An Chúirt Uachtarach

The Supreme Court

Clarke CJ
O'Donnell J
MacMenamin J
Charleton J
O'Malley J

Supreme Court appeal number: S:AP:IE:2019:000193
[2020] IESC 046
Court of Appeal record number 2017/591
[2019] IECA 183
High Court record number 2017 No 120 JR
[2017] IEHC 490, [2017] IEHC 613

Between

NVU, MU, MNI, MS (both minors proceeding by their next friend NVU)
Respondents/Applicants

- and -

The Refugee Appeals Tribunal, the Minister for Justice and Equality, Ireland and the Attorney General
Appellants/Respondents

Judgment of Mr Justice Peter Charleton delivered on Friday 24th of July 2020

1. Where a person claiming to be a refugee from persecution in their country of origin seeks protection in Ireland, the normal rule is that the claim be processed here. Where, however, the person has previously made an application for refugee status within the European Union, or has travelled on a visa to another EU country, European law generally requires that they be transferred to that other country for their claim to be there considered. To that there is an exception made in respect of countries overwhelmed by migration, which is not relevant here, and another exception whereby the country where the application is made has a general discretion to consider it, including on humanitarian grounds and including including family reunification, but not in any way so limited, notwithstanding the general rule. That exception is set out in article 17 of Regulation EU 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, commonly referred to at the Dublin III Regulation. What is at issue on this appeal is whether the discretion was, or could legally have been, devolved by the Minister for Justice and Equality onto the examining and appeal bodies for refugee applications under the European Union (Dublin System) Regulations 2014, SI 525 of 2014, or retained by the Minister.

Background

2. The respondents are a family of a mother and three children from Pakistan. They had originally come to Great Britain on a visiting visa but on its expiry, on 28 May 2015, came to Ireland, arriving it is claimed on 5 June 2015, and sought asylum on the basis of the alleged brutality of the father of the family, understood to also be in Great Britain but to be estranged from them. It is claimed that he was involved in law-enforcement as were many within his family and that consequently complaint to the authorities in Pakistan would be futile. This claim was not considered here because of the prior visa issued to the family in another European country. The visa came to light on 9 July 2015 when the Home Office indicated that the mother's fingerprints matched their records in respect of the visa. This happened in the ordinary way on the examination by the Refugee Applications Commissioner of the claim, since checks are routinely made as to whether those seeking asylum sought that status elsewhere or entered the European Union on a visa. No issue was taken by the family with the residence documents on the visa. The Office of the Refugee Applications Commissioner wrote to the family on 29 April 2016 stating that it had been "decided that the above applications for international protection should properly be examined by the United Kingdom, in line with the provisions of Regulation (EU) No. 604/2013 (Dublin III) Regulation)." No issue as to the Dublin III Regulation had been raised before the commissioner. It was thus proposed to transfer the asylum application to Great Britain. The family appealed to the Refugee Applications Tribunal and asserted that the tribunal had the power under the European Union (Dublin System) Regulations 2014 to exercise a discretion in favour of considering the substantive application for refugee status. By a decision of 24 January 2017, the tribunal ruled that this was not so:

> The above issues may or may not be resolved by the High Court (and/or Court of Appeal or Supreme Court) while Dublin III is in force. The Minister may or may not enact a regulation giving effect to the Tribunal exercising a discretionary power and setting out the basis on which it may be exercised, while Dublin III remains in force. But until such time as an organ of the State, executive/judicial/legislative sets out clearly that the Tribunal has jurisdiction to exercise discretionary power, this Tribunal declines to do so. Clearly, this tribunal cannot act *ultra vires*.

3. The family issued judicial review proceedings on 8 May 2017 claiming that the power of the Minister to exercise discretionary functions had been delegated to the decision-making bodies on refugee status and claiming violations of such a transfer would be a breach of human rights. In reply, the State contended that only the Minister has the power to exercise any discretion whereby that transfer might not take place where that is based on humanitarian or family grounds. The family argued that the power has been vested by the State by the relevant statutory instrument in the general asylum decision system. Considerations of family rights are also argued by them to arise. While on this appeal the Minister announced that the application of the family would be considered in the exercise of the discretion in article 17, the issue remains important as to who has the power to decide that an application should be considered in Ireland notwithstanding a visa issued elsewhere in the EU or an application having been previously made in such a country for refugee status. At least 250 other cases have raised the same issue.

4. The High Court decided, in two written judgments of O'Regan J delivered on 26 June 2017, [2017] IEHC 490, and 24 October 2017, [2017] IEHC 613, to uphold the decision of the tribunal that there was no discretion vested in anyone apart from the Minister to decline to transfer the family to Great Britain. The argument was made and rejected that the refugee assessment bodies had no power to transfer as they had not considered the humanitarian function in article 17. While the functions of these bodies are now, under the International Protection Act 2015, taken over by the International Protection Office and the International Protection Appeals Tribunal, the case continues to be of importance. According to submissions made at case management, Ireland has a very large, and it is said disproportionate, number of applicants, some 250, claiming that on humanitarian grounds, a transfer should not be made.

5. As between the family and the State, the central argument is that the Minister asserts that matters of discretion as to transfer are entirely within the scope of executive power and that the

statutory refugee assessment bodies have no such power. The family, however, argues, that the right place to make a claim for humanitarian consideration that no transfer take place is to the refugee assessment bodies and that the Minister has no residual or any power.

6. The Court of Appeal, Irvine, McGovern and Baker JJ, in a judgment of Baker J of 26 June 2019, [2019] IECA 183, reversed the High Court and decided that the power to apply discretionary humanitarian considerations not to transfer vested in the refugee assessment bodies and that the Minister had no primary or residual power in that regard. By determination of this Court of 26 March 2020, [2020] IESCDET 45, leave was given to appeal that decision. Following on case management, the parties agreed that the issues which this appeal must decide are:

1. In whom the discretion under article 17(1) is vested?
2. What sequence applies and when is the discretion to be exercised?
3. What is the effective remedy to a refusal to decline not to transfer?
4. Does Article 8 of the European Convention on Human Rights or Article 7 of the Charter of Fundamental Rights and Freedoms of the European Union have to be considered in this discretion?

High Court

7. The High Court gave two judgments on this matter. 14. In her first judgment, O'Regan J dealt with the interpretation of article 17 of Dublin III and concluded at paragraphs 33 and 34 that:

> The sovereign discretion referred to in Article 17 of Dublin III has not been vested in [the commission or the appellate tribunal] and remains with the Minister for Justice/the Oireachtas …There is no requirement of or wrongful failure by the Minister for Justice in failing to publish a policy or criteria in respect of the exercise of the Article 17 discretion.

8. In the second judgment, O'Regan J found that there had been no failure on the part of the appellate tribunal to consider European Convention on Human Rights issues or Charter rights as the argument that these rights were engaged had not been raised in the notice of appeal or at the oral hearing. She further considered, at paragraph 18, that: "there is no European case law to date to support the proposition that Article 8 rights must be considered in or about a Dublin III transfer decision" and at paragraph 26 that "the only jurisprudence upon which the applicant might rely is the aforesaid judgments from the UK Court of Appeal, which I do find persuasive, however a threshold of 'an especially compelling case' was held to be necessary and the applicants are nowhere close to that threshold.". The judge found as a matter of fact that the fears expressed on behalf of the appellants were adequately dealt with. Addressing arguments in relation to the best interests of the children, she held that proper regard had been given to their best interests, and that a medical report tendered on behalf of the first appellant had been considered as the content of the report was set forth in the decision.

The Court of Appeal

9. The Court of Appeal held that the Minister did not have any residual or any function in deciding that an applicant, here in this case the family, should not be transferred to another Member State because of humanitarian considerations. Instead, on the reasoning of the Court of Appeal, the responsibility for any discretion to keep the application where an applicant had entered another EU country on a visa or had made an application for asylum there or had been refused there or in multiple countries was squarely on the refugee deciding and appeal bodies. Existing case law of the Court of Justice of the European Union was merely to the effect of confirming that a Member State could decide which body or what organ of government might decide on an application, on a transfer or be given the discretionary power not to transfer on humanitarian grounds. Here, on this appeal, the State argue that it is the Government which has power not to transfer as this amounts to a governmental function to keep a person despite there

being no international obligation. The State further claims that there has been no legislative delegation of that power to any other body. In short, the contention runs, the State always had power to take non-citizens on humanitarian grounds and nothing in the legislation or in Dublin III has changed this. Further, an additional asylum examination, to that commenced in another country of the EU, or which first issued a travel document, is a right that alone the State can confer. Where a person enters Ireland illegally, the country is entitled to expel that person to where the person comes from. Where the person had a visa, the normal rule is to return the person to where that visa was issued for, so that the continued presence of that person may be examined there.

10. The family rely on the arguments in their submission and seek to uphold the reasoning of the Court of Appeal. There it was held that under the plain language of the national Regulations, the discretion is vested in the examining bodies:

> 71. A plain reading of r. 3 of the 2014 Regulations could lead to a conclusion that the functions of the determining Member State taken as a whole are to be performed by ORAC, and that no implication is to be derived therefrom that the Minister, in making the Regulations, reserved onto herself the function under article 17 of Dublin III which, as a matter of European Union law, is an integral part of the functions of a determining Member State.

11. The family asserts that this has nothing to do with State sovereignty and that the Court of Appeal was correct in rejecting this argument:

> 79. Dublin III left to the Member States the choice as to by whom the decision to transfer is to be made. The 2014 Regulations do no more than to designate the authority in which is vested the power to make the determination as to the proper jurisdiction to hear the application for refugee status. In the light of the decision of the CJEU in *C. K. v. Republika Slovenija and M. A. v. International Protection Appeals Tribunal* (Case C-661/17), it seems to me that Dublin III leaves little choice of how the principles and policies are to be implemented. The policies of Dublin III as a whole are to be discerned from its text, the intention whereof is to create a harmonious system by which Member States are to determine the jurisdiction responsible for the assessment of an asylum application. The policies to be exercised by a Member State in the exercise of the discretion under article 17 of Dublin III are apparent, and the text of article 17(1) of Dublin III itself envisages the discretion as having a role when consideration of humanitarian or compassionate nature, inter alia, in the interests of family unity, are to be engaged. The discretion is to be exercised within that principle and in the light of the principles and policies in Dublin III taken as a whole. It is a jurisdiction existing by way of derogation from the first principle of the Regulation and the Member States are not, as a result, to be at large in the factors, principles, and policies to be engaged in the discretionary exercise.
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> 80. The decision of MacEochaidh J. in *B. A. v. Minister for Justice and Equality* [2014] IEHC 618, [2014] 2 IR 377 in respect of the EU(Subsidiary Protection) Regulations 2013 offers a useful analysis. Having considered the decisions of the Supreme Court in Meagher v. Minister for Agriculture and Maher v. Minister for Agriculture, MacEochaidh J. concluded, at para. 39, that the regulations with which he was concerned were an "implementing mechanism" and what he described as a "classic 'filling in the gaps' exercise in accordance with directions, principles and policies given by a parent directive".
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> 81. He went on to hold, at para. 44, that the transfer of the relevant function from the Minister to ORAC was "capable of being regarded as a measure which was incidental, supplementary or consequential upon an obligation arising from the Qualification Directive and thereby properly included in a Statutory Instrument designed to ensure that Ireland's obligations under EU law were fully met."

> 82. Accordingly, in the light of these factors, I am not persuaded that the trial judge was correct in coming to the conclusion that the vesting of article 17 of Dublin III discretion in ORAC "cannot withstand the test mentioned by Denham J. in Meagher". The decision in *Meagher v. Minister for Agriculture* and the analysis contained in the later decisions in Maher v. Minister for Agriculture and *B. A. v. Minister for Justice and Equality,* do not support the argument that it was not possible for the Minister, as a matter of law, by statutory instrument, to vest the discretionary power in article 17 of Dublin III in whomsoever he chose. The power is one to assume jurisdiction, and is procedural in nature.

12. The State put forward an argument based on sequencing. The Court of Appeal held that the statutory deciding bodies were only functus officio where they had decided the discretionary aspect of the transfer as well as who bore primary responsibility for examining an application. This has nothing to do, according to the Court of Appeal, with the identification of a different forum:

> 84. The decision to derogate under article 17(1) of Dublin III and to thereby assume jurisdiction to assess an application for refugee status notwithstanding that Dublin III might identify a different forum, may be made at any stage in the process. This is clear from the second para. of article 17 of Dublin III, by which a Member State which decides to assume responsibility for an application for international protection in the exercise of the discretionary power must notify "where applicable" 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."
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> 85. This subparagraph has the purpose of ensuring efficiency and limits or eliminates duplication in the process. It has the effect that the discretion may be exercised after the decision to transfer has been made or whilst the jurisdictional question is awaiting determination. The respondents argue that this paragraph suggests that, as the Member State to be responsible may, in some cases, be known definitively, as a matter of law, only when the process for the determination of that Member State has been completed, the discretionary power falls to be exercised only after ORAC has completed the process of the application of the criteria and after a transfer decision is made. But I would observe that, equally, the obligation to notify exists in respect of an application pending before another Member State, and where the jurisdiction has not yet been established. It therefore seems to me that article 17 of Dublin III is intended to vest a discretion in the Member States to be exercised at any stage in the process, be that an early, late, or intermediate stage. The express terms of the second para. of article 17 of Dublin III do not support the proposition that the exercise of discretion must await a determination by ORAC and that, as a matter of sequencing, discretion comes to be exercised only after ORAC had completed its function.

13. Nor does any control of borders argument assist the State, on the judgment of the Court of Appeal:

> 95. The individual decision maker who is called upon to exercise discretion in the light of humanitarian and compassionate considerations is not exercising an executive power of the State, but is making the individual decision in the light of humanitarian and compassionate principles. The application of those principles is not the application of policies or principles as to whether a person ought to be permitted to remain in the State, but rather a decision at the procedural level further to assume jurisdiction.
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> 96. The decision maker who, in the exercise of discretion under article 17 of Dublin III, determines that the application for asylum is to be assessed in Ireland is doing no more

> than assuming jurisdiction, and is not engaged in the exercise of controlling the entry residency and exit of foreign nationals, to borrow the language of Denham J. in *Bode (a Minor) v. Minister for Justice*, and the language of Gannon J. in *Osheku v. Ireland* [1986] IR 733, at p.746, where he referred to the power of the State to: "have control of the entry of aliens, their departure, and their activities and duration of stay within the State".
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> 97. The right to control the borders of the State and the persons who may reside within it is a matter particularly within the control of the executive arm of the State, and the exercise of choice of jurisdiction under Dublin III, whether that be achieved by the application of the criteria in Chapter III or by the exercise of the discretionary powers in article 17, is a procedural choice and, in itself, does not determine the rights of a person to have residency in the State and is not a matter concerning the integrity of its borders.

14. The fact that this is a discretion is claimed by the family not to matter in the context where discretion is conferred by legislation on many bodies and the Court of Appeal agree:

> 100. Article 17 of Dublin III is not concerned with domestic procedural rules, but is a European Union law principle which entitles a decision maker to engage with humanitarian and compassionate considerations in the context of family unity insofar as they may arise on a case-by-case basis. The discretionary power of its nature in the light of the language of article 17 of Dublin III is a power to be exercised in an individual case and as circumstances arise. Relevant circumstances can arise after an answer has been found by the decision maker following the application of the criteria in Dublin III, or in the course of that decision making process.
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> 101. That has the effect that the compassionate and humanitarian grounds which might trigger the exercise of discretionary power will, as circumstances require, come to be engaged by whomsoever is involved in making the relevant decision. Support for this proposition is found in the determination of the CJEU that article 17 is an "integral part" of Dublin III, a position that was reaffirmed in the recent ruling of the preliminary reference in M. A. v. International Protection Appeals Tribunal (Case C-661/17). If the discretion is to be integral to the decision-making process, it must be capable of being exercised at any or every stage of the process.

15. As to effective remedy, it is not under appeal. Nor is the duty contended for to publish guidance on the basis on which the Minister, or the bodies, might exercise any discretion.

16. On private and family rights, the Court of Appeal considered that a temporary presence in the State did not engage these and that there was no case law to support this and that in any event consideration had been given to relevant medical reports while the family had not argued for such rights before the deciding bodies. As to the rights of the child, there was no case to be made that the allegedly abusive father would find the children either in the neighbouring kingdom or, if deported, in Pakistan.

The Dublin Regulation

17. A brief background to the Dublin Convention should be set out. A formalised system for deciding which European country was responsible for dealing with an asylum application was originally set out in the Dublin Convention of 1990, achieving the force of law in 1997. It applied also to some non-EU countries through agreement. The Dublin I Regulation was replaced by the Dublin II Regulation in 2003, replacing the Dublin Convention in all EU member states except Denmark, which joined later. Non-EU countries such as Switzerland also joined by agreement. Amendments were proposed which in 2013 became the Dublin III Regulation. In terms of purpose, the system was set up to deter forum choice while providing what is supposed to be an effective, objective and speedy system for the identification of the country responsible for the determination of an application for international protection. While not initially constructed to

share out responsibility for applications for international protection, the refugee applications burden forced some changes. What is central to the motivation for the Regulation is the need to have a coherent framework where the same applicant may not make repeated applications for asylum in different countries sequentially and without declaring a prior claim. Important also is the taking of responsibility by countries which issue visas to be the forum for any asylum application. While some countries may have systems that are perceived as slow, or as more sympathetic than others or as capable of being delayed by legal process, the series of Regulations based on the original Dublin Convention of 1990 have as their aim the setting of clear and common standards whereby forum choice by applicants must give way to responsibility of countries to finally determine asylum applications where an application has been made there or travel permission resulted in an applicant being present on that country's territory prior to an asylum application elsewhere.

18. 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.

19. Of importance is the unity of families. It may happen that an unaccompanied minor arriving in one country may have a mother in another and that dispatch and fairness in considering what may be a family's claim of persecution can suggest that a single country consider an application. This, as recital 13 states, assists in taking "due account of the minor's well-being and social development, safety and security considerations and the views of the minor in accordance with his or her age and maturity, including his or her background." Recital 14 notes "respect for family life" as being a primary consideration while recital 15 states that the "processing together of the applications for international protection of the members of one family by a single Member State makes it possible to ensure that the applications are examined thoroughly, the decisions taken in respect of them are consistent and the members of one family are not separated."

20. Thoroughness, 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. From this, there must be a derogation. Nothing in European Union law forbids a country from deciding that, for example, more nurses are needed within its health system or that skilled steel framers for building construction are need and that to attract these, visas should be granted or that citizenship might follow where immigrants prove to be of good character and have a record of contributing to the community. One of these may be a person seeking asylum. This is an aspect of sovereignty, to take in a person notwithstanding that they may not qualify as needing international protection. This was, in part, reflected in s 3 of the Immigration Act 1999, where even though a foreign national did not qualify as a refugee or for international protection based on chaos in their country of origin, subsidiary protection, the Minister was entitled on the basis of age, duration of residence, family considerations, connection with Ireland, employment, conduct and general humanitarian considerations not to deport a person where that was consistent with national security and public policy. It is to be noted that whereas s 50 of the International Protection Act 2015 continues the prohibition on refoulment originally set out in s 5 of the Refugee Act 1996,

the Minister retains an entitlement under s 49 of the 2015 Act to allow someone to stay in the State based on very similar criteria to those set out in s 3 of the 1999 Act; ones based on a simplified list of "the nature of the applicant's connection with the State, if any … humanitarian considerations… the character and conduct of the applicant both within and (where relevant and ascertainable) outside the State (including any criminal convictions) … considerations of national security and public order, and … any other considerations of the common good." The State thus retains executive discretion to keep persons based on broadly humanitarian considerations notwithstanding that they have applied for international protection. Hence, recital 17 of the Dublin III Regulations may more properly emerge as an exercise in sovereignty:

> 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.

21. The legal basis for that derogation on compassionate grounds is set out in Article 17, which should be set out in full:

> 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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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.

22. Such an examination neither guarantees nor predicts the extension of international protection to any particular applicant or that by examining a number of family members' claims together that they are refugees. What it does is to enable countries subject to the Dublin III Regulations 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. The issue here is whether that discretion is vested in the Minister or has been passed to the refugee assessment bodies by statutory instrument.

Context in national statutory instrument

23. Statutory Instrument 525 of 2014 gives effect to the Dublin III Regulation, itself a directly-applicable instrument of European law. Article 288 of the Treaty on the Functioning of the European Union places a regulation at the top of the legal order, making it effective on promulgation:

> To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions.
> A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.
> A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.
> A decision shall be binding in its entirety upon those to whom it is addressed.
> Recommendations and opinions shall have no binding force.

24. SI 525 of 2014 provides at article 2(2) that a word or expression used is to have the same meaning if also found in the Dublin III Regulation, unless there is a contrary intention. Article 4 gives effect to the requirement for a personal interview for those seeking international protection. Article 5 states that notification of a transfer decision should be given in writing and that this may be appealed under article 6, which specifies the form of the hearing. While this is pending, there is a right to remain in the State under article 7. The transfer itself is empowered by article 8 and is the responsibility of the Minister. Where a function may be appealed, the first issue is what function has been conferred, in this instance on the Refugee Applications Commissioner under the 1996 Act, or the equivalent under the 2015 Act. The family argue that the terms of article 3 make it clear that the entirety of the decision-making powers under Dublin III has been conferred by the State on the commissioner and on appeal upon the tribunal. While the State initially thought that this was the position, this is now said to be a mistake and that as a matter of construction only the transfer or not to transfer decision is so vested with the discretion to proceed with examination of any international protection grounds remaining vested in the Minister. Article 3 of the statutory instrument provides:

> (1) The following functions under the EU Regulation shall be performed by the Commissioner:
> (a) the functions of a determining Member State;
> (b) the functions of a requesting Member State;
> (c) the functions of a requested Member State;
> (d) the communication and requesting of personal data and information under Article 34.
> (2) The functions of a transferring Member State under the EU Regulation shall be performed by the Minister.
> (3) The Commissioner shall perform the functions of a Member State under Article 6 of the EU Regulation [on guarantees for minors] and, in doing so, shall consult as necessary with the Agency in relation to his or her functions under—

> (a) subparagraphs (b) and (d) of paragraph 3 of that Article, and
> (b) such other provisions of that Article as the Commissioner considers necessary.

25. That appears also in article 3 of the replacement SI 62 of 2018. Article 3 needs little elucidation outside the central issue faced on this appeal. For the family it is argued that every function under Dublin III has gone from the Minister to the commissioner and on appeal to the tribunal. The words, it is asserted, admit no other construction. State submissions point to the complete absence of any reference to any discretionary function and claims that there would be no principles or policies available either in the statutory instrument or in Dublin III whereby the decision making bodies might be so equipped.

26. The Court of Justice of the European Union elucidated the general purpose of Dublin III in Case C-63/2015, *Ghezelbash v. Staatssecretarisvan Veiligheid en Justitie* thus:

> [A]ccording 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.

27. The identification of the country responsible for an international protection application is to be ascertained by application of the criteria in Chapter III of the Regulation, and the order in which they are to be applied is found in article 7(1) of Dublin III, which refers to the sequence established by article 8 to 11 of Dublin III. Priority is given to factors involving family unity and the best interests of any child affected. If the determining country, through its competent national authority, considers the criteria under article 8 to 11 of Dublin III, and does not identify a responsible country, it is then required by article 12 of Dublin III to consider whether another country had previously granted the asylum seeker a valid residence document or a valid visa permitting lawful entry to the European Union, in which case, that Member State will be responsible for examining the asylum application. The primary function of countries is, however, to consider applications on the basis that they may have the responsibility to consider an international protection application or that may be transferred to another country. Article 3 of Dublin III provides:

> 1. Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.
> 2. Where no Member State responsible can be designated on the basis of the criteria listed in this Regulation, the first Member State in which the application for international protection was lodged shall be responsible for examining it.

28. A derogation follows where there exists: "substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that member state, resulting in a risk of inhuman or degrading treatment within the meaning of article 4 of the Charter of fundamental rights of the European Union". Where that occurs, as where a Mediterranean country's system is undermined by large influxes of migrants, the member state where the application is made should continue. But article 17 did not have that purpose but to enable the aim of recital 17 in making available to each country the option of continuing with an application notwithstanding that enquiries have established a visa issued by another participating country or that an international protection application had been started or determined elsewhere. With Great Britain about to depart the European Union, but noting that non-EU countries

remain within the Dublin III system through agreement, the High Court referred an issue as to the functioning of the system; Case C=661/2017, *MA v International Protection Appeals Tribunal* (Case C-661/17), EU:C:2019:53. In later litigation, *HN v The International Protection Appeals Tribunal* [2018] IECA 102, delivered some months after the High Court judgments in this case, Hogan J considered that it was "at least arguable" that, on appeal, a tribunal was under an obligation to consider exercising the article 17(1) of Dublin III discretion in the light of the decision of the CJEU in Case C-578/2016 *CK v Republika Slovenija* (Case C-578/16 PPU), EU:C:2017:127, an issue there as to health and the effect of a transfer. That was not necessarily a decision to the effect that the same authority considering a transfer should make the decision to not transfer on discretionary grounds related to humanitarian choice. In Case C-661/2017 *MA v International Protection Appeals Tribunal* the Court of Justice of the European Union determined that Dublin III did not require that the same national authority as is responsible in national law for the application of the criteria for transfer in article 6 to 16 of Dublin III be vested with the discretionary power under article 17 of Dublin III. National law could vest these different functions in different national authorities.

29. In that context, it is useful to quote from the reasoning of the CJEU in *MA*. Firstly, the factual circumstances bear some similarities to those dealt with in this case. One of the applicants for international protection came to Great Britain on a student visa and then another visa was issued to a second party who joined the first person and they had a child. They came to Ireland to seek asylum, but the asylum application was one that enabled a transfer back to the visa-issuing state. Before the Refugee Appeals Tribunal, those parties raised the point raised in this case, requiring that tribunal to exercise a discretion whereby it might be decided that this jurisdiction would take on the task of examining the applications and enquiring as to whether there were any grounds for a finding that international protection was needed for the couple and their child. The tribunal refused, reasoning, as in this case, that no such discretionary power had been devolved from the Minister. The CJEU held that the departure of the neighbouring kingdom from the EU was not in itself a ground to require the discretion vested in article 17 of Dublin III to be exercised in favour of those who had travelled from that jurisdiction to this country. In the context of that request issued by the High Court to the CJEU for a preliminary ruling, in November 2017, the State submissions, as recorded in the judgment, proceeded on the basis that the Minister alone had the power to exercise any discretion under article 17 and that no such power had been devolved to the decision-making bodies. That point was one for national law. Consequently, it formed no part of the reasoning of the CJEU on the reference. But, in analysing the Dublin III Regulation, the court made it clear that it was within national competence to decide that any analysis as to transfer, together with responsibility for seeking information, could be devolved onto a decision-making body while a different organ retained the discretionary power set out in article 17:

> 62. It is apparent from the information in the documents before the Court that the second question is based on the premise that, in Ireland, it is the Refugee Applications Commissioner who determines the Member State responsible under the criteria defined by the Dublin III Regulation, whereas the exercise of the discretionary clause, set out in Article 17(1) of that regulation, is a matter for the Minister for Justice and Equality.
> 63. In those circumstances, it must be considered that, by its second question, the referring court asks, in essence, whether the Dublin III Regulation must be interpreted as meaning that it requires the determination of the Member State responsible under the criteria defined by that regulation and the exercise of the discretionary clause set out in Article 17(1) of that regulation to be undertaken by the same national authority.
> 64. It should be recalled, first, that it is apparent from the case-law of the Court that the discretion conferred on Member States by Article 17(1) of the Dublin III Regulation is an integral part of the mechanisms laid down by that regulation for determining the Member State responsible for an asylum application. Thus, a decision adopted by a Member State on the basis of that provision, to examine, or to not examine, an application for international protection for which it is not responsible in the light of the criteria set out in Chapter III of that regulation implements EU law (see, to that effect,

> judgment of 16 February 2017, C. K and Others, C-578/16 PPU, EU:C:2017:127, paragraph 53 and the case-law cited).
> 65. Next, it should be noted that the Dublin III Regulation nevertheless does not contain any provision specifying which authority has power to take a decision under the criteria defined by that regulation that relate to determining the Member State responsible or in respect of the discretionary clause set out in Article 17(1) of that regulation. Nor does that regulation specify whether a Member State must entrust the task of applying such criteria and applying that discretionary clause to the same authority.
> 66. Article 35(1) of the Dublin III Regulation does however provide that each Member State is to notify the Commission without delay of the 'authorities responsible', in particular, for fulfilling the obligations arising under that regulation, and any amendments regarding those authorities.
> 67. It follows from the wording of that provision, in the first place, that it is for a Member State to determine which national authorities have power to apply the Dublin III Regulation. In the second place, the expression 'the authorities responsible' in Article 35 implies that a Member State is free to entrust to different authorities the task of applying the criteria defined by that regulation relating to determining the Member State responsible and the task of applying the 'discretionary clause' set out in Article 17(1) of that regulation.
> 68. That assessment is also supported by other provisions of the Dublin III Regulation, such as Article 4(1), Article 20(2) and (4) or Article 21(3), in which the expressions 'its competent authorities', 'the authorities', 'competent authorities of the Member State concerned', 'competent authorities of a Member State' and 'the authorities of the requested Member State' are used.
> 69. In the light of all the foregoing considerations, the answer to the second question is that the Dublin III Regulation must be interpreted as meaning that it does not require the determination of the Member State responsible under the criteria defined by that regulation and the exercise of the discretionary clause set out in Article 17(1) of that regulation to be undertaken by the same national authority.

30. It follows that the nature of what was devolved can be ascertained from the text of SI 525 of 2014 interpreted in the light of the Dublin III Regulation.

31. Article 2 of Dublin III gives the relevant definitions, adopted in full in SI 525 of 2014. In that regard, what is not involved in the functions of the decision-making bodies, once Dublin III applies, is assessing the need for international protection. Article 2(d) provides:

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

32. Within the text of Dublin III there are strong indications that examination of an application should be preceded by enquiries as to the commencement of an international protection application in another country or the issue of a visa for travel to that jurisdiction. Hence, under article 1, it is for countries to examine applications so that only one country, or Member State as the Regulation states, though non-EU countries are also within the system, examines the case. Where there is none other which has already started an application or which has issued a visa, the country to which application is made should proceed to consider the need for international protection. Article 7 deals with the criteria for examining which country is responsible and sets out the "criteria for determining the Member State responsible". This requires a country to determine "on the basis of the situation" when an application was first lodged in any participating country. Article 12 states that where a "valid residence permit" was issued, the country so issuing "shall be responsible for examining the application for international protection." Similarly, where a visa has been issued. Under Article 18, the country responsible is obliged to "take charge … of

the applicant who has lodged an application" in a different country and "take back … an applicant". Then, that country must "examine or complete the examination of the application for international protection made by the applicant." Where an application has been withdrawn, on return to the country where it has been commenced, a new examination may be requested "which shall not be treated as a subsequent application". Article 28 enables detention for the purpose of transfer. Finally, article 34 requires administrative inter-country cooperation and the sharing of information.

33. Returning to SI 525 of 2014, it becomes apparent that no discretionary power has been devolved from the Minister to the decision-making bodies. What have been transferred are administrative tasks as to the enquiry into the origin of an applicant for international protection, whether he or she reveals the issue of a visa for another country or that an application had already been commenced in another country. Thus, it becomes necessary to examine fingerprints and other data under Eurodac with a view to finding the relevant country for the purpose of fulfilling the obligations under Dublin III. SI 525 of 2014 has devolved the functions as to determining, as Dublin III requires, which country is responsible for examining the application. Under SI 525 of 2014, the decision-making bodies may request another country to take back an applicant for the purposes of Article 18 of Dublin III. Where another country has an applicant who has previously been issued a residence permit for Ireland, or a visa, or where a person has lodged an application for international protection here, the decision-making bodies have devolved onto them from the Minister the function of determining that this jurisdiction should take back an applicant from another country. Finally, a power is devolved to use Eurodac and other means of communication to request personal data and information under Article 34 of Dublin III. Where a transfer becomes necessary, the Minister is responsible.

Discretion

34. Nothing suggests that there is any basis for the argument that matters of discretion have been devolved by the State by virtue of SI 525 of 2014. What is striking, in this regard, is the breadth of the discretion under article 17 of Dublin III. This may reflect that notwithstanding the voluntary sharing of responsibilities under what was originally the Dublin Convention, sovereign states continue to be entitled to control their borders and the acceptance of new residents and the conferring of citizenship is intrinsic to this. Thus, in *MA*, the CJEU emphasised the entirely unfettered nature of the discretion:

> 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.
> 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).
> 61. In the light of all the foregoing considerations, the answer to the first question is that Article 17(1) of the Dublin III Regulation must be interpreted as meaning that the fact that a Member State, designated as 'responsible' within the meaning of that regulation, has notified its intention to withdraw from the European Union in accordance with Article 50 TEU, does not oblige the determining Member State to itself examine, under the discretionary clause set out in Article 17(1), the application for protection at issue.

35. The nature of the sovereign power of the State and the extent to which governmental powers may be devolved onto decision-making bodies have not been argued on this appeal and will not here be commented upon. What is of relevance, however, is the subsidiary argument whereby the family have sought to claim that within Dublin III and SI 525 of 2014 are to be found some basis whereby the examining-bodies for international protection could decide that this unfettered discretion reserved to the State is to be exercised by them. For the State, the wide-ranging nature of that power, its sovereign character and the absence of principles and policies are counter-argued.

34. One useful approach to this matter would be to try to construct a devolved legislative instrument on which an administrative tribunal could exercise an unfettered discretion. Immediately, the exercise is tripped up by the very nature of a decision-making power, one which is completely at large. Already quoted here has been s 3 of the Immigration Act 1999, whereby the Minister has a wide discretion subject to broad statutory criteria not to deport an unsuccessful applicant for international protection and the modern iteration as to leave to remain in the State in s 50 of the International Protection Act 2015. Of their nature, these are sovereign powers retained by the Minister. Where an obligation under European law requires legislation which otherwise would necessitate the passing of a statute by the Oireachtas under Article 15.1 of the Constitution, the State's obligations under Article 29.4.5° would enable delegated legislation instead where the duty of fidelity and cooperation made those measures such that there was no room, or no significant room for choice; see the judgment of Fennelly J in *Maher v AG* [2001] 2 IR 139 at 254 and see also *Meagher v AG* [1994] 1 IR 329. Here, those issues are beside the point since the Dublin III Regulation has direct effect.

35. Also argued has been the absence, or contended-for presence, of principles or policies within Dublin III whereby the discretion under article 17 might be exercised by the commissioner or the tribunal. Where within legislation there exist sufficient indications whereby a section giving a statutory power on particular matters to a minister or a local authority or other body, that can validly be done where the subject matter is specified and where the nature of the legislation enables what is to be done to be clearly delimited to the delegated body under Article 15.2 of the Constitution; see in that regard *Bederev v Ireland* [2016] 3 IR 1 and *O'Sullivan v Sea Fisheries Protection Authority* [2017] 3 IR 751.

36. There is no necessity to cover this ground again. Examples of discretionary powers of such a wide and unfettered nature vested in an administrative or quasi-judicial body are difficult to come by, if these exist at all. Furthermore, the nature of the article 17 Dublin III Regulation power is not simply limited to the best interests of children or the reunification of family units, but extends beyond that into the exercise of discretion based on humanity or compassion or whereby the State may embrace an obligation which in international and European law does not exist. There is no sign of any such delegation or of any basis on which that discretion could ever be exercised by anyone other than the Minister. Of their nature, administrative bodies exist to make decisions based on fact and quasi-judicial bodies are there to assess facts and to issue rulings

within rigid boundaries of the powers so enjoyed through the setting of jurisdiction pursuant to statue. That does not embrace this discretion.

Rights

37. Finally, the issue of rights requires a brief mention. The issue of rights is not part of the statement of grounds. As the CJEU made clear in Case C-411/10 and Case C-493/10 *NS v Secretary of State for the Home Department*, *ME v Refugee Applications Commissioner*, Dublin III is part of European law and SI 525 of 2014 is an implementation. Hence, rights under the Charter of Fundamental Rights of the European Union might apply; see paragraph 68 of *NS*. Neither Charter rights nor rights under the European Convention on Human Rights nor constitutional rights would ordinarily arise. The 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. One with which those seeking international protection should and are required to cooperate. Where individuals come illegally, without a visa and without a residence permit, to this jurisdiction and forego legal status within another country subject to Dublin III, or abandon an application for international protection there, rights are not simply assumed by virtue of travel. Nor is it necessary for there to be a specific consideration of potential or possible rights. If these are specifically asserted and on a factual basis which, exceptionally, engages such rights, consideration should be given. But this would be a rare exception. This 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. Nothing more than that could ordinarily be involved. Furthermore, as has been emphasised by the CJEU at paragraph 98 of *NS*, it is not for countries to "worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member state responsible which takes an unreasonable length of time." Rather, 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.