IN THE UPPER TRIBUNAL

JR/2203/2016

Field House,
Breams Buildings
London
EC4A 1WR

1st December 2016

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BEFORE

UPPER TRIBUNAL JUDGE REEDS

Between

THE QUEEN (ON THE APPLICATION OF)
MA
(ANONYMITY ORDER MADE)

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Mr T. Bahja, Counsel, instructed by OTS Solicitors appeared on behalf of the Applicant.

Mr R. Harland, instructed by the Government Legal Department appeared on behalf of the Respondent.

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JUDGMENT

(TO BE HANDED DOWN on 12th April 2017)

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UPPER TRIBUNAL JUDGE REEDS:

Introduction

1. This is an application for judicial review of the decisions made by the Secretary of State ("the Respondent") on 21st January 2016 and the decision of the 26th February 2016; the application having been lodged on 26th February 2016 and permission having been granted at a oral permission hearing by order of Upper Tribunal Judge Kebede on the 2nd August 2016. At that hearing permission was granted to amend the grounds to include a challenge to the decision of the 26th February 2016.

   Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269 as amended) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the applicant or her family members. For the avoidance of doubts, this order also applies to both the applicant and to the Respondent. The failure to comply with this order could lead to contempt of court proceedings.

Background

2. The applicant is a national of Somalia born on the 1st December 1991. She arrived in the United Kingdom via Heathrow on the 19th December 2015 and claimed asylum. Upon arrival she claimed not to know anyone in the UK. She underwent an asylum interview relating to the substance of her claim and at that time made reference to a sister living in the UK. A Eurodac check revealed that she had been fingerprinted in Germany on the 2nd November 2015. On the 18th January 2016 Germany accepted responsibility for the claim under Regulation 604/2013 ("the Dublin III Regulation").

3. On the 21st January 2016, the Secretary of State declined to examine the applicant's asylum claim substantively in the light of the German authorities having accepted responsibility for the claim and Germany being a safe third country. Thus a decision was made to refuse and to certify her case. In accordance with schedule 3, part 2, paragraph 5(3) of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004("the 2004 Act"), if the Respondent proposes to remove the applicant to a safe third country (and she is not a national of that country) she cannot bring an appeal in her asylum claim.

4. On the 22nd February 2016 a pre-action protocol letter was received by the Home Office seeking to challenge the lawfulness of the decision made on the 21st January 2016 under Article 17 of the Dublin Regulation and gave details of her relatives in the UK, including her sister, aunts and cousins with accompanying witness statements.

5. On the 23rd February 2016 removal directions were set for her removal to Germany.

6. On the 26th February 2016 the applicant lodged proceedings for permission to apply for judicial review of the decision of the 21st January 2016 on the grounds that the Secretary of State was in breach of Article 17(2) of the Dublin Regulation.

7. On the same day, the 26th February 2016 the Secretary of State refused the applicant's representations and a decision was made on Article 8 grounds, and also under the Dublin Regulation. The decision was not certified and thus the applicant had an in-country right of appeal. The removal directions were duly cancelled and the applicant lodged an appeal against the decision of the 26th February 2016.

8. On 20th April 2016, Upper Tribunal Judge Chalkley refused permission on the papers but upon oral renewal, Upper Tribunal Judge Kebede granted permission to apply for judicial review as follows:-

> *"1. The Applicant seeks to challenge the Respondent's decision of 21st January 2016 certifying her asylum application on third country grounds under paragraphs 4 and 5 of Part 2 of Schedule 3 of the Asylum and Immigration (Treatment of Claimants) Act 2004.*
>
> *2. Permission is granted to the Applicant to amend her grounds to include a challenge of the Respondent's decision of 26th February 2016 refusing an Article 8 claim.*
>
> *3. It is arguable, given the Respondent's arguable concession at paragraphs 16 to 19 of the decision of 26th February 2016, that limiting the Applicant's grounds of appeal to Article to article 8 grounds, is contrary to the provisions of the Dublin III Regulation and that the Applicant is arguably entitled to challenge the transfer decision of 21st January 2016 on that basis*".

9. The decision of Upper Tribunal Judge Kebede then set out a number of Case Management directions. Those Case Management directions included a requirement for the Respondent to lodge and serve detailed grounds within 35 days of the date of the order and an extension of time was sought and was granted. As can be seen from the decision of the UT Judge, the Secretary of State had not been represented at that hearing and thus was not aware of the amended grounds that had been referred to in the oral renewal grounds.

10. On the 23rd November 2016 the Respondent served a supplementary letter on the applicant.

The Parties' Respective Submissions:

11. Both parties have provided skeleton arguments setting out their submissions on the relevant issues and supplemented their written arguments with oral submissions. It is not necessary to set out in detail all of those submissions but

the relevant points made by each party in advancing their respective submissions. I shall deal in detail with those submissions when considering the relevant issues as identified by the parties.

12. Mr Bahja's submissions can be summarised as follows:-

(i) The Appellant is entitled to challenge a transfer decision under Article 27 (alongside Recital 19) by alleging a breach of Article 17 which is justiciable.

(ii) He relies on the CJEU decisions of **Ghezelbash** and **Karim** and that those decisions are not confined to Chapter III but extend to discretionary criteria in Chapter IV.

(iii) He places reliance on the decisions made by other Member States relating to justiciability.

(iv) He places significant weight and reliance upon the dicta of Beatson LJ in the decision of **ZAT**.

(v) Therefore he submits the discretionary clause of Article 17 is subject to judicial review when considering an exercise of discretion on humanitarian and compassionate grounds to bring together family reunification.

13. Mr Harland on behalf of the Secretary of State takes the opposite view that Article 17 is not justiciable either on its own or when read with Article 27 and Recital 19. Thus he submits:-

(i) The cases in respect to Dublin II are still applicable and the exercise of discretion set out in Article 17(2)

is not justiciable because it confers discretion on a state to act in a certain way rather than bestowing a right upon individuals.

(ii) The CJEU decisions only go so far as finding that under Article 27 an asylum seeker can challenge the incorrect application of one of the criteria for determining responsibility laid down by Chapter III of the Regulations (and following **Karim** the way in which the criteria are assessed under Article 19). Thus he submits it does not extend to a challenge to a discretionary clause in Chapter IV.

(iii) The decisions of other Member States are of limited value.

(iv) The decision of **ZAT** was not a case concerning Dublin III and that the comments of Beatson LJ are obiter dicta and they should not be followed.

14. Each party sought to raise other grounds but I have distilled the main arguments relied upon by each of the advocates as set out above.

The Dublin Regulation:

15. The European Union Regulation 604/2013, commonly known as Dublin III, establishes 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. Dublin III replaced Dublin II. It sets out a hierarchy of criteria for determining which member state is responsible for determining an asylum claim and sets out procedures for that to take place.

16. The stated aim of the Dublin III regulation is to provide a process 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*" (see recital 3 of the preamble to the Regulation).

17. The structure of the Regulation is relevant to this claim. It is divided into chapters. Chapter II (Articles 3-6) is called "general principles and safeguards", and sets out how the Regulation is to work (see in particular Article 3(1): "*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*"). It also sets out the minimum procedural requirements that member states must afford to asylum applicants (essentially, the provision of information and a personal interview; guarantees for minors).

18. Chapter III (Articles 7-15) is called "criteria for determining the member states responsible" and sets out the different criteria which determine the responsible member state, and the hierarchy of those criteria (so that one can determine which member state is in fact responsible if the different criteria identify two or more possible candidates).

19. Chapter IV (Articles 16-17) concerns "dependent persons and discretionary clauses", of which Article 16 is concerned with dependent persons and Article 17 headed 'Discretionary Clause'. It says in terms:

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…

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

20. Chapter V is headed "obligations of the member state responsible" and sets out (i) what a responsible member state must do once identified (Article 18) and (ii) how a member state's responsibility can end, and what is to happen in those circumstances ("*an application lodged after an effective removal has taken place shall be regarded as a new application*

giving rise to a new procedure for determining the Member State responsible" (Article 19(3)).

21. Chapter VI (Articles 20-33) sets out the procedures for taking charge of and taking back asylum applicants. Relevant for the Applicant's purposes is Article 27:

Article 27

Remedies

The applicant or another person as referred to in Article 18(1)(c) or (d) shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.

1. The provisions of Dublin III are given effect in the UK by the 2004 Act. Part 2 of Schedule 3 to that Act applies to a list of safe countries which includes Germany. Paragraph 3 provides:

"(1) This paragraph applies for the purposes of the determination by any person, tribunal or court whether a person who has made or a human rights claim may be removed –

(a) from the United Kingdom, and

(b) to a state of which he is not a national or citizen.

(2) A State to which this part applies shall be treated, in so far as relevant to the question mentioned in sub-paragraph (1), as a place –

(a) where a person's life and liberty are not threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion,

(b) from which a person will not be sent to another State in contravention of his convention rights, and

(c) from which a person will not be sent to another State otherwise than in accordance with the refugee convention."

1. Paragraph 4 disapplies s.77 of the Nationality, Immigration and Asylum Act 2002 and thus enables a person who has made a claim for asylum to be removed from the United Kingdom and to a state to which Part 2 of Schedule 3 to the 2004 Act applies "provided that the Secretary of State certifies that in his opinion the person is not a national or citizen of the State".

1. Paragraph 5 contains important certification provisions:

"(1) This paragraph applies where the Secretary of State certifies that-

(a) it is proposed to remove a person to a State to which this Part applies, and

(b) in the Secretary of State's opinion the person is not a national citizen of the State.

(3) The person may not bring an immigration appeal from within the United Kingdom in reliance on –

(a) an asylum claim which asserts that to remove the person to a specified State to which this Part

applies would breach the United Kingdom's obligations under the Refugee Convention…

(4) The person may not bring an immigration appeal within the United Kingdom in reliance on a human rights claim to which this sub-paragraph applies if the Secretary of State certifies that the claim is clearly unfounded; and the Secretary of State shall certify a human rights claim to which this sub-paragraph applies unless satisfied that the claim is no clearly unfounded.

The issues:

2. The first issue is whether Article 17 is justiciable. As his starting point, Mr Bahja submits that a Regulation that is said to be directly applicable is necessarily justiciable (relying on the wording of Dublin III inserted after Article 49 which provides as follows:-

> "The Regulation shall be binding in its entirety as "directly applicable in the Member States in accordance with the Treaties."

3. Mr Harland, on behalf of the Respondent, disagrees with that approach and cites a number of cases which concern its predecessor the Dublin II Regulations which have considered this issue. I observe that being directly applicable does not mean directly effective rights have been conferred on an individual which can be exercised in a domestic court. In this context, Dublin III's predecessor also had a similar provision and also stated it was directly applicable in the same terms but was not justiciable.

4. In my judgment, the Dublin II case law that has been the subject of argument before me, when broadly analysed, demonstrates that even where the Regulation is said to be directly applicable, one still needs to consider whether the intention of the provision is to regulate relations between

the States rather than confer rights on individuals. Thus provisions which are intended to regulate relations between Member States and between Member States of the European Union may not be intended to confer directly effective rights on individuals and may not, therefore, have direct effect.

Case law relevant to Dublin II:

5. There are two cases relied upon by Mr Harland to demonstrate that discretionary clauses under Dublin II are not justiciable. Those cases are **Jeyarupan v SSHD [2014] EWHC** and the Court of Justice of the European Union ("CJEU". **Federal Republic of Germany v Puid [2014] QB 346 (Case C-4/11)**. Those cases were concerned with Article 3(2) of Dublin II and whether it was justiciable.

6. Article 3(2) of Dublin II reads as follows:-

> "By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility. Where appropriate, it shall inform 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 take back the applicant."

The Decision in Puid

7. The facts of the case can be briefly summarised. The applicant was a national of Iran who travelled to Greece and then to Germany where the application for asylum was refused and, in accordance with the criteria specified in Dublin II Greece was identified as the Member State responsible for

examining his asylum claim and his transfer was ordered. This was annulled by a German court on the basis that Germany was required to exercise the assumption of responsibility enshrined in Article 3(2) in light of the relevant conditions in Greece. On appeal a reference was made to the CJEU (see paragraph 24).

8. The CJEU reiterated its ruling in **NS v SSHD C-411/10** that Dublin II provides a hierarchy of criteria in determining the Member State responsible for examining an asylum claim. If it is impossible to transfer the asylum seeker to the Member State initially identified under the criteria, the Member State in which it is located must continue to examine the criteria in order to establish whether another Member State can be identified. It is only if no Member State could be identified to which the asylum seeker can be transferred, because of the real risk of inhuman or degrading treatment contrary to Article 4 of the Charter of Fundamental Rights of the European Union, that the Member State in which the asylum seeker is located may need to examine the asylum claim itself using its discretion under Article 3(2) in order to avoid the procedure taking an unreasonable length of time. The failure at the initial stage to identify another Member State to which the asylum seeker can be transferred does not itself require the first Member State to invoke Article 3(2).

9. The CJEU concluded at paragraphs [57]-[58] as follows:-

> "The fact that .. Article 3(2) of Regulation No. 343/2003 is a discretionary measure, points away from an interpretation that would vest asylum seekers with any individual rights relating to the application of that provision. As the court has consistently held, while Regulations generally have immediate effect in the national legal systems of the Member States without it being necessary for the national authorities to adopt measures of application, or with it being necessary for the EU Legislature to adopt supplementary legislation, some of the

> provisions of a Regulation may, however, necessitate, for their implementation, the adoption of measures of application either by the Member States or by the EU Legislature itself ... Further measures are plainly required when a Member State is vested with discretion. Therefore, under normal circumstances asylum seekers cannot derive any right from the provisions of Regulation 343/2003 to the effect that they could require a Member State other than the one responsible in accordance therewith to examine their application for asylum. As pointed out in the written observations of the Commission, for a provision of EU law to produce direct effects in relation to between individuals and Member States, there must a clear and unconditional obligation imposed on Member States, the execution or effects of which are not subject to intervention by an Act of the Member States or the Commission. Article 3(2) of Regulation No. 343/2003 does not correspond to these criteria."

10. In the decision of **Jeyarupan v SSHD [2014] EWHC 386**, the High Court considered the issue of justiciability of the exercise of discretion under Article 3(2) and whilst a review of the authorities was not undertaken, the court cited at [27] the Court of Appeal's decision in **Habte v SSHD [2013] EWHC 3295**:-

> "Provisions which are intended to regulate relations between Member States (or between Member States and European institutions) may not be intended to confer directly effective rights on individuals and may not, therefore, have direct effect. The Court Appeal has held the provisions of the Dublin II Regulation, including Article 16, are concerned with the allocation of responsibility as between Member States and are not intended [to] and do not create directly effective rights for individual asylum seekers."

11. Mr Bahja argues that the decision of the Northern Irish Court in ALJ and A, B and C's application for **JR [2013] NIQB 88** took a contrary view as to the scope of Article 3(2). In that decision Stephens J dealt with two issues; whether there were

systemic deficiencies in Ireland's asylum system and whether the UKBA in Northern Ireland should have exercised discretion to assume responsibility for assessing the applicant's asylum claim under Article 3(2). The court rejected the first challenge but quashed UKBA's decision and its failure to consider and exercise a discretion under Article 3(2) to assume responsibility for assessing the claim for asylum.

12. The brief facts of the case are as follows. ALJ aged 37 and her three children (A, B and C aged 18, 16 and 12)who were Sudanese nationals arrived in Ireland in May 2010 and sought asylum. In July 2011 she and her children travelled to Northern Ireland and sought asylum. After a fingerprint search was undertaken, it was found that ALJ had claimed asylum in Ireland and a request was made by the UK Government for ALJ and her children to be taken back to Ireland. Ireland agreed to take them back and their claims were certified on third country grounds in October 2011. Judicial proceedings were instituted challenging the Secretary of State's decision to certify their claims for protection on third country grounds based on the existence of systemic deficiencies in the Ireland's asylum system and also the failure to exercise discretion under Article 3(2). Stephens J at paragraphs [110]-[111] held:-

> "[110] I reject all the applicant's grounds of challenge which rely on the contention that there is a systemic deficiency, known to the United Kingdom, in Ireland's asylum or reception procedures amounting to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment (Article 4 of the Charter) on return to Ireland.
>
> [111] I quashed the removal decision and the decision not to assume responsibility under Article 3(2) of Dublin II Regulation on the basis of a failure to have regard to the need to safeguard and promote the welfare of the children

> A, B and C as required by Section 55 of the Borders, Immigration and Citizenship Act 2009."

13. Thus Mr Bahja argues that this is a case that demonstrates an example of a failure to exercise discretion under Article 3(2) s justiciable on rationality grounds.
14. However, as Mr Harland submits the more recent case of **R on the application of CK (Afghanistan) and Others v SSHD [2016] EWCA Civ 166** carried out an extensive consideration of all the authorities and reached a contrary view.
15. The brief facts of that case involved **CK**, a vulnerable Afghan Sikh mother who had been the victim of rape in Afghanistan who had a 3 year old child. They left Afghanistan travelling to France and were fingerprinted there. However the father had an adult brother and sister in London and the father entered the UK on a false passport and claimed asylum, he was then joined by his wife who became pregnant. They claimed that they required the help of their relatives in the United Kingdom on whom they were dependent. The applicants relied on Article 3 and Article 15 of Dublin II. They also relied on Article 8 of the European Convention on Human Rights and on Section 55 of the 2009 Act. The applications were refused by the Secretary of State.
16. As regards Article 3(2) of Dublin 2, the Secretary of State considered that there were no "exceptional circumstances" to justify and exercise discretion in their favour and also that Article 15 did not arise because it only fell for consideration upon a request being made by the State that would otherwise be responsible. When dealing with the Article 8 consideration, the Secretary of State observed that the first and second Appellants had only been in the UK since September 2012 and thus it was not accepted that they had established any significant private life in the UK. The Secretary of State certified the human rights claim was clearly unfounded with the consequence they could not appeal

against the decision whilst they remained in the United Kingdom.

17. The High Court concluded that the decisions under the Dublin II Regulation were not justiciable save where the enforcement of the decision would lead to inhuman or degrading treatment which had not been raised on the facts of this particular case. However the court went on to state that if they were wrong in taking that view, when considering the merits of the case whilst it was accepted the Secretary of State had made a legal error in concluding that Article 15 of Dublin II only fell for consideration upon a request being made by the State that would otherwise be responsible (applying **K v Bundesasylamt [2013] 1 WLR 883)**. However, the court concluded that even if the Secretary of State had proceeded to consider Article 15(2) it was inevitable that she would have declined to examine the asylum claim. The court concluded that had the applicants been entitled to bring a judicial review claim, it would have failed on the merits.

18. On behalf of the applicants, before the Court of Appeal it was argued that the decision as to whether to apply the humanitarian clause in Article 15(2) was subject to challenge on ordinary public law grounds. The argument was refined further on the basis that a Dublin II decision to remit an asylum claim to another Member State is justiciable on **Wednesbury** grounds or by reference to Article 8 of the ECHR.

19. The issue of principle identified by the Court of Appeal at [9] was

> "what, if any is the scope for challenge to the removal of the affected individual to another Member State following a decision under Dublin II that the other State is responsible for the examination of his asylum claim".

As the Court of Appeal went on to state:-

> "The issue is one of principle because its resolution requires the court to find an accommodation between two competing legal imperatives:
>
> (i) The vindication of Dublin II is a regime for the distribution of an Inter-State level between the Member States of responsibility for the determination of asylum claims, and
>
> (ii) The vindication of individual claims of right which might be denied by a rigorous enforcement of the Inter-State regime. ... the learning, unfortunately, swings between the two."

20. At paragraphs [11] to [16] of the decision, Laws LJ summarised the cases that had reached the conclusion that a Dublin II decision could not be challenged by an individual save for on ECHR Article 3 grounds. Laws LJ went on to cite passages from **AR (Iran) v SSHD [2013] EWCA Civ 778** at paragraphs [29] and [31] and the decision of Stadlen J in a case called **Kheirollihi-Ahmadrogain v SSHD [2013] EWHC Admin 1314** at [47] and [166]. Lastly he quoted the CJEU decision in **Abdullahi v Bundesasylamt (Case C-394/12)**. That was a case in which the applicant, having travelled through Greece and Hungary claimed asylum in Austria. The applicant was a Somali national. The Austrian authorities mistakenly believed that Hungary was the first Member State that she had entered and Hungary agreed to take charge of the applicant. She claimed that Greece, not Hungary was responsible for her asylum application but because of Greece's human rights record, the Austrian authorities should examine her case. The Austrian Court referred to the Court of Justice the question whether an asylum claim it was entitled to seek review of the determination of the responsible Member State on the ground that Chapter III criteria in Dublin II had been misapplied. The court held as follows:-

> "[57] Thus, Article 3(2) of [Dublin II] ... and Article 15(1) ... are designed to maintain the prerogatives of the Member States in the exercise of the right to grant asylum, irrespective of the Member State responsible for the examination of an application on the basis of the criteria set out in that Regulation. These are optional provisions which grant a wide discretionary power to Member States ...
>
> [60] The only way in which the applicant for asylum can call into question the choice of that criterion [SC. under Article 10(1)] is by pleading systematic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that latter Member State, which provides substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment ...".

21. Having reviewed the authorities, Laws LJ reached the following conclusion:

> "[16] It can be seen, then, that there is a consistent line of authority demonstrating that the choice of responsible Member State for the purpose of Dublin II is ascertained and regulated at the Inter-State level. This learning supports the view that Dublin II confers no rights in individual asylum seekers to challenge the decision as to the responsible Member State or to require a particular Member State to examine their asylum application. But that is not the only line of authority which bears on this appeal."

22. At paragraphs [17] to [23], Laws LJ went on to consider the contrary line of authority. The first case considered was **K v Bundesasylamt Case C-245/11 [2013] 1 WLR 883**. That was a case in which the Austrian authorities rejected the applicant's asylum application on the ground that Poland was a responsible Member State. On appeal, the Austrian Court sought a

preliminary ruling on the interpretation of Dublin II Article 15, asking:-

> "Whether Article 15 of Dublin II must be interpreted as meaning that, in circumstances such as those in the main proceedings, in which the daughter-in-law of the asylum seeker is dependent on the asylum seeker's assistance because that daughter-in-law has a newborn baby and suffers from serious illness and handicap, a Member State which is not the State responsible for examining the asylum request according to the criteria laid down in Chapter III of that Regulation can automatically become the responsible State on humanitarian grounds. If the answer to that question is in the affirmative, the Austrian Court wishes to know whether that interpretation remains valid, where the Member State which is responsible in accordance with those criteria did not make any request pursuant to the second sentence of Article 15(1) of the Regulations."

23. The Court of Justice at [38] held that the scope of Article 15 was not limited to the ties between the asylum seeker and "family members" as defined in Article 2(i) of Dublin II. The conclusions at [47] and [54] were as follows:-

> "[47] Where the condition stated in Article 15(2) are satisfied, the Member State which, on the humanitarian grounds referred to in that provision, is obliged to take charge of an asylum seeker becomes the Member State responsible for the examination of the application for asylum.
>
> [54] In the light of all the foregoing considerations, the answer to the first question is that, in circumstances such as those in the main proceedings, Article 15(2)... must be interpreted as meaning that a Member State which is not responsible for examining an application for asylum pursuant to the criteria laid down in Chapter III of Dublin II becomes so responsible. It is for the Member State which has become the responsible Member

> State within the meaning of that Regulation to assume the obligations which go along with that responsibility. It must inform in that respect the Member State previously responsible. This interpretation of Article 15(2) also applies when the Member state which is responsible pursuant to the criteria laid down in Chapter III ... did not make a request in that regard in accordance with the second sentence of Article 15(1) of that Regulation."

24. Laws LJ went on to consider some observations that he had made in **AA (Afghanistan) [2006] EWCA Civ 1550** at [19] and the decision in **AM (Somalia) [2009] EWCA Civ 114** at [20–21]. That was the case in which the Appellant was a Somalian national who had entered the UK after claiming asylum in Italy. He had mental health difficulties and was reliant upon his two brothers and sister-in-law who were in the United Kingdom. The Italian authorities accepted responsibility for the examination of his asylum claim and the Secretary of State proposed to remove him to Italy. The Appellant appealed to the Tribunal asserting a prospective violation of Article 8 of the ECHR. The Secretary of State issued a certificate that the objection to removal to Italy was manifestly unfounded so that he would have no in-country right of appeal. The applicant thus sought judicial review of that certificate. The court considered the merits of the Article 8 case. However given that the challenge was to the validity of the certificate the question for the court was not whether in all the circumstances removal was nevertheless proportionate it was whether the Secretary of State could properly decide that the contrary argument was bound to fail (per Sedley LJ at paragraph [20]). Sedley LJ continued:-

> [22] The Dublin system has nothing to do with the merits of individual cases: it is designed simply to prevent forum shopping while ensuring that every asylum claim is properly processed. By itself it does not address the

> problem of removals which may violate Convention rights. That is catered for by the separate obligation of the Home Secretary not to act inconsistently with such rights.
>
> [23] Thus the question in the present case is whether an independent adjudication could find substance in the contention that had followed the Dublin procedure in this Appellant's case will be disproportionate. In my judgment it undoubtedly could.
>
> [25] .. (i)(f) as is distinctly possible ... he is given asylum in Italy, all that will lie ahead there is a life of isolation and probable relapse. In other words, this is a case in which, on appeal, an Immigration Judge might well hold that the lawful purpose of the Dublin Regulation was not sufficient to justify the damaging effect on this Appellant of disrupting what is now his private and family life by compelling him to present his asylum claim in Italy rather than here."

25. Jacob Lloyd LJ agreed, and the certificate was quashed.

26. Lloyd LJ then went on to consider the decision of the Upper Tribunal in **ZAT and Others v SSHD [2016] UKUT 0061**. This case involved seven applicants, all were Syrian nationals; the first four, having fled Syria got as far as Calais and desired to join the last three who had been granted asylum in the UK. All seven were related and had previously enjoyed family life in Syria, thus sought family reunion in the UK. In that decision, the President of the Upper Tribunal McCloskey J observed that it was

> "common ground among the parties ... that all the applicants are entitled, in principle to invoke Article 8 ...; and the central question to be determined is whether the Secretary of State's refusal is a proportionate means of achieving the legitimate aim (of effective and orderly immigration control)".

As the Court of Appeal noted this was a case that proceeded under Dublin III which entered into force as the successor to Dublin II on the 1st January 2014. That included Article 27 which conferred an expressed right of an appeal or review in fact and in law against the transfer decision before a court or Tribunal.

50. In that decision, the President addressed the terms of the relationship between the two regimes of the Dublin Regulation and the ECHR. Whilst the decision was concerned with Dublin III, Laws LJ considered that it had value when considering the issues in the present appeal. He quoted paragraphs 50 to 52 of **ZAT** (as cited) as follows:-

> "[50] It is not suggested, correctly and in our view, that either of these regimes has any inherent value or status giving one precedence over the other. They are not in competition with each other. However, as this litigation demonstrates, they may sometimes tug in different directions. Where this occurs full cohesion, or harmonisation, is unlikely to be achievable and some accommodation, or compromise, must be found.
>
> [51] ... the question to be determined in (a) a case of this kind is whether a disproportionate interference with the Article 8 rights of a person claiming to be a victim within the compass of Section 7 of the Human Rights Act 1998 is demonstrated.
>
> [52] What is the correct approach of the Dublin Regulation in a case of this kind? We consider that the Dublin Regulation, with its rational and overarching aims and principles, has a status of a material consideration of undeniable potency in the proportionality balancing exercise. It follows that vindication of an Article 8 human rights challenge will require a strong and persuasive case on its merits. Judges will not likely find that, in a given context, Article 8 operates in a

manner which permits circumvention of the Dublin Regulations, procedures and mechanisms, whether in whole or in part. We consider that such cases are likely to be rare."

51. Laws LJ quoted from the President's observation that the Dublin and ECHR regimes "may sometimes tug in different directions" which he considered was in line with his reference in paragraph [9] to the need to find an accommodation between the two competing legal imperatives.

52. The conclusions on that issue of principle were set out at paragraphs [24] to [32]. Laws LJ concluded as follows:-

"[25] ... however the difficulty in this case, and the explanation of the apparent tension between the two lines of authority I have discussed (on the Inter-State regime and on individual claims of right), arises from a non-sequitur which needs to be exposed: the proposition that Dublin II confers no right on the affected individual to challenge a decision as to which Member State is responsible for the determination of his asylum claim does not entail the further proposition that the decision to remove him to the responsible State may not be challenged from grounds other than that of Dublin II.

[26] The cases on the Inter-State regime vouched the first proposition, not the second. Thus in G at paragraph 25:

> "The effect of Article 15 is not to confer a freestanding substantive right on individual applicants".

In **KA** at paragraph 166:

> "alleged breaches of those provisions are not actionable at the suit of an individual".

In **Abdullahi v Bundasasylamt** at paragraph 60:

> "The only way in which the applicant for asylum can call into question the choice of that criterion [SC. under Article 10(1)] is by pleading systemic deficiencies in asylum procedure ...".

These formulations deny the conformant or individual rights by Dublin II. I have considered whether **K v Bundasasylamt** is to contrary effect, and allows for a challenge by the affected individual to the Dublin II decision as to the responsible State, on the footing that the proceedings giving rise to the preliminary ruling in that case were by way of an appeal of the applicant against the Austrian authorities' refusal of her asylum application on the ground that Poland was the responsible Member State; and the Court of Justice did not conclude that the questions asked of them did not arise because of the issue raised was not justiciable.

[27] But this, I think, will be to misread **K v Bundasasylamt**. The fact that an asylum seeker's daughter-in-law was dependent on the asylum seeker's assistance was given – a premise – of the first question asked of the court (which I have cited at paragraph 17), not an issue which fell for decision. The Court of Justice then had to decide whether the referring Member State (Austria) "can automatically become the responsible State on humanitarian grounds". The issue was as to the interpretation of Article 15(2). The court's judgment opens no door to the possibility of a merits challenge to the Dublin II determination. In the course of argument My Lord Davis LJ posed the question, what the position will be if the Dublin II decision maker reached a wholly unsustainable conclusion that Article 15(2) had no application from the facts it plainly did. This is not, of course, the **K v Bundasasylamt** case; but where it arise I think the court will consider it through the prism of Article ECHR Article 8, to whose viability in the Dublin II context I now turn."

[28] The cases on the Inter-State regime are in my judgment perfectly consistent with the enjoyment of a right in the hands of the affected individual to challenge his removal to the responsible State on grounds having nothing to do with Dublin II – notably Article 8; and the cases on individual claims that show in principle such challenge may be brought.

[29] The distinction between a challenge to the Dublin II decision itself, which is not justiciable, and an Article 8 claim directed to the affected person's removal, which is, has not been altogether lost in the cases though it has not always been spelt out ..."

53. Laws LJ made reference to the right under the ECHR to challenge a removal decision alongside the absence of any right to challenge a Dublin II determination as a responsible State. He found this to be "wholly unsurprising" [see 30]. However he found that the existence of the Dublin II regime had a

> "profound impact on the application of Article 8 to a case where the claimant is to be removed to another Member State following a decision that the other Member State is responsible for the determination of his asylum claim" [see 31].

54. Laws LJ cited with approval McCloskey J's description of the Dublin III Regulation as a "material consideration of undeniable potency and the proportionality balancing exercise" in such a situation. He further quoted with approval the following:-

> "Judges will not likely find that, in a given context, Article 8 operates in a manner which permits circumvention of the Dublin Regulation procedures and mechanisms, whether in whole or in part. We consider that such cases are likely to be rare."

55. Laws LJ went on to state:-

> "I would express the force of the Regulation in stronger terms. It is a legal instrument of major importance for the distribution of responsibility among the Member States for the administration of asylum claims. If it was seen as establishing little more than a presumption as to which State would deal with which claim, its purpose will be critically undermined. In my judgment an especially compelling case under Article 8 would have to be demonstrated to deny removal of the affected person following a Dublin II decision."

56. I therefore conclude from those authorities (although in relation to the Dublin II Regulation) that even when a Regulation is directly applicable, there is still the need to consider whether the intention of the provision is to regulate relations between Member States rather than confer individual rights. I have set out in the preceding paragraphs at some length the decision in **CK** (cited). However at [32] Laws LJ recognised that Dublin II had been succeeded by Dublin III which included a right of appeal or review given by Article 27. He did not therefore consider whether the redrafting of the Regulation and the inclusion of a specific clause namely Article 27 would make any difference to the issue of principle decided.

Dublin III and Article 27:

57. I therefore now turn to the decision under Dublin III and Article 27.

58. Mr Bahja seeks to argue that there is a difference between the provisions of Dublin II and Dublin III and that Dublin III is not limited to the regulatory duties and obligations of the Member State.

59. Mr Harland for the Secretary of State argues that Article 17 does not create individual rights. The Dublin III

Regulations, he argues, were not intended to confer legal rights in the way Dublin II did not. He further submits that even if the transfer could be challenged, there is nothing to suggest that there was any intention that the discretion set out in Article 17 should confer any individual rights.

60. The extent of any change in the law under Dublin III has been considered by the CJEU in two relevant cases and by the domestic courts; none of those cases however have dealt with Article 17. However those decisions do demonstrate that certain provisions of Dublin III are capable of direct effect so as to permit an individual to invoke them against the State and thus give individual rights. Article 27 is identified as one of them

61. Article 27 reads as follows:

Article 27

Remedies

1. The applicant or another person as referred to in Article 18(1) (c) or (d) shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.

2. Member States shall 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.EN 29.6.2013 Official Journal of the European Union L 180/45 (1) OJ L 348, 24.12.2008, p. 98.

3. 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.

4. *Member States may provide that the competent authorities may decide, acting ex officio, to suspend the implementation of the transfer decision pending the outcome of the appeal or review.*

5. *Member States shall ensure that the person concerned has access to legal assistance and, where necessary, to linguistic assistance.*

6. *Member States shall ensure that legal assistance is granted on request free of charge where the person concerned cannot afford the costs involved. Member States may provide that, as regards fees and other costs, the treatment of applicants shall not be more favourable than the treatment generally accorded to their nationals in matters pertaining to legal assistance.*

   Without arbitrarily restricting access to legal assistance, Member States may provide that free legal assistance and representation not be granted where the appeal or review is considered by the competent authority or a court or tribunal to have no tangible prospect of success.

   Where a decision not to grant free legal assistance and representation pursuant to this paragraph is taken by an authority other than a court or tribunal, Member States shall provide the right to an effective remedy before a court or tribunal to challenge that decision.

   In complying with the requirements set out in this paragraph, Member States shall ensure that legal assistance and representation is not arbitrarily restricted and that the applicant's effective access to justice is not hindered.

   Legal assistance shall include at least the preparation of the required procedural documents and representation before a court or tribunal and may be restricted to legal advisors or counsellors specifically designated by national law to provide assistance and representation.

   Procedures for access to legal assistance shall be laid down in national law.

Recitals 16, 17 and 19 of Dublin III provides:

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

17. In order to ensure full respect for the principle of family unity and for the best interests of the child, the existence of a relationship of dependency between an applicant and his or her child, ***sibling*** *or parent on account of the applicant's pregnancy or maternity, state of health or old age, should become a binding responsibility criterion. When the applicant is an unaccompanied minor, the presence of a family member or relative on the territory of another Member State who can take care of him or her should also become a binding responsibility criterion.*

19. In order to guarantee effective protection of the rights of the persons concerned, legal safeguards and the right to an effective remedy in respect of decisions regarding transfers to the Member State responsible should be established, in accordance, in particular, with Article 47 of the Charter of Fundamental Rights of the European Union. In order to ensure that international law is respected, an effective remedy against such decisions should cover both the examination of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred".

62. The two decisions of the CJEU are **Ghezelbash v Staatssecretiris Van Veiligheid en and Justitie Case (C-63/15) [2016] WLR 301 (7th June 2016)** and **Karim v Migration Skverket [2016] EUECJ C-155/15 (7th June 2016)**.

63. The facts of **Ghezelbash** are as follows. The applicant applied for a residence permit to the Netherlands authorities for a fixed period, on the grounds of asylum. After a search disclosed that the French Republic's external representation in Iran had previously granted the applicant a visa covering an earlier period, the Secretary of State requested the French authorities to take charge of them on the basis of Parliament and Counsel Regulation No. 604/2013 (establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national

or a stateless person). Article 4 of the Regulation conferred a right on the applicant to be informed of, inter alia, the criteria of determining the Member State responsible and the relative importance of those criteria, including the fact that an application for international protection lodged in one Member State could result in that Member State becoming the Member State responsible, even if that designation responsibility was not based on those criteria. Article 5(1), (3) and (6) of Regulation No. 604/2013 provided that the Member State carrying out the determination of the Member State responsible had to conduct a personal interview of the asylum seeker. Pursuant to Article 5(2), the interview did not have to take place if the applicant had already provided the information relevant to the determination of the Member State responsible and, in that case, the Member State in question had to give the applicant the opportunity to present any further information. Section IV of Chapter IV of the Regulation No. 604/2013, entitled "Procedural Safeguards", set out the arrangements for the notification of transfer decisions and the Rules governing the remedies available in respect of such decisions. Article 27(1) of the Regulation provided that the asylum seeker was to have the right to an effective remedy in the form of an appeal or a review against the transfer decision before a court or Tribunal. The scope of the remedy available to an asylum seeker against the decision to transfer him was made clear in Recital 19 of Regulation No. 604/2013.

64. The applicant made further submissions to the Netherlands' authorities and was questioned more closely and he requested the Secretary of State to examine his application under the extended asylum application procedure in order to allow him to submit original documents proving that he returned to Iran and remained there after visiting France and during the period to which the visa applied, which meant, according to the

applicant, that France was not the Member State responsible for examining his asylum application. On the applicant's challenge to the Secretary of State's decision, a judge granted an interim measure and ordered that the Secretary of State's decision be suspended. The Netherlands Court referred the Court of Justice of the European Union for a preliminary ruling; the question whether Article 27(1) of Regulation No. 604/2013, read in the light of Recital 19, meant that an asylum seeker was entitled to plead, in an appeal against the decision to transfer him, the incorrect application of one of the criteria for determining responsibility laid down in Chapter III of the Regulation, in particular the criterion relating to the grant of a visa set out in Article 12 of the Regulation. The referring court was also uncertain as to the relevance of **Abdullahi v Bundesasylamt (Case C-394/12) [2014] 1 WLR 1895** in determining the scope of Article 27(1) of Regulation No. 604/2013.

65. The Grand Chamber of the CJEC held at paragraphs [46-51]:-

> *"Parliament and Council Regulation No 604/2013 differed, to a significant degree, from Council Regulation (EC) No 343/2003, which was applicable in Abdullahi v Bundesasylamt (Case C-394/12) [2014] 1 WLR 1895. The detailed "Procedural safeguards" under Section IV of Chapter VI of Regulation No 604/2013 were not covered with the same degree of detail in Regulation No 343/2003. It was apparent from article 27(3) to (6) of Regulation No 604/2013 that, in order to ensure that those remedies were effective, the asylum seeker had to be given 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 and have legal assistance. It followed that the European Union legislature did not confine itself, in Regulation No 604/2013, to introducing organisational rules simply governing relations between member states for the purpose of determining the member state responsible, but decided to involve asylum seekers in that process by obliging member states to inform them of the criteria for determining responsibility and to provide them with an opportunity to submit information relevant to the correct interpretation of those criteria, and by conferring on asylum seekers the right to an effective remedy in respect of any transfer decision that may be taken at the conclusion of that process. Article 27(1), read in the light of recital (19) of the Regulation, meant that an asylum seeker was entitled to plead,*

in an appeal against a decision to transfer him, the incorrect application of one of the criteria for determining responsibility laid down in Chapter III of the Regulation, in particular the criterion relating to the grant of a visa set out in art 12 of the Regulation ".

66. The second case is **Karim v Migrations Skolverket [2016] EUECJ C-155/15 (7th June 2016)**. In that case the Grand Chamber of the Court of Justice of the European Union dealt with the issue of whether an applicant is entitled to challenge a transfer decision within the meaning of Article 27(1). The facts are as follows.

67. Mr Karim applied for asylum in Sweden on 03rd March 2014. A Eurodac search revealed that he had applied for asylum in Slovenia on 14th May 2013. On 20th March 2014, the Sweden authorities required the Slovenian authorities to take Mr Karim back on the basis of Article 18(1)(b) of Dublin III. Slovenian authorities agreed to that take-back request on 03rd April 2014. The Sweden authorities then informed the Slovenian authorities that Mr Karim had claimed that he had left the Slovenia territory for more than 3 months, after he first applied for asylum, and his passport had an entry visa for Lebanon dated 20th July 2013. Following an exchange of letters between Member States, the Slovenian authorities on 12th May 2014 repeated their acceptance of the take-back request. On 13th May 2014, the Sweden authorities rejected Mr Karim's application for a residence permit, including his application for asylum, closed the case and decided to transfer him to Slovenia. Mr Karim challenged the Swedish authorities' decision before the Swedish court.

68. The Swedish court dismissed his action on the ground that, in the case where a Member State agrees to take back an asylum applicant, s/he may challenge his/her transfer to that Member State only by pleading the existence of systemic deficiencies. Mr Karim contested the judgment of the Swedish court, contending that; (i) Slovenia was not the Member State

responsible for examining his asylum claim in that that he left Slovenia for more than 3 months after his first asylum application; and (ii) for humanitarian reasons his transfer should not proceed and that the asylum procedure in Slovenia had systematic deficiencies.

69. In those circumstances, the Swedish court decided to stay the proceedings and to refer the following questions to *the Court of Justice of European Union* for a preliminary ruling:

> *'(1) Do the new provisions on the right to an effective remedy set out in Regulation No 604/2013 (recital 19 and Article 27(1) and (5)) mean that an asylum applicant is also to be given the opportunity to challenge [the implementation of] the criteria in Chapter III of Regulation No 604/2013 on the basis of which he or she is transferred to another Member State which has agreed to receive him or her? Alternatively, can the right to an effective remedy be limited to mean only the right to an examination of whether there are systemic deficiencies in the asylum procedure and the reception conditions in the Member State to which the applicant is to be transferred [as the Court of Justice held in the judgment of 10 December 2013 in Abdullahi, C-394/12, EU: C: 2013:813];*

70. In the event that the Court should consider that it is possible to challenge [the implementation of] the criteria in Chapter III of Regulation No 604/2013, does Article 19(2) of Regulation No 604/2013 mean that that regulation may not be applied where the asylum applicant shows that he or she has been outside the territory of the Member States for at least three months?'

The Grand Chamber of the CJEU at [Para 28] of its judgment held:

> *" Article 19(2) of 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 must be interpreted to the effect that that provision, in particular its second subparagraph, is applicable to a third-country national who, after having made a first asylum application in a Member State, provides evidence that he left the territory of the Member States for a period of at least three months before making a new asylum application in another Member State.*
> *Article 27(1) of Regulation No 604/2013, read in the light of recital 19 thereof, must be interpreted to the effect that, in a situation such as that at issue in the main proceedings, an asylum applicant may, in an action challenging a transfer decision made in respect of him, invoke an infringement of the rule set out in the second subparagraph of Article 19(2) of that regulation".*

71. Thus in the decision of **Karim**, the CJEU found that the criteria in Chapter III had been applied wrongly because responsibility with the claim had already ceased under Article 19. Article 27 must therefore permit a challenge to Article 19 as well as Chapter III (I refer to paragraphs 23 and 27 of the decision), the former being the framework for the correct interpretation of the latter.

72. Dealing with the domestic cases, the first relevant case is that of **K v SSHD No. 2 [2016] EWHC 1394**, a decision of Garnham J. In that case the applicant asserted that he could rely on Article 28 of Dublin III (governing the criteria for detention of the applicant) in the context of his detention being unlawful. It was argued by the Secretary of State that Article 28 did not create individual rights and that the Dublin III Regulation did not alter the position as it had previously been under Dublin II and that it did not confer individual rights. It was further argued on the Respondent's behalf that even if the transfer decision could be challenged, there was nothing to suggest that there was any intention that Article 28 should confer individual rights: the terms of Article 28 did not create a clear, precise and unconditional

outcome "which is the cornerstone of conferring a directly effective right" [see 45].

73. Garnham J considered the Regulation itself at [50], and reached the following view:-

> "[50] In my judgment, it is plain from a reading of the whole Regulation that its primary objective is improving the mechanics of determining which Member State is responsible for examining an asylum application. A determination to avoid forum shopping remains central to the Dublin arrangements. That was true for Dublin II and it remains true for Dublin III.
>
> [51] That notwithstanding, however, there does seem to be an argument of substance that certain provisions of the Regulation are capable of having direct effect so as to permit an individual to invoke them against the State. In other words, there is force in the point that, alongside changes to the arrangements between Member States, the Regulation appears to contemplate giving rights to individuals. One such Article is Article 27."

74. Garnham J did not have the advantage of the CJEU Grand Chamber decision in **Ghezelbash and Karim** but had the decision of the Advocate General Sharpston and her interpretation of Article 27 which he quoted at [53-55]. He found the Advocate General's analysis to be "persuasive" and stated at [57]:-

> "[57] Dublin III is drafted in notably broader terms, with a notably greater focus on the position of individual applicants for asylum, than Dublin II. In my judgment a powerful case can be made in respect of a number of Articles, notably Article 27, that they were intended to be of direct effect. Whether or not any particular Article can be relied upon by an individual against a Member State, however, turns on an analysis of the Article in question. For present purposes, therefore, it

is necessary to consider in detail the terms of Article 28."

75. Garnham J then went on to consider Article 28. He did not find Article 28 to be sufficiently clear and unconditional as to make reliance upon it possible by a detained person in the position of the claimant in his case. He considered at [69]:-

> "[69] It follows that I conclude that Dublin III is capable of direct effect, but whether or not it has that effect depends on an analysis that the individual Article concerned but that Article 28 does not provide an individual with the right to challenge at administrative detention by the UK in circumstances such as the present."

76. Mr Bahja also relied on further case law and in particular two cases which refers directly to Article 17 of Dublin III.

Further relevant case law:

77. The first is case **IB 5946/5**, a judgment of the German Administrative Court of Hanover of 7th March 2016. The brief facts are as follows; the applicants were a mother and her three children who were Russian nationals of the Yazidi faith. The mother, her husband and the three children had entered France in 2012 and lodged a claim for international protection which was rejected by the French authorities. In 2015 the mother and her three children entered Germany and lodged a second claim for international protection. A Eurodac search revealed that they had claimed asylum in France in 2012 and thus a request was made to France to take them back. The French authorities agreed to the general request to take them back. They sought to resist removal under Article 17(1) of Dublin III, arguing that the father of the children had been extradited to Germany and was serving a prison term of nine years. They also contended that they were presently receiving

support from the children's grandparents who were German nationals. The children were attending school and sought to stay close to their father who was in prison. It was thus asserted that Germany should exercise discretion on humanitarian grounds to maintain family unity and to assess their claim rather than remove them to France under the Dublin III Regulation. The Federal Office held that the applications were inadmissible according to Section 72(a) of the Asylum Act because France was responsible to examine the claims for protection. Thus there were no reasons to invoke the discretionary clause under Article 17(1). The applicants appealed their decision to the Administrative Court of Hannover and separately claimed interim legal protection against the deportation order of the Federal Office (pursuant to Section 80(5) of the German Code of Administrative Court Procedure. The court granted the applicants' request for interim legal protection and ordered the appeal to have suspensive effect.

78. In its decision the court addressed three main areas. First of all dealing with the circumstances which would be sufficient to derogate from the provisions and responsibility laid down in the Dublin III Regulation according to Article 17(1). Article 17 did not specify the circumstances under which a Member State may derogate from the provisions on responsibility. However Recital 17 of the Dublin III Regulation explicitly states that Member States may derogate from the binding criteria of responsibility laid down in Article 3(1) of the Dublin III Regulation based on humanitarian or compassionate grounds in order to bring together family members, relatives or persons that are related in any other way. In this context, Recitals 13 and 14 of the Dublin III Regulation set out that the best interests of the child and the respect for family life should be a primary considerations and applying the Regulation. Article 6(3)(a)

of the Dublin III Regulation also stipulates that Member States shall take due account of the possibility of family reunification when assessing the best interests of a child.

79. Applying this, the court held that the Federal Office failed to take due account of these considerations in the assessment of the discretionary clause since it disregarded the possibility of family reunification and the particular interest of the children in maintaining regular contact with the father during his imprisonment. Additionally the support of the grandparents who were also residing in Germany in particular with regards to the care and upbringing of the children due to the mother's mental illness would also have to be taken into account. The court therefore concluded that there were exceptional circumstances which justified a derogation from the provisions on responsibility pursuant to Article 17 taking into consideration humanitarian grounds and family reunification.

80. As to whether the Federal Office had discretionary powers it was held that the office did enjoy discretionary powers in applying 17(1) of Dublin III. However the court concluded that in cases involving humanitarian considerations there may be no room for discretion by the Federal Office. In the court's view, there was no possible action other than the invocation of the discretionary clause in order to safeguard the primary objectives of the Dublin III Regulation, the best interests of the child and the support of family reunification.

81. The third question was whether the provision governing procedural aspects of the Member State's responsibility for examining an application for international protection provided with the individual with subjective rights. When looking at this question, in the court's view, the Procedural Rules laid down in the Regulation (time limits etc.) did not generally provide for subjective rights of the individual since such

Rules merely governed the legal relationship between the Member States. However, the court held that Article 17 of Dublin III constitutes an exemption given that the discretion granted when assessing the discretionary clause aims precisely takes into consideration humanitarian and compassionate grounds. Article 17 of the Dublin II Regulation therefore governs not only the legal relationship between Member States but also serve to protect human rights/fundamental rights. Consequently the court concluded that Article 17 of the Dublin III Regulations served to protect rights of individuals and therefore provided the applicants with the subjective right which can be enforced in a court of law.

82. The second case relied on by Mr Bahja is case number 387329 (a French case). This was a judgment of the State Council on 29th January 2016. The applicants, MA, Mrs C and their five children entered France in August 2014 to join the brother of MA, a French national. The claim for international protection was lodged on 9th September and having ascertained that they claimed asylum in Hungary in July, France requested Hungary to take them back under Article 18 of Dublin III. Hungary accepted responsibility for assessing their asylum claims and on 12th November 2014 the French authorities refused to accept responsibility for assessing his claim for protection and declared the applications inadmissible.

83. The applicants sought to challenge the decision in the French court (State Council) who held as follows:-

> *"6. Whereas Regulation (EU) No 603/2013 of 26 June 2013 laying principle in paragraph 1 of Article 3 that an asylum application is examined by a single Member State; that State is determined by applying the criteria established by Chapter III, in the order stated by this chapter; that according to the regulation, the application of criteria*

for examining applications for asylum is rejected in case of implementation, or the notwithstanding clause of ***paragraph 1 of Article 17*** *of the Regulation, which proceeds from a unilateral decision by a member State or of the humanitarian clause set out in* ***paragraph 2 of the same Article 17*** *of the Regulation; that paragraph 2 of this Article provides that a Member State may, even if it is not responsible under the criteria set by the regulation, "any parent bring on humanitarian grounds based in particular on family grounds or cultural "; the implementation by the French authorities of* ***Article 17*** *must be ensured in the light of the requirements of the second paragraph of Article 53-1 of the Constitution, which reads: "the authorities of the Republic still the right to grant asylum to any foreigner who is persecuted for his action in favor of freedom or who seeks the protection of France for some other reason.*

7. *Whereas both parts produced before the court of first instance referred that the parts produced and discussions during the hearing that, since their arrival in France, the applicants and their five children are accommodated and fully taken supported by the* ***brother of MA .., of French nationality****; the five daughters of the couple are all minors, the youngest being two years old and the eldest of fourteen years; the latter suffers from psychological disorders that require therapeutic monitoring; it appears that many certificates from their schooling in France in September 2014, four older girls showed real integration capabilities and achieved excellent academic results; that in these circumstances, the French authorities' refusal to make use of the option to consider the asylum request of interested while this examination normally under the jurisdiction of Hungary ignores obvious from the constitutional right asylum; It follows from the foregoing that the interior minister, who does not dispute the existence of an emergency, is not justified in complaining*

that, by order of 22 December 2014, the judge of the Toulouse administrative court ordered the suspension of the execution of these orders and directed the prefectural authority to review the situation of those concerned within fifteen days. "

84. A further case relied upon is **AL v Advocate General [2015] CSOH** which considered Article 27 of Dublin III and whether the Regulation had direct effect in the UK. The petitioners challenge in that case was whether the right to an effective remedy contained in Article 27 of Dublin III had been transposed into Scottish law and they also challenged the validity of judicial review as giving effect to that right. The petitioner had submitted that the law did not provide for a transfer decision to be suspended in accordance with Article 27(3). Whilst the policy of the Respondent was to cancel any removal direction once first orders had been granted, that policy was unpublished, unknown and the law was unclear. In any event, the policy did not amount to automatic supervision which was what Article 27(3) required.

85. The petitioner failed in both challenges. The Lord Ordinary decided that the language of Article 27(3) was clear. It required Member States to provide a means by which an asylum seeker could remain in the country for a period of time sufficient to allow him to challenge the transfer decision. This could be by way of a right to remain pending appeal or review; automatic suspension of the transfer request pending appeal or review or the opportunity to require suspension pending an appeal or review. Judicial review taken together with the published policy and the opportunity to request suspension pending determination of review. Article 27(3)(c) required a Member State to provide an effective remedy by suspending the transfer while the decision as the first supervision required was taken. Thus it had been open to the petitioner to apply for interim suspension pending the outcome

of the request. Judicial review amounted to an effective remedy where the Respondent sought a transfer on receipt of the first order, he was acting as envisaged under Article 27(4).

86. The court also ruled that there was no obligation on a Member State to "transpose" the provisions of Dublin III into domestic law. The provisions had direct effect and there was no inconsistency as what was required because what was required under Article 27(3) and the judicial review even if the UK had breached Article 27 the Lord Ordinary would have refused judicial review given the petitioner had achieved suspension pending the outcome of review.

87. The last relevant case is that of the **Secretary of State for the Home Department v ZAT and Others (Syria)[2016] EWCA Civ 810**. This is an appeal by the Secretary of State against the decision of the Upper Tribunal (President Vice President) and was the case referred to by Laws LJ in the decision of **CK** (as cited) which I have considered earlier in this judgment. For the purposes of this judgment it is not necessary to set out the factual background any further than I have done already.

88. It was submitted on behalf of the Secretary of State that in principle Article 8 co-existed with the Dublin III processes and procedures but submitted that it was only in an exceptionally compelling case that the ECHR Article 8 could prevail on the basis that because the Dublin Regulations strikes the proportionate balance of the purposes of Article 8 by putting family reunification in appropriate certain circumstances at the top of the hierarchy of the applicable State (Recital 3 to 15 and Article 6 and 8 of Dublin III). Thus it was submitted that the Regulation allowed for the orderly and proper consideration of family life by process and a system, that if followed will be compliant with Article 8 [see paragraphs 59 to 60]. On behalf of the Respondents, it was accepted that the adherence to the Dublin processes and

procedures had a “high value” but submitted that the Upper Tribunal would carefully analyse them and the relevant authorities. As to the balance between the Dublin process and Article 8, it was argued that in their special circumstances the operation of the Dublin process in France fell to vindicate and protect their rights under the ECHR. It was submitted that an unaccompanied minor has formed a category of

> “particularly vulnerable persons as to those with physical and mental health problems and it is important not to prolong more than is strictly necessary the procedure for determining the Member State responsible for the claims of such persons”.

It was argued that it was not possible to ignore conditions in the “jungle” camp because together with delay in bringing about reunification, they go to the severity of any breach and that was a relevant factor in considering proportionality under Article 8. It was secondly asserted that they had a freestanding right to assert the right under Article 8 irrespective of the efficacy or adequacy of the operation of the Dublin III Regulations in France. The United Kingdom was under a substantive obligation to admit the first four Respondents to the UK to make asylum claims because they had siblings legally present in the United Kingdom.

89. Beatson LJ set out his discussion at paragraphs 64 to 100. At paragraphs 64 to 68, the court considered previous authorities relevant to the Dublin II which did not contain a provision similar to Article 27 of the Dublin III Regulation [see 69]. He concluded that those earlier authorities demonstrated that although the ECHR and the Dublin II regime co-existed,

> "where the Dublin II processes and procedures have been operated, to date it is only where there is a systemic deficiency or a real risk of ill-treatment contrary to the ECHR Article 3 in the first Member State that the provisions of the ECHR had been accepted as overriding them."

90. The court then went on to consider the decisions relating to cases asserting systemic deficiency including **Abdullahi v Bundesasylamt**, and **R (NS) (Afghanistan) v SSHD** and **R (EM) (Eritrea) v SSHD**, **Tarakhel v Switzerland** at paragraphs 70 to 75.

91. At paragraph 76 Beatson LJ considered the two cases of **Ghezelbash** and **Karim** noting that the Grand Chamber in those cases had taken a different approach to that taken by **Abdullahi** in relation to the Dublin III Regulation. At [77] Beatson LJ did not consider that those cases gave any support to the Respondent's argument because Article 27 only dealt with the position where a person had made an application for asylum in the first Member State, which alone or together with the second Member State had to determine which State is responsible for determining the application. Those two cases therefore concern the scope of an appeal within the Dublin system but that was a different scenario than the Respondents in the present case where there had been no application made for asylum [see 77]

92. At paragraphs [78] to [80] Beatson LJ considered the second situation where the court of the second Member State is concerned not with the conditions in the first Member State but with an individual's family and private life and quoted the decision of **CK (Afghanistan)** and summarised the issue of principle in that case at [79 and 80].

93. Having considered that case Beatson LJ observed that there was "considerable force" in the Secretary of State's emphasise

on the importance of an orderly process and the need for biometric data, verification of identity and assessments of age and that there will be cases where certain individuals would be given priority. However notwithstanding the histories and trauma of the individuals concerned, it was not considered that the subjective fear about the French process could justify bypassing the Dublin process in the French courts [see 82].

94. However Beatson LJ went on to reject the Secretary of State's case in the following way:-

1. "In my judgment, Mr Eadie also puts the matter too high when he argues that the Dublin Regulation itself strikes the proportionate ECHR Article 8 balance because it places family reunification at the top of the hierarchy in ascertaining the responsible state and allows for orderly and proper consideration of family life. There was tension between what can be described as this absolutist strand of his submissions and his acceptance that in an exceptionally compelling case ECHR Article 8 can prevail over the Dublin process and procedures. Moreover, the authorities do not suggest that, even in what Mr Eadie described as the "initial procedural stages", there is an absolute rule that the determination of the responsible Member State must be by the operation of the Dublin process and procedures in the Member State in which the individual is present.

1. The need for expedition in cases involving particularly vulnerable persons such as unaccompanied children is recognised in the Regulation and authorities such as Case C-648/11 *R (MA (Eritrea)) v Secretary of State for the Home Department* [2013] 1 WLR 2961 and *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104 at [64]. Delay to family reunification may in itself be an interference with rights under ECHR Article 8: see *Tanda-Muzinga v France* (Application No. 2260/10) 10 July 2014, although it should be noted that in that case the delay was of three years. Mr Eadie accepted that the decisions in *R (Chikwamba) v Secretary of State for the Home Department* [2008] UKHL 40, [2008] 1 WLR 1420 and *Mayeka v Belgium*, to which I referred at [64] above, show that the operation of a procedural rule may be disproportionate. I accept Ms Demetriou's submission that the urgency of particular circumstances may require a shorter period than the periods specified as longstops in the Regulation. It is therefore material to consider not only what provisions are made in the procedural rules but how they operate in practice.

1. A further reason for rejecting Mr Eadie's submission in its absolutist form is Article 17 of the Dublin III Regulation. Since the relevant officials in the second Member State have power to assume responsibility in a case in which the Regulation assigns it to another Member State, it cannot be said that it is never open to an individual to request that state to do that. Mr Eadie suggested, or came close to suggesting, during the course of the

hearing that a refusal to exercise the power under Article 17 was not justiciable. That, in my judgment, is unsound in principle and also finds no support in the authorities. *Abdullahi v Bundesasylamt* recognised only that the second Member State has a wide margin of discretion in deciding whether to assume responsibility pursuant to the provision in the Dublin II Regulation that is the equivalent of Article 17. In a context in which the exercise of power relates to relations between two Member States as to the operation of a treaty arranging for the allocation of responsibility for examining applications for asylum between Member States, this is clearly correct. There will be a wide range of relevant considerations for the decision-maker to take into account: see all the factors that the Upper Tribunal stated were relevant to the assessment of proportionality. But subject to the effective scope of judicial review being narrower for this reason, the exercise by the Secretary of State of her discretion is subject to the ordinary public law principles of propriety of purpose, relevancy of considerations, and the longstop *Wednesbury* unreasonableness category and, because of the engagement of ECHR Article 8, the intensity of review which is appropriate in the assessment of the proportionality of any interference with Article 8 rights.

1. The fact that ECHR Article 8 can be engaged by delay and that the operation of a procedural rule may be disproportionate, together with the existence of Article 17, brings one back to the question of the balance between what Laws LJ in *CK's* case (see [79] above) referred to as the two competing legal imperatives and the height of the hurdle required to permit the Dublin process to be "trumped" by ECHR Article 8. The AIRE Centre criticise Laws LJ's statement in *CK*'s case that what is needed is "an especially compelling case" but the respondents maintained that, in any event, they fall within Laws LJ's formulation. It was argued by the AIRE Centre that all that has to be shown is a manifest deficiency in the protection of ECHR rights in the first Member State, because that will defeat the presumption that Member States will comply with their international obligations, including those in the ECHR: see the discussion of the principle of equivalent protection in *Bosphorus v Ireland* (2006) 42 EHRR 1, reaffirmed in *Avotins v Latvia* (Application No.17502/07) 23 May 2016. It is not contended that there is a general manifest deficiency by France in protecting rights under the ECHR and the EU Charter. The criticisms relate only to the specific circumstances of family reunion of unaccompanied minors.

1. There will be a need for expedition in many cases involving unaccompanied minors. The circumstances of the first four respondents' cases, especially the psychiatric evidence, suggested in their cases there was a particular need for urgency. But an orderly process is also important in cases of unaccompanied minors. The need to examine their identity, age, and claimed relationships remains, and there is a particular need to guard against people trafficking. I do not accept that the "especially compelling case" hurdle articulated by Laws LJ in *CK's* case is too high for the "initial procedural stages". In *R (Elayathamby) v Secretary of State for the Home Department* [2011] EWHC 2182 (Admin) at [42(i)] Sales J described the principle of mutual confidence as creating "a significant evidential presumption". In *EM (Eritrea)* (at [64]) Lord Kerr approved of this description. He had stated earlier in his judgment (at [40] – [41]) that the presumption reflected not only principle but pragmatic

> considerations. This is because a system which required a Member State to conduct an intense examination of avowed failings of another Member State would lead to disarray."

95. As to the merits of the case, the court considered that the Tribunal had set "too low a hurdle" for permitting the Dublin III process to be displaced by Article 8 considerations [see 92] and also that the Tribunal had taken "too broad a brush and approach to the relevance of the appalling conditions in the camp". The court considered that those conditions were not central to the Article 8 claim the focus of which must be family life rather than conditions but were, however, relevant to the assessment of proportionality namely when considered in the context of delay in bringing about reunification such conditions went to the severity of any breach which was a relevant factor in considering the proportionality of an interference with the Respondent's Article 8 rights. That was a matter that had not been explained in the judgment [see paragraph 93]. Thus at [95] the court considered that the application such as the one made by these Respondents should only be made in

> "very exceptional circumstances" where they can show the system of the Member State they do not wish to use, in this case a French system, is not capable of responding adequately to their needs."

The court went on to state that it would generally be necessary for minors to institute the process in the country in which they are in to find out and to be able to show that the system there is not working in their case. However there will be cases of such urgency and of such a compelling nature because the situation of the unaccompanied minor can clearly be shown that the Dublin system in the other country does not work fast enough. It is only after it is demonstrated that there is no effective way of proceeding in that jurisdiction

that they should turn to the authorities in the courts in the United Kingdom [see 95].

Discussion:

96. It has been necessary to review the case law relied upon by each of the parties in the preceding section when dealing with the Dublin II Regulations and in particular the decision of Laws LJ in **CK** (as cited) and the issue of principle set out at [9] and the conclusion at [25]. At [30] he observed that the "absence of any right to challenge a Dublin II determination as to the responsible State" whilst a right to challenge a removal decision under the ECHR subsisted, was "wholly unsurprising". Any other conclusion could not have been the intention of the European legislature when enacting Dublin II, and would, at least potentially conflict with the Human Rights Act 1998. However as set out the decision in CK was not one concerned with Dublin III and in particular Article 27. In those circumstances I consider that the principles established in that case need to be set against the introduction of Article 27 and the significant changes brought about to the Dublin III Regulation.

97. In this respect I do not find that any comparison with the Dublin II Regulations assists me in reaching a conclusive view on the issue of justiciability. There have been a number of significant and important changes brought about to Dublin III. As Garnham J observed in **Khaled** (No. 2) at [57] Dublin III is drafted in notably broader terms with a notably greater focus on the position of the individual applicant for asylum. He considered that there was a "powerful case" to be made in respect of a number of Articles, notably Article 27 which was intended to have direct effect. It is true to say that he went on to observe that whether a particular Article will be relied upon by an individual against a Member State but that must entail the analysis of the particular Article in

question. This is a point relied upon by Mr Harland who strongly resists any suggestion that Article 17 is justiciable in the light of it being a discretionary clause.

98. However in my judgment what is equally important is to consider the context in which the Articles are now set and the aims and objectives of Dublin III.

99. It must beyond argument that there have been important and significant changes made to Dublin III. They are set out in the judgment of the Advocate General Sharpston and ultimately the decision of the CJEU in **Ghezelbash and Karim**.

100. It is helpful to consider the judgment of the Advocate General in **Ghezelbash** who refers to a number of substantial changes, including the introduction of Recital 19. In her examination of Article 27 she identified that Dublin III had introduced procedural safeguards which were not found in Dublin II (notably those relating to notification of transfer decisions and suspensions of such decisions) and at [57] she said about Article 27 that it created "in unequivocal terms" a right to an effective remedy. The remedy was also specified as "in the form of an appeal or review in fact and in law against the transfer decision before a court or Tribunal". The differences between the two regimes were set out at [58]. They included the following; a right to appeal or review available to all asylum seekers, the right to appeal is expressed in mandatory terms "shall" have the right under the appeal or review was to cover both "law and fact". The Advocate General went on to state that the appeal or review was to provide "judicial oversight" of the administrative decision taken by the competent authority and that Member States must allow a reasonable time in which an individual could exercise their right to an effective remedy. The Advocate General observed that Article 27 did not specify what components of the authority's decision making process leading up to the transfer decision may be the subject of a review or

appeal. However the Advocate General did consider the aims in the context of the Regulations themselves at paragraphs 64 to 66. Those aims included establishing a clear and workable method for determining the Member States responsible based on objective criteria for the Member State and the person concerned and to improve the legal protection afforded to the applicant for asylum. The Advocate General described it as "the enhanced judicial protection" created by Article 27(1). The Advocate General also considered Recital 19 (which she considered to be expressed as a substantive provision in Article 27(1)) which explicitly stated in order to guarantee effective protection of an applicant's rights, legal safeguards and the right to an effective remedy are to cover both the application of the Regulation and also the legal and factual situation.

101. It is also plain from reading the Advocate General's observations that the second option (favouring a narrow interpretation of Dublin III as an "Inter State measure" and the associated argument that the aim was to eliminate "forum shopping") was an argument that she was not convinced of (see 69). The view taken by her was that it was "over simplistic" to describe Dublin III as an "Inter State" instrument and that whilst certain Inter State aspects remained in force that with the introduction of Dublin III it had seen the introduction and reinforcement of "substantive individual rights and procedural safeguards". Examples of such substantive individual rights that dealt with family reunification were identified as Articles 9 and 11 and procedural safeguards in Article 4 and 5. The Advocate General did not however identify Article 17 and at [72] made it plain that in her view the possibilities for challenging the application of Chapter III criteria were not "unlimited".

102. The Advocate General also considered that the "floodgate argument" overstated the consequences of interpreting Article

27(1) and that an application to the court to seek judicial scrutiny could not properly be equated with "forum shopping". Thus she observed that an appeal or review under Article 27 protected the individual against disregarded or incorrect characterisation of the relevant facts and against any misinterpretation or misapplication of the relevant law.

103. The conclusion reached at paragraph [91] was that the Dublin III Regulation should be interpreted as meaning that the applicant is able to challenge on appeal/review a transfer decision under Article 27(1) and to require the national court to verify whether the criteria in Chapter III had been correctly applied in his case. She went on to state that the effectiveness of judicial review guaranteed by Article 47 of the Charter required an assessment of the lawfulness of the grounds which were the basis of the transfer decision and whether it was taken on a sufficiently solid factual basis. The manner in which the examination is concluded as to whether the Chapter III criteria has been applied objectively and fairly, is governed by national Rules "which also govern the intensity and outcome of the appeal or review process". Thus at [93] she reached the conclusion that an "asylum applicant may bring proceedings under Article 27(1) of Dublin III in order to challenge an alleged violation of any substantive or procedural right specifically conferred by that Regulation.

104. Whilst the examples given included guarantees for minors [Articles 6 and 8] and the right to family reunification are set out [in Articles 9 and 11] the Advocate General stressed that she had not conducted a "complete examination" or compiled an "exhaustive list" of the rights whose violation would be susceptible to challenge. In my judgment that is an important qualification to remember when making an assessment of the issues before this Tribunal.

105. The decision of the Grand Chamber stated as a preliminary point that the rights under Dublin III differed from those

under Dublin II which had given rise to the decision in **Abdullahi** and took the view that the scope of the appeal in Article 27(1) must therefore be determined in the light of the wording of the provisions of the new Regulation, its general scheme and its objectives, its context and the evolution in connection with the system that it formed part of. I understand that to mean the fundamental principles of EU law set out in the Charter and under the ECHR.

106. On looking at the wording of Article 27(1) they considered any legal remedy must be "effective" and cover questions of both "law and fact" and observed that when drafting Article 27, there was no reference to any limitation of the arguments that may be raised by an applicant. At [37] the Grand Chamber stated that it was clear that the EU legislative did not provide for any specific link or any exclusive link between the legal remedies established in Article 27 and the Rule now set out in Article 3(2) which limited the possibilities of transferring an applicant to the Member State designated as responsible where there were systemic flaws. The Grand Chamber also highlighted that the scope of the remedy available against the decision to transfer an applicant is made clear in Recital 19 which did not appear in Dublin II. Recital 9 was intended to ensure that a State ensured compliance with international law, the effective remedy introduced in Dublin III in respect of a transfer decision should cover the examination of the applicant of that Regulation and also the examination of the legal and factual situation in the Member State to which any asylum seeker was to be transferred.

107. The Grand Chamber also referred to the differences between Dublin II and Dublin III. They referred to the general thrust of the developments that have taken place in the system and the objectives in the Regulations. They referred to the EU legislation which it introduced and enhanced various rights

and mechanisms guaranteeing the involvement of asylum seekers in the process of determining the Member State responsible. The Grand Chamber stated that Dublin III "differs to a significant degree" from Dublin II (see [46]) and set out Articles in that respect namely Articles 4 and 5. At [51] the Grand Chamber concluded that it followed that the EU legislature did not confine itself in introducing organisational Rules simply governing relations between Member States but decided to involve asylum seekers in that process by obliging Member States to inform them of the criteria for determining responsibility and to provide them with the opportunity to submit that information relevant to the correct interpretation of those criteria and conferred a right to an effective remedy. At [52] the Grand Chamber referred to the objectives of Dublin III and that it was intended to make "the necessary improvements" (in the light of the experience) not only to the effectiveness of the Dublin system but also the protection afforded to applicants to be achieved by judicial protection.

108. In my judgment the decisions of the CJEU recognised that not all Articles of Dublin III were susceptible to challenge. However whilst Mr Harland submits that those decisions limit the right of appeal or review under Article 27 to the correct application of Chapter III and Article 19(2) of Chapter V (**Karim**) to ensure the criteria are "correctly applied", it does not necessarily follow that the underlying reasoning cannot extend to the Chapter IV criteria which would include a challenge to Article 17. I have set out at some length the observations of both the Advocate General and those of the Grand Chamber in **Ghezelbash** which provide an understanding of the changes made to Dublin III and in particular in the context of Article 27 and in my judgment the objectives, aims and principles referred to underlying the introduction of Article 27 can extend to other Articles notably Article 17.

109. I have been referred to decisions of other Member States who have been grappling with similar issues including both Germany and France. I recognise, as Mr Harland submitted, that they are of limited value in reaching a decision on this issue. I have not been provided with the full transcripts and Mr Bahja was not able to provide any knowledge of the German and French domestic legislation or law that was applicable in those cases. In the German case this appeared to be an interim application and thus could be the subject of an appeal further and the French case demonstrated that the implementation of Article 17 must be seen in the light of the French Constitution.

110. Notwithstanding the shortcomings I have just identified, those cases are instructive and in my view that other Member States when interpreting Dublin III have found that Article 17 is justiciable when read with Article 27 and Recital 19.

111. However, I also place weight and reliance on the view expressed by Beatson LJ in **ZAT** at [85] in which he rejected an argument thought to be advanced by the Secretary of State that Article 17 was not justiciable. In his oral submissions Mr Harland submitted that those words of Beatson LJ were obiter dicta and as such could not be relied upon. He reminded me that the decision itself did not concern the Dublin III Regulations. That might be so, but when seeing that in the totality of the case law that I have been referred to and in the light of what I consider to be significant changes made to Dublin III both in its objectives and its aims and the introduction of a right to an effective remedy, that the words of Beatson LJ are persuasive and powerful.

112. Consequently I reach the conclusion that Article 17 when taken with Article 27 can be challenged by way of judicial review on public law grounds.

113. I now turn to the arguments advanced by Mr Bahja relating to the Secretary of State’s consideration of the Dublin

Regulation and in particular, Articles 17 and 9 within the decision letters under challenge.

The decisions made by the Secretary of State:

114. The applicant seeks to challenge the transfer decision made by the Secretary of State under the Dublin III Regulations by asserting a breach of Article 17(2) (see paragraph 12 of the original grounds).

115. In his skeleton argument, Mr Bahja refined that argument as follows; that the applicant seeks judicial review of the decision of 21st January 2016 and 26th February 2016 to certify the case on third country grounds ("the transfer decision") and to remove her to Germany under Dublin III Regulations. She contends that she is entitled to challenge the Respondent's decision under Article 27(1). She also asserts that the removal to Germany will be in reach of her rights under Article 9. Further or alternatively she challenges the decision under Article 17(2) as being irrational.

116. I observe that when the matter came before Upper Tribunal Judge Kebede on 2nd August 2016 she gave permission to amend the grounds to include a challenge to the decision of 26th February 2016. I have set out earlier the grant of permission. There were no additional grounds drafted setting out the nature of the amended challenge but it is accepted by Mr Harland on behalf of the Secretary of State that the decision letter of 26th February 2016 is challenged on the basis that a concession is said to have been made by the Secretary of State that Article 9 applied and that the applicant is entitled to succeed (that is for the claim to be heard in the UK under Article 9). In the alternative it is asserted the Secretary of State did not apply her discretion under Article 17(2).

117. Since the hearing before UTJ Kebede, a third decision letter has been served on 23rd November 2016. Mr Bahja has not

sought to amend his grounds but has filed a skeleton argument shortly before the hearing addressing that decision letter. Mr Harland did not take issue with the challenge in the circumstances of its late service and thus that decision is also under challenge to the extent that it is asserted that it suffers from the same defects as the decision letters of 21st January and 26th February. I shall therefore deal with all issues raised.

118. In the original grounds for judicial review, the applicant sought to challenge the decision of 21st January 2016. In his submissions, Mr Bahja submitted that the decision letter demonstrated that the Secretary of State failed to exercise any discretion under Article 17 or Article 17(2) and that the Secretary of State was aware of the circumstances of the applicant.

119. During his oral submissions he made a concession in this respect namely that he accepted that Article 17(1) was not justiciable because it conferred too wide a discretion that could not be associated or linked to any objective criteria. However he made it plain in his submissions that Article 17(2) was justiciable and therefore he relied upon Article 17(2).

120. In considering the submissions, it is necessary to take account of the material that was before the Secretary of State when the decision was taken. The applicant had been initially interviewed on her arrival on 19th December 2015 and claimed that she did not know anyone in the UK and no family members were identified. In an interview on the same date, she informed the Secretary of State that she had a sister (see page 15; tab 2 1.15). It is plain from the later responses in that interview that she had a “sister” whom she identified as a “half-sister” whom she had never met and who was not aware that she was coming to the UK. No further material was submitted on the applicant’s behalf before the Secretary of State before the process under Chapter III began. The case

was therefore referred to the third country unit and a formal request was made to Germany under Article 18(i)(b) of the Dublin III Regulations and on 18th January 2016 the German authorities accepted responsibility. No further information was provided by the time the decision was made to accept responsibility. The decision was therefore made in the light of the material provided.

121. Furthermore no request had been made for the exercise of discretion or any grounds advanced upon which it was said such discretion should be exercised. There was no request made until after the decision of 21st January 2016 in a letter of 8th February 2016.

122. In any event, I am satisfied that the Secretary of State explicitly considered whether she should depart from normal practise and considered an exercise in her discretion but decided not to do so. This is demonstrated in the decision letter where it was stated:-

> "The Secretary of State will normally decline to examine the asylum application substantively if there is a safe third country to which the applicant be sent. There are no grounds for departing from this practise in your case."

123. Notwithstanding what is said and that Germany had accepted responsibility, the Secretary of State set out that she still considered whether to depart from the normal practise and was therefore applying her discretion in that context. Whilst the consideration is brief, there is no requirement upon the Secretary of State to explicitly state that there was an exercise of discretion under Article 17. Furthermore, in the light of the material put before the Secretary of State as identified in the preceding paragraph, the applicant had not identified any specific duty or given any reasons for departing from such a practise.

124. The question is whether the decision maker turned her mind to whether she should hear the claim in the UK and in my judgment the Secretary of State did that on the little material that was before her. Thus the Secretary of State reached the rational conclusion that there was no good reason to exercise her discretion to hear the claim in the United Kingdom.

125. Whilst the skeleton argument at [37] argues that the decision to certify her claim was in breach of Article 9, there was no material before the Secretary of State to support any such claim under Article 9 or any other Article. Consequently the decision of 22nd January was a rational and lawful decision.

126. I now turn to the decision letter of 26th February 2016. The decision letter was in response to the letter of 22nd February 2016.

127. I shall summarise the decision letter. At paragraphs 3 to 5, the applicant's immigration history was set out before turning to consideration under Article 8 of the ECHR. The Secretary of State began by considering family life as a dependent adult applying Appendix FM to the information provided by the applicant that she had members of her family who were present and settled in the UK including her half-sister, aunts and cousins. At paragraph 8 of the decision letter, the Secretary of State reached the conclusion that the applicant did not meet the provisions set out in Appendix FM as she had entered the United Kingdom with no valid leave. It also recorded that she had entered the UK under a false pretence claiming that she had not known anyone in the UK but had now submitted evidence of extended family present and settled in the UK and further observed that whilst the family members had offered support, there was no financial evidence to show that she could be maintained for any prolonged period of time.

128. The decision letter at paragraphs 9 to 15 considered the applicant's private life both under paragraph 276ADE of the Immigration Rules and also outside of the Rules. In relation

to the consideration under paragraph 276ADE, the Secretary of State concluded that she had been present in the UK since 19th December 2015 and had been in detention since her arrival thus she could not meet the requirements of paragraph 276ADE(1)(iii). At paragraph 13, it was not accepted that she had established any meaningful or significant private life in the UK and under paragraph 14, the Secretary of State reached the conclusion that there were no circumstances demonstrating that a grant of leave outside of the Rules was appropriate and that the applicant's case had been considered under the provisions of the Dublin III Regulations whereby Germany had accepted responsibility for examining her claim. Thus the claim made under Article 8 of the ECHR was refused.

129. The decision letter then went on to consider the Dublin Regulations. The decision letter stated as follows:-

"Dublin Regulation

16. Consideration has been given to preserving family unity as defined under the terms of the Dublin Regulation:

Article 9

Where the applicant has a family member, regardless of whether the family was previously formed in the country of origin, who has been allowed to reside as a beneficiary of international protection in a Member State, that Member State shall be responsible for examining the application for international protection, provided that the persons concerned express their desire in writing.

17. It is noted that you have provided witness statements from seven members of your client's extended family which includes aunts, cousins and in-laws. They state that they are settled in the UK, are willing to provide support to your client, and have provided photocopies of their British passport details. With regards to the evidence provided, it is accepted that your client has a number of family members

present and settled in the UK who have been the beneficiary of international protection in the UK. Your client did however fail to mention that she had any family in the UK when she was first encountered, but during interview she did mention that she had a sister in the UK.

Conclusion

18. In view of the aforementioned jurisprudence, and having carefully considered your client's circumstances, the benefit of the doubt has been provided to her, and while it is considered that her removal to Germany would not breach the United Kingdom's obligations under Article 8 of the ECHR, given the aforementioned Dublin Regulation Article 9, it is considered appropriate to provide your client with an in-country appeal to our refusal of her Article 8 ECHR claim.

19. As the Secretary of State has refused your client's Article 8 ECHR claim but not certified the claim as clearly unfounded, it is now open to your client to lodge an appeal, solely on Article 8 grounds, should she wish to challenge this decision. This appeal right has been granted because of the Dublin Regulation aspect with regards to family members and the responsibility. As such please find enclosed appropriate appeal papers. If you do intend to appeal please pay particular attention to the deadline for doing so …

21. Removal scheduled for 29th February 2016 will be cancelled."

130. It is submitted on behalf of the applicant that the decision letter in the terms of its drafting clearly accepts that the applicant had family members who have been the beneficiaries of international protection. However the Secretary of State therefore failed to consider the applicant under Article 9 of Dublin III which was unlawful because having accepted that the applicant had family members in the UK who had been

beneficiaries of international protection, the Secretary of State had no discretion in terms of Article 9 to refuse to examine her claim. Mr Bahja submits that the Secretary of State's refusal to consider that the UK was the Member State responsible under Article 9 was unlawful, irrational or Wednesbury unreasonable. By way of reply, Mr Harland submits the applicant cannot fall within Article 9 and therefore any claim in this respect must fail whether it is justiciable or not.

131. I shall set out Article 9 of the Dublin III Regulations. It reads as follows:-

> "Article 9
>
> Family members who are beneficiaries of international protection
>
> Where the applicant has a family member, regardless of whether the family was previously formed in the country of origin, who has been allowed to reside as a beneficiary of international protection in a Member State, that Member State shall be responsible for examining the application for international protection, provided that the persons concerned expressed their desire in writing."

132. For the applicant to fall within Article 9 of the Dublin III Regulation, the applicant must demonstrate that she has a "family member … who has been allowed to reside as a beneficiary of international protection in a Member State …" The definition of a "family member" is set out in Article 2(g). That reads as follows:-

> "(g) 'Family members' means, insofar as the family already existed in the country of origin, the following members of the applicant's family who are present on the territory of the Member States:
>
> The spouse of the applicant or his or her unmarried partner in a stable relationship, where the law or practise of the

> Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third country nationals;
>
> The minor children of couples referred to in the first indent or of the applicant, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law;
>
> When the applicant is a minor and unmarried, the father, mother or another adult responsible for the applicant, whether by law or by the practise of the Member State where the adult is present;
>
> When the beneficiary of international protection is a minor and unmarried, the father, mother or another adult responsible for him or her whether by law or by the practise of the Member State where the beneficiary is present; .."

133. There is no dispute that the applicant is an adult and therefore by reference to the definition of a "family member" under Article 2(g) the applicant would have to demonstrate that the family member relied upon was a spouse or unmarried child who was a beneficiary of international protection. The Appellant can demonstrate neither. The relatives that she has set out in the representations of 22nd February were identified as a half-sibling, brother-in-law, aunts and cousins and thus they do not fall within the definition and therefore Article 9 does not apply.

134. It is in this context that I have considered Mr Bahja's argument that the definition of a "family member" should be read broadly to include a half-sibling. Thus he argues that the family relationship of a sibling is referred to in Recital 17 in Article 16 of Dublin III in order to preserve family unity and the guiding principle in Article 9 is the maintenance of the family unit.

135. He further argues that the proposals for Dublin IV indicate a proposal to redraft the definition of "family members".

136. In considering those arguments it is necessary to return to the structure and wording of the Dublin III Regulation. Chapter III contains Articles 7 to 15 and is called "Criteria for determining the Member State responsible". It sets out a criteria which determine the responsible Member State and the hierarchy of those criteria (so that one can determine which Member State is in fact responsible if the different criteria identify two or more possible Member States).

137. Where an applicant for asylum has a connection with two or more Member States that determination is primarily an interstate process and consequently it is not a feature of the process to take account of an individual's preferences or desires. However there are a number of exceptions to that general rule within the legislative scheme of the Regulation as set out in the decision of **Ghezelbash v Staatssecretaris van Veiligheid en Justitie (Case C-63/15) [2016] WLR** at paragraphs 37 to 43. Those paragraphs in **Ghezelbash** make reference to when applying the Chapter III criteria the Member States must take account of the presence of an applicant's family members in the EU territory (where relevant) before another Member State accepts a request to take back or take charge of the applicant.

138. There is no doubt that one of the features of the Dublin Regulations is the provision which it makes for the protection of minors and those who are vulnerable as set out in Article 6 "guarantees for minors" and Article 8 which sets out a number of circumstances dealing with minors and their family members and relatives (see Article 8(2)). Article 9 (as already cited) makes reference to family members in the context of family members as so defined and Article 10 which deals with family members whose applications for international protection

in that Member State have not been the subject of a first decision.

139. Article 16 is set out in Chapter IV of Dublin III and is entitled "Dependent persons and discretionary clauses". Article 16 reads as follows:-

> "Article 16
>
> Dependent persons
>
> Where, on account of pregnancy, a newborn child, serious illness, severe disability or old age, an applicant is dependent on the assistance of his or her child, sibling or parent legally resident in one of the Member States, or his or her child, sibling or parent legally resident in one of the Member States is dependent on the assistant of the applicant, Member States shall normally keep or bring together the applicant with that child, sibling or parent, provided that family ties existed in the country of origin, that the child, sibling or parent or the applicant is able to take care of the dependent person and that the persons concerned expressed their desire in writing."

140. The last remaining relevant Article is set out at Article 7(3) which stipulates that in considering an application under Article 8, 10 or 16 of Dublin III, the determining Member State is only required to take into consideration evidence provided prior to the decision of another State to accept responsibility for a claim for international protection.

141. Recital 17 is a general discretion which is transposed into the Dublin III Regulations in Article 17(1).

142. The submissions made by Mr Bahja are that the Recital and Article 16 both view "siblings" as being sufficiently close relatives and therefore they fall within Article 16. His argument follows thereafter that Article 9 should therefore be read more broadly to encompass "siblings". However, as set out above, that submission is not supported by the wording of Article 16 which is in wholly different terms to that of

Article 9. A careful examination of the wording of the two Articles demonstrates that the draughtsman sought to distinguish between the types of family member who would qualify under each of the respective Articles. There is a clear distinction in Article 16 which deals with dependent persons and identifies circumstances of such dependence by an applicant or vice versa upon a child, sibling or parent and a non-dependent and non-vulnerable person who falls under Article 9 when read with the definition of "family members" set out in Article 2(g).

143. Under Article 16, in relation to siblings, it concerns a situation where the applicant is dependent on a sibling or the sibling is dependent on the applicant (so long as the relationship previously existed) and that where there is such a sibling they should normally be kept together. However under Article 9 only a more proximate relationship as defined under Article 2(g) will apply. Mr Bahja puts forward no submission as to why the drafting of Article 9 and 16 are formulated in this way and are therefore different. His argument is that the proposals for Dublin IV suggest that the definition of "family member" should be altered to include wider family relatives and in particular a sibling.

144. I have considered those submissions but I am satisfied that the applicant does not nor cannot fall within Article 9 when seen in the context of Article 2(g). She cannot demonstrate a proximate family member as so defined; she does not have a spouse or an unmarried child who is a beneficiary of international protection. Additionally, it is not advanced on her behalf that she can meet any of the conditions set out in Article 16.

145. I cannot see any scope for reading Article 2(g) any wider than it is presently defined. Whilst there is no definition of "siblings" within the Regulations I do not find that to be

surprising as “sibling” is a term of art and it is not necessary to define it further.

146. Furthermore I can see no force in the argument that a wider interpretation under Article 2(g) is supported to include a “sibling” as supported in the decision of **K v Bundesasylamt (Case – 245/11)**(6th November 2012). As set out earlier in this determination, that was a decision which related to Article 15(2) of the Dublin II Regulations in the context of dependency. Article 15(2) of Dublin II has been replaced by Article 16 and is intended to deal with those who are dependent in particular circumstances of vulnerability, (pregnancy, newborn child, ill-health, disability). The Appellant cannot and does not fall within Article 16. Whilst Article 15(2) did not refer to “family members” but “other relatives” Article 9, which is relied upon by the applicant, does not use the same terminology.

147. It also seems to me that to consider any further proposals for reform to Dublin III is speculative and that for the purposes of this claimant, I should apply the form of the Regulation that is in force and was in force at the material time.

148. The alternative argument advanced by Mr Bahja is that in the decision letter of 26th February 2016, the Secretary of State made a concession that the Appellant had “family members” in the UK as within the definition of Article 2(g) of the Dublin III Regulation. He argues that the applicant is entitled to rely on the wording of the decision letter and that the concession is such that this alone is sufficient for the applicant to succeed and demonstrating that the conclusion reached that Article 9 does not apply in her case is unlawful.

149. He submits that on this basis that once the Secretary of State has accepted that the applicant has a family member who is entitled to reside as a beneficiary of international protection, that that Member State is responsible for

examining the application for international protection. Thus, he submits, that there is no discretion when applying Article 9 on the basis of the concession found within the decision letter.

150. Mr Harland by way of reply submits the decision letter cannot be so construed and that if it is suggested that there was any legitimate expectation on the applicant's behalf that she could rely on a family member as defined in Article 2(g), no such question arises from the wording within the decision letter. He submits the decision letter does not provide any expectation or promise that she will be treated by the Secretary of State as if Article 9 applied. In his oral submissions, he submitted that even if it could be said to be a concession, it could be withdrawn as this was not a case in which it could properly be said that the applicant was granted any form of benefit from the decision letter of 26th February and that she was in the same position as she was before. In any event, Mr Harland submits that the decision letter of 23rd November 2016 made it plain at paragraph 2 of that letter that there was no intention of any such concession.

151. I have set out earlier in this judgment the relevant parts of the decision letter of 26th February and in particular paragraphs 16 and 17 which are in issue between the parties.

152. Insofar as the submission is based on any "legitimate expectation" on the applicant's part, I am satisfied that the decision letter and its wording does not offer any such legitimate expectation that the family members that she seeks to rely upon are "family members" within Article 9. Applying the principle in **R (Nadarajah) v Secretary of State for the Home Department [2005] EWCA Civ 1363** per Laws LJ there is no evidence of a "clear, unambiguous statement of practise or promise for which it would be contrary to principles of good administration for the minister to resile, absent good reasons to do so."

153. I cannot read the decision letter to provide any such promise that the applicant would be treated as if Article 9 applied. Nor can it be reasonably said that there was any such concession. Had there been, I am satisfied that it would have been set out in clear and unambiguous terms, namely, that the Secretary of State intended to treat her relatives and in particular her half-sibling to fall within Article 9 notwithstanding the definition in Article 2(g).

154. I also consider that the argument advanced on behalf of the applicant ignores paragraph 17 of the decision letter where it refers to the extended family members (which includes aunts, cousins and in-laws) as members of the "extended family" rather than "family members" under Article 9. The architecture of the European Regulations, going back to the Directive, is to distinguish between family members and extended family members. Here the Secretary of State is using the vocabulary of "extended family members" and is a reference to the fact that she expressly does not accept that there are "family members" within the definition of Article 2(g). I do not consider that there was any concession in the decision letter of 26th February 2016; the family relatives either are or they are not "family members" within Article 2(g).

155. Furthermore, I consider that if there had been any such concession that the applicant's half-sibling or any of her other family members fell within Article 9, that the Secretary of State would not have gone on to consider whether Article 8 applied. There would have been no reason to reach the conclusion at paragraphs 18 and 19 that in view of the applicant's circumstances that the Secretary of State decided not to certify a human rights claim. The effect of this was that she had a challenge to the Secretary of State's decision on Article 8 grounds as set out in the decision of **R (on the application of ZAT) v SSHD, (Article 8 ECHR – Dublin Regulations, interface, proportionality) IJR [2016] UKUT** at

[49] and confirmed in **SSHD v ZAT [at ZAT] [2016] EWCA Civ** at [66] whereby it is said that the Dublin regime does not operate to the exclusion of the human rights regime but exists side-by-side with it.

156. In conclusion, I reject the submission that the decision letter made any concession and that the Appellant could therefore rely on Article 9. I observe in passing that in the letter of 22nd February, the applicant's solicitors make no reference to Article 9 or that the family members that were in the United Kingdom fell within that Article.

157. The fact that the Upper Tribunal Judge when granting permission made reference to there being a "arguable concession", does not mean that this Tribunal, after hearing full argument is bound by that. The judge in granting permission identified what was an arguable point but no more than that.

158. As to any argument that the decision maker failed to consider any residual discretion under Article 17, I consider that the decision letter should be read with that of 21st January. I have already found that the decision letter of that date did consider any residual exercise of discretion for the reason that I have set out. Whilst it is true that following that decision, further information was provided it was of a limited nature. The statements of the family members gave no details in substance of any relationships. It was not apparent from those statements, that none of them had previously met the applicant including her half-sibling and that the extent of any relationship was in the context of visiting her in short periods whilst she was in detention, which was the position at the date of the decision under challenge. There was no evidence put before the Secretary of State either to bring family relatives together on any "humanitarian grounds".

159. I do not read the decision letter as one in which the decision maker was not aware of the discretion to hear the

claim under Article 17 despite the other Member State having accepted to take back the take back request but that the Secretary of State was not satisfied that the circumstances were such to exercise discretion in her favour. That is made more explicit in the decision not to certify her claim on Article 8 grounds which would have the effect of not removing the applicant from the UK while she had a claim outstanding under Article 8 relying on her family relationships within the UK. This is consistent with the decision on CK (as cited).

160. Consequently the Secretary of State when taking the decision on 26th February, and having taken into account the material made a rational and lawful decision to refuse the claim under the Dublin Regulations (whether Article 9 or whether under the general discretionary clause under Article 17) but had recognised that such a claim should not be certified.

161. In those circumstances it is not necessary to address any further submissions made concerning the withdrawal of the concession or indeed the decision letter of 23rd November 2016 and its contents when considering Article 9.

162. Even if I were wrong in that respect, the decision letter of 23rd November at paragraph 4 provides support for the earlier decision made and that the Secretary of State, having taken into consideration all the circumstances of the case (and the letters from the applicant's sister and other relatives) that there are no good reasons for exercising the discretion under Article 17 to hear the claim in the UK. Mr Bahja seeks to challenge the decision on the basis that the Secretary of State failed to consider any humanitarian purposes or any family re-unification.

163. However the terms of Article 17(2) makes reference to "bringing together any family relatives on humanitarian grounds based in particular on family or cultural considerations." In the evidence provided to the Secretary of State no such grounds have been articulated or identified in the context of the

circumstances of the applicant and her family members. They had not met her until they visited her in custody and there were no family or other cultural considerations advanced on her behalf.

164. Furthermore Mr Bahja does not identify any policy or any guidance as to how the discretion should be exercised. Whilst he argues that the Secretary of State was wrong to take account of the public interest in ensuring that any asylum claims are heard in the country where the applicant first claimed asylum (see paragraph 4 of the decision letter) in my judgment, such a factor was properly considered by the Secretary of State in exercising any discretion to determine the claim under Article 17 or otherwise. This is recognised implicitly within the Dublin Regulations the stated aim to provide a method:

> "… based on objective, fair criteria both Member States and for the person concerned. It should, in particular make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedure for determining refugee status and not compromise the objective of the rapid process of applications for international protection" (see Recital 5).

165. For these reasons I am not satisfied that it has been demonstrated that the decisions of the Secretary of State were unlawful, irrational or unreasonable and thus the application for judicial review should be dismissed.

166. I dismiss the application for judicial review.

167. I will deal with any other ancillary matters when this judgment is handed down, including any application for anonymity. The parties are invited to agree a draft order to be lodged 48 hours before judgment is handed down (to include costs) and in the absence of such an order they will be required to attend.

POSTSCRIPT:

168. After sending a draft judgment to the parties in February and providing for a later time for hand down of it, both parties provided preliminary written submissions relating to a new decision of the Fifth Chamber of the CJEU **CK and Others [2017] EUECJ C-578/16**. Neither party had been able to obtain an authorised translated copy of that decision and on behalf of the Secretary of State, it was argued that the Tribunal should not finalise this decision on the question of justiciability of Article 17(2) until the decision was available. In those circumstances, the parties were invited to send any further written submissions along with a properly translated copy of the decision **CK**. Both parties subsequently complied with that direction at the end of March.

169. I confirm that I have considered those submissions in the light of the decision and in the light of the issues in this case.

170. The request for the preliminary ruling in the decision of CK concerned the interpretation of Articles 3(2) and 17(1) of Dublin III, Article 267 TFEU and Article 4 of the Charter of Fundamental Rights of the European Union and four questions were referred to the Court of Justice (see paragraph 46).

171. In answer to the first question, as to whether Article 17(1) must be interpreted as meaning that the question of the application by a Member State, of the discretionary clause is governed solely by national law and the interpretation given to it by the constitutional court of the Member State, or whether it is question of interpretation of EU law, the CJEU ruled that the discretionary clause under Article 17(1)

implies an interpretation of EU law within the meaning of Article 267(3) of the TFEU (see paragraphs 52-54).

172. The conclusions of the CJEU when considering the second, third and fourth questions are set out at paragraph 96. In essence, the CJEU ruled that the transfer of an asylum seeker within the framework of the Dublin III Regulation can only take place in conditions that preclude the transfer for resulting in a real risk of the person suffering inhuman or degrading treatment (within the meaning of Article 4 of the Charter). The CJEU also ruled that the provisions of Dublin III must be interpreted and applied with respect to the fundamental rights in the Charter, namely, Article 4 which relates to the prohibition of inhuman or degrading treatment (as provided in Article 3 of the ECHR), and in accordance with Article 52(3) of the Charter, its meaning and scope must be the same as conferred by the ECHR. Even if there are no grounds for believing that there are systemic failures in the asylum procedure and reception conditions, a transfer can entail a real risk of inhuman or degrading treatment within the meaning of Article 4, in circumstances where the transfer of the applicant, who has particularly serious physical/mental health conditions, would lead to their health deteriorating. Therefore where an applicant provides objective evidence showing the seriousness of the consequences of transfer, in the context of an effective remedy set out in Article 27, the authorities and the courts of the Member States cannot ignore that evidence. A Court would have to consider the legality of a decision to transfer because such a decision may lead to inhuman or degrading treatment of that person.

173. The court disagreed with the Advocate General’s opinion as to the interpretation of Article 3(2) of Dublin III and Article 4 of the Charter for the reasons set out at [93] and [94] in which the court distinguished the decision in **Abdullahi**. It

is also right to note that the court at [94] referred to its earlier observations set out at paragraphs [56–65] concerning the nature of the Dublin III Regulation and that it "differed in essential respects from the Dublin II Regulation", and in particular that the provisions of Dublin III must be interpreted and applied in a manner consistent with the fundamental rights guaranteed by the Charter (see paragraph [59]). Whilst the court did not explicitly say so, those observations were akin to those made in the decision of **Ghezelbash** to which I have referred earlier in this judgment.

174. Thus the court, disagreeing with the Advocate General's opinion found that even if there are no systemic failings in the reception conditions of a receiving Member State, the transfer of an asylum seeker within the framework of the Dublin III Regulation can only take place in conditions which exclude the possibility of transfer which may result in a real or proven risk of the person concerned suffering inhuman or degrading treatment (Article 4) (see paragraph 96).

175. That conclusion does not bear on the question that I have had to decide earlier in this judgment.

176. The Secretary of State relies on paragraph [97] to support her argument that Article 17 is not justiciable. Paragraph [97] reads as follows:–

> "Article 17(1) of that Regulation, read in the light of Article 4 of the Charter, cannot be interpreted as requiring, in circumstances such as those at issue in the main proceedings, that Member State to apply that clause."

However, the Fifth Chamber does not give any reasoning for that conclusion. Mr Harland on behalf of the Secretary of State in the written submissions asserts that the conclusion is made clear by the reasoning of the Advocate General and

that as the court adopted his conclusion, it should be thought to have adopted his reasoning as set out at paragraph [62–7]. However in my judgement, the reasoning of the CJEU in CK does not lead to the conclusion that Article 17 is not justiciable. The Court did not adopt the reasoning of the Advocate General. Even if it could be said that the Advocate General provided such reasoning at paragraphs62-67, the Advocate General in those paragraphs considered the argument advanced by the applicants in the main proceedings that the exercise of Article 17(1) was mandatory (my emphasis) where the applicant runs a real risk of being subject to inhuman or degrading treatment. The Advocate General set out at [62] that Article 17(1) cannot serve as an obligation to examine an application for international protection and gave four reasons for this set out at paragraphs [63–66] of his decision.

177. In my judgment, by saying that there was no obligation, the Advocate General was explicitly considering the applicant's argument (based on the circumstances of the applicant in **CK**) that the consideration of Article 17(1) was mandatory. However, the absence of an obligation on the part of the Slovenian authorities in **CK** did not necessarily mean that the Member State did not have a choice or discretion to consider whether Article 17 should be exercised (which would allow the Member State to hear the claim themselves). Thus, when read with Article 27 (in this context an effective remedy guaranteed by Article 47 of the Charter) and where circumstances are raised which relate to the exercise of discretion, then a failure to exercise that discretion can be challenged on rationality grounds (in the present case it is a challenge to Article 17(2) not Article 17(1)).

178. Whilst the written submissions make reference to the Advocate General's answer to question 4, that question was not answered by the Advocate General who found on the particular

circumstances of the case that such a question was hypothetical and therefore inadmissible. It is right that the Advocate General did set out the arguments advanced by the Commission, Slovenia and the UK government that the examination of an application for international protection on the basis of Article 17(1) is an option for the Member State concerned and not a right for the Applicant (see paragraph 70) the Advocate General did not reach any conclusive view on this (see paragraphs [73] and [74]) and more importantly nor did the CJEU.

179. Consequently I do not consider that the interpretation of **CK** is that which is reflected in the submissions advanced by the Secretary of State and prefer those of the applicant on this issue. Consequently those submissions do not affect the decision I have reached on the issue of the interpretation of Article 17.

180. However even if I were wrong in my interpretation of Article 17(2), it is plain from this judgment that such an interpretation does not affect the outcome of the decision I have made, as the case fails on its facts. It would also not preclude any further arguments advanced by either party in relation to **CK** or reliance on any other cases that have a bearing on the justiciability issue, including cases that are presently the subject of appeal relating to Article 28 and cases presently before the CJEU. ~~~*0*~~~~