues of protection of fundamental rights in the UK, required to disregard circumstances as they stand at the time of such consideration in relation to the proposed withdrawal of the UK from the EU;

(ii) does the concept of the "*determining member state*" in regulation 614/2013 include the role of the member state in exercising the power recognised or conferred by art. 17 of the regulation;

(iii) do the functions of a member state art. 6 of regulation 604/2013 include the power recognised or conferred by art. 17 of the regulation;

(iv) does the concept of an effective remedy apply to a first instance decision under art. 17 of regulation 604/2013 such that an appeal or equivalent remedy must be made available against such a decision and/or such that national legislation providing for an appellate procedure against a first instance decision under the regulation should be construed as encompassing an appeal from a decision under art. 17;

(v) does art. 20(3) of regulation 604/2013 have the effect that in the absence of any evidence to displace a presumption that it is in the best interests of a child to treat his or her situation as indissociable from that of the parents, the national decision maker is not required to consider such best interests separately from the parents as a discrete issue or as a starting point for consideration of whether the transfer should be take place.

43. I will further respectfully request that the urgent procedure under Rule 107 of the Rules of Procedure of the Court of Justice be applied, and that if it is considered that the urgent procedure should not be applied, I would respectfully request that the expedited procedure pursuant to Rule 105 of the Rules of Procedure be applied.