THE COURT OF APPEAL

Neutral Citation Number: [2019] IECA 183

Appeal No.: 2017/591

Irvine J.
McGovern J.
Baker J.
BETWEEN/

N. V. U. AND

M. U., M. N. I., AND M. S.

(MINORS SUING BY THEIR MOTHER AND NEXT FRIEND N. V. U.)

APPLICANTS/

APPELLANTS

- AND -

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

RESPONDENTS

JUDGMENT of Ms. Justice Baker delivered on the 26th day of June 2019

1. This appeal concerns article 17 of Regulation EU 604/2013 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 (Recast) ("Dublin III") which vests in Member States the discretion to deal with an application for refugee status on humanitarian or compassionate grounds where Dublin III would otherwise have resulted in that application being transferred to another Member State.

2. The appeal is from two written judgments of O'Regan J. delivered on 26 June 2017, *U. v. Refugee Appeals Tribunal* [2017] IEHC 490, and 24 October 2017, *U. v. Refugee Appeals Tribuna*l [2017] IEHC 613 (the names are not redacted in the original), and order of 14 November 2017 in judicial review proceedings brought against a decision of the Refugee Appeals Tribunal (" RAT") which had upheld the decision of the Office of the Refugee Appeals Commissioner ("ORAC") to transfer the application for refugee status to the relevant authorities in the United Kingdom.

3. The functions of ORAC and RAT are now performed respectively by the International Protection Office ("IPO") and the International Protection Appeals Tribunal ("IPAT").

Background
4. The first appellant, Ms N. V. U., a Pakistani national, was born in 1979. She is the mother of the second, third, and fourth appellants, all minors. She asserts that she had travelled to the United Kingdom on foot of a spousal visa granted on 10 January 2014. In June 2015, her visa having expired on 28 May 2015, she travelled from the United Kingdom to Ireland with her children. She claims that she was in flight from an abusive husband. On 5 June 2015 she made an application under the Refugee Act 1996 for a declaration of refugee status on behalf of herself and her three children to the Irish authorities. Her claim for refugee status was based on an asserted fear of persecution if she and her children were returned to Pakistan. She asserted that the correct forum for the determination of her application for refugee status was Ireland, as she was at risk of inhuman and degrading treatment in the United Kingdom if she was returned there for the purpose of the determination by the United Kingdom of her application.

5. On 9 July 2015, a request for information was sent to the United Kingdom authorities under article 34 of Dublin III and on 20 December 2015, the Home Office advised ORAC that fingerprints and details of the appellants matched their records. By correspondence dated 28 January 2016, the United Kingdom authorities agreed to accept the transfer of the appellants' applications for refugee status pursuant to article 12(4) of Dublin III.

6. ORAC came to a decision that the application for refugee status should, in the light of article 12(4) of Dublin III, properly be examined by the United Kingdom authorities and on 29 April 2016, informed the appellants of its decision by "Notice of Decision to Transfer".

7. The appellants appealed ORAC's decision to RAT by notice of appeal dated 24 May 2016. It is the decision on that appeal that fell for consideration by O'Regan J.

The decision of RAT
8. In its decision of 24 January 2017 (the "RAT Decision"), RAT dismissed the appeal and affirmed the transfer decision of ORAC.

9. The decision of RAT was the subject of an application for judicial review heard by O'Regan J. and the central legal question in the judicial review and which formed the basis of her first decision was the nature of the jurisdiction to be exercised by RAT under Dublin III.

10. The appellants had argued at first instance and on appeal that the discretion provided by article 17 of Dublin III should have been exercised by RAT so as to enable the application for refugee status to be determined in Ireland. RAT determined that it had no jurisdiction to exercise the discretion accorded to Member States by article 17 of Dublin III. It gave the following as a reason for its decision:

> "The Minister may or may not enact a regulation giving effect to the Tribunal exercising a discretionary power and setting out the basis on which it may be exercised, while Dublin III remains in force. But until such time as an organ of the State, executive/judicial/legislative sets out clearly that the Tribunal has jurisdiction to exercise discretionary power, this Tribunal declines to do so. Clearly, this Tribunal cannot act *ultra vires*" (para 5.6).

11. RAT went on and stated that:

> "[i]t will be a matter for the Commissioner [ORAC]/Minister to address the medical concerns when putting the transfer into effect, unless in interim, Ireland as the Member State, exercises article 17 in an appropriate manner" (para. 5.10).

The decisions in the High Court

12. The appellants sought judicial review by way of *certiorari* of the RAT Decision and various declaratory and injunctive reliefs on the grounds that RAT was wrong in law that it did not have discretion under article 17 of Dublin III to refuse to transfer. The appellants also sought to quash the RAT Decision on the grounds that RAT failed to adequately consider the appellants' rights to family life and private life under article 8 of the European Convention of Human Rights ("ECHR") or under article 7 of the European Charter on Fundamental Rights ("the Charter").

13. The matter was heard by way of telescoped hearing by O'Regan J. who refused the reliefs sought for the reasons stated in two written judgments, the first of which dealt with the legal issue as to jurisdiction, and the second, delivered some months later, with the question whether RAT had an obligation to consider the rights of the appellants under article 8 of the ECHR or article 7 of the Charter.

The judgments

14. In her first judgment, O'Regan J. dealt with the interpretation of article 17 of Dublin III. She came to the conclusion stated at paras. 33 and 34 that:

> "The sovereign discretion referred to in Article 17 of Dublin III has not been vested in [ORAC] and remains with the Minister for Justice/the Oireachtas"
>
> and that
>
> "There is no requirement of or wrongful failure by the Minister for Justice in failing to publish a policy or criteria in respect of the exercise of the Article 17 discretion".

15. In her second judgment, O'Regan J. found that there had been no failure on the part of RAT to consider ECHR or Charter rights as the argument that these rights were engaged had not been raised in the notice of appeal to RAT or at the oral hearing before RAT. She further considered that:

> "there is no European case law to date to support the proposition that Article 8 rights must be considered in or about a Dublin III transfer decision" (para. 18).
>
> and that
>
> "[…] the only jurisprudence upon which the applicant might rely is the aforesaid judgments from the UK Court of Appeal, which I do find persuasive, however a threshold of 'an especially compelling case' was held to be necessary and the applicants are nowhere close to that threshold" (para. 26).

16. O'Regan J. found as a matter of fact that the fears expressed on behalf of the appellants were adequately dealt with by RAT. She further addressed arguments in relation to the best interests of the children, finding that proper regard had been given to their best interests, and that a medical report tendered on behalf of the first appellant had been considered as the content of the report was set forth in the decision.

The grounds of appeal

17. The grounds of appeal as regards the first judgment can be summarised as follows:

- ground 1: The trial judge erred in law in concluding that the discretion referred to in article 17 of Dublin III is vested solely in the Minister;

- ground 2: The trial judge erred in finding that there is no requirement on the Minister to publish, or wrongful failure by him in not publishing, any policy guidance or criteria in respect of the exercise of its discretionary powers under the Dublin III;

- ground 3: The trial judge erred in finding that the approach of the respondent had the effect that no effective remedy exists against a refusal to exercise discretion referred to in article 17(1) of Dublin III.

18. The grounds of appeal as regards the second judgment, can be summarised as follows:

- ground 4: The trial judge erred in failing to determine whether or not private and/or family rights under article 8 of the ECHR and/or article 7 of the Charter must be considered by RAT in the transfer process and further erred in substituting its decision for that of RAT;

- ground 5: The trial judge erred in finding that the "best interests of the children" under article 6 of Dublin III had been adequately considered by RAT. In particular, the appellant contests O'Regan J.'s finding, at para. 28 of her second judgment, that the children's "express fear that if returned to the UK the first named applicant's husband would find them in circumstances where he works in a takeaway is sufficiently irrational and unsupported by any evidence whatsoever";

19. The respondents oppose the appeal in its entirety. They also cross-appeal the cost award in the High Court.

The legal issues

20. The following legal issues fall to be determined by this Court on the appeal:

a) In whom is vested the discretion referred to in article 17 Dublin III (Grounds 1 and 3);

b) Whether the Minister is required to publish a policy, guidance, or criteria in respect of the exercise of the article 17 of Dublin III discretion. (Ground 2);

c) Whether private and/or family rights under article 8 ECHR and/or article 7 of the Charter must be considered in the transfer process (Ground 4);

d) Whether the "best interests of the children" under article 6 of Dublin III had been adequately considered by RAT (Grounds 4 and 5);

The Dublin System

21. It is useful to briefly outline the legislative history of Dublin III, part of the broader Common European Asylum System ("the Dublin System"). The Dublin system was originally established by the Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities of 15 June 1990 (the "Dublin Convention").

22. In 2003, the Dublin Convention was replaced by Regulation (EC) No. 343/2003 Establishing the Criteria and Mechanisms for Determining the Member State Responsible for Examining an Asylum Application Lodged in One of the Member States by a Third-Country National (the "Dublin II"), which was, in turn, replaced by Dublin III in 2013. Dublin III has been in force since 1 January 2014.

23. The general purpose of the Dublin System was to prevent forum shopping and to provide for an effective, objective, speedy, and generally applicable system for the identification of the Member Sate responsible for the determination of an application for international protection.

24. The Dublin System was not designed with a view to ensure the sharing of responsibility for applications for international protection. Its main purpose was to assign responsibility for processing an asylum application to a single Member State, a principle which is maintained by Dublin III.

25. Article 3 of Dublin III reads as follows:

> "1. 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 or 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.
>
> 2. Where no Member State responsible can be designated on the basis of the criteria listed in this Regulation, the first Member State in which the application for international protection was lodged shall be responsible for examining it."

26. The identification of the Member State responsible for an asylum application is to be ascertained by application of the criteria set out in Chapter III of the Regulation, and the order in which they are to be applied is found in article 7(1) of Dublin III, which refers to the sequence established by article 8 to 11 of Dublin III. Priority is given to factors involving family unity and the best interests of any child affected.

27. If the determining Member State, through its competent national authority, considers the criteria under article 8 to 11 of Dublin III, and does not identify a responsible Member State, it is then required by article 12 of Dublin III to consider whether another Member State had previously granted the asylum seeker a valid residence document or a valid visa permitting lawful entry to the European Union, in which case, that Member State will be responsible for examining the asylum application.

28. Those criteria are not relevant to this judgment which is concerned with the argument regarding the right of a Member State to derogate from the strict application of those criteria.

29. The Court of Justice of the European Union ("CJEU") explained the general purpose of Dublin III in *Ghezelbash v. Staatssecretaris van Veiligheid en Justitie* (Case C 63/15) ECLI:EU:C: 2016:409 as follows:

> "[A]ccording to recitals 4, 5 and 40 of Regulation No 604/2013, the objective of the regulation is to establish a clear and workable method based on objective, fair criteria both for the Member States and for the persons concerned for determining the Member State responsible for examining an asylum application. It follows, in particular, from Articles 3(1) and 7(1) of the regulation that the Member State responsible is, in principle, the Member State indicated by the criteria set out in Chapter III of the regulation."

Derogation

30. The perceived need for derogation from the generality of the Dublin System arose in 2013/2014 from the migrant crisis in Greece and the concern that systemic failures in the reception and processing of claims in Greece were not readily dealt with under Dublin II.

31. Article 3(2) of the recast Regulation makes provision for a mandatory assumption of responsibility by a Member State of an application for international protection by a third country national or a stateless person where it is considered there are "substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that member state, resulting in a risk of inhuman or degrading treatment within the meaning of article 4 of the Charter of fundamental rights of the European Union".

32. In those circumstances, the determining Member State is to continue to examine the criteria set out in the Chapter in order to establish whether another Member State can be designated as responsible and, in default, the determining Member State shall become the Member State responsible.

33. The provisions of article 17 of Dublin III had a different objective, to vest in the Member States the discretion to assume responsibility for an application that would otherwise fall to be determined by another Member State identified by the application of the hierarchy set out in Dublin III. Unlike article 3(2), article 17 of Dublin III imposes no obligation on a Member State to exercise the discretion to assume jurisdiction.

Discretionary Power
34. Article 17(1) of Dublin III reads as follows:

> "By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation.
>
> The Member State which decides to examine an application for international protection pursuant to this paragraph shall become the Member State responsible and shall assume the obligations associated with that responsibility."

35. Recital 17 of Dublin III clarifies that the circumstances envisaged by article 17 may cover, but are not limited to, compassionate and humanitarian situations in order to facilitate family relations:

> "Any Member State should be able to derogate from the responsibility criteria, in particular on humanitarian and compassionate grounds, in order to bring together family members, relatives or any other family relations and examine an application for international protection lodged with it or with another Member State, even if such examination is not its responsibility under the binding criteria laid down in this Regulation."

36. The discretionary clause in article 17 contained in Chapter IV of Dublin III therefore provides an alternative mechanism for Member States to assume responsibility for asylum applications. This was explained by the CJEU in *Ghezelbash v. Staatssecretaris van Veiligheid en Justitie* at para 42:

> "Chapter IV of the regulation identifies specifically the situations in which a Member State may be deemed responsible for examining an asylum application by way of derogation from those criteria."

37. Under the previous regime, a similar provision existed in Dublin II, the so-called "sovereign clause".

38. The central question for determination in this appeal is the identification of the body or person in Ireland responsible for the exercise of this discretionary power.

European Union (Dublin System) Regulations 2014
39. Dublin III was given further effect in the State by the European Union (Dublin System) Regulations 2014, S.I. No. 525/2014 (the "2014 Regulations"). The European Union (Dublin System) Regulations 2018 have now repealed the 2014 Regulations, which continue to apply to transfer decisions made under the 2014 Regulations, as in the present case.

40. Regulation 2(2) of the 2014 Regulations provides that:

> "A word or expression that is used in these Regulations and is also used in the EU Regulation shall have in these Regulations the same meaning as it has in the EU Regulation unless the contrary intention appears".

41. Regulation 3(1) and (2) of the 2014 Regulations provide that "the Commissioner" (defined in s. 1 of the Refugee Act 1996 as ORAC), is to perform the functions of a determining, requesting, and requested Member State, whilst the Minister for Justice and Equality is to perform the functions of a transferring Member State:

"(1) The following functions under the EU Regulation shall be performed by the Commissioner:

> (a) the functions of a determining Member State;
>
> (b) the functions of a requesting Member State;
>
> (c) the functions of a requested Member State;
>
> (d) the communication and requesting of personal data and information under Article 34.

(2) The functions of a transferring Member State under the EU Regulation shall be performed by the Minister."

42. The 2014 Regulation defines a "transfer decision" in r. 2(1) as follows:

"[A] decision made by the Commissioner to transfer, in accordance with the EU Regulation—

> (a) an applicant, or
>
> (b) a person, other than an applicant, referred to in Article 18(1)(c) or (d) of the EU Regulation".

43. The making of the decision to transfer to another Member State following an application for refugee status is one of the functions of a determining Member State. This is clear from the wording of the provisions of the 2014 Regulations themselves. For example, r. 5(1) of the 2014 Regulations reads as follows:

> "Where the Commissioner makes a transfer decision, he or she shall send the applicant concerned and the applicant's legal representative (if known) a notification under paragraph (2)".

44. Regulation 6(1) of the 2014 Regulations provides that an applicant may appeal to RAT from a "transfer decision" of ORAC:

> "An applicant may appeal to the Tribunal, in fact and in law, against a transfer decision."

45. Regulation 3(3) of the 2014 Regulations provides that ORAC shall perform all the functions under article 6 of Dublin III, which refers to the best interest of the child:

> "The Commissioner shall perform the functions of a Member State under Article 6 of the EU Regulation and, in doing so, shall consult as necessary with the Agency in relation to his or her functions under—

(a) subparagraphs (b) and (d) of paragraph 3 of that Article, and

(b) such other provisions of that Article as the Commissioner considers necessary."

46. On the other hand, the functions of a "transferring Member State" under Dublin III, which include the performance of the necessary procedural and administrative steps for the actual transfer of such application, are vested in the Minister.

47. Up to 2015, the Minister was of the view that the exercise of discretion under article 17(1) of Dublin III was vested in ORAC under r. 3(1) of the 2014 Regulations. This is confirmed at para. 6 of the affidavit of Brian Merriman, Principal Officer in the International Protection Policy Unit in the Department of Justice and Equality, sworn on 28 April 2017.

48. The Minister now says this interpretation was not correct, and Mr Merriman avers "[i]t has now become clear that the discretion provided for in Article 17(1) is not so conferred", and further, that neither ORAC nor RAT have ever purported in practice to exercise the discretionary power.

49. O'Regan J. considered that the 2014 Regulations reserved unto the Minister (or the Oireachtas, but that was clearly an error and the parties do not stand over the proposition) the power to exercise the discretion vested in a Member State by article 17(1) of Dublin III. Some five months later, in *M. A. (a Minor) v. International Protection Appeals Tribunal* [2017] IEHC 677, Humphreys J. tentatively expressed a different view but made a reference to the CJEU having regard to the difficulty he perceived in the interpretation and operation of Dublin III.

50. Humphreys J. noted at para. 7, that the 2014 Regulations "certainly could have been drafted so as to at least recognise where the art. 17 function lies." The 2014 Regulations provisions were described by him as very unclear and "crying out for express amendment". Humphreys J. proposed an answer to the jurisdictional question as follows:

> "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 this question or the second question would suffice for the applicants to succeed on the art. 17 issue."

51. In the light of this difficulty of interpretation and questions arising from the anticipated departure of the United Kingdom from the European Union, Humphreys J. made a reference to the CJEU under article 267 of the Treaty on the Functioning of the European Union which delivered its judgement on 23 January 2019, *M. A. v. International Protection Appeals Tribunal (Case C-661/17)*, EU:C:2019:53.

52. In *H. N. v. The International Protection Appeals Tribunal* [2018] IECA 102, delivered some months after the judgments of O'Regan and Humphreys JJ., Hogan J. was hearing an appeal from the refusal of O'Regan J. to grant leave to apply for judicial review regarding the same jurisdictional point, *viz*. whether IPAT (the successor in title to RAT) was entitled to exercise the discretion conferred by article 17(1) of Dublin III. He considered that it was "at least arguable" that the tribunal member was under an obligation to consider exercising the article 17(1) of Dublin III discretion in the light of the decision of the CJEU in *C. K. v. Republika Slovenija* (Case C-578/16 PPU), EU:C:2017:127 that the authorities of a Member State determining question of transfer cannot ignore evidence regarding, for example, the seriousness of an applicant's state of health and the significant and irreversible consequences to which a transfer might lead.

53. The judgement of Hogan J. was given in the context of an application for leave to seek judicial review and must be seen in the light of the criteria relevant to the grant of leave. It does, however, indicate tentatively the view of Hogan J. and is supportive of that expressed by Humphreys J.

54. In *M. A. v. International Protection Appeals Tribunal* (Case C-661/17), the CJEU determined that Dublin III did not require that the same national authority as is responsible in national law for the application of the criteria for transfer in article 6 to 16 of Dublin III be vested with the discretionary power under article 17 of Dublin III. National law could vest these different functions in different national authorities.

Issue A: – Where is the discretion under article 17 of Dublin III vested?

55. In *C. K. v. Republika Slovenija*, the CJEU held that the discretionary power under article 17 of Dublin III is an "integral part of the mechanism" for determining responsibility of Member States. The appellants submit that in Ireland, the function of making this determination is vested by the 2014 Regulations in ORAC. This judgment was referred to as supportive of the respective views of both Humphreys and Hogan JJ. in the decisions mentioned above. It was referred to by O'Regan J. in her recital of counsel's arguments, but did not form part of her reasoning, save with regard to "procedural difficulties" (para. 30(e) of her first judgment) and by way of contrast with other decisions (para. 25(2)(iv) of her first judgment).

56. The judgment of the CJEU in *C. K. v. Republika Slovenija* does seem to me to warrant consideration.

The decision of the CJEU in *C. K. v. Republika Slovenija*

57. The decision in *C. K. v. Republika Slovenija* followed a request for a preliminary ruling from the Supreme Court of Slovenia regarding the interpretation of article 3(2) and 17(1) of Dublin III.

58. The first question answered by the CJEU concerned the interpretation of the rules relating to the discretionary clause under article 17(1) of Dublin III. The Court considered, at para. 53, that the operation of the discretionary clause is not one governed solely by national law and the interpretation given to it by the constitutional court of any Member State, but is rather:

> "an integral part of the system for determining the Member State responsible developed by the EU legislature".

59. The CJEU then went on to hold, at para. 58, that a Member State with whom an asylum application has been lodged is:

> "required to follow the procedures laid down in Chapter VI of that regulation for the purposes of determining the Member State responsible for examining that application, to call upon that Member State to take charge of the applicant concerned and, once that request has been accepted, to transfer that person to the Member State."

60. The Court considered that in a suitable case, where questions regarding, for example, the state of health of an asylum seeker arise for consideration, the Member State carrying out a transfer may protect the interests of the asylum seeker in a number of ways, for example, by organising suitable transportation, resources or medication, and may, if it is not satisfied that suitable precautions can be, or are likely to be, put in place, suspend the execution of a transfer decision as it considered fit.

61. Because the CJEU determined that the exercise of discretion is an integral part of the system and is a function exercised by the determining Member State, the first question for consideration is the meaning of the "functions of the determining Member Sate".

Functions of a determining Member State
62. The appellants argue that the power to derogate from the consequence of the application of the criteria of Dublin III and, in an individual case, to exercise discretion to assume responsibility for the assessment of the refugee application, is an integral part of the assessment of the Member Sate responsible and, thus, must be seen as vested in ORAC.

63. The respondents argue that the "functions of a determining Member State" do not expressly include a decision made in the exercise of the discretion granted to Member States under article 17(1) of Dublin III, and that ORAC could not have any inherent or implied power to exercise any function under that provision. They say that the discretion arising from article 17 of Dublin III is separate and distinct from the application by which ORAC determines the proper forum for the determination of refugee status applications in the light of the criteria laid down in Dublin III. They argue that, as article 17 of Dublin III does not enumerate the discretionary factors to be considered in the exercise of the power under article 17 of Dublin III and provides no governing principles for the operation and application of that exercise, the discretion must be seen to be a purely executive function of the State to be exercised by the Minister.

64. The meaning of the 2014 Regulations depends, in the first instance, on the meaning of "determining Member State" in Dublin III. This is clear from r. 2(2) of the 2014 Regulations.

65. In *C. K. v. Republika Slovenija*, at para. 54, the CJEU held that:

> "Article 17(1) of the Dublin III Regulation must be interpreted as meaning that the question of the application, by a Member State, of the 'discretionary clause' laid down in that provision is not governed solely by national law and by the interpretation given to it by the constitutional court of that Member State, but is a question concerning the interpretation of EU law, within the meaning of Article 267 TFEU."

66. The CJEU reiterated, and somewhat amplified, its interpretation in its answer to the reference made by Humphreys J. in *M. A. v. International Protection Appeals Tribunal* (Case C-661/17), at para. 64:

> "[I]t is it is apparent from the case-law of the Court that the discretion conferred on Member States by Article 17(1) of the Dublin III Regulation is an integral part of the mechanisms laid down by that regulation for determining the Member State responsible for an asylum application. Thus, a decision adopted by a Member State on the basis of that provision, to examine, or to not examine, an application for international protection for which it is not responsible in the light of the criteria set out in Chapter III of that regulation implements EU law (see, to that effect, judgment of 16 February 2017, C. K and Others, C-578/16 PPU, EU:C:2017:127, paragraph 53 and the case-law cited)".

67. The CJEU went on to note, at para. 65, that Dublin III does not specify which authority was to be vested with the power of determining the Member State responsible under the criteria defined in Dublin III or that of exercising the discretion in article 17(1) of Dublin III:

> "[I]t should be noted that the Dublin III Regulation nevertheless does not contain any provision specifying which authority has power to take a decision under the criteria defined by that regulation that relate to determining the Member State responsible or in respect of the discretionary clause set out in Article 17(1) of that regulation. Nor does that regulation specify whether a Member State must entrust the task of applying such criteria and applying that discretionary clause to the same authority."

68. The material question for the CJEU was the concept of "determining Member State" in Dublin III. It was not concerned with the logically prior question as to whether ORAC or RAT were vested with the discretionary power in the 2014 Regulations. Its answer does not therefore afford much assistance in regard to the central question in issue in this appeal, whether under Irish law the implementing regulations designated ORAC as the body vested with the power to exercise article 17 of Dublin III discretion. It answers a different and antecedent question, whether it is permissible, as matter of European Union law, to vest the functions in different national authorities.

69. In consequence of the answer from the CJEU that a Member State may allocate responsibility for the exercise of the functions under article 17 of Dublin III to a different body from that which determines the application for transfer in Chapter IV, the question to be determined as a matter of interpretation of national law is how the Minister has chosen to allocate responsibility for the exercise of the functions of Ireland as "determining Member State" in the 2014 Regulations.

Plain language of the 2014 Regulations
70. The 2014 Regulations, in its plain language, provide that the functions of a "determining Member State" under Dublin III are vested in ORAC.

71. A plain reading of r. 3 of the 2014 Regulations could lead to a conclusion that the functions of the determining Member State taken as a whole are to be performed by ORAC, and that no implication is to be derived therefrom that the Minister, in making the Regulations, reserved onto herself the function under article 17 of Dublin III which, as a matter of European Union law, is an integral part of the functions of a determining Member State.

72. But the respondents argue that discretionary power of the type envisaged in article 17 Dublin III is quintessentially an executive function and that it must be seen as part of the sovereign power of the State. That argument is allied to the concept found in Dublin II of the "sovereign power" of the Member State.

Sovereign clause
73. In *Abdullahi v. Bundesasylamt* (Case C 394/12), ECLI:EU:C:2013:813, the CJEU explained that the sovereignty clause included in article 2 of Dublin II was "designed to maintain the prerogatives of the Member States in the exercise of the right to grant asylum" and that these optional provisions granted a wide discretionary power to Member States.

74. O'Regan J. considered that the discretion was to be termed a "sovereign discretion" and was vested in the executive. She based her decision on two main arguments: A constitutional argument in relation to the proper form for the implementation of legislation of the European Union, from the judgment of the Supreme Court in *Meagher v. Minister for Agriculture* [1994] 1 IR 329, and further interpretative arguments. Having noted that "no policy as to the exercise of the discretion was incorporated in Dublin III" she held, at para 24, that:

> "[t]he interpretation advocated by the applicants, that Reg. 3(1)(a) of S.I. 525/2014 vests Article 17 discretion in ORAC, in my view cannot withstand the test mentioned by Denham J. in *Meagher* aforesaid".

75. The judgment in *Meagher v. Minister for Agriculture* concerned the judicial review of Regulations which were made in order to implement a Directive of the then EEC. In her concurring judgment, at pp. 365-366, Denham J. outlined the test which was relied upon by O'Regan J. in her judgment:

> "If the directive left to the national authority matters of principle or policy to be determined then the "choice" of the Minister would require legislation by the Oireachtas. But where there is no case made that principles or policies have to be determined by the national authority, where the situation is that the principles and policies were determined in the directive, then legislation by a delegated form, by regulation, is a valid choice. The fact that an Act of the Oireachtas has been affected by the policy in a directive, is a "result to be achieved" wherein there is now no choice between the policy and the national act. The policy of the directive must succeed. Thus where there is in fact no choice on a policy or a principle it is a matter appropriate for delegated legislation. If the directive or the Minister envisaged any choice of principle or policy, then it would require legislation by the Oireachtas."

76. Denham J. adopted the test outlined by O'Higgins C.J. in *Cityview Press v. An Chomhairle Oiliúna* [1980] IR 381, at p. 399:

> "In the view of this Court, the test is whether that which is challenged as an unauthorised delegation of parliamentary power is more than a mere giving effect to principles and policies which are contained in the statute itself. If it be, then it is not authorised; for such would constitute a purported exercise of legislative power by an authority which is not permitted to do so under the Constitution. On the other hand, if it be within the permitted limits - if the law is laid down in the statute and details only are filled in or completed by the designated Minister or subordinate body - there is no unauthorised delegation of legislative power."

77. The principles in *Meagher v. Minister for Agriculture* were further clarified in *Maher v. Minister for Agriculture* [2001] 2 IR 139, where the Supreme Court held that whether European Union law should be transposed by way of statutory instrument or act of the Oireachtas is entirely a matter of domestic law and that a particular form is therefore never "necessitated" under Article 29.4.10° of the Constitution. The Supreme Court held that where a Directive or Regulation sought to be transposed contains "sufficient principles and policies", transposition by way of primary legislation would be superfluous. Part of the test is to see also what discretion the European Union has conferred on Member States.

78. In *Maher v. Minister for Agriculture*, the Supreme Court held that the European Communities (Milk Quota) Regulations 2000 were constitutionally permissible as "the choices as to policy available to the member states have in truth, been reduced almost to vanishing point."

79. Dublin III left to the Member States the choice as to by whom the decision to transfer is to be made. The 2014 Regulations do no more than to designate the authority in which is vested the power to make the determination as to the proper jurisdiction to hear the application for refugee status. In the light of the decision of the CJEU in *C. K. v. Republika Slovenija* and M*. A. v. International Protection Appeals Tribunal* (Case C-661/17), it seems to me that Dublin III leaves little choice of how the principles and policies are to be implemented. The policies of Dublin III as a whole are to be discerned from its text, the intention whereof is to create a harmonious system by which Member States are to determine the jurisdiction responsible for the assessment of an asylum application. The policies to be exercised by a Member State in the exercise of the discretion under article 17 of Dublin III are apparent, and the text of article 17(1) of Dublin III itself envisages the discretion as having a role when consideration of humanitarian or compassionate nature, *inter alia*, in the interests of family unity, are to be engaged. The discretion is to be exercised within that principle and in the light of the principles and policies in Dublin III taken as a whole. It is a jurisdiction existing by way of derogation from the first principle of the Regulation and the Member States are not, as a result, to be at large in the factors, principles, and policies to be engaged in the discretionary exercise.

80. The decision of *MacEochaidh J. in B. A. v. Minister for Justice and Equality* [2014] IEHC 618, [2014] 2 IR 377 in respect of the EU (Subsidiary Protection) Regulations 2013 offers a useful analysis. Having considered the decisions of the Supreme Court in *Meagher v. Minister for Agriculture* and *Maher v. Minister for Agriculture*, MacEochaidh J. concluded, at para. 39, that the regulations with which he was concerned were an "implementing mechanism" and what he described as a "classic 'filling in the gaps' exercise in accordance with directions, principles and policies given by a parent directive".

81. He went on to hold, at para. 44, that the transfer of the relevant function from the Minister to ORAC was "capable of being regarded as a measure which was incidental, supplementary or consequential upon an obligation arising from the Qualification Directive and thereby properly included in a Statutory Instrument designed to ensure that Ireland's obligations under EU law were fully met."

82. Accordingly, in the light of these factors, I am not persuaded that the trial judge was correct in coming to the conclusion that the vesting of article 17 of Dublin III discretion in ORAC "cannot withstand the test mentioned by Denham J. in *Meagher*". The decision in *Meagher v. Minister for Agriculture* and the analysis contained in the later decisions in *Maher v. Minister for Agriculture* and B*. A. v. Minister for Justice and Equality*, do not support the argument that it was not possible for the Minister, as a matter of law, by statutory instrument, to vest the discretionary power in article 17 of Dublin III in whomsoever he chose. The power is one to assume jurisdiction, and is procedural in nature.

83. However, the trial judge considered also that "independently of the constitutional element" certain other matters suggested that the discretion was not vested in ORAC and these are expressed at para. 25 of her judgement. I turn now to examine the other arguments.

Sequencing

84. The decision to derogate under article 17(1) of Dublin III and to thereby assume jurisdiction to assess an application for refugee status notwithstanding that Dublin III might identify a different forum, may be made at any stage in the process. This is clear from the second para. of article 17 of Dublin III, by which a Member State which decides to assume responsibility for an application for international protection in the exercise of the discretionary power must notify "where applicable" 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 to take back, the applicant."

85. This subparagraph has the purpose of ensuring efficiency and limits or eliminates duplication in the process. It has the effect that the discretion may be exercised after the decision to transfer has been made or whilst the jurisdictional question is awaiting determination. The respondents argue that this paragraph suggests that, as the Member State to be responsible may, in some cases, be known definitively, as a matter of law, only when the process for the determination of that Member State has been completed, the discretionary power falls to be exercised only after ORAC has completed the process of the application of the criteria and after a transfer decision is made. But I would observe that, equally, the obligation to notify exists in respect of an application pending before another Member State, and where the jurisdiction has not yet been established. It therefore seems to me that article 17 of Dublin III is intended to vest a discretion in the Member States to be exercised at any stage in the process, be that an early, late, or intermediate stage. The express terms of the second para. of article 17 of Dublin III do not support the proposition that the exercise of discretion must await a determination by ORAC and that, as a matter of sequencing, discretion comes to be exercised only after ORAC had completed its function.

86. The argument of the respondents does not assist in the answer to the question as to where the discretion under article 17 of Dublin III is vested.

Chapter IV of Dublin III
87. The respondents argue that, as article 17 is contained in Chapter IV of Dublin III, it was not intended to be part of the functions of the body/bodies charged with determining the jurisdictional question, and that it belongs, therefore, to the executive arm of the State.

88. The purpose of Dublin III is to ensure that, as a matter of European Union law, there be a clear set of criteria to designate which Member State must consider an application for international protection by a third country national, to prevent asylum forum shopping and to ensure a speedy decision. It is argued in that context, that the discretionary power arising from article 17 of Dublin III by which a Member State may determine an application must be seen as distinct from the application of the criteria for determining which Member State must assume jurisdiction, because article 17 of Dublin III does not constrain the exercise of the discretion by any rules and does not detail the factors which might bear on the individual discretion vested in a Member State under article 17 of Dublin III.

89. The difficulty with that argument is that the CJEU has clarified that in the exercise of such discretion, the decision maker must still respect the broader framework of asylum law and the basic principles of the Dublin System.

90. The respondents argue that in the sequence, there may be circumstances where the exercise of discretion under article 17 of Dublin III might come to be exercised after ORAC has fully determined the matter and has become *functus officio*. I am not convinced that, in practice, the deciding body can truly be said to be *functus officio* in any case where it has made a decision to transfer further to the application of the criteria under Chapter III of Dublin III, without having considered whether article 17 fell to be exercised, as it would be the making of a decision in the exercise of that discretionary power that could mean it was thereafter *functus officio*. I will leave further consideration of this point to a case where it is fully argued.

91. But, if there is an argument that ORAC or RAT or its successors in title are *functus officio* in an individual case, the discretion may come to be exercised by the Minister. The fact that this can happen, means that a correct interpretation of the 2014 Regulations may not in all cases exclude the exercise by the Minister of the discretionary power, but the corollary is not the case and it seems to me to be a reasonable interpretation of the 2014 Regulations that discretion under article 17 Dublin III may be exercised by the deciding body at each and every stage of the process, and, by implication, by the bodies designated at those stages, and that article 17 Dublin III was intended to vest in a Member State the power to derogate in its determination of an individual application, and to come to a decision that it would itself assume the obligation of assessing the application for asylum.

Control of borders
92. The respondents also argue that because the responsibility for the control of foreign nationals is a quintessentially executive power, as explained by the judgment of Denham J. *in Bode (a Minor) v. Minister for Justice* [2007] IESC 62, [2008] 3 IR 663, the discretionary power to decide to assume jurisdiction must be vested in the executive. As Denham J. said at para. 22:

> "[T]he power to control the entry, the residency, and the exit, of foreign nationals […] is an aspect of the executive power to protect the integrity of the State".

93. In my view, a decision, procedural in nature, to assume jurisdiction is not one by which the decision maker protects the integrity or controls the entry, residency, and exit of foreign nationals. The procedural decision to assume jurisdiction is not a decision by which the individual entry to, or right to remain in, the State is determined.

94. Support for this is found in the dicta of MacEochaidh J. in *B. A. v. Minister for Justice and Equality*, at para. 45:

> "Identification of a decision maker is neither a matter of principle nor of policy. It is a mechanical administrative act involving only a choice as to who the person will be. It does not involve a choice as to what they will do or how they will do it."

95. The individual decision maker who is called upon to exercise discretion in the light of humanitarian and compassionate considerations is not exercising an executive power of the State, but is making the individual decision in the light of humanitarian and compassionate principles. The application of those principles is not the application of policies or principles as to whether a person ought to be permitted to remain in the State, but rather a decision at the procedural level further to assume jurisdiction.

96. The decision maker who, in the exercise of discretion under article 17 of Dublin III, determines that the application for asylum is to be assessed in Ireland is doing no more than assuming jurisdiction, and is not engaged in the exercise of controlling the entry residency and exit of foreign nationals, to borrow the language of Denham J. in *Bode (a Minor) v. Minister for Justice*, and the language of Gannon J. in *Osheku v. Ireland* [1986] IR 733, at p.746, where he referred to the power of the State to:

> "have control of the entry of aliens, their departure, and their activities and duration of stay within the State".

97. The right to control the borders of the State and the persons who may reside within it is a matter particularly within the control of the executive arm of the State, and the exercise of choice of jurisdiction under Dublin III, whether that be achieved by the application of the criteria in Chapter III or by the exercise of the discretionary powers in article 17, is a procedural choice and, in

itself, does not determine the rights of a person to have residency in the State and is not a matter concerning the integrity of its borders.

98. Thus, the argument from *Bode (a Minor) v. Minister for Justice* does not offer assistance in the interpretation of the 2014 Regulations.

The nature of discretionary power
99. It seems to me that regard must also be had to the purpose of the discretionary power. Having regard to the fact that the second para. of article 17(1) of Dublin III suggests that discretion may be involved at any stage of the process of determining the jurisdictional question, a decision maker called upon to exercise discretion on compassionate and humanitarian grounds may do so. In the light of the judgments of the CJEU in *Abdullahi v. Bundesasylamt* and in *M. A. v. International Protection Appeals Tribunal (Case C-661/17),* a decision maker is entitled to, but not obliged to, exercise its discretion insofar as it falls for consideration. The discretion must be seen as an overreaching or overarching right in the decision maker as the occasion requires to refuse to make a decision to transfer wholly on the basis of the criteria set out in Chapter III, or to refuse to implement that decision once it has been made.

100. Article 17 of Dublin III is not concerned with domestic procedural rules, but is a European Union law principle which entitles a decision maker to engage with humanitarian and compassionate considerations in the context of family unity insofar as they may arise on a case-by-case basis. The discretionary power of its nature in the light of the language of article 17 of Dublin III is a power to be exercised in an individual case and as circumstances arise. Relevant circumstances can arise after an answer has been found by the decision maker following the application of the criteria in Dublin III, or in the course of that decision making process.

101. That has the effect that the compassionate and humanitarian grounds which might trigger the exercise of discretionary power will, as circumstances require, come to be engaged by whomsoever is involved in making the relevant decision. Support for this proposition is found in the determination of the CJEU that article 17 is an "integral part" of Dublin III, a position that was reaffirmed in the recent ruling of the preliminary reference in *M. A. v. International Protection Appeals Tribunal* (Case C-661/17). If the discretion is to be integral to the decision making process, it must be capable of being exercised at any or every stage of the process.

102. Further, the purpose of permitting a decision maker to exercise discretion is to prevent hardship in an individual case. If discretion could be exercised only after the deciding body has concluded its deliberations in the application of the criteria under Dublin III, the purpose of the discretion might not always be achieved. The discretionary element which is permissible as a matter of European Union law under article 17 of Dublin III would not properly be treated as an intrinsic element in the process if it could not be exercised at any stage.

103. There is no procedural requirement in European Union law as to how article 17 of Dublin III is to work in an individual Member State. Representations may be made at any point in the sequence. European Union law leaves to national rules the decision as to by what means, and by whom, the criteria in Dublin III are to be applied, and by whom and at what point in the process article 17 of Dublin III discretion may be triggered. The decision does not have to made by the same body as a matter of European Union law, but equally, it may be made by the same body.

104. The sequencing in the 2014 Regulations by which ORAC is empowered to make a transfer decision does not mean that the exercise of discretion under article 17 of Dublin III must await the decision to transfer. I accept the argument of counsel for the respondents that not all decisions and exercise of the discretion under article 17 of Dublin III are made on the "steps of the airplane". The decision may be made earlier, and the discretion may be invoked earlier. The factors are humanitarian and compassionate, factors which may fall to be considered insofar as they are relevant, and, by their nature, factors which may but do not always arise unexpectedly. Discretion is not to be seen as so fettered as to be unable to meet the needs of an individual case.

105. It is in the nature of humanitarian and compassionate considerations that they are specific to the facts and circumstances of the individual person, and may change with the passage of time or as a result of a change in circumstances or factors such as health or other personal circumstances giving rise to humanitarian or compassionate concerns.

106. I reject for the reasons explained the argument of the respondents that article 17(1) of Dublin III creates an executive power of the State which is exercisable only by the Minister and may not be delegated other than by legislation which contains sufficient principles and policies, *inter alia*, in the light of the judgments of the Supreme Court in *Maher v. Minister for Agriculture* or *Laurentiu v. Minister for Justice* [1999] 4 IR 26. Those judgments, in my view, do not offer support for the proposition that the exercise of article 17 of Dublin III discretion is the exercise of an exclusively executive power, but rather the application of humanitarian and compassionate principles to the determination of jurisdiction under Dublin III.

Conclusion
107. For the reasons stated I am not persuaded that the arguments made by the respondents that justify a departure from the plain meaning of the Irish Regulations of 2014, and that the jurisdiction to exercise the discretion to assume jurisdiction for which provision is made in article 17(1) is in a suitable case one that may be exercised by the determining body, now IPO and IPAT. I would therefore propose to allow that ground of appeal.

The question of appeal/effective remedy
108. Although it was not argued with any great force in the appeal, a question did arise for consideration and was briefly touched on by O'Regan J. as to whether European Union law required any specific form of remedy to challenge a decision made in the exercise of discretion under article 17 of Dublin III. A reading of the express language of the 2014 Regulations suggest no appeal lies from that exercise in Irish law. The exercise of discretionary power is quintessentially one which is personal to the decision maker, and accordingly it seems to me that a decision made in that exercise may be open to judicial review by the High Court, and that O. 84 of the Rules of the Superior Courts ("RSC") provide the remedy.

109. That consequence may seem to produce an undesirable practical consequence if early and frequent challenges to a decision were to encumber the judicial review lists in the superior courts. Notwithstanding the relatively high threshold that must be satisfied by an applicant for leave to bring judicial review in asylum cases, there may be a risk that a disappointed applicant might seek to review a decision to refuse jurisdiction in the exercise of the discretionary power when an appeal to IPAT is pending.

110. In its decision on the preliminary ruling in *M. A. v. International Protection Appeals Tribunal (Case C-661/17)*, the CJEU, at para. 77,offers some clarity on this point. Having noted that the principle of effective judicial protection is a general principle of European Union law to which expression is now given by article 47 of the Charter, and that a person whose rights and freedoms guaranteed by European Union law are violated has a right to an effective remedy as a result, the CJEU, at paras. 78 *et seq*. of its judgment in *M. A. v. International Protection Appeals Tribunal (Case C-661/17)*, identifies the remedy:

> "78. The Member States refusal to use that discretionary clause set out in [article 17(1)] should as the case arise be challenged at the time of an appeal against a transfer decision.
>
> 79. Consequently, Art. 27(1) of the Dublin III Regulation must be interpreted as meaning that it does not require a remedy to be made available against the decision not to use the option set out in Art. 17(1) that regulation, without prejudice to the fact that that decision may be challenged at the time of an appeal against a transfer decision."

111. The remedy, therefore, is a matter for domestic law and the appropriate governing procedure in the Irish context is that provided by O. 84 RSC, but the interpretation by the CJEU of Dublin III seems to avoid this risk of administrative unworkability, and envisages that a challenge to a decision under article 17 Dublin II, or to a refusal to engage the power thereby vested in a Member State, is not to be made before an appeal against a transfer decision has been determined.

112. As Humphreys J. said *in M. A. (a Minor) v. International Protection Appeals Tribunal* the Regulations of 2014 lack clarity and the absence of clarity regarding the procedural manner by which a challenge to the exercise of the discretionary power may be brought is a matter of further concern.

Issue B: Is the Minister required to publish any policy, guidance or criteria in respect of the exercise of the article 17 discretion?

113. The discretion to be exercised is one that is fact sensitive and it would not be proper or possible for me to outline those that may fall for consideration in an individual case. In passing, however, I note that RAT set out a list matters which may fall for consideration in any request for discretionary relief, but which it considered did not fall within its remit:

> "The Tribunal will not comment on the merit or otherwise of the appellant's claim for the exercise of discretion, save that I list the factors which I have been asked to highlight:
>
> • The appellants' complex family relationship;
>
> • That she is currently receiving counselling, medication and family therapy for depression and post-traumatic stress disorder;
>
> • She has improved significantly since she first arrived in the state, as she is now away from her husband;
>
> • Her eldest son has also been a victim of violence in the home at the hands of his father;
>
> • Her children are attending school here;
>
> • She is receiving family law advice from the legal aid board (which she would not be able to obtain in the UK)" (para. 5.7).

114. These may be some of the relevant factors that engage the discretion but in its nature, and subject to the overriding restriction to compassionate and humanitarian considerations from Dublin III itself, the discretion is not one constrained by policies or criteria.

115. For that reason, there can be no requirement at law that the criteria for the exercise of discretion be published by the respondents.

The second judgment

116. The main question for consideration in the second judgment of O'Regan J. focused on the approach of RAT to the interest of the children. It was also argued by the appellants that in making any decision to transfer, consideration had to be given to the rights of the applicants under the ECHR and the Charter. She found on the facts that grounds regarding ECHR/Charter rights could not be raised in the judicial review proceedings as they had not been raised before RAT.

117. The appellants submit that regardless of where article 17 of Dublin III discretion lies, the RAT was nevertheless obliged to assess the alleged violation of the appellants' ECHR rights to family and private life, and the equivalent rights under the Charter in the making of the transfer decision. They also submit that RAT had given no regard to the best interests of the children as prescribed by article 6 of Dublin III, and engaged in no analysis of the effect on the children of their removal from the State. Further, they argue that RAT erred in failing to consider, on a *de novo* basis, the medical documentation submitted in support of the claim of the first appellant, in failing to address her fears on behalf of herself and her children of being further subjected to domestic violence in the United Kingdom.

118. I will now examine these issues in turn

Issue C: Are private and/or family rights to be considered in the transfer process?

119. The appellants rely in particular on the judgment of the CJEU in *C. K. v. Republika Slovenija* as support for the proposition that in the transfer process under article 12 of Dublin III, there is an obligation to consider rights of an applicant under ECHR or the Charter, where the CJEU held, at para. 63, that:

> "As regards the fundamental rights that are conferred on them, in addition to the codification, in Article 3(2) of the Dublin III Regulation, of the case-law arising from the judgment of 21 December 2011, N. S. and Others (C 411/10 and C 493/10, EU:C:2011:865), referred to in paragraph 60 of the present judgment, the EU legislature stressed, in recitals 32 and 39 of that regulation, that the Member States are bound, in the application of that regulation, by the case-law of the European Court of Human Rights and by Article 4 of the Charter."

120. They also rely on the judgment of Hogan J. in *H. N. v. The International Protection Appeals Tribunal*. As noted above, that was an appeal from a refusal at first instance to grant leave to bring judicial review. Hogan J. considered that it was "at least arguable" that the decision maker was required to examine whether a transfer to another Member State could impact on the health and mental state of an applicant in the light of the decision of CJEU in *C. K. v. Republika Slovenija*. At para. 17, Hogan J. quoted from para. 75 of *C. K. v. Republika Slovenija*:

> "[W]here an asylum seeker provides, particularly in the context of an effective remedy guaranteed to him by Article 27 of the Dublin III Regulation, objective evidence, such as medical certificates concerning his person, capable of showing the particular seriousness of his state of health and the significant and irreversible consequences to which his transfer might lead, the authorities of the Member State concerned, including its courts, cannot ignore that evidence. They are, on the

> contrary, under an obligation to assess the risk that such consequences could occur when they decide to transfer the person concerned or, in the case of a court, the legality of a decision to transfer, since the execution of that decision may lead to inhuman or degrading treatment of that person [...]".

121. The respondents argue that the trial judge was correct in that no argument was advanced from ECHR or the Charter before RAT in the appeal from ORAC's decision, whether in the notice of appeal or at the oral hearing before RAT. They submit, in particular, that the issues in relation to article 8 ECHR rights were only raised before RAT in the context of an argument for the exercise of article 17(1) of Dublin III discretion.

122. Before dealing with this point, I note that in the making of a transfer decision two matters fall for consideration. First, the consideration of the best interest of any child whose interest is expressly stated to be a primary factor to which consideration must be had in the light of article 6(1) of Dublin III:

> "The best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation."

123. That is an entirely separate and distinct matter from the considerations of humanitarian or compassionate factors that may engage the discretion of a Member State under article 17 of Dublin III, albeit the same or similar factual matters may, in an individual case, fall to be engaged.

Ground not raised before decision maker

124. O'Regan J. held that that the arguments before her regarding the rights of the applicants under art 8 ECHR and art 7 of the Charter which had not been raised before the RAT could not form the basis of the judicial review and that this principle is well established and flows from basic requirement of fairness of process. She quoted from the judgment of Clarke J. in *Imoh v. Refugee Appeals Tribunal* [2005] IEHC 220, at p. 6, in which he was dealing with the contention of the applicant that RAT had not addressed a feared forced marriage:

> "I find it hard to see how any appropriate criticism can be made of the RAT under this heading. Where, as here, the applicant chooses not to raise the issue in the notice of appeal or to refer to the matter at the appeal hearing I do not believe that there is any basis for suggesting that there was any inappropriate failure on the part of the RAT to deal with the matter in the course of its determination."

125. In my view the High Court judge was correct, and the point is not one that may, in consequence, form the basis of the appeal from her second judgment.

ECHR/Charter rights

126. However, O'Regan J. expressed a view which was *obiter* that ECHR/Charter rights do not fall from consideration under Dublin III or, as she put it, that Dublin III "can be bypassed by virtue of Article 8 rights". Whilst her comments were *obiter* I consider that it is proper that I comment on the views she expressed as the point is one of some general importance.

127. The relevant part of her judgment reads:

> "25. [I]t does not appear to me that it would be appropriate to read into the applicant's appeal document of 24th May 2016 an argument based on Article 8 in the circumstances of the content of the appeal document and the failure on the part of the applicants to make any reference to Article 8 therein or indeed at the oral hearing.
>
> 26. However even assuming that I am incorrect in that regard and an Article 8 submission should be read into the applicant's appeal before the Tribunal (it is common case that the impugned decision does not deal with an Article 8 issue) nevertheless I am satisfied that I am entitled to exercise discretion in refusing any declaratory relief sought given that there is as yet no EU decision to suggest that Dublin III can be bypassed by virtue of Article 8 rights and the only jurisprudence upon which the applicant might rely is the aforesaid judgments from the UK Court of Appeal, which I do find persuasive, however a threshold of "an especially compelling case" was held to be necessary and the applicants are nowhere close to that threshold. The within Applicants' claim based upon the fact that the children attend school in Ireland or indeed on the basis of any other of the complaints made by the applicants (which in my view relate to the behaviour of the first named applicant's husband and his family) does not amount to "an especially compelling case"."

128. The trial judge was in error in taking the view that the decision maker had no obligation to consider the impact of article 8 of ECHR and article 7 of the Charter and there is ample authority that the principles in these international instruments must inform a decision maker, most especially in a context where rights as fundamental as where a person would live, and how he or she is to be protected from perceived threats to life or health are engaged.

129. Article 51(1) of the Charter addresses the scope of the Charter:

> "The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers."

130. Under domestic law a deciding body is obliged by s. 3 of the European Convention on Human Rights Act 2003 to "perform its functions in a matter compatible with the State's obligation under the Convention provisions".

131. The CJEU in *C. K. v. Republika Slovenija*, at para. 59, regarded it as settled that the provisions of Dublin III:

> "must be interpreted and applied in a manner consistent with the fundamental rights guaranteed by the Charter".

132. And at para. 63, specifically with regard to Dublin II, that:

> "The Member States are bound, in the application of that Regulation, by the case law of the European Court of Human Rights and by Art. 4 of the Charter".

133. Further, the application of Dublin III is the implementation of European Union law and therefore the rights in the Charter are to be observed in the operation and interpretation of Dublin III and of the 2014 Regulations.

134. In its decision in *Abdullahi v. Bundesasylamt*, the Grand Chamber of the CJEU, on a request for a preliminary ruling from Austria in the context of Dublin II noted, at para. 52:

> "[I]t should be borne in mind, first, that the Common European Asylum System was conceived in a context making it possible to assume that all the participating States, whether Member States or third States, observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, and on the ECHR, and that the Member States can have confidence in each other in that regard […]".

135. In *Luximon v. Minister for Justice and Equality* [2015] IEHC 227, Barr J. rejected the argument that the Minister was not obliged to *inter alia* take ECHR rights into consideration when deciding whether to vary or renew a permission to remain in the State under s. 4(7) of the Immigration Act 2004. I consider that what Barr J. held at para. 171 and 172 of his judgment correctly state the law:

> "171. Finally, the jurisprudence of the ECHR reviewed above shows that, firstly, the Article 8 rights of an applicant are capable of being engaged in circumstances where the refusal of a residence permit would require an applicant to leave the state and would thereby affect the applicant's private and family life; and secondly, when the Convention rights of an applicant are engaged, the Minister is obliged to strike a fair balance between the competing interests of the individual applicant and of the community as a whole. In order to fulfil this obligation, it seems to me that the Minister must have regard to ECHR rights in the context of a s. 4(7) application.

136. The Court of Appeal upheld Barr J.'s judgment in *Luximon v. Minister for Justice* [2016] IECA 382, [2016] 2 IR 725, at paras. 47 *et seq., per* Finlay Geoghegan J.:

> "47. […] it is not in dispute that a non national in the State has a right to respect for his private and family life by the State pursuant to the 2003 Act and Article 8(1) ECHR. The Minister correctly accepts that prior to deportation of a non national; there is an obligation to consider such rights.
>
> 48. One of the difficulties in considering obligations pursuant to an Irish statute to consider rights claimed to be protected by Article 8 ECHR is the use of the phrase that 'Article 8 rights are engaged'. It is not always clear what this means and it does appear to be used in more than one sense. The first is where an applicant's right to family or private life within the meaning of Article 8 is relied upon in support of or to contest a proposed decision by a public authority and the nature of the decision is such that it has the potential to interfere with the applicant's right to such respect. A proposal to make a deportation order is accepted as such a decision. However, whilst it is sometimes said in such a situation that Article 8 rights are engaged that does not appear to me either accurate in accordance with the case law and may lead to confusion. In such a situation Article 8 right s are only 'capable of being engaged' or 'potentially engaged' or as is sometimes put the decision is 'within the scope of Article 8'. It follows from that potential engagement by reason of the nature of the decision to be taken that the applicant is entitled to an assessment of whether the proposed decision will have consequences of such gravity for the applicant's private or family law rights such that Article 8 is engaged in the second sense that term is used. That second sense means that the public authority is bound to make the assessment required by Article 8(2) prior to taking the decision".

137. Further, in the light of the conclusion of the CJEU in *Ghezelbash v. Staatssucretaris Van Veiligherd en Justitie*, at para. 51, Dublin III did not confine itself "to introducing organisational rules" only but also confirmed certain procedural rights upon the asylum seekers themselves. It is clear also, from the next paragraphs of that judgment, that improvements were intended by the then existing system to further protect applicants and that it was important in that context that the interpretation of the scheme and scope of the remedy should not be so restrictive as to "thwart the attainment of that objective", and for that purpose, an incorrect application for the criteria were to be subject to judicial scrutiny.

138. In *Ghezelbash v. Staatssucretaris Van Veiligherd en Justitie*, it was considered that the European Union legislature intended by the recast Dublin system to respect the fundamental rights of asylum seekers, and that in the application of Dublin III, Member States are bound by "the case law of the European Court of Human Rights and by Art.4 of the Charter". (para. 63)

139. The question before the Court in that case concerned the argument that the transfer of an asylum seeker with particular medical conditions could result in a real or proven risk of inhuman or degrading treatment but the principles must be the same if what is asserted are personal or private rights or family rights and that rights under the Charter and under the ECHR must be respected in the operation of the process.

140. The CJEU regarded the Member States as being "under an obligation to assess the risk" of likely consequences to the health and wellbeing of an asylum seeker, and by analogy it seems to me that the Member State is obliged to have regard to other fundamental rights including those contained in article 8 of the ECHR. The task, as identified by the CJEU in *Ghezelbash*, at para. 76, is "to eliminate any serious doubts concerning the impact of the transfer" on the relevant fundamental rights.

141. I am supported in this position by the judgment of the Court of Appeal for England and Wales in *Z. T. (Syria) v. Secretary of State for the Home Department* [2016] EWCA Civ 810, [2016] 1 WLR 4894, at para. 85, that:

> "[…] the exercise by the Secretary of State of her discretion is subject to the ordinary public law principles of propriety of purpose, relevancy of considerations, and the longstop Wednesbury unreasonableness category (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223) and, because of the engagement of article 8 of the European Convention , the intensity of review which is appropriate in the assessment of the proportionality of any interference with article 8 rights."

142. I make no observation on the view tentatively expressed by that Court regarding the question of whether the scope of judicial review was narrow having regard to the fact that the exercise of the discretionary power relates to the operation between two Member States of a treaty.

143. I note also that *Z. T. (Syria) v. Secretary of State for the Home Department* did consider that article 8 rights might come to be engaged and that, as was stated by Tribunal (whose decision was overturned), the Dublin III and ECHR regimes "may sometimes tug in different directions". I do not, however, accept the proposition stated by the trial judge at para. 19 of her judgment that "an especially compelling case under Art.8 would have to be demonstrated". Whether that is the relevant test in Ireland is a matter not yet determined and one which does not need to be determined in the present case. I consider, however, that she was incorrect in her view expressed at para. 26 that:

"There is as yet no EU decision to suggest that Dublin III can be bypassed by virtue of Art.8 rights"

144. Fundamental rights, whether they be derived from the Charter or the ECHR, are to be engaged wherever circumstances demand, and the implementation of Dublin III must be done in a manner compliant with the principles in both instruments.

145. Because the statement of the trial judge in her second judgement was clearly *obiter*, and because she made an actual finding that the rights asserted on behalf of the appellants were, in fact, not raised before RAT, this is not a matter on which this Court should express any further opinion, and I will therefore leave to another case in which the matter has been fully argued at first instance a more nuanced and complete determination on the point.

Issue D: - Interests of children

146. This ground of appeal raises primarily a question of fact.

147. The appellants plead that O'Regan J. was incorrect in her determination regarding the approach of RAT to the interest of the children. Article 6(3) of Dublin III requires that Member States shall assess the best interests of any child whose application is in issue and the recitals to article 3 and the factors expressly required to be taken into consideration show one of the aims of Dublin III was to have regard to considerations of family unity.

148. In its determination, RAT came to the view that the best interests of the three minor appellants was best served by their remaining in the custody of their mother and that no conflict of interest existed between the rights of the mother and those of the minors. RAT therefore took a view regarding the best interest of the children in coming to its determination regarding jurisdiction.

149. O'Regan J. found that the "height of the applicants' argument" was that a) the children attended school in Ireland; b) the children are fearful their father will find them if they returned to the UK; c) the UK will deport the children to Pakistan.

150. In my view, O'Regan J. was correct that RAT, in fact, did deal with the applications of the appellants and reached its transfer decision applying the criteria under article 12 of Dublin III, *i.e*. enquiring as to whether another Member State had previously granted the asylum seeker a valid residence document or a valid visa permitting lawful entry to the European Union.

Termination of UK membership to the EU

151. A final issue that I consider worthy of mention, although I will refer to it only briefly as it did not form any great part of the oral argument on appeal, is the status of the United Kingdom as future third country to the European Union. Such status might be configured in at least two scenarios:

> a) A termination of the United Kingdom's membership without any guarantee that the United Kingdom be part of the Dublin System, so that the United Kingdom is a third country;
>
> b) A termination of the United Kingdom's membership which retains the United Kingdom as part of the Dublin System, in a way which would not affect the operatively of the Dublin system.

152. The only certainty in the present circumstances is that, in *M. A. v. International Protection Appeals Tribuna*l (Case C-661/17), the CJEU held that:

> "Article 17(1) […] must be interpreted as meaning that the fact that a Member State, designated as 'responsible' within the meaning of that regulation, has notified its intention to withdraw from the European Union in accordance with Article 50 TEU does not oblige the determining Member State to itself examine, under the discretionary clause set out in Article 17(1), the application for protection at issue."

153. It is not a matter for this Court to speculate on any of the possible scenarios until the departure actually happens and unless the parties need to discuss same before the Court.

Conclusion

154. For the reasons stated in my judgment, I would therefore allow the appeal in respect of the first judgment (grounds of appeal No. 1, 2, and 3) and uphold the decision of the trial judge in her second judgment, save and insofar as she made a determination or observations regarding the place of ECHR/Charter rights in the Dublin System.

155. I propose to hear counsel regarding the issue of costs of the appeal and of the costs order made in the High Court.