THE COURT OF APPEAL

UNAPPROVED **REDACTED**

Whelan J.
Faherty J.
Murray J.

Neutral Citation Number [2020] IECA 357
Court of Appeal Record No. 2019/498
High Court Record No. 2016/968JR

BETWEEN:

P.F.

APPLICANT /APPELLANT

-AND-

THE INTERNATIONAL PROTECTION APPEALS TRIBUNAL AND THE MINISTER FOR JUSTICE AND EQUALITY

RESPONDENTS

AND

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High Court Record No. 2017/918JR

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APPLICANT/APPELLANT

-AND-

THE INTERNATIONAL PROTECTION OFFICER, INTERNATIONAL PROTECTION APPEALS TRIBUNAL, THE MINISTER FOR JUSTICE AND EQUALITY, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS

Judgment of the Court delivered on the 18th day of December 2020

Introduction

1. These are appeals from the orders of Keane J. of 16 October 2019 refusing the appellant's application for judicial review in proceedings bearing High Court record number 2017/918 JR ("the 2017 proceedings") and striking out the proceedings bearing High Court record number 2016/968 JR ("the 2016 proceedings") on the grounds that they were rendered moot by the refusal of the relief sought in the 2017 proceedings.

2. The 2016 proceedings concerned a decision of the of the Refugee Appeals Tribunal ("RAT", now, pursuant to s. 71(5) of the International Protection Act 2015, the International Protection Appeals Tribunal) to affirm a recommendation that the appellant not be declared eligible for subsidiary protection. The 2017 proceedings sought judicial review of the decision of the International Protection Office ("the IPO") concerning Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (hereinafter "the Dublin III Regulation"). Essentially, the impugned decision of the IPO denied that the State enjoys a discretion under Article 17(1) of the Dublin III Regulation to reassume responsibility for the examination of the international protection application of the appellant following a transfer of responsibility to the UK pursuant to Article 29(2) of the Regulation.

Background

3. The appellant is a national of Zimbabwe who applied for asylum in Ireland on 10 May 2011. Following a negative recommendation of the Office of the Refugee Applications Commissioner ("ORAC") as subsequently affirmed on appeal, the Minister issued a decision to refuse a declaration of refugee status to the appellant on 20 June 2012. ORAC is the office formerly responsible for such applications.

4. The appellant subsequently applied for subsidiary protection on 11 July 2012. On 7 July 2015 it was recommended that the appellant not be declared eligible for subsidiary protection. Following an oral hearing on 3 May 2016, this recommendation was affirmed on appeal on 2 November 2016 by the decision of RAT. It was this decision of 2 November 2016 which formed the basis of the appellant's application for judicial review in the 2016 proceedings.

5. On 18 June 2016 the appellant was encountered and detained by Hampshire police in the UK. In correspondence from the Home Office to the appellant and exhibited in the affidavit of Siúna Bartels of 23 November 2017, it is noted that the appellant stated that she arrived in Southampton in February 2016. In a letter dated 29 November 2016, exhibited in the affidavit of Siúna Bartels of 15 December 2016, the Home Office noted that the appellant had claimed that she had a sister who resided in Southampton. In both sets of correspondence it was noted that the appellant had previously attempted to fly to Southampton via Belfast in May 2014.

6. In her affidavit of 18 January 2018, sworn in the 2016 proceedings, the appellant averred that she had travelled to the UK. She does not in that affidavit state exactly when she travelled to the UK; averring that following her appeal hearing (which took place in May 2016) and prior to

receipt of the impugned decision she was arrested following an attempt to enter the UK for the purposes of a visit. She says that she travelled in order to visit her long-term partner who resides in Perthshire, Scotland. She also averred that her partner moved to London in April 2014. Further, it was stated at para. 4 of the amended Statement of Grounds in the 2017 proceedings, dated 16 February 2018, that the appellant travelled to the UK in May 2016 to visit her partner.

7. On 22 June 2016 the UK requested that Ireland take back the appellant pursuant to Article 18(1)(b) of the Dublin III Regulation. In this so-called "Take Back" request, exhibited in the affidavit of Sean Dooley of 8 February 2018, it is noted that the appellant gave the name of her partner in Scotland as P.M.N.

8. On 5 August 2016 ORAC acceded to the "Take Back" request following the receipt of further information on 19 July 2016. In the information received from the Home Office on 19 July 2016, it was noted that the appellant "*has no children and no known relationship in the UK*" and had stated that she was "*not with anyone".* It was also noted that, after searching every database available to the Home Office, no records were found for her partner, P.M.N.

9. When the appellant's solicitors became aware that Ireland had acceded to the UK's "Take Back" request, they wrote to the Home Office on 5 and 9 December 2016 enquiring where the appellant should present herself so that she could be transferred to Ireland. The appellant's solicitors also wrote to the Irish Naturalisation and Immigration Service ("INIS") on 9 December 2016 seeking confirmation of their efforts and/or role in facilitating the appellant's transfer back to Ireland. In a letter dated 6 January 2017, INIS confirmed that there was ongoing liaison between the two jurisdictions but that it was "*essentially a matter for the UK's Third Country unit as to when that transfer might be effected."* The appellant's solicitors wrote separately to INIS and the

Home Office again on 7 February 2017, seeking confirmation that arrangements had been made to transfer the appellant to Ireland together with details of same.

10. Since the transfer of the appellant did not take place by 5 February 2017, responsibility for the appellant's international protection application transferred to the UK pursuant to Article 29(2) of the Dublin III Regulation. This transfer of responsibility was confirmed by the IPO in a letter to the Home Office dated 8 February 2017. The IPO further confirmed by letter of 14 February 2017 that Ireland would not accept a voluntary transfer of the appellant as the UK was now the Member State responsible for her international protection application.

11. By letters dated 7 and 24 March, 21 April and 21 July 2017 the appellant's solicitors requested the State, through the IPO and INIS, to consider whether, in light of all the circumstances relating to the appellant, it would exercise a discretion pursuant to Article 17 of the Dublin III Regulation to continue examining the appellant's international protection application notwithstanding that it was no longer Ireland's responsibility by virtue of Article 29. By letter dated 10 April 2017, the IPO stated that it would be for the UK to exercise Article 17(2) and "*[n]o such request was received*" from the UK.

12. On 31 July 2017 the IPO wrote to the appellant's solicitors, stating:-

> *"Article 17(1) envisages the person being present in the jurisdiction exercising the discretion. That is not the position in [this] case. In fact your client left the Irish jurisdiction without the permission of the Minister as required and launched another protection application in the United Kingdom. That country has now become the Member State*

responsible for processing the application and any utilisation of the discretionary Article 17(1) or request under Article 17(2) is a matter for it to exercise."

In the course of the High Court proceedings, it was acknowledged by the respondents that the statement that the appellant had made an international protection application in the UK was incorrect.

13. The appellant subsequently applied for judicial review of the decision communicated by the IPO's letters of 10 April 2017 and 31 July 2017.

Decision of the High Court

14. Before addressing the question of whether a discretion arose under Article 17, the trial judge outlined, in paras. 12 and 13 of his judgment, certain inconsistencies in the reasons given by the appellant for her presence in the UK. While noting at para. 14 that these reasons were *"not strictly relevant*" to the question of law arising, he considered that they were "*potentially material*" to the extent that the appellant contended that they amounted to humanitarian considerations in favour of the State exercising the discretion she contended was available to it under Article 17.

15. The main issues before the High Court, as identified at para. 22 of the trial judge's decision, were:

i. whether Ireland had erred in law and in fact in reaching a finding that it does not have jurisdiction to exercise its discretion pursuant to Article 17 where the appellant was not present in its territories;

ii. whether Ireland had acted in breach of the Dublin III Regulation in failing to consider whether it would accept a transfer of the appellant into the State; and,

iii. whether Ireland had acted in breach of law, its obligation pursuant to Article 35 and in breach of the appellant's right to fair procedures and right to transparency in failing to have in place a designated system and/or mechanism through which Ireland can exercise its discretion under Article 17 and in failing to publish and/or notify concerned applicants of such system.

16. After setting out the material provisions of the Dublin III Regulation, the trial judge turned to consider the appellant's contention that there was *"no impediment*" to Ireland exercising a discretion under Article 17(1) to reassume responsibility for the examination of her international protection application. The trial judge observed that two difficulties arose with the appellant's interpretation of Article 17 when considered in light of the qualifying words *"[b]y way of derogation from Article 3(1)"* at the commencement of Article 17:-

> *"The first is that, if Ireland invoked Art. 17(1) to take back responsibility for the examination of the applicant's international protection claim, it would be reassuming its responsibility to do so under Art. 3(1), not derogating from that article.*
>
> *The second difficulty is the obverse of the first. It is that the responsibility of the United Kingdom to examine the applicant's claim for international protection is not one that it assumed under Art. 3(1), from which Ireland might then derogate under Art. 17(1). The United Kingdom was fixed with responsibility to examine that claim by operation of the relevant time-limit in Art. 29 in Chapter VI, which – if it can be properly characterised as a 'criterion' at all – is certainly not one of the criteria in Chapter III, recognised in Art. 3(1)."* (paras. 33 and 34)

17. The trial judge then addressed the question of whether the principles governing the interpretation of EU law, summarised in cases such as *C.I.L.F.I.T. v. Ministry of Health (Case 283/81)* [1982] E.C.R. 3415, nonetheless required the result for which the appellant contended. The trial judge considered that the appellant had advanced the argument, at least by implication, that the effect of Article 17 was that contended for by her when considered in its context and interpreted in the light of the provisions of EU law as a whole, with regard to the objectives of that law and to its state of evolution at the date on which the provision in question was to be applied. In that regard, the trial judge noted that the appellant relied upon, "*implicitly if not expressly*", an analysis from Hailbronner and Thym, *EU Immigration and Asylum: A Commentary* (2nd ed., Hart Publishing, 2016) at pp. 1533 to 1534. In the extract quoted by the trial judge, the authors assert that Article 17 is "*meant to allow the rigidities of the 'ordinary rules' to be overcome and to ensure that the system is implemented at all times in keeping with its principles and objectives*", in particular those identified by the preamble such as the rapid processing of applications, solidarity between Member States and respect for *inter alia* family life and the best interests of children.

18. The trial judge noted that the appellant lay particular emphasis on the fact that she was approaching the end of the examination process in Ireland in arguing that her interpretation would assist in the objectives identified by recital 5 (rapid processing of applications) and recital 25 (solidarity between Member States) of the preamble. However, the trial judge considered that those aims and objectives were at least as well served by giving both Article 17 and Article 29 their "*plain and obvious meaning*":-

> *"…In that way, the necessary flexibility in the application of the criteria under Chapter III is maintained, but the requirement upon Member States to address their obligations under*

the transfer provisions of Chapter VI with appropriate celerity and in a spirit of solidarity is not weakened or undermined." (para. 38)

19. The trial judge was satisfied that that conclusion was consistent with the Commission's statement that the precursor of Article 17 was introduced in order to allow each Member State "*to decide sovereignly, for political, humanitarian or practical considerations, to agree to examine an application for asylum*" even if it is not responsible under the criteria in the Regulation, as outlined at para. 37 of *Halaf (Case C-528/11)* EU:C:2013:342, [2013] 1 W.L.R. 2832.

20. Finally, the trial judge observed that *RSM (Eritrea) v. Home Secretary* [2018] EWCA Civ 18, [2018] 1 W.L.R. 5489 was not on point in circumstances where the respondents had made it clear that they did not contend that presence of the appellant for protection in the jurisdiction was a necessary precondition to the exercise of the discretion under Article 17(1).

21. In summary, the trial judge concluded:

"…the sovereign clause of Art. 17(1) of the Dublin III Regulation applies as a derogation from Art. 3(1), which requires an application for international protection to be examined by the Member State that the criteria set out in Chapter III indicate is responsible. It does not apply as a derogation from the express attribution of responsibility to a requesting Member State under Art. 29(2) where the transfer of the person concerned has not taken place within the time-limit of six months from the acceptance of a transfer request fixed under that provision." (para. 41)

22. Following from that conclusion, the trial judge held :

i. there was no error of law by the IPO in its determination that the exercise of the discretion under Article 17(1) did not arise after February 2017;

ii. that Ireland had not acted in breach of the Dublin III Regulation in failing to consider whether to accept the transfer of the appellant into the State after February 2017; and,

iii. no issue concerning the policy or procedure under which Ireland exercises the discretion under Article 17 arose for determination.

23. Accordingly, the trial judge refused the application for judicial review in the 2017 proceedings. He further held, applying the principles identified in *Lofinmakin v. Minister for Justice* [2013] IESC 49, [2013] 4 I.R. 274 and *G. v. Collins* [2004] IESC 38, [2005] 1 I.L.R.M. 1, that the 2016 proceedings had been rendered moot. Therefore, the 2016 proceedings were dismissed.

Notice of appeal

24. In her notice of appeal in the 2017 proceedings, the appellant contends that the trial judge erred in law in his interpretation of Article 17(1) of the Dublin III Regulation insofar as he found that, on a correct interpretation of Article 17, the exercise of the discretion under Article 17 did not arise for consideration in the circumstances of this case where Article 29(2) was relevant. In particular, the appellant contends that:-

i. the words "*By way of derogation from Article 3(1)…"* do not restrict the exercise of the Article 17 discretion only to situations where the Article 3(1) criteria would

otherwise dictate that another country is responsible and that Article 17 may also be applied where responsibility is transferred pursuant to Article 29(2);

ii. according to the terms of Article 17(1), the only condition precedent for the exercise of Article 17 is that an application for international protection has been *"lodged with it by a third-country national or a stateless person"* and that, in effect, the trial judge has introduced a second condition precedent; and,

iii. the words *"even if such examination is not its responsibility under the criteria laid down in this Regulation"* at the end of Article 17(1) indicate wide circumstances in which that Article may be applied and make clear that it covers *inter alia* a situation where criteria laid down in the Regulation might suggest that another Member State shall/should examine an application.

25. In addition, the notice of appeal indicates that the appellant is asking this court to make a reference to the Court of Justice of the EU ("CJEU").

26. In her notice of appeal in the 2016 proceedings, the appellant asserts that if she is successful in her appeal of the 2017 proceedings, the 2016 proceedings ought to be remitted back to the High Court.

27. The respondents oppose the appeal of the 2017 proceedings in its entirety. In addition, the respondents contend that:

i. the appellant is not entitled to an order of *mandamus* compelling the respondents to consider the exercise of discretion under Article 17;

ii. the appellant is barred from relief by reason of her lack of *bona fides* and the fact that the within proceedings amount to an attempt to procure assistance of the court in facilitating her illegal conduct which brings her outside the spirit of the Regulation; and,

iii. a reference to the CJEU is not necessary to enable this court to give judgment.

28. In the respondents' notice to the appeal of the 2016 proceedings, the respondents contend that the transfer of responsibility for the appellant's international protection application to the UK on 5 February 2017 renders the appellant's challenge to the decision of 2 November 2016 moot.

Supplemental affidavits of the appellant

29. The appellant has filed two further affidavits since issuing her notices of appeal. The first, sworn on 11 February 2020, was produced in response to the respondents' notice which stated that she had *"shown an egregious lack [of] candour in her dealing with the international protection process and has engaged in a serious abuse of the immigration system, the Dublin III Regulation and the controls of the Member States*".

30. At para. 4 of that affidavit the appellant avers that her partner's name is M.P.N., not P.M.N., the name under which the Home Office claimed it could find no record. She avers that the address at which she resided with her partner in Perthshire appeared on correspondence from the Home Office. She further exhibits a copy of the bio-data page of M.P.N.'s passport.

31. At para. 5 the appellant avers that she never had a sister in the UK and never provided the Home Office with information that she had a sister residing in the UK. She states that any reference

to a sister in Southampton in correspondence is a mistake by the Home Office. She further points out that correspondence from the Home Office was sent to her address in Perthshire and also confirms that there was no evidence of a sister of hers in Southampton.

32. At para. 6 the appellant explains that after the breakdown of her relationship with M.P.N. she resided briefly with a friend in West Yorkshire. The appellant avers that she is currently living with her aunt in West Yorkshire after meeting her through church, not having previously been aware that her aunt was in the UK.

33. In her affidavit of 1 June 2020, sworn for the purposes of grounding an application to extend time to appeal, the appellant further confirms at para. 18 that the Home Office was made aware that she is currently residing with her aunt in West Yorkshire and refers to a copy of a notification of change of address from the Home Office dated 23 May 2019.

Sovereign discretion under Article 17 of the Dublin III Regulation

34. The first – and critical - issue which arises in the appeal against the judgment in the 2017 proceedings is whether Article 17(1) of the Dublin III Regulation confers a discretion on Ireland to decide to examine the appellant's application for international protection or continue to do so:

(a) where responsibility for the appellant had previously been accepted by Ireland applying the criteria under Chapter III of the Dublin III Regulation; and

(b) where, having left the jurisdiction, the appellant's transfer back to the jurisdiction following Ireland's acceptance of a "Take-Back" request from the UK did not take place within the time limits provided for in Article 29 of the Dublin III Regulation and,

accordingly, Ireland was relieved of its obligations to take back the appellant and the UK was fixed with responsibility for examining her international protection application.

The appellant's arguments

35. The appellant's core contention is that notwithstanding that the time limit in Article 29(2) has expired, Ireland may nonetheless invoke the sovereign discretion pursuant to Article 17(1) and take the appellant back into the Irish domestic international protection system so that her subsidiary protection application can continue to be progressed. It is argued that the discretion provided for under Article 17(1) has not been displaced by the operation of Article 29(2) of Dublin III and that the Minister has a discretion to extend the time, should she wish to, for the transfer of the appellant back to this jurisdiction. Simply because Article 17(1) was redundant in 2011 in circumstances where Ireland was the Member State responsible having regard to the criteria set out in Chapter III of the Dublin III Regulation, it is argued, it does not follow that the Minister cannot now invoke the discretion preserved by Article 17(1) notwithstanding that responsibility for the appellant has been transferred to the UK.

36. Effectively, the appellant argues that Ireland has a greater power pursuant to Article 17(1) to permit the appellant to return to the State than it acknowledges in these proceedings. It is however accepted that it is open to the Minister not to exercise the discretion provided for in Article 17(1) in the appellant's favour. The gravamen of the appellant's case is that the Minister has such discretion and that same has not been displaced or rendered inoperative by the operation of Article 29(2).

37. It is asserted that the only precondition to the exercise of the discretion provided for in Article 17(1) is that an application for international protection has been made in the State. This has been satisfied given that the appellant has lodged such an application in this jurisdiction.

38. It is argued that the trial judge fundamentally erred in law in seeking to apply criteria (Chapter III of the Dublin III Regulation) designed specifically for the identification of which Member State holds mandatory responsibility for the examination of an international protection claim to restrict a separate and distinct provision (Article 17(1)) which is intended as an exception to the assumption of mandatory responsibility, by way of the exercise of sovereign discretion. It is submitted that at the most fundamental level there is no connection between the Chapter III criteria and Article 17(1) and that the former are not relevant to the latter. It is argued that if the Article 17(1) discretion was to be confined to criteria under Chapter III, this would constitute a significant deviation from the wording of Article 17(1) and the objects of the Dublin III Regulation as a whole.

39. The appellant further says that the trial judge's finding that in invoking Article 17(1), Ireland would be resuming responsibility under Article 3(1) and not derogating from it is fundamentally flawed in circumstances where the State would merely be assuming responsibility for the appellant under Article 17(1), the sole criterion for the assumption of responsibility having been met, namely that the appellant has applied in the State for international protection.

40. The literal interpretation which the trial judge afforded to Article 17(1) is not, it is said, correct. What is required is a teleological approach to the construction of Article 17(1), as recital 17 of Dublin III mandates. Applying a teleological approach, it is argued, Article 17(1) of Dublin III cannot be restricted in the manner suggested by the trial judge. It is contended that the trial

judge has imposed a common law solution to an EU concept by taking an excessively literal approach to the interpretation of Article 17(1).

41. It is further submitted that there is no reason in logic, where a requesting Member State misses a deadline provided for under Article 29, why the sovereign discretion (which may be required to be exercised on humanitarian or other grounds) of the requested Member State cannot be exercised.

42. The appellant takes issue with the case made by the Minister (and accepted by the trial judge) that the words *"By way of derogation from Article 3(1)"* as contained in Article 17(1) preclude the construction for which the appellant contends. It is argued that the words are descriptive only and not restrictive. Even on a literal interpretation of Article 17(1), it is said, the words *"By way of derogation from Article 3(1)…"* do not state or imply that the discretion is to be exercised only where a Member State is determining responsibility pursuant to the criteria set out in Chapter III. If that were the intention of the EU legislators, the appellant says, clearer language would have been used.

43. It is argued that support for the appellant's position is found in the manner in which the protections in the Dublin system have evolved over time, from the inception of the Dublin Convention to the present. Counsel highlights the recognition afforded both in the Dublin III Regulation itself and in the jurisprudence of the CJEU to the rights of international protection applicants.

44. The appellant says that the interpretation afforded to Article 17(1) by the appellant would not, contrary to the trial judge's finding, undermine the objectives sought to be achieved by

Chapter VI of Dublin III. She says that the aims of Dublin III will not be achieved by ascribing to Article 17(1) and Article 29(2) the meanings ascribed by the trial judge to these provisions. To do so would leave a "humanitarian gap" in the Dublin III Regulation. This would be contrary to the clear intention of the EU legislators.

45. It is acknowledged that there is no CJEU case law addressing the specific question of whether Article 17(1) can be applied when the Article 29(2) time limit has expired. It is submitted however that the emphasis on individual rights in Dublin III, in tandem with the consideration of Article 17(1) of Dublin III in CJEU jurisprudence, requires Article 17(1) to be read as conferring on the Minister the sovereign discretion to take back the appellant even where the time limit under Article 29(2) has expired and the UK as a matter of law has been fixed with responsibility for her international protection application.

The Minister's submissions

46. The Minister disputes the appellant's arguments and contends that the terms of Article 17(1) of Dublin III do not apply to the appellant's circumstances. It is submitted that the terms of Article 17(1) apply only where a Member State, applying the responsibility criteria in Chapter III, is not the responsible Member State and, by way of derogation from Article 3(1), determines to examine the protection application which has been lodged. The derogation provided for in Article 17(1) did not and could not apply to the facts of the appellant's case in circumstances where Ireland accepted that it was the responsible Member State.

47. In 2016, once it was brought to Ireland's attention that the appellant was in the UK without lawful authority, the procedures for taking charge or taking back the appellant under Chapter VI

of Dublin III came into play. It is submitted that Article 17(1) had and could have no application to this process. The Minister says that it is only at the stage of the initial determination of which Member State is responsible for a person seeking international protection that Article 17(1) may come into play. Once Article 29(2) came into play, which was post the determination ordained by Article 3 and Chapter III of the Dublin III Regulation, Article 17(1) had no bearing on the Article 29(2) process.

48. It is submitted that what the appellant seeks to do is to circumvent the provisions of Article 29(2) of Dublin III in circumstances where her proposed interpretation of Article 17(1) would wholly undermine the transfer framework that is built into the Dublin III Regulation and the time limits for giving effect to the transfer and/or take-back framework. The operation of these time limits has been examined by the CJEU in *Shiri* (*Case C-201/16)* EU:C:2017:805, [2018] 1 W.L.R. 3384 upon which the Minister relies in support of the argument that the coming into operation of Article 29(2) has conclusively fixed the UK with responsibility for the appellant.

Discussion

49. The appellant's case falls to be considered in the context of the purpose, structure and legislative intent underlying the Dublin III Regulation in general, and Article 17 in particular.

50. Dublin III is the most recent iteration of what is commonly referred to as "the Dublin system". The Dublin system has its origins in the Dublin Convention of 1990 which came into effect in 1997. It was created to meet three main objectives: (1) to ensure that only one Member State is responsible for the examination of an application for international protection, (2) to deter multiple asylum claims in various Member States, and (3) to determine as quickly as possible the

responsible Member State so as to ensure effective access to an asylum procedure. The Dublin Convention was replaced by the Dublin II Regulation in 2003. In 2008, the European Commission issued a recast proposal of Dublin II (COM(2008) 820 final), with the purpose of remedying deficiencies in the Dublin system. The proposal sought to address the efficiency of the system, *"situations of particular pressure on Member States' reception capacities and asylum systems"* and to increase the level of protection afforded to international protection applicants. The European Commission's document referred variously to the need to *"ensure that* [the provisions of the Dublin Regulation] *are fully compatible with fundamental rights as general principles of Community law as well as international law", "the need to strengthen the legal and procedural safeguards for persons subject to the Dublin procedure"* and *"the need to ensure better respect for the right to family unity and to improve the situation of vulnerable groups in particular that of unaccompanied minors".*

51. This ultimately led to the adoption of the Dublin III Regulation on 29 June 2013 and its entry into force on 19 July 2013.

52. In *Ghezelbash (Case C-63/15)* EU:C:2016:409, [2016] 1 W.L.R. 3969, the CJEU elucidated the general purpose of Dublin III in the following terms:

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

Moreover, Chapter IV of the Regulation identifies specifically the situations in which a Member State may be deemed responsible for examining an asylum application by way of derogation from those criteria." (at para. 42)

53. The purpose of the Dublin III Regulation is also aptly described by Charleton J. in *N.V.U. v. Refugee Appeals Tribunal* [2020] IESC 46:-

"The purpose of the Dublin III Regulation may be seen in the recitals to the Regulation. As recital 3 recalls, it was in consequence of a meeting of the European Council at Tampere in 1999 that agreement emerged on applying the Geneva Convention Relating to the Status of Refugees of 28 July 1951, as supplemented by the New York Protocol of 31 January 1967, in order to ensure that 'nobody is sent back to persecution'. In that respect all of the European Council countries 'are considered as safe countries for third-country nationals.' It was necessary in that respect, all countries being in principle equal in their protection for those in need of asylum, that there be, as recital 4 declares, 'a clear and workable method for determining the Member State responsible for the examination of an asylum application.' This is to be, according to recital 5, 'based on objective, fair criteria both for the Member States and for the persons concerned.' The idea was simplicity and ease of application in order to '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.' Regrettably, this family has now been in the country for 5 years pending the resolution of this point for them and for other applicants." (at para. 18)

54. Article 17 of the Dublin III Regulation provides:

"1. By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation.

The Member State which decides to examine an application for international protection pursuant to this paragraph shall become the Member State responsible and shall assume the obligations associated with that responsibility. Where applicable, it shall inform, using the 'DubliNet' electronic communication network set up under Article 18 of Regulation (EC) No 1560/2003, the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of, or to take back, the applicant. The Member State which becomes responsible pursuant to this paragraph shall forthwith indicate it in Eurodac in accordance with Regulation (EU) No 603/2013 by adding the date when the decision to examine the application was taken.

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.

The request to take charge shall contain all the material in the possession of the requesting Member State to allow the requested Member State to assess the situation.

The requested Member State shall carry out any necessary checks to examine the humanitarian grounds cited, and shall reply to the requesting Member State within two months of receipt of the request using the 'DubliNet' electronic communication network set up under Article 18 of Regulation (EC) No 1560/2003. A reply refusing the request shall state the reasons on which the refusal is based.

Where the requested Member State accepts the request, responsibility for examining the application shall be transferred to it."

55. The purpose of Article 17 is found in recital 17 of the Dublin III Regulation:

"(17) 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."

56. As put by Charleton J. in *N.V.U.* at para. 22, *"[w]hat* [Article 17] *does is to enable countries subject to the Dublin III Regulation or who join the system from outside the EU to choose to examine an application for refugee status or subsidiary protection rather than transferring to another country."* Hailbronner and Thym, referred to earlier, describe Article 17 as *"a crucial component"* of the Dublin system. That is undisputed. The issue here, however, is whether the jurisdiction which enables a Member State or another signatory country to make the choice

described by Charleton J. in *N.V.U.* at para. 22 of his judgment, is capable of being invoked by the Minister in the circumstances of the present case. It has been clarified in *N.V.U.* that the discretionary power in issue here vests in the Minister.

57. The factual backdrop which gives rise to the question of the proper interpretation of Article 17(1) of Dublin III is set out in detail earlier in this judgment. The appellant applied for asylum in this State on 10 May 2011 and it is not in dispute but that this State accepted responsibility for her asylum application and the subsidiary protection application that followed in its wake. The issue of whether the sovereign discretion provided for in Article 17(1) should be invoked did not fall for consideration since Ireland determined that it was the responsible Member State for the purposes of the appellant's international protection application.

58. Ireland's identification as the Member State responsible arose from the application of the criteria set out in Chapter III of the Dublin III Regulation. The order in which these criteria are to be applied is found in Article 7(1) which itself refers to the sequence established by Articles 8 to 11 inclusive. As can be seen, priority is given to factors involving family unity and the best interests of any child affected. The primary function of Member States pursuant to Article 3(1) is to consider international protection applications on the basis that they may have the responsibility to consider same or that such applications may be transferred to another country in circumstances ordained by the Regulation.

59. The UK's "Take Back" request (after the appellant was found in the UK without a residence document) was made pursuant to Article 18 of Dublin III which provides, in relevant part:

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

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

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

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

(d) take back, under the conditions laid down in Articles 23, 24, 25 and 29, a third-country national or a stateless person whose application has been rejected and who made an application in another Member State or who is on the territory of another Member State without a residence document."

60. Following this State's acceptance of the "Take Back" request, in accordance with the provisions of Article 29(1) of Dublin III, the transfer of the appellant to Ireland should have taken place within a period of six months and no later than 5 February 2017. Article 29(1) provides:

"1. The transfer of the applicant or of another person as referred to in Article 18(1)(c) or (d) from the requesting Member State to the Member State responsible shall be carried out in accordance with the national law of the requesting Member State, after consultation between the Member States concerned, as soon as practically possible and at the latest within six months of acceptance of the request by another Member

State to take charge or to take back the person concerned or of the final decision on an appeal or review where there is a suspensive effect in accordance with Article 27(3)…"

61. That the transfer of the appellant did not take place within the requisite six months is clear and undisputed. This triggered the operation of the provisions of Article 29(2) of Dublin III:

"2. Where the transfer does not take place within the six months' time limit, the Member State responsible shall be relieved of its obligations to take charge or to take back the person concerned and responsibility shall then be transferred to the requesting Member State. This time limit may be extended up to a maximum of one year if the transfer could not be carried out due to imprisonment of the person concerned or up to a maximum of eighteen months if the person concerned absconds."

62. Responsibility for the appellant's international protection application was thus transferred to the UK. No issue is taken by the appellant with the fact that by operation of Article 29(2) the UK became the Member State responsible. However, the appellant argues (on the basis of the submissions outlined above) that the UK may nonetheless still be relieved of its obligation under Article 29(2) by this State exercising the sovereign discretion which is provided for under Article 17(1) of Dublin III.

63. Notwithstanding the arguments canvassed by counsel for the appellant, the Court finds that Article 17(1) does not operate as a derogation from the express attribution of responsibility to a requesting Member State under Article 29 where the transfer of the international protection applicant concerned has not taken place within the requisite time limit.

64. The purpose of Article 17 is clear, both on its face, and within the structure of the Dublin III Regulation. Article 17 is intended to enable the aim of recital 17 in making available to each signatory country the option of embarking on the consideration of or continuing an application for international protection notwithstanding that the requisite enquiries have established that a visa issued in another participating country or that an international protection application has been commenced elsewhere. The sovereign discretion provided for in Article 17(1) is rooted firmly in the context of a Member State's mandatory obligations as set out in Article 3(1) of the Dublin III Regulation:

> *"Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in transit zones. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible."*

It is by way of exception to the mandatory obligation in Article 3(1) that Article 17(1) comes into play, as expressly set out therein by the words *"By way of derogation from Article 3(1)…"*. The Court so concludes from a consideration of the legal and administrative framework provided for in the Dublin III Regulation and the pronouncements of the CJEU on that Regulation.

65. It is of some assistance at this juncture to look at how the concept of sovereign discretion has evolved since the inception of the Dublin system.

66. The equivalent of Article 17 under the Dublin Convention was Article 3(4) which provided:

"4. Each Member State shall have the right to examine an application for asylum submitted to it by an alien, even if such examination is not its responsibility under the criteria defined in this Convention, provided that the applicant for asylum agrees thereto."

67. Article 3 of the Dublin II Regulation, the immediate predecessor to Dublin III provided:

"1. Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.

2. 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."

68. The preparatory document which led to Article 3(2) in Dublin II (COM(2001) 447 final) explained that:

"…a Member State may sovereignly decide, for political, humanitarian or practical considerations, to agree to examine an asylum application lodged with it by a third-country national, even if it is not responsible under the criteria in the Regulation. The condition of the asylum seeker's consent, which figured in the Dublin Convention, is not reproduced in the Regulation, since it is the applicant who takes the initiative to lodge an application with the Member State concerned: he necessarily consents, therefore, to that State examining his application. A Member State which takes such a decision thus becomes the State responsible within the meaning of the Regulation and assumes all the obligations associated with such responsibility…" (p. 10)

69. Counsel for the appellant contends that the explanatory document does not suggest that the invocation of the discretion provided for in Article 3(2) was restricted to the criteria set out in Chapter III of the Dublin II Regulation. While this may be so, it is the case that in similar vein to Article 17(1) of Dublin III, the sovereignty provision of Article 3(2) of Dublin II is prefaced by the words *"By way of derogation from paragraph 1…"*

70. Dublin III's equivalent (Article 17) of Article 3(2) of Dublin II is now found in Chapter IV of Dublin III entitled "Dependent Persons and Discretionary Clauses". As explained in the preparatory documents for Dublin III (COM(2008) 820 final):

"For reasons of clarity, the 'sovereignty' and the 'humanitarian' clauses are brought together under the same Chapter, called 'discretionary clauses', and are revised. It is proposed that the 'sovereignty clause' be used mainly for humanitarian and compassionate reasons. Regarding the circumstances for applying the 'humanitarian clause', it is proposed

to keep a general clause allowing Member States to use it whenever the strict application of the binding criteria will lead to a separation of family members or of other relatives." (p. 9)

71. As stated by the CJEU in *C.K. and others (Case C-578/16 PPU)* EU:C:2017:127, [2017] 3 C.M.L.R. 10 at para. 53, *"the 'sovereignty clause' clause under art.3(2) of the Dublin II Regulation…coincide, in essence, with those of the 'discretionary clause' laid down in art.17(1) of the Dublin III Regulation…".*

72. Thus, insofar as it was suggested by counsel for the appellant that the location of Article 17 within Chapter IV of the Dublin III Regulation assists his interpretation of Article 17(1), the Court does not accept that argument. The happenstance of the sovereignty discretion provision provided for in Article 17(1) now being located in Chapter IV of the Dublin III Regulation (and not appended as an adjunct to Article 3 as was the case with the Dublin II Regulation) does not lead inexorably to the conclusion that Article 17(1) confers on a Member State an overarching sovereign discretion outside of that which arises by way of derogation from Article 3(1).

73. Counsel for the appellant cited decisions of the CJEU which he says support the argument that the sovereign discretion provided for in Article 17 is of broader application than in the context of Member State contemplating the exercise of such discretion by way of derogation from Article 3(1) of the Dublin III Regulation and the Chapter III criteria.

74. Reference was made to *Halaf (Case C-528/11)*. There, the CJEU opined, with regard to Article 3(2) of Dublin II:

"34. In this respect, it should be noted that Article 3(1) of the Regulation states that an application for asylum is to be examined by a single Member State, which is to be the one which the criteria set out in Chapter III of the Regulation indicate as responsible.

35. However, Article 3(2) of the Regulation expressly provides that, by way of derogation from Article 3(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 the Regulation.

36. It is thus apparent from the very wording of Article 3(2) of the Regulation that the exercise of that option is not subject to any particular condition.

37. That conclusion is also corroborated by the preparatory documents for the Regulation. The commission proposal that led to the adoption of the Regulation (COM (2001) 447 final) states that the rule in Article 3(2) of the Regulation was introduced in order to allow each Member State to decide sovereignly, for political, humanitarian or practical considerations, to agree to examine an application for asylum even if it is not responsible under the criteria in the Regulation.

38. Therefore, with regard to the extent of the discretion thus conferred on each Member State, whether or not the Member State responsible under the criteria set out in Chapter III of the Regulation has responded to a request to take back the asylum seeker has no bearing on the possibility of another Member State examining an application for asylum on the basis of Article 3(2) of the Regulation."

Counsel highlights the CJEU's endorsement of the breadth of the sovereign discretion set out in Article 3(2) of Dublin II, which must by implication apply to Article 17(1) of Dublin III.

75. The Court is cognisant of the breadth of the unconditional sovereign discretion ascribed by the CJEU to participating countries under Article 17(1) of Dublin III. Indeed, as the preparatory documents for Dublin III show, an earlier intention of the drafters to confine the exercise of the sovereign discretion in Article 17(1) *"in particular for humanitarian and compassionate reasons"* did not find its way into Article 17(1). The issue, however, is whether the broad unconditional jurisdiction that Article 17(1) confers on a Member State continues to subsist where the provisions of Article 29(2) have come into play.

76. Albeit accepting that no direct CJEU authority on this point exists, in advocating that such jurisdiction exists, counsel for the appellant refers to *Jafari (Case C-646/16)* EU:C:2017:586, [2018] 1 W.L.R. 773, where at para. 100, the CJEU emphasised the *"spirit of solidarity, which, in accordance with Article 80 TFEU, underlies the Dublin III Regulation — of the power provided for in Article 17(1) of that regulation, to decide to examine applications for international protection lodged with them, even if such examination is not their responsibility under the criteria laid down in that regulation."*

77. In the appellant's written submissions reliance is placed on paras. 58 to 60 of the decision of the CJEU in *M.A. and others (Case C-661/17)* EU:C:2019:53, [2019] 2 C.M.L.R. 21. There, citing, *inter alia*, *Halaf*, the CJEU considered Article 17(1) of Dublin III in the following terms:

> *"58. It is clear from the wording of Article 17(1) of the Dublin III Regulation that that provision is optional in so far it leaves it to the discretion of each Member State to decide to examine an application for international protection lodged with it, even if that examination is not its responsibility under the criteria defined by that regulation for determining the Member State responsible. The exercise of that option is not, moreover, subject to any*

particular condition (see, to that effect, judgment of 30 May 2013, Halaf, C‑528/11, EU:C:2013:342, paragraph 36). That option is intended to allow each Member State to decide, in its absolute discretion, on the basis of political, humanitarian or practical considerations, to agree to examine an asylum application even if it is not responsible under the criteria laid down in that regulation (judgment of 4 October 2018, Fathi, C‑56/17, EU:C:2018:803, paragraph 53).

59. In the light of the extent of the discretion thus conferred on the Member States, it is for the Member State concerned to determine the circumstances in which it wishes to use the option conferred by the discretionary clause set out in Article 17(1) of the Dublin III Regulation and to agree itself to examine an application for international protection for which it is not responsible under the criteria defined by that regulation.

60. That finding is also consistent, first, with the case-law of the Court relating to optional provisions, according to which such provisions afford wide discretionary power to the Member States (judgment of 10 December 2013, Abdullahi, C‑394/12, EU:C:2013:813, paragraph 57 and the case-law cited) and, second, with the objective of Article 17(1), namely to maintain the prerogatives of the Member States in the exercise of the right to grant international protection (judgment of 5 July 2018, X, C‑213/17, EU:C:2018:538, paragraph 61 and the case-law cited).”

78. Counsel for the appellant stresses that the reference by the CJEU to *“that regulation”* in the foregoing passages (see paras. 58 and 59) indicates that the CJEU was not confining the sovereign power provided for in Article 17(1) to Chapters II and III of the Dublin III Regulation. It is important to note, however, that at paras. 56 to 57 of its judgment, the CJEU firmly rooted the admittedly broad discretion of a Member State under Article 17(1) to Article 3(1). It stated:

"56. Under Article 3(1) of the Dublin III Regulation, an application for international protection is to be examined by a single Member State, which is to be the one which the criteria set out in Chapter III of that regulation indicate is responsible.

57. By way of derogation from Article 3(1), Article 17(1) of that regulation provides that 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 such criteria." (emphasis added)

79. It is the Court's view that a purposive or teleological reading of Article 17(1) indicates that the sovereign discretion therein provided for is to enable a Member State, that is not the Member State responsible under the Chapter III criteria, to take on responsibility for a protection seeker, exercising its sovereign discretion. Thus, this Court cannot accept the argument advanced by the appellant that in construing the provisions of Article 17(1) by having regard to the words *"By way of derogation from Article 3(1)…"*, the trial judge imposed a precondition to the exercise of the discretion provided for in Article 17(1) that is not called for in the provision itself.

80. In *M.A.*, the CJEU did not ascribe to Article 17(1) the overarching jurisdiction which the appellant contends for in these proceedings. As was the case in *Halaf,* in *M.A.*, the CJEU expressly linked the exercise of the discretion set out in Article 17(1) to the process (the Chapter III criteria) under which a Member State or participating country determines responsibility for an international protection applicant. Thus, inasmuch as counsel for the appellant urged on the Court that Article 17(1) does not refer to Chapter III criteria and that it expressly sets out the criteria and/or the parameters for its own operation, namely that a Member State may decide to examine an international protection application made to it *"even if such examination is not its responsibility under the criteria laid down in this regulation"*, that argument, in the Court's view, is

misconceived having regard to the way in which the CJEU has interpreted Article 17(1) and indeed its precursor, Article 3(2) of the Dublin II Regulation.

81. In support of his argument that the Chapter III criteria cannot be regarded as the sole circumstances in which the Article 17(1) discretion may be invoked, counsel for the appellant pointed to the fact that the responsibility for determining an international protection application is also the subject of other chapters in Dublin III, including Chapter VI where Article 29(2) is to be found. While Article 29(2) most certainly deals with the imposition of responsibility outside of the criteria set out in Chapter III, in the view of the Court this does not assist the appellant's argument. At para. 42 of its judgment in *Ghezelbash,* the CJEU has emphasised that *"…Chapter IV of the regulation* [where Article 17 is located] *identifies specifically the situations in which a Member State may be deemed responsible for examining an asylum application by way of derogation from those criteria"* (emphasis added). The *"criteria"* therein referred to are those referred to in Article 3(1) and as set out in Chapter III of the Dublin III Regulation.

82. Counsel for the appellant also stresses the emphasis which Dublin III places on the rights of the individual international protection seeker. He refers to the Opinion of Advocate General Sharpston in *Ghezelbash,* EU:C:2016:186, where at para. 55, she refers, *inter alia,* to the *"procedural safeguards"* introduced by the Dublin III Regulation, noting that *"these provisions contain detailed rules requiring the first Member State to notify the applicant of the transfer decision and to provide information on the legal remedies available to him, including the right to apply for the transfer decision to be suspended".*

83. Advocate General Sharpston revisited this theme in *Jafari,* where at para. 4 of her Opinion, EU:C:2017:443, she said:

> *"Another essential element of the Dublin system is that it focuses on the individual applicant…who is assessed by reference to the criteria set out in its Chapter III in order to determine which Member State is responsible for considering his application for international protection. The whole regulation is cast in terms of the individual. That is self-evidently right and proper. Individual human beings seeking protection are not statistics; they are to be treated humanely and with respect for their fundamental rights…"*

84. The Court does not gainsay the views expressed by Advocate General Sharpston and indeed echoes her Opinion that it is "*self-evidently right and proper"* that the Dublin III Regulation is cast in terms of the individual. As said by Charleton J. in *N.V.U., "[t]horoughness, commonality of system, fundamental standards of protection and dispatch in declaring the presence of refugee rights or in declaring that a person is required to leave a jurisdiction are the foundations upon which the Dublin III Regulation is built"* (at para. 20). He opines, at para. 37, that *"[t]he purpose of Dublin III is to find and to transfer responsibility to the country responsible for deciding on international protection. This is designed to be a transparent, swift and mutually entrusted process".* It bears repeating that in the present case, there is no dispute but that in 2011, by the application of Chapter III criteria, this State was the Member State found to be responsible for the appellant's international protection application and, thus, the question of the State assuming responsibility by dint of its prerogative under Article 17 never arose. As acknowledged by all, once Ireland was conferred by the application of the Chapter III criteria with responsibility, the sovereign discretion provided for in Article 17(1) of Dublin III was a wholly redundant concept. It is also undisputable that in 2016, this State, as the Member State responsible for the appellant, acknowledged its responsibility pursuant to Article 18 to take her back into the domestic protection system. However, the failure of the UK as the requesting Member State to effect the transfer of

the appellant had consequences at the realm of EU law, as the provisions of Article 29(2) demonstrate. The UK was fixed with mandatory responsibility for the appellant. In drafting the Dublin III Regulation, the EU legislators did not choose to interpose into Dublin III the type of sovereign discretion which the appellant contends for here. In the view of the Court, to have done so would have conflicted with the very rationale for the imposition of the time limit that is set out in Article 29(1) of Dublin III. The time limit is there to achieve the objective set out in recital 5 of, *inter alia*, *"the rapid processing of applications for international protection".*

85. Undoubtedly, as far as the appellant is concerned, the UK was fixed with responsibility for her international protection application at a point where her asylum application in this jurisdiction had been determined and her subsidiary protection application commenced and determined subject only to the challenge she has brought to the negative decision which ensued. It is common case that the appellant has been in the Irish international protection system for a number of years. The course of her subsidiary protection application took from 2012 until 2016. This was due in no small part to the myriad legal challenges brought, both at national and EU level, to the bifurcated system that pertained when the appellant commenced her subsidiary protection application. Her counsel argues that given the length of time that she has been in the Irish system it is only proper that her claim to international protection would continue to be processed in this jurisdiction. In the view of the Court, notwithstanding the number of years that have elapsed since the appellant first came to these shores, that factor cannot confer on the Minister a jurisdiction to assume responsibility for the appellant where that power is not available to the Minister. The carefully constructed legal and administrative framework of the Dublin III Regulation cannot be read as permitting a Member State (in this case Ireland) whose responsibility for examining the application of an international protection seeker has been disposed of by operation of law to then assume the mantle of sovereign discretion provided for in Article 17(1). To interpret the provisions of Article

17(1) thus would do violence (on any teleological or purposive reading of Dublin III) to the proper understanding of Article 17(1) and its function within the Dublin III framework.

86. In *Shiri*, the CJEU considered the objective sought to be achieved by Article 29(1) and (2) of Dublin III. It stated:

> *"30. It is apparent from the very wording of Article 29(2) that it provides for an automatic transfer of responsibility to the requesting Member State, without making that transfer conditional on any reaction by the Member State responsible (see, by analogy, judgment of 26 July 2017, Mengesteab, C 670/16, EU:C:2017:587, paragraph 61).*
>
> *31. That interpretation is, moreover, consistent with the objective, referred to in recital 5 of the Dublin III Regulation, of rapid processing of applications for international protection, in so far as the interpretation ensures, in the event of a delay in the take charge or take back procedure, that the examination of the application for international protection is carried out in the Member State where the applicant is, so as not to delay that examination further (see, by analogy, judgment of 26 July 2017, Mengesteab, C 670/16, EU:C:2017:587, paragraph 54).*
>
> *32. That interpretation is also reflected by the rules relating to the carrying out of the transfer set out in Chapter III of Regulation No 1560/2003.*
>
> *33. Whilst Article 8 of Regulation No 1560/2003 obliges the Member State responsible to allow the asylum seeker's transfer to take place as quickly as possible, no provision of that regulation confers on that Member State the power, after accepting, explicitly or implicitly, a take charge or take back request pursuant to Article 22 or 25 of the Dublin III Regulation, to express a fresh view on its willingness to take charge of or take back the person concerned.*

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

…

39. The take charge and take back procedures established by the Dublin III Regulation must, in particular, be carried out in compliance with a series of mandatory time limits, which include the six-month time limit referred to in Article 29(1) and (2) of that regulation. Whilst those provisions are intended to provide a framework for those procedures, they also contribute, in the same way as the criteria set out in Chapter III of the regulation, to determining the Member State responsible. As is clear from paragraphs 30 to 34 of the present judgment, the expiry of that six-month period without the transfer of the applicant from the requesting Member State to the Member State responsible having been carried out results in the automatic transfer of responsibility from the second Member State to the first (see, by analogy, judgment of 26 July 2017, Mengesteab, C 670/16, EU:C:2017:587, paragraphs 50 to 53)."

87. The appellant argues that *Shiri* is not dispositive of whether Article 17(1) can be applicable in circumstances such as pertain here, where the UK is now the Member State responsible for the appellant. The Court understands the appellant's argument to be that what the CJEU says at para. 30, namely that *"[i]t is apparent from the very wording of Article 29(2) that it provides for an automatic transfer of responsibility to the requesting Member State, <u>without making that transfer conditional on any reaction by the Member State responsible</u>"* (emphasis added), does not impinge

on the discretion that enures to the Minister pursuant to Article 17(1). It is said that this is because Ireland is no longer the Member State responsible for the appellant. However, for the reasons already stated above, the Court has determined that the legal scaffolding upon which the Dublin system is built does not admit of the construction which the appellant seeks to put on Article 17(1).

88. Counsel for the appellant advocates that were Article 17(1) to be construed in the manner found by the trial judge, there would then be a "humanitarian gap" in the Dublin III framework, contrary to the intention of the EU legislators. That argument is not well made, in the view of the Court.

89. As put by Charleton J. in *N.V.U.*, Dublin III is *"an administrative scheme assuming equal protection in all participating countries. What it involves is returning those seeking international protection to a country issuing travel or residence documents or where they had previously started an application…the system under Dublin III assumes equality of rights being upheld throughout and that transfer enables the examination in the transferred country as thoroughly as here, and probably more expeditiously"* (at para. 37). While, admittedly, the factual matrix in the present case is different to *N.V.U.* in that the appellant has become the responsibility of the UK by dint of the default procedure set out in Article 29(2) of Dublin III as opposed to the more straightforward transfer decision which was in issue in *N.V.U.*, this does not in any way detract from or undermine the substantive and procedural safeguards which Dublin III Regulation ensures for international protection applicants and to which the UK must adhere. As put by the trial judge, the Member States responsible under the transfer provisions of Chapter VI must address their obligations "*with appropriate celerity and in a spirit of solidarity*" (para. 38).

90. In summary, therefore, the Court agrees with the trial judge that the sovereign discretion clause of Article 17(1) applies as a derogation to the responsibility criteria mandated by Article 3(1). It does not apply as a derogation from Article 29(2). It has been determined (by dint of the mandatory requirements of Article 29(2), described by the CJEU as *"automatic"*) that the UK is the Member State responsible for the appellant.

91. Insofar as the exercise of any discretion might arise by which the UK as the Member State responsible for the appellant might at some further point be absolved of that responsibility, that issue, if it arises at all, falls to be considered pursuant to Article 17(2) of the Dublin III Regulation. The Court hastens to add, however, that that debate is not for this State, or the Minister, and most certainly not for this Court.

92. Article 17(2) of Dublin III provides, *inter alia*, that *"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"* (emphasis added). Recital 17, quoted earlier in this judgment, explains the purpose of Article 17(2). As is clear from Article 17(2) the exercise of discretion on *"humanitarian grounds"* is for "*another Member State*" as that phrase is understood in Article 17(2). The exercise of such discretion by another Member State may come into play if the Member State responsible requests that Member State *"to take charge"* of an international protection applicant. As to whether the provisions of Article 17(2) can assist the appellant *qua* her status as an international protection seeker now under the responsibility of the UK, and/or having regard to her particular personal or family circumstances, those are questions that are not open to

this Court to determine. Nor, indeed, has the Court been asked to do so by counsel for the appellant. Insofar as such questions may arise, they fall to be initiated by the relevant authorities in the UK, not in this jurisdiction.

The Court's discretion to refuse relief by way of judicial review

93. The Minister further submits that having regard to the appellant's conduct, the Court should refuse her relief. She says that the appellant has "*shown a blatant disregard for the immigration processes operating in both the State and the United Kingdom and a lack of bona fides during her international protection process"*. As well as pointing to the Court's discretion in connection with the grant or refusal of judicial review, the Minister says that the appellant has invoked her rights in EU law for an improper purpose and outside the spirit and intendment of the relevant EU legal instrument to the extent that the "*abuse of rights"* principle is engaged. In that regard, the Minister says that the appellant has not invoked Article 17(1) in a manner that complies with the objects of the Dublin III Regulation either generally or in respect of either humanitarian or family reunification issues. Specifically, she says that the attempt to avail of Article 17 neither fulfils the objects of the Dublin III Regulation nor pursues any legitimate end, and in particular that the appellant:

(i) left this jurisdiction without permission on at least two occasions and illegally entered another Member State;

(ii) seeks in these proceedings to procure the assistance of the Court in facilitating her illegal conduct, bringing her outside the spirit of the Regulation;

(iii) can proceed with her international protection application in the UK;

(iv) does not seek a second transfer process to Ireland either because this is the responsible Member State or because of any humanitarian issue or in order to bring about the rapid processing of her application; and,

(v) is engaged in "*forum shopping"*.

94. The power of the Court to refuse relief by way of judicial review on account of the conduct of an applicant must be exercised with the greatest of caution. Cases in which an otherwise meritorious claim will be rejected on this basis are, as has been frequently held, necessarily rare (see *D.W.G. v. Minister for Justice* [2007] IEHC 231 at pp. 8 and 14). However, and at the same time, the power of the Court to withhold relief from a party otherwise entitled to it because of misconduct that is serious, flagrant, deliberately engaged in and abusive of legal process is, as McKechnie J. stated in *P.N.S. v. Minister for Justice* [2020] IESC 11 at para. 96, fundamental to the functioning of any legal system. The Court's discretion is important in enabling it to condemn the behaviour in question, to ensure that parties are not rewarded for misconduct and to maintain the integrity of the judicial process.

95. Thus, the decision to grant or refuse relief having regard to a party's conduct will depend upon a range of factors including the nature and importance of the illegality alleged by the applicant in the proceedings, the impact on the applicant of refusing the relief because of his or her conduct, the gravity of the misconduct in question, the intent of the person seeking relief, and the effect on the both the respondent and the due administration of justice of granting the relief claimed notwithstanding the behaviour of the applicant.

96. The context in which the question of the Court's discretion falls to be exercised, is as follows:

(i) On 21 May 2014, the appellant was detained at Belfast City Airport while *en route* to Southampton. She had not applied for, and did not have, a visa to enter the UK, and she had not been granted permission to be in that jurisdiction. On 28 May the appellant was removed back to Ireland by the UK authorities.

(ii) It has been suggested that at the time of this attempt to enter the UK she was seeking to visit her partner. Her partner, according to her evidence at that point lived in London. She has never offered any explanation for seeking to travel to Southampton in order to visit her partner in London. The trial judge specifically raised this question in his judgment, and although the appellant swore a further affidavit in the proceedings following that judgment, she did not address the question thus raised by the Court.

(iii) It is common case that in June 2016 the appellant was arrested in the UK. The documentation from the authorities in that jurisdiction exhibited in the affidavits sworn on the appellant's behalf in both proceedings state that the appellant was arrested at a residential address in Southampton by Hampshire police on 18 June of that year. The appellant in her evidence does not deny any of these details, but neither does she confirm or explain them. Her solicitor in the affidavit sworn to ground the 2016 proceedings says that the appellant was arrested "*following an attempt to enter the UK for the purposes of a visit"*. The appellant uses similar language in her affidavit, adding that she was attempting to visit her partner.

(iv) The papers from the UK authorities state that the appellant advised them at the time of her arrest that she had arrived in Southampton in February of 2016. The appellant

does not deny this. She does not state exactly when in 2016 she arrived in England but gives the impression that she did not go to the UK until after her RAT hearing in May, stating in her affidavit in the 2016 proceedings "*following my appeal hearing and prior to receipt of the impugned decision, I was arrested following an attempt to enter the UK for the purposes of a visit"*. Her solicitor in the affidavit she swore to ground the 2017 proceedings states that the appellant was attempting to visit her partner "*in May 2016"* and the Statement of Grounds pleads that she went to the UK in May.

(v) The respondents in their Statement of Opposition in the 2016 proceedings plead that the appellant "*appears to have"* left the State in February 2016, and that she "*appears to have returned to Ireland and attended an oral hearing before the first named respondent".* In their Statement of Opposition in the 2017 proceedings they plead that the appellant "*was outside the State and had been residing in another Member State since February 2016 and during the extensive subsidiary protection process in Ireland".* On that basis the appellant is said by the respondents to have "*shown an egregious lack of candour in her dealings with the international protection process and has engaged in a serious abuse of the immigration system and controls of the Member States".* At no point in her evidence does the appellant ever address these claims - which are based on the material she herself put before the Court.

(vi) The UK Home Office documents record the impression that the appellant had advised its agents upon her arrest that she had a sister living in Southampton, and indeed the Home Office wrote to her on 29 November 2016 treating that statement as a claim under Article 8 of the European Convention of Human Rights to remain

in the UK. The letter rejected that claim. On 9 January 2017 the appellant's English lawyers wrote to the Home Office asserting that their client had never intended to make a human rights application for leave to remain in the UK or to claim asylum there. They never suggested that the basis of the letter – that the appellant had a sister living in the UK - was untrue, and no such denial was recorded in any of the papers put before the High Court. In their Statement of Opposition in the 2016 proceedings the respondents plead that the presence of a sister in the UK was inconsistent with the material and/or evidence provided in the subsidiary protection process. The proceedings continued before and were heard by the High Court on the basis of this evidence, which was not then contradicted by the appellant. However, in her affidavit sworn *after* the High Court judgment the appellant says that her sister *never* lived in the UK.

(vii) The appellant has chosen to provide very little information about her time in the UK prior to her arrest. In particular:

(a) She provides no explanation as to why she travelled to Southampton to visit a person who lived some distance from there;

(b) She does not explain what she was doing in Southampton when she was arrested there. The trial judge noted her failure to explain her presence in Hampshire and again she failed to provide any explanation for this when she chose to address some relevant issues of fact in the affidavit sworn by her after the judgment;

(c) She does not say for how long she was in Southampton, with whom she stayed when she was there or how or where she spent the period during which she was unlawfully in the UK. The material from the UK Home Office suggests that the

appellant was in Britain for four months prior to her arrest. As noted earlier, she has neither contradicted nor explained that.

(viii) In her February 2020 affidavit the appellant explains that her relationship with her partner in Perthshire broke down and that she then moved to live with a friend in Leeds. She does not state exactly when she moved there but exhibits correspondence to her at her friend's address from "*early 2019"*. This, it should be said was after the case had been argued in the High Court but before judgment had been delivered. While in Yorkshire she says that she met her maternal aunt and moved in to live with her. She avers that she did not know that her aunt (who is married with at least two children) lived in the UK: the appellant says that she met her through a named church. She did not tell her solicitor this until 28 May 2019, hence explaining why her solicitor did not refer to the fact that the appellant was living with her aunt in a letter she sent to the respondents on 25 April 2019. In that letter it was stated that her only significant connection with the UK was her former partner and that she had nowhere to turn for support or assistance.

97. Accepting the various averments in her affidavit sworn for the purposes of this appeal that her partner did exist and that the failure of the UK authorities to identify him arose from their searching by reference to an incorrect name, that she never said to those authorities that she had a sister living in the UK, that her sister never in fact lived in the UK, and that the appellant now lives in Yorkshire with a maternal aunt who she did not know lived with her husband and children in the UK until she met through a church, the state of the evidence discloses four unsatisfactory features.

98. Firstly, on at least two occasions the appellant sought to leave the State unlawfully, succeeding the second time. If it is true that she actually arrived in Southampton in February 2016 and given that she attended the hearing of her RAT appeal in Dublin on 3 May, she would actually have left the State at least twice. In leaving the State without the consent of the Minister the appellant breached s. 9(4) of the Refugee Act 1996, and in so doing committed a criminal offence (s. 9(7)).

99. Secondly, on at least one occasion she unlawfully sought entry to the UK, on at least one other achieved it and thereafter spent an unspecified period of time unlawfully in that jurisdiction.

100. Thirdly, the appellant has throughout the progress of these proceedings drip fed information to the Court, most notably in respect of whether she had a sister in the UK. To this can be added the fact that she elected to provide an explanation on affidavit of why she contends her partner could not be located, only after the High Court decision and that she can say no more than that she met her aunt at an unspecified date in "*early"* 2019, yet only told her solicitor (who was writing correspondence on her behalf in April) of this on 28 May 2019.

101. Fourthly, even then the appellant has not provided any explanation as to why she travelled to Southampton once and tried to go there a second time in order to visit a person in London and then Perthshire, as to how long she had been there when arrested, as to what she was doing there and with whom she was staying in Southampton (if she had been staying there). Noting that the appellant attended the hearing of her appeal before the RAT on 3 May 2016, the appellant's failure to engage with the evidence from the Home Office that she told them she had arrived in Southampton in February 2016 is as striking as it is surprising.

102. The Court has no doubt but that the combination of these circumstances is such that in the event that the appellant had established grounds for the grant of any relief, this is a case in which the Court should exercise its discretion to refuse it.

103. In *P.N.S. v. Minister for Justice* McKechnie J. explained that the power of the Court to withhold relief because of the conduct of an applicant:

> *"…is particularly important in the context of refugee and asylum cases, as where an applicant engages in serious abusive practices, they put the integrity of the entire system in jeopardy. That system, to successfully reflect genuine cases depends on fairness, good faith and transparency; all are seriously at risk with such abuse. Therefore, there is and must be the jurisdiction for such behaviour to be recognised and controlled at a judicial level."* (para. 96)

104. He identified at para. 98 four matters relevant to the exercise of the jurisdiction – (a) the conduct must be such as to amount to an "*abuse"*, (b) it must be "*serious and flagrant"*, (c) it must have been "*deliberately engaged in"*, and (d) the applicant must have shown a clear disregard for the asylum system. These conditions are, on the evidence before the Court here, satisfied.

105. As has already been noted, the Court must exercise the greatest of caution in refusing relief because of the conduct of an applicant in proceedings of this kind. The fact that an applicant broke the criminal law of this State and/or disregarded the immigration law of another may well, in appropriate circumstances, be explicable by reference to particular exigencies and may well be such that having regard to humanitarian concerns and the critical importance of ensuring that the State complies with its legal obligations, it should not operate as a barrier to the grant of otherwise appropriate relief. Here, the appellant relies on the length of time it was taking for her applications to be dealt with in this jurisdiction, and the fact that her partner was living in the UK. While noting

this (and noting the fact that the appellant never explains why her partner – an Irish citizen – could not visit her for a "*short stay*"), for two reasons, however, the Court cannot in this case ignore the nature and extent of the appellant's admitted breaches of the law in this jurisdiction and in the UK.

106. First, the breach by the appellant of the law was the very action which gave rise to the need for the proceedings in the first place. Had the appellant complied with her legal obligations she would not have been in the UK and the issues which prompted this application would never have arisen. The comments of Lord Carnworth in *R. (Youssef) v. Foreign Secretary* [2016] UKSC 3, [2016] A.C. 1457 at para. 61 and cited with approval by Humphreys J. in *Mirga v. Garda National Immigration Bureau* [2016] IEHC 545 at para. 20 are apt: "*Judicial Review is a discretionary remedy. The court is not required to ignore the appellant's own conduct, or the extent to which he is the author of his own misfortunes"*. In circumstances where the proceedings arise because of the appellant's own breach of the criminal law, it appears to the Court that the discretion of the Court must be closely engaged.

107. Second, in this case, there is a further and more fundamental consideration in play. If an applicant who has behaved in this way is to seek to have the Court grant relief notwithstanding misconduct of that kind, it is incumbent on them to provide a full and candid explanation of the circumstances in which they so conducted themselves. In this case, this did not happen. Listed above is a litany of questions arising from the evidence in this case – most of it put before the Court by the appellant herself – which have not been addressed in her affidavit evidence.

108. When those factors are viewed in the light of the nature of the illegality alleged against the State in these proceedings (the failure to exercise a discretion which the appellant says the State enjoys under Article 17), the impact for the appellant if that discretion is not exercised (and exercised in her favour) and the cumulative effect of the conduct of the appellant as it appears from

the evidence (which discloses a significant abuse by her and disregard of the immigration laws of both this State and of the UK) this is a case in which the Court would, were it necessary to do so, exercise its discretion against granting the relief claimed.

Request for a preliminary reference to the CJEU

109. In his written submissions, counsel for the appellant advocated that the Court might consider referring the following questions to the CJEU pursuant to Article 267 TFEU:

> *"a. In circumstances where the time limit in Article 29(2) of the Dublin III Regulation has expired, is the exercise of the Article 17 discretion precluded by the provisions of the Dublin III Regulation and in particular Article 17 itself, so that the time limit cannot be extended?*
>
> *b. May a domestic Court, on discretionary grounds grounded in domestic law, deny relief based on European Law to an applicant for Judicial Review in circumstances such as those of this case, or do the principles of effective judicial protection/effective remedy require that the Court grant relief in this case?"*

110. As regards the first suggested question, the Court is satisfied, for the reasons set out in the judgment and which are grounded on the pronouncements of the CJEU in relation to Article 17(1) of the Dublin III Regulation, that Article 17(1) applies *"by way of derogation"* from the responsibility provisions of Article 3(1) and has no applicability to Article 29(2). The terms of the Dublin III Regulation in this regard are *acte clair* as found in para. 90 of this judgment. To quote the CJEU itself at para. 16 of *C.I.L.F.I.T,* there is *"no scope for any reasonable doubt as to the manner in which the question raised is to be resolved."*

111. With regard to the second suggested question, the Court has found that the provisions of Article 17(1) do not apply to the appellant's circumstances. Thus, the issue of a reference to the CJEU in the terms suggested by counsel for the appellant did not arise for consideration, notwithstanding that the Court has opined as to how it would have exercised its discretion were it necessary to do so.

Conclusion

112. As the appellant has been entirely unsuccessful in this appeal, it is the provisional view of the Court that the costs of this Court and of the High Court should be awarded against her. If she wishes to contend otherwise, she should deliver a short submission not exceeding 1,500 words in length to the Office of the Court of Appeal by close of business on Friday 8 January 2021. In that event, the respondents shall have ten days to deliver a submission of similar length in reply. In default of such a submission being received, the Court shall direct costs in accordance with that provisional view.