Neutral Citation Number: [2020] EWHC 967 (Admin)

Case No: CO/5712/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 April 2020

Before :

THE HONOURABLE MR JUSTICE MURRAY

- -

Between :

THE QUEEN (ON THE APPLICATION OF MUKUR TIKABO HABTE)	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Ms Louise Hooper (instructed by **Duncan Lewis Solicitors**) for the **Claimant**
Mr Alan Payne QC (instructed by the **Government Legal Department**) for the **Defendant**

Hearing date: 29 January 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email and release to BAILII. The date and time for hand-down is deemed to be 10:00 am on 23 April 2020.

Mr Justice Murray :

1. This is an application by the claimant, Mr Mukur Habte, a national of Eritrea, for judicial review of the decision of the defendant, the Secretary of State for the Home Department, of 6 September 2016 ("the Decision") to transfer him to Italy under Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) ("Dublin III" or "the Regulation").

2. In these judicial review proceedings, Mr Habte also seeks to challenge the defendant's decision to detain him on immigration grounds between 4 October 2016 and 18 November 2016 pending his transfer to Italy. That aspect of the claim, however, is currently stayed, pending the defendant's consideration of her position in light of the judgment of the Supreme Court in *R (Hemmati) v Secretary of State* [2019] UKSC 56, [2019] 3 WLR 1156, which was handed down on 27 November 2019.

The issues

3. The fundamental question raised by this claim is whether the United Kingdom became the Member State responsible under the terms of Dublin III for processing the claimant's application for international protection (asylum claim) as a consequence of the defendant's having "examined" his asylum claim by conducting an asylum interview with the claimant on 17 June 2016.

4. The claimant says that this aspect of his judicial review claim raises at least three issues for the court to determine. The defendant accepts that the first two issues arises for decision by the court but says that the third issue raised by the claimant is now academic for reasons I will revert to in due course. The three issues are:

    i) whether, by conducting a substantive asylum interview with the claimant on 17 June 2016, the defendant conducted an "examination of an application for international protection" within the meaning of Article 2(d) of Dublin III;

    ii) whether, as a result of conducting a substantive asylum interview with the claimant on 17 June 2016, responsibility for the claimant's asylum claim was transferred to the UK under Article 17(1) of Dublin III; and

    iii) whether, if a Member State, in error, makes a decision to examine an asylum claim, that decision can be rescinded and, if so, what the consequences of that rescission are for determining which Member State is responsible under Dublin III for determining the asylum claim.

Background

5. The claimant is a national of Eritrea, born on 6 September 1997. At some point he travelled to Italy, where he was fingerprinted by the Italian immigration authorities on 7 October 2015. He subsequently made his way to Calais.

6. The claimant arrived in the UK on 3 February 2016 concealed in a lorry. According to the claimant, he claimed asylum in the UK on that day. The defendant says that he claimed asylum on 11 February 2016, when he was interviewed by the defendant at the Asylum Intake Unit in Croydon. Nothing turns on this timing difference for present purposes.

7. At his interview on 11 February 2016, the claimant disclosed he had been fingerprinted on his journey. He did not know in which country that had happened, but he thought that it had probably occurred on 6 October 2015. A Eurodac fingerprint match record of 3 February 2016 confirms that the claimant was fingerprinted at Cremona in Italy on 7 October 2015.

8. The claimant explained he had travelled from Eritrea via Sudan and Libya and then travelled by ship to Italy. He spent a night in Italy and then travelled to France on 7 October 2015. He stayed in Calais for about four months and then travelled by lorry to the UK arriving on 3 February 2016.

9. On 20 March 2016, on the basis of Article 13(1) of Dublin III, the UK made a request to Italy under Article 21 to Italy to "take charge" of the claimant for purposes of determining his asylum application. The UK received no response from Italy within that two-month period. Under Article 22(1) Italy was required to give the UK its decision on the request to take charge of the claimant within two months of receipt of the UK's request, that is, by 20 May 2016. Italy, however, did not do so. Under 22(7) Italy's failure to respond within the two-month period was:

> "… tantamount to accepting the request, and entail[ed] the obligation to take charge of the person, including the obligation to provide for proper arrangements for arrival."

In other words, from 20 May 2016 Italy was deemed responsible under Dublin III for determining the claimant's asylum claim.

10. On 6 June 2016 the defendant sent a letter to the claimant inviting him to attend at Lunar House in Croydon on 17 June 2016 at 9:00 am for "an interview … to discuss your claim for asylum, eligibility for Humanitarian Protection and human rights claim in the United Kingdom". The defendant says that this invitation to interview was issued in error by a unit of the Home Office not responsible for compliance with Dublin III.

11. On 17 June 2016 the claimant was interviewed in respect of his asylum claim, giving a history of his religious beliefs and experiences of persecution in Eritrea, during the course of an interview which consisted of 126 questions and which concluded at 12:55 pm.

12. On 6 September 2016 the defendant wrote to the relevant Italian authority requesting acknowledgement of Italy's responsibility for the claimant owing to Italy's failure to comply with the time limit in Article 22(1). On the same day the defendant wrote to the claimant to notify him of her decision ("the Decision"), challenged by this claim, that she considered that under paragraph 8(1)(c) of the Schedule 2 to the Immigration Act 1971 he was returnable to Italy and that therefore it was appropriate for her to decline to examine his asylum application substantively as there was a safe third

country, Italy, to which he could be sent. In the Decision, the defendant certified that the conditions mentioned in paragraphs 4 and 5 of Part 2 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 were satisfied, namely, that (i) it was proposed to remove the claimant to Italy and (ii) in the defendant's opinion the claimant was not a national or citizen of Italy.

13. On 4 October 2016 the claimant was taken into immigration detention. On 28 October 2016 the claimant was served with notice of removal and removal directions, with the removal date set for 11 November 2016.

14. Following pre-action protocol correspondence, the claimant lodged judicial review proceedings on 10 November 2016. The defendant cancelled the removal directions.

15. On 15 November 2016 the claimant amended his grounds for judicial review.

16. The claimant was released from immigration detention on 18 November 2016. As I have already noted, the detention part of this claim is stayed.

Procedural history

17. On 7 February 2017 on a review of the papers Roger ter Haar QC, sitting as a Deputy High Court Judge, refused the claimant permission to apply for judicial review. On 6 April 2017 at a hearing to consider the claimant's renewed application, Robin Purchas QC, sitting as a Deputy High Court Judge, granted permission.

18. On 7 July 2017 Leigh-Ann Mulcahy QC, sitting as a Deputy High Court Judge, granted the application of the defendant dated 16 June 2017 to vacate the substantive hearing of this claim that was then listed on 19 July 2017 and gave directions for the hearing of the defendant's application of a stay of proceedings pending a decision of the Court of Justice of the European Union (CJEU) in *Fathi v Predsedatel na Darzhavna agentsia za bezhantsite* (Case C-56/17) and pending decisions of the Court of Appeal in *R (HK) v Secretary of State for the Home Department* (C4/2016/3323, 3324, 3325, 3153, 2996) and *Abdulkadir v Secretary of State for the Home Department* (C4/2016/4307, 3946) in relation to the unlawful detention part of the claim.

19. At a hearing on 2 November 2017, Michael Kent QC, sitting as a Deputy High Court Judge, refused the application to stay the claim pending the decision of the CJEU in the *Fathi* case, granted the stay of the unlawful detention part of the claim pending the decisions of the Court of Appeal in *HK* and *Abdulkadir* and gave directions for the service of amended grounds of claim and amended detailed grounds of defence following delivery of the Court of Appeal's judgment in *HK*.

20. On 4 October 2018 the CJEU handed down its decision in *Fathi*. On the same day the Court of Appeal handed down its decision in the conjoined appeals of the High Court's decisions in *HK* and *Abdulkadir* under the name *R (Hemmati) v Secretary of State for the Home Department* [2018] EWCA Civ 2122, [2019] QB 708 (CA).

21. The substantive hearing of Mr Habte's claim was eventually listed for 11 December 2018, but that hearing was vacated by order of Martin Spencer J on 4 December 2018, with further directions given for written submissions in relation to the future conduct

of the claim, including whether there should be a stay of the unlawful detention part of the claim.

22. By a consent order approved by the court on 26 February 2019 directions were agreed:

    i) for the relisting of the claimant's judicial review claim in relation to the legality of his transfer to Italy under Dublin III, permitting the parties to amend their respective grounds following the CJEU's decision in the *Fathi* case and giving directions as to skeleton arguments and the hearing bundle; and

    ii) staying the claimant's challenge to the lawfulness of his detention, pending the final determination of the appeal to the Supreme Court of the Court of Appeal's decision in the *Hemmati* case, with directions permitting the parties to make further amendments to their grounds, following the Supreme Court's decision in *Hemmati*.

23. The claimant filed amended grounds for judicial review on 18 November 2019. The defendant filed amended detailed grounds of defence on 3 December 2019.

24. As noted at [2] above, the Supreme Court's decision in the *Hemmati* case was handed down on 27 November 2019. The parties agreed to a further stay of the unlawful detention part of this claim while the defendant considers her position in light of that decision.

Dublin III

25. Dublin III is one of the principal pillars of the EU's Common European Asylum System (CEAS). Dublin III establishes the criteria and mechanisms that Member States are required to apply in determining which State is responsible for examining an application for international protection lodged in a Member State by a third-country national or a stateless person.

26. Recitals 4 and 5 of Dublin III make clear that:

> "(4) … the CEAS 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."

27. Dublin III is arranged in Chapters:

i) Chapter I (Articles 1-2) states the subject matter of the Regulation and sets out various definitions. Article 2(d) is an important definition for this claim:

> " '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;"

ii) Chapter II (Articles 3-6) sets out general principles and safeguards. Article 3(1) provides:

> "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."

Article 4 sets out an applicant's right to information regarding the status of their application for international protection in relation to the procedures under Dublin III, including (a) the criteria for determining the Member State responsible for their application, (b) the organisation of a personal interview with the applicant for the purposes of Dublin III (regarding which Article 5 applies), (c) the possibility that the applicant has of submitting information to the competent authorities, (d) how to challenge a transfer decision, (e) how to apply for a suspension of transfer and (f) other matters.

iii) Chapter III (Articles 7-15) sets out a set of criteria designed to determine which Member State is responsible for taking charge of an asylum claim from a third-party national or stateless person, where it has not been previously examined or determined, or taking back the person, where the claim has been previously withdrawn or determined. Article 7(1) makes it clear that the criteria are mandatory. Article 13(1) provides:

> "1. 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."

iv) Chapter IV (Articles 16-17) deals with dependent persons and discretionary clauses. Of particular relevance to this claim is Article 17, which is known as the "sovereignty clause" and confers a wide discretion on each Member State. Article 17 provides:

> "*Article 17*
>
> **Discretionary clauses**
>
> 1. By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation.
>
> The Member State which decides to examine an application for international protection pursuant to this paragraph shall become the Member State responsible and shall assume the obligations associated with that responsibility. Where applicable, it shall inform, using the 'DubliNet' electronic communication network set up under Article 18 of Regulation (EC) No 1560/2003, the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of, or to take back, the applicant.
>
> 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."

v) Chapter V (Articles 18-19) sets out the obligations of a Member State in relation to a third-country or stateless asylum applicant and the circumstances in which the Member State's responsibilities cease.

vi) Chapter VI (Article 20-33) deals in detail with the procedures relevant to a Member State taking charge of or taking back an application for international protection from a third-country national or stateless person. Of particular relevance to this claim are Articles 21(1), 22(1) and 22(7):

"*Article 21*

Submitting a take charge request

1. Where a Member State with which an application for international protection has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible and in any event within three months of the date on which the application was lodged within the meaning of Article 20(2), request that other Member State to take charge of the applicant.

Notwithstanding the first subparagraph, in the case of a Eurodac hit with data recorded pursuant to Article 14 of Regulation (EU) No 603/2013, the request shall be sent within two months of receiving that hit pursuant to Article 15(2) of that Regulation.

Where the request to take charge of an applicant is not made within the periods laid down in the first and second subparagraphs, responsibility for examining the application for international protection shall lie with the Member State in which the application was lodged.

…

Article 22

Replying to a take charge request

1. The requested Member State shall make the necessary checks, and shall give a decision on the request to take charge of an applicant within two months of receipt of the request.

…

7. Failure to act within the two-month period mentioned in paragraph 1 … shall be tantamount to accepting the request, and entail the obligation to take charge of the person, including the obligation to provide for proper arrangements for arrival."

Article 27(1) provides that an applicant for international protection from a Member State should have a right to an effective remedy in the form of an appeal or review, in fact and in law, before a court or tribunal against a transfer decision made by a Member State. Such a right did not exist in the prior European instruments dealing with this subject matter. The remainder of Article 27 sets out detailed provisions to ensure that the right to a remedy is

effective, for example, by ensuring that the applicant has access to legal and linguistic assistance.

vii) The remaining Chapters of Dublin III are:

a) Chapters VII (Articles 34-36) dealing with matters of administrative cooperation between Member States, including information sharing;

b) Chapter VIII (Article 37), setting out a conciliation mechanism for resolving disputes between Member States arising under the Regulation; and

c) Chapter IX (Articles 38-49), setting out transitional and final provisions in relation to a variety of matters that do not require specific consideration in this claim.

28. Both the claimant and the defendant consider that the *Fathi* case is relevant to this claim, but they disagree as to how it applies. The claimant considers that it supports his case. The defendant considers that *Fathi* can be distinguished, but that it does set out relevant principles regarding the operation of Dublin III, and the purpose and effect of Article 17 within that scheme, that support her case.

29. In *Fathi*, Mr Bahtiyar Fathi, an Iranian national of Kurdish origin, applied to the Bulgarian authorities for international protection. Bulgaria considered and rejected his application without having expressly decided that it was the Member State responsible for determining his application under Dublin III. Mr Fathi sought to challenge that decision before the Bulgarian court, which stayed the proceedings and referred the matter to the CJEU for a preliminary ruling on various questions, including concerning the interpretation of Dublin III.

30. In *Fathi* the CJEU concluded at paragraph 56 that:

> "56. … article 3(1) of the Dublin III Regulation must, in a situation such as that in the main proceedings, be interpreted as not precluding the authorities of a member state from conducting an examination on the merits of an application for international protection, within the meaning of article 2(d) of that Regulation, where there is no express decision by those authorities determining, on the basis of the criteria laid down by the Regulation, that the responsibility for conducting such an examination lies with that member state. "

31. In reaching that conclusion, the CJEU made the following observations at paragraphs 51 and 53:

> "51. … [W]ith regard to the wording of article 3(1) of the Dublin III Regulation, it must be pointed out that that provision does not expressly require the member state on whose territory an application for international protection has been lodged to adopt, expressly, a decision establishing that it is responsible

> under the criteria laid down in that Regulation, nor does it specify the form that such a decision should take.
>
> ...
>
> 53. Further, article 17 of the Dublin III Regulation, headed "Discretionary clauses", provides specifically, in paragraph 1, that, by way of derogation from article 3(1) of that Regulation, each member state may decide to examine an application for international protection lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in that Regulation, and that that member state becomes the member state responsible and is to assume the obligations associated with that responsibility. The court has noted in that regard that the aim of that option is to allow each member state to decide, in the exercise of its sovereignty, for political, humanitarian or practical considerations, to agree to examine an application for asylum even if it is not responsible under those criteria … ."

Issue 1: Did the defendant conduct an "examination of an application for international protection" within the meaning of Article 2(d) of Dublin III?

32. Ms Louise Hooper, of counsel, on behalf of the claimant, submitted that the conduct of a substantive asylum interview, as occurred on 17 June 2016, falls clearly within the principal part of the definition of "examination of an application for international protection" in Article 2(d) of Dublin III and does not fall within the exception, in that definition, for "procedures for determining the Member State responsible in accordance with this Regulation".

33. Ms Hooper submitted that the definition in Article 2(d) of Dublin III requires there to be an "examination of, or decision or ruling concerning" the relevant asylum claim. The detailed interview with the claimant that took place on that day was, without doubt, an examination of his application for international protection. It is not necessary that there be a decision or ruling on the application.

34. Mr Alan Payne QC, on behalf of the defendant, accepted that interviewing a person in connection with their claim for asylum is an act falling within the definition in Article 2(d) of Dublin III. He denied, however that it amounted to a decision to: (i) examine the application for the purposes of Article 17 of Dublin III; (ii) decide the application; or (iii) assume responsibility for the application under Dublin III.

35. I agree with both Ms Hooper and Mr Payne that the conduct of the substantive asylum interview with the claimant on 17 June 2016 falls within the scope of the words "examination of … an application for international protection". The real issue is, of course, the consequence of falling within that definition. That is the second issue arising on this part of this judicial review claim, to which I now turn.

Issue 2: Did the conduct of the substantive asylum interview with the claimant have the effect of transferring responsibility for his asylum claim to the UK?

36. Ms Hooper submitted that Article 3(1) of Dublin III allocates responsibility for examining an asylum claim by a third-country national or stateless person to a single Member State, to be determined according to the criteria set out in Chapter III of Dublin III. Article 17(1) of Dublin III provides a derogation from Article 3(1) such that a Member State may, as an exercise of its sovereignty, "decide to examine an application for international protection" that has been lodged with it by a third-country national or stateless person, even though responsibility for doing so has not been allocated to it under the criteria set out in Chapter III.

37. Ms Hooper noted that Article 17(1) of Dublin III confers a very wide discretion on each Member State, as confirmed by Singh LJ in *RSM (Eritrea) v Secretary of State for the Home Department* [2018] 1 WLR 5489 at [170]-[171]. She submitted that there is no requirement for a Member State to demonstrate that there are factors that are compelling or sufficiently compelling before assuming responsibility, in contrast to the position taken by the defendant in her Detailed Grounds of Defence at paragraphs 64-68.

38. Ms Hooper submitted that if the defendant conducted an examination of the claimant's asylum claim, then she clearly must have decided to do so. The defendant made a decision to invite the claimant to a substantive interview in relation to his asylum claim at a specific place on a specific date at a specific time. She made a decision to send that invitation by letter to the claimant. The interview was then conducted by Home Office staff on her behalf. Accordingly, Ms Hooper submitted, it cannot be denied that the UK is a Member State "which decide[d] to examine an application for international protection" pursuant to Article 17(1) of Dublin III, with the necessary consequence that it became the Member State responsible for that asylum claim, assuming all of the obligations associated with that responsibility, as required by Article 17(1). The UK was not obliged to examine the claimant's asylum claim, but, having done so, it became responsible for determining that claim.

39. Ms Hooper further submitted that the case of *Fathi* makes clear there is no requirement for a formal or express decision by the UK to accept responsibility under Article 17(1). It is sufficient that a decision was made to examine the claimant's application for international protection, as evidenced by the conduct of the substantive asylum interview on 17 June 2016.

40. Ms Hooper noted that the CJEU reached its decision in *Fathi* after considering submissions from the UK, among other Member States. She submitted that the relevant conclusions are set out in *Fathi* at paragraph 51-56 and can be summarised as follows:

    i) Article 3(1) of Dublin III does not expressly require the Member State on whose territory an application for international protection has been lodged to adopt, expressly, a decision establishing that it is responsible under the criteria laid down in the Regulation, nor does it specify what form that such a decision should take (paragraph 51);

ii) the safeguards set out in Article 4 of Dublin III include notifying the applicant of the fact that "an application for international protection lodged in one Member State can result in that Member State becoming responsible under that regulation, even if such responsibility is not based on those criteria" (paragraph 52);

iii) by way of derogation from Article 3(1) each Member State has a wide discretion to "examine an application for international protection" even if such examination is not its responsibility under the criteria (paragraph 53);

iv) no specific procedural safeguards are provided for in circumstances where a Member State decides not to transfer an applicant to another Member State (paragraph 54);

v) one of the objectives of Dublin III was to ensure the rapid determination of the Member State responsible so as to guarantee effective access to the procedures for granting international protection and not to compromise the objective of processing applications for international protection expeditiously (paragraph 55); and

vi) in light of the foregoing factors, a Member State is not precluded from conducting an examination of the merits of an application for international protection within the meaning of Article 2(d) of the Regulation where there is no express decision by those authorities determining, on the basis of the criteria laid down by the Regulation, that the responsibility for conducting such an examination lies with that Member State (paragraph 56).

41. Ms Hooper submitted that the foregoing conclusions of the CJEU in *Fathi* are entirely consistent with paragraphs 22-24 of the written submissions of the UK dated 31 May 2017, submitted to the CJEU pursuant to Article 23 of the Protocol on the Statute of the Court of Justice of the European Union and Article 96(1)(b) of the Rules of Procedure of the Court of Justice:

> "22. The United Kingdom submits that a Member State, in the exercise of its discretion under Article 17(1) of the Dublin III Regulation, may issue a decision that constitutes an examination of an application made to it within the meaning of Article 2(d) of the Regulation, without expressly deciding on the responsibility of that Member State under the criteria set out in Chapter III. Indeed, this is what Article 17 expressly dispenses with.
>
> 23. Further, it is not necessary that each applicant should receive a notification expressly stating that a Member State has decided to examine its request. What is required under the Dublin III Regulation is, *inter alia*, information about the system (Article 4), and notification of the decision to transfer, in the event of such a transfer in circumstances where another Member State has accepted responsibility to examine a

> request (Article 26). The United Kingdom considers that to interpret Article 17(1) of the Regulation as requiring, by way of a preliminary step, that a specific and formal decision … to examine a claim, in principle, must be made would be [to] introduce an unnecessary formalistic stage in the examination procedure. If the legislature had intended that such a preliminary decision was required to be made, it would have made this clear in the text of Article 17 itself.
>
> 24. Thus, under Article 17(1) of the Dublin III Regulation a Member State may exercise its discretion to decide to examine an application for international protection lodged with it by a third-country national or stateless person irrespective of whether it is otherwise responsible to undertaken such an examination pursuant to the criteria in Chapter III of the Regulation."

42. Ms Hooper submitted that the defendant's pleaded case in these judicial review proceedings, at paragraphs 48 to 54 of the Detailed Grounds of Defence, directly contradicts these written submissions of the UK to the CJEU in the *Fathi* case. She submitted that no explanation has been given for the change in the government position and that for the defendant, in her defence of this claim, now to argue the contrary is an abuse of the process of the court.

43. Ms Hooper submitted, in summary, that the evidence shows that the UK made a decision to examine the claimant's application for international protection on or about 6 June 2016 when the defendant invited the claimant to a substantive asylum interview, which was confirmed when that decision was implemented by conducting that interview on 17 June 2016. The *Fathi* case makes clear that this had the effect of transferring responsibility for the claimant's asylum claim to the UK, without the need for an express decision on responsibility having been made under Article 17(1) of Dublin III. As at 6 September 2016, the date of the Decision, the claimant could not be lawfully transferred to Italy under Dublin III, and therefore the Decision must be quashed.

44. In response to these submissions, Mr Payne submitted that there is nothing in Article 17 or in any other provision of Dublin III that has the consequence that an act by a Member State falling within Article 2(d) *without more* transfers responsibility to that Member State under Article 17(1). He submitted that, to the contrary, it is clear from Article 17(1) that it is only engaged when a Member State "decides to examine an application for international protection *pursuant to this paragraph*", emphasising those last four words. The decision to interview the claimant was not taken *pursuant to* Article 17(1).

45. Mr Payne also submitted that there is no basis under Dublin III for concluding that a decision to interview an applicant for asylum amounts to a decision to examine their asylum claim. Dublin III sets out in prescriptive terms various actions and time limits that have the effect of allocating responsibility for an asylum claim to a Member State. There is no provision in Dublin III that provides that interviewing an applicant

for asylum has that effect nor is there any reason, considering the objectives of Dublin III, why the act of interviewing an applicant for asylum should result in a transfer of responsibility for the asylum claim.

46. Mr Payne submitted that the *Fathi* case does not support the claimant's position. In *Fathi* the CJEU were considering a case where a claim for asylum had been determined and the Dublin III process had not been undertaken. In this case, the claim has yet to be determined, and the Dublin III process has been undertaken. Italy has been identified as the responsible Member State under Dublin III. There is no reason not to proceed with the transfer of Mr Habte to Italy.

47. Mr Payne submitted further that the *Fathi* case is entirely inconsistent with the claimant's case. In *Fathi* at paragraph 53, the CJEU made it clear that Article 17(1) of Dublin III is intended:

> "to allow each member state to decide, in the exercise of its sovereignty, for political, humanitarian or practical considerations, to agree to examine an application for asylum even if it is not responsible under those criteria … ."

48. Mr Payne submitted that fixing a Member State with responsibility for determining a claim for asylum in circumstances where the Member State has not taken a decision under Article 17(1) of Dublin III and where there are no "political, humanitarian or practical considerations" of sufficient weight to justify departing from the normal Dublin III process would be contrary to the purpose and nature of Article 17(1) as a derogation from the ordinary procedures.

49. Mr Payne submitted that the issue in this case is whether the defendant has exercised her discretion under Article 17(1). The defendant's position is that this requires a decision taken pursuant to that provision, which has not happened in this case. There is no issue, as there was in *Fathi*, as to whether a decision on an asylum claim is invalidated by the lack of a decision under Article 17. There has been no decision on the claimant's asylum claim. The defendant accepts, in accordance with *Fathi*, that a substantive decision by a Member State on an asylum claim is not invalidated by the absence of a formal or express decision under Article 17.

50. Mr Payne submitted that the defendant's position in this case is not inconsistent with the written submissions of the UK in the *Fathi* case. He notes that the UK said the following in its written submissions to the CJEU in the *Fathi* case:

> "32. It is the United Kingdom's view that the fact that a further procedural step had been initiated, for example, that a Member State authority has set a date for (or even conducted) an interview in order to make a preliminary assessment on the substance of the claim does not indicate that a Member State has assumed responsibility for the examination of the claim."

51. Mr Payne submitted that it is fundamentally inconsistent with the nature of a discretionary provision for it to be engaged where there has been no exercise of that discretion. Article 17(1) provides a derogation from the usual requirement, provided

for in Article 3 of Dublin III, that a Member State shall apply the hierarchy of criteria set out in Chapter III to determine the responsible Member State.

52. In my judgment, the decision by the defendant to conduct a substantive interview with the claimant on 17 June 2016 in respect of his asylum claim, whether or not that decision was made "in error", is not sufficient to amount to a decision by the defendant, on behalf of the UK, to exercise the discretion conferred by Article 17(1) of Dublin III. It is common ground that the conduct of the interview falls within the words of Article 2(d), but Mr Payne is correct to say that that, without more, is not sufficient to engage Article 17(1). The decision of the defendant, on behalf of the UK, needs to be taken pursuant to that provision. There is no evidence in this case that that happened.

53. Article 17(1) involves the exercise of the sovereign discretion of a Member State to derogate from the otherwise prescriptive provisions of Article 3 and Chapter III of the Regulation. *Fathi* makes it clear that no formal or express decision is required under Article 17(1), but there must be evidence that a decision has been taken in substance that engages with the purpose of Article 17(1), as summarised in *Fathi* at paragraph 53. There needs to be an exercise of sovereignty for the purpose of Article 17(1).

54. In *Fathi* the exercise of sovereignty engaging Article 17(1), without a formal or express decision under that provision having been made, was the making of an actual decision on the application for international protection in that case, namely, to reject it. That was a clear assumption of responsibility by the relevant Member State, Bulgaria, for Mr Fathi's application for international protection.

55. In this case, the defendant made a decision in June 2016 to invite the claimant for a substantive asylum interview. The defendant now says that that decision was made in error. Whether or not the invitation was issued in error, the key question is whether that invitation alone provides a sufficient evidential basis for concluding that the UK, through the defendant, intended to exercise its sovereign discretion under Article 17(1) for the purpose of that provision, namely, to assume responsibility for the claimant's application for international protection, by way of derogation from the normal Dublin III provisions for the allocation of Member State responsibility. In my view, that invitation is clearly not sufficient on its own to indicate that the UK had exercised its discretion under Article 17(1).

56. I conclude, therefore, that neither the invitation to the claimant made on 6 June 2016 to attend a substantive asylum interview with the claimant nor the conduct of that interview on 17 June 2016 was sufficient to engage the responsibility of the UK for the claimant's application for international protection, absent any other evidence that the defendant had decided to examine the claimant's application for international protection pursuant to Article 17(1) with a view to derogating from the normal procedure under Dublin III for allocating to a Member State responsibility for an asylum claim of a third-party national or stateless person.

57. For the purposes of this claim, I do not need to decide how wide the discretion is under Article 17(1) and whether, for example, it must be for "compelling" or "sufficiently compelling" reasons. I also do not need to decide whether a Member State can only exercise its discretion under Article 17(1) if it can justify that exercise

by reference to "political, humanitarian or practical considerations", although the CJEU in *Fathi* at paragraph 53 appears to suggest such a limitation. It seems to me, however, unlikely that a Member State would exercise its discretion to assume responsibility for an asylum claim other than for one or more of those reasons.

58. It follows that I agree with Mr Payne's submission that the *Fathi* case can be distinguished, for the reasons he gave, and that the written submissions of the UK to the CJEU in the *Fathi* case are not inconsistent with the position being taken by the defendant in this case.

59. During the hearing I was taken by both counsel to various internal Home Office documents, and there was discussion about allocation of responsibility between different units of the Home Office, in particular, as between the UK Dublin/Third Country Unit responsible for the UK's compliance with Dublin III and the unit that arranged and conducted Mr Habte's substantive asylum interview on 17 June 2016. There were also submissions about the significance of the fact that no letter was sent to Mr Habte indicating that the UK had assumed responsibility for his asylum claim under Dublin III and whether or not that normally happened. I consider that most of that evidence and those submissions were concerned primarily with the third issue, but, in any event, I was taken to nothing which indicated that the defendant had taken a decision in substance to exercise the sovereign discretion conferred by Article 17(1).

Issue 3: Can a Member State rescind an erroneous decision to examine an application for international protection and, if so, what are the consequences?

60. Turning to the third issue, the defendant says that the question of whether a Member State can rescind an erroneous decision to examine an application for international protection is now academic, given that the claimant has indicated at paragraph 42 of the claimant's skeleton argument for this hearing that he accepts, for present purposes, that there was no decision by the UK under Article 17 of Dublin III. I note, however, that the claimant accepted at paragraph 42 of his skeleton argument that there was no "express" decision under Article 17.

61. In any event, whether or not the third issue is now academic, it is clear that, in light of my conclusion in relation to issue 2, I do not need to consider whether a Member State can rescind an erroneous decision to examine an application for international protection.

Conclusion

62. The claimant's application for judicial review of the Decision is dismissed.