

UNAPPROVED

REDACTED



THE COURT OF APPEAL

Record No.: 2021/287

Neutral Citation Number [2022] IECA 7

Edwards J.

Faherty J.

Collins J.

BETWEEN

BK

Applicant/Appellant

AND

THE MINISTER FOR JUSTICE

Respondent

JUDGMENT of Mr Justice Maurice Collins delivered on 19 January 2022

BACKGROUND

1. This appeal raises difficult issues regarding the implementation and application of Regulation (EU) No 604/2013 (“*Dublin III*”) and the operation of the *Dublin system* in the State which have already been the subject of many decisions of the Irish courts and of the Court of Justice.

The Dublin System

2. Dublin III sets out the criteria and mechanisms for determining the Member State responsible for examining applications for international protection made in one of the Member States by a third country national or stateless person. Dublin III repealed and replaced Regulation (EC) No 343/2003 (“*Dublin II*”) which had in turn replaced the Dublin Convention.¹ The Dublin system is a critical component of the European Common Asylum System (ECAS) adopted by the EU following the Tampere European Council in 1999. Article 78 TFEU confers broad competence on the Union in this area.

3. Article 3(1) of Dublin III provides that applications for international protection by a third-country national or stateless person who applies on the territory of any Member State “*shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.*” Chapter III then sets out a hierarchy of criteria for determining the responsible Member State. These criteria are intended to provide “*a clear and workable method*” which “*should .. make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for granting international protection and not to compromise the objective of the rapid processing of applications for international protection.*” (Recitals (5) & (6)). Once the Member State responsible has been identified, it is obliged (as the case may be) to “*take charge*” or “*take back*” the applicant or other person (Dublin III

¹ Formally, the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, signed in Dublin on 15 June 1990

applies to certain persons who have not made an application in the requesting Member State as well as to persons who have) and, where relevant, to examine and determine their application for protection (Article 18).

4. Chapter VI makes detailed provision for the procedures to be applied. Where a Member State accepts a take charge or take back request “*the requesting Member State shall notify the person concerned of the decision to transfer him or her to the Member State responsible and, where applicable, of not examining his or her application for international protection*” (Article 26(1)). Article 27 then provides that the person concerned “*shall have the right to an effective remedy, in the form of an appeal or review, in fact and in law, against a transfer decision, before a court or tribunal*”. Recital (19) expressly links such remedy to Article 47 of the Charter of Fundamental Rights of the European Union (“*the Charter*”) and states that an effective remedy against “*decisions regarding transfer*” should “*cover both the examination of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred.*”
5. Article 19(2) Dublin II had also provided for “*an appeal or a review*” against a decision to transfer but in much briefer terms and the scope of such appeal or review had been interpreted narrowly by the CJEU (Case C-394/12, *Abdullahi v Bundesasylamt* [2014] 1 WLR 1895). In contrast, in a series of decisions, beginning with Case C-63/15 *Ghezelbash v Staatssercretaris van Veiligheid en Justitie* [2016] 1 WLR 3969 (“*Ghezelbash*”), the CJEU has emphasised the broad scope of the Article 27 remedy (see also Case C-578/16 *CK v Republika Slovenija* (“*CK*”), Case C-155/15 *Karim v*

Migrationsverket; Case C-670/16 *Mengesteab v Germany* [2018] 1 WLR 865; Case C-201/16 *Shiri v Bundesamt für Fremdenwesen und Asyl* [2018] 1 WLR 3384 and Case C-194/19 *HA v État Belge*). The Article 27 remedy encompasses, but is by no means limited to, disputes concerning the application of the criteria for determining the Member State responsible under Dublin III.

6. Article 27(2) requires Member States to “*provide for a reasonable period of time within which the person concerned may exercise his or her right to an effective remedy pursuant to paragraph 1*”. Article 27(3) then provides that:

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

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

(b) the transfer is automatically suspended and such suspension lapses after a certain reasonable period of time, during which a court or a tribunal, after a close and rigorous scrutiny, shall have taken a decision whether to grant suspensive effect to an appeal or review; or

(c) the person concerned has the opportunity to request within a reasonable period of time a court or tribunal to suspend the implementation of the transfer decision pending the outcome of his or her appeal or review. Member States shall ensure that an effective remedy is in place by suspending the transfer until

the decision on the first suspension request is taken. Any decision on whether to suspend the implementation of the transfer decision shall be taken within a reasonable period of time, while permitting a close and rigorous scrutiny of the suspension request. A decision not to suspend the implementation of the transfer decision shall state the reasons on which it is based. “

7. Article 17 of the Dublin III provides that “[b]y way of derogation from Article 3(1)”, any Member State “*may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation*” . Provision to the same effect was made in Dublin II, Article 3(2). While recital (17) refers to humanitarian and compassionate grounds “*in particular*”, Article 17(1) is not so limited and is “*intended to allow each member state to decide, in its absolute discretion, on the basis of political, humanitarian or practical considerations, to examine an asylum application even if it is not responsible under the criteria laid down*” in Chapter III: Case C-661/17 *MA v International Protection Appeals Tribunal* [2019] 1 WLR 4975 (“*MA*”)
8. As will become apparent, Articles 17(1) and Article 27, and their interaction, are central to the issues raised on this appeal.
9. Before turning to consider the Irish Regulations which seek to give further effect to Dublin III (which, of course, has direct effect in accordance with Article 288 TFEU), two further Dublin III provisions should be noticed. The first is Article 20(1) which

provides that the “*process of determining the Member State responsible shall start as soon as an application for international protection is first lodged with a Member State.*” The second is Article 29. Article 29(1) provides that the transfer of the person concerned from the requesting Member State to the Member State responsible shall be carried out “*as soon as practically possible, and at the latest within six months of acceptance of the request by another Member State to take charge or to take back the person concerned or of the final decision on an appeal or review where there is a suspensive effect in accordance with Article 27(3).*” Article 29(2) then provides that if the transfer does not take place within that six month limit, the Member State responsible is relieved of its obligations and responsibility transfers to the requesting Member State. While Article 29(2) identifies certain limited circumstances in which that time limit may be extended, none has any relevance to the circumstances here. At the hearing of this appeal, the Court was informed that the six month time limit expires at midnight on next Friday (21 January 2022).

10. Regulations have been made from time to time under section 3 of the European Communities Act 1972 for the purpose of giving further effect to Dublin III. The current Regulations are the European Union (Dublin System) Regulations 2018 (SI No 62/2018) (“*the 2018 Regulations*”). Article 3 of the 2018 Regulations confers on international protection officers appointed under the International Protection Act 2015 (“*the 2015 Act*”) collectively constituting the International Protection Office (the “*IPO*”), the functions (*inter alia*) of determining the Member State responsible under the criteria in Dublin III, Chapter III and of making transfer decisions/ Article 6 provides for an appeal against a transfer decision (defined in Article 2(2) as “*a decision*”).

made by an international protection officer to transfer..”) to the International Protection Appeals Tribunal established under Part 10 of the 2015 (“*IPAT*”). Where such an appeal is brought, the person subject to the transfer decision is entitled to remain in the State pending the outcome of the appeal: Article 8(1). Article 8(1) clearly reflects the provisions of Article 27(3)(c) of Dublin III.

11. As I explained in my judgment in *TAO v Minister for Justice and Equality* [2021] IECA 293 (Noonan and Ni Raifeartaigh JJ concurring), neither the 2018 Regulations nor the Regulations that it replaced expressly address Article 17(1) or specify the person or body by whom the option or discretion provided for by it was exercisable in the State and there was significant uncertainty as to the correct position which was definitely resolved only by the decision of the Supreme Court in *NVU v Refugee Appeals Tribunal* [2020] IESC 46. For the reasons set out in the judgment of Charleton J (with which Clarke CJ and O’ Donnell, MacMenamin and O’ Malley JJ agreed), the court held that that the discretion was exercisable by, and only by, the Minister for Justice and Equality (“*the Minister*”). The decision in *NVU* was given on 24 July 2020.

12. Accordingly, as a matter of Irish law, the IPO is responsible for determining the Member State responsible under the criteria in Dublin III whereas the exercise of the Article 17(1) discretion is a matter for the Minister. Dublin III permits such a division of function: *MA*, paras 62-69. It follows from it that the procedure leading to the making of a transfer decision by the IPO under the 2018 Regulations does not involve any consideration of Article 17(1). The jurisdiction of *IPAT* under Article 6 is limited to appeals from such transfer decisions and it has no jurisdiction to hear an appeal from a

decision of the Minister as to the exercise of the Article 17(1) discretion. That being so, it follows that, in Irish law, the only available remedy in respect of such a decision is judicial review under Order 84 RSC. So much was not in dispute before us on this appeal.

The Material Facts Here

13. The facts are set out in detail in the judgment of Ferriter J ([2021] IEHC 717). For the purposes of this judgment, they may be stated relatively briefly. Ms K (“*the Applicant*”) is a national of the Democratic Republic of the Congo. She arrived in the State in October 2018 and made an application for international protection. On interview, she disclosed that she had travelled to Ireland *via* Brussels, having travelled from South Africa to Brussels on a Belgian visa. Following a process of engagement between the respective competent authorities, Belgium accepted Ireland’s “*take charge*” request and on 23 January 2019 the IPO gave the Applicant notice of its decision that she be transferred to Belgium. IPO had been invited to decide to accept responsibility for the Applicant’s protection application pursuant to Article 17(1) but did not do so.

14. The Applicant appealed the transfer decision to IPAT but, after a considerable lapse of time, IPAT affirmed the transfer decision on 22 July 2021. IPAT examined and rejected the Applicant’s contention that there was a real risk that she would be subjected to inhuman and/or degrading treatment if returned to Belgium due to systemic failures in the asylum procedures and in the reception conditions for asylum applicants in Belgium (that being an express bar to transfer under Article 3(2) of Dublin III). In light of the

Supreme Court's decision in *NVU*, IPAT concluded that it could not exercise the discretion conferred by Article 17(1) and also held that it did have any inherent discretionary jurisdiction to set aside the transfer decision.

15. The Applicant has not challenged IPAT's decision to affirm the transfer decision. It follows that there is no extant dispute as to the fact that Belgium is the Member State responsible under Dublin III, Chapter III or as to the legality of the transfer decision.

The Application to the Minister

16. By letter of 6 September 2021, the Applicant was asked to present herself to the Garda National Immigration Bureau on 16 September 2021 to make arrangements for her transfer "*not later than 21/01/2022*". In advance of that date, on 14 September 2021 the Applicant's solicitors wrote to the Minister requesting her to grant the Applicant "*discretionary relief*" under Article 17 and to cancel the transfer decision with immediate effect. The letter also requested that, in the event of Article 17 relief being denied, the Minister would provide an undertaking that no further action would be taken to effect the transfer pending any application she might make for judicial review. The letter sought a response by 28 September 2021 in default of which an application would be made for leave to seek judicial review and to enjoin the transfer. I shall refer to this letter as the "*Article 17 Application*"
17. The Article 17 Application set out three grounds. The first was the Applicant was at risk of detention in Belgium which (so it was said) implicated her rights under Article

6 of the Charter and Article 5 ECHR. In that context reliance was placed on the same evidential material as had been provided to IPAT, as well as a more recent AIDA Country Report. I will refer in more detail to this material below. Noting that IPAT had found nothing to suggest that Belgium was not operating in line with its international obligations or that there were systemic flaws in its asylum procedure and reception conditions, the Applicant submitted that she did not have to demonstrate such systemic flaws as she was relying on humanitarian considerations. The second ground was that “*given the extent of relationships and duration of stay*” in the State, her transfer to Belgium implicated her right to private life under Article 7 of the Charter/Article 8 ECHR. No further detail of the “*relationships*” relied on by the Applicant in this context was set out in the letter to the Minister but it appears that material attesting to the Applicant’s educational achievements and personal circumstances was enclosed with it. The third and final ground was that the Applicant should not be transferred to Belgium during the Covid-19 pandemic, the Applicant submitting that a transfer would expose her to a high risk of infection and that a lack of guaranteed access to health care would place her at risk of inhuman or degrading treatment and/or be in breach of her private rights under Articles 4, 5 and/or 7 of the Charter. Reliance was placed in this context on the European Commission Communication: *Covid-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement* (C(2020) 2516) as well as Irish and Belgian travel rules and advice. The letter does not suggest that the Applicant was in a position of particular vulnerability as regards Covid-19 or that the risk of infection in Belgium was higher than in Ireland.

The Minister's Decision

18. The Minister's decision issued on 23 September 2021, in the form of a letter signed by one of her officers, Paul Byrne. As it is this decision that is impugned in these proceedings, and as it is relatively short, I shall set it out in full:

“Having read and considered your request that I exercise discretion so that your International Protection claim would be determined in this jurisdiction, I am satisfied that the materials submitted by you on your behalf do not disclose any humanitarian or compassionate ground such that I would invoke Article 17(1) of Dublin III of the above regulations. In the circumstances, I am satisfied that transfer to the responsible Member State, Belgium, should proceed.

The decision has been reached following a review of the representations made on your behalf on 14 September 2021, but also having reviewed the entirety of the information available to the Minister. A summary of the reasons include the following:

- There is no reason to believe that there are any systemic deficiencies in the asylum system in Belgium either as alleged or at all.*
- There is nothing to indicate that a Transfer to Belgium would pose any real risk to the applicant's Article 4 rights under the European Charter of Fundamental Rights, nor the Article 3 rights found in the European Convention on Human Rights.*

• *It is noted from the representations received that the applicant has begun to settle and has engaged in educational pursuits and has made connections in the local community and further note other letters of support in respect of Ms K. All of this was undertaken at a time when she had no reason to believe that she would be in a position to remain in the State, given the precarious nature of her presence in the State it is difficult to see how Article 8.1 rights would be engaged let alone breached. As such there are no exceptional circumstances that would merit not applying the Dublin Regulations to this case.*

In accordance with the provisions of Regulation (EU) No. 604/2013, your transfer to Belgium will take place as soon as practically possible.”

In his judgment, Ferriter J refers to this decision as the “*Article 17 Decision*” and I shall adopt that description also.

THE PROCEEDINGS

19. The Applicant had filed judicial review papers on 23 September 2021 (the same day as the Article 17 Decision). It appears that, as drafted, the principal relief sought in the Statement of Grounds was an order of *mandamus* directing the Minister to make a decision on the Article 17(1) application. When the application for leave was moved before the High Court (Heslin J) on the following day, 24 September 2021, Heslin J gave leave to amend the Statement of Grounds to delete the relief of *mandamus* and to seek instead an order of *certiorari* of the Article 17 Decision. An injunction restraining the Minister from taking any further steps in relation to the removal of the Applicant from the State pending the determination of the judicial review proceedings was also sought. These are the only substantive reliefs sought in the Amended Statement and the only reliefs that the Applicant was given leave to apply for by Heslin J.
20. A number of “*legal grounds*” are set out in the Amended Statement, only one of which appears to be directed to the Article 17 Decision. As amended, it reads as follows:

“Unfairness/irrationality and abuse of discretion: *In making the Impugned Decision the Respondent has fettered her discretion and/or given no adequate regard to the Applicant’s rights under Articles 4 and/or 7 of the Charter and/or Articles 3 and/or 8 ECHR, having regard to the Respondent’s obligations under s.3 of the European Convention on Human Rights 2003, in the following respect:*

(i) The Respondent has given no adequate regard to the Applicant’s submissions that transfer to Belgium in the current circumstances would expose her to high

risk of infection and/or detention, contrary to Arts. 4,6 and 7 Charter/Arts. 3,5 and 8 ECHR;

(ii) Contrary to Art. 7 Charter/Art. 8 ECHR, the Respondent has given no adequate regard to the Applicant's integration into the State, or to the period of [time]² she has spent in the State (three years) in contrast to the brief period of time (two days) she spent in Belgium. The Respondent has erred in finding that the Applicant's Article 8.1 ECHR rights (or Art. 7 Charter rights) have not been engaged or breached.

(iii) The Respondent has erred in law and/or fettered her discretion in suggesting that the Applicant is required to demonstrate "exceptional circumstances" for the application of the Dublin Regulations to her case.

(iv) The Respondent erred in fact and/or abused her discretion and/or acted unfairly in finding that the material submitted on the Applicant's behalf "do not disclose any humanitarian or compassionate ground."

The Minister joins issue with these grounds in her Statement of Opposition, saying that she considered all relevant matters and found that there was no basis on which to exercise the Article 17(1) discretion in favour of the Applicant.

² The Amended Statement refers to "system" here but it seems clear that this is an error.

21. Of the other “*legal grounds*”, that at (e)(2) appears to have no continuing relevance given that *mandamus* is no longer being pursued. The remaining ground, that at (e)(1), asserts that the Applicant’s right to an effective remedy under Article 47 of the Charter entitles her to challenge the Article 17 Decision by way of judicial review and says that any implementation of the transfer decision pending the making of an application for leave to apply for judicial review would be unlawful. Notably, ground (e)(1) makes no reference to Article 27 of Dublin III. That the Applicant is entitled to an effective remedy pursuant to Article 47 of the Charter is not disputed by the Minister and she accepts that the Article 17 Decision is amenable to judicial review. However, the Minister does not accept that the Applicant’s entitlement to an effective remedy encompasses any entitlement to remain in the State pending an application for leave to apply for judicial review or, where leave is granted, the judicial review itself and denies that an application for judicial review of a refusal to exercise the Article 17(1) discretion in favour of an applicant have the effect of suspending a valid transfer decision (Statement of Opposition, para 2).
22. It is not entirely clear how the (e)(1) ground relates to the reliefs actually sought in the Amended Statement. It cannot be a ground for granting *certiorari* of the Article 17 Decision. No declaratory reliefs were sought by the Applicant (a point to which I will return). By a process of elimination, therefore, ground (e)(1) must be directed to the only other relief sought by the Applicant, the interlocutory injunction restraining her removal from the State and ground (e)(1) must therefore be interpreted as asserting that the grant of such an injunction was, in the circumstances, a mandatory requirement of EU law, in other words that EU mandated the automatic suspension of the transfer

decision in the circumstances. However, no argument appears to have been made to the High Court that Article 47 of the Charter mandated the automatic suspension of the transfer decision in the circumstances here. Certainly, no such argument was made to this Court on appeal. As regards Article 27, it seems clear from its terms that it does not require Member States to provide for a regime of automatic suspension of a transfer decision pending the determination of an appeal or review of it. That is one – but only one - of the options provided for in Article 27(3) of Dublin III. That position appears to have been implicitly accepted by the Applicant before the High Court when she sought to rely on Article 27(1)(c). It was explicitly accepted before this Court on appeal that the State was under no obligation to adopt the option in Article 27(1)(a).

23. In any event, the transfer decision was not implemented before the Applicant had an opportunity to make an application for leave to apply for judicial review of the Article 17(1) Decision on 24 September 2021 and on that date Heslin J granted an interim injunction restraining the Minister from taking any further steps in relation to the removal of the Applicant from the State until after 5 October 2021. On 5 October the High Court (Meenan J) continued that injunction until after 19 October 2021. On that date the proceedings were set down for hearing – both in respect of the interlocutory injunction application and the substantive application for judicial review – on 3 November 2021. No order was made extending the interim injunction – perhaps, as the Judge suggests, due to an oversight – but no steps were taken to implement the transfer decision in the period before the hearing in any event. The application for an interim injunction was renewed before the Judge on 3 November and, as his Judgment records, he reflected on that application overnight and on 4 November made an order restraining

removal until after 18 November. The Judge gave his Judgment on that date dismissing the applications before him and discharging the interim injunction granted on 4 November. However, the Order ultimately made by the Judge on 22 November put a stay on the discharge of the interim injunction until 26 November. That allowed the Applicant an opportunity to apply to this Court for a further stay on the discharge of the interim injunction and/or an interlocutory injunction restraining her removal pending the determination of this appeal. That application was refused by Costello J on 10 December 2021 but, in the event, no steps to transfer her were taken prior to the hearing of the appeal. At the conclusion of the appeal this Court granted an injunction restraining the Applicant's removal until tomorrow morning, Thursday 20 January 2021.

24. Thus the Applicant has had her application for judicial review, and her appeal to this Court from the refusal of that application, heard and determined prior to any implementation of the transfer order directing her removal to Belgium. That being so, and given the Applicant's acceptance that judicial review is, in substance, an "*effective remedy*", it would appear to follow that the Applicant has had an effective remedy here. In fact, that is expressly accepted by the Applicant. There is therefore no live concrete dispute on this issue and, as I shall explain, this has important implications for the scope of this appeal.

THE HIGH COURT JUDGMENT

25. The Judge delivered a careful and comprehensive Judgment on 18 November 2021, addressing in detail the injunction application as well as the substantive application for certiorari of the Article 17(1) Decision.

26. The Judge identified two issues arising in relation to the injunction application. The first was whether the fact that the Applicant had sought judicial review of the Article 17 Decision *of itself* entitled the Applicant to an injunction or, putting it differently, whether the institution of the judicial review proceedings had the legal effect under Dublin III of suspending the transfer decision. The second issue was whether, if the institution of the judicial review proceedings did not have such effect, the Applicant was nonetheless entitled to an interlocutory injunction on the application of the principles set out in *Okunade v Minister for Justice* [2012] 3 IR 152 (Judgment, para 48).

27. As to the first issue, the Judge noted that the Applicant's contention was that automatic suspensory effect flowed from Dublin III, Article 27(3) on the basis that the reference to "*transfer decision*" in that provision was properly to be read as encompassing a decision made under Article 17(1). That, the Applicant contended, followed from *CK* where the CJEU had observed that the Article 17(1) discretion was "*an integral part of the system for determining the Member State responsible*" and that use of the clause involved the implementation of EU law and was not solely a matter for domestic law. However, the Judge did not read *CK* as authority for the proposition that a decision

under Article 17(1) was to be regarded as a transfer decision within the meaning of Article 27 (Judgement, para 53) and, in his view, the CJEU's decision in *MA* made it clear that Article 27, and in particular the provisions of Article 27(3) relating to suspensive effect, had no application to a decision under Article 17(1) (Judgment, para 56). The Judge then addressed and rejected what he characterised as a transposition argument advanced for the first time at the hearing to the effect that Article 27(3)(c) applied in circumstances where the only remedy available to the Applicant was judicial review of the Article 17 Decision. In the Judge's view it was not open to the Applicant to make that argument as it had not been pleaded and, in any event, the argument rested on the premise that Article 27 applied to a decision under Article 17(1) which the Judge regarded as "*untenable*" (Judgment, para 58).

28. That did not leave the Applicant without a remedy, however, given the availability of judicial review and the Applicant was also entitled to seek an interlocutory injunction in his judicial review proceedings. The appropriate approach to applications for such injunctions in an asylum/immigration had been authoritatively addressed in *Okunade*. Applying that approach, the "*real question*" was where the balance of justice properly lay. In the Judge's view, the balance of justice came down very much against the grant of the injunction sought. In contrast to *CK*, there was no contemporary or compelling evidence that the Applicant's fundamental rights would be breached by her transfer to Belgium. Furthermore, the Applicant had been guilty of significant delay in making her application to the Minister. Even if one overlooked the period prior to the Supreme Court's decision in *NVU* (which had clarified that the Article 17(1) discretion remained with the Minister), the Applicant had failed to make her application until the "*eleventh*

hour” (Judgment, para 77). It was important that applications under Article 17(1) should not be seen as a form of “*second go*” following a failed challenge to a transfer decision. The transfer decision here had been confirmed by IPAT and its decision had not been challenged. *Okunade* suggested that significant weight should be given to permitting the implementation of *prima facie* valid public law measures and, in the absence of any compelling countervailing circumstances, the Minister was entitled to proceed on the basis that she could act on foot of the transfer decision here. It followed that the Applicant was not entitled to an interlocutory injunction (Judgment, paras 79-80).

29. The Judge went on to make some general observations as to the appropriate timing of an Article 17 request, suggesting that such requests should in general be made no later than the time of any appeal to IPAT from a transfer decision made by the IPO (though noting that there was nothing to stop such a request being made before then (Judgment, para 87). An adverse decision by the Minister could then be challenged by way of judicial review which could be progressed while IPAT considered the transfer decision appeal (which had suspensive effect). While there might be exceptional situations warranting a different approach, the Judge considered that “*the overall architecture*” of the Dublin III regime put an onus on an applicant to make any Article 17(1) application no later than the transfer decision and if an applicant waited until after the determination of an appeal to IPAT to do so, the balance of justice would inevitably be tipped “*very significantly*” against the grant of an interlocutory injunction, absent the most exceptional circumstances (Judgment, para 89).

30. Finally, the Judge addressed the substantive application for judicial review. He noted what had been said by the Supreme Court in *NVU* as to the very wide discretion vested in the Minister under Article 17(1) and its view that fundamental rights would be engaged only exceptionally. He therefore rejected the Applicant's contention that the Minister had fettered her discretion in applying a threshold test of "*exceptional circumstances*". While the Applicant was entitled to deploy before the Minister the same points as had been advanced before IPAT (citing *DE v Minister for Justice and Equality* [2018] IESC 16, [2018] 3 IR 326), the Applicant's complaint that the Minister had failed to consider her arguments that transfer to Belgium would breach her rights was without substance. As to the Covid issue, the Judge noted the absence of any evidence to the effect that the Applicant stood to be at any particular risk from Covid in the event of her transfer. The arguments made were "*generic*" and had been substantively addressed by the Minister.

31. The Judge expressed his conclusions on the substantive application thus:

"98. In summary, in my view, the Minister's decision demonstrates on its face that all of the Applicant's representations were considered and gives a concise but perfectly coherent set of reasons as to why the Applicant's submissions were not considered such as to persuade the Minister to exercise her very wide discretion under Article 17 in favour of Ireland assuming jurisdiction to examine the Applicant's international protection application."

APPEAL

The Appeal from the Refusal of Judicial Review

32. I shall address the Applicant's appeal from the substantive decision of the Judge refusing *certiorari* first and then address the other aspects of the appeal.

The Nature of the Article 17(1) Discretion

33. Before addressing the Applicant's arguments in support of her appeal, it appears appropriate to consider in more detail the nature and scope of the Article 17(1) discretion. Article 17(1) is "*an integral part of the mechanisms laid down by [Dublin III] for determining the member state responsible for an asylum application*": *MA*, para 64. Consequently these questions involve the interpretation and application of EU law: *CK*, para 54.
34. The Court of Justice has consistently emphasised the broad nature of the discretion. That is abundantly clear from the following passage from the CJEU's judgment in *MA*:

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

57 *By way of derogation from Article 3(1), Article 17(1) of that regulation provides that each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under such criteria.*

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).”

35. Thus, if the state of health of an applicant for international protection is such as to prevent the implementation of a transfer order, the requesting Member State may choose to exercise its discretion to examine their application but would be under no obligation to do so: *CK*, at para 88. Similarly, the fact that conditions in the Member State responsible were such as to pose a threat to the fundamental rights of the asylum seeker did not, in itself, trigger an obligation on the part of the requesting Member State to exercise its option to assume responsibility: Case C-4/11, *Puid*.
36. Nevertheless, the CJEU’s jurisprudence does appear to leave open the possibility that, in certain circumstances, such an obligation could be triggered: Joined cases C-411/10 and C-493/10, *NS (Afghanistan) v Secretary of State for the Home Department* [2013] QB 102. The two references in *NS* involved the transfer of asylum applicants to Greece in circumstances where, as a result of the influx of illegal immigrants into that country, there were significant difficulties in the asylum procedure and in the reception conditions of asylum seekers. In such circumstances, the Court held, Member States

could not transfer applicants to Greece, even though it was the Member State responsible. It did not follow, the Court went on, that the requesting Member State thereby became obliged to consider the applications under Article 3(2) (*NS* was a Dublin II case). Its obligation in such circumstances was to “*continue to examine the criteria set out in [Chapter III] in order to establish whether one of the following criteria enables another member state to be identified as responsible for the examination of the asylum application*” (para 96). However, the Court added:

“[98] *The member state in which the asylum seeker is present must, however, ensure that it does not 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. If necessary, that member state must itself examine the application in accordance with the procedure laid down in article 3(2) of [Dublin II].*”

37. The nature of the Article 17(1) discretion was also considered in *NVU*. In this Court, Baker J observed that “*in its nature, and subject to the overriding restriction to compassionate and humanitarian considerations from Dublin III itself, the discretion is not one constrained by policies or criteria*” (para 114). The reference to compassionate and humanitarian considerations here clearly reflects recital (19) but as is clear from that recital and from Article 17(1) itself, and as the CJEU emphasised in *MA*, the discretion is not limited to such considerations. “*Political*” and “*practical*” considerations may also be relevant. In the Supreme Court, Charleton J thought the breadth of the discretion “*striking*”. The CJEU in *MA* had “*emphasised the entirely*

unfettered nature” of it (para 34). It was, he observed, difficult to identify other examples of discretionary powers “*of such a wide and unfettered nature*” (para 36). He contrasted the Article 17(1) power with the type of discretion given to administrative or quasi-judicial bodies to make decisions based on factual assessments (*ibid*).

38. The Supreme Court in *NVU* did not exclude rights-based arguments being made in the context of Article 17(1). However, Charleton J indicated that such issues would not “*ordinarily arise*”. The Dublin system “*assumes equality of rights being upheld throughout*” and a thorough examination of applications for protection throughout the EU. Only where rights-based grounds were specifically asserted, and where there was a factual basis that, “*exceptionally*”, engaged such rights, would there be a need to give consideration to them. That would, however, be a “*rare exception*” (para 37).
39. The issue of mutual trust referred to by Charleton J is potentially a significant factor in the exercise of the Minister’s discretion under Article 17(1) and in any judicial review of the Minister’s decision. It may be, of course, that the grounds that the Minister is asked to consider will not involve any assertion that the transfer of the applicant would breach their rights. But where – as here – it is suggested that rights of the applicant would not be adequately protected in the Member State responsible in the event of transfer, “*it must be assumed that the treatment of asylum seekers in all member states complies with the requirements of the Charter, the Geneva Convention and the ECHR*” (*NS*, para 80). That presumption is rebuttable (*NS*, para 98). But if it is to be rebutted, a cogent evidential basis for doing so must be established.

Judicial Review of the Article 17(1) Discretion

40. As already explained, there was no issue between the parties as to the availability of judicial review of the Article 17 Decision. The Minister expressly accepted that Article 47 of the Charter gives a right to an effective remedy and that, in that context, the Article 17 Decision was amenable to judicial review. In light of the decisions of the CJEU in *NS*, *CK* and *MA*, it appears to me that the Minister was correct to do so. For her part, the Applicant accepted that judicial review was an effective remedy here, both as regards Article 47 of the Charter and also by reference to the requirements of Article 27 of Dublin III. Judicial review was, the Applicant accepted, a form of “review” sufficient to satisfy those requirements, assuming that – as the Applicant contended but the Minister disputed – a decision under Article 17(1) came within the scope of Article 27 in the first place. The decision of the High Court in *Efe (A Minor) v Minister for Justice* [2011] IEHC 214, [2011] 2 IR 798 appears to support the approach of the Applicant but it is not necessary to consider that issue further here. The Applicant did not contend that Article 27 required a *de novo* assessment of whether or not to exercise the discretion.³

41. The authorities provide only very limited guidance as to the approach the court should take in a judicial review of a decision under Article 17(1). The issue was, however, touched on by the Court of Appeal for England and Wales in *ZT (Syria) v Secretary of*

³ In this context it may be noted that in Case C-194/19, *HA v État Belge*, the CJEU (Grand Chamber) noted that Article 27 of Dublin III differed from the provisions of Article 46 of Directive 2013/32 in that it did not expressly require an *ex nunc* examination of the lawfulness of the transfer decision: para 40 and following.

State for the Home Department [2016] EWCA Civ 810, [2016] 1 WLR 4894, a case where Article 8 family rights were centrally engaged. In a passage cited with apparent approval by Baker J in *NVU*, Beatson LJ stated (at para 85):

“the exercise by the Secretary of State of her discretion is subject to the ordinary public law principles of propriety of purpose, relevancy of considerations, and the longstop Wednesbury unreasonableness category (Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223) and, because of the engagement of article 8 of the European Convention, the intensity of review which is appropriate in the assessment of the proportionality of any interference with article 8 rights.”

42. However, in light of the CJEU’s characterisation of the Article 17(1) discretion as “absolute” and “wide” and given that its exercise is not “*subject to any particular condition*”, some at least of the “*public law principles*” identified by Beatson LJ in the passage above would seem to have only limited application. On any view – or so it appears to me – an applicant for judicial review of a decision of the Minister not to exercise the Article 17(1) discretion in a given case faces a difficult task. There are no statutory criteria to which the Minister is required to have regard. There are no specific procedural rules set out either in Dublin III or in the 2018 Regulations. No particular form of decision is required. In contrast to the provisions of Article 17(2), Article 17(1) does not require reasons to be given for a refusal to exercise the discretion, though it may be that such a requirement must be read into it as otherwise the right to an effective

remedy and judicial protection would be undermined.⁴ There was no discussion of that issue here, presumably because the Minister in fact gave reasons for her decision. In any event, provided that the Minister's decision demonstrates adequate engagement with the grounds relied on by the applicant, the scope for interference with the Minister's exercise of discretion on judicial review would appear to be very limited. At a minimum, it would appear that some significant error or errors of assessment on the Minister's part would need to be demonstrated.

43. In the absence of any detailed argument on this issue, however, it does not seem appropriate to seek to offer any more detailed guidance as to the proper scope of judicial review in this context or the extent to which and/or the manner in which the established grounds on which administrative decisions may be judicially reviewed apply to a decision of the Minister under Article 17(1).

The Grounds on which the Article 17 Decision is Impugned Here

44. An overarching complaint made by the Applicant is that the Minister erred in requiring her to demonstrate "*exceptional circumstances*" warranting the exercise of the Article 17(1) discretion in her favour. This, it was said, was founded on a misreading of *NVU*. While Charleton J had indeed stated that it would only be exceptionally that rights would be engaged and would have to be considered by the Minister, that did not support

⁴ See for instance Case C300/11, *ZZ*, at para 22.

any general proposition that exceptional circumstances had to be demonstrated in an application under Article 17(1).

45. The only reference to “*exceptional circumstances*” in the Article 17 Decision occurs in the context of assessing the claim made by the Applicant that her transfer to Belgium would breach Article 8(1) ECHR. That appears to accord with the approach indicated by Charleton J in *NVU*. However, even if it were the case that the Decision identified a general requirement to demonstrate the existence of exceptional circumstances, I would share the Judge’s view that there is no substance in this complaint. The rules set out in Dublin III are mandatory. The fundamental rule in Article 3(1) is that an application for asylum must be examined by the Member State identified as responsible under the criteria set out in Chapter III. Where the Member State responsible is not Ireland, Dublin III contemplates that a transfer decision will be made requiring the transfer of the person concerned to the Member State responsible. Article 17(1) is a “*derogation*” from the fundamental rule in Article 3(1). Similar language is used in recital (19). In my view, there would be nothing improper in the Minister taking the view that applicants should identify some exceptional circumstance – in the sense of some circumstance warranting the exercise of that “*derogation*” and the consequent disapplication of the ordinary Dublin III rules - in their particular case. That simply reflects where the Article 17(1) discretion is properly located within the Dublin III regime and would not, in my view, involve the fettering of the Minister’s discretion or the adoption of any excessively high standard.

46. Next, it is said that the Minister did not properly engage with the Applicant's claim that she faced the risk of detention or other ill-treatment in the event of her transfer to Belgium in breach of Article 6 of the Charter/Article 5 ECHR. Again, there is no force in that point in my view. The evidential material submitted to the Minister in support of this ground was substantially the same as the material relied on by the Applicant before IPAT. I agree with the Judge that, having regard to the decision of the Supreme Court in *DE v Minister for Justice and Equality* [2018] IESC 16, [2018] 3 IR 326, the Applicant was not precluded from relying on this material again for the purposes of her Article 17(1) application. Material that falls short of establishing a *de jure* basis for objecting to a transfer decision (whether by reference to Article 3(2) of Dublin III, Article 4 of the Charter or otherwise) may nonetheless be relevant to a humanitarian assessment. However, the material relied on before the Minister simply did not substantiate the Applicant's stated concerns. The Freedom House and Amnesty International reports issued in 2018 and related back to events in 2017. In any event, neither report suggested that applicants for asylum were at risk of detention in breach of applicable international or EU standards or that their rights of appeal had been improperly curtailed. That is true also of the 2021 AIDA Country Report. That Report does suggest that there were difficulties concerning access to the reception system for certain categories of applicants between March and October 2020 but it is also evident from it that those difficulties were resolved as of November 2020.
47. The Applicant seeks to make something of the reference in the Article 17 Decision to there being no reason to believe that there were any "*systemic deficiencies*" in the Belgian asylum system. That, it is said, was a matter for IPAT rather than the Minister

and indicates that the Minister misdirected herself. That is, with respect, wholly unconvincing. The entire thrust of this aspect of the Applicant's application was that she was at risk of ill-treatment by reason of systemic issues affecting the operation of the asylum system in Belgium. She never sought to make a case that she was at risk of ill-treatment because of any personal characteristics. In the circumstances, the Minister's reference to "*systemic deficiencies*" can only be understood as referring to, and rejecting, the case actually made by the Applicant.

48. It is also said that the Minister failed to engage appropriately with the Applicant's stated concerns regarding Covid. However, as the Judge observed, there was a complete absence of any evidence suggestive of any particular risk (or any increased risk) to the Applicant in the event of her transfer to Belgium and the arguments advanced in this context were entirely generic. It was clearly open to the Minister to conclude that the Applicant's stated concerns did not provide grounds for exercising the Article 17(1) discretion in her favour. In truth, that was not seriously disputed. Rather, once again, the Applicant's focus was on the precise language used in the Article 17 Decision. Again, it is suggested that the Minister wrongly addressed only issues of legal rights and had not assessed the Applicant's concerns from a humanitarian point of law. I see no force whatever in that argument. The Article 17 Decision is not to be parsed as if it were a statute and must be read by reference to the application addressed by it. The ground as advanced to the Minister was explicitly framed by reference (*inter alia*) to Article 4 of the Charter. That being so, the argument that the reference to that provision in the subsequent Decision is indicative of the Minister having misdirected herself is wholly implausible. Furthermore, that argument flies in the face of the first paragraph

of the Decision which makes it clear that the Minister correctly understood that what she was being asked to decide was whether there was “*any humanitarian or compassionate grounds*” such that she should invoke Article 17(1).

49. As regards the ongoing risks presented by Covid, I agree with the Judge’s view that these are matters to be addressed by reference to conditions at the time of transfer. I note that, in the affidavit sworn by the Applicant for the purposes of the injunction application made to this Court in December last, she states that she is unvaccinated. That position was not disclosed to the Minister. It rather undermines the Applicant’s stated concerns about the risks of Covid to her health. In any event, the material before the Court (including that affidavit) does not appear to provide any basis for interfering with the Article 17(1) assessment carried out by the Minister.

50. The final ground on which the Article 17 Decision is impugned relates to the period of time that the Applicant has spent in the State and the ties that she has established in that period. As it is put in the Amended Statement of Grounds, the complaint made is that the Minister did not give “*adequate regard to the Applicant’s integration in the State or the period of time she spent in the State (three years) in contrast to the brief period (two days) in Belgium.*” On that basis, it is said that the Minister erred in finding that the Applicant’s rights under Article 8(1) ECHR (Article 7 of the Charter) had not been engaged or breached.

51. It is clear from the Article 17(1) Decision that the Minister did have regard to these matters. The Decision expressly notes “*from the representations received that the*

applicant has begun to settle and has engaged in educational pursuits and has made connections in the local community.” It also refers to “*other letters of support in respect of*” the Applicant. It is also clear that the Minister weighed these matters in assessing the Applicant’s contention that transfer to Belgium would involve a breach of Article 8 ECHR. In that context, the Minister clearly attached weight to the fact that the Applicant’s presence in the State was at all times precarious.

52. That aspect of the Minister’s analysis was not directly challenged on appeal but it was said that it disregarded the spirit of the observations made by Baker J at para 128 of her judgment in *NVU* where she expressed her disagreement with the trial judge’s view that the decision maker had no obligation to consider the impact of Article 8 ECHR (Article 7 of the Charter). Reliance is also placed on the further observations of Baker J at para 144 of *NVU* where she stated that “*fundamental rights, whether they be derived from the Charter or the ECHR, are to be engaged wherever circumstances demand.*” As regards the exercise of the Article 17(1) discretion by the Minister (as opposed to the exercise by IPO and IPAT of their functions under Dublin III), those observations must now be read subject to the further observations of Charleton J for the Supreme Court on appeal. But the Minister manifestly *did* consider the impact of Article 8. At issue here, on the Applicant’s case, was her right to respect for her private life (no reliance being placed on family life) and the Minister’s assessment was entirely consistent with the Strasbourg jurisprudence: see, by way of example, the Strasbourg Court’s decision in *Nnyanzi v United Kingdom* (2008) 47 EHRR 18, at paras 72-78. Even assuming that the ties that the Applicant had established since her arrival in the State constitute private life within the meaning of Article 8(1) ECHR, given that her proposed removal to

Belgium was “*in accordance with law*” (the provisions of Dublin III and of the 2018 Regulations) and was motivated by a legitimate aim (the operation of the Dublin system) and having regard to the fact that the Applicant was not a settled migrant and had never been granted a right to remain in the State, the Minister was entitled to conclude that her removal to Belgium would not constitute any disproportionate interference with the Applicant’s private life (*Nnyanzi*, para 62). The applicant in *Nnyanzi* had lived in the UK for almost 10 years. Even in the context of family life, it is the Strasbourg Court’s “*well-established case law*” that, where the family life relied on was established while the immigration status of the non-national family member was precarious “*it is likely to be only in exceptional circumstances that the removal of the non-national family member will constitute a violation of art 8*” (*AS v Switzerland* (2017) 65 EHRR 12, para 48).

53. Again, it is suggested that the Minister took an unduly legalistic approach to the Article 8 ground and did not have regard to the issue within the context of humanitarian considerations. Once again, I see no force in that suggestion. The Minister is not to be criticised for engaging with this issue in the terms and on the basis on which it was actually advanced by the Applicant. The Applicant asserted that transfer to Belgium would breach her Article 8 rights. The Minister examined and rejected that assertion. In any event, as I have already noted, the first paragraph of the Decision makes it clear that the Minister correctly understood that what she was being asked to decide was whether there was “*any humanitarian or compassionate grounds*” such that she should invoke Article 17(1). She took the view that the Applicant’s ties to the State did not

justify the invocation of Article 17(1) and in my view the Applicant has failed to demonstrate any error of assessment by the Minister.

54. In the Applicant's written and oral submissions to this Court, the focus of this aspect of her challenge to the Article 17 Decision shifted. It was said that the Minister failed to have any adequate regard to the period of time that the Applicant had spent in the State and to the fact that this was the result of delay on the part of IPAT in determining her appeal from the transfer decision. That delay was, it was said, inconsistent with the fundamental objectives of the Dublin system. Reference was made in this context to what was characterised as the "*admonition*" in *NS* to the effect that Member States should not "*worsen a situation where the fundamental rights of that applicant by using a procedure for determining the Member State responsible which takes an unreasonable length of time.*"

55. As Counsel for the Minister observed, no argument in these terms was made to the Minister. However, I do not think that it adds anything of substance in any event. The Minister was clearly aware of the period of time that the Applicant had spent in the State and was also clearly aware of how long her appeal to IPAT had taken. All of that information was set out in the application letter and was otherwise available to the Minister in any event. As for the *NS* "*admonition*", *NS* was not brought to the attention of the Minister. Even if that fact is to be overlooked, it appears to me that *NS* is of limited relevance in this context. As I have said, there are statements in *NS* that appear to suggest that in certain circumstances it may be necessary for a Member State to examine an application for protection in accordance with what is now Article 17(1) of

Dublin III. However, I do not interpret *NS* as meaning that any such obligation will arise whenever the Dublin III procedures in a Member State take an “*unreasonable length of time*”. No argument to that effect was made by the Applicant and any such approach would, in my view, involve a significant re-writing of Dublin III. As I read *NS*, the CJEU was addressing a particular scenario where transfer to the Member State responsible under Chapter III could not be effected because of systemic deficiencies in the asylum procedures and reception conditions in that Member State *and* where difficulty arose in identifying a different Member State responsible under Chapter III to which a transfer could be effected in a timely way. In such circumstances, it might be necessary for the requesting Member State to assume responsibility for the protection application in order to bring a situation of ongoing uncertainty to an end. That was not the scenario that confronted the Minister here, however. Belgium had been identified as the Member State responsible for considering the Applicant’s claim for international protection. It had indicated its willingness to accept a transfer of the Applicant. As was her entitlement, the Applicant had appealed the consequent transfer decision to IPAT but her appeal had been rejected. In the event that the Minister declined to exercise the Article 17(1) discretion, the Applicant would be transferred to Belgium and no plausible argument was advanced to the Minister to the effect that there would be any unreasonable delay on the part of the competent Belgian authorities in considering the Applicant’s protection claim.

56. In the result, therefore, I do not believe that this reformulated argument advances the Applicant’s position in any material way.

57. It follows that I would dismiss the Applicant's appeal from the decision of the Judge to dismiss her application for judicial review of the Article 17 Decision.

The Appeal from the Refusal of the Interlocutory Injunction

58. The remaining grounds of appeal are directed to the Judge's refusal of the interlocutory injunction.
59. That injunction sought to restrain the removal of the Applicant from the State pending the determination of her application for judicial review of the Article 17 Decision. As I have already explained, however, orders were granted restraining the removal of the Applicant before the application for an interlocutory injunction was heard and, by the time that the Judge gave judgment on that application on 18 November 2021, the application was effectively moot given that the Judge refused the application for judicial review on the same date.
60. A decision at that stage that it was appropriate to grant the injunction sought would not have conferred any benefit whatever on the Applicant; equally, the refusal of the injunction did not prejudice her in any concrete way. That position was implicitly recognised by the Judge when he explained that he proposed to consider "*whether the Applicant would have been entitled to an interlocutory injunction in the circumstances that obtained at the outset of the proceedings*" (Judgment, para 2) and "*on the basis of the consideration which I would have given to that application in the event that the application was before me for hearing and consideration in advance of me giving*

judgment on the substantive judicial review application” (Judgment, para 47). These were not the circumstances in which the application was in fact decided.

61. In any event, the issue that now arises is whether this Court should engage substantively with the Applicant’s appeal from the refusal of her application for an interlocutory injunction, in circumstances where it has dismissed the appeal from the refusal of her substantive application for judicial review.
62. This issue was raised by the Court at an early stage of the appeal hearing. While counsel for the Applicant made it clear that he wished the Court to address all aspects of his client’s appeal, he properly acknowledged that the Applicant had no direct interest in the interlocutory injunction appeal. The position of the Minister was that it would not be appropriate for the Court to address the interlocutory injunction appeal in the circumstances.
63. In my view, this aspect of the Applicant’s appeal is clearly moot. A decision on it “*can have no practical impact or effect on the resolution of some live controversy between the parties*” (*Lofinmakin v Minister for Justice, Equality and Law Reform* [2013] IESC 49, [2013] 4 IR 274, per McKechnie J at para 82). This aspect of the appeal does not involve “*real and definite issues in which the parties retain a legal interest in their outcome*” (*Ibid*)
64. Even so, there are circumstances in which the Court may consider it appropriate to entertain an appeal, notwithstanding that the issues are moot in the sense indicated

above: see generally the discussion in *Delany and McGrath on Civil Procedure* (4th ed, 2018) at para 23-202 and following. In my opinion, however, this is not such a case.

65. As already explained, the Judge considered that the interlocutory injunction application raised two issues arose for consideration. The first was whether the Applicant's application for judicial review triggered the automatic suspension of the transfer decision having regard to Article 27(3) of Dublin III. The second was whether, assuming no such automatic suspension, the Applicant was entitled to an interlocutory injunction on the application of the principles set out in *Okunade*.

66. As regards the second of these issues – the application of *Okunade* – the appeal raises no significant or exceptional point of law such as might warrant consideration by this Court notwithstanding that the issue of interlocutory injunctive relief is moot.

67. The automatic suspension issue is clearly an issue of general significance, at least at the level of principle. However the issue actually arising on this appeal is a relatively narrow one. The Applicant accepts – correctly, in my view - that, even on the premise that the Article 17 Decision here is properly treated as a transfer decision for the purposes of Article 27 of Dublin III, the fact that her judicial review challenge against the Decision did not trigger an automatic suspension of her removal to Belgium did not necessarily involve a breach of Article 27(3), given that it was open to the State to make provision in terms of Article 27(3)(c). But, the Applicant said, while she was able to seek interim interlocutory relief in her judicial review proceedings, the procedures under Order 84 did not guarantee her the right to have her application for suspension

heard and determined prior to her transfer. Thus, it was said, the availability of judicial review of the Article 17 Decision under Order 84 RSC did not satisfy the requirements of Article 27(3) (or Article 27(2)) in any event. However, as the Applicant also accepted, any such inadequacy in the procedures for interim relief available under Order 84 has not caused her any concrete prejudice.

68. The fact that this issue arose only in the context of an application for an interlocutory injunction is of some relevance in this context. In the event that the Applicant had sought declaratory relief which had been the subject of determination by the High Court, there might be a stronger argument for addressing the issue, notwithstanding its mootness. No such declaratory relief was sought however. In her Notice of Appeal, the Applicant purports to seek two declarations.⁵ But it is not open to the Applicant to seek additional reliefs in this way. Absent a further amendment of the Amended Statement of Grounds – and no application for leave to amend was made to this Court – the Applicant is confined to the reliefs which she was given leave to seek by Heslin J in the High Court on 24 September 2021.

69. There is one further consideration which, in my view, has significant if not decisive weight in this context. It is this. The automatic suspension issue necessarily raises the issue of the scope of the Article 27 remedy and whether or not it encompasses the exercise of the discretion under Article 17(1). In light of the CJEU's decision in *MA*,

⁵ One to the effect that the Applicant was entitled to an undertaking and/or a reasonable period of time in the State to consider the Article 17 Decision and the other to the effect that she was entitled to an injunction having initiated the judicial review process and/or that same operated to suspend the transfer decision.

the Judge thought it clear that it did not: Judgment, para 56. For reasons that I will briefly indicate, I do not consider that issue to be clear and, if the Court were proceeding to address that issue on this appeal, it seems to me that it would be necessary to seek to seek further guidance from the CJEU pursuant to Article 267 TFEU.

70. In para 64 of *MA*, the CJEU recalled that it was “*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, the Court went on, a decision whether to exercise that discretion implements EU law. Referring to a similar statement by the Court in *CK*, the Judge expressed the view that it related only to the question of whether the application of Article 17(1) is governed solely by national law or whether it is a question governed by EU law (Judgment, para 53). Arguably, that is too cramped a view. The jurisprudence of the CJEU might in fact be thought to suggest that the Article 27 remedy encompasses *all* aspects of the determination of the Member State responsible. Thus, in Case C-670/16 *Mengesteab v Germany* [2018] 1 WLR 865, the CJEU (Grand Chamber) stated that while the provisions of Article 21(1) of Dublin III (the time-limits for effecting a transfer) were intended to provide for a framework for the take charge procedure, they “*also contribute, in the same way as the criteria set out in Chapter III of that Regulation, to determining the responsible member state, within the meaning of that Regulation*” (para 53). On that basis, the Court concluded that the court dealing with an action challenging a transfer decision had to be able to consider any claim that their transfer would infringe Article 21(1) (para 55-58). Arguably, Article 17(1) is much more central to the

determination of the Member State responsible than a provision such as Article 21(1). Where a Member State exercises the discretion conferred by Article 17(1), it *ipso facto* becomes the Member State responsible, thus effectively trumping the Chapter III criteria.

71. In *MA*, the CJEU stated that “Article 27(1) of the Dublin III Regulation must be interpreted as meaning that it does not require a remedy to be made available against the decision not to use the option set out in Article 17(1) of that regulation” (para 79). So much is clear. However, the Court also emphasised that the principle of effective judicial protection applied. Thus, the Court went on, the decision not to use the Article 17(1) option “may be challenged at the time of an appeal against a transfer decision” (paras 78 & 79). In saying that, the Court clearly contemplated that a decision under Article 17(1) would precede a transfer decision (“if a member state refuses to use the discretionary clause set out in article 17(1) ... that necessarily means that that member state must adopt a transfer decision”).
72. The Minister says that *MA* should not be taken as indicating that an appeal against a transfer decision must therefore encompass any challenge to the decision not to use the option in Article 17(1). All that *MA* requires is that such a challenge can be made “at the time of” such an appeal and not necessarily as part of it. Here, it was said, applicants have a separate remedy available to them in respect of a decision not to use the option in Article 17(1), namely Order 84 judicial review. Notwithstanding the CJEU’s observation that the objectives of Dublin III “discourages multiple remedies”, that

procedure is said by the Minister to be fully compliant with the requirements of Article 27 of Dublin III and Article 47 of the Charter as explained in *MA*.

73. That may well be right but it does not appear to me that the position is so clear as to be beyond argument. *MA might* be read as indicating that in an appeal from/review of a transfer decision pursuant to Article 27(1), an applicant must be able to challenge the decision on the basis (*inter alia*) that the competent authority – here, the Minister – did not properly consider the exercise of the Article 17(1) discretion in their case. In other words, *MA might* be read as holding that, while Article 27(1) does not provide for a separate appeal/review against a decision under Article 17(1), that is precisely because any challenge to that decision may be advanced as part of the appeal/review of the transfer decision itself (to which the provisions of Article 27(2) and 27(3) would apply). That is not possible under the 2018 Regulations. IPAT has no function in relation to Article 17(1) and any challenge to the Minister’s refusal to exercise her discretion under that provision is by way of judicial review to the High Court. Requiring an applicant to pursue multiple remedies, with different standards of review and different consequences for the implementation of the disputed transfer decision, *might* be said to depart from the fundamental requirement of EU law that the applicant have an effective remedy and effective judicial protection. I do not mean to suggest that such is the case. Important questions of Member State procedural autonomy would also need to be considered in this context. The point is that, in my view, the decision in *MA* does not clearly foreclose such arguments.

74. In these circumstances, before determining the automatic suspension issue and the issues that it gives rise to as to the scope of the Article 27 remedy and whether or not it encompasses the exercise of the discretion under Article 17(1), it appears to me that it would be necessary to make a reference to the CJEU. But given that by its judgment today the Court is finally dismissing the Applicant's judicial review proceedings, I do not believe that it would be open to the Court to make a reference at this point, having regard to the threshold condition for doing so contained in Article 267. No decision on these issues is necessary to enable the Court to give judgment in the particular circumstances. Even if the Court were to make a reference, it seems likely that the CJEU would decline to adjudicate on it: Case C-169/18 *Atif Mahmood*, para 21 and following.
75. In light of the above analysis, I would dismiss the appeal from the Judge's refusal to grant an interlocutory injunction on the basis that the appeal is moot. The issues identified above must await determination in proceedings where they were the subject of a live controversy.
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CONCLUSION AND ORDER

76. Accordingly, I would dismiss the Applicant's substantive appeal. It follows that the injunction granted by the Court at the conclusion of the appeal hearing must be discharged.
77. The Applicant also appealed against the costs orders made by the Judge. That aspect of the appeal was not addressed at the appeal hearing. It, and the issue of the costs of the appeal, can be addressed now.

Edwards and Faherty JJ agree with this judgment and with the orders proposed.