Neutral Citation Number: [2019] EWCA Civ 1340

Case No: C2/2018/1950

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGES GRUBB AND BLUM
Claim No JR/9682/2017

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/19

Before :

THE MASTER OF THE ROLLS
SIR TERENCE ETHERTON

LORD JUSTICE SIMON
and
LORD JUSTICE HICKINBOTTOM

- -

Between :

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

- and -

THE QUEEN ON THE APPLICATION OF MS (a child by his Litigation Friend MAS)

Respondent

- -
- -

Lisa Giovannetti QC and **Gwion Lewis** (instructed by **Government Legal Department**)
for the **Appellant**
Charlotte Kilroy QC and **Michelle Knorr (**instructed by **Bhatt Murphy Solicitors)**
for the **Respondent**

Hearing dates: 2 and 3 July 2019

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Approved Judgment

Lord Justice Hickinbottom :

Introduction

1. The Respondent, MS, is an Afghan national with an assumed date of birth of 1 January 2001.

2. In 2016, he left Afghanistan, and made his way to France where he arrived as an unaccompanied and undocumented minor. He applied for asylum in France, but claimed that he had a brother, MAS, living lawfully in the United Kingdom. If that were true, then, under Regulation 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 stateless person ("Dublin III"), the United Kingdom would be the state responsible for considering and determining his asylum application; and, subject to other criteria not relevant to this appeal, France would in practice be bound to transfer MS to the United Kingdom, and the United Kingdom would be bound to accept him, pending determination of that application.

3. On 27 July 2017, on 21 August 2017 and again on 12 March 2018, the Secretary of State refused to accept repeated take charge requests from France under Dublin III in respect of MS, on the basis that MAS was not his brother. Despite evidence of a sibling relationship, the Secretary of State gave substantial weight to the fact that, in his asylum claim made in the United Kingdom in 2003, MAS had denied having any siblings.

4. The refusal decisions were not appealable; but MS challenged them by way of judicial review. In a determination dated 19 July 2018, a panel of the Upper Tribunal (Immigration and Asylum Chamber) (Upper Tribunal Judges Grubb and Blum) found the refusal decisions unlawful and quashed them; and went on to find that MS and MAS were brothers. The tribunal then remitted the matter to the Secretary of State to make lawful decisions on the requests on the basis of that finding.

5. The tribunal gave the Secretary of State permission to appeal to this court on two grounds, as follows.

    i) The tribunal erred in holding that, for the purposes of article 27 of Dublin III, "transfer decision" includes the rejection of a take charge request, which involves no transfer. Therefore, it is submitted that the requirement of article 27, that an asylum applicant should have "the right to an effective remedy, in the form of an appeal or a review, in fact and law, against a transfer decision, before a court or tribunal", does not apply in this case where there has been no decision to transfer MS.

    ii) Even if "transfer decision" does include a rejection of a take charge request, the tribunal erred in proceeding on the basis that the tribunal itself must determine, as a matter of preliminary fact, whether the relevant Dublin III criteria (including any required relationship) are met.

    I will call these "Ground 1" and "Ground 2" respectively.

6. The tribunal left over to this court the question of any costs indemnity which should be given to MS on the appeal; and it refused permission to appeal on five further grounds, which focused on the investigatory obligations which fall on the Secretary of State upon receipt of a take charge request.

7. In the meantime, the Secretary of State took the pragmatic step of soliciting a further take charge request from France, which he accepted on 27 July 2018. MS and MAS were then re-united in the United Kingdom, whilst MS's asylum claim was determined. MS thus in practice obtained everything that he sought from his judicial review. In fact, to complete the history, a DNA test undertaken here proved that MS and MAS were indeed brothers; and, in due course, MS was granted asylum.

8. So far as MS was concerned, the judicial review and the Secretary of State's appeal from the tribunal determination have therefore become academic. However, permission to appeal had been granted on Grounds 1 and 2; and the Secretary of State renewed his application for permission to appeal on the other five grounds on the basis that, although not relevant to MS himself, they raised important points of principle which satisfied the criteria in Hutcheson v Popdog Ltd [2011] EWCA Civ 1580; [2012] 1 WLR 782 ("Hutcheson").

9. In Hutcheson, the court emphasised that, even where there is a point of general public interest or importance, an academic appeal will only be entertained very sparingly; and, save in exceptional circumstances, permission to appeal should only be granted in respect of an academic ground of appeal where "(i) the court is satisfied that the appeal would raise a point of some general importance; (ii) the respondent to the appeal agrees to it proceeding, or at least is completely indemnified on costs and is not otherwise inappropriately prejudiced; and (iii) the court is satisfied that both sides of the argument will be fully and properly ventilated" (at [15] per Lord Neuberger of Abbotsbury MR, with whom Etherton LJ (as he then was) and Gross LJ agreed).

10. I stress that the satisfaction of these criteria is merely a gateway to the exercise of discretion which the court has to undertake when considering whether to examine and/or determine academic issues. In addition to the time that will be expended by an overburdened court in deciding issues which are not germane to an actual dispute, determining an issue (even an issue of construction) outside a real dispute can be frustrating and even unhelpful. The key question is whether, in all the circumstances, it is in the public interest for the court to consider and determine an issue which is academic as between the parties. The cases suggest that cases in which it is in the public interest will be rare.

11. Returning to the chronology, on 9 November 2018, in a judgment following an oral hearing ([2018] EWCA Civ 2596):

    i) I refused permission to appeal on the remaining five grounds, on the basis that this case was not an appropriate vehicle for the (now academic) issues raised in those grounds to be determined.

    ii) I directed that, in respect of Grounds 1 and 2, the Secretary of State should indemnify the costs of the Respondent on the appeal up to a maximum of £35,000.

12. Thus, Grounds 1 and 2 alone are now before the court.

13. Ground 1 is narrow, turning upon the proper construction of article 27. Ground 2 was effectively conceded by the Secretary of State in the course of the hearing before us, as he formally accepted that, if article 27 applies, the domestic court which is conducting the article 27 review of the transfer decision should (i.e. is able to and required to) determine whether there is a "sufficiently solid factual basis" for it, the quotation coming from the opinion of Advocate General Sharpston in Ghezelbash v Staatssecretaris van Veiligheid en Justitie (Court of Justice of the European Union ("CJEU") Case No C-63/15) [2016] 1 WLR 3969 ("Ghezelbash") at [89]). If the Secretary of State were to fail on Ground 1, he therefore conceded Ground 2 by accepting that the tribunal did not err in its approach to the factual question of whether the relevant Dublin III criteria (including any required relationship) had been met. Thus, the only issue before the court is whether the refusal of a take charge request is a "transfer decision" giving rise to the right to an effective remedy within the meaning of article 27 of Dublin III .

14. Before us, Lisa Giovannetti QC and Gwion Lewis appeared for the Secretary of State, and Charlotte Kilroy QC and Michelle Knorr for the Respondent; and at the outset I thank them for their assistance.

Article 27 of the Dublin III Regulation

15. Dublin III came into effect on 1 January 2014. It is the third iteration of a European instrument which, as its full title indicates, is designed to establish criteria and mechanisms for determining which EU Member State should be responsible for considering and determining the asylum application of a non-EU national wherever, within the EU, it is lodged. This is regarded as important to avoid delay in the determination of such applications, and to prevent multiple asylum applications by a non-EU national as he travels through Europe. "Dublin 1" (The Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Community) came into force on 1 September 1997. "Dublin II" (Regulation (EC) No 343/2003) came into force on 6 September 2003.

16. Article 19(1) of Dublin II imposed a requirement on a requesting Member State to notify an asylum applicant that the requested Member State had agreed to accept a transfer. Article 19(2) provided:

> "The decision referred to in paragraph 1 shall set out the grounds on which it is based. It shall contain details of the time limit for carrying out the transfer and shall, if necessary, contain information on the place and date at which the applicant should appear, if he is travelling to the Member State responsible by his own means. This decision may be subject to an appeal or a review…".

17. However, in Abdullahi v Bundesasylamt (CJEU Case No C-394/12) [2014] 1 WLR 1895, the Grand Chamber held that Dublin II did not confer any rights on asylum seekers who were the subject of the inter-state mechanism found in the Regulation. Therefore, where a Member State had agreed to take charge of an asylum applicant

under Dublin II and the applicant sought an appeal or review of that decision, he could not call into question the application of the Dublin criteria except by relying upon rights derived from elsewhere, e.g. where systemic deficiencies in the asylum procedure and/or in the reception conditions for asylum applicants in the requested Member State provided substantial grounds for believing that the particular applicant would face a real risk of being subjected to inhuman or degrading treatment within the meaning of article 4 of the Charter of Fundamental Rights of the European Union ("the Charter") (see [62]).

18. Whilst continuing to provide an inter-state mechanism for determining which Member State should determine any application for asylum (see article 1), Dublin III has a wider objective of guaranteeing the involvement of an asylum seeker in the process for determining the Member State responsible for the examination of his or her asylum application (Ghezelbash at [46]-[52]), without compromising the aim of rapid processing of applications (see recital (5)). It therefore not only creates individual rights, but expressly provides that those rights may be enforced at the suit of an affected individual.

19. This new scheme is underpinned by the norms found elsewhere in European law. The recitals to Dublin III therefore note that, in the application of the Regulation:

    i) in accordance with the UN Convention on the Rights of the Child and the Charter, the best interests of any relevant child should be a primary consideration (recital (13));

    ii) in accordance with the European Convention on Human Rights ("the ECHR") and the Charter, respect for family life should be a primary consideration (recital (14)); and

    iii) full respect for the principle of family unity should be given (see, e.g., recitals (15) and (16)).

20. So far as minors are concerned, these rights are reinforced by article 6, which emphasises that the best interests of the child will be a primary consideration with respect to all of the procedures provided for in the Regulation (article 6(1)), and, in assessing such best interests, Member States shall closely cooperate and take into account family reunion possibilities (article 6(3)).

21. A hierarchy of criteria is set out in Chapter III of Dublin III, and a Member State is obliged to examine any asylum application for which, by the application of the hierarchy, it is responsible (article 3(1)).

22. In the light of the above, it is unsurprising that criteria relating to unaccompanied minors are at the top of the hierarchy. Article 8(1) states:

> "Where the applicant is an unaccompanied minor, the Member State responsible shall be that where a family member or a sibling of the unaccompanied minor is legally present, provided that it is in the best interests of the minor."

Article 6(4) provides:

> "For the purpose of applying article 8, the Member State where the unaccompanied minor lodged an application for international protection shall, as soon as possible, take appropriate action to identify the family members, siblings or relatives of the unaccompanied minor on the territory of Member States, whilst protecting the best interest of the child".

23. Further down the hierarchy are family members who are the beneficiaries of or applicants for international protection (articles 9 and 10 respectively), and then applicants in possession of a valid residence document from another Member State (article 12), applicants who have irregularly crossed the border (article 13), applicants whose need for a visa is waived (article 14) and applicants who make an application from an international transit area of an airport (article 15). Chapter IV deals with dependents and discretionary claims.

24. The procedure for take charge requests is set out in Section II of Dublin III. If a Member State where an asylum application is lodged considers on the basis of the hierarchy criteria that another Member State is responsible for determining the claim, it may within three months of the date the application is lodged request that other Member State to take charge of the applicant, failing which responsibility for examining the application lies with the Member State in which the application was lodged (article 21(1)). The requested Member State shall make the necessary checks and give a decision within two months of the receipt of the request (article 22(1)), failing which there is a deemed obligation to take charge of the person (article 22(7)).

25. In determining the Member State responsible, "elements of proof and circumstantial evidence shall be used" (article 22(2)), as set out in Commission Regulation (EC) No 1560/2003 as amended by Commission Implementing Regulation (EU) No 118/2014 which sets out lists of means of proof (e.g., in relation to proving presence of a family member of an unaccompanied minor, extracts from registers or a DNA test) and lists of circumstantial evidence (e.g. verifiable evidence from the asylum applicant, or statements from family members). By article 22(5):

> "If there is no formal proof, the requested Member State shall acknowledge its responsibility if the circumstantial evidence is coherent, verifiable and sufficiently detailed to establish its responsibility".

26. Dublin III still leans heavily upon the principle of mutual confidence as between Member States to observe fundamental rights and to cooperate to ensure that asylum claims are handled speedily and efficiently in the interests of both the applicants and the participating Member States, in the context of increasingly harmonised rules applicable to asylum applications.

27. However, it also recognises that that may not be sufficient properly to protect asylum applicants. Therefore, recital (19) states:

> "In order to guarantee effective protection of the rights of the persons concerned, legal safeguards and the right to an effective remedy in respect of decisions regarding transfers to the Member State responsible should be established, in

> accordance, in particular, with article 47 of the Charter…. In order to ensure that international law is respected, an effective remedy against such decisions should cover both the examination of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred."

Article 47 of the Charter provides (so far as relevant to this appeal):

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article…".

28. Article 4 of Dublin III imposes an obligation on a Member State to inform an asylum applicant of the hierarchy criteria for determining which Member State is responsible for examining the application (article 4(1)(b)); that there will be a personal interview and the possibility of submitting information regarding the presence of family members in another Member State (article 4(1)(c)); and "the possibility to challenge a transfer decision and, where applicable, to apply for a suspension of the transfer" (article 4(1)(d)). Article 5 requires the determining Member State to conduct a personal interview with the applicant, which, amongst other things, is designed to ensure the information is supplied to the applicant as required by article 4.

29. Section IV provides for "Procedural safeguards" for applicants. Where the requested Member State accepts to take charge of an applicant, article 26(1) requires the requesting Member State to notify the person concerned of the decision to transfer him or her to the Member State responsible; and that decision is required to include information on the legal remedies available and the time limits applicable in seeking such remedies and for carrying out the transfer (article 26(2)). The transfer of an asylum applicant is required to take place within six months of the acceptance of a take back request, or of the final decision on an appeal or review which has the effect of suspending transfer (article 29(1) read with article 27(3)).

30. Article 27(1) and (2), headed "Remedies", state:

> "1. The applicant… shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.
>
> 2. Member States shall provide for a reasonable period of time within which the person concerned may exercise his or her right to an effective remedy pursuant to paragraph 1."

31. The scope of the remedy granted by article 27(1) has been considered in a number of CJEU cases to which we were referred, notably Ghezelbash, Karim v Migrationsverket (CJEU Case No C-155/15) [2017] 1 CMLR 187 ("Karim"), Mengesteab v Federal Republic of Germany (CJEU Case No C-670/16) [2018] 1 WLR 865 ("Mengesteab") and Hassan v Préfet du Pas-de-Calais (CJEU Case No C-647/16) [2018] 1 WLR 4711 ("Hassan") upon which Ms Giovannetti particularly relied.

32. In Ghezelbash, the Netherlands issued a take back request to France in respect of an Iranian national who had claimed asylum in the Netherlands, on the basis that France had previously granted him a visa. France accepted the request; but the applicant appealed against the decision of the Dutch authorities to transfer him to France, claiming that he had been back to Iran for more than three months before entering France, and had thus "left the territories of the Member States" which broke the relevant connection between him and France for the purposes of article 12. He claimed that, by making the decision to transfer him to France, the Netherlands had therefore wrongly applied the criteria in Chapter III of Dublin III. Relying on Abdullahi, the Netherlands Government contended that an asylum applicant such as the Iranian national could not contest the application of the Chapter III criteria.

33. The CJEU agreed with the applicant's submission: it held that, in an appeal against a transfer decision, an asylum applicant is entitled to plead that, in the determining the responsible Member State, the criteria in Chapter III of Dublin III had been incorrectly applied (see [44]). The Grand Chamber referred to recital (19), saying that it stated that, in order to comply with international law, the effective remedy introduced by Dublin III should cover, not only the examination of the position in the requested Member State, but also "the examination of the application of [Dublin III]" (see [39], repeated and adopted by the CJEU in Mengesteab at [43], and Shiri v Bundesamt für Fremdenwesen und Asyl (CJEU Case No C-201/16) [2018] 1 WLR 3384 at [37]).

34. In coming to that conclusion, the Grand Chamber generally followed the advisory opinion of Advocate General Sharpston. At [AG56], she considered the relationship between the take charge request and a transfer decision, as follows:

> "An applicant cannot lodge an application for appeal or review before the requesting state takes a transfer decision. The challenge, if one is made, is to the transfer decision, not to the requested Member State's agreement to accept responsibility as such. That is logical, as it is the transfer decision which directly affects the individual asylum applicant."

35. In respect of that challenge, the Advocate General said that the effectiveness of an appeal or review of a transfer decision "requires an assessment of the lawfulness of the grounds which are the basis of the decision and whether the latter is taken on a sufficiently solid factual basis" (see [AG89]). However, she said that, as article 27(1) "does not specify how that examination is to be conducted", that is "a matter for the national court to oversee pursuant to domestic procedural rules" including "the intensity of the review process" and "the outcome – that is, whether a successful challenge would result in the application being remitted to the competent national authorities for consideration, or whether the decision is taken by the courts themselves, subject always to the principle of effectiveness" (see [AG90]).

36. On similar facts, the CJEU came to a similar conclusion in Karim, where a Syrian national claimed asylum in Sweden, although he had made a previous application in Slovenia. He contended that he had left the Member States for more than three months since being in Slovenia. Advocate General Sharpston said (at [AG42]-[AG43], emphasis in the original):

> "AG42. Slovenia's confirming its agreement to be the responsible Member State is *not* a transfer decision and cannot therefore be itself the subject of an appeal or review by the Swedish courts under article 27(1) of the Regulation.
>
> AG43. It is however conceivable that the probative value and the weight attached by the Swedish authorities to the information that Mr Karim gave them in deciding to transfer him to Slovenia could be amenable to appeal or review insofar as it is relevant to whether the Swedish authorities applied the Chapter III criteria correctly *when making the transfer decision itself*."

37. In Mengesteab, following Ghezelbash, the CJEU held that an asylum applicant could challenge a decision to transfer him to another Member State on the basis that the take charge request was not made within the time limits set out in article 21 of Dublin III itself (see paragraph 22 above). The Grand Chamber considered that the fact that the requested Member State was willing to take charge of the asylum claim despite the lateness of the request could not be determinative (see [59]), pointing out that, once a period of two months had expired, the Member State in which the application was lodged was fully responsible for examining the asylum claim without making that responsibility subject to any later reaction by the requested state (see [61]).

38. The court said (at [60]):

> "Indeed, as the remedy provided for in article 27(1) of [Dublin III] can be applied, as a matter of principle, only in a situation where the requested Member State has accepted, either explicitly, under article 22(1) of that Regulation, or implicitly, under article 22(7) thereof, that fact cannot, in general, lead to a limitation of the scope of judicial review provided for in article 27(1)…"

39. In Hassan, the Grand Chamber held that, when a person makes an asylum claim in one Member State and then voluntarily travels to another such state, the second state cannot transfer him back to the first state before the first state accepts, explicitly or implicitly, a formal Dublin III request to take him back (see [42] and [46]). This was said to derive from article 26 of Dublin III:

> "42. It therefore follows from the actual wording of article 26(1)… that the notification of a transfer decision to the person concerned may take place only if, and therefore after, the requested Member State has agreed to the request to take charge or take back, or, where appropriate, after the expiry of the period within which the requested Member State must reply to that request, failure to act, in accordance with article 22(7) and article 25(2) of [Dublin III], being tantamount to acceptance of such a request.
>
> 43. The wording of article 26(1)… thus makes it clear that the EU legislature established a specific procedural order between

> acceptance of the request to take charge or take back by the requested state and the notification of the transfer decision to the person concerned.
>
> …
>
> 46. Therefore, it follows from the actual wording of article 26(1) of [Dublin III], read in the light of the history of that provision, that a transfer decision may be notified to the person concerned only after the requested Member State has, implicitly or explicitly, agreed to take charge of that person or to take him back…
>
> …
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> 53. Article 26(1)… is thus intended… to strengthen the protection of that person's rights by ensuring that he is, in the case where the transfer is in principle accepted between the Member States involved in the procedure to take back or take charge, fully informed of all the reasons underpinning that decision so as to enable him, if appropriate, to challenge that decision before the court with jurisdiction and to request that its enforcement be suspended."

The Upper Tribunal Determination

40. Before the Upper Tribunal, the core issue with regard to lawfulness was the extent to which the Secretary of State had an "investigative duty" which extended to facilitating and securing the provision of a DNA sample from an asylum applicant in France. In relation to each of the three challenged decisions to refuse the take charge request, the tribunal found that the Secretary of State acted unlawfully in failing to take reasonable steps to investigate the viability of obtaining DNA evidence in France and/or the possibility of admitting MS to the United Kingdom for the purpose of DNA testing (see [158] and following of the determination). In relation to the third decision of 12 March 2018, the tribunal also found that the Secretary of State had acted unlawfully in his consideration of the two statements from MAS's partner, and in failing to take into account relevant evidence in the form of an independent psychiatric report which included evidence relevant to the claimed relationship between MS and MAS (see [165]-[169]). As each decision was unlawful, the tribunal quashed it (see [160], [161] and [170]).

41. The tribunal therefore found the three decisions unlawful and quashed them without reference to article 27 of Dublin III. No reference to that provision was made until, having quashed the decisions, the tribunal dealt with the submission by Ms Kilroy (who also appeared below) that article 27, read with article 47 of the Charter, applied to a decision of the Secretary of State to reject a take charge request; and it required the tribunal to determine for itself whether MS met the relevant criteria in Dublin III notably that he is MAS's brother.

42. Having considered the European jurisprudence to which I have already referred, the tribunal concluded that a transfer decision could be challenged by an affected

individual on the basis that the criteria for determining responsibility for examining an asylum application had been wrongly or incorrectly applied, and a challenge was not limited to questions of legality but could cover questions of law and fact (see [179]). It considered the submission of Mr Lewis (who also appeared for the Secretary of State below) that a refusal of a take charge request did not amount to a "transfer decision" for these purposes, but was unconvinced. In coming to that conclusion, the tribunal particularly noted the broad import of recital (19) (see [187]) and the acknowledgement in both Ghezelbash and Mengesteab of the breadth of both that recital and the effective remedy envisaged in article 27. The key rationale for the conclusion is found in [188]:

> "… We are in no doubt that the Grand Chamber contemplated an individual being entitled to challenge the correctness in the application of the 'criteria' to determine which Member State is responsible under [Dublin III] whether the effect of the decision led the individual's transfer to another Member State or, as in this case, left him or her in the Member State in which he or she currently was present. The substance of what the Court considers should be subject to an 'effective remedy' is the application of the 'criteria'. Were it otherwise, as Ms Kilroy submitted, is it likely that those at the 'top of the hierarchy', seeking family reunification such as the applicant would be individuals most likely to be deprived of any 'effective remedy'. We do not consider that can have been intended by the CJEU. The distinction between the two situations leading to a difference in an individual's ability to challenge the decision taken under the Dublin III Regulation would, in our judgment, be arbitrary and is unwarranted."

43. Having reviewed domestic cases in which the court has, in judicial review proceedings, accepted a fact finding role (e.g. in R (A) v London Borough of Croydon [2009] UKSC 8 with regard to age assessment) – and refraining from determining whether the application of the Dublin III hierarchy criteria is an exercise in determining a precedent fact – the tribunal concluded that the court must find necessary facts where that is necessary to establish whether or not a right is actually engaged (see [208]). That was so, it held, in this case.

44. The tribunal then proceeded to find on the evidence before it that MAS and MS were indeed brothers (see [225]). Having done so, the tribunal remitted the matter to the Secretary of State to determine other matters relevant to the take charge request, e.g. the best interests of the child. That was not pursued for the reasons I have already given (see paragraph 7 above).

The Ground of Appeal

45. In respect of the only extant ground of appeal before us, it is uncontroversial that, in interpreting a provision of EU law, it is necessary to consider its wording, its origin, its context and the objectives pursued by the legislation of which it forms part (see, e.g., Hassan at [40]).

46. Ms Giovannetti submitted that the tribunal erred in construing "transfer decision" for the purposes of article 27 of Dublin III as including the rejection of a take charge request, which involves no transfer. In support of that proposition, she relied in particular upon the following.

i) As emphasised in (e.g.) Ghezelbash at [AG56], Karim at [AG42] and Hassan at [42], the decision to transfer by the requesting state is a discrete and subsequent decision to the decision by the requested state to accept responsibility for the asylum application; and the right to appeal or review granted by article 27(1) is "not to the requested Member State's agreement to accept responsibility as such" (Ghezelbash at [AG17]). By interpreting "transfer decision" to include a refusal to accept a take charge request, the tribunal wrongly negated the "specific procedural order between acceptance of the request to take charge or take back by the requested state and the notification of the transfer decision to the person concerned" (Hassan at [42] quoted at paragraph 39 above).

ii) As a "transfer decision" does not include the acceptance of a take charge request, it cannot logically include the rejection of such a request.

iii) As the CJEU has made clear, the article 27(1) remedy in respect of transfer decisions is "only" available when a take charge request is accepted, not when it is rejected (see, e.g., Mengesteab at [60], and Hassan at [60]).

iv) That interpretation of article 27(1) is supported by reading article 27 as a whole. For example, (i) article 27(3)(b) provides for the automatic suspension of "*the transfer*"; (ii) article 27(3)(c) refers to "suspending *the transfer* until the decision on the first suspension request is taken" and to a decision "not to suspend *the implementation of the transfer decision*"; and (iii) article 27(4) refers to competent authorities deciding "to suspend *the implementation of the transfer decision* pending the outcome of the appeal or review" (all emphases added). These provisions only make sense, Ms Giovannetti submitted, if "transfer decision" is restricted to a positive decision to transfer, and do not include a decision not to transfer in which event there is no "transfer" to implement or suspend.

v) That construction of "transfer decision" is supported by article 26(1) of Dublin III, which identifies two stages in the process: only when the requested state has accepted the take charge request (the first stage) is there an obligation on the requesting state to make a transfer decision and notify the applicant of it (the second stage). Article 26 thus does not contemplate a decision not to transfer falling within the scope of "transfer decision".

vi) Recital (19) is of no assistance in construing article 27(1) because a transfer decision is necessarily temporally after a refusal of a take back request, and so the latter cannot be a "decision regarding a transfer"; and it is well-established that a recital cannot be relied upon for derogating from the actual provisions of the instrument in question.

vii) Ms Giovannetti also submitted that to interpret the phrase "transfer decision" in article 27(1) to include a refusal of a take charge request is inconsistent with

the fundamental objective of Dublin III which is to establish a "clear and workable" system for determining the Member State responsible for examining an asylum application, so as "not to compromise the objective of the rapid processing" of protection claims, thereby guaranteeing "effective access to the procedures for granting international protection" (see recitals (4) and (5), and Hassan at [56]), by giving a right to asylum applicants in the requesting state to bring proceedings in the requested state to challenge a refusal to accept a take charge request which would lead to substantial delay which could not have been the intention of Dublin III. Such cross-border proceedings would inevitably be procedurally complex, without provision within Dublin III itself for assistance to applicants. By allowing such proceedings, the mechanism of Dublin III (which imposes the primary obligation to determine which Member State is responsible for examination of an asylum claim upon the state where the application is made and where the asylum applicant is physically situated) is effectively circumvented (see Secretary of State for the Home Department v ZAT (also known as ZT (Syria) v Secretary of State for the Home Department) ("ZT (Syria)") [2016] EWCA Civ 810; [2016] 1 WLR 4894). It is unsurprising (submits Ms Giovannetti) that the Respondent has been unable to identify any case law concerning such a "cross-border" appeal such as this: article 27 does not provide for it.

47. To the contrary, Ms Kilroy submitted that the tribunal were correct to find that article 27 of Dublin III provided MS with an effective remedy in respect of the United Kingdom's decision to refuse to accept the take charge requests issued by the French authorities. The main strands of her submissions were as follows.

i) To interpret "transfer decision" narrowly to include only a positive decision to transfer after an acceptance of a take charge request would undermine the intended purpose of article 27, namely to enhance individual rights by providing an effective remedy. The CJEU jurisprudence in cases such as Ghezelbash and Mengesteab make clear that the article 27(1) right to a remedy is broad, and intended to provide effective judicial protection to applicants against the misapplication of the criteria in Chapter III of Dublin III.

ii) To restrict article 27 in the way suggested by the Secretary of State is not only contrary to the objectives of Dublin III, but arbitrary. There is no good reason for giving an individual who is the subject of a positive decision to transfer an effective remedy on the grounds that the Dublin III criteria have been misapplied, but denying the same remedy to an individual in respect of whom a decision not to transfer has been made by such a misapplication.

iii) Dublin III treats the best interests of the child, the right to family life and the respect for the principle of family unity as of particular importance, and makes clear that its provisions must be interpreted compatibly with the Charter which requires any violation of a right guaranteed by EU law to have an effective remedy (see paragraphs 18 and following above). The allocation criteria in articles 8-10 of Dublin III are intended to promote those rights and principles, giving them priority over all subsequent criteria for the allocation of asylum claims within Member States. Article 27 cannot sensibly be interpreted so as to deprive those at the very top of the hierarchy of an effective remedy when the Dublin criteria have been misapplied to their disadvantage, when those

who rely on articles 12 -14 (and even procedural rights such as time limits) have a remedy when there is a positive decision to transfer. This was a point that the tribunal (at [188] of its determination) considered was of considerable weight in construing article 27.

iv) Ms Kilroy submitted that it is plain enough that the phrase "transfer decision" in article 27 includes the refusal of a take charge request; but such a refusal is in any event clearly within the scope of "a decision regarding transfer" as stated in recital (19) since, without an express or deemed acceptance of a take charge request, no transfer can take place. Recital (19) confirms the context in which the scope of article 27 has to be measured.

v) Ms Kilroy does not accept that her interpretation of article 27 will in fact result in delay – and certainly not to the extent that it assists in the interpretation of article 27 – but, insofar as it may, she relies upon the principle that judicial protection relied on by asylum seekers should not be sacrificed to the requirement of expedition in processing asylum claims (see Ghezelbash at [56]-[57]; and Hassan at [57]).

vi) Immigration claims by individuals who are outside the United Kingdom are not uncommon. Even if article 27 were to be construed narrowly as the Secretary of State contends, Ms Kilroy submitted that it would always be open to an applicant to issue proceedings in the requested state to challenge a refusal to accept a take charge request, which would be by way of judicial review in the United Kingdom. There is nothing inherently wrong with so-called "cross-border" claims.

vii) ZT (Syria) does not assist the Secretary of State. In that case, the respondent asylum seekers in France sought to rely upon article 8 of the ECHR to gain entry into the United Kingdom where they said they had adult siblings. They made no asylum claim in France, and Dublin III was not therefore engaged. Beatson LJ (with whom Moore-Bick and Longmore LJJ agreed) held that asylum seekers are generally bound to use Dublin III processes and the procedures in the state where they are living. He said (at [95]):

> "I consider that applications such as the ones made by these respondents should only be made in very exceptional circumstances where they can show that the system of the Member State that they do not wish to use, in this case the French system, is not capable of responding adequately to their needs. It will, in my judgment, generally be necessary for minors to institute the process in the country in which they are in order to find out and be able to show that the system there is not working in their case. This is subject to the point that, as I have stated, these cases are intensely fact-specific. There will be cases of such urgency or of such a compelling nature because of the situation of the unaccompanied minor that it can clearly be shown that the Dublin system in the other country does not work fast enough. The case of the Syrian baby left behind in

> France when the door of a lorry bound for England closed after his mother got onto the lorry referred to in Mr Scott's fourth statement is an example. But save in such cases, I consider that those representing persons in the position of the respondents should first seek recourse from the authorities and the courts of the Member State in which the minor is. Only after it is demonstrated that there is no effective way of proceeding in that jurisdiction should they turn to the authorities and the courts in the United Kingdom."

However, in this case, MS did make an asylum application in France, and therefore Dublin III was engaged. He could make no application in France to further his cause: it was the United Kingdom which was misapplying the Dublin III criteria, not France – and there was no effective way of proceeding in France. ZT (Syria) thus supported the submissions made on behalf of MS.

48. Therefore, Ms Kilroy submitted that, in respect of Ground 1, on the true construction of article 27, "transfer decision" is wide enough to include a decision not to accept a take charge request; and the Upper Tribunal was correct to conclude as much.

49. However, her primary submission was that this court should not determine the issue raised by that ground. As she rightly submitted, as MS was represented at the tribunal hearing at which permission to appeal on the ground was granted, it is not open to her to apply to set aside the permission (CPR rule 52.18(3)); but if, as she contends, this court decides that it is inappropriate to determine the issue raised in Ground 1 in the context of this appeal, then it is open to us to refuse the appeal without determining it on the merits.

50. She submitted that that was the appropriate course, for essentially two reasons.

51. First, the tribunal held that the three decisions not to accept the take charge requests were unlawful because the Secretary of State failed to comply with his investigatory obligations under Dublin III. That is not now being challenged in this court. Leaving article 27 aside, Ms Kilroy submits that MS is entitled to any remedies available under domestic law, the judicial review he brought having been successful. Ms Giovannetti accepts – rightly – that there is a residual power in judicial review proceedings to make findings of fact; and, when article 8 of the ECHR in engaged, the court has to determine proportionality for itself and it may be required to resolve issue of fact in this context (see, for a recent example, Balajigari v Secretary of State for the Home Department [2019] EWCA Civ 673 especially at [104]). In this case, paragraph 2.3.5 of the Grounds of Claim pleaded that the alleged failure to investigate etc breached, not only Dublin III, but article 8 of the ECHR and the Charter. It was therefore open to the tribunal, irrespective of article 27, to make findings of fact in relation to MS and MAS as it did, as a matter of domestic law and domestic remedies. The availability of domestic remedies will, of course, vary from Member State to Member State. However, as in this case, they may make the question of the scope of article 27 immaterial. Existing domestic remedies may be effective enough.

52. Second, insofar as it is necessary to consider article 27, Ground 1 squarely raises a question on the interpretation of EU law which is governed by article 267 of the

Treaty on the Functioning of the European Union which deals with the making of preliminary references to the CJEU. A final court of appeal must make such a reference (article 267(3)); and, although there is a discretion in other circumstances (article 267(2)), the case law is clear that a reference should ordinarily be made unless the matter is *acte clair*. Ms Kilroy submitted that that the scope of article 27 of Dublin III is clear; but she fairly accepted that it may not be so clear that it is *acte clair* which has been restrictively construed in this context (see, e.g., R v Pharmaceutical Society of Great Britain ex parte Association of Pharmaceutical Importers [1987] 3 CMLR 951 at [23(4)]). However, although article 267 may compel a reference to the CJEU, that court is generally unwilling to take references which are concerned with hypothetical questions in the sense that the determination of those questions is not necessary for the effective resolution of a particular dispute (Djabili v Caisse d'Allocations Familiales de l'Esonne (CJEU Case No C-314/96) [1998] All ER (EC) 426 at [19]-[23]; and Fish Legal v Information Commissioner (CJEU Case No C-279/12) [2014] QB 521 at [AG56]-[AG57] and [33]), although it may in some circumstances be persuaded to take a reference on a question even where there is no actual dispute which turns upon that question (see, e.g., Wightman v Secretary of State for Exiting the European Union (CJEU Case No C/621/18) [2019] QB 199 at [201]-[21] and [29]-[30]).

53. I see the force in Ms Kilroy's submission on the substantive issue of the construction of article 27 in Ground 1; but, in respect of that issue, which is now entirely academic as between the parties, I would exercise the court's discretion not to determine it.

54. I do not consider it is necessary to resort to the problems that arise from the CJEU's reluctance to examine academic issues: in my view, the proper application of our domestic approach to academic appeals is sufficient to decline to determine the issue raised. When our courts consider whether to accept academic claims or appeals, as this court emphasised in Hutcheson, the focus is upon whether – and the extent to which – determining the issue is in the public interest. I accept that the issue raised here may be of some, but certainly not outstanding, public importance. Article 27(1) has been in force since mid-2013, and there appears to be no case in which the issue raised here has been live. There is no evidence that there are any substantial number of cases raising the issue, behind this one. As Ms Kilroy submitted, where a refusal to accept a take charge request has been found against (or conceded by) the Secretary of State, then domestic remedies in respect of that unlawfulness may well be sufficient in future cases to satisfy the applicant and/or to satisfy the effective remedy provisions of article 27 in any event. That may be the case in other Member States. In my view, it would not be helpful if this court were to determine the scope of article 27 in the circumstances of this case.

55. Whilst I do not rely on the possible unwillingness of the CJEU to take a reference in this case because of its academic nature, the fact that, at some stage, there may be a reference which is not accepted reinforces my view that it is not only unnecessary but inappropriate to determine the issue in Ground 1 in the context of this particular case.

Conclusion

56. For those reasons, I would dismiss this appeal, without determining the merits of Ground 1, on the basis that it is academic, and it is not in the interest of justice to determine it in the circumstances of this appeal.

57. Finally, I should say that I have had the benefit of seeing the additional observations of my Lord, the Master of the Rolls, with which I agree.

Simon LJ :

58. I agree with both judgments.

Sir Terence Etherton MR :

59. I agree, and wish to add only a short amplification of the place of article 8 of the ECHR and ordinary domestic law principles of judicial review in the proceedings below and on this appeal.

60. In MS's Grounds for Judicial Review (at paragraphs 2.2-2.4) he claimed that the Secretary of State's refusals to accept France's take charge requests were unlawful and contrary to the Secretary of State's legal obligations under the Charter, article 8 of the ECHR, Dublin III and the Convention on the Rights of the Child. In paragraphs 4.17-4.18 of the Grounds it was stated that the Secretary of State was bound to act compatibly with the rights protected by the Charter whenever she was acting within the scope of EU law, and that the relevant rights protected by the Charter included, among other things, article 7 (respect for family life) and article 47 (the right to an effective remedy for violations of rights and freedoms guaranteed by EU law). In paragraphs 4.19-4.23 of the Grounds it was stated that the Secretary of State owed a domestic statutory duty to act compatibly with article 8 of the ECHR pursuant to section 6 of the Human Rights Act 1998, and those duties existed alongside Dublin III and were not subsumed or replaced by it.

61. In the Detailed Grounds of Defence reference was made to R (ZT (Syria)) v Secretary of State for the Home Department [2016] EWCA Civ 810; [2016] 1 WLR 4894, and R (RSM (Eritrea)) v Secretary of State for the Home Department [2018] EWCA Civ 18; [2018] 1 WLR 2595. Passages from the judgments in those cases were quoted to the effect that the processes in the Dublin system should only be circumvented by recourse to article 8 of the ECHR in very exceptional circumstances. As to the allegation that the decisions of the Secretary of State were incompatible with article 8 of the ECHR and article 7 of the Charter, it was stated in paragraph 37 of the Grounds of Defence that article 8 of the ECHR and article 7 of the Charter could only be engaged if the decisions of the Secretary of State that MS and MAS were not brothers contained a material error of fact, were irrational or were otherwise wrong in law, and that could not be shown.

62. Ms Giovannetti stated in her oral submissions before us that, in the proceedings before the tribunal below, the Secretary of State accepted that there could be judicial review under ordinary domestic law principles even if the alleged unlawfulness arose under Dublin III itself.

63. It is apparent from the judgment of the tribunal that its decision to quash the Secretary of State's refusal to accept France's take charge requests was made on that basis (see the way the tribunal summarises MS's case in paragraphs 44 and 45). The issue of article 27 arose only in the context of the subsequent question whether, having concluded that the decisions of the Secretary of State should be quashed, the tribunal

should decide for itself whether the criteria for determining responsibility under article 8 of Dublin III were met on the facts.

64. Hickinbottom LJ has set out in paragraph 5 above the two grounds of appeal. In her arguments for dismissing the appeal on the footing that it is academic Ms Kilroy relied upon, among other things, the right to challenge refusals by the Secretary of State of take charge requests as infringements of article 8 of the ECHR, irrespective of rights and obligations under Dublin III, applying ordinary domestic law judicial review principles and also bearing in mind the Secretary of State's acceptance on the appeal that (1) there is residual power in judicial review proceedings to make findings of fact, and (2) when called upon to determine whether there is a breach of article 8 of the ECHR, the court has to decide proportionality for itself, and it may be required to resolve issues of disputed fact.

65. ZT (Syria) and RSM (Eritrea), cited in the Grounds of Defence and in the arguments before us on the appeal, are not relevant to that line of argument and are plainly distinguishable on their facts as cases in which the applicants were seeking to bypass or override express procedures under the Dublin process which would otherwise have applied.

66. Ms Giovannetti, perhaps rather surprisingly in view of the way matters proceeded in the tribunal below and the concession by the Secretary of State on Ground 2 of the appeal, urged us to express no view about the application of ordinary domestic law principles of judicial review in a case such as the present one as, she emphasised, that is not the subject of the notice of appeal. It is sufficient, therefore, to conclude this description of the way the issue arose in this case and on the appeal by recording that nothing was said to us to indicate that the tribunal was wrong to approach the case as it did, by reviewing the Secretary of State's decision on the basis of ordinary judicial review principles.