

**THE HIGH COURT  
JUDICIAL REVIEW**

[2021] IEHC 717  
**Record No. 2021/824JR**

**BETWEEN:**

**BIBOLA KATSHIBOMBO**

**APPLICANT**

**-AND-**

**THE MINISTER FOR JUSTICE**

**RESPONDENT**

**Judgment of Mr Justice Cian Ferriter delivered this 18th day of November 2021**

**Introduction**

1. In these proceedings, the Applicant seeks an Order of *certiorari* quashing the decision of the Respondent (“the Minister”) made on 23rd September, 2021, pursuant to Article 17(1) of Regulation (EU) No. 604/2013 (“the Dublin III Regulation” or “the Regulation”, as appropriate), refusing the Applicant’s request for the exercise of her discretion to examine the Applicant’s application for international protection in Ireland and affirming that she will be transferred to Belgium. I will refer to this decision as “the Article 17 Decision”. Prior to the Article 17 Decision, Belgium was the country which had been determined, on the application of the criteria in Chapter III of the Dublin III Regulation, to be the appropriate country to examine the Applicant’s international protection application.
2. The Applicant also sought interlocutory injunctive relief preventing her removal from the State pending the determination of these proceedings. She was granted interim injunctive relief on various dates since the inception of these proceedings, including, most recently, by me on 4th November last, when I made an Order by way of interim injunction preventing her removal from the State until 18th November, which as it happens is the date of this judgment. As the issues raised on this aspect of the case have the potential for application beyond the facts of this case, I have addressed in this judgment whether the Applicant would have been entitled to an interlocutory injunction in the circumstances that obtained at the outset of the proceedings.

**Background**

3. The background to the matter is as follows. The Applicant is a national of the Democratic Republic of Congo (“DRC”). She had been resident in the Republic of South Africa, from where she travelled to Belgium on 16th October, 2018. The Applicant had been granted refugee status in South Africa.
4. The applicant entered Ireland on 19th October, 2017 and made an application for international protection to the International Protection Office (“IPO”). She disclosed that she had been issued a visa for Belgium and had travelled from South Africa via Brussels. She was interviewed by the IPO pursuant to Article 5 of the Dublin III Regulation on the 9th November, 2018 and again confirmed that she had a visa issued for Belgium and travelled from South Africa to Belgium on 16th October, 2018, where she remained for two days.

5. On 12th November, 2018, the IPO issued a request for information to Belgium under Article 34 of the Dublin III Regulation, to which Belgium responded on 20th November, 2018.
6. On 4th December, 2018, Ireland made a "take-charge" request to Belgium under Articles 12(2), 12(3) and 14(1) of the Dublin III Regulation. On the 14th December, 2018, Belgium confirmed that it would accept the transfer of the Applicant pursuant to Article 12(2).
7. On 19th November, 2018, the Applicant was notified by the IPO that Belgium had accepted responsibility for her international protection application. She was invited to make submissions on any further humanitarian grounds she considered to be relevant within 10 days.
8. On 28th December, 2018, the Applicant's solicitors made an express request to the IPO for discretionary relief under Article 17(1) of the Dublin III Regulation.
9. The Applicant was subsequently issued by IPO with a "Notice of Decision to Transfer Application to Another Member State" on 23rd January, 2019 (the "Transfer Decision"). In the accompanying "Recommendation re Decision to Transfer," the IPO noted the Article 17 submissions made on the Applicant's behalf by her solicitors, but made no Article 17 determination in her favour.
10. On 1st February, 2019, the Applicant appealed the Transfer Decision to the International Protection Appeals Tribunal ("IPAT" or "Tribunal"). This included a request for the Tribunal to exercise Article 17 discretion, and a challenge to the IPO's failure to exercise the discretion.
11. The Tribunal ultimately affirmed the decision to transfer under Regulation 6(9) of the European Union (Dublin System) Regulations 2014, S.I. 525/2014 ("the 2014 Dublin System Regulations") on 22nd July, 2021. The Tribunal was satisfied that it did not have Article 17 discretion pursuant to *NVU. v. RAT & Ors* [2020] IESC 46 ("NVU"). The Tribunal was further satisfied that it did not have inherent discretion under Regulation 6(9) of the 2014 Dublin System Regulations, also relying on NVU.
12. Following the IPAT Decision, the Department of Justice and Equality ("the Department") wrote to the Applicant on 6th September, 2021 and instructed her to present to the Garda National Immigration Bureau ("GNIB") on 16th September, 2021 to make arrangements for her transfer "not later than 21/01/2022."

**14th September 2021 Article 17 Application**

13. On 14th September, 2021, the Applicant's solicitors issued a pre-action letter to the Minister, which made an application for Article 17 discretionary relief on behalf of the Applicant.
14. The Applicant made three points in the Article 17 submission contained in the pre-action letter. Firstly, she contended that she "*may be subject to detention in Belgium which*

*implicates her rights under Article 6 of the Charter and/or Article 5 ECHR". She submitted that "for Article 17 purposes, she does not need to demonstrate that there are systemic flaws in the asylum procedures and reception conditions but rather that humanitarian considerations should apply. She maintains that she is at real risk of mistreatment as an asylum seeker in Belgium, either by way of detention or curtailment of the right to appeal". She advanced a number of documents from 2018 in support of this submission. She also invoked an April 2021 AIDA country report on Belgium from the European Council on Refugees and Exiles which noted that "between March and October 2020" a significant number of applicants for international protection had no access to the reception system because of the closure of the Belgian Immigration Offices arising from the Covid 19 pandemic. There was no information put before the Minister as to whether that situation continued to obtain in September 2021.*

15. The Applicant next submitted that her right to private life under Article 7 of the Charter and Article 8 ECHR were engaged, on the basis that *"she has now developed Article 8 private life rights in the State given the extent of her relationships and duration of stay".* The submission quoted various authorities, including from paragraph 37 of the Judgment of Charlton J. in NVU where he had noted that if *rights "are specifically asserted and on a factual basis which, exceptionally, engages such rights, consideration should be given. But this would be a rare exception"*. It was submitted *"that the Applicant's circumstances give rise to Article 7 rights and provide the "rare exception" to transferees without similar rights"*.
16. Finally, the Applicant submitted that she should not be transferred to Belgium during the pandemic. She invoked EU Commission Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures on resettlement in the context of Covid 19, which guidance was published in April 2020. The Applicant did not claim that she suffered from any underlying medical condition or that she was personally in any particularly vulnerable position as regards Covid. Rather, she submitted *"that transfer to Belgium in current circumstances where she would be exposed to a high risk of infection and lacks guaranteed access to healthcare would place her at a risk of inhuman or degrading treatment and/or be in breach of her private rights under Articles 4, 5 and/or Article 7 of the Charter"*.
17. The Applicant's solicitors concluded the pre-action letter with a request that the Minister (i) grant the Applicant discretionary relief under Article 17 of the Dublin III Regulation; (ii) cancel the decision to transfer her to Belgium with immediate effect; (iii) if Article 17 relief was denied, provide an undertaking that no further action would be taken to transfer the Applicant to Belgium pending any application she may make for judicial review challenging the refusal of Article 17 relief, or confirmation that she does not intend to challenge any refusal.

**Post 14 September 2021 Article 17 application**

18. The Applicant duly presented to GNIB on 16th September, 2021, as directed. She was issued with a further notice from GNIB under Article 8(2) of the Dublin System

Regulations 2018 to present on Monday, 27th September, 2021, at 12:20 p.m. to facilitate her transfer to Belgium.

19. On 21st September, 2021, a flight was booked for the Applicant's transfer from Dublin Airport bound for Brussels on Tuesday, 28th September, 2021.
20. On 23rd September, 2021, the Applicant's solicitors were issued with the Article 17 Decision. An Officer of the Minister stated in the Decision that he was satisfied that the materials submitted on behalf of the Applicant "*do not disclose any humanitarian or compassionate ground*" such that Article 17(1) of the Dublin III Regulation would be invoked. I will turn to the full text of the Article 17 Decision shortly.
21. Also on 23rd September, 2021, the Applicant was issued with a new presentation date, bringing forward her presentation date of Monday, 27th September 2021 to Saturday, 25th September, 2021, at 13:00 to make arrangements for her transfer.

### **These proceedings**

22. The Applicant lodged these judicial review proceedings on 23rd September, 2021, the same day as the Article 17 Decision. In her Statement of Grounds, the Applicant challenged the lawfulness of the Article 17 Decision and she also sought an injunction restraining the Minister, her servants or agents, including the Garda National Immigration Bureau ("GNIB"), from taking any further steps in relation to the removal of the Applicant from the State pending the determination of these proceedings.
23. The following day, 24th September, 2021, the Applicant applied to the High Court Duty Judge (Heslin J.) for leave to apply for judicial review and for injunctive relief on an emergency basis. On that date, Heslin J. granted the Applicant leave to apply for judicial review, along with an interim injunction in the following terms:

*"the Respondent, her servants or agents including the Garda National Immigration Bureau (GNIB) be restrained in the meantime from taking any further steps in relation to the removal of the Applicant from the State until after 5 October 2021".*
24. Heslin J. directed motions to be returnable to the Asylum List on 5th October, 2021. On 5th October, 2021, the Court extended that interim injunction until 19th October, 2021.
25. The Applicant duly issued a Notice of Motion for an Interlocutory Injunction along with the post-leave Notice of Motion for Judicial Review on 7th October, 2021. As the Applicant's solicitors had inadvertently filed an incorrect amended Statement of Grounds (not conforming to the reliefs upon which leave was granted) the Court granted the Applicant liberty to file the correct Amended Statement of Grounds and to serve a Notice of Motion returnable to the Asylum List on 19th October, 2021.
26. On the 19th October, 2021, the matter was set down for a telescoped hearing to address both the applications for injunctive relief and substantive judicial review reliefs. Perhaps due to oversight, there was no application to extend the interim injunction on that date.

27. The telescoped hearing came on for hearing before me on 3rd November, 2021. During the course of the hearing it became clear that the Respondent - as was her entitlement - was not going to give any undertaking to not take steps on foot of the Transfer Decision. In the circumstances, Counsel on behalf of the Applicant indicated that he required an interim injunction from the Court, in the terms of the interim injunction made previously on 24 September, 2021, and continued on 5 October, 2021, pending the Court's judgment on the substantive judicial review application and the related injunction application.
28. I reflected on this application overnight and on the morning of 4th November, 2021, I granted an interim injunction in the following terms:

*"that the Respondent, her servants or agents including the Garda National Immigration Bureau (GNIB) be restrained from taking any further steps in relation to the removal of the Applicant from the State until after 18 November 2021."*

ruling in material part as follows:

*"12. I have a concern that if an interim injunction is not granted at this point (or, perhaps more accurately, restored), and the Respondent sought to take steps to transfer the Applicant out of the jurisdiction before I deliver judgment on the substantive applications, the Court could be deprived of the opportunity to meaningfully consider and rule on the availability of the injunctive relief sought (both as a matter of principle and on the facts), thereby potentially rendering moot the substantive relief sought and/or potentially emptying these judicial review proceedings of their efficacy. In my view, such potential outcomes should be avoided in the interests of justice."*

29. Accordingly, as matters transpired, the Applicant obtained an injunction, albeit on an interim basis, until the date of this judgment, without the Court having had an opportunity to consider the substantive arguments for and against the grant of interlocutory injunctive relief.

30. I did note at the end of my ruling that:

*"14. I wish to emphasise that in making the interim injunction in these terms, I am not to be taken as offering a view, still less ruling, on the arguments advanced at the hearing in relation to the substantive injunctive relief application (or indeed on the arguments advanced at that hearing in relation to the application for an order of certiorari in respect of the impugned Article 17 decision)."*

31. As the arguments advanced for and against the grant of the interlocutory injunction sought by the Applicant have the potential to have implications beyond the facts of this case, I propose to address those arguments and give my view as to what the appropriate determination of the interlocutory injunction application would have been in the event

that the Court had had proper time to evaluate and rule on those arguments before giving judgment on the substantive judicial review challenge to the Article 17 Decision.

**The Article 17 Decision**

32. The Minister's Article 17 Decision of 23rd September, 2021 which is the subject of challenge in these judicial review proceedings read as follows:

*"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 Katshimbombo. 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."*

**The Dublin System, Article 17, and CJEU and Supreme Court consideration of same**

33. In order to put the issues that arise on both the injunction and substantive judicial review applications in their appropriate context, it is necessary to give a brief overview of the Dublin system as set out in the Dublin III Regulation.

34. The Dublin III Regulation, when enacted in 2013, repealed and recast the earlier Regulation 343/2003/EC ("the Dublin II Regulation") which in turn had replaced the

"Dublin Convention" signed in Dublin on 15 June 1990. The Dublin III Regulation (which provides for and regulates what is known as the "Dublin System") is intended to ensure a clear, workable and rapid method for determining the Member State responsible for an international protection application based on objective and fair criteria as regards both the Member States and applicants (recitals 4 and 5 of the Regulation).

35. Member States are obliged by Article 3(1) to examine international protection applications made on EU territory and the Member State responsible for doing so is identified by the criteria contained in Chapter III of the Regulation. Chapter III (Articles 7 to 15) is entitled the "Criteria for determining the Member State responsible". Article 7(1) provides that Chapter III sets out the criteria by which Member States are to accept responsibility and the order in which they are to be applied. Priority is given to factors involving family unity and the best interests of the child and the determination is to be made in the sequence established by Articles 8 to 11.
36. If no Member State is identified as responsible, the determining Member State is then obliged to consider whether another Member State granted the asylum applicant a valid residence document or visa permitting lawful entry to the EU in which case the latter shall be responsible for examining the international protection application (Article 12) or failing which the responsible Member State will be the one where the applicant entered EU territory unlawfully (Article 13). The final criteria in the hierarchy are Articles 14 and 15 which are not of relevance here.
37. Article 17 is contained in Chapter IV of the Regulation and sits outside the hierarchy of criteria contained in Chapter III. Chapter IV covers 'Dependent Persons' (Article 16) and 'Discretionary Clauses' (Article 17).
38. Article 17(1) provides as follows:

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

*The Member State which decides to examine an application for international protection pursuant to this paragraph shall become the Member State responsible and shall assume the obligations associated with that responsibility. Where applicable, it shall inform, using the "DubliNet" electronic communication network set up under Article 18 of Regulation (EC) No 1560/2003, the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of, or to take back, the applicant.*

*The Member State which becomes responsible pursuant to this paragraph shall forthwith indicate it in Eurodac in accordance with Regulation (EU) No 603/2013 by adding the date when the decision to examine the application was taken."*

39. The discretionary terms of Article 17(1) in Dublin III were closely reflected in the text of Article 3(2) of the Dublin II Regulation. Following the EU migrant crisis and the difficulties in particular faced by Greece, the CJEU in the cases of *N.S. v Home Secretary* and *M.E. v Minister for Justice, Equality and Law Reform* (Joined Cases C-411/10 and C-493/10) construed Article 3(2) of the Dublin II Regulation to be mandatory in nature where there was a substantial risk of a breach of Article 4 of the Charter (relating to inhuman or degrading treatment) due to *systemic deficiencies* in the asylum procedures and reception conditions of a Member State which would in law prevent a transfer; this became known as the 'systemic flaw' exception. This very specific prohibition was subsequently codified in the recast Article 3(2) of the Dublin III Regulation and is non-derogable in nature. By contrast Articles 17(1) and (2) in the Dublin III Regulation now contain the purely discretionary compassionate and humanitarian considerations previously found in Article 3(2) of the Dublin II Regulation.
40. The precise characterisation, and role, of Article 17 in the Dublin system scheme has been the subject of litigation before the Irish Courts and the CJEU. Two of the more noteworthy of these cases can be mentioned briefly at this point.
41. In *M.A. v IPAT* Case C-661/17 [2019] 1 WLR 4975 ("MA") the CJEU (on a reference from the Irish High Court) stated that optional provisions such as Article 17(1) confer on each Member State an '*absolute discretion*' (paragraph 58) and '*afford wide discretionary power to the Member States ...and... maintain the prerogatives of the Member States in the exercise of the right to grant international protection...*' (paragraph 60). It is worth setting out paragraph 58 of the CJEU's judgment in full:
- "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)."*
42. The CJEU in MA went on to emphasise that the exercise of the option in Article 17 is '*not subject to any particular condition*' as a matter of EU law and '*in principle, it is for each Member State to determine the circumstances in which it wishes to use that option*' (at paragraph 71).
43. In *NVU* the Supreme Court considered whether the discretionary power in Article 17(1) had been conferred on the Office of the Refugee Applications Commissioner ("ORAC") and the Refugee Appeals Tribunal ("RAT") (the forerunners of IPO and IPAT, respectively) or



could only be exercised by the Minister. Charleton J., giving judgment for the Court, found as follows in relation to the discretionary nature of the provision (at paragraph 34):

*"Nothing suggests that there is any basis for the argument that matters of discretion have been devolved by the State by virtue of The Dublin System Regulations 2014. What is striking, in this regard, is the breadth of the discretion under article 17 of Dublin III. This may reflect that notwithstanding the voluntary sharing of responsibilities under what was originally the Dublin Convention, sovereign states continue to be entitled to control their borders and the acceptance of new residents and the conferring of citizenship is intrinsic to this. Thus, in M.A., the CJEU emphasised the entirely unfettered nature of the discretion [citing paragraphs 57-61 of M.A.]*

44. Charleton J. went on to note (at paragraph 36) that:

*"Examples of discretionary powers of such a wide and unfettered nature vested in an administrative or quasi-judicial body are difficult to come by, if these exist at all. Furthermore, the nature of the article 17 Dublin III Regulation power is not simply limited to the best interests of children or the reunification of family units, but extends beyond that into the exercise of discretion based on humanity or compassion or whereby the State may embrace an obligation which in international and European law does not exist."*

45. Charleton J. then went on, under the heading "Rights", in the final paragraph of his Judgment in NVU (paragraph 37) to observe as follows:

*"Finally, the issue of rights requires a brief mention. The issue of rights is not part of the statement of grounds. As the CJEU made clear in Case C-411/10 and Case C-493/10 NS v Secretary of State for the Home Department, ME v Refugee Applications Commissioner, Dublin III is part of European law and SI 525 of 2014 is an implementation. Hence, rights under the Charter of Fundamental Rights of the European Union might apply; see paragraph 68 of NS. Neither Charter rights nor rights under the European Convention on Human Rights nor constitutional rights would ordinarily arise. The purpose of Dublin III is to find and to transfer responsibility to the country responsible for deciding on international protection. This is designed to be a transparent, swift and mutually entrusted process, one with which those seeking international protection should and are required to cooperate. Where individuals come illegally, without a visa and without a residence permit, to this jurisdiction and forego legal status within another country subject to Dublin III, or abandon an application for international protection there, rights are not simply assumed by virtue of travel. Nor is it necessary for there to be a specific consideration of potential or possible rights. If these are specifically asserted and on a factual basis which, exceptionally, engages such rights, consideration should be given. But this would be a rare exception. This is an administrative scheme assuming equal protection in all participating countries. What it involves is returning those seeking international protection to a country issuing travel or*

*residence documents or where they had previously started an application. Nothing more than that could ordinarily be involved. Furthermore, as has been emphasised by the CJEU at paragraph 98 of NS, it is not for countries to "worsen a situation where the fundamental rights of that applicant have been infringed by using a procedure for determining the Member State responsible which takes an unreasonable length of time." Rather, the system under Dublin III assumes equality of rights being upheld throughout and that transfer enables the examination in the transferred country as thoroughly as here, and probably more expeditiously."*

46. It is clear from the foregoing that the Minister enjoys a very wide discretion under Article 17, and that it will only be a very exceptional case that may warrant the exercise of discretion in favour of an applicant under Article 17.

#### **The injunction application**

47. Before addressing the substantive judicial review application, it is appropriate to consider the application for an interlocutory injunction. As noted earlier, I propose to do so 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.
48. Two discrete issues arise in relation to the Applicant's application for injunctive relief. The first is whether the fact that the Applicant has instituted judicial review proceedings against the Article 17 Decision *of itself* entitles the Applicant to an injunction pending the determination of those judicial review proceedings or, put differently, whether the institution of the judicial review proceedings has the legal effect under the Dublin III Regulation of suspending the Transfer Decision (it being common case that there is no challenge in being to the Transfer Decision *per se* and that the Transfer Decision is valid in law). The second is whether, if not, the Applicant is nonetheless entitled to an interlocutory injunction on the application of the principles set out in *Okunade v. Minister for Justice* [2012] 3 IR 152. ("*Okunade*").

#### **Is the Applicant entitled to an injunction as of right pending determination of the challenge to the Article 17 Decision?**

49. The Applicant contended in this regard that automatic suspensory effect on the Transfer Decision flowed from the terms of Article 27(3) of the Dublin III Regulation, once she had launched her judicial review against the Article 17 Decision.
50. Article 27 is headed "*Remedies*" and provides as follows:-

*"Article 27 Remedies*

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

2. *Member States shall provide for a reasonable period of time within which the person concerned may exercise his or her right to an effective remedy pursuant to paragraph 1.*
3. *For the purposes of appeals against, or reviews of, transfer decisions, Member States shall provide in their national law that:*
  - (a) *the appeal or review confers upon the person concerned the right to remain in the Member State concerned pending the outcome of the appeal or review; or*
  - (b) *the transfer is automatically suspended and such suspension lapses after a certain reasonable period of time, during which a court or a tribunal, after a close and rigorous scrutiny, shall have taken a decision whether to grant suspensive effect to an appeal or review; or*
  - (c) *the person concerned has the opportunity to request within a reasonable period of time a court or tribunal to suspend the implementation of the transfer decision pending the outcome of his or her appeal or review. Member States shall ensure that an effective remedy is in place by suspending the transfer until the decision on the first suspension request is taken. Any decision on whether to suspend the implementation of the transfer decision shall be taken within a reasonable period of time, while permitting a close and rigorous scrutiny of the suspension request. A decision not to suspend the implementation of the transfer decision shall state the reasons on which it is based."*

51. It is common case that Ireland opted for the option provided in Article 27(3)(a), i.e. that for the purposes of appeals against, or reviews of, transfer decisions, such appeal or review confers upon the person concerned the right to remain in Ireland pending the outcome of the appeal or review, as reflected in the terms of Regulation 8 of the 2018 Dublin System Regulations (which amended the 2014 Dublin System Regulations) which is headed "*Right to remain in the State*" and provides that:-

*"An applicant who appeals [under the Regulation dealing with appeals to IPAT] shall ..... be entitled to remain in the State pending the outcome of the appeal".*

52. The Applicant contends that a judicial review challenge to an Article 17 Decision comes within the scope of Article 27(3) on the basis that the CJEU stated in *CK v. Republika Slovenija* C-578/16 at paragraph 53 that the discretion in Article 17 "*is an integral part of the system for determining the Member State responsible developed by the EU legislature ("the Dublin System"), it follows that a Member State implements EU law, within the meaning of Article 51(1) of the Charter, also when it makes use of that clause ..... Consequently, the application of the "discretionary clause" laid down in Article 17(1) of the Dublin III Regulation does indeed involve an interpretation of EU law, within the meaning of Article 267 TFEU*".

53. However, as is clear from the terms of paragraphs 52 to 54 of the CJEU's judgment in CK, the relevant *dictum* relied upon by the Applicant in fact relates to the question of whether the application by a Member State of the discretionary clause in Article 17 is governed solely by national law, or whether it is a question governed by EU law. I do not at all read CK as being authority for the proposition that a decision under Article 17 becomes a "transfer decision" within the meaning of Article 27(3).
54. The Applicant relies further in this regard on paragraph 78 of the CJEU's judgment in MA as follows:-

*"However, if a Member State refuses to use the discretionary clause set out in Article 17(1) of the Dublin III Regulation, that necessarily means that that Member State must adopt a transfer decision. The Member State's refusal to use that clause may, should the case arise, be challenged at the time of an appeal against a transfer decision."*

55. As we saw earlier, it was conclusively confirmed by the Supreme Court in NVU in the context of the 2014 Dublin System Regulations (and by implication the 2018 Dublin System Regulations) that the Article 17(1) jurisdiction did not vest in the Dublin System bodies (RAC/IPO and RAT/IPAT) and therefore that the exercise of Article 17(1) discretion was not governed by those Regulations. It is necessary to set paragraph 78 of the CJEU's judgment in its appropriate context in the judgment from which is it clear that the CJEU held that Article 27(1) provided for remedies against transfer decisions alone and did not cover remedies against an Article 17 decision. Thus, at paragraphs 74 to 79 of MA the CJEU stated:

*"74 Under Article 27(1) of the Dublin III Regulation, an applicant for international protection has the right to an effective remedy, in the form of an appeal against a transfer decision, or a review, in fact and in law, of that decision, before a court or tribunal.*

*75 Thus, that article does not expressly provide for an appeal against the decision to not use the option set out in Article 17(1) of that regulation.*

*76 Furthermore, the objective of the rapid processing of applications for international protection and, in particular, the determination of the Member State responsible, underlying the procedure established by the Dublin III Regulation and referred to in recital 5 of that regulation, discourages multiple remedies.*

*77 It is true that the principle of effective judicial protection is a general principle of EU law to which expression is now given by Article 47 of the Charter (judgment of 10 July 2014, Telefónica and Telefónica de España v Commission, C 295/12 P, EU:C:2014:2062, paragraph 40 and the case-law cited) and under which everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that article.*

78 *However, if a Member State refuses to use the discretionary clause set out in Article 17(1) of the Dublin III Regulation, that necessarily means that that Member State must adopt a transfer decision. The Member State's refusal to use that clause may, should the case arise, be challenged at the time of an appeal against a transfer decision.*

79 *Consequently, 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, without prejudice to the fact that that decision may be challenged at the time of an appeal against a transfer decision.” (emphasis added)*

56. In my view, it is clear from the foregoing that the exercise of Article 17(1) discretion does not fall within the scope of Article 27(1) such that the provisions in relation to suspensive effect laid out in Article 27(3) are simply not applicable to an Article 17 discretion refusal. A challenge to an Article 17 decision by way of judicial review is not “*an appeal against or review of a transfer decision*” for the purposes of Article 27(1). Accordingly, the automatic suspensive effect of an appeal against a transfer decision which is provided by Article 27(3) does not apply to a judicial review challenge to an Article 17 decision.
57. The Applicant, in a separate submission advanced for the first time in oral argument at the judicial review hearing, sought to contend that Article 27(3)(c) (as opposed to Article 27(3)(a)) applied in the circumstances and that the State was under an obligation to suspend the transfer pending a request within a reasonable period of time to the Court to suspend the implementation of the transfer decision pending the outcome of the Applicant’s judicial review. Article 27(3)(c) was not opted into by Ireland. It was not transposed into Irish law. I agree with the submission made by counsel for the Minister that it is simply not open to the Applicant in these proceedings to seek to invoke Article 27(3)(c) where no non-transposition argument was made in the pleadings, and where a non-transposition argument would be of a wholly different order to the premise of the argument in fact advanced by the Applicant, which was to the effect that Article 27(3)(c) in fact applied in Ireland and could be invoked by the Applicant. It was not an argument which the Applicant got leave to argue and was contained nowhere in his Statement of Grounds, Amended Statement of Grounds or Written Submissions.
58. In any event, quite apart from the fact that Article 27(3)(c) was not opted into by Ireland and has not been transposed into Irish law, for the reasons advanced in relation to Article 27(3) more generally as set out above, as Article 27(1) does not engage a decision under Article 17, the Article 27(3)(c) argument is untenable.
59. The Minister, quite properly, accepts that this does not mean that the Applicant is left without a remedy to challenge an Article 17 Decision. The Applicant has sought to invoke this Court’s supervisory jurisdiction in respect of the lawfulness of Article 17 Decision by way of judicial review. This is consistent with the decision of the CJEU in *MA* (at paragraph 79, as set out above). This is the route that was flagged as ensuring the

availability of an effective remedy by the Court of Appeal in *NVU* [2019] IECA 183 where Baker J. at paragraph 108 found:

*"Although it was not argued with any great force in the appeal, a question did arise for consideration and was briefly touched on by O'Regan J. as to whether European Union law required any specific form of remedy to challenge a decision made in the exercise of discretion under article 17 of Dublin III. A reading of the express language of the 2014 Regulations suggest no appeal lies from that exercise in Irish law. The exercise of discretionary power is quintessentially one which is personal to the decision maker, and accordingly it seems to me that a decision made in that exercise may be open to judicial review by the High Court, and that O. 84 of the Rules of the Superior Courts ("RSC") provide the remedy."*

The Supreme Court did not address this question in *NVU* but there is nothing in the Supreme Court's decision to suggest that the Court of Appeal was wrong on this issue.

60. The Minister further accepts that an applicant is entitled to seek an interlocutory injunction pending determination of the judicial review challenge to the Article 17 Decision on the basis that the Court will evaluate that application for an interlocutory injunction by reference to the criteria set down by the Supreme Court in *Okunade*.
61. I will accordingly turn to consider the Applicant's submissions under that heading.

**Interlocutory Injunction - application of Okunade principles**

62. The question of the appropriate approach to an application for an interlocutory injunction in an asylum/immigration context was authoritatively addressed by the Supreme Court in *Okunade*, where Clarke J. (as he then was) articulated the following four stage test (at paragraph 104):
  - (a) the court should first determine whether the applicant had established an arguable case; if not the application must be refused, but if so, then;
  - (b) the court should consider where the greatest risk of injustice would lie. In doing so the court should:-
    - (i) give all appropriate weight to the orderly implementation of measures which were *prima facie* valid;
    - (ii) give such weight as was appropriate (if any) to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made; and,
    - (iii) give appropriate weight (if any) to any additional factors which arose on the facts of the individual case which would heighten the risk to the public interest of the specific measure under challenge not being implemented pending resolution of the proceedings; but also,
    - (iv) give all due weight to the consequences for the applicant of being required to comply with the measure under challenge in circumstances where that measure may be found to be unlawful;

- (c) the court should, in those limited cases where it was relevant, have regard to whether damages were available and would be an adequate remedy and also whether damages could be an adequate remedy arising from an undertaking as to damages; and,
- (d) subject to the issues arising in the judicial review not involving detailed investigation of fact or complex questions of law, the court could place all due weight on the strength or weakness of the applicant's case.
63. As Clarke J pointed out in *Okunade* (and as is reflected in the four step test promulgated by him set out above) the court should have regard in the context of judicial review proceedings "to the public interest in the orderly operation of the particular scheme in which the measure under challenge was made" and to "the risk to the public interest of the specific measure under challenge not being implemented pending the resolution of the proceedings."
64. In relation to the public interest, Clarke J stated (at paragraph 92) that:
- "the entitlement of those who are given statutory or other power and authority so as to conduct specified types of legally binding decision-making or action-taking is an important part of the structure of a legal order based on the rule of law. Recognising the entitlement of such persons or bodies to carry out their remit without undue interference is an important feature of any balancing exercise. It seems to me to follow that significant weight needs to be placed into the balance on the side of permitting measures which are prima facie valid to be carried out in a regular and orderly way. Regulators are entitled to regulate. Lower courts are entitled to decide. Ministers are entitled to exercise powers lawfully conferred by the Oireachtas. The list can go on. All due weight needs to be accorded to allowing the systems and processes by which lawful power is to be exercised to operate in an orderly fashion. It seems to me that significant weight needs to be attached to that factor in all cases. Indeed, in that context it is, perhaps, appropriate to recall what was said by O'Higgins C J. in Campus Oil. At p. 107 of the report he said the following:-*
- "The order which is challenged was made under the provisions of an Act of the Oireachtas. It is, therefore, on its face, valid and is to be regarded as a part of the law of the land, unless and until its invalidity is established. It is, and has been, implemented amongst traders in fuel, but the appellant plaintiffs have stood aside and have openly defied its implementation."*
- It is clear, therefore, that the apparent prima facie validity of an order made by a competent authority was a factor to which significant weight was attributed."*
65. Clarke J. also considered it appropriate to take into account "the importance to be attached to the operation of the particular scheme concerned or the facts of the individual

*case in question which may place added weight on the need for the relevant measure to be enforced unless and until it is found to be unlawful.”*

**Application of *Okunade* principles to the facts of this case**

66. In circumstances where the High Court granted leave to challenge the Article 17 Decision, I accept that the Applicant has made out an arguable case. The real question is where the balance of justice properly lies on the facts before me.
67. In my view, a consideration of the factors relevant to the balance of justice on the facts of this case demonstrate that the balance of justice comes down very much against the grant of the interlocutory injunction sought.
68. This is not a case in which the Applicant is suffering from some emergency, or very serious, medical condition which would stand to be exacerbated, in breach of her fundamental rights, in the event that the Transfer Decision was given effect to (in contrast to the situation applying in e.g. *CK*). There is no contemporary, still less compelling, evidence that the Applicant stands to suffer any breach of her fundamental rights if transferred to Belgium. It must be remembered that the Applicant is to be transferred to Belgium on foot of the Transfer Decision and not her country of origin. She will be entitled to the benefit of all relevant EU law protections (such as those contained in the EU Reception Conditions Directive) once transferred to Belgium while her application for international protection is being considered in that State. The Applicant is not in a position to pray in aid any family rights. She has no children whose interests may need to be weighed in the balance. While she has established certain personal and community relationships during her stay in Ireland, they are not of an order which would render a transfer to Belgium in fundamental breach of rights particularly in circumstances where the rights (such as they are) stemming from such relationships accreted largely during a time when she was the subject of a transfer decision (January 2019) which was under appeal.
69. In addition to the foregoing matters, the Minister pressed the case that the Applicant had been guilty of inordinate delay in making her Article 17(1) request to the Minister and that this must be weighed heavily against her in assessing the balance of justice. The Applicant contends that the Minister has stated consistently since filing her Statement of Opposition in NVU in April 2017 that she has jurisdiction to consider Article 17(1) requests and that the Applicant did not make her Article 17(1) request to the Minister until 14th September, 2021 despite making her international protection application in Ireland on 19th October, 2018. The Minister seeks to characterise this state of affairs as “*brinkmanship*” on the part of the Applicant.
70. The Applicant, for her part, says that it was a perfectly appropriate step at the time to apply to the IPO for Article 17 relief in her application of 19th October, 2018, and that indeed (as is borne out by the evidence) the IPO invited an Article 17(1) request when the IPO wrote to the Applicant on 19th December, 2018 stating as follows:-



*"I wish to advise you that Belgium has accepted responsibility for your international protection application under Article 12.2 of Regulation (EU) No. 604 of 26th June, 2013 (the Dublin III Regulation). You may submit any further information including humanitarian grounds you consider relevant to your case within 10 (ten) calendar days from the date of this letter, to the Dublin Unit in the International Protection Office for consideration before a decision is made on your transfer". (emphasis added)*

71. The IPO in its decision of 25 January, 2019, in reference to the Applicant's submissions, stated:-

*"The submissions were, in summary, that the Minister should exercise his discretion under Article 17 of the Regulation on the basis that the Applicant may be mistreated in Belgium and may suffer stress and anxiety".*

72. The IPO Officer went in her decision to engage fully with the Applicant's Article 17 case before rejecting those submissions and concluding with a recommendation that a transfer decision issue to the Applicant.
73. The Applicant points out that both the application to the IPO and the IPO's decision were copied to the Minister.
74. The Applicant then lodged an appeal against the IPO decision, by appeal letter of 1st February, 2019. The Grounds of Appeal included a series of grounds of appeal against the IPO's refusal to recommend an exercise of discretion pursuant to Article 17.
75. At this time, there were conflicting views as to whether IPAT had a jurisdiction to exercise discretion under Article 17(1). While the High Court (O'Regan J.) in *NVU* had held that IPAT did not have jurisdiction to entertain Article 17(1) requests, this decision was under appeal to the Court of Appeal. The Court of Appeal reversed the High Court by decision of 26 June, 2019. The Court of Appeal's decision was in turn appealed to the Supreme Court which gave judgment on 24 July, 2020 reversing the Court of Appeal and holding that IPAT did not have jurisdiction to entertain Article 17(1) requests; only the Minister had. It might further be noted that Burns J., the judge at the time in charge of the Asylum List, delivered a ruling in *LK v. IPAT* on 25th November, 2020, in light of the Supreme Court decision in *NVU*, putting an end to the practice which had prevailed up to then (as had been set out in High Court Practice Direction 81) whereby a global stay was in place where judicial review challenges to Article 17 decisions were in being. Accordingly, applicants within the Dublin III system were well aware of the fundamental change in the landscape effected by the Supreme Court's decision in *NVU*.
76. I am prepared to accept in light of the reasonable legal question marks which hung over the precise status of Article 17 requests and decisions within the Dublin III scheme up to the handing down by the Supreme Court of the decision in *NVU*, that the Applicant was not guilty of culpable delay in not making a separate Article 17 request to the Minister prior to July 2020. In that regard, it is important to note that the IPO effectively invited

an Article 17 request from the Applicant in its letter of 19 December, 2018 and engaged with Article 17 submissions made on behalf of the Applicant. However, none of that excuses the delay from July 2020 onwards.

77. In my view, the Applicant has accordingly been guilty of very significant delay since July 2020 in failing to bring an Article 17 application until the "*eleventh hour*", some 14 months after the Supreme Court's decision in *NVU* and some 8 weeks after IPAT formally refused her appeal in its decision of 22nd July, 2021 and formally declared *inter alia* that it had no jurisdiction to deal with her Article 17 appeal from the IPO, a decision (as regards the Article 17 aspect of the matter) which was inevitable in light the Supreme Court's decision in *NVU*. It was very clear at the end of July 2020, following the Supreme Court handing down its decision in *NVU*, that IPAT simply had no jurisdiction to deal with an Article 17 request. Accordingly, the Applicant was on notice from July 2020 onwards of the fact that if she had any Article 17 application to make, it needed to be made to the Minister.
78. The CJEU in *MA* made clear that the appropriate time to make an Article 17 request was at the time of an appeal against a transfer decision, i.e. at the time at which the IPO hands down a transfer decision. It is important that Article 17 requests are made at this time (if not before), in order to ensure that the whole *raison d'être* of the Dublin III system (being an expeditious determination of which Member States shall examine an applicant's application for international protection) is not frustrated.
79. While there may be exceptional situations in which there is such a material change in the Applicant's circumstances that an applicant will be justified in making an Article 17 application later than the time of lodging an appeal with IPAT (e.g. because of the development of a very serious medical condition on the part of the applicant), those scenarios are likely to be rare. It is important to emphasise that an Article 17 request is a request to engage an exceptional jurisdiction invested in the Minister for the invocation of genuine humanitarian or compassionate grounds. It is not to be seen, and should be not be treated, as a form of "*second go*" following a failed challenge to a transfer decision.
80. One aspect of the *Okunade* test is of particular relevance in this context viz. the need to give all appropriate weight to the orderly implementation of measures which are *prima facie* valid; and to give such weight as is appropriate to any public interest in the orderly operation of the particular scheme in which the measure under challenge was made. In that regard, in my view, significant weight must be placed in the scales of the balance of justice on an interlocutory injunction application such as this on the fact that a valid, lawful and effective transfer decision is in place and that the efficacy of the Dublin System is predicated on a swift determination of both the Member State responsible and the international protection application itself. On the facts here, there was no legal challenge to the Transfer Decision. IPAT validly refused the Applicant's appeal against a Transfer Decision and there is no challenge to IPAT's decision. Absent the most compelling countervailing circumstances, the Minister is entitled to proceed on the basis

that she can act on foot of the Transfer Decision, in furtherance of Ireland's obligations of fidelity to the system established by the Dublin III Regulation.

81. I should note, in parenthesis, that the fact that IPAT did not deliver its decision on the Applicant's appeal until July 2021 meant that there were some 2 years 10 months elapsing between the Applicant arriving in the State and being the subject of a final, effective decision under the Dublin III system. Delays of this order are not conducive to the attainment of the objective of swift determination of the Member State responsible for examination of international protection applications as set out in the Dublin III Regulation.
82. In all of the circumstances, applying the balance of interests test as set out in *Okunade*, I am driven to the conclusion that the Applicant was not entitled to an interlocutory injunction pending the outcome of her judicial review challenge on the facts of this case.

**Appropriate timing of an Article 17 application where a challenge to a transfer decision is pending or in being?**

83. In light of the circumstances that have arisen in this case, it may be helpful to make some observations more generally about the question of the appropriate timing of an Article 17 request.
84. As noted by the Court of Appeal in *NVU v. Refugee Appeals Tribunal & Ors.* [2019] IECA 183:

*"[110]. In its decision on the preliminary ruling in M. A. v. International Protection Appeals Tribunal (Case C 661/17), the CJEU, at para. 77, offers some clarity on this point. Having noted that the principle of effective judicial protection is a general principle of European Union law to which expression is now given by article 47 of the Charter, and that a person whose rights and freedoms guaranteed by European Union law are violated has a right to an effective remedy as a result, the CJEU, at paras. 78 et seq. of its judgment in M. A. v. International Protection Appeals Tribunal (Case C 661/17), identifies the remedy:*

*"78. The Member States refusal to use that discretionary clause set out in [article 17(1)] should as the case arises be challenged at the time of an appeal against a transfer decision.*

*79. Consequently, Art. 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 Art. 17(1) that regulation, without prejudice to the fact that that decision may be challenged at the time of an appeal against a transfer decision."*

*[111]. The remedy, therefore, is a matter for domestic law and the appropriate governing procedure in the Irish context is that provided by O. 84 RSC, but the interpretation by the CJEU of Dublin III seems to avoid this risk of administrative unworkability, and envisages that a challenge to a decision under article 17 Dublin II, or to a*

*refusal to engage the power thereby vested in a Member State, is not to be made before an appeal against a transfer decision has been determined.*

*[112]. As Humphreys J. said in M. A. (a Minor) v. International Protection Appeals Tribunal the Regulations of 2014 lack clarity and the absence of clarity regarding the procedural manner by which a challenge to the exercise of the discretionary power may be brought is a matter of further concern."*

85. As can be seen, the Court of Appeal in *NVU* cites the CJEU in *CM* where the CJEU appears to envisage an Article 17(1) application being made at the same time as an appeal against a transfer decision, i.e. just after a first instance transfer decision, with the Court of Appeal then envisaging a challenge to an Article 17 decision (which would be way of judicial review) not being made before an appeal (to IPAT) against a transfer decision has been determined.
86. The Court of Appeal's comments arose after its determination that ORAC and RAT had jurisdiction to exercise the Article 17 discretion, a view subsequently overturned by the Supreme Court, and the comments accordingly need to be seen in that context. It is also the case that the question of an interlocutory injunction was not before the Court of Appeal in the *NVU* case.
87. It seems to me that it must follow from the CJEU's views in *MA* that Article 17 requests should in general be made no later than the time of an appeal against an IPO transfer decision (there of course being nothing to stop such a request being made to the Minister at any stage before then); and that if the Minister refuses an Article 17 request before IPAT hands down its decision on an appeal against a transfer decision, it will be incumbent on an applicant who may (exceptionally) have a case in judicial review against the article 17 decision, to bring that judicial review as soon as possible after the Article 17 decision.
88. If this approach is taken, it may well be that the judicial review proceedings are substantially advanced if not indeed heard and determined by the time IPAT hands down a decision on the transfer decision appeal, such that the question of the need for an interlocutory injunction application may not arise at all given the ongoing suspensive effect of an extant appeal to IPAT against a transfer decision. The extent to which an interlocutory injunction may be required for a short period into the 6 month transfer window in the event that IPAT upholds a transfer decision while a decision on a judicial review challenge to the article 17 decision is awaited, would have to depend on the facts. However, it is clear that the later an applicant leaves an article 17 request (and any resulting judicial review challenge, if one properly arises), the more firmly the scales of justice on an interlocutory injunction application will be weighted against the grant of such an injunction.
89. If the approach of the applicant in this case were to be replicated in any widespread way, it would inevitably place a very serious and potentially intolerable strain on court resources given that Article 17(1) requests, and judicial review challenges to decisions

refusing the exercise of discretion pursuant to such requests, would be left to be dealt with within unreasonably tight timeframes. While I recognise that there may be very exceptional situations in which, through no fault of an applicant, there is very little time within which a judicial review challenge might be brought and determined, in my view, the overall architecture of the regime established under the Dublin III Regulation puts an onus on an applicant to make any Article 17(1) application no later than the transfer decision. If an applicant chooses to leave an Article 17 request to a point after an IPAT decision has been handed down and when the 6 month window to effect transfer under the Regulation has been eaten into, the balance of justice will inevitably be tipped very significantly against the grant of an interlocutory injunction, absent the most exceptional circumstances.

### **Challenge to the Article 17 Decision**

90. In her Amended Statement of Grounds, the Applicant articulates her case in judicial review against the Article 17 Decision as follows:-

*"Unfairness/irrationality and abuse of discretion: In making the Impugned Decision failing to make any Art.17 determination, or to grant an undertaking pending such determination, 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 system 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."*

91. As we have seen, it is clear from the terms of the Supreme Court's decision in *NVU* that the Minister has a very wide discretion indeed in the exercise of her discretion under

Article 17(1). It is further clear that Charleton J. was of the view that fundamental rights would become engaged only exceptionally in cases involving transfer under the Dublin system and that such rights would be assumed to be upheld throughout the Dublin system (see *NVU* paragraph 37, cited earlier).

92. It is, of course, not the role of this Court on a judicial review challenge to engage with, still less express a view on, the merits of the Minister's Article 17 Decision. In my view, it was perfectly open to the Minister on the material and arguments before her to take the view that the Applicant's case were not such as to bring the Applicant into the type of very exceptional situation where it may have been appropriate for the Minister to exercise her discretion under Article 17.
93. In my view, there is no substance to the Applicant's case that the Minister failed to consider and/or have regard to her case on Article 3 ECHR/Article 4 Charter and Article 8 ECHR/Article 7 Charter rights, as set out in his pre-action letter/Article 17(1) request letter of 14th September, 2021. The decision states that it "*has been reached following a review of the representations made on your behalf of 14 September, 2021, but also having reviewed the entirety of the information available to the Minister*". The Minister is not, as a matter of law, required to recite in terms every point made to her; however, it is clear from the terms of the Article 17 Decision that the substance of the Applicant's case was engaged with and considered by the Minister. Indeed, Article 3 ECHR/Article 4 Charter and Article 8 ECHR are expressly referenced in the reasons section of the decision.
94. As regards the Applicant's case that the Minister failed to engage with her case as the risks stemming from Covid presented by her transfer, it is notable that there was no even *prima facie* evidence tendered on behalf of the Applicant as to why she stood to be at particular risk from Covid in the event she was transferred to Belgium. Rather, generic arguments were raised on her behalf. Her submission asserted that her transfer would expose the Applicant as an asylum seeker to a high risk of Covid infection and that transfer to Belgium would lack guaranteed access to healthcare, and that this "*would place her at as risk of inhuman or degrading treatment and/or be in breach of her private rights under Articles 4, 5 and/or Article 7 of the Charter*". This contention was substantively addressed by two of the reasons given by the Minister in the decision; firstly the reason that "*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*", and, secondly the reason given that "*there is no reason to believe there are any systemic deficiencies in the asylum system in Belgium either as alleged or at all*".
95. Accordingly, in my view, the decision did address the Covid-related arguments in substance. As regards to the ongoing risks presented by Covid, I accept the Minister's submission that these were a matter to be addressed by reference to the situation at the time of the transfer itself, bearing in mind the existence of an EU wide scheme for movement of persons within the EU in a Covid-context since July 2021.

96. The Minister advanced an argument that the reliance by the Applicant in her Article 17 application on Article 4 Charter/Article 3 ECHR arguments constituted a collateral attack on the IPAT decision in circumstances where IPAT refused to accept that there were systemic deficiencies in Belgium such as to render inappropriate the making of the transfer decision. However, it does not seem to me that an applicant is shut out from seeking to deploy in an Article 17 request application points which may have been raised in the different context of a transfer decision challenge once those points are validly positioned in the context of compassionate or humanitarian grounds for the purposes of the Article 17 request. This appears clear from the Supreme Court's decision in *D.E. v. Minister for Justice and Equality* [2018] 3 I.R. 326, where O'Donnell J. (as he then was) (at paragraph 92) held that "*Humanitarian considerations are not limited to, or defined by, the necessarily high threshold for consideration of breaches of article 3 which would require a minister in a case such as this not to deport an individual. Situations which may not reach the high threshold posed by article 3 may nevertheless properly be taken into account by a decision maker in considering the broad question of humanitarian leave to remain.*"
97. The Applicant contends that the Minister fettered her discretion in holding that "*as such, there are no exceptional circumstances that would merit not applying the Dublin Regulations to this case*", contending that there was no such test applicable. However, in my view, the Minister was correct in taking the view that exceptional circumstances have to be made out if the "*ordinary*" Chapter III transfer decision process is to be disapplied by the invocation of discretion under Article 17. This is clear from the terms of paragraph 37 of the judgment of Charleton J in NVU set out earlier in this judgment.
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.

### **Conclusion**

99. In the circumstances, I refuse the relief sought by the Applicant and discharge the interim injunction order made by me on 4th November, 2021.