APPROVED

THE COURT OF APPEAL

Record Number: 2021/729JR

Court of Appeal Record No.: 2022/171

Donnelly J. **Neutral Citation Number [2023] IECA 290**

Noonan J.

Ní Raifeartaigh J.

BETWEEN/

M.M.

APPELLANT

-AND-

INTERNATIONAL PROTECTION APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE

RESPONDENTS

JUDGMENT of Ms. Justice Ní Raifeartaigh delivered on the 30th day of November 2023

Introduction

1. This judgment concerns Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 (hereinafter "the Dublin III Regulation" or "the Regulation"). The Regulation establishes the criteria and mechanisms for determining the Member State responsible for examining an application for international protection. It concerns a "take back" request pursuant to Article 23(1) of the Regulation and the question of when the conditions in Article 18(1)(d) are satisfied.

2. The appellant is an adult asylum seeker from Iran. He made an application for international protection in Ireland in August 2020. A search on the system known as Eurodac indicated that he had previously sought international protection in three Member States: Belgium, Sweden and the United Kingdom. The Irish authorities made a request to Sweden and the United Kingdom (but not Belgium) to "take back" the appellant pursuant to the provisions of the Regulation (hereinafter "a take back request"). Sweden accepted the request and a decision was made to transfer him to Sweden. This decision was appealed to the International Protection Appeals Tribunal (hereinafter "IPAT")which upheld the decision. The appellant seeks certiorari of that decision by way of judicial review. He was unsuccessful in the High Court and appeals from that decision. Although the respondents in this appeal include the Minister, I will refer to them collectively as "The Tribunal" for ease of reference in this judgment.

3. It may be helpful to set out certain provisions of the Regulation in detail at this early stage of the judgment before turning to the evidence in the case and the jurisprudence of the CJEU in respect of the Regulation. The framework as established by the Regulation and the caselaw is a complex tapestry of interlocking principles and it is useful to examine this before setting out the impugned decision and the other evidence in the case.

Relevant provisions of the Dublin III Regulation

4. The general background to the Dublin III Regulation was usefully set out by this Court in *P.F. v. International Protection Appeals Tribunal and Minister for Justice and Equality* [2020] IECA 357. The Court (Whelan, Faherty, Murray JJ) usefully described the background to the Regulation in the following terms:-

> "50. Dublin III is the most recent iteration of what is commonly referred to as "the Dublin system". The Dublin system has its origins in the Dublin Convention of 1990 which came into effect in 1997. It was created to meet three main objectives: (1) to ensure that only one Member State is responsible for the examination of an application for international protection, (2) to deter multiple asylum claims in various Member States, and (3) to determine as quickly as possible the responsible Member State so as to ensure effective access to an asylum procedure. The Dublin Convention was replaced by the Dublin II Regulation in 2003. In 2008, the European Commission issued a recast proposal of Dublin II (COM (2008) 820 final), with the purpose of remedying deficiencies in the Dublin system. The proposal sought to address the efficiency of the system, "situations of particular pressure on Member States' reception capacities and asylum systems" and to increase the level of protection afforded to international protection applicants. The European Commission's document referred variously to the need to "ensure that [the provisions of the Dublin Regulation] are fully compatible with fundamental rights as general principles of Community law as well as international law", "the need to strengthen the legal and procedural safeguards for persons subject to the Dublin procedure" and "the need to ensure better respect for the right to family unity and to improve the situation of vulnerable groups in particular that of unaccompanied minors".
>
> 51. This ultimately led to the adoption of the Dublin III Regulation on 29 June 2013 and its entry into force on 19 July 2013."

5. In setting out the relevant provisions of the Regulation below, I have added emphasis by way of italics in certain places, the significance of which will later become apparent when we come to the precise arguments made by the parties.

6. The title of the (recast) Regulation refers to "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 ".

7. Certain of the Recitals to the Regulation are of particular interest:

"(4) The Tampere conclusions [of the European Council at its special meeting on 15 and 16 October 1999] also stated that the [Common European Asylum System] should include, in the short-term, *a clear and workable method* for determining the Member State responsible for the examination of an asylum application.

(5) Such a method should be based on *objective, fair criteria* both for the Member States and for the persons concerned. It should, in particular, make it possible to determine *rapidly* the Member State responsible, so as to guarantee effective access to the procedures for granting international protection and not to compromise the objective of the *rapid processing* of applications for international protection. ...

(9) In the light of the results of the evaluations undertaken of the implementation of the first-phase instruments, it is appropriate, at this stage, *to confirm the principles underlying [Regulation No 343/2003], while making the necessary improvements, in the light of experience, to the effectiveness* of the Dublin system and the protection granted to applicants under that system. … ...

(19) In order to guarantee *effective protection of the rights of the persons concerned, legal safeguards and the right to an effective remedy in respect of decisions regarding transfers to the Member State responsible should be established, in accordance, in particular, with Article*

47 of the Charter of Fundamental Rights of the European Union. In order to ensure that international law is respected, *an effective remedy against such decisions should cover both the examination of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred. ...*"

8. Article 1 (entitled "subject matter") provides:

"This Regulation lays down 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 ('the Member State responsible')".

9. Article 2 provides for definitions, one particular aspect of which is relevant to these proceedings:

"(d) '*examination of an application for international protection' means any examination of, or decision or ruling concerning, an application for international protection* by the competent authorities in accordance with Directive 2013/32/EU and Directive 2011/95/EU, *except for procedures for determining the Member State responsible in accordance with this Regulation*".

Thus, the phrase "examination of an application for international protection" has a particular meaning under the Regulation. It refers to what we might call the substantive examination of the protection application. It does *not* include the (logically prior) determination as to which Member State is responsible for engaging in the examination of the protection application, which might therefore be conceived of as a preliminary or jurisdictional type of issue.

10. Chapter II entitled "General Principles and Safeguards" starts with Article 3 entitled "Access to the procedure for examining an application for international protection", which provides:

"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. [The sub-Article goes on to provide for an exception where there are systemic flaws and/or the potential for inhuman or degrading treatment, but this is not relevant in the present case]."

11. Chapter III is entitled "Criteria for determining the Member State responsible" and contains Articles 7-15 inclusive. Article 7 entitled "Hierarchy of *criteria*" provides as follows:

"1. The criteria for determining the Member State responsible shall be applied in the order in which they are set out in this Chapter.

2. The Member State responsible in accordance with the criteria set out in this Chapter shall be determined on the basis of the situation obtaining when the applicant first lodged his or her application for international protection with a Member State.

3. In view of the application of the criteria referred to in Articles 8, 10 and 16, Member States shall take into consideration any available evidence regarding the presence, on the territory of a Member State, of *family members, relatives or any other family relations of the applicant*, on condition that such evidence is produced before another Member State accepts the request to take charge or take back the person concerned, pursuant to Articles 22 and 25 respectively, and that the previous applications for international protection of the applicant have not yet been the subject of a first decision regarding the substance."

12. Thus, for example, Article 8 deals with minors and Article 9 deals with family members. To take a hypothetical example, the Member State with responsibility for a minor might turn out to be Germany because the minor had family members already there by reason of the application of the Chapter III provisions, even though Italy was the first Member State in which the minor made an application for international protection.

13. Article 12, also within Chapter III, provides that where the applicant is in possession of a valid residence document, the Member State which issued the document shall be responsible for examining the application for international protection.

14. Interestingly, Article 13(1) provides:

> "Where it is established, on the basis of proof or circumstantial evidence as described in the two lists mentioned in Article 22(3) of this Regulation, including the data referred to in Regulation (EU) No 603/2013, that an applicant has *irregularly crossed the border into a Member State* by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for international protection. That responsibility *shall cease 12 months* after the date on which the irregular border crossing took place."

15. Chapter IV deals with dependency and special discretionary situations. It may be noted that Article 17(1) provides:

> "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 becomes responsible pursuant to this paragraph shall forthwith indicate it in Eurodac in accordance with Regulation (EU) No 603/2013 by adding the date when the decision to examine the application was taken."

Article 17(2) provides:

"The Member State in which an application for international protection is made and which is carrying out the process of determining the Member State responsible, or the Member State responsible, may, at any time before a first decision regarding the substance is taken, request another Member State to take charge of an applicant in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations, even where that other Member State is not responsible under the criteria laid down in Articles 8 to 11 and 16. The persons concerned must express their consent in writing. … "

16. Chapter V is entitled "Obligations of the Member State responsible" and commences with Article 18, carrying the same heading. This provision is central to the present case and its precise language may be noted:

"1. The Member State responsible under this Regulation shall be obliged to:

(a) *take charge*, under the conditions laid down in Articles 21, 22 and 29, of an applicant who has lodged an application in a different Member State;

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

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

(d) *take back*, under the conditions laid down in Articles 23, 24, 25 and 29, a third-country national or a stateless person *whose application has been rejected* and who made an

application in another Member State or who is on the territory of another Member State without a residence document.

2. In the cases falling within the scope of paragraph 1(a) and (b), the Member State responsible shall examine or complete the examination of the application for international protection made by the applicant.

In the cases falling within the scope of paragraph 1(c), when the Member State responsible had discontinued the examination of an application following its withdrawal by the applicant before a decision on the substance has been taken at first instance, that Member State shall ensure that the applicant is entitled to request that the examination of his or her application be completed or to lodge a new application for international protection, which shall not be treated as a subsequent application as provided for in Directive 2013/32/EU. In such cases, Member States shall ensure that the examination of the application is completed.

In the cases falling within the scope of paragraph 1(d), where the application has been rejected at first instance only, the Member State responsible shall ensure that the person concerned has or has had the opportunity to seek an effective remedy pursuant to Article 46 of Directive 2013/32/EU."

17. A key distinction is therefore drawn between *take back (sub-paragraphs (b), (c) and (d)) of 18(1)* and *take charge (sub-paragraph (a) of 18(1)).* Further, the difference between the three take back situations in (b), (c), (d) lies in the status of the examination of the application: under examination, withdrawn or rejected, respectively. As we shall see, Article 20(5) provides for a further take back scenario. All four scenarios of take back were discussed in the Grand Chamber decision of *H&R v. Staatssecretaris van Veiligheid en Justitie*, Joined Cases C-582/17 and C-583/17, 2 April 2019 (hereinafter "*H&R"),* as we shall see, with the court stressing important differences between them.

18. Chapter VI is entitled "Procedures for Taking Charge and Taking Back". Article 20, within this chapter, is entitled "Start of the Procedure". It provides:

" 1. The process of determining the Member State responsible shall start as soon as an application for international protection is first lodged with a Member State."

Article 20 (5) provides:

"5. An applicant who is present in another Member State without a residence document or who there lodges an application for international protection after *withdrawing* his or her first application made in a different Member State *during the process of determining the Member State responsible shall* be *taken back*, under the conditions laid down in Articles 23, 24, 25 and 29, by the Member State with which that application for international protection was *first lodged, with a view to completing the process of determining the Member State responsible.*

That obligation shall cease where the Member State requested to complete the process of determining the Member State responsible can establish that the applicant has in the meantime left the territory of the Member States for a period of at least three months or has obtained a residence document from another Member State.

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

19. A point about terminology may be noted. There is a distinction between (1) a determination as to which Member State is responsible, on the one hand, and (2) an examination of an application for international protection, on the other. Broadly speaking the two different issues might be said to correspond, conceptually, to the question of jurisdiction (which Member State is responsible for examining the application?) and substance (should international protection be granted?). Accordingly, the take back situation covered by Article 20(5) applies when a determination as to responsibility is under way, whereas the situations covered by Article 18(1)(b) to (d) apply when an

examination of the international protection application itself is under way or has been rejected or withdrawn.

20. Subsequent Articles in the Regulation set out the nuts and bolts of take back and take charge requests. Article 21 deals with "Submitting a *take charge* request" and Article 22 deals with "Replying to a *take charge* request". In the present case, we are particularly concerned with Article 23 (and its interaction with Article 18(1)(b) and (d), set out above).

21. Article 23 is entitled "Submitting a *take back* request when a new application has been lodged in the requesting Member State". It provides:

> "1. Where a Member State with which a person as referred to in *Article 18(1)(b), (c) or (d)* has lodged a new application for international protection considers that another Member State is responsible in accordance with Article 20(5) and Article 18(1)(b), (c) or (d), it may *request that other Member State to take back that person*.
>
> 2. A take back request shall be made *as quickly as possible and in any event within two months of receiving the Eurodac hit,* pursuant to Article 9(5) of Regulation (EU) No 603/2013. If the take back request is based on evidence other than data obtained from the Eurodac system, it shall be sent to the requested Member State within three months of the date on which the application for international protection was lodged within the meaning of Article 20(2).
>
> 3. *Where the take back request is not made within the periods laid down in paragraph 2, responsibility for examining the application for international protection shall lie with the Member State in which the new application was lodged*.
>
> … "

22. Three points may be made. First, this procedure applies only to take back and not take charge (because it does not include Article 18(1)(a) which concerns take charge). Secondly, there is a default position once the relevant time period expires (two months in the case of a Eurodac hit). The default position is that responsibility for examining the application for protection lies with the Member State

in which the *new* application was lodged i.e. the Member State which failed to make the request within the relevant time period. As we shall see from the caselaw of the CJEU, this transfer of responsibility is automatic by operation of the Regulation. Thirdly, the opening language may be noted: the new Member State "may request".

23. Article 25 is entitled "Replying to a take back request" and provides:

> "1. The requested Member State shall make the necessary checks and *shall give a decision* on the request to take back the person concerned as quickly as possible and in any event no later than one month from the date on which the request was received. When the request is based on data obtained from the Eurodac system, that time limit shall be reduced *to two weeks.*
>
> 2. *Failure to act within the one month period or the two weeks period mentioned in paragraph 1 shall be tantamount to accepting the request, and shall entail the obligation to take back the person concerned,* including the obligation to provide for proper arrangements for arrival."

24. Again, therefore, there is a default or automatic position if the time limit is not complied with (two weeks in the case of a Eurodac hit). In this situation, the automatic transfer of responsibility is to the requested Member State by reason of its failure to act within the relevant time frame.

25. Article 27 deals with the question of remedy and provides as follows:

> "1. The applicant … shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.
>
> … [there are numerous other sub-paragraphs which deal with matters such as legal aid and linguistic assistance, but they are not relevant in the present case]."

As already noted, Recital 19 provides that "*an effective remedy against such decisions should cover both the examination of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred".* The language of Article 27 echoes this

language, and this language forms a repeated refrain in the jurisprudence of the Grand Chamber, as we shall see.

26. Further, a different EU directive, namely Directive 2013/32 (on common procedures for granting and withdrawing international protection (recast)) provides specifically for a right of appeal (Article 46). This includes the obligation on Member States to ensure that an effective remedy provides for a full and ex nunc examination of both facts and points of law. It provides also that the time limits applying to this remedy shall not render such exercise impossible or excessively difficult. Further provision is made for legal and linguistic assistance as well as the right of the applicant to remain on the territory of the Member State while this remedy is being exercised.

27. Finally, it may be noted that Article 29 of the Regulation provides for a further default provision in the event of a transfer not taking place within the relevant time period. A six-month time limit applies here unless it is extended by reason of imprisonment or absconding, in which case the outer limits are 12 months and 18 months respectively:

> "1. The transfer of the applicant or of another person as referred to in Article 18(1)(c) or (d) from the requesting Member State to the Member State responsible shall be carried out in accordance with the national law of the requesting Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within *six months* of acceptance of the request by another Member State to take charge or to take back the person concerned or of the final decision on an appeal or review where there is a suspensive effect in accordance with Article 27(3).
>
> …
>
> 2. Where the transfer does not take place within the six months' time limit, the Member State responsible shall be relieved of its obligations to take charge or to take back the person concerned and responsibility shall then be transferred to the requesting Member State. This time limit may be extended *up to a maximum of one year* if the transfer could not be carried

out due to *imprisonment* of the person concerned or up to a maximum of *eighteen months* if the person concerned absconds.

If a person has been transferred erroneously or a decision to transfer is overturned on appeal or review after the transfer has been carried out, the Member State which carried out the transfer shall promptly accept that person back."

28. I should also mention Commission Regulation (EC) No. 1560/2003 which lays down detailed rules for the application of the Dublin III Regulation. Detailed procedures are set out therein, as well as template forms (in Annexes to the Commission Regulation) for the making of requests to take charge (Annex I) and requests to take back (Annex III). As we shall see, the CJEU in one of its decisions pointed out that the standard form for *take charge* requests provides that the requesting Member State must, by ticking a box, mention the relevant criterion for determining responsibility and provides the opportunity to supply the information necessary to check whether that criterion has been satisfied. By way of contrast, the standard form for *take back* requests requires only that the requesting Member State indicate whether its request is based on Article 20(5) or Article 18(1)(b), (c) or (d) of the Dublin III Regulation, and does not contain any section relating to the criteria for determining responsibility set out in Chapter III of that regulation.

Summary of the Take Back Procedure

29. It may be helpful to summarise the take back procedure in a straightforward case involving two Member States and the interaction of Articles 18 and 23:

- An applicant lodges an application for international protection in one Member State (MS1).
- The applicant subsequently lodges another application in another Member State (MS2).
- Where MS2 "considers that" MS1 "is responsible in accordance with 18(1)(b), (c) or (d)", it "may request" MS1 to take back the applicant. This group of situations (Article

18(1)(b), (c) and (d)) is where MS1 had started examining the application for international protection and the examination was either ongoing, had been withdrawn, or had been rejected.

- If no take back request is made by MS2 to MS1 within the relevant time period (2 months in a Eurodac hit situation), responsibility for examining the application remains with MS2 by reason of the automatic operation of the time limit.
- If MS2 makes a take back request to MS1, the latter is supposed to "make checks" and reply. If MS1 accepts the take back request, an order is made to transfer the applicant from MS2 to MS1. If MS1 fails to reply within the time limit (2 weeks in a Eurodac situation), responsibility for examining the application transfers to MS1 by reason of the automatic operation of the time limit.
- If a take back request has been accepted and/or MS1 is responsible by operation of time limit, and a transfer order is made, the transfer should take place either (a) within six months or (b) an extended period not greater than 18 months, in the case of the applicant having absconded or having been imprisoned. If the transfer has not taken place within the six-months or the extended period (whichever applies), responsibility for examining the application remains with MS2 by reason of the automatic operation of the time limit.

The Evidence

30. The appellant arrived in Ireland on 2nd August 2020. He completed an "International Protection Application Form" ("IPO 05"), dated 17th August 2020 at the offices of the International Protection Office. He was given a preliminary interview for the purposes of Section 13(2) of the International Protection Act 2015 ("IPO 09") on that date. He was given a more detailed interview under Section 13(2) on 21st October 2020. He completed an International Protection Questionnaire thereafter which was translated into English. In this he stated that he had applied for international protection in Sweden on 7 November 2015 and was refused "because they did not believe my words". The appellant's solicitor exhibited the form IPO 05 and the record of two 'preliminary

interview' records dated 17th August 2020 and 21st October 2020 as well as the appellant's translated International Protection Questionnaire.

31. A Eurodac Enquiry was made in respect of the appellant on 18th August 2020. The result was a "Category 1 Hit" indicating that the appellant had lodged an application for international protection in Belgium on 10/11/2015, in Sweden on 17/11/2015, and in the United Kingdom on 22/07/2020, prior to his application in this State on 17/08/2020. The dates of the Eurodac hits therefore indicate that there was a period of only 7 days between the Belgian application and the Swedish application, and more than four years between the Swedish and the UK applications. No further information was furnished via the Eurodac hit.

32. On the 2nd October 2020, a personal interview pursuant to Article 5 of Regulation (EU) No 604/2013 was conducted with the appellant at the International Protection Office. During the interview, the appellant gave the following account. He said that he left Iran in 2015; that he travelled to Turkey by foot, before travelling to Belgium by lorry; that he did not claim asylum in Belgium and that he provided a false identity there; that he left the country immediately and travelled to Sweden by train and ferry; that he claimed international protection in Sweden but his application was refused; that he lived in Sweden until 17/02/2020, then he travelled to Germany by train, to France by taxi and to the UK by lorry; that he was fingerprinted as soon as he arrived in the UK but he did not claim asylum because he did not want to stay there; that in early August 2020 he travelled to Ireland by ferry and bus. The appellant stated that he has never returned to his country of origin, Iran, since his asylum application in Sweden. He said he had no family members in the EU.

33. On the 5th October 2020, take back requests were made to both the UK and to Sweden. No request was made to Belgium. The request forms referenced Article 18(1)(b) of the Regulation. This sub-paragraph refers to "an appellant whose application is under examination and who made an application in another Member State".

34. By correspondence dated 14th October 2020, UK authorities rejected the take back request, citing a prior acceptance by Sweden of responsibility in response to a prior request by the UK and their view that Sweden was the Member State Responsible.

35. By correspondence dated 15th October 2020, Sweden accepted the take back request under Article 18(1)(d) of the Regulation. This sub-paragraph concerns "a third-country national or a stateless person whose application has been rejected and who made an application in another Member State…". Thus, it appears that Sweden examined the application for international protection and rejected it. Sweden did not provide any information as to the circumstances in which it undertook to examine his international protection application or when and why it subsequently rejected it.

36. By letter dated 10th November 2020 the International Protection Office wrote to the appellant informing him of Sweden's acceptance of the take back request and affording him an opportunity to make submissions within 10 days prior to any decision to make a transfer order.

37. Correspondence was then entered into and submissions were made on the appellant's behalf by correspondence dated 7th December 2020. The appellant asserted that there had been a "misapplication" of Article 3(2) of the Regulation and that a correct application of the Article would have resulted in Belgium being requested to take back the appellant. Article 3(2) of the Dublin Regulation states that the first Member State in which the application for international protection was lodged shall be responsible for examining it. It was asserted that "*the Eurodac hit is proof of an international protection claim having been made in Belgium and there is no proof or circumstantial evidence to the contrary*". As no take back request was made to Belgium within the time limits set out in the Regulation, he contended, Ireland was required to take charge of the appellant's claim for international protection on the basis that Sweden does not have responsibility under the Dublin III Regulation. He asserted that: "*There is no evidence that Sweden positively accepted responsibility under Article 17 of the Dublin III Regulation, and they cannot be deemed to have done so by default.*

Had such a decision been taken, Sweden would have been obliged to record on Eurodac the date of such a decision. They therefore did not do so."

38. By notice dated 19th February 2021, the IPO informed the appellant that it had decided that his application for international protection should properly be examined by Sweden. In the recommendation of the panel member, which was approved by the Officer, the following was set out:

> "In light of the above, it is possible to ascertain that the Regulation establishes that if the request to take back is not made within two months of receiving the Eurodac hit, the Member State in which the new application was lodged is responsible for examining the application for international protection. Similarly, when the take back request is made but the transfer did not take place within the six months' time limit, the responsibility is transferred to the requesting Member State. These Articles clearly outline that the first Member State in which the application for international protection was lodged is not always the one responsible for examining it. Article 3(1) of Regulation (EU) No. 604/2013 states: '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.' The regulation envisages that an applicant will have only 1 application in the Member States and responsibility for this application is determined by the regulation. On the basis of the above it is found that the Regulation (EU) No 604/2013 was correctly interpreted and applied, and that Sweden has been properly identified as the Member State. responsible to examine the applicant's claim".

39. Thus, the decision referenced the default periods in Articles 23 and 29 of the Regulation (failure to make a request within the time period, and failure to transfer within the time period, respectively).

40. An appeal was filed on behalf of the appellant which included the following:

> "The position in the present case is that the applicability of Article 23 and 29 to the conclusion that Sweden (the second Member State in which an application for international protection was made) is responsible for the processing of the application, suffers two legal and factual flaws. The first is that the application of these Articles or either of them is *wholly theoretical. IPO have not investigated how or why Sweden came to commence the processing of the Appellant's international claim. Neither Article can therefore be a basis the responsibility of Sweden in fact*. As has been set out in case law of the CoJ, the acceptance of a Member State of responsibility is not determinative of whether the determining State (Ireland) has properly applied the Regulation. This proposition is correct both by reference to the initial processing that was done by Sweden in the present case, as well as its acceptance of responsibility on foot of Ireland's take back request". (Emphasis added)

And later:

> "No specific fact leading to the cessation of Belgium's responsibility can be identified on the facts of the present case and *their responsibility cannot be presumed to have ceased. It is not open to Ireland to essentially treat the prior processing of the application for international protection by Sweden as a correct (or presumptively correct) application of the Dublin III Regulation*, and/or Ireland is required to conduct a fresh inquiry as to the applicability of the Dublin III Regulation as the determining State in the present time". (Emphasis added)

41. The Tribunal issued its decision refusing the appeal by decision dated 30th April 2021 and cover letter dated 5th May 2021. Its decision included the following paragraphs:-

> "[4.2] When applied to this case, Article 23.1 permitted Sweden to make a "take back" request to Belgium within the period of two, or at most, three months after the Appellant applied for international protection in Sweden on 17th November, 2015. Sweden did not do so.
>
> ….

[4.6] Sweden did not make a "take back" request within the time limited in Article 23.2. That being so, "responsibility for examining the application for international protection shall lie with the Member State in which the new application was lodged", i.e. Sweden (Article 23.3) to which responsibility is "transferred in full" (X. v. Staatssecretaris van Veiligheid en Justitie). It follows that, in the context of Ireland's request, Sweden is "the Member State responsible under this Regulation" for the purpose of Article 18.1 of the Dublin Regulation".

42. Thus, the Tribunal referenced the default period in Article 23 only (failure to make a take back request within the time period).

43. Leave to bring judicial review proceedings was granted to the appellant by order dated 29th July 2021. In his affidavit grounding the judicial review proceedings, the appellant, apart from formal averments, merely stated:

> "I do not believe that I have any immigration history other than that set out in these proceedings, which would be relevant to these proceedings. The only other countries in which I have an immigration history are those in which I applied for international protection being: Belgium, the United Kingdom and Sweden. I am not and have not previously been involved in any other proceedings in the State".

44. It is notable that he gave no information either to the International Protection Office or to this Court about what happened in Sweden; for example, matters such as when he received the rejection, the terms of the Swedish decision, whether he appealed against the decision and/or whether he challenged Sweden's assumption of responsibility for examining his application.

Statement of Grounds

45. The Statement of Grounds asserted that the Tribunal erred in upholding the transfer decision and concluding that Sweden was the Member State responsible for processing the appellant's application for international protection for the following reasons.

- In concluding that Article 23 of the Dublin III Regulation "makes Sweden responsible," because Article 23 is not a criterion under which responsibility is identified and that responsibility is to be identified by reference to Article 3 and Chapter III (which Chapter comprises Articles 7 to 17), and Article 23 falls outside of those provisions.
- In concluding that Article 3(2) (which, when read in conjunction with Article 3(1) dictates that the first Member State in which an application for international protection is lodged is the Member State responsible where no criteria under Chapter III indicate responsibility) is not applicable. Article 3(2) is only non-applicable where a criterion under Chapter III indicates responsibility, and Article 23 is not a Chapter III criterion.
- In basing its decision on the factual conclusion that Sweden did not make a take back request to Belgium. The Tribunal did not have any information before it upon which that conclusion could be based, and the finding is therefore unreasonable and/or irrational.
- Even if the Tribunal did have a lawful basis for the factual conclusion that Sweden did not make a take back request to Belgium, the Tribunal was in error in assessing the question of responsibility by reference to a period in which the appellant was in Sweden and/or breached the requirement of Article 7(2) of the Dublin III Regulation which says that, "The Member State responsible ... shall be determined on the basis of the situation obtaining when the applicant first lodged his or her application for international protection with a Member State."
- In addition, or in the alternative to the foregoing sub-ground, the Tribunal did not correctly apply the dicta which it cited from Case C-213/17, *X. v. Staatssecretaris van Veiligheid en Justitie*, to the effect that, "The transfer of responsibility cannot be prevented by the fact that another Member State was responsible for examining applications for international protection lodged previously ... "

46. A statement of opposition was duly filed on the 10th November 2021, essentially disputing the appellant's interpretation of the Dublin Regulation and standing over the decision of the Tribunal.

The High Court Decision

47. The High Court (O'Regan J.) delivered a short *ex tempore* judgment on the 20th May 2022 refusing the application for judicial review ([2022] IEHC 358). At paragraph 15 of her judgment, she referred to authorities of the CJEU: *Mengesteab v. Germany*, Case C-670/16, 26 July 2017 (hereinafter *Mengesteab*) , *Shiri v Bundesamt für Fremdenwesen und Asyl*, Case C-201/16, 25 October 2017, *X v. Staatssecretaris van Veiligheid en Justitie*, Case C-213/17, 5 July 2018, and the *H&R* case. With regard to the last decision, she said, in a passage which the appellant maintains fundamentally misstates the decision in *H&R*, as follows:

> "In the joint cases of H. & R. v. Staatssecretaris van Veiligheid en Justite, Joined Cases C-582/17 and C-583/17, ECLI:EU:C:2019:280, at para. 64 it was recorded that the Regulation sets out specific obligations on the first Member State and that that Member State is thus granted a special status. It doesn't appear to me that that makes any material difference in the conclusions in this matter. At para. 73 it is stated that the argument to the effect that a take back request may be made only if the requested Member State can be designated as a Member State responsible pursuant to the criteria for determining under Chapter III is at variance with the general scheme of the Regulation. Accordingly, the argument now presented by the applicant is at variance with the general scheme of the Regulation. Under para. 77 it is provided that it is not intended to look behind the response of the accepting Member State as it would lead to additional applications and it would lead to an examination by one Member State of another Member State. This in my view is consistent with the implementing Regulation for Dublin III — Article 6 of Regulation 1560 of 2003 which provides if the requested Member State accepts responsibility they must reply and say what specific provision of Dublin III is taken as the basis for accepting — in this regard Sweden said the basis was Article 18(1)(d)."

She then continued:

"16. I am satisfied that Sweden didn't just volunteer an acceptance of responsibility, and Article 6 of Regulation 1560 of 2003, and the H. & R. decision aforesaid, are consistent with the proposition that each Member State makes the presumption that the other Member State carried out the appropriate checks. Accordingly, there is no need to look behind the decision of Sweden.

17. There is an error in my view in the assessment by IPAT, in that IPAT comes to the conclusion that Sweden *failed to make a take back request to Belgium* in circumstances where there was no evidential basis for that suggestion. In my view it was *either Sweden failed to make a take back request or failed to make a transfer for whatever reason,* possibly because they voluntarily decided that they would deal with the applicant, but the reason doesn't matter as the reality is that they had two months to make the take back request and if they didn't a default provision applied. If they had made such a request and if Belgium had accepted, Sweden had six months to effect a transfer — if they did not Sweden would be the responsible Member State. In these events Sweden had less than a year after the applicant arriving in Sweden to return the applicant to Belgium otherwise by default Sweden would be the responsible Member State.

18. It is manifest that the default occurred in either the take back or the effective transfer between Sweden and Belgium. Accordingly, at that point (the precise date not known because it is not known what Sweden did), but in any event within the first year namely before the end of 2016 Sweden was responsible and there is nothing in the legislation to suggest that once responsible you lose that responsibility save in accordance with Dublin III.

19. In the circumstances therefore, even though there is an error insofar as it asserted as a matter of fact that Sweden did not make a take back request, nevertheless, because *it is manifest that there was default of one description or another under Article 23 and/or Article 29* of Dublin III, Sweden under Dublin III was considered by the end of 2016 as being the relevant responsible Member State, and therefore it does appear to me that notwithstanding the asserted matter of fact without an evidential basis, nevertheless, this is an appropriate

matter in which I would exercise my discretion and not grant the relief of certiorari." (Emphasis added)

48. In effect, therefore, the High Court found that the precise factual circumstances in which Sweden came to assume responsibility for examining the international protection application did not matter because the passage of time had overtaken events and the default provisions in Articles 23 or 29 must have applied one way or another. Accordingly, the evidential deficit relied upon by the appellant was of no consequence, in her view.

Grounds of Appeal

49. The Notice of Appeal stated that the High Court erred in finding that:

i. IPAT did not err in upholding the transfer of the Appellant to Sweden.

ii. Sweden becam responsible for examining the appellant's international protection as made there on 17 November 2015 meant that the State was entitled (on that basis alone) to transfer the appellant to Sweden by way of 'take back' request following the application for international protection made by the appellant in Ireland on 17 August 2020.

iii. Default provisions are capable of mandating a later 'take back' procedure adopted after a subsequent international protection application has been made in a different Member State.

iv. The 'take back' response under Article 18(1)(d) is a decision which the requesting Member State should not 'look behind'.

v. In failing to properly apply the concept of 'special status' of the first Member State in which an application for international protection is made.

vi. In failing to properly distinguish *H&R v Staatssecretaris*.

vii. In failing to broach the matter from the perspective of the circumstances pertaining when the application for international protection was made in Ireland.

viii. In drawing the wrong conclusion from para. 73 of *H&R v Staatssecretaris* by failing to recognise that the principle therein applies more to Belgium than to Sweden.

ix. By assessing the matter from the point of view of which member state appeared to Ireland to be responsible for examining the claim for international protection.

x. The High Court, IPO and IPAT engaged in conjecture as to how the Swedish authorities dealt with Dublin III issues.

Submissions

The appellant's submissions

50. The appellant's core contention is that Ireland should have made a take back request to Belgium but did not do so, and thereby failed to follow the correct procedure under the Regulation. He relies on the broad scope of the remedy under Article 27 of the Regulation (as interpreted by the CJEU) for the proposition that an applicant for international protection is entitled, in proceedings challenging a transfer order, to rely upon the fact that a Member State has not correctly applied the Regulation.

51. He submits that there are two issues in the appeal:

1. Whether Sweden's acceptance of the take back is determinative of the legality of the Tribunal's decision that the transfer order was lawful.
2. Whether the High Court was correct in finding that because Sweden had previously examined the application, Ireland was entitled to make a take back transfer to Sweden.

52. The appellant submits these two issues are inextricably interlinked and arise from the "misinterpretation" by the High Court of *H&R*. He submits that the High Court upheld the take back request on the basis that because Sweden had in fact examined the application, it must be the "Member State responsible" for that examination. He contends that the decision in *H&R* makes it clear that the Member State "responsible" is not synonymous with a Member State to whom a take back request may be made, and that the judgment makes it clear that there can be a return under

Article 18 (b) to (d) only where there has been a prior determination by that Member State (here, Sweden) that it is the Member State responsible, as distinct from responsibility arising by application of the default provisions.

53. He submits that it is not permissible simply to assume that Sweden correctly assumed responsibility. He says this involves making evidential assumptions and conjecture, and "*necessarily involves an acceptance that Sweden did **not** in fact comply with its obligations to return the appellant to Belgium in the first place*" (emphasis added). He submits that there is insufficient knowledge as to what happened between Belgium and Sweden, and why Sweden undertook to examine the application, when all the available evidence suggests that Belgium, as the first State in which application was made, was in the process of determining responsibility when he went to Sweden and/or had responsibility itself for examining his application. He maintains that Ireland should have used Article 34 of the Regulation to seek further information as to the circumstances in which Sweden decided to examine the application. He also points out that there is no explanation as to why Ireland did not make a take back request to Belgium.

54. The appellant maintains that there are at least three possible scenarios in which the examination of the appellant's application for international protection was carried out by Sweden:

i. One of the default provisions applied because Sweden did not take a particular action within the prescribed time period e.g. Sweden failed to request Belgium to take back within the time period, or Sweden, having made such a request and it having been accepted, failed to transfer within the relevant time period (Articles 23 and 29 respectively);

ii. Sweden exercised its discretion pursuant to Article 17 to accept responsibility for examining the application;

iii. Sweden issued a take back request to Belgium and the latter wrongfully refused to accept it.

The appellant says that it is not appropriate to simply assume, as the High Court did, that one of the default provisions applied. It is entirely possible, he says, that Belgium wrongfully refused to accept a request made by Sweden. He says the principle of mutual trust as described in *Jawo v. Germany*, Case C-163/17, 19 March 2019 does not extend to making assumptions that other Member States have correctly applied the provisions of the Regulation; an applicant is entitled to rely on the Article 27 remedy to ensure that the Member States properly applied the rules laid out in the Regulation.

55. He says that an appellant is entitled to an effective remedy regarding the transfer and therefore the authorities should engage properly and seek information pursuant to Article 34. The authorities, he says, should not "*blind themselves*" to the objective evidence that Belgium was the first Member State in which the appellant made application for protection. He relies on *Ghezelbash v Staatssecretaris van Veiligheid en Justitie* Case C-63/15, 7 June 2016 (hereinafter "*Ghezelbash")* with regard to the scope of the effective remedy under Article 27, which must cover both facts and law, and submits that the authorities should not be allowed to "*escape scrutiny*" by "*obfuscation of relevant evidence*". The reality, he says, is that we simply do not know whether a determination of responsibility was ever carried out by Belgium or Sweden.

56. He says that the essence of his case is that since Belgium was the first Member State to which an application for protection was made, any transfer order should have been to Belgium because its acceptance would always have taken priority over that of Sweden under the Regulation.

57. The appellant contends that the High Court incorrectly framed the issue to be determined as whether Sweden could accept the take back request, instead of whether Ireland was entitled to make the request in the first place and whether a transfer order should have issued. He says that he is not

seeking to 'look behind' Sweden's acceptance of the take back, but rather to question Ireland's failure to make a take back request of Belgium.

58. He says that the High Court found that the transfer order was valid because Sweden accepted the take back request but that this was incorrect. Acceptance by a Member State of a take back request cannot be determinative of the correct application of the Regulation, citing *Karim v Migrationsverket* Case C-155/15, 7 June 2016. That was a case in which Slovenia had accepted a take back request from Sweden but the applicant claimed that he had left the territory of the Member States for more than three months following his first asylum application in Sweden , and that he had passport entries to establish this (Article 19(2) provides that obligations under Article 18(1) will cease where the applicant has left the territory of the Member States for at least three months). The CJEU confirmed that an applicant is entitled, in an action challenging a transfer decision made in respect of him, to invoke an infringement of the rule set out in the second subparagraph of Article 19(2) of that regulation.

59. The appellant also cites *Mengesteab* as a case where the time limit for making the take back request expired, and the court emphasised the justiciability of the rules set out in the Regulation despite the acceptance of the take back, saying at para 62 that an applicant may rely on the expiry of a period even if the transfer has been accepted. He says therefore that it is not relevant to ask the question "Can a Member State look behind the acceptance of take back or take charge request?" but rather "Has the *requesting* Member State properly applied the Regulation?" (emphasis added) Therefore the issue is not whether Sweden correctly accepted the request, but whether Ireland was entitled to make the request in the first place, having regard to the conditions set out for making such a request in the Regulation.

60. The appellant contends that, given that he left Belgium after one week, it seems likely that he left before the conclusion of the process to determine which Member State was responsible for examining his international protection application; if so, then Article 20(5) would have applied. If he had been transferred from Sweden to Belgium at that time, Belgium would have carried out the determination as to which Member State was responsible based on the Chapter III criteria.

61. The appellant refers to the obligation on the *requested* Member State (here, Sweden) to carry out checks under Article 25 of the Regulation (and as elaborated upon in Articles 4 to 6 of Commission Regulation 1560 of 2003 as amended by Commission Implementing Regulation of 118/2004).

62. He says that examination of the take back provisions in the Regulation suggests that Sweden was correct to accept the take back request (and that the UK may have been incorrect in rejecting it but that there appears to be no procedure for rectifying such a situation). He says that it is clear that Sweden accepted the take back request because it believed that Article 18(1)(d) was applicable. However, Ireland did not have "vouching evidence" that Article 18(1)(d) applied to Sweden, and there is no "discernible reason" that a take back request to Belgium would not have been accepted.

63. The appellant submits that everything known about the facts suggests that Belgium would have had to accept a take back request had Ireland so requested, because he had made his first claim for international protection there. What is not known is the precise basis on which they would have accepted it, i.e. which of Article 20(5) or Article 18 (b) to (d) applied, although in circumstances where the applications in Belgium and Sweden were only one week apart, it seems likely, he contends, that Article 20(5) would have applied because it was extremely unlikely that the determining process would have been completed in Belgium in less than one week. He suggests that the wording of Article 20(5) is "directive" in a manner in which Article 18(1) is not (the former uses the phrase "shall be taken back…"). The appellant submits that in light of the language of the section and the special status concept referred to in the CJEU caselaw, an Article 20(5) request would "take

precedence" over an Article 18(1)(d) request. However, he says even an Article 18(1) application to Belgium (and acceptance thereof) would take precedence over Sweden's acceptance because of the caveat in paragraphs 52 and 66 of *H&R* that a determination as to responsibility must have been carried out.

64. The appellant submits that it is not good practice, and may be impermissible, to make multiple take back requests to different Member States. However, it would have been correct for any or all three Member States to have accepted a take back request.

65. The appellant relies on *H&R* for the proposition that the condition for making a take back request is not whether the requested Member State has responsibility for examining the international protection application but rather on whether the conditions in Article 20(5) or Article 18(1)(b) to (d) are satisfied. He lays emphasis on Article 3(2) and the special status of the Member State in which an application was first lodged. He accepts that Article 3 does not "directly assist" in answering how a requesting Member State may choose between numerous Member States to whom the articles relevant to the take back procedure applies, but he submits that priority should be afforded to the first Member State in which an application was lodged.

66. The appellant says that the High Court misinterpreted key passages of the judgment in *H&R*, in particular those (such as para 66) which referred to Article 18(1)(b) to (d) being applicable "only if the process of determining the Member State responsible for examining the application…has previously been completed in the requested Member State and it resulted in that State's acknowledging that it was responsible for examining that application". There was no evidence of any such process in this case. He contends that *H&R* makes it clear that there must have been a determination process and not default process.

67. The appellant submits that the correct questions to be asked were: (i) To which Member States are Article 20(5) or Article 18(1)(b) to (d) applicable? And (ii) if there is more than one answer, to which Member State should a transfer order be made?

68. He contends that the High Court erred in concluding that a default provision of some kind was the reason why the claim was examined in Sweden and that this was significant because it made Sweden responsible for examining the application. He contends that this is what the CJEU has said should not be done and that Article 23(3) is a default provision and not a "criterion". He says that the *X* case made it clear that a transfer of responsibility cannot be prevented by the fact that another Member State was responsible for examining applications for international protection lodged previously. In *X* itself, this meant that the substantive application for international protection was required to be examined by Italy even though the Netherlands had already examined and refused it.

69. The appellant says that Sweden became responsible for processing the claim due to some default in the take back procedure (between it and Belgium) but there is no suggestion that Sweden was the Member State identified by the criteria or that it ever made a determination that it was the Member State responsible, as described by *H&R*.

70. The appellant says that while the Regulation strives to ensure that only one Member State shall examine an application, situations may arise where in fact two Member States end up doing so. He cites the X case as an example of this, citing in particular paragraph 38 (set out later in this judgment).

The submissions of the Tribunal

71. The Tribunal relies upon the same CJEU authorities but contends that they support its position and not that of the appellant.

72. The Tribunal points to the language of Article 3(2) which refers to "the criteria listed *in this Regulation*", not the criteria listed in Chapter III. It points out that this stands in contrast to Article 7(2) (which is within Chapter III) and which refers to "the criteria …in the order in which they are set out *in this Chapter".* It submits therefore that on a literal construction of the Regulation, the appellant is mistaken.

73. The Tribunal submits that if the argument made by the appellant were correct, it would render the mechanism in Article 23(3) meaningless. It submits that the core purpose of the Regulation (as emphasised by Recitals 4 and 5) is to establish a clear and workable method for determining the Member State responsible for the examination of an asylum application and making it possible to determine "rapidly" the member State responsible. Moreover, Article 3(1) emphasises that the assessment is to be carried out by a single Member State (to avoid multiple decisions and/or forum shopping). It submits that the Chapter III criteria do not address a situation where an application for international protection *has already been made in another Member State.* The latter situation is governed by Articles 18 and 23.

74. The Tribunal relies upon the Title and Article 1 and the reference to criteria *and* mechanisms. It submits that the Regulation does not always require that responsibility result from a specific procedure leading to a concrete decision; sometimes responsibility may arise automatically by default after a certain period of time e.g. by failure to execute a transfer decision within six months of the relevant deadline (Article 29(2)).

75. The Tribunal rejects the appellant's characterisation of the issues to be decided in the appeal. It says that, contrary to what is submitted by the appellant, neither IPAT nor the trial judge found that Sweden's acceptance of the take back request was determinative. The High Court specifically said that Sweden was responsible because of a default of one kind or another (para 19 of its judgment). IPAT said that Sweden was responsible under Article 23(3) having regard to the

judgment in *X v. Staatsscretaris van Veiligheid en Justitie*, Case C-213, in particular paragraphs 35 and 36.

76. The Tribunal also submits that the appellant is wrong to say that the trial judge found that Ireland was entitled to transfer to Sweden simply because Sweden had examined the appellant's application for international protection. Again, the trial judge's determination was that a default of one kind or another led to Sweden having become responsible by the end of 2016.

77. The Tribunal submits that arguments made by the appellant concerning Article 20(5) were not contained in the Statement of Grounds nor made at the hearing, which is presumably why it is not addressed in the High Court judgment.

78. The Tribunal relies on the analysis of the take back scheme set out by the CJEU at paras 54-58 of *H&R*. It relies on the conclusion at para 61 which is:

> "61 Thus, in accordance with Article 23(1) and Article 24(1) of the Dublin III Regulation, the exercise of the option to submit a take back request presupposes *not that the responsibility of the requested Member State to examine the application for international protection is established, but that that Member State satisfies the conditions laid down in Article 20(5) or Article 18(1)(b) to (d) of the Regulation.*"

79. It submits that "translating" the conclusion at para 61 to the present case, it means that Ireland's request to Sweden presupposed that Ireland was satisfied that the condition in Article 18(1)(b) was met (even though Sweden in its response clarified that the situation actually fell within Article 18(1)(d).)

80. Further, it submits that the "special status" given to the first Member State with which an application is lodged does not arise in the context of Article 18(1)(b) to (d).

81. The Tribunal submits that the appellant is inviting the Court to ignore everything that happened after the appellant left Belgium, and that it would be entirely artificial and contrary to the view taken by the CJEU if Ireland determined that Belgium ought to have been the subject of the take back request. This would fly in the face of the fundamental rule in Article 3(1) that a single Member State should examine the application for international protection, which has already happened in Sweden.

82. The Tribunal also submits that there is no need for a preliminary reference to the CJEU because the case involves a relatively straightforward exercise in interpreting the Regulation and the answer is *acte claire* and/or has been sufficiently clarified by the jurisprudence of the CJEU.

Relevant CJEU authorities

83. A series of decisions of the Grand Chamber have addressed a number of specific aspects of the Regulation:

- The basic principles underlying the Regulation including the principle that one Member State should be responsible for the examination of an international protection application; the principle of mutual respect as between Member States; and the need for rapidity of decision-making.
- The (broad) scope of the remedy provided for by Article 27 which includes an examination of the law and the facts and entitles an applicant to rely upon the provisions of the Regulation to ensure its provisions have been correctly applied.
- The automatic nature of the allocation of decision-making responsibility when certain time-limits within the Regulation have expired.
- The difference between (a) a (preliminary) determination as to which Member State is responsible for examining an application for international protection, and (b) the (substantive) examination of the application for international protection itself.

- The difference between the concepts of “take charge” and “take back”, and the procedures in respect of each.
- The precise conditions in which a take back request may be made.

84. In setting out below relevant passages from the relevant judgments, I have added emphasis by way of italics in particular places.

85. The first of the Grand Chamber decisions is *Ghezelbash v Staatssecretaris van Veiligheid en Justitie* Case C-63/15, 7 June 2016. Here, the Grand Chamber confirmed that the remedy in Article 27 was wider than it had been under the old version of the Regulation, and that an applicant was entitled, in an appeal against a decision to transfer him to another Member State, to argue that there had been an incorrect application of one of the criteria for determining responsibility laid down in Chapter III of the regulation.

86. The factual context was as follows. Mr. Ghezelbash made an application for asylum in the Netherlands, but when a search in the EU Visa Information System (VIS) disclosed that he had previously been granted a French visa, the State Secretary requested the French authorities to take charge of him. This request was accepted. However, Mr. Ghezelbash made further submissions to the Netherlands authorities and requested an opportunity to submit documents which proved that he had returned to Iran from France. The State Secretary rejected Mr Ghezelbash's application for a residence permit for a fixed period on grounds of asylum. Mr Ghezelbash brought court proceedings challenging that decision and produced various items of circumstantial evidence to show that he had in fact returned to Iran after his stay in France, and it was in that context that the CJEU made the general statements of principle above. It should perhaps be noted that *Ghezelbash* did not concern the expiry of any time-periods in respect of take back or transfer under the Regulation, but rather a straightforward application of the Regulation to the facts of his case.

87. Under the previous iteration of the Regulation, the scope of the remedy had been considerably narrower; in *Abdullahi* (C-394/12, EU:C:2013:813, 10 December 2013) it was held that the only way an asylum seeker could challenge the responsibility of a Member State, as Member State of the asylum seeker's first entry into EU territory, was by pleading systemic flaws in the asylum procedure and in the conditions for the reception of asylum seekers in that latter Member State, which provide substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights. The new iteration of the Regulation allowed much more scope for raising legal issues (see paras 32-61of *Ghezelbach*). In *Ghezelbash*, the court said:

> "36. It is apparent from the wording of Article 27(1) of Regulation No 604/2013 that the legal remedy provided for in that article must be effective and cover questions of both fact and law. Moreover, the drafting of that provision makes no reference to any limitation of the arguments that may be raised by the asylum seeker when availing himself of that remedy. The same applies to the drafting of Article 4(1)(d) of that regulation, concerning the information that must be provided to the applicant by the competent authorities as to the possibility of challenging a transfer decision".

88. The court engaged in a detailed examination of the reasons for the expansion of the scope of the remedy, which included the following passages:

> "51. It follows from the foregoing that the EU legislature did not confine itself, in Regulation No 604/2013, to introducing organisational rules simply governing relations between Member States for the purpose of determining the Member State responsible, but decided *to involve asylum seekers in that process* by obliging Member States to inform them of the criteria for determining responsibility *and to provide them with an opportunity to submit information relevant to the correct interpretation of those criteria*, and by conferring on asylum seekers the right to an effective remedy in respect of any transfer decision that may be taken at the conclusion of that process.

52. As regards, second, the objectives of Regulation No 604/2013, it is apparent from recital 9 thereof that, while it confirms the principles underlying Regulation No 343/2003, Regulation No 604/2013 is intended to make the necessary improvements, in the light of experience, not only to the effectiveness of the Dublin system *but also to the protection afforded applicants under that system*, to be achieved, inter alia, by the judicial protection enjoyed by asylum seekers.

53. A restrictive interpretation of the scope of the remedy provided in Article 27(1) of Regulation No 604/2013 might, inter alia, thwart the attainment of that objective by depriving the other rights conferred on asylum seekers by that regulation of any practical effect. Thus, the requirements laid down in Article 5 of the regulation to give asylum seekers the opportunity *to provide information to facilitate the correct application of the criteria for determining responsibility* laid down by the regulation and to ensure that such persons are given access to written summaries of interviews prepared for that purpose would be in danger of being deprived of any practical effect if it were not possible for an incorrect application of those criteria — *failing, for example, to take account of the information provided by the asylum seeker* — to be subject to judicial scrutiny."

89. The discussion culminated in the following (para 61):

"In the light of all the foregoing considerations, the answer to the first question is that Article 27(1) of Regulation No 604/2013, read in the light of recital 19 of the regulation, must be interpreted as meaning that, in a situation such as that in the main proceedings, an asylum seeker is entitled to plead, in an appeal against a decision to transfer him, *the incorrect application of one of the criteria for determining responsibility laid down in Chapter III of the regulation*, in particular the criterion relating to the grant of a visa set out in Article 12 of the regulation."

90. The issue of the time limits in respect of a take charge request was addressed in *Mengesteab v. Germany*, Case C-670/16, 26 July 2017. Here, the Grand Chamber confirmed that the Article 27

remedy permits an applicant for international protection to rely, in the context of an action brought against a decision to transfer him, on the expiry of a period laid down in Article 21(1) of the Regulation, even if the requested Member State is willing to take charge of that applicant. Thus, the general principle is that the time limits are automatic and override any apparent agreement between Member States.

91. That was a case in which Germany had requested Italy to take charge of the applicant but had done so outside the time limits provided for in Article 21. In court proceedings challenging the transfer order made by the German authority for the purpose of transferring him to Italy, Mr. Mengesteab claimed that responsibility for examining his application for international protection had been transferred to Germany because the take charge request had been made only after the expiry of the three-month period provided for in the first subparagraph of Article 21(1).

92. The Court held that Article 21(1) of Regulation No 604/2013 must be interpreted as meaning that a take charge request cannot validly be made more than three months after the application for international protection has been lodged, even if that request is made within two months of receipt of a Eurodac hit within the meaning of that article. Moreover, it clarified that the Article 27 remedy permits an applicant for international protection to rely, in the context of an action brought against a decision to transfer him, on the expiry of a period laid down in Article 21(1) of that regulation, even if the requested Member State is willing to take charge of that applicant.

93. It may be noted that *Mengesteab* concerned a **take charge** and not a take back situation. As we have seen from our examination of the Regulation's provisions, the concepts of take charge and take back, and their associated procedural provisions, are separate and distinct.

94. The question of the time-limit in connection with the implementation of a transfer order following a **take back** request was discussed in *Shiri v Bundesamt für Fremdenwesen und Asyl*, Case C-201/16, 25 October 2017. The automatic nature of the time-limit was emphasised, as was the right

of an applicant to rely upon it as part of his Article 27 remedy. Mr Shiri lodged an application for international protection first in Bulgaria and then in Austria. The Austrian authorities asked the Bulgarian authorities to take Mr Shiri back and the Bulgarian authorities agreed to do so. An order was made for his transfer to Bulgaria. That decision had to be revisited for reasons connected with his health, and a fresh decision was made leading to a second order for his transfer. In court proceedings challenging the transfer order, Mr Shiri submitted that Austria had become the Member State responsible for examining his application for international protection because the six-month period for a transfer, as defined in Article 29(1) and (2) of the Dublin III Regulation, had expired.

95. The CJEU confirmed, applying *Mengesteab*, that the scope of the remedy under Article 27 could encompass an argument as to time periods:

` "40 Accordingly, in order to ensure that the contested transfer decision has been adopted following a proper application of those procedures, the court or tribunal dealing with an action challenging a transfer decision must be able to examine the claims made by an applicant for international protection that that decision was adopted in breach of the provisions set out in Article 29(2) of the Dublin III Regulation in so far as the requesting Member State is said to have already become the Member State responsible on the day when that decision was adopted, on account of the prior expiry of the six-month period as defined in Article 29(1) and (2) of the regulation (see, by analogy, judgment of 26 July 2017, Mengesteab, C 670/16, EU:C:2017:587, paragraph 55)."

96. The CJEU also held that the transfer periods were automatic, saying:

"30 It is apparent from the very wording of Article 29(2) that *it provides for an automatic transfer of responsibility to the requesting Member State, without making that transfer conditional on any reaction by the Member State responsible* (see, by analogy, judgment of 26 July 2017, Mengesteab, C 670/16, EU:C:2017:587, paragraph 61).

31 *That interpretation is, moreover, consistent with the objective, referred to in recital 5 of the Dublin III Regulation, of rapid processing of applications for international protection, in so far as the interpretation ensures, in the event of a delay in the take charge or take back procedure, that the examination of the application for international protection is carried out in the Member State where the applicant is, so as not to delay that examination further* (see, by analogy, judgment of 26 July 2017, Mengesteab, C 670/16, EU:C:2017:587, paragraph 54).

32 That interpretation is also reflected by the rules relating to the carrying out of the transfer set out in Chapter III of Regulation No 1560/2003.

33 Whilst Article 8 of Regulation No 1560/2003 obliges the Member State responsible to allow the asylum seeker's transfer to take place as quickly as possible, no provision of that regulation confers on that Member State the power, after accepting, explicitly or implicitly, a take charge or take back request pursuant to Article 22 or 25 of the Dublin III Regulation, to express a fresh view on its willingness to take charge of or take back the person concerned.

34 In the light of the foregoing, the answer to the second question is that Article 29(2) of the Dublin III Regulation must be interpreted as meaning that, where the transfer does not take place within the six-month time limit as defined in Article 29(1) and (2) of that regulation, responsibility is transferred automatically to the requesting Member State, without it being necessary for the Member State responsible to refuse to take charge of or take back the person concerned."

97. It is important to note in the above passage the connection between the automatic nature of the time-limits and the broader objective of rapid processing of applications. Further, it is clear that the time limits ensure *"that the examination of the application for international protection is carried out in the Member State where the applicant is, so as not to delay that examination further";* this

means that the time-limits may effect a *shift* in responsibility for examining the application from one Member State to another simply by reason of the passage of time.

98. In *X v. Staatssecretaris van Veiligheid en Justitie*, Case C-213/17, 5 July 2018, the Court confirmed the automatic nature of the operation of the time limits relating to **take back** requests in the context of rather complicated facts and multiple applications and appeals. X made several unsuccessful applications for international protection in the Netherlands. Two appeals were unsuccessful and a further appeal against a decision refusing him international protection was pending before the Raad van State (Council of State) when he left the Netherlands, where he had been charged with a sexual offence. He lodged an application for international protection in Italy. He was later surrendered by the Italian authorities to the Netherlands authorities under a European arrest warrant (EAW), with a view to criminal prosecution. [The criminal proceedings were later dropped, and in any event the Grand Chamber would hold that the EAW procedure did not interfere with the procedures in respect of international protection under the Regulation]. *However, Italy did not make any take back request to the Netherlands under the Regulation*.

99. In the Netherlands, a search in the Eurodac system revealed that X had lodged an application for international protection in Italy. Accordingly, the Netherlands requested the Italian authorities to take him back pursuant to Article 18(1)(b) and Article 23(2) of the Dublin III Regulation. *As the Italian authorities did not respond to that take back request within the relevant time period*, the Dutch authority ordered that X be transferred to Italy and ordered him to leave the Netherlands immediately.

100. X brought an appeal against that decision and also lodged a new application for international protection in the Netherlands. By decision of 21 May 2015, the State Secretary rejected that application, considering that it had already been established that Italy was responsible for examining the application for international protection lodged by X. An appeal was then brought by X against that decision before the referring court. Later he was informed that the criminal proceedings against

him had been discontinued. Various questions were referred by the Dutch court concerning the application of the Directive's provisions in this factual context which was complicated by (a) the surrender of the individual pursuant to an EAW and (b) the fact that an appeal was pending on his Dutch application when he made his second application in Italy.

101. Among the questions was whether Article 23(3) of the Regulation should be interpreted as meaning that Italy had become responsible for examining the application for international protection lodged by the applicant in that country by reason of its failure to request the Netherlands to take back X within the relevant time-limit, despite the fact that he had at the time an appeal which was still live in the Netherlands. It was held that Italy was responsible.

102. In the course of its judgment, the Court referred to Directive 2013/32 and said –

"31 Given that Article 46 of that directive provides for the right to bring an appeal against a decision of the competent authority, it must be held that Article 18(1)(d) of the Dublin III Regulation covers, inter alia, cases in which an application for international protection has been rejected by a decision of that authority which has not yet become final.

32 Therefore, the take-back procedure laid down in Article 23 of the Dublin III Regulation is applicable to a third-country national who has lodged a new application for international protection in one Member State although an application for international protection lodged previously in another Member State had been rejected by a decision of the competent authority, even if that decision has not yet become final owing to the bringing of an appeal which is pending before a court of that other Member State.

33 Accordingly, in a situation such as that at issue in the main proceedings, the authorities of the Member State in which that new application was lodged had the power, pursuant to Article 23(1) of that regulation, to make a take back request in respect of the person concerned.

34 However, it was for those authorities, in accordance with Article 23(2) of that regulation, to make that request as quickly as possible and in any event within the periods laid down in that provision, as such a request could not validly be made after expiry of those periods (see, by analogy, judgment of 26 July 2017, Mengesteab, C-670/16, EU:C:2017:587, paragraph 67).

35 It follows from both the wording of Article 23(3) of the Dublin III Regulation and the general scheme and objectives of that regulation that, in the case of the expiry of those periods, responsibility is to be transferred in full to the Member State in which a new application for international protection has been lodged (see, by analogy, judgments of 26 July 2017, Mengesteab, C-670/16, EU:C:2017:587, paragraph 61, and of 25 October 2017, Shiri, C-201/16, EU:C:2017:805, paragraph 30).

36 *That transfer of responsibility cannot be prevented by the fact that another Member State was responsible for examining applications for international protection lodged previously* or the fact that the appeal brought against the rejection of one of those applications was pending before a court of that Member State when those periods expired.

…..

38 It is true that that solution is likely to result in the Member State in which a new application for international protection has been lodged examining that application, even if an examination of an application for international protection lodged by the same person is ongoing or has already been completed in another Member State." (Emphasis added)

103. At para 40, it concluded in answer to the first question referred:

" Accordingly, the answer to the first question is that Article 23(3) of the Dublin III Regulation must be interpreted as meaning that the Member State in which a new application for international protection has been lodged is responsible for examining that application when no take back request has been made by that Member State within the periods laid down in

Article 23(2) of that regulation, even though another Member State was responsible for examining applications for international protection lodged previously and the appeal brought against the rejection of one of those applications was pending before a court of that other Member State when those periods expired."

104. Perhaps the most important decision for present purposes is that in *H&R v. Staatssecretaris van Veiligheid en Justitie*, Joined Cases C-582/17 and C-583/17, 2 April 2019. The Grand Chamber in this detailed judgment discussed all of the following matters:

i. The difference between the take charge and the take back procedures;

ii. The difference between a determination as to which Member State is responsible for examining the application for international protection and an examination of the application for international protection respectively;

iii. Whether the criteria in Chapter III applied in the circumstances of a **take back** request;

iv. The circumstances in which a take back request may be made;

v. The scope of the remedy provided for by Article 27;

vi. The automatic default provisions in the event of certain time-limits being exceeded.

In both cases, an issue arose as to whether or not the criteria in Chapter III ("Criteria for determining the Member State responsible"), specifically Article 9, were relevant in a **take back** situation. It was held that they were not (with one exception, relating to Article 20(5)).

105. In Case C-582/17, H. lodged an application for international protection in the Netherlands. Taking the view that H. had previously lodged an application for international protection in Germany, the State Secretary submitted to the German authorities a take back request pursuant to Article 18(1)(b) of the Dublin III Regulation. The German authorities failed to reply to that take back request within the period prescribed of two weeks. The State Secretary decided not to examine the application for international protection lodged by H. and took the view that, because a take back situation rather than a take charge situation was at issue, H. was not entitled to rely on Article 9 of

the Dublin III Regulation in order to establish the responsibility of the Netherlands on account of her husband's presence in that Member State.

106. In Case C-583/17, R lodged an application for international protection in the Netherlands, and, taking the view that R. had previously lodged an application for international protection in Germany, the State Secretary requested the German authorities to take her back pursuant to Article 18(1)(b) of the Dublin III Regulation. The German authorities initially rejected that application on the grounds that Ms R. was married to a person who was a beneficiary of international protection in the Netherlands. The Staatssecretaris then sent the German authorities a request to reconsider in which it was specified that R.'s marriage to that person was not deemed plausible. On the basis of that application, the German authorities reconsidered their position and agreed, by a decision of 1 June 2016, to take back R. By decision of 14 July 2016, the State Secretary decided not to examine the application for international protection lodged by R., taking the view (i) that R.'s alleged husband could not be regarded as a member of her family, given that R's alleged marriage had been shown to be implausible, and (ii) that R. was not entitled to rely on Article 9 of the Dublin III Regulation, since a take back situation rather than a take charge situation was at issue.

107. The Grand Chamber held that a third-country national who lodges an application for international protection in a first Member State [in these cases, Germany], then left that Member State and subsequently lodged a new application for international protection in a second Member State [in these cases, the Netherlands] is *not in principle entitled to rely* in an action brought under Article 27(1) of the Regulation in that second Member State [here, the Netherlands] *on the criterion for determining responsibility set out in Article 9 of the Regulation* [which is chapter III] against a decision to transfer her. What mattered was whether the provisions of Article 18(1) (b), (c) or (d) were fulfilled. The only exception to that principle was, the Court held, in a take back situation covered by Article 20(5) of the Regulation, in so far as that third-country national has provided the competent authority of the requesting Member State with information clearly establishing that it should be regarded as the Member State responsible for examining the application pursuant to that

criterion for determining responsibility. Article 20(5), of course, concerns situation where the first Member State was still engaged in the (preliminary) process of determining which Member State was responsible.

108. The judgment proceeded in the following manner. The court first addressed the scope of the remedy provided for by Article 27, summarising the principles set out in the previous authorities:

> "38 Article 27(1) of the Dublin III Regulation provides that a person who is the subject of a transfer decision is to have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against that decision, before a court or tribunal.
>
> 39 The scope of that remedy is explained in recital 19 of the Dublin III Regulation, which states that, in order to ensure compliance with international law, the effective remedy introduced by that regulation in respect of transfer decisions must *cover (i) the examination of the application of the regulation and (ii) the examination of the legal and factual situation in the Member State to which the applicant is to be transferred* (judgments of 26 July 2017, Mengesteab, C-670/16, EU:C:2017:587, paragraph 43, and of 25 October 2017, Shiri, C-201/16, EU:C:2017:805, paragraph 37).
>
> 40 In that context, in the light, in particular, of the general thrust of the developments that have taken place, as a result of the adoption of the Dublin III Regulation, in the system for determining the Member State responsible for an asylum application made in one of the Member States, and of the objectives of that regulation, Article 27(1) thereof must be interpreted as meaning that the remedy for which it provides against a transfer decision *must be capable of relating both to observance of the rules attributing responsibility for examining an application for international protection and to the procedural safeguards laid down by that regulation* (see, to that effect, judgments of 26 July 2017, A.S., C-490/16, EU:C:2017:585, paragraphs 27 and 31; of 26 July 2017, Mengesteab, C-670/16, EU:C:2017:587, paragraphs 44 to 48, and of 25 October 2017, Shiri, C-201/16, EU:C:2017:805, paragraph 38).

41 The fact that the transfer decision against which the remedy was exercised was adopted at the end of a take charge or take back procedure is not capable of influencing the scope that that remedy is thus recognised as having.

42 Article 27(1) of the Dublin III Regulation guarantees a right to a remedy both to applicants for international protection, who may be the subject, as applicable, of a take charge or take back procedure, and to the other persons referred to in Article 18(1)(c) or (d) thereof, who may be the subject of a take back procedure, without making any distinction as to the scope of the remedy open to those different categories of applicants.

43 However, *that finding does not imply that a person concerned may rely, in the national court before which such a remedy has been invoked, on the provisions of that regulation which, in so far as they are not applicable to his situation, did not bind the competent authorities when conducting the take charge or take back procedure and adopting the transfer decision*." (Emphasis added)

109. Thus, while the scope of the remedy entitled a person to argue that the authorities did not properly apply the provisions of the Regulation, this raised the question of what provisions properly applied when the authorities were making the relevant decision. There, the question was whether Article 9 (contained within the 'criteria' of Chapter III) applied. The Court framed the question thus:

"44 In this case, it is apparent from the orders for reference that the questions referred arise specifically from the doubts of the referring court on whether, in the situations at issue in the main proceedings, Article 9 of the Regulation is applicable and, therefore, whether the competent Netherlands authorities are obliged to take account, in the context of a take back procedure, of the criterion for determining responsibility set out in that article.

45 In order to reply to those questions, it is therefore appropriate to determine whether the competent authorities are required, in situations such as those at issue in the main proceedings,

to determine the Member State responsible for examining the application by taking into consideration that criterion before they can properly make a take back request."

110. The court pointed out that Articles 23 and 24 apply the take back procedures to persons falling within both Article 20(5) and Article 18 (1) (b), (c) and (d).

111. Regarding the Article 20(5) take back situations, the court confirmed that it encompasses not only situations where (as explicitly referred to in Article 20(5) itself) an applicant has given formal notice to the competent authority of the Member State in which he or she had lodged his or her first application of their wish to abandon that application before that process is completed, but also "*a situation in which an applicant has left that Member State, before the process of determining the Member State responsible for examining the application has been completed, without informing the competent authority of that first Member State of his or her wish to abandon the application and in which, consequently, that process is still ongoing in that Member State*" (para 49); this is because " *an applicant's departure from the territory of a Member State in which he or she lodged an application for international protection should be treated in the same way, for the purposes of applying that provision, as an implicit withdrawal of that application*" (para 50).

112. The Court then moved on to the Article 18 (1)(b) to (d) take back situations. It pointed out that this is premised on the first Member State having already accepted that it is responsible for examining the application and has started to examine that application (as distinct from the preliminary determination of *whether it is responsible).* I will set out certain paragraphs in full because the parties differ as to their interpretation of this judgment. It may be noted that the appellant relies in particular on the italicised portions of paragraph 52 and 66.

" 51 As regards Article 18(1)(b) to (d) of the Dublin III Regulation, it refers to a person who, first, has lodged an application for international protection, which is under examination, has

withdrawn such an application while it is under examination or whose application has been rejected and who, second, has either made an application in another Member State or is staying on the territory of another Member State without a residence document (judgment of 25 January 2018, Hasan, C-360/16, EU:C:2018:35, paragraph 44).

52 Since it is apparent from Article 2(d) of the Regulation that the examination of an application for international protection covers any examination carried out by the competent authorities of an application for international protection, except for the procedure for determining the Member State responsible in accordance with the Regulation, *it must be held that Article 18(1)(b) to (d) thereof can apply only if the Member State in which an application was previously lodged* ***has completed that procedure for determining responsibility by accepting that it is responsible for examining that application*** *and has started to examine that applicatio*n in accordance with Directive 2013/32.

53 It follows from the foregoing that situations such as those at issue in the main proceedings fall within the scope of the take back procedure, irrespective of whether the application for international protection lodged in the first Member State has been withdrawn or whether the examination of that application in accordance with Directive 2013/32 has already started in that Member State."

113. The Court then went on to draw a distinction between the take charge and take back procedures. Turning first to the take charge procedure, it said:

"55 In the framework of the take charge procedure, Article 21(1) of that regulation provides that it is possible for the Member State with which an application for international protection has been lodged to request another Member State to take charge of an applicant only if the first Member State considers that the second is the Member State 'responsible for examining the application', the latter in principle being the Member State indicated by the criteria set out in Chapter III of that regulation.

56 The applicability of those criteria in the framework of the take charge procedure is confirmed by the provisions of Article 22(2) to (5) of that regulation, which regulate, in detail, the examination of the elements of proof and circumstantial evidence enabling those criteria to be applied and which set out the standard of proof required to establish that the requested Member State is responsible.

57 It follows from those factors that, *in the framework of the take charge procedure, the process of determining the Member State responsible for examining the application on the basis of the criteria set out in Chapter III of the Dublin III Regulation is of crucial importance* and that the competent authority of the Member State with which an application has been lodged may send another Member State a request for charge to be taken of the applicant only where that authority considers that that other Member State is responsible for examining that application (see, to that effect, judgment of 7 June 2016, Ghezelbash, C-63/15, EU:C:2016:409, paragraph 43)."

114. However, the take back procedures are different:

"58 However, the same is not true of the take back procedure, since that procedure is governed by provisions differing substantially, in that regard, from the provisions governing the take charge procedure.

59 Thus, in the first place, Article 23(1) and Article 24(1) of the Dublin III Regulation provide for the option of submitting a take back request when the requesting Member State considers that another Member State is '*responsible in accordance with Article 20(5) and Article 18(1)[(b) to (d)*]' of that regulation, and *not when it considers that another Member State is 'responsible for examining [the] application'*."

115. Thus, the word "responsible" has different meanings in different provisions of the Regulation:

"60 It follows, as the Commission observed at the hearing, that the *term 'responsible' is used in Article 23(1) and in Article 24(1) of the Dublin III Regulation differently from the manner in which it is used in Article 21(1) of the Regulation*, in so far as it does not relate specifically to the responsibility to examine the application for international protection. Indeed, it is apparent from Article 18(2) and Article 20(5) of the Regulation that the purpose of the transfer of a person to the Member State bound by an obligation to take back is not necessarily to complete the examination of that application.

61 Thus, in accordance with Article 23(1) and Article 24(1) of the Dublin III Regulation, the exercise of the option to submit a take back request presupposes *not that the responsibility of the requested Member State to examine the application for international protection is established, but that that Member State satisfies the conditions laid down in Article 20(5) or Article 18(1)(b) to (d) of the Regulation.*

62 It is clear from the very wording of Article 20(5) of the Regulation that the obligation to take back that it establishes is imposed on 'the Member State with which that application for international protection was first lodged'. Accordingly, the criteria for determining responsibility set out in Chapter III of the Regulation cannot serve to identify that Member State."

116. The Court explained why this must be so:-

"63 Moreover, to make implementation of the obligation to take back conditional on the completion, in the requesting Member State, of the process of determining the Member State responsible for examining the application, for the purpose of verifying that that responsibility lies with the Member State referred to in Article 20(5) of the Regulation, *would run counter to the very logic of that provision*, since the latter specifies that the purpose of the taking back of the applicant imposed on that Member State is to enable the latter 'to complet[e] the process of determining the Member State responsible'.

64 The Court has moreover already held that that provision sets out specific obligations on the first Member State with which an application for protection has been lodged, that Member State thus being granted a special status by the Dublin III Regulation (see, to that effect, judgment of 26 July 2017, Mengesteab, C-670/16, EU:C:2017:587, paragraphs 93 and 95).

65 As regards Article 18(1)(b) to (d) of that regulation, it is indeed apparent from its `wording that the obligations that it sets out are imposed on 'the Member State responsible'.

66 Nonetheless, as was found in paragraphs 52 and 53 of this judgment, the obligations to take back laid down in those provisions are applicable *only if the process of determining the Member State responsible for examining the application set out by the Regulation has previously been completed* in the requested Member State and it resulted in that State's acknowledging that it was responsible for examining that application.

67 In such a situation, since responsibility for examining the application *has already been established, it is no longer necessary to re-apply the rules governing the process of determining that responsibility, foremost among which are the criteria set out in Chapter III of the Regulation.*"

117. The Court added that Article 25, which concerns "Replying to a take back request" supported this analysis:-

"68 Article 25 of the Dublin III Regulation bears out, in the second place, the lack of relevance of the criteria for determining responsibility set out in Chapter III thereof in the framework of the take back procedure.

69 While Article 22(2) to (5) of the Dublin III Regulation sets out in detail how those criteria must be applied in the framework of the take charge procedure, it must be stated that Article 25 thereof contains no similar provision and merely requires the requested Member State to make the necessary checks in order to give a decision on the take back request.

70 The *simplified nature of the take back procedure* is moreover borne out by the fact that *the time limit laid down in Article 25(2) of the Regulation to act upon a take back request is*

significantly shorter than the time limit laid down in Article 22(7) thereof to act upon a take charge request."

118. The Court drew further support from the standard forms provided for in the Annexes to the Regulations:-

"71 In the third place, the foregoing interpretation is supported by the standard forms for take charge and take back requests set out in Annex I and Annex III to Regulation No 1560/2003, respectively.

72 Whereas the standard form for *take charge requests* provides that the requesting Member State must, by ticking a box, mention the *relevant criterion for determining responsibility and provides the opportunity to supply the information necessary to check whether that criterion has been satisfied,* the standard form for *take back requests* requires *only that the requesting Member State indicate whether its request is based on Article 20(5) or Article 18(1)(b), (c) or (d)* of the Dublin III Regulation, and *does not contain any section relating to the criteria for determining responsibility set out in Chapter III of that regulation*."

119. The Court referred to the general scheme of the Regulation which had clearly provided for two different mechanisms in respect of take charge and take back-

"73 It should be pointed out, in the fourth place, that the opposite interpretation, according to which a take back request may be made only if the requested Member State can be designated as the Member State responsible pursuant to the criteria for determining responsibility set out in Chapter III of the Dublin III Regulation, is at variance with the general scheme of that regulation.

74 That interpretation would ultimately mean that the take charge and take back procedures must be conducted in exactly the same way in almost every respect and that they form, in

practice, a single procedure making it necessary, first of all, to determine the Member State responsible for examining the application on the basis of those criteria for determining responsibility, and then, secondly, to submit to that Member State a request whose substantive correctness it will have to assess on the same basis.

75 However, *if the EU legislature had intended to set up such a single procedure, it would not logically have chosen to establish, in the actual structure of that regulation, the existence of two separate procedures,* applicable to different situations, set out in detail, and which are the subject of different provisions."

120. Finally, the Court said that the opposite interpretation would undermine the Regulation's objectives:-

"76 In the fifth and last place, the interpretation mentioned in paragraph 74 of this judgment would also be liable to undermine the achievement of certain objectives of the Dublin III Regulation.

77 That interpretation would imply, in the cases referred to in Article 18(1)(b) to (d) of that regulation, that the competent authorities of the second Member State could re-examine, de facto, the conclusion reached, at the end of the process for determining the Member State responsible for examining the application, by the competent authorities of the first Member State regarding its own responsibility, in so far as the persons concerned leave the territory of that Member State after it has started examining their applications, which *would risk encouraging third-country nationals who submitted an application for international protection in a Member State to travel to other Member States, thereby causing secondary movements of people* which is specifically what the Dublin III Regulation seeks to prevent by establishing uniform mechanisms and criteria for determining the Member State responsible (see, by analogy, judgments of 17 March 2016, Mirza, C-695/15 PPU, EU:C:2016:188, paragraph 52, and of 13 September 2017, Khir Amayry, C-60/16, EU:C:2017:675, paragraph 37).

78 The interpretation mentioned in paragraph 74 of this judgment could, moreover, have the consequence of undermining the essential principle of the Regulation, set out in Article 3(1) thereof, according to which *an application for international protection must be examined by a single Member State only*, in a situation where the process of determining responsibility carried out in the second Member State leads to an outcome different from that reached in the first Member State.

79 Moreover, the re-examination — which might, depending on the circumstances, be repeated on several occasions — of the outcome of the process for determining the Member State responsible, in a context where the application of the Regulation and effective access to an international protection procedure have already been ensured, *would undermine the objective of the rapid processing of applications* for international protection, mentioned in recital 5 of the Regulation.

80 *It follows that, in the cases referred to in Article 23(1) and Article 24(1) of the Dublin III Regulation, the competent authorities concerned are not required, before making a take back request to another Member State, to establish, on the basis of the criteria for determining responsibility laid down by the Regulation and in particular of the criterion set out in Article 9 thereof, whether that latter Member State is responsible for examining the application*."

121. The Court envisaged one exception as follows;_

"81 Nonetheless, it should be pointed out that, in the cases referred to in Article 20(5) of the Dublin III Regulation, a possible transfer could then, in principle, occur without it previously having been established that the requested Member State is responsible for examining the application.

82 Accordingly, following such a transfer and on completion, in that Member State, of the process for determining the Member State responsible, it cannot be ruled out that a transfer, in the opposite direction, to the Member State which had previously requested that the

applicant be taken back might have to be envisaged. Moreover, as the German Government and the Commission observed, in the light of the time limits laid down in Article 21(1) of the Regulation, it is probable that, at the end of that process, a take charge request can no longer properly be made by the Member State which had previously been required to take back that applicant.

83 With this in mind, it should be observed that the criteria for determining responsibility set out in Articles 8 to 10 of the Regulation, read in the light of recitals 13 and 14 thereof, are intended to promote the best interests of the child and the family life of the persons concerned, which are moreover guaranteed in Articles 7 and 24 of the Charter of Fundamental Rights. In those circumstances, a Member State cannot, in accordance with the principle of sincere cooperation, properly make a take back request, in a situation covered by Article 20(5) of the regulation, *when the person concerned has provided the competent authority with information clearly establishing that that Member State must be regarded as the Member State responsible for examining the application pursuant to those criteria for determining responsibility. In such a situation, it is, on the contrary, for that Member State to accept its own responsibility.*"

122. There was much debate between the parties as to how the judgment in *H&R* applied to the present situation and as to the meaning of particular passages. I will return to this in the last section of this judgment. However, we may note at this point that the appellant contends that the court in *H&R* held that the condition for an Article 18(1)(b) or (d) take back request was *only* satisfied if there had been a *determination* that the requested State (here, Sweden) had responsibility for examining the application, and that it would not suffice if the requested Member State had acquired responsibility by the operation of one of the time-limit default mechanisms.

123. Finally, the parties referred the Court at the oral hearing to a decision of the First Chamber in *Staatssecretaris van Justitie en Veiligheid v B, F, and K*, Joined Cases 323/21, 324/21 and 325/21, 12 January 2023 which had been handed down after the High Court decision and which concerns the

operation of the time-limits in respect of take back requests and transfers in the Regulation in the context of scenarios where an applicant has made multiple applications for international protection in different Member States, sometimes more than once in the same Member State. The court said in its judgment:

> "55 Those time limits make *a decisive contribution to achieving the objective of rapidly processing applications for international protection* set out in recital 5 of the Dublin III Regulation, by ensuring that those procedures will be implemented *without undue delay*, and testify to the *particular importance which that legislature has attached to the rapid determination of the Member State responsible* for the examination of an application for international protection and to the fact that, having regard to the aim of ensuring effective access to the procedures for granting international protection and of not compromising the objective of rapid processing of applications for international protection, the EU legislature regards it as essential that *such applications are, when necessary, examined by a Member State other than the one designated as being responsible pursuant to the criteria set out in Chapter III of that regulation* (see, to that effect, judgment of 13 November 2018, X and X, C 47/17 and C 48/17, EU:C:2018:900, paragraphs 69 and 70).
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> 56 It follows, in the first place, that the mandatory time limits laid down in Article 23(2) of the Dublin III Regulation must be complied with both by the second and by the third Member State with which an application for international protection was lodged by a third-country national, where those Member States make a take back request.
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> 57 However, since some of the cases at issue in the main proceedings relate to situations in which a third-country national has lodged a number of applications for international protection in the same Member State, it should be noted that, where an applicant makes a new application for international protection in a Member State after that Member State has adopted a decision to transfer that applicant, the implementation of that decision remains, in principle, possible, without it being necessary for that Member State to lodge a new take back request, even if that

applicant has, in the meantime, lodged an application for international protection in another Member State.

58 If a transfer decision were not to be recognised as having such an effect, that would enable any third-country national against whom a transfer decision has been adopted by a Member State *to evade definitively the implementation of that decision* before it has been able to take effect, by lodging an application for international protection in another Member State, then returning to the first Member State, *at the risk of paralysing completely the mechanism* for processing applications for international protection established by the Dublin III Regulation and *jeopardising the attainment of the objective of rapidly processing those applications.*"

124. Later in its judgment, the court said:

"77 Second, as regards the situation in which the transfer of responsibility for examining the application for international protection to a Member State other than the requested Member State took place after a take back request made by a third Member State has been accepted, it should be borne in mind, first, that the Dublin III Regulation is based on the essential principle, set out in Article 3(1), that an application for international protection must be examined by a single Member State only, which means that *a single Member State may be considered to be, **at a given moment**, the Member State responsible for examining an application for international protection* (see, to that effect, judgment of 2 April 2019, H. and R., C 582/17 and C 583/17, EU:C:2019:280, paragraph 78)."

Analysis and Conclusions

121. The information obtained from an interrogation of the Eurodac system showed the following:

(i) The appellant had made his first application for international protection in Belgium on 10th November 2015.

(ii) The appellant had made a second application for international protection in Sweden one week after he had applied in Belgium, on the 17th November 2015.

(iii) The appellant had made a third application for international protection in the United Kingdom on 22nd July 2020, four years after he applied in Sweden, and shortly before he applied in Ireland.

(iv) He made his fourth application for international protection in Ireland in August 2020.

122. Ireland made take back requests to the United Kingdom and Sweden; the former was rejected, and the latter was accepted. No request was made by Ireland to Belgium. The appellant maintains that the proper procedure would have been for Ireland to make a single take back request to Belgium and that the provisions of the Regulation, as interpreted by the CJEU, were not applied and accordingly the decision to transfer him to Sweden is invalid and should be quashed. He argues, in what appears to be an alternative argument, that even if Ireland was entitled to make multiple take back requests, it should have included Belgium in those requests, and the latter's acceptance of the request would have taken priority under the Regulation over any other Member State's acceptance of a take back request. The point common to both of these arguments is that there should have been a request to Belgium, and there was not.

123. It is key to the appellant's argument to note that his focus is on Ireland's take back request, not on Sweden's acceptance of it. He does not argue that Sweden was in any way incorrect to accept the take back request. Indeed, he submits that a reading of the Regulation's take back provisions suggests that Sweden was correct in accepting the take back request. His argument is that Ireland did not follow the correct procedure for making a take back request as laid down in the Regulation (not that Sweden incorrectly accepted the take back request), and that a request should have been made to Belgium.

124. There is perhaps an irony in the fact that the appellant, who told the Irish authorities that he never made any international protection application in Belgium, is now contending that Belgium is the only Member State to which a take back request should have been made (or at the very least, that an application should have been made to Belgium and its acceptance would have taken priority over any acceptance by Sweden). The fact that the appellant had applied in Belgium emerged from Eurodac and not from his own account. Be that as it may, the appellant's argument is made on the basis of the facts that were known to the Irish authorities when they made the take back request.

125. As we have seen in the summary of the appellant's submissions, his argument that a take back request should have been made to Belgium was a relatively complex one, based in part on a close reading of the judgment of the CJEU in *H&R*. I hope I am not doing it any disservice by summarising it as follows:

a. The question of whether a Member State has properly accepted a take back request is separate and distinct from whether a Member State may make the request in the first place. What is in issue in these proceedings is the latter i.e. the legal validity of Ireland's approach to the take back request and its failure to make a take back request of Belgium, not whether Sweden correctly accepted the take back request. The validity of Sweden's acceptance of the request to take back the appellant is neither relevant nor in dispute.

b. The Irish authorities learned (after they submitted the take back requests to Sweden and the United Kingdom) that Sweden had previously *in fact* examined and rejected the appellant's application for international protection; but they have no knowledge as to *why* Sweden undertook to examine his application (in circumstances where one would have thought, at first sight, that Belgium should have done so as the first Member State in which he claimed international protection, according to Eurodac).

c. At a theoretical level, there are a number of possibilities as to how or why Sweden came to examine the application for international protection, including the operation of default provisions (Articles 23 and 29); however, the possibilities *also* include a scenario in which the Regulation was incorrectly applied back in 2015/2016; for example, Belgium may have wrongly refused to accept a take back request from Sweden (and curiously it appears that there is no remedy if a requested Member State wrongly refuses to accept a take back request).

d. At a practical level, given that this particular appellant spent only about a week in Belgium before he arrived in Sweden (the two Eurodac hits in 2015 being only one week apart), it seems likely that Belgium was in the process of determining what Member State was responsible when the appellant made his second application in Sweden in 2015. Under the Regulation, the correct procedure at that time would have been for Sweden to issue a take back request to Belgium on the basis of Article 23 and Article 20(5). However, we simply do not know whether this happened or not, or how it came about that Sweden examined (and rejected) his application.

e. There is no evidence that any Member State ever made a positive *determination* as to who was responsible for examining the application. This is important because the judgment in *H&R* (especially paras 52 and 66) lays down that the conditions in Article 18 (1)(b) to (d) are only satisfied if there was a prior *determination of responsibility.* There being no evidence here of any prior determination that Sweden was responsible for examining the application, the conditions for making a take back request were not satisfied.

f. If Sweden became responsible for examining the application by *default* through the automatic operation of the time-limit provisions in Article 23 or 29, the condition for making a take back request from Sweden under Article 23/Article 18(1)(d) would not have been satisfied.

g. Similarly, if Sweden came to examine the application through a misapplication of the Regulation, the condition for making a take back request from Sweden would not have been satisfied.

h. Ireland should have made inquiries (pursuant to Article 34) as to how and why Sweden came to examine his application.

i. Further, Ireland should have made a single take back request to Belgium. However, even if Ireland was entitled to make multiple take back requests, the acceptance by Belgium of any take back issued by Ireland to it would have taken priority over an acceptance by any other country because of the importance accorded by the Regulation and the caselaw of the CJEU to the Member State in which an application for international protection is first made. Either way, Ireland should have made a take back request to Belgium.

126. As already noted the appellant relies in particular on paragraphs 52 and 66 of the *H&R* judgment in support of his argument that (i) there must have been a positive determination of responsibility before the conditions in Article 18(1)(b) or (d) may be satisfied, and (ii) that attribution of responsibility by operation of default provisions is not sufficient to satisfy the conditions in Article 18(1)(b) or (d). The two passages from H&R are here set out again for ease of reference -

> "52 Since it is apparent from Article 2(d) of the Regulation that the examination of an application for international protection covers any examination carried out by the competent authorities of an application for international protection, except for the procedure for determining the Member State responsible in accordance with the Regulation, it must be held that *Article 18(1)(b) to (d) thereof can apply only if the Member State in which an application was previously lodged has completed that procedure for determining responsibility by accepting that it is responsible for examining that application* and has started to examine that application in accordance with Directive 2013/32

….

66 Nonetheless, as was found in paragraphs 52 and 53 of this judgment, the obligations to take back laid down in those provisions are applicable only *if the process of determining the Member State responsible for examining the application set out by the Regulation has previously been completed* in the requested Member State and it resulted in that State's acknowledging that it was responsible for examining that application."

The answer lies in the correct interpretation of Articles 23 and 18(1)(b)-(d)

127. I would start my analysis by noting that although the Article 27 remedy (of which these judicial review proceedings are an expression) is broad in scope, as was made clear in the CJEU authorities, it is subject to the following (and important) parameters as expressed by the court in *H&R*:–

> "[T]hat finding [as to the broad scope of the Article 27 remedy] does not imply that a person concerned may rely, in the national court before which such a remedy has been invoked, on the provisions of that regulation which, in so far as they are not applicable to his situation, did not bind the competent authorities when conducting the take charge or take back procedure and adopting the transfer decision". (para 43)

What, then, bound the Irish authorities when they were considering to whom they should address the take back request?

128. Article 23 and its interpretation is where the answer must lie. It provides that where a Member State with which a person as referred to in *Article 18(1)(b), (c) or (d)* has lodged a new application for international protection considers that another Member State is *responsible in*

accordance with Article 20(5) and Article 18(1)(b), (c) or (d), it may request that other Member State to take back that person. But what exactly does this mean?

What Article 23 does <u>not</u> mean

129. Two things are entirely clear. <u>First,</u> it is clear that the *acceptance* by a Member State (here, Sweden) of a take back request is not determinative as to whether or not the request was properly made in the first place by the requesting State (here, Ireland) and/or whether the condition(s) in Article 23/Article 18(1)(d) was satisfied. (Incidentally and for the avoidance of doubt, I do not think that the High Court judge ever said it was). One has to focus on whether the condition(s) in Article 23/Article 18(1)(d) was satisfied in order to determine the validity of the take back request.

130. Secondly, the word "responsible" in Article 23 has a very particular meaning which was clarified by the Grand Chamber in *H&R*. What it does *not* mean is that the requesting Member State has to satisfy itself that the requested Member State was the correct Member State to carry out the examination of the international protection examination. The Grand Chamber clearly stated: *"Article 23(1) and Article 24(1) of the Dublin III Regulation provide for the option of submitting a take back request when the requesting Member State considers that another Member State is 'responsible in accordance with Article 20(5) and Article 18(1)[(b) to (d)]' of that regulation, and not when it considers that another Member State is 'responsible for examining [the] application'*." (para 59). Otherwise, as the court pointed out, the distinction between the take back and take charge procedures would collapse. The whole point of the take back procedure is that it is a relatively simple procedure, and as the court pointed out, the official forms provided for the two respective procedures underscore that, as does the short time-frame for the take back request to be made, accepted and implemented. In a take back situation, the requesting Member State does not have to (and should not) engage in a process of determining which is the Member State responsible for examining the

application: it merely considers whether the conditions in Article 18(1)(b)-(d) or Article 20(5) are satisfied. So far, so good. I will return below to the outstanding question of interpretation that arises where a Member State may have become responsible through the operation of default provisions/time-limits. But first, I wish to address one particular scenario posited by the appellant, namely that of a possible misapplication of the Regulation (in 2015 or thereabouts) by Belgium.

The theoretical possibility of a misapplication of the Regulation at an early stage

126. The appellant emphasised that the Irish authorities had no knowledge of how it came about that the international protection application was ultimately examined by Sweden (and rejected). He suggested that at first sight it seemed surprising that Sweden and not Belgium had done so, given that Belgium was the first Member State in in which the appellant had made an application (and there was no suggestion that any of the Chapter III criteria such as family members in the EU applied). Counsel argued that it was entirely possible that there had been a misapplication of the Regulation prior to the examination by Sweden of the application. He gave the example of Sweden making a take back request of Belgium and the latter wrongly refusing it. He emphasised those passages in the caselaw of the CJEU which makes clear that the Article 27 remedy entitles an applicant to ensure that the rules laid out in the Regulation are/were properly applied.

127. I would start by observing that the appellant has failed to produce any evidence whatsoever to suggest that there may have been a misapplication of the Regulation by Sweden and/or Belgium at an earlier stage in the process.

128. The Tribunal argued that, if necessary, the Court should rely on the principle of mutual trust as between Member States in support of a presumption that Sweden had properly applied the Regulation, citing a discussion of the principle in *Jawo v. Germany*, Case C-163/17, 19 March 2019. The appellant's response was that reliance on any such presumption in the present context would be misplaced, and that the CJEU had repeatedly made clear that the remedy to which he was entitled

permitted him insist upon the Regulations being properly implemented. He also submitted that even if there was any such presumption, it could be rebutted but that it would be impossible for him to produce evidence to do so, as he had no access to the information systems and channels available to the authorities of Member States and it was unfair to expect him to produce evidence to rebut any presumption that the Regulation had been properly applied by Sweden and Belgium. He argued that in those circumstances, the Irish authorities should have made inquiries to uncover the actual background as to how Sweden came to examine the application.

129. I accept that the appellant had no access to the information systems and channels available to the Irish authorities, but this is explanatory only up to a point. The appellant must have at least *some* further information that he could have put forward if he wished to raise the issue of a possible misapplication of the Regulation by Sweden and/or Belgium. For example, when did he receive a decision from Sweden on his application, and what did it say, even in broad terms? Did it explain why it was accepting responsibility for examining the application? Was there any reference to Article 17 and the exceptional acceptance of jurisdiction? Had he claimed system flaws or inhuman or degrading treatment in Belgium? Was there any reference to such matters in the decision rejecting his application? Did he appeal against Sweden's decision to examine the application? Did he appeal against the rejection of his application? (Article 46 of the 2013 Regulation gives him a clear and unequivocal right to do so). If he claims not to have received any document(s) from the Swedish authorities concerning his application, why was that: had he changed addresses? And so on. Even accepting the point that the appellant does not have access to the systems and information channels available to Member States' authorities, he must nonetheless have *some* information as to what happened regarding his Swedish application; but he has shared none of this with the Irish authorities or courts. He has, as a matter of evidence, put forward nothing at all to suggest that there was a misapplication of the Rules by Sweden and/or Belgium.

130. I do not see any need to engage with the possibility of a misapplication of the Regulation in circumstances where an appellant posits an entirely theoretical scenario in which the requested

Member State may have misapplied the Regulation, without his having adduced or pointed to any evidence at all to support his theory other than the bare fact that he arrived in Belgium first.

131. In that regard, it may be relevant to observe that the Grand Chamber in *Ghezelbash*, when discussing the broad scope of the Article 27 remedy, referred several times to the need "*to provide them [the applicants] with an opportunity to submit information relevant to the correct interpretation of those criteria*". Thus, the court appears to have envisaged that the remedy should be used to facilitate applicants who are forthcoming with information in support of their applications, not to enable applicants to stay silent and then rely upon the authorities' ignorance of the facts as a basis for impugning the validity of their decisions. In *Ghezelbash* itself, for example, the applicant submitted documents which proved that he had returned to Iran from France, in support of his case that he had left the EU for more than three months before making application to the Netherlands and that there had been a misapplication of the Regulation to the facts of his case. No evidence has been forthcoming from the appellant in support of his theoretical scenario in which Belgium might have erroneously refused to take him back upon being so requested by Sweden.

132. I also do not accept the appellant's suggestion that on the facts of this case, it is more likely than not that there was a misapplication of the Regulations at an earlier stage by Sweden and/or Belgium, by reason of the fact that Belgium was the first Member State in which he arrived and yet it was Sweden which examined his application. The entirely obvious, and entirely regular, explanation for why Sweden may have assumed responsibility for examining the application under the Regulation, is that Sweden failed to make a take back request within the relevant time-period; or that, having done so, and it having been accepted by Belgium, Sweden failed to transfer within the relevant period. There is no evidence as to which if any of these scenarios occurred as a matter of fact, but I see no reason whatsoever to make the assumption that the more likely scenario is that which was non-Regulation compliant, as the appellant urges the Court to do. On the contrary, my view is that the Court should proceed on the basis that Sweden's assumption of responsibility resulted from a correct application of the principles under the Regulation, by reason of the general

principle of mutual trust as between the Member States operating the Dublin III system and the absence of any evidence to the contrary.

133. Accordingly, in my view, Ireland was entitled to assume that the other Member States had correctly applied the Regulation prior to Sweden's examination of the Regulation.

134. This brings us to what is perhaps the key question in this case: whether the condition for making a valid take back request in Article 23/Article 18(1)(d) would *not* be satisfied if Sweden's assumption of responsibility for examining the application (in or about 2015/2016) had arisen from the operation of a default provision/time-limit in the Regulation.

Whether the condition for making a valid take back request in Article 23 would not be satisfied if Sweden's assumption of responsibility for examining the application (in or about 2015/2016) arose from the operation of a default provision/time-limit in the Regulation

135. The appellant maintains that the Grand Chamber in *H&R* made it clear that a Member State making a request under the take back procedure with reference to Article 18 (1)(b)-(d) need *not* satisfy itself that the requested Member State was the one with responsibility for examining the application. This was because the Grand Chamber envisaged that in those scenarios there would have been a "positive determination" that the Member State which in fact examined the application was indeed the one with responsibility for the application. He relies on the language of the Grand Chamber, particularly at the paragraphs set out above for the proposition that a positive determination must have been made for the proposition to apply. The kernel of his argument is that

it would not suffice if a Member State had examined the application in circumstances where, instead of a positive determination of responsibility, it had become responsible merely by reason of the passage of time and the automatic operation of a default provision.

136. In my view, the emphasis placed by the appellant on the reference in *H&R* to prior determinations of responsibility represents an over-literal approach to certain passages in that particular judgment, without sufficient account being taken of the Grand Chamber's emphasis on the distinction between the take charge and take back procedure, the relatively simple and speedy nature of the take back procedure, and the importance of the automatic time-limits/default provisions in the caselaw of the CJEU as a whole.

137. As Sweden in fact carried out the examination of the international protection application here, it must at that time have been of the view that it had responsibility for doing so. As concluded earlier in this judgment, absent evidence to the contrary, this Court should accept that the Regulation was properly applied by Sweden in reaching this conclusion. When Sweden undertook to conduct the examination, there was in that event an implicit determination that it was the Member State with responsibility at that point in time. I would consider that when the Grand Chamber in *H&R* referred to a prior 'determination' that the Member State examining the application had responsibility for doing so, this includes not only an explicit determination of responsibility but also an implicit determination, such as the one inherent in the very fact that the Member State (Sweden) commenced and carried out the examination. Further, I see no reason to interpret the Grand Chamber's words as intending to exclude an explicit or implicit determination of responsibility based upon the automatic/default provisions based on the passage of time. The point being made by the Grand Chamber was that a Member State making a take back request concerning an Article 18(1)(b) to (d) situation need not question whether the requested State was the correct Member State at that time precisely because it was a take back and not a take charge situation, hence the speedy process for doing so. The appellant's contention comes dangerously close to requiring Ireland to do precisely that which the Grand Chamber said it should *not* do: namely, to satisfy itself that Sweden was in fact

the correct Member State to conduct the examination when it conducted the examination. In my view, Ireland does not have to do so. It should accept that the Member State which undertook to examine the application had determined implicitly or explicitly that it was the right Member State to do so at that moment in time, and it should accept (absent evidence to the contrary) that the Member State correctly applied the Regulation, including the default provisions, in reaching its conclusion that it should examine the application.

138. If the appellant were correct, unless there was positive evidence of a formal determination that Sweden was the Member State appropriate to conduct the examination for some reason other than the default provisions, Ireland should make a take back request to Belgium, which would have been accepted. This would have resulted in Belgium having to conduct an examination of the application, or at the very least of a determination as to which Member State should conduct the examination, some five years after the appellant left Belgium and despite the fact that Sweden actually conducted an examination already and completed it. The scheme of the Regulation as a whole and the caselaw of the CJEU places considerable importance on the relatively speedy disposal of applications for international protection, and of take back applications. While there is of course an emphasis in the caselaw on the importance of the Article 27 remedy, and the entitlement of applicants to insist upon the rules being correctly applied, the entirety of the regime set out by the Regulation affords an important role to the time-limits and the automatic shifting of Member State responsibility when a time-limit has expired.

139. This latter point concerning the balance to be struck was discussed by the CJEU in *B, F & K*, albeit in the context of the extended time limit for transfer in Article 29. The normal deadline under Article 29 for transfer is six months, but a Member State may extend that deadline to a period not greater than 18 months in the event that the applicant absconds or is imprisoned. The outer limit of 18 months applies absolutely, however. In *B, F & K*, the Court said that this absolute cut-off limit was "*an expression of the balance struck by the EU legislature between the different objectives of the Dublin III Regulation and the competing interests involved*" (para 68). The default provisions,

therefore, play an important role in the overall scheme and the balance it strikes between competing interests, one of which is the needs for swift disposal of applications for international protection.

140. Given the importance of the default provisions in the overall scheme of things under the Regulation, it seems to me inconceivable that it was intended that the language used by the Grand Chamber in *H&R* in its interpretation of the Article 23/ 18(1)(b)-(d) take back procedure would *exclude* a take back request to a Member State which in fact had examined in international protection application merely because it may have assumed responsibility because of the operation of the default provisions. While the CJEU in *H&R* did use the language of a prior "determination" of responsibility (and not assumption of responsibility by default through passage of time), this may have been because the paradigm case of accepting responsibility for the examination of an international protection case involves a positive determination by a Member State that it has responsibility (and the *H&R* case did not involve a complicated, multi-State, lengthy set of facts). I do not think the CJEU thereby intended, however, to exclude from the operation of Article 23 certain situations where a Member State assumed responsibility for examining the international protection application as a result of the time limit/default provisions. The overall thrust of the judgment, and the individual matters discussed by the CJEU at paras 68-80 of its judgment (described above), support the conclusion that the take back procedure was intended to be a relatively simple one which does not involve the requesting Member State becoming embroiled in trying to determine which Member State bore responsibility for examining the international protection application.

141. I also note that in *B, F & K*, the court said at para 73 that "*a transfer of responsibility for examining the application for international protection lodged by a third-country national, arising from the application of Articles 23 or 29 of the Dublin III Regulation, must be duly taken into account by all the Member States when implementing any take back procedures relating to that applicant*." I accept that this was not a judgment of the Grand Chamber, as was the judgment in *H&R,* but I

would see that view as fitting comfortably within the overall scheme as described in *H&R*, and as supporting the conclusion I have reached.

142. Accordingly, I would reject the appellant's argument that the condition in Article 23/Article 18(1)(b)-(d) would not have been satisfied if it were the case that Sweden had become responsible for examining the application by virtue of one of the default provisions in Article 23 or 29. I take the view that Sweden must have *determined* (implicitly or explicitly) that it had responsibility for examining the application; otherwise it would not have embarked on the process of examination. This fulfils the requirement of Articles 23 and 18(1)(b)-(d) as articulated by the Grand Chamber in *H&R.* Further, I conclude that the fact that the determination may have been arrived at because of the operation of the default provisions does not rob the determination of its necessary quality for the purpose of an Article 23/18(1)(b)-(d) request.

143. I should add that in my view the interpretation contended for by the appellant does not raise an issue such as to require a preliminary reference to be sent to the CJEU. In my opinion the existing authorities of the CJEU clearly provide the answer to the question posed.

The question of multiple requests

144. I express no view as to whether Ireland should have made multiple requests to different Member States as it is not necessary to do so for the purpose of this appeal. The question arising in these proceedings is whether it was permissible for Ireland to issue a take back request to Sweden. In my view, it was entitled to issue a take back request to Sweden because the conditions in Articles 18(1)(b)-(d) and 23 were satisfied by reason of the *fact* that Sweden had previously examined the application and thereby must have made a prior *determination* albeit an implicit one that it was the Member State responsible for examining the application, even if it became responsible through the operation of the default/time-limit provisions. Ireland could equally have submitted a take back request to Belgium (presumably with reference to Article 20(5)), but the fact that Belgium may also

have satisfied the conditions in Article 18(1)(b)-(d) and 23 does not mean that Sweden was thereby excluded from satisfying those conditions. I do not accept the appellant's argument as to the priority of Belgium, which again, seems to me to come dangerously close to suggesting that Ireland should satisfy itself that Belgium was itself the appropriate Member State to examine the application.

Outcome

145. For all of the above reasons, I would dismiss the appeal.

146. As the respondent has been entirely successful in this appeal, my provisional view is that the costs should be awarded to the respondent(s). The appellant is entitled to seek a short hearing on costs to contend otherwise if he so wishes (and such indication should be given to the Registrar within two weeks of this judgment being delivered).

147. As this judgment is being delivered electronically, I wish to record the agreement of my colleagues Donnelly J. and Noonan J. with it.