

**HIGH COURT  
JUDICIAL REVIEW**

[2022] IEHC 198  
**RECORD NO. 2022/134/JR**

**BETWEEN:**

**AHY**

**APPLICANT**

**AND**

**THE MINISTER FOR JUSTICE**

**RESPONDENT**

**JUDGMENT of Mr Justice Cian Ferriter delivered this day 31st of March 2022**

**Introduction**

1. The applicant is a Somalian national who arrived in the State from Sweden. He claimed international protection here. He was the subject of a “take back” request to the Swedish authorities under the provisions of Council Regulation (EC) No. 604/2013 (the “Dublin III Regulation”). Sweden agreed to that request. The applicant was, in consequence, furnished with a notice of decision to transfer to Sweden. He appealed that decision to the International Protection Appeals Tribunal (“IPAT”). IPAT refused his appeal and affirmed the decision to transfer. The applicant was then instructed by the respondent’s Department to present to the Garda National Immigration Bureau (GNIB) on 16th December 2021 to make arrangements for his transfer to Sweden not later than 6th April 2022.
2. On 15th November 2021 the applicant applied to the respondent (“the Minister”) for discretionary leave to have his international protection claim determined in the State pursuant to article 17 of the Dublin III Regulation. He also requested, if article 17 relief were to be denied, that he be granted an undertaking that no further action would be taken to transfer him pending any judicial review application he may make.
3. The Minister did not substantively respond to that application and so the applicant issued judicial review proceedings against the Minister (High Court record number 2021/1058JR) in which he sought leave to apply for an order of mandamus to compel the Minister to make a determination in respect of his article 17 request, and an injunction restraining any steps in relation to his removal from the State pending the determination of those proceedings (“the first judicial review proceedings”).
4. The High Court directed that the applicant’s leave application in the first judicial review proceedings be heard on notice to the Minister. The leave application was scheduled for hearing on 24th February 2022. Shortly before that hearing, on 16th February 2022, the Minister gave her decision on the article 17 application, refusing that application.
5. The applicant then issued these judicial review proceedings (“the second judicial review proceedings”) in which he seeks leave to challenge the article 17 decision and an injunction restraining his removal from the State pending the determination of this judicial review.

6. As the first judicial review proceedings were effectively overtaken by the event of the article 17 decision, I gave directions at the hearing before me on 24th February 2022 that the leave application in the second judicial review proceedings would proceed before me, on notice to the Minister, on 15th March 2022. Written submissions were exchanged on the issues in the second judicial review proceedings in advance of that hearing.
7. As will become clear, the applicant seeks a reference to the CJEU in respect of a number of questions as to the proper interaction between articles 17, 27 and 29 of the Dublin III Regulation. The potential need for such a reference had been flagged by the Court of Appeal in a very recent Dublin III case (*BK v Minister for Justice* [2022] IECA 7 Collins J, 19 January 2022) ("BK") which, as it happens, was a decision on an appeal from a judgment which I delivered in November 2021 - see [2021] IEHC 717.
8. Before addressing the legal issues arising, it is necessary to say a little more about the factual background.

### **Background**

9. The applicant is a national of Somalia, born on 21st October 1987. He arrived in the State on 20th January 2020 and applied for international protection the next day on the basis that he had been subject to a bomb attack in Somalia which destroyed his shop and killed one of his employees. He claims to have scars on his hands and arm arising from this attack.
10. A EURODAC search resulted in two Category 1 search hits with Sweden for 5th November 2012 and 2nd October 2017, which disclosed that he had lodged an application for international protection in Sweden on those dates.
11. On 5th February 2020, he was interviewed under Article 5 of the Dublin III Regulation. He described that he left Somalia on 3rd October 2012 using a false passport. He flew to Nairobi, Kenya, and arrived in Stockholm, Sweden on 5th November 2012. He was fingerprinted on that date.
12. Sweden refused his asylum application on 5th November 2012. He remained there for eight years before travelling on a false Swedish passport to Ireland. He has no family members anywhere in the Dublin III countries, including Sweden.
13. On 17th February 2020, the IPO made a take back request to Sweden under article 18(1)(b) of the Dublin III Regulation. Sweden agreed to accept responsibility on 19th February 2020.
14. On 12th March 2020, the IPO informed the applicant that Sweden had accepted responsibility and that he may submit "*further information including humanitarian grounds*" which he considered to be relevant within 10 days. No submissions were furnished.
15. The applicant was then issued with a "*Notice of decision to transfer application to another Member State*" dated 23rd July 2020.

16. The applicant filed a Notice of Appeal with IPAT against this transfer decision on 5th August 2020. He submitted three Grounds of Appeal: (i) this would be an appropriate case for the exercise of article 17 discretion (ii) he was awaiting treatment in the State for pain due to injuries sustained from an explosion in Somalia, and he suffers from depression, which would render it unconscionable to separate him from his support network in the State (iii) he feared detention in Sweden if returned. Country of origin information ("COI") in respect of this last ground was furnished.
17. He further advised IPAT that SPIRASI had informed him on 16th June 2021 that he would be recommended for a medico-legal report in respect of his health concerns.
18. His appeal hearing before IPAT took place on 8th July 2021. On 5th October 2021, IPAT affirmed the decision to transfer him under Regulation 6(9) of the Dublin System Regulations (S.I. 62 of 2018) ("the 2018 Regulations").
19. Subsequently, on 8th November 2021 the Minister's Department instructed the Applicant to present to the GNIB on 16th December 2021 to make arrangements for his transfer "not later than 06/04/2022."
20. On 15th November 2021, BKC Solicitors made an application to the Minister on the applicant's behalf for article 17 discretionary relief. BKC requested that the applicant not be transferred to Sweden in light of Covid-19 emergency restrictions and/or because of a change in his personal circumstances including a risk of suicide in the event of such transfer.
21. BKC enclosed a SPIRASI medico-legal report dated 15th October 2021 ("Dr. Giller's first report"), which had not been available to IPAT, in which Dr. Joan Giller, psychotherapist, set out as follows:

*"Further to my letter of 29 September 2021, I saw Mr Y. again today for a therapy session. I found him to be extremely depressed and hopeless. He expressed a great deal of despair. He has definite and strong suicidal ideation. In my opinion, the removal of this client from the State to Sweden is very likely to have a seriously deleterious effect on his mental health, to the extent that he would be at high risk of self-harm and possible suicide."*
22. BKC submitted that, having regard to the real risk of harm and in light of the CJEU's decision in Case C-578/16 *CK v Republika Slovenija* ("CK"), the applicant's transfer must be cancelled, and the applicant admitted to the international protection system in Ireland.
23. BKC requested that the Minister (i) cancel the decision to transfer him with immediate effect (ii) grant him discretionary relief under article 17 of the Dublin III Regulation (iii) if article 17 relief is denied, provide an undertaking that no further action would be taken to transfer the Applicant to Sweden pending any application he may make for judicial review challenging the refusal of article 17 relief.

24. The applicant issued the first judicial review proceedings on 17th December 2021, and applied for an interim injunction on 20th December 2021, which was granted. The proceedings were then listed for mention on 17th January 2022. On that date, the applicant was directed to put the Minister on notice of his leave and interlocutory injunction applications.
25. At the next hearing on 21st January 2022, Counsel for the applicant advised the Court of the outcome of the *B.K.* case in the Court of Appeal, and was granted liberty to amend the Statement of Grounds to reflect issues arising from that decision. The matter was assigned for hearing on 24th February 2022.
26. An affidavit from the applicant's solicitor, sworn on 2nd February 2022 in the first judicial review proceedings, attached an updated report from Dr. Giller dated 2nd February 2022. ("Dr. Giller's second report"). In this report, Dr. Giller stated that she had become "*increasingly worried about his suicidal ideation*", and that he stated he does not care any more what happens to him, even if he dies, which Dr. Giller says "*raises alarm bells*". She reported that he was "*certain that if sent back to Sweden, he will be returned to Somalia*" and that he has "*become very isolated and detached from other people, with few friends*". Dr. Giller stated that on a diagnostic level he is "*suffering from complex PTSD, Generalised Anxiety Disorder and Depressive Disorder*". She expressed concern that if the applicant is returned to [Sweden], he "*will be at serious risk of taking his life*". It will be noted that Dr. Giller's opinion in her second report as to the level of risk of suicide was of a higher order than that contained in her first report.
27. Dr. Giller noted that, whereas he was refused asylum in Sweden, he said he never had a medicolegal report there and he has scars on his body related to his alleged torture in Somalia that were never examined in Sweden. She has no doubt that the applicant is "*suffering severely psychologically and is in extreme fear of being returned to Somalia.*"

**The article 17 decision**

28. On 16th February 2022, the Minister issued her decision under article 17(1) of the Dublin III Regulation (the "article 17 decision") refusing the applicant's request for the exercise of discretion to determine his application for international protection in Ireland, and affirming that his transfer to Sweden "*will take place as soon as practically possible*".
29. Given its centrality to the case, I set out below the text of the article 17 decision in full:

*"Having read and considered your request that I exercise discretion so that your international protection claim would be determined in this jurisdiction, I am satisfied that the materials submitted by you on your behalf do not disclose any humanitarian or compassionate ground such that I would invoke article 17 (1) of Dublin III of the above regulations and circumstances, I am satisfied that transfer to the responsible member State, Sweden, should proceed.*

*The decision has been reached, following a review of the representations made on your behalf on 20 November 2021 and on 01 December 2021 but also having reviewed the entirety of the information available to the Minister.*

*A summary of the reasons include the following:*

- *There is no reason to believe that there are any systemic deficiencies in the asylum system in Sweden either as alleged or at all.*
- *There is nothing to indicate that a Transfer to Sweden would pose any real risk to the applicant's Article 4 rights under the European Charter of Fundamental Rights, nor the Article 3 rights found in the European Convention on Human Rights*
- *It is noted that the applicant has medical issues however there is nothing to suggest that there is a lack of availability of appropriate medical treatment in Sweden such as to constitute a breach of Article 7 rights under the European Charter of Fundamental Rights nor the Article 8 rights found in the European Convention on Human Rights. As such, there are no exceptional circumstances that would merit not applying the Dublin Regulation to this case.*

*In accordance with the provisions of regulation (EU) number 604/2013, your transfer to Sweden will take place as soon as practically possible."*

30. The article 17 decision was signed by Niamh Bannigan, "officer of the Minister".
31. I will refer to the reasons set out in the bullet points in the article 17 decision as the "bullet point reasons".
32. The applicant then launched these judicial review proceedings, the second judicial review proceedings, on 22nd February 2022 in which he sought also to challenge the article 17 decision.
33. On 24th February, 2022, I extended the interim injunction which had been granted to the applicant in the first judicial review proceedings. As noted earlier, I gave directions with a view to a hearing in the second judicial review proceedings taking place on 15th March 2022.
34. As Dr. Giller's second report had not been submitted directly to the Minister's department in support of the request made for the exercise of discretion under article 17(1), on 14th March 2022 (the day before the hearing) the Minister filed a supplemental affidavit in the second judicial review proceedings, from John Moore, a HEO in the Irish Naturalisation and Immigration Service of the Minister's department, in which he averred that this medical report had been "recently" submitted to the decision maker, Niamh Bannigan, who was acting on acting on behalf of the Minister. He said that the decision maker had now had the opportunity of reviewing the medical report and had added an addendum to the article 17 decision.

35. In that addendum, dated 11th March, 2022 (“the addendum”), Ms. Bannigan states as follows:

*“I hereby state that I did not have sight of the second report of Dr. Joan Giller dated 2nd February, 2022 before issuing the original decision on 16th February, 2022. Having now considered this document, I am satisfied that this material would have made no difference to the outcome of that decision had I been aware of it at the time”.*

36. On 15th March 2022, I further extended the interim injunction, to Monday, 28th March 2022. I should note for the record that the Minister formally objected to such an extension. On Monday 28th March 2022 I further extended the interim injunction to Monday 4th April 2022, again without consent.

### **Reliefs sought**

37. In his original statement of grounds in these second judicial review proceedings, the applicant sought an order of *certiorari* quashing the article 17 decision. He sought an interlocutory injunction restraining his removal from the State pending the determination of these proceedings.

38. He also sought the following declaratory reliefs:

- *“that only the Minister can make and/or authorise a decision under Article 17(1) of the Dublin III Regulation, and that this authority has not been delegated to any of her officials within the Department of Justice;*
- *that an applicant who brings an Order. 84 application to challenge an Article 17 decision is entitled to either automatic suspensive relief and/or injunctive relief under Article 27 of the Dublin III Regulation pending the outcome of judicial review proceedings;*
- *an applicant who applies under Ord. 84 to challenge an Article 17 decision is entitled to automatic suspensive relief under Article 27(3) conferring the right to remain in the State pending the outcome of his/her judicial review proceedings;*
- *in the alternative, an applicant who applies for judicial review of an Article 17 decision is entitled, under Article 27(3), to the opportunity to apply within a reasonable time for injunctive relief;*
- *that Article 27(6) precludes the making of any adverse costs order against such an applicant;*
- *that an injunction from the Superior Courts preventing transfer operates as a stay on the time limit for the transfer of an application under Article 29(1).”*

39. The applicant confirmed at the hearing that he was not pursuing the declaratory relief that Article 27(6) precludes the making of any adverse costs order against such an applicant.

40. As part of the relief included in his statement of grounds, the applicant sought a reference to the CJEU under article 267 TFEU referring the question whether, in order to give effect to the Dublin III regulation, the effective remedy and suspensive effect provisions of article 27 encompass a challenge to a decision under article 17(1).
41. The Minister took issue with the applicant seeking a reference by way of substantive relief, pointing out that the question of a reference was one for the Court and not a substantive relief to be sought *inter partes*. The applicant pointed out that the Minister for Health brought a motion seeking a reference to the CJEU in the case of *JTI v Minister for Health and others* [2015] IEHC 481. While I accept the Minister's point that it is not technically correct to seek an article 267 reference as a substantive relief in judicial review proceedings, I do not believe much turns on the point in circumstances where the applicant was simply seeking to make clear that he believed a reference was necessary in order to determine the substantive issues arising in his case.
42. Following receipt of the addendum, the applicant delivered an amended statement of grounds just before the commencement of the hearing. Given the lateness of the addendum, no objection was taken by the Minister to the amended statement of grounds. A further amended statement of grounds was delivered shortly after the hearing to reflect an accidental omission from the amended statement of grounds. For the purposes of this judgment, I will rely on the further amended statement of grounds.
43. In the further amended statement of grounds, the applicant sought, in so far as necessary, an order of *certiorari* quashing the addendum and/or quashing the article 17 decision insofar as same is to be read together with the addendum.
44. I will consider the grounds advanced in support of the reliefs claimed by the applicant further below.

### **The Dublin III System**

45. In light of the issues arising in this case, it is necessary to sketch the structure and essential elements of the system put in place pursuant to the Dublin III Regulation. The following summary of the salient features of the Dublin III regime is adopted, with gratitude, from the judgment of Collins J. in *BK*.
46. The Dublin III Regulation sets out the criteria and mechanisms for determining the Member State responsible for examining applications for international protection made in one of the Member States by a third country national or stateless person. Dublin III repealed and replaced Regulation (EC) No 343/2003 ("Dublin II") which had in turn replaced the Dublin Convention. The Dublin system is a critical component of the European Common Asylum System (ECAS) adopted by the EU following the Tampere European Council in 1999. Article 78 TFEU confers broad competence on the Union in this area.
47. Article 3(1) of the Dublin III Regulation provides that applications for international protection by a third-country national or stateless person who applies on the territory of

any Member State “shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.” Chapter III then sets out a hierarchy of criteria for determining the responsible Member State. These criteria are intended to provide “a clear and workable method” which “*should .. 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.*” (Recitals (5) & (6)).

48. Once the Member State responsible has been identified, it is obliged (as the case may be) to “take charge” or “take back” the applicant or other person.
49. Chapter VI makes detailed provision for the procedures to be applied. Where a Member State accepts a take charge or take back request “*the requesting Member State shall notify the person concerned of the decision to transfer him or her to the Member State responsible and, where applicable, of not examining his or her application for international protection*” (Article 26(1)). Article 27(1) then provides that the person concerned “*shall have the right to an effective remedy, in the form of an appeal or review, in fact and in law, against a transfer decision, before a court or tribunal*”. Recital (19) expressly links such remedy to Article 47 of the Charter of Fundamental Rights of the European Union (“the Charter”) and states that an effective remedy against “decisions regarding transfer” 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.*”
50. Article 19(2) Dublin II had also provided for “an appeal or a review” against a decision to transfer but in much briefer terms and the scope of such appeal or review had been interpreted narrowly by the CJEU (Case C-394/12, *Abdullahi v Bundesasylamt* [2014] 1 WLR 1895). In contrast, in a series of decisions, beginning with Case C-63/15 *Ghezelbash v Staatssercretaris van Veiligheid en Justitie* [2016] 1 WLR 3969 (“*Ghezelbash*”), the CJEU has emphasised the broad scope of the Article 27 remedy (see also Case C-578/16 *CK v Republika Slovenija* (“*CK*”), Case C-155/15 *Karim v Migrationsverket* (“*Karim*”); Case C-670/16 *Mengesteab v Germany* [2018] 1 WLR 865 (“*Mengesteab*”); Case C201/16 *Shiri v Bundesamt fur Fremdenwesen und Asyl* [2018] 1 WLR 3384 (“*Shiri*”) and Case C-194/19 *HA v Belgium*). The Article 27 remedy encompasses, but is not limited to, disputes concerning the application of the criteria for determining the Member State responsible under the Dublin III Regulation.
51. Article 27(2) requires Member States to “*provide for a reasonable period of time within which the person concerned may exercise his or her right to an effective remedy pursuant to paragraph 1.*” Article 27(3) then provides that:

*“For the purposes of appeals against, or reviews of, transfer decisions, Member States shall provide in their national law that:*

- (a) *the appeal or review confers upon the person concerned the right to remain in the Member State concerned pending the outcome of the appeal or review; or*



- (b) *the transfer is automatically suspended and such suspension lapses after a certain reasonable period of time, during which a court or a tribunal, after a close and rigorous scrutiny, shall have taken a decision whether to grant suspensive effect to an appeal or review; or*
- (c) *the person concerned has the opportunity to request within a reasonable period of time a court or tribunal to suspend the implementation of the transfer decision pending the outcome of his or her appeal or review.*

*Member States shall ensure that an effective remedy is in place by suspending the transfer until the decision on the first suspension request is taken. Any decision on whether to suspend the implementation of the transfer decision shall be taken within a reasonable period of time, while permitting a close and rigorous scrutiny of the suspension request. A decision not to suspend the implementation of the transfer decision shall state the reasons on which it is based."*

- 52. Article 17 of the Dublin III Regulation provides that "[b]y way of derogation from Article 3(1)", any 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". Provision to the same effect was made in Article 3(2) of Dublin II. While recital (17) refers to humanitarian and compassionate grounds "in particular", article 17(1) is not so limited and is "intended to allow each member state to decide, in its absolute discretion, on the basis of political, humanitarian or practical considerations, to examine an asylum application even if it is not responsible under the criteria laid down" in Chapter III: Case C-661/17 *MA v International Protection Appeals Tribunal* [2019] 1 WLR 4975 ("*MA*").
- 53. As will become apparent, articles 17 and 27, and their interaction, are central to the issues raised in this case.
- 54. Two further Dublin III provisions are worthy of note. The first is Article 20(1) which provides that 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." The second is Article 29. Article 29(1) provides that the transfer of the person concerned from the requesting Member State to the Member State responsible shall be carried out "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)." Article 29(2) then provides that if the transfer does not take place within that six month limit, the Member State responsible is relieved of its obligations and responsibility transfers to the requesting Member State. Article 29(2) identifies certain limited circumstances in which that time limit may be extended.
- 55. The Minister contends that the six-month time limit in this case expires at midnight on 6th April 2022.

56. Regulations have been made from time to time under section 3 of the European Communities Act 1972 for the purpose of giving further effect to the system established by the Dublin III Regulation. The current Regulations are the European Union (Dublin System) Regulations 2018 (SI No 62/2018) ("the 2018 Regulations"). Article 3 of the 2018 Regulations confers on international protection officers appointed under the International Protection Act 2015 ("the 2015 Act") collectively constituting the International Protection Office (the "IPO"), the functions (*inter alia*) of determining the Member State responsible under the criteria in Chapter III of the Dublin III Regulation and of making transfer decisions. Article 6 provides for an appeal against a "transfer decision" (defined in Article 2(2) as "a decision made by an international protection officer to transfer..") to IPAT. Where such an appeal is brought, the person subject to the transfer decision is entitled to remain in the State pending the outcome of the appeal: Article 8(1). Article 8(1) reflects the provisions of Article 27(3)(a) of the Dublin III Regulation.
57. As explained by Collins J. in his judgment in *Tao v Minister for Justice and Equality* [2021] IECA 293 (Noonan and Ni Raifeartaigh JJ. concurring), neither the 2018 Regulations nor the regulations that it replaced expressly address article 17(1) or specify the person or body by whom the option or discretion provided for by it was exercisable in the State. As a result, there was significant uncertainty as to the correct position which was definitely resolved only by the decision of the Supreme Court in *NVU v Refugee Appeals Tribunal* [2020] IESC 46 ("*NVU*"). For the reasons set out in the judgment of Charleton J. (with which Clarke CJ and O'Donnell, MacMenamin and O'Malley JJ. agreed), the court held that that the discretion was exercisable by, and only by, the Minister. The decision in *NVU* was given on 24th July 2020.
58. Accordingly, as a matter of Irish law, the IPO is responsible for determining the Member State responsible under the criteria in chapter III of the Dublin III Regulation whereas the exercise of the article 17(1) discretion is a matter for the Minister. Dublin III permits such a division of function: MA, paragraphs 62-69. It follows that the procedure leading to the making of a transfer decision by the IPO under the 2018 Regulations does not involve any consideration of article 17(1). The jurisdiction of IPAT under article 6 of the 2018 Regulations is limited to appeals from such transfer decisions and it has no jurisdiction to hear an appeal from a decision of the Minister as to the exercise of the article 17(1) discretion. That being so, it follows that, in Irish law, the only available remedy in respect of such a decision is judicial review under Order 84 RSC.

**The issues in this case**

59. I propose to consider, firstly, the applicant's application for leave to challenge the article 17 decision by way of judicial review. I will then consider, if necessary, the applicant's application for an interlocutory injunction pending the determination of the proceedings. Finally, insofar as appropriate, I will address the question of a proposed reference to the CJEU.
60. While the applicant's application at this point is only for leave to apply for judicial review, as the application was on notice, detailed arguments were made both in writing and orally

on the grounds on which leave was sought. I propose to record those arguments in a little more detail than I might otherwise in the circumstances.

### **Leave application**

#### **Grounds of challenge to Article 17 decision and Addendum**

61. I propose firstly to deal with the question of whether the applicant should be granted leave to apply for judicial review of the article 17 decision and addendum. While the leave application has been on notice to the Minister, it must be remembered that the threshold to be surpassed by the applicant remains the low threshold of demonstrating that he has an arguable case.
62. In broad terms, the grounds upon which relief is sought, as set out in section E of the applicant's further amended statement of grounds, can be grouped into the following categories:
- (a) "*Carltona*" grounds i.e. the decision was not lawfully made by the Minister but rather, impermissibly, by an officer on her behalf.
  - (b) grounds relating to the contents of, and reasons given in, the article 17 decision with a particular focus on the Minister's alleged failure to lawfully deal with the medical evidence of serious risk article of infringement of the applicant's 3 ECHR/article 4 Charter rights and his article 8 ECHR/article 7 Charter private life rights
  - (c) grounds relating to the alleged unlawfulness of the addendum
  - (d) grounds relating to the contention that this judicial review of the article 17 decision entitles the applicant to the benefits of article 27, including automatic suspensive relief.
63. I propose to address the applicant's leave application in relation to those four sets of grounds, in the order set out above.

### **Carltona arguments**

#### **Parties' submissions**

64. The applicant submitted that the article 17 process did not benefit from the *Carltona* principle (i.e. the principle that powers conferred on a Minister can be lawfully exercised by his or her officials), on the basis that the principle was negated by both article 35 Dublin III Regulation, as well as by implication having regard to the article 17 jurisprudence in the State.
65. In that latter regard, the applicant relied on *dicta* of Charleton J. in *NVU v. Refugee Appeals Tribunal* [2020] IESC 48 where he stated that "there is no sign of any such delegation or of any basis on which that discretion could ever be exercised by anyone other than the Minister", in reference to the discretion under article 17. The Minister contends that the applicant's reliance on the judgment of Charlton J. in *NVU* was entirely

misplaced in circumstances where the question arising in that case concerned delegation to a separate statutory body and not a delegation retained to the Minister.

66. The applicant contends that article 35 requires member states to notify the Commission of the “*specific authorities responsible for fulfilling the obligations arising under this regulation*” and that the only responsible authorities notified by Ireland to the Commission pursuant to that provision were the Office of the Refugee Applications Commission, the Refugee Appeals Tribunal and the Minister. It is contended, that as officers or servants or agents of the Minister had not been notified or designated as responsible authorities within article 35, the Minister could not seek to delegate her powers under article 17 to such persons.
67. The applicant relied on the *dictum* of Hogan J. in *HN v IPAT* [2018] IECA 102 (at paragraph 18) to the effect that the Minister had an obligation to consider an applicant’s application for a decision under article 17. It followed that, pursuant to article 35, the Minister was the specified authority for an application under the Regulation, such that article 35 became the sole legal source of the Minister’s powers under article 17. Given that the Minister, and not her department, had been designated as a specified authority pursuant to article 35, it was submitted that the *Carltona* principle had been displaced. (By contrast, when the UK was a member of the EU, it had designated the Home Office as opposed to the relevant minister as a specified authority for article 35 purposes).
68. The question was said to be one of domestic law: in *North East Pylon Pressure Campaign Ltd v An Bord Pleanála* [2019] IESC 8 the question of the designation of An Bord Pleanála, as the competent authority responsible for granting permission for projects of strategic infrastructural development pursuant to an EU regulation, by an assistant secretary general in a government department was accepted to be one of national law.
69. The Minister, for her part, submits that article 17(1) does not engage article 35 at all as it does not involve any “obligation” arising under the Dublin III Regulation; article 17 did not specify any application process or any other set of obligations as regards requests to the Minister to exercise her discretion under article 17. The Minister did accept that there was a procedural obligation to deal with a request for exercise of discretion under article 17 but said no substantive obligation arose.
70. The applicant in reply said that a procedural obligation was an obligation within article 35 and that it must further be the case that article 17 is within article 35 as if the Minister decided to exercise her discretion in favour of dealing with the applicant’s protection application in this State, substantive obligations would also follow.
71. The Minister contended that no arguable point was raised by the applicant on this issue as it was a matter of national procedural autonomy for the State to choose to implement the various obligations in the Regulation as it saw fit.
72. The Minister submitted that the *Carltona* doctrine was explicitly endorsed by the Supreme Court in the immigration context in *Tang v. Minister for Justice* [1996] 2 ILRM 46 and *WT*

*v. Minister for Justice and Equality* [2015] IESC 73 (“*WT*”). In *WT*, the Supreme Court held that the *Carltona* principle could be negated by “expressed statutory provision to the contrary, or by necessary implication”. The Supreme Court held that “in such cases, then, the test is whether it can be established that a statute clearly conveys that the *Carltona* principle is not to be recognised, or clearly implies such a conclusion.”

73. It was submitted that there was no express or implied requirement in article 35 or the Dublin III Regulation more generally that the Minister must personally take decisions under article 17. It was pointed out that in the designation by Ireland of specific authorities pursuant to article 35(1), there had been no specific allocation of tasks under the Regulation as between the three designated authorities (which included the Minister) such that no implied ouster of *Carltona* arose.
74. The applicant further contended that as article 35(3) mandates that the responsible authorities “shall receive the necessary training with respect to the application of this regulation”, it is also incumbent on the Minister to demonstrate that she has the necessary training to make article 17 decisions. The Minister submits that the applicant has not discharged the burden of proof of demonstrating, even to a *prima facie* basis, that training was somehow deficient and therefore no arguable issue arises on this point.

#### **Arguable grounds**

75. In my view, it is arguable that the Minister’s consideration of a request for exercise of discretion under article 17 is an “obligation” to be fulfilled “arising under this regulation” within the proper meaning of article 35(1). It is further arguable - just about - that as article 35(1) imposes a mandatory obligation on member states to notify the Commission of the specific authorities responsible for fulfilling that obligation, and Ireland appears to have notified the Minister as the relevant authority, it is implied that the Minister alone must make that decision. I am prepared to grant leave to argue this point as it does not appear to have arisen for consideration under the Dublin III Regulation to date.
76. I do not see that there is any arguable point in respect of the allegation that the Minister or decision maker did not have the requisite training pursuant to article 35(3) given that no *prima facie* evidence of an absence of the requisite training was before the court.

#### **Content of the article 17 decision**

##### **Applicant’s submissions**

77. As a preliminary but overarching point, the applicant submitted that the level of intensity of the review by the Court in this judicial review challenge depended in turn on whether an article 17 decision was within article 27 as, if it was, given that article 27(1) requires the member state to provide for a review of law and fact in relation to the first instance decision, the Court’s role in review may be broader than the conventional judicial review grounds available in Irish law.
78. It is fair to say that practically all of the grounds of challenge to the content of the article 17 decision resolve back to how the decision-maker dealt with the medical evidence tendered on behalf of the applicant, both in fact and in law.

79. The applicant submitted that the reasons set out in the article 17 decision did not in fact address the article 17 application made by the applicant. The applicant contends that the Minister acted in breach of the principles set out in *CK* in that the Minister effectively ignored the medical evidence regarding the seriousness of the applicant's state of health and the significant and irreversible consequences to which a transfer might lead.
80. The applicant submitted that the decision maker was in error in holding (in the first bullet point reason, as set out in paragraph 29 above) that there was no evidence of "systemic deficiencies" in Sweden. He said that he did not assert systemic deficiencies in the asylum system in Sweden; rather he complained of breach of his fundamental rights by the fact of transfer, as well as risk of detention in Sweden as a vulnerable individual. It was submitted that such constituted an error of law and/or having regard to an irrelevant consideration in circumstances where the applicant had not made the case that there were systemic deficiencies in Sweden. The applicant argues that when his article 3 ECHR/article 4 Charter (for ease, "article 3") rights are engaged it is not an answer to his case to say that there was nothing to suggest any lack of availability of appropriate medical treatment in Sweden. He relies on *CK* (at paragraphs 84, 85, 88 and 92) to say that as the evidence is that his transfer *per se* would result in a real risk of a significant and permanent deterioration of his state of health, in breach of article 3, the Minister accordingly misapplied herself in law.
81. It was next submitted that in respect of the second and third bullet point reasons outlined in the article 17 decision (as set out in paragraph 29 above), the decision-maker erred in focusing only on rights arguments and not having regard, in light of the Minister's broader discretion under article 17, to the purely humanitarian considerations disclosed by the evidence as to his psychiatric difficulties and the real risk of suicide in the event he was transferred to Sweden.
82. The applicant submitted that it was irrational for the decision-maker to state, in the second bullet point reason, that "*there is nothing to indicate that a transfer to Sweden would pose any real risk*" to the applicant's article 3 rights; this flew in the face of the medical evidence tendered, including Dr. Giller's first report which it is accepted was before the decision-maker at the time of the article 17 decision.
83. The applicant submitted that the third bullet point reason provided in the article 17 decision revealed an error of law, in relation to his article 8 ECHR/article 7 Charter (for ease "article 8") private life rights, as it failed to engage with the exceptionality of the applicant's personal circumstances, which were sufficiently grave to require a proportionality analysis. The applicant says that no proper balancing exercise was carried out by the Minister under article 8(2). The decision of Humphreys J in *Azeem v Minister for Justice and Equality* [2017] IEHC 719 was invoked in this regard. The issue was not one of a disparity of available medical treatment but rather the personal impact on the applicant which was the subject of undisputed evidence demonstrating a sufficiently grave impact to trigger the requirement for a proportionality analysis.

84. The applicant further alleged, as grounds related to the above, that there had been a failure to give reasons and irrationality in the decision in the treatment of the uncontradicted medical evidence.

**The Minister's submissions**

85. The Minister, for her part, submitted that there were no arguable grounds for contending that the article 17 decision was vitiated by unlawfulness as alleged.
86. The Minister contends that it was perfectly within her entitlement to find that there was no risk to the applicant's article 3 rights and that article 8(1) was not engaged. The Minister contends that the proper reading of CK was that the CJEU approached the matter on the basis that the member state may choose to conduct its own assessment of an asylum application under article 17(1) where it is noted that that an asylum seeker's medical condition is not expected to improve in the short term. However, the Minister submits that the CJEU was very clear that even in a case involving significant psychiatric issues including suicidal tendencies, there could be no *obligation* imposed on the relevant authority to apply article 17(1) in such circumstances: CK at paragraphs 88, 96 and 97. Accordingly, even where article 3 issues arose, the Minister still had a full discretion under article 17; there could be no question of the Minister being obliged to exercise her article 17 discretion in favour of the applicant, as a matter of EU law.
87. The Minister contended that the applicant had tendered no evidence of deficiencies in the likely medical treatment to be afforded to him in Sweden. The Minister relies on the *dictum* in CK that there is a "strong presumption" that the medical care in the receiving state will be adequate (at paragraph 70). It is submitted that there is no legal bar *per se* restraining the transfer of a person who has displayed suicidal tendencies so long as, crucially, appropriate concrete measures are put in place for the transfer and there are the necessary medical supports in place following arrival (CK, paragraphs 78 and 79).
88. The Minister relies in this regard on the ECHR decision in *AS v Switzerland* (application number 39350/13) where the Court noted (at paragraph 34) that "*as far as the risk of suicide is concerned, the Court reiterates that the fact that a person whose expulsion has been ordered threatened to commit suicide does not require the State to refrain from enforcing the envisaged measure, provided that concrete measures are taken to prevent those threats from being realised... The court has reached the same conclusion also regarding applicants who have a record of previous suicide attempts*". The Minister also relied on *dicta* to similar effect in *Karim v Sweden* (application number 24171/05) (at page 15).
89. The Minister further submitted that the CJEU case law and the Dublin III Regulation itself (in article 31) imposed an obligation on the transferring state and the receiving state to ensure that all proper medical support was put in place for the transfer of a patient who was very ill, including mentally ill.
90. The Minister tendered an affidavit from a department official, Paul McGuire, which set out that the concerns raised by the applicant in relation to his mental health can be

communicated to the Swedish authorities with a view to ensuring that he is provided with adequate assistance and/or necessary healthcare on arrival in Sweden. He also averred that GNIB will ensure a medical assessment is conducted prior to transfer to determine if the applicant is fit to fly and to determine, if so, whether he needs to be accompanied by a clinician or a medical escort.

91. The Minister submitted that detention of Dublin III transferees was not of itself unlawful for failed asylum seekers; the only potential breach of article 5 ECHR would arise if a person with mental health difficulties was detained and was not afforded access to any medical care. It was submitted that there was no evidence before the court that that would occur here and, indeed, the evidence tendered here on behalf of the Minister was to the contrary.
92. In relation to article 8 ECHR, the Minister submitted that the decision maker had engaged with the applicant's submissions and had decided that was no breach and that such a finding could not be gainsaid by way of judicial review.
93. As regards the administrative law challenges, the Minister maintained that no arguable grounds had been disclosed. There was no question of irrationality, particularly in light of the Minister's absolute discretion under article 17. It was clear that the Minister had considered all of the issue raised by the applicant; the decision maker said as much in the decision. Reasons were given. In truth, it was submitted, the applicant was seeking to challenge the merits of the decision which was of course impermissible in judicial review.

**Arguable grounds**

94. I am satisfied that the applicant has raised an arguable case as to whether the Minister properly considered and/or properly engaged with the applicant's article 17 case and in particular his article 3 case based on the medical evidence tendered by the applicant. I am satisfied that there is a sufficiently arguable case raised as to whether the correct interpretation of *CK* and related EU case law is such as to have required the Minister (notwithstanding her unfettered discretion under article 17) to have determined that the applicant should not be transferred to Sweden in light of the medical evidence tendered on his behalf. The scope of the Court's review in that regard is likely to be influenced by the answer to the question as to whether this judicial review is within article 27, an issue I will return to below.
95. I also accept that there is an arguable case that the Minister did not engage in a proper proportionality consideration for the purposes of article 8(2).
96. In my view, the applicant has also raised an arguable case in relation to the grounds relating to failure to have regard to relevant considerations; failing to have regard to the applicant's case; failing to properly engage with his article 8 case; failure to provide adequate reasons and irrationality.



97. In truth the resolution of all of the grounds is linked to the fundamental question of the appropriate treatment as a matter of law of the applicant's circumstances as disclosed by the medical evidence tendered on his behalf.

## **Addendum**

### **Parties' submissions**

98. The applicant submitted that the addendum to the article 17 decision made clear that the Minister had not taken into account the very relevant material of Dr Giller's second report, notwithstanding that this report was in possession of the Minister, having been furnished by way of affidavit from the applicant's solicitor in the first judicial review proceedings on 2nd February 2022 and having been specifically referred to in the Minister's replying affidavits in those proceedings.
99. The applicant also contended that other arguable grounds of challenge arose from the addendum. It was contended that the addendum was not legally valid as it was arguable that the Minister was *functus officio* as regards the applicant's article 17 application once Ms. Bannigan had issued her decision on 16th February 2022. It was said that the addendum represented an impermissible backdoor attempt to remedy the decision. It was further contended that the addendum, having been made subsequent to the launch of the second judicial review proceedings which were challenging the original article 17 decision was vitiated by objective bias and that it was arguable that a fresh decision should have been taken by a separate decision maker. It was also said that the addendum was vitiated by a failure to give reasons and was so unclear as to be invalid in law.
100. The Minister submitted that Dr. Giller's second report should have been sent to the Minister's department directly, and not *via* an exhibit to an affidavit in court proceedings. It was accordingly understandable that the decision maker did not see it before the article 17 decision was made on 16th February 2022. It was accepted that the reader of the 16th February article 17 decision may have assumed that the decision maker had considered Dr. Giller's second report but that it was now clear from the evidence that that is not in fact what happened.
101. It was submitted that there was nothing inappropriate in providing an addendum to the decision and that, indeed, the very nature of the type of circumstances that might lead to an article 17 request might be fluid and evolving (particularly where the related to a person's medical situation) such as to require an earlier decision to be revisited. The decision of Burns J in *HK v Minister for Justice* [2021] IEHC 40 (which is under appeal to the Court of Appeal) was relied on as authority for the proposition that there is nothing legally inappropriate about issuing an addendum to a decision in an immigration context. Counsel for the applicant in reply pointed out that the *HK* decision concerned an addendum to a s.35 report and not to a decision which made that case readily distinguishable.
102. The Minister also submitted that the only appropriate person to consider an addendum to the decision was the person who had made the original decision, given that this person

was the person who was most familiar with the file and who best understood the basis of the original decision.

#### **Arguable grounds re addendum**

103. I am satisfied that the applicant has raised arguable grounds in relation to the lawfulness of the addendum and its proper status vis-à-vis the original article 17 decision, given the novelty of the issues arising on the facts in relation to the addendum, its timing and the manner in which it is expressed.

#### **Conclusion on leave application to challenge article 17 decision and addendum**

104. The substantive hearing will require careful analysis of the reasons advanced in the article 17 decision, when viewed in light of the contents of the addendum. I am satisfied, in the circumstances, that the applicant should be granted leave to seek reliefs D 1(a) and (b) on all of the grounds set out at paragraphs E (1) to (10) and (14) to (18) of the further amended statement of grounds.

#### **Declaratory reliefs: Application of article 27 to this judicial review challenge to article 17?**

##### **Introduction**

105. In order to determine whether the applicant has raised a sufficiently arguable case in respect of the various declaratory reliefs sought (as set out at paragraph 29 above) including those declarations to the effect that he is entitled to automatic suspensive relief and/or injunctive relief under article 27 pending the outcome of the judicial review proceedings, it is necessary to set out in a little detail the parties' arguments on these issues. These arguments will also be of relevance in the context of the request for an article 267 reference to the CJEU.

##### **Applicant's submissions**

106. The applicant submits that the Court of Appeal in BK identified that the interaction between an article 17 decision and the effective relief at article 27, particularly with regard to the suspensive effect thereunder, was not acte claire, and may require a reference to the CJEU in the appropriate case. The applicant submits that not only is his case an arguable one as regards his entitlement to suspensive relief and therefore to remain in the State pending the determination of this judicial review, but further contends that his case provides the appropriate vehicle for an article 267 reference on these issues.

107. I will come separately to the question of a reference to the CJEU later in this judgment, but for present purposes the applicant submits that it is clear that arguable grounds arise in relation to the interaction between an article 17 decision and article 27 in light of various passages in the CJEU judgement in *MA* including paragraph 64, 78 and 79.

108. At paragraph 64 of *MA* the CJEU held that "*the discretion conferred on Member States by Article 17(1) of the Dublin III Regulation is an integral part of the mechanisms laid down by that regulation for determining the Member State responsible for an asylum application*". At paragraphs 78 and 79 of *MA*, the CJEU held:-

"78. *However, if a Member State refuses to use the discretionary clause set out in Article 17(1) of the Dublin III Regulation, that necessarily means that that Member State*

*must adopt a transfer decision. The Member State's refusal to use that clause may, should the case arise, be challenged at the time of an appeal against a transfer decision.*

79. *Consequently, Article 27(1) of the Dublin III Regulation must be interpreted as meaning that it does not require a remedy to be made available against the decision not to use the option set out in Article 17(1) of that regulation, without prejudice to the fact that that decision may be challenged at the time of an appeal against a transfer decision.” [emphasis added.]*
109. The applicant contends that the proper interpretation of these paragraphs is that an article 17 refusal is intrinsically bound to the ultimate question of which member state will be responsible for determining an applicant's claim for international protection such there must be an effective remedy pursuant to article 27 permitting a challenge to an article 17 refusal; the outcome of such a challenge may have a real bearing on whether a transfer decision is in fact adopted.
110. The applicant submits that the CJEU in *MA* was saying that a separate article 27 remedy is not required in respect of a challenge to an article 17 decision because, as a necessary part of the transfer decision process, article 27 already encompasses a challenge to the article 17 decision. Accordingly, he argues, that as article 27(3) applies to a challenge to an article 17 decision by way of judicial review, such challenge has a suspensive effect such as to entitle him to remain in the State pending the outcome of the judicial review challenge. The suspensive effect either applies automatically until the outcome of the judicial review, pursuant to article 27(1)(a) or applies automatically, pursuant to article 27(1)(c), at least until the Court has had an opportunity to consider suspending the implementation of the transfer decision pending the outcome of the judicial review challenge following an appropriate application.
111. In contending that the term “transfer decision” in article 27(1) must be taken to incorporate an article 17 decision, as an article 17 decision forms an integral part of the process by which the responsible member State is determined, the applicant relies on the case law of the CJEU which he says has given an expansive interpretation to the scope of the article 27 remedy, including *Ghezelbash*, *Megestab* and *Shiri* (the citations for these cases are at paragraph 50 above).
112. In *Shiri*, the CJEU held that article 27 could be invoked in circumstances where there had been a failure to transfer the applicant within the 6-month time limit such that, pursuant to article 29(2), responsibility for dealing with the applicant's international protection application was transferred to the requesting member state (i.e. the state from which the applicant was sought to be transferred back to the requested member state). The applicant contended that the CJEU's decision in *Shiri* made clear that an expansive approach was adopted to article 27; as the CJEU held that decisions relating to alleged non-compliance with article 29 time limits were within the compass of the remedies provided under article 27, it followed that article 27 was not limited to transfer decisions under chapter III of the Dublin III Regulation. In circumstances where, in *Shiri*,

procedural and not substantive matters were regarded as within article 27, it was submitted that it must follow that a substantive decision under article 17 will also be covered by article 27.

113. The applicant argued that it would undermine the efficacy of article 27 to have an integral part of the transfer system fall outside of the review mechanisms available within the Dublin III Regulation. This was supported, it was said, by the terms of recital 19 of the Regulation which provides:

*"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."* (emphasis added)

114. As regards sequencing of an article 17 application and decision, it was pointed that the CJEU at paragraph 78 of *MA* referred to the "adoption" of a transfer decision subsequent to an article 17 decision, thereby connoting that it is only after an article 17 refusal that a chapter III transfer decision becomes final and operative.
115. The applicant argued that it was the State's decision to bifurcate the chapter III and article 17 aspects of the Dublin system process which led to the issues now being raised by way of complaint on behalf of the State in relation to delays in the system caused by article 17 applications subsequent to IPAT decisions; that was not a matter which could be laid at the applicant's door.
116. The applicant contended that there was no set definition of "transfer decision" within the Dublin III Regulation. The fact that there was such a definition in the 2018 Regulations could not be dispositive of the EU law position. The State had chosen a bifurcated approach to different aspects of the decisions relevant to transfer, being the IPO/IPAT machinery in relation to the chapter III criteria, and the Minister in relation to article 17; it was submitted that it could not through such bifurcation escape its article 27 obligations in respect of both such aspects of the transfer decision process.
117. In relation to the six-month time limit in article 2 (1), the applicant submitted that if he was right in respect of his arguments that article 17 decisions were covered by article 27, it would follow that the six-month time limit will only begin to run when the suspensive effect of the judicial review against the article 17 decision had terminated. This is so because article 29 (1) provides, in its first paragraph, as follows:

*"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)." (emphasis added)*

118. Accordingly, he says that the six-month time limit does not expire on 6th April next but rather the time limit runs from the determination of these judicial review proceedings.
119. The Minister offered an undertaking through an official's affidavit in these proceedings "that in the event the Minister decided to assume responsibility for the applicant's international protection application in the State following the transfer of the applicant to Sweden where the applicant is successful in these proceedings and is further successful in relation to his article 17(1) application review at that stage, the Minister undertakes to take all appropriate and reasonable steps to facilitate the return of the applicant to this jurisdiction for that purpose." The applicant submitted that this undertaking was only consistent with an article 17 decision being within the concept of a transfer decision amenable to article 27, as the form of transfer back of the applicant to the State pursuant to this undertaking was the type of transfer back contemplated by article 29(3) and article 30(2) of the Dublin III Regulation i.e. a transfer back relating to the outcome of a challenge to a transfer decision.

#### **The Minister's submissions**

120. As a preliminary objection, the Minister contended that the applicant was not entitled to invoke arguments in relation to article 27 at all, as article 27 was not directly effective. This was so, contended the Minister, because article 27(3) provided the State with three disjunctive options and the State had manifestly opted for the first option i.e. article 27(3)(a) as implemented in the 2018 Regulations (i.e. providing for suspensive effect on a transfer pending the determination of an appeal to IPAT against the chapter III criteria decision).
121. The Minister relied on the CJEU decision in *Dél-Zempléni Nektár Leader Nonprofit kft. v Vidékfejlesztési Minister* C-24/13 ("Nektar") which stated as follow:
- "14 .if, by virtue of the very nature of regulations and their function in the system of sources of European Union law, the provisions thereof generally have immediate effect in the national legal systems, without it being necessary for the national authorities to adopt application measures; some provisions may, however, require for their implementation the adoption of application measures by the Member States (see, inter alia, Case C 592/11 *Ketelä* [2012] ECR, paragraph 35 and the case-law cited).
15. In that regard, it follows from settled case-law that the Member States may adopt rules for the application of a regulation if they do not obstruct its direct applicability and do not conceal its nature as an act of European Union law, and if they specify that a discretion granted to them by that regulation is being exercised, provided

*that they remain within the limits laid down therein (Ketelä, paragraph 36 and the case-law cited)."*

122. The Minister contends that the 2018 Regulations provide rules for the application of article 27(3) and "do not obstruct its direct applicability" within the meaning of this passage from *Nektar*, such that the applicant cannot now seek to litigate an alleged failure by the State to provide that article 27(3) would also apply to a challenge to an article 17 decision.
123. The Minister argued that the applicant had not sought to issue proceedings alleging infringement by the State of its EU law obligations under the Dublin III Regulation or otherwise making non-transposition arguments. The Minister submits that the State opted for the option in article 27(3)(a) and implemented that option in the 2018 Regulations by conferring on IPAT the jurisdiction to deal with an appeal against a transfer decision (i.e. a Chapter III transfer decision). As has been made clear by the Supreme Court in *NVU*, IPAT has no jurisdiction in respect of an appeal from or a challenge to an article 17 decision.
124. Without prejudice to her arguments as to the applicant's lack of standing to invoke article 27, the Minister, for her part, takes a very different reading of *MA*. The Minister submits that the CJEU was making clear in its judgment in *MA* that an article 17 decision was not within the scope of article 27 and that an article 17 decision was essentially a freestanding matter which arose independently of the transfer decision under chapter III of the Dublin III Regulation. If the CJEU was of the view that article 17 was within the scope of article 27, it would have so stated in *MA*, particularly in light of the questions referred to it and considered in that judgment described by the CJEU at paragraph 73 of its judgment as "*by its fourth question, the referring court asks, in essence, whether article 27(1) of the Dublin III regulation must be interpreted as meaning that it requires a remedy to be made available against the decision not to use the option provided for art.17(1) of that regulation.*"
125. The Minister submits that the remedy of judicial review, pursuant to order 84 Rules of Superior Courts, is an effective remedy pursuant to article 47 of the Charter. However, importantly, the Minister submits that because a judicial review challenge to an article 17 decision is not within the scope of article 27, it follows that there is no automatic suspensive effect, whether pending the determination of the article 17 judicial review under article 27(3)(a) or pending determination of an injunction application for suspension under article 27(3)(c). She further submits that it follows that the six-month time limit in article 29(1) begins at the time IPAT has refused an appeal against a transfer decision and not at some later point, if an article 17 decision is made later and thereafter challenged by way of judicial review.
126. In answer to the question as to what happens, on the Minister's analysis, in the event that an applicant is transferred back to the requesting state but an article 17 decision is subsequently overturned and a second article 17 decision is made pursuant to which Ireland decides to examine the applicant's application for international protection (a

scenario which does not appear to be addressed in terms in article 29, which refers only to where "*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 Minister says that in keeping with the spirit of reciprocity underpinning the Dublin system, the requesting State would return the applicant to Ireland. The undertaking offered in the affidavit filed on her behalf (referred to at paragraph 119 above) is in keeping with this approach.

127. The Minister submits that the interpretation of articles 27 and 29, and their alleged interaction with article 17, as contended for by the applicant will serve to fundamentally undermine the core objective of the Dublin III regime which is to ensure a rapid processing of the decision as to which Member State shall be responsible for determining the international protection application of any given applicant.

### **Judgment of Collins J. in BK**

128. Collins J. in BK noted (at paragraph 71) that the CJEU's finding in *MA* (at paragraph 79) was clear that "*Article 27(1) of the Dublin III Regulation must be interpreted as meaning that it does not require a remedy to be made available against the decision not to use the option set out in Article 17(1) of that regulation*". However, Collins J noted that the CJEU had also emphasised that the principle of effective judicial protection applied. Accordingly, the decision not to use the Article 17(1) option "*may be challenged at the time of an appeal against a transfer decision*" (*MA* paragraph 79). Collins J. found that, in setting out that "*if a member state refuses to use the discretionary clause set out in article 17(1) ... that necessarily means that that member state must adopt a transfer decision*" the CJEU clearly contemplated that an article 17(1) decision would precede a transfer decision.
129. The Minister had argued in BK (as she has argued here) that *MA* should not be read as indicating that an appeal against a transfer decision must therefore encompass any challenge to the decision not to use article 17(1), and that *MA* merely requires that a challenge can be made "*at the time of*" such an appeal but not necessarily part of it. As applicants have a separate remedy by way of an Order 84 judicial review, then notwithstanding the CJEU's observation that the objectives of Dublin III "*discourages multiple remedies*", the Minister's position is that the Order 84 procedure is fully compliant with the article 27 of Dublin III and article 47 of the Charter.
130. Collins J. stated as follows in relation to the Minister's argument:
- "73. *.it does not appear to me that the position is so clear as to be beyond argument. MA could be read as indicating that in an appeal from/review of a transfer decision pursuant to Article 27(1), an applicant must be able to challenge the decision on the basis (inter alia) that the competent authority – here, the Minister – did not properly consider the exercise of the Article 17(1) discretion in their case. In other words, MA could be read as holding that, while Article 27(1) does not provide for a separate appeal/review against a decision under Article 17(1), that is precisely because any challenge to that decision may be advanced as part of the appeal/review of the transfer decision itself (to which the provisions of Article 27(2)*

*and 27(3) would apply). That is not possible under the 2018 Regulations. IPAT has no function in relation to Article 17(1) and any challenge to the Minister's refusal to exercise her discretion under that provision is by way of judicial review to the High Court. Requiring an applicant to pursue multiple remedies, with different standards of review and different consequences for the implementation of the disputed transfer decision, could be said to depart from the fundamental requirement of EU law that the applicant have an effective remedy and effective judicial protection. I do not mean to suggest that such is the case. Important questions of Member State procedural autonomy would also need to be considered in this context. The point is that, in my view, the decision in MA does not clearly foreclose such arguments.*

74. *In these circumstances, before determining the automatic suspension issue and the issues that it gives rise to as to the scope of the Article 27 remedy and whether or not it encompasses the exercise of the discretion under Article 17(1), it appears to me that it would be necessary to make a reference to the CJEU."*

131. The Minister submits that the observations of Collins J. in *BK* were *obiter* and that this Court is not obliged to follow them and that I was in fact correct in the analysis I proffered in my judgment in *BK* (which judgment was the subject of the judgment of Collins J. on appeal in *BK*).

#### **Arguable Grounds re declaratory relief sought**

132. In light of the arguments advanced by the applicant as set out above, I am satisfied that the applicant has raised a sufficiently arguable case in respect of the various declaratory reliefs sought including those declarations to the effect that he is entitled to automatic suspensive relief and/or injunctive relief under article 27 pending the outcome of the judicial review proceedings.

133. While it is technically correct to say that the comments of Collins J in *BK* were *obiter*, his comments were carefully considered and, in my view, persuasive as to the arguability of the proposition that any challenge to an article 17 decision "*may be advanced as part of the appeal/review of the transfer decision itself (to which the provisions of article 27(2) and 27(3) would apply)*" (*BK*, paragraph 73).

134. Accordingly, I propose to grant leave to the applicant to seek the reliefs sought at paragraphs 4, 5, 6 and 8 of section D of the further amended statement of grounds, on the legal grounds set out at paragraphs 11 to 14 of section E of the further amended statement of grounds.

#### **Interlocutory Injunction application**

135. As (for the reasons I will come to shortly) the applicant's application for injunctive relief as of right under article 27 is a matter on which I will need guidance from the CJEU, I believe that it is appropriate to deal with his application for an interlocutory injunction on the basis of the principles set out in *Okunade v Minister for Justice* [2012] 3 IR 152 ("*Okunade*").



136. For the reasons set out in the preceding sections of this judgment, I am satisfied that the applicant has raised an arguable case. The question then becomes one of whether the balance of justice favours refusal of the interlocutory injunction i.e. the applicant's transfer to Sweden proceeding notwithstanding that these judicial review proceedings will not have been determined before his proposed transfer on 6th April 2022.
137. In relation to the balance of justice, the applicant contends that it would be disproportionate to remove him pending the determination of these proceedings in circumstances where he submitted that the very fact of transfer would constitute an infringement of his Charter and ECHR rights. The applicant lays particular emphasis on the fact that Dr Giller's second report expresses the professional opinion that if the applicant is returned to Sweden he will be "at serious risk of taking his life".
138. The applicant also relies on the delay in the application of the Dublin System processes to date. Sweden accepted responsibility for the take back request on 19th February, 2020. The IPO transfer decision issued on 23rd July, 2020. The applicant did not receive a decision from IPAT on his appeal against the transfer decision until fourteen months later on 5th October, 2021.
139. In relation to the balance of justice, the Minister relies on the CJEU decision in *NS v. Home Secretary* joint cases C-411/10 and C-493/10 at paragraph 80 to the effect that it must be assumed that treatment of asylum seekers in all member states complies with the requirements of the Charter and the ECHR. The Minister submits that there was simply no evidence before the Court that the applicant will be treated in a manner incompatible with his fundamental rights if returned to Sweden.
140. The Minister submitted that the default position is that the applicant should be transferred to Sweden in circumstances where the IPAT decision affirming the transfer decision is not simply *prima facie* valid but is unchallenged and, in those circumstances, the Minister contends that the orderly operation of the uniform scheme contained in the Dublin III Regulations should not be undermined. The Minister relied on *dicta* of Clarke J. (as he then was) in *Okunade* to the effect that significant weight must attach to these factors in considering the balance of justice.
141. The applicant submitted that the Minister cannot rely on the "orderly implementation" of a valid transfer decision in circumstances where the Court of Appeal made clear in *NVU* that the decision maker must engage with humanitarian considerations where they arise. It is submitted that the interference with the applicant's fundamental rights and the risks inherent in transferring him outweigh any public interests in his transfer or the orderly implementation of the Dublin III System. It is submitted that damages are not an adequate remedy in the circumstances.
142. The Minister also seeks to rely on the applicant's delay in making his article 17(1) request in circumstances where it was known from July 2020, when the Supreme Court delivered its judgment in *NVU*, that IPAT did not have jurisdiction to deal with an article 17 (1)

request, and only the Minister could deal with such a request. It was submitted that the applicant's delay here was such as to disentitle him to an interlocutory injunction.

143. The Minister invoked a further delay argument, in the context of the interlocutory injunction application, arising from the fact that while the applicant had approached SPIRASI in June 2021 and would appear to have met Dr. Giller before the oral hearing date of 8th July 2021 before IPAT, no adjournment of the tribunal hearing was sought to allow a report from Dr. Giller to be put before IPAT. This was criticised by the Minister on the basis that such a report would clearly have been relevant to the applicant's case before IPAT in relation to article 3 ECHR/article 4 Charter.

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144. In my view, the balance of justice on the facts of this case, exceptionally, favours the grant of an interlocutory injunction to the applicant pending determination of these proceedings. The applicant has tendered medical evidence which suggests he is suffering from suicidal ideation and that if returned to Sweden he would be at serious risk of taking his life. I have held that there is an arguable case as to whether the applicant's article 3 rights were sufficiently engaged by that evidence (and the other medical evidence tendered on his behalf) to require, as a matter of law, the Minister not to transfer him.
145. It is also relevant to the balance of justice that part of the applicant's case is that he is entitled as of right to remain in the State pending the determination of this judicial review challenge to the article 17 decision, if the relevant provisions of the Dublin III Regulation are correctly interpreted as he contends for. If he is proven right in respect of those contentions, he will have been returned to Sweden at a serious risk to his life, in breach of his legal entitlements under the Regulation.
146. It is also, I believe, relevant to the balance of justice that the applicant has raised issues of general importance as to the proper interaction between the provisions of articles 17, 27 and 29 of the Dublin III Regulation.
147. I do not believe any delay here is of such an order as to disentitle the applicant to an interlocutory injunction. Indeed, the applicant had been waiting over 12 months for an oral hearing before IPAT and it is understandable why the applicant would have wished to proceed with his appeal hearing in July 2021 when he did. The very issue of sequencing (i.e. whether it is appropriate or indeed necessary to await the outcome of the Chapter III decision and appeal before making an article 17 request) is one on which I need guidance from the CJEU and I do not believe it would be appropriate to hold any question of delay against the applicant in weighing the balance of justice in the circumstances.
148. In all those circumstances, in my view, an interlocutory injunction restraining the taking of any steps to remove the applicant from the State pending determination of this judicial review is warranted.
149. I should emphasise that the particularly serious nature of the medical evidence before the Court is a very important factor on the balance of justice in this case. It may be that my

view on the balance of justice could be different in a case where the medical evidence is not of the order it is in this case.

### **Reference to CJEU**

150. Having granted leave to the applicant to seek the reliefs he seeks by way of judicial review, and having granted him an interlocutory injunction preventing his removal from the State pending determination of these proceedings, I turn to the question of whether it is necessary to refer any questions to the CJEU to enable me determine the issues arising in these judicial review proceedings.
151. As regards the proposed reference to the CJEU, the Minister emphasised that the Irish High Court in *MA* had already referred to the CJEU question as to whether a decision under article 17 was covered by article 27. The fourth question referred by the Irish High Court in *MA* was as follows:
- "Does the concept of an "effective remedy" apply to a first instance decision under Article 17 of the [Dublin III] Regulation such that an appeal or equivalent remedy must be made available against such a decision and/or such that national legislation providing for an appellate procedure against a first instance decision under that regulation should be construed as encompassing an appeal against a decision under Article 17?"*
152. The Minister submitted that the CJEU answered that question its judgment in *MA* and that it would not be appropriate to refer substantively the same question to the CJEU; to do so would be tantamount to telling the CJEU it had got it wrong in *MA*.
153. At paragraph 73 of its judgment in *MA*, the CJEU stated: *"by its fourth question, the referring court asks, in essence, whether article 27 (1) of the Dublin III regulation must be interpreted as meaning that it requires a remedy to be made available against the decision not to use the option provided for art.17(1) of that regulation."*
154. The CJEU clearly contemplated, at paragraph 79 of *MA*, that the article 17 decision could be challenged at the time of an appeal against a transfer decision. In paragraph 78 of *MA*, the CJEU appears to hold that adoption of a transfer decision would necessarily follow a refusal to use the discretionary clause set out in article 17(1). The CJEU did not address, in terms, the question of whether the suspensive effect provisions of article 27 applied when a challenge by way of judicial review was taken to an article 17 decision.
155. While I accept that the CJEU in *MA* was asked to address questions relating to the interaction between article 17 and article 27, the CJEU was not asked in that case to address questions relating to suspensive effect. For the reasons identified by Collins J in *BK*, it seems to me that the question of suspensive effect of a judicial review of an article 17 decision is not *acte claire*.
156. I also note that Hogan J in *Taj v RAT* [2015] IECA 127 (albeit prior to the CJEU's decision in *MA*) expressed the view that it would be appropriate in a suitable case to refer to the CJEU the question of whether judicial review proceedings constituted a "review" within the

meaning of article 29(1) and the general interaction of articles 27 and 29 of the Dublin III Regulation.

157. Fundamentally, clear guidance is required as to whether an article 17 decision must be taken prior to the transfer back to the requesting state of an applicant. If so, guidance is further required as to whether the subject of an article 17 decision is entitled to remain in the State, with the transfer put on hold, until any judicial review challenge to the article 17 decision has been determined i.e. whether suspensive effect in article 27(3) applies and, if so, which form of suspensive effect applies. The question of whether an article 17 application can or should be made after an appeal against a Chapter III transfer decision has been determined also necessarily arises. These are not matters on which the CJEU has specifically ruled to date. They are clearly matters of potentially significant importance for the operation of the Dublin III system more generally.
158. During the course of the hearing, the applicant suggested the following questions ought to be referred:
- (i) Must a "transfer decision" made under Regulation (EU) 604/2013 of the European Parliament and of the Council of 26th June 2013 (the "Dublin III Regulation") be interpreted to include a decision made under Article 17(1) where the exercise of discretion under Article 17(1) has been invoked?
  - (ii) Are requesting Member States precluded from the implementation of a transfer decision pending the determination of an applicant's request for the exercise of discretion under Article 17(1) of the Dublin III Regulation?
  - (iii) Are requesting Member States precluded from the implementation of a transfer decision prior to exhaustion of an applicant's right to an effective remedy challenging the refusal of an application made under Article 17(1)?
  - (iv) Do the provisions of Articles 27(1) and (2) which provide for the right to an effective remedy, and the provisions of Article 27(3) which provides for suspensive effect, encompass a challenge to a decision made under Article 17(1)?
  - (v) Must each and all of the suspensive remedies under Article 27 be interpreted to operate as a stay on the time limit for the implementation of a transfer decision under Article 29(1) of the Dublin III Regulation?
159. In fairness to the Minister, she did not have sufficient time to give instructions on these questions before the conclusion of the hearing. I accordingly propose to discuss further with counsel for both parties the appropriate questions to be referred before taking a final decision on same.

### **Conclusion**

160. In conclusion, I propose to make an order granting the applicant leave to apply by way of judicial review for the relief sought at D(1)(a) and (b); 2; 3, 4, 5, 6, 8, 9 and 10 of the

further amended statement of grounds on all of the grounds set out section E of the further amended statement of grounds.

161. I will grant the applicant an interlocutory injunction restraining the respondent, her servants or agents from taking any steps to remove the applicant from the State pending determination of these proceedings.
162. I propose to make a reference to the CJEU under article 267 TFEU following further discussion with counsel as to the precise questions to be referred.