APPROVED
REDACTED

AN ARD-CHÚIRT
THE HIGH COURT

[2024] IEHC 579

Record No. 2023/1131JR

BETWEEN/

RG

APPLICANT

-AND-

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

RESPONDENTS

(No. 2)

JUDGMENT of Mr. Justice Conleth Bradley delivered on the 20th day of September 2024

INTRODUCTION

Preliminary

1. In this application for judicial review, the applicant *inter alia* contends that the Minister for Justice ("the Minister") failed to properly consider the *change of circumstances*, which, it is argued, occurred *after* the decision of the High Court[1] on 19th December 2023 refusing an injunction following an initial take-back request dated 27th September 2022 from the International Protection Office ("IPO")[2] to the French authorities in accordance with Regulation (EU) No. 604/2013 ("the Dublin III Regulation")[3] and subsequent transfer decision or notification from the IPO dated 16th February 2023 (confirmed on appeal by the International Protection Appeals Tribunal ("IPAT") on 20th September 2023) that he be transferred to France as his application for international protection remained pending there from 25th March 2022.

2. Whilst the applicant was in fact transferred from Ireland to France on 13th February 2024, he argues that this could not have been lawfully implemented because of the alleged failure by the Irish authorities to meet the requirements to exchange with their French counterparts: (a) relevant information before a transfer was carried out (Article 31 of the Dublin III Regulation); and (b) health data before a transfer was carried out (Article 32 of the Dublin III Regulation).

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[1] *RG v The IPAT & Ors (No.1)* [2023] IEHC 742 per Hyland J.

[2] Issued pursuant to Article 18(1)(b) of Regulation EU) No.604/2013 ("the Dublin III Regulation").

[3] Regulation (EU) No. 604/2013 (26th June 2023) established the criteria and process for determining which Member State was responsible for examining an application for international protection lodged in one of the Members States of the EU by a third-country national or a stateless person.

3. The changed circumstances contended for, on behalf of the applicant, arose from a second medical report dated 30th January 2024, which included, *inter alia*, the applicant's regression from *not currently* displaying severe suicidal ideation in the first medical report dated 16th April 2023 to *having developed* suicidal ideation at the thought of being returned to France as per the second medical report dated 30th January 2024.

4. In a pre-action letter dated 31st January 2024, the applicant's solicitors *inter alia* raised these matters with the Irish authorities alleging there was no proof at that time that the Minister had complied with Articles 31 and 32 of the Dublin III Regulation and further arguing that "*in the absence of compliance with Articles 31 and 32, the Minister has the option to suspend the transfer and/or grant the applicant discretionary relief under* [Article] *17 of the Dublin III Regulation*".

5. The Minister issued her Article 17(1) decision on 12th February 2024 refusing the applicant's request that she exercise her discretion to determine his application for international protection in Ireland and stating *inter alia* that there were no exceptional circumstances which would merit not applying the Dublin III Regulation to his case and that his transfer to France would take place as soon as possible. The Minister's Article 17(1) decision was signed by Luke Dineen, Officer of the Minister, Dublin Unit, International Protection Office and the applicant further argues that Mr. Dineen lacked the authority to sign this decision on behalf of the Minister.

6. Eamonn Dornan BL appeared for the Applicant. Mark J. Dunne SC and Sarah-Jane Hillery BL appeared for the Respondents.

THE DUBLIN III REGULATION

7. The allocation of responsibility between the Member States of the European Union in relation to applications for international protection is governed by Regulation (EU) No.604/2013, which was given further effect by the European Union (Dublin System) Regulations 2018 in S.I. No.62/2018. Regulation (EU) No.604/2013 had previously repealed Regulation (EC) No.343/2003, which had in turn repealed the first Dublin Convention dated 15th June 1990, providing the initial process for the designating the responsible State for processing asylum applications lodged in a member state of the (then) European Communities.

8. In *T.T. (Transfer Decision) v IPAT & Ors* [2024] IEHC 470, at paragraph 4, Simons J. observed (in the context of those proceedings) that the Dublin III Regulation addresses the contingency of an individual making a series of applications for international protection as follows: the Member State which rejected the first application may be obliged to "*take back*" an individual who has since made a second application in another Member State or who is on the territory of another Member State without a residence document.

9. In *A v Minister for Justice & Ors and B v IPAT* [2024] IEHC 183, at paragraph 128, Phelan J. observed that the Dublin III Regulation established the criteria and mechanisms for determining which Member State was responsible for examining an asylum claim made in the EU and allowed Member States to send requests to other Member States to "*take charge of*" or "*take back*" asylum applications (subject to time

limits) in order to effect timely access to asylum procedures and reduce double handling of asylum claims by different States.

10. In *AHY v The Minister for Justice* [2022] IEHC 198, Ferriter J., at paragraph 52 of his judgment, described Article 17 of the Dublin III Regulation as follows:

> "*(52) Article 17 of the Dublin III Regulation 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 Article 3(2) of Dublin II. 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")*".

11. Article 31 of the Dublin III Regulation provides for the exchange of relevant information before a transfer is carried out.

12. Article 32 of the Dublin III Regulation provides for the exchange of health data before a transfer is carried out.

13. Article 32(1) provides as follows:

> "*For the sole purpose of the provision of medical care or treatment, in particular concerning disabled persons, elderly people, pregnant women, minors and persons who have been subject to torture, rape or other serious forms of psychological, physical and sexual violence, the transferring Member State shall, insofar as it is available to the competent authority in accordance with national law, transmit to the Member State responsible information on any special needs of the person to be transferred, which in specific cases may include information on that person's physical or mental health. That information shall be transferred in a common health certificate with the necessary documents attached. The Member State responsible shall ensure that those special needs are adequately addressed, including in particular any essential medical care that may be required.*"

14. Article 32(2) provides as follows:

> "*The transferring Member State shall only transmit the information referred to in paragraph 1 to the Member State responsible after having obtained the explicit consent of the applicant and/or of his or her legal representative or, if the applicant is physically or legally incapable of giving his or her consent, when such transmission is necessary to protect the vital interests of the Applicant or of another person. The lack of consent, including a refusal to consent, shall not constitute an obstacle to the transfer.*"

15. Article 32(3) provides as follows:

> "*The processing of personal health data referred to in paragraph 1 shall only be carried out by a health professional who is subject, under national law or rules established by national competent bodies, to the obligation of professional secrecy or by another person subject to an equivalent obligation of professional secrecy.*"

16. Article 32(4) provides that the exchange of information under that Article shall only take place between the health professionals or other persons referred to in paragraph 3. The information exchanged shall only be used for the purposes as set out in paragraph 1 and should not be processed further.

17. Article 32(5) provides as follows:

> "*The Commission shall by means of implementing acts, adopt uniform conditions and practical arrangements for exchanging the information referred to in paragraph 1 of this Article. Those implementing acts shall be adopted in accordance with the examination procedure laid down in Article 44(2).*"

18. Article 32(6) provides: "*The rules laid down in Article 34(8) to (12) shall apply to exchange of information pursuant to this Article.*"

19. Article 34(8) of the Dublin III Regulation provides:

"*The Member State which forwards the information shall ensure that it is accurate and up-to-date. If it transpires that it has forwarded information which is inaccurate or which should not have been forwarded, the recipient Member States shall be informed thereof immediately. They shall be obliged to correct such information or to have it erased.*"

20. Article 34(12) of the Dublin III Regulation provides:

"*Where the data are not processed automatically or are not contained, or intended to be entered, in a file, each Member State shall take out public measures to ensure compliance with this Article through effective checks.*"

FACTUAL BACKGROUND

Chronology

21. As a central feature of the applicant's case is that there was a change of circumstances after the decision of this court (Hyland J.) on 19th December 2023, which the Minister allegedly failed to properly consider (and, it is contended, was made by an official without lawful authority), the first part of the following chronology adopts the facts as set out at paragraphs 8 to 15 in the judgment of Hyland J. in *RG v The IPAT & Ors (No.1)* [2023] IEHC 742, which addresses the period between 21st September 2022 to 19th December 2023.

21st September 2022 to 19th December 2023

22. The applicant had lodged an application for international protection in France on 25th March 2022.

23. Thereafter, the applicant had applied for international protection in Ireland on 21st September 2022.

24. A search in the EURODAC database resulted in a 'category 1 hit' with France which disclosed the applicant's previous application for international protection in France on 25th March 2022.

25. On 27th September 2022, the IPO issued a take-back request to France under Article 18(1)(b) of the Dublin III Regulation.

26. On 10th October 2022, France agreed to accept responsibility under Article 18(1)(d) of the Dublin III Regulation, *i.e.*, where an application for international or subsidiary protection had been denied.

27. On 5th December 2022, the applicant was informed that France had accepted responsibility for him.

28. On 15th December 2022, the applicant's solicitors furnished submissions to the IPO setting out that the applicant had been detained and beaten in France by the individuals from whom he had fled when in Georgia. Photographs of the injuries,

screenshots of threatening messages and a medical certificate from a Georgian hospital were submitted.

29. On 16th January 2023, the applicant was interviewed under Article 5 of the Dublin III Regulation.

30. On 16th February 2023, the IPO issued the transfer decision where it noted that France had accepted Ireland's request in accordance with Article 18(1)(d) of the Dublin III Regulation, *i.e.*, on the basis that the applicant had sought international/subsidiary protection in France and that his application had been rejected there.

31. On 20th February 2023, the applicant appealed to the IPAT against the transfer decision.

32. On 16th April 2023 a medical report was submitted by Dr. Giller, obstetrician/gynaecologist and psychotherapist, to the IPAT which concluded that the evidence was consistent with the applicant's history of torture in Georgia, his re-traumatisation by an incident in a hostel in France during which Georgian men attended his hostel and ransacked his room when he was not present and his fear of being returned to France, where he was terrified of deportation to Georgia. Dr. Giller opined that if the applicant was returned to France he would present as being at a serious/high risk of suicide.

33. On 17th April 2023, the applicant's solicitors made further submissions and argued *inter alia* that his return would infringe his rights under Articles 4 and 7 of the Charter

of Fundamental Rights of the EU ("the EU Charter") and Articles 3 and 8 of the European Convention on Human Rights ("the ECHR") and that the applicant was at risk of refoulement.

34. On 20th September 2023, the IPAT refused the applicant's appeal and affirmed the transfer decision (*i.e.*, the notice of decision to transfer the applicant to France) which had previously been made by the IPO.

35. The applicant's initial Statement of Grounds, grounding Affidavit, Affidavit of Verification in relation to the translation from the English to the Georgian language, and the Affidavit of the translator, were all dated 6th October 2023. The applicant's solicitor swore an affidavit dated 6th October 2023 in accordance with paragraph 7(8)(b) of Practice Direction HC78 – Asylum, Immigration and Citizenship List and a further affidavit dated 10th October 2023 in accordance with paragraph 19(d)(ii) of Practice Direction HC78.

36. In summary, the applicant sought *inter alia* to challenge the following decisions: the initial IPO transfer decision in the Notice of Decision dated 16th February 2023; the IPAT (appeal) decision dated 20th September 2023 upholding the IPO's initial transfer decision of 16th February 2023; in addition, the applicant sought declaratory relief and an injunction.

37. On 23rd October 2023 the applicant was granted leave to apply for judicial review by the High Court (Hyland J.).

38. The injunction/stay application was heard by the High Court (Hyland J.) on 28th November 2023 and this application was refused by judgment delivered on 19th December 2023.

19th December 2023 to 17th June 2024

39. A Statement of Opposition on behalf of the respondents was filed in the Central Office of the High Court with a date stamp of 6th February 2024 which *inter alia* raised preliminary objections in relation to delay regarding the challenge to the initial IPO decision of 16th February 2023 and the fact that the applicant had availed of an adequate alternative remedy through the mechanism of an appeal to the IPAT. That Statement of Opposition was grounded on an affidavit of John Moore, a HEO in the Immigration Service Delivery function of the Department of Justice which was sworn on 31st January 2024.

40. A notice of change of solicitors for the applicant was filed in the Central Office with a date stamp of 14th February 2024.

41. A Notice of Motion seeking an amendment of the applicant's Statement of Grounds pursuant to Order 84, rule 20(4) of the Rules of the Superior Courts 1986, as amended ("RSC 1986") issued on 1st March 2024 and the Amended Statement of Grounds was verified by the third Affidavit of the applicant's solicitor also dated 1st March 2024. The applicant was given liberty to file an Amended Statement of Grounds by order of Hyland J. dated 8th March 2024 and the Amended Statement of Grounds is also dated 8th March 2024.

42. This third Affidavit exhibited a pre-action letter dated 31st January 2024 and the second medical report of Dr. Giller dated 30th January 2024. Essentially the pre-action letter canvassed the issues which would be subsequently raised in the Amended Statement of Grounds and which now forms the gravamen of the proceedings before me.

43. The issues, from the applicant's perspective, are summarised in paragraphs 4 and 5 of the third Affidavit of the applicant's solicitor dated 1st March 2024 as follows:

> "*(4)The Pre-Action Letter requested that the Minister (i) cancel the decision to transfer; (ii) in the alternative, provide an undertaking that no action would be taken to transfer the applicant in the absence of a medical certificate under Article 32; (iii) confirm that any Art. 17 decision would be made by the Minister alone, and not be delegated to [an]"officer of the Minister" under the Carltona principle; (iv) issue an Art. 17 determination; (v) if Art.17 discretionary relief was refused, provide an undertaking that no further action would be taken to transfer the Applicant to France to permit him to amend his current judicial review proceedings to challenge the failure to comply with Articles 31 and 32 and/or the refusal of Article 17 relief.*
>
> *(5) The Pre-Action Letter included an updated medical report from Dr. Giller, dated 30th January 2024. She noted that he[4] continues to suffer from "severe symptoms of PTSD and anxiety" and had "developed suicidal ideation at the thought of being returned to*

[4] The applicant.

France" where he was "rendered homeless and vulnerable" and from where he was certain he would be returned to Georgia where he fears he will be killed. Dr. Giller opined that, if deported to France, he would "present a high risk of suicide.""

44. These matters were considered by the Department of Justice, who replied by letter dated 31st January 2024 from Ms. Elaine Houlihan, stating *inter alia* that having examined the correspondence and the entirety of the applicant's file, it was considered that no new elements had been presented in relation to the applicant's personal circumstances and health conditions and that as nothing further arose, that Office was satisfied that the process which was applied in respect of the applicant, giving rise to his pending transfer to France, was in line with the provisions of Regulation (EU) No.604/2013 (Dublin III Regulation) and had been afforded in accordance with law.

45. The letter dated 31st January 2024 from Ms. Houlihan also stated that with regard to the applicant's Article 17 submission, the Minister would make the decision in accordance with law in due course.

46. Initially, on 17th January 2024, the applicant had been booked for 1st February 2024 to fly to Charles de Gaulle airport in Paris, but he failed to present at Dublin Airport on that date. A similar attempt was made, this time by boat, on Thursday, 25th January 2024 and Thursday 8th February 2024 – on this occasion, the French authorities said that they could not accept the transfer in Cherbourg as there were no border police available there.

47. The Minister issued the Article 17(1) decision – "*Decision of the Minister for Justice in regards to exercise of discretion in accordance with Article 17(1) of Regulation (EU) No.604/2013*" – on 12th February 2024. It was signed by Luke Dineen, Officer of the Minister, Dublin Unit, International Protection Office.

48. On 12th February 2024, arrangements were made for his transfer to Charles de Gaulle airport. The applicant was transferred to France from Dublin on 13th February 2024.

49. The applicant's Amended Statement of Grounds of 8th March 2024 reflects the pre-action letter dated 31st January 2024.

50. The applicant, for example, in the Amended Statement of Grounds, *inter alia* sought the quashing of the Minister's Article 17(1) decision dated 12th February 2024, declaratory relief that the Minister failed to obtain and convey a health certificate under Articles 31 and 32 of the Dublin III Regulation prior to the applicant's transfer and an order directing the Minister to make arrangements to accept the applicant back to the State in accordance with Article 29(3) of the Dublin III Regulation.

51. Further, the Amended Statement of Grounds *inter alia* contended at paragraph 3 that there was an "*illegality*" in effecting the transfer and that the implementation of the transfer decision in transferring the applicant to France was unlawful and in breach of his fundamental rights on the following alleged grounds:

> "*(i) The transfer was effected in breach of the Minister's obligations in respect of the health data under Article 31 of the Dublin III Regulation, which provides for the "exchange of relevant information*

before a transfer is carried out" and Article 32 of the Dublin III Regulation which provides for the "exchange of health data before a transfer is carried out";

(ii) The Minister was aware, having regard to the medical reports from Dr. Giller that the applicant was a vulnerable person for the purpose of Articles 31 and 32 of the Dublin III Regulation, but transferred him without having exchanged his health data to the French authorities. The conduct of the transfer breached the applicant's rights under Article 3 ECHR/Article 4 CFR and/or Article 8 ECHR/Article 7 CFR;

(iii) As a consequence of the foregoing, the transfer should be vitiated and the applicant returned to the jurisdiction under Article 29(3) of the Dublin III Regulation;

(iv) The "Decision of the Minister for Justice in regard to [the] exercise of discretion in accordance with Article 17(1) of Regulation (EU) 604/2013" ("the Article 17 Decision") dated 6th February 2024[5] [sic.] *is ultra vires, was made unlawfully by an International Protection Officer, described as an "Officer of the Minister". The Supreme Court in NVU v Refugee Appeals Tribunal [2020] IESC 46, was clear that statutory authorities, including the IPO, had no jurisdiction in this regard. The Article 17 Decision erred in finding that the Supreme Court did not invalidate the Carltona principle in the exercise of the discretion.*"

[5] The Article 17 decision was dated 12th February 2024.

52. At paragraph 4 of the Applicant's Amended Statement of Grounds, it is contended that the Article 17 decision was irrational and had inadequate regard to the applicant's fundamental rights under the Constitution, the Dublin III Regulation, Article 7 of the EU Charter and Article 8 of the ECHR, having regard to the obligations under section 3 of the ECHR Act 2003 (as amended) on the following alleged grounds:

> "*(i) The Article 17 Decision was irrational in finding that the materials submitted on the Applicant's behalf did not disclose "any humanitarian or compassionate ground" which would invoke* [the] *Article 17(1) discretion, in light of the reports from Dr. Giller including an up to date report of 29th January, 2024;*
>
> *(ii) The Article 17 decision is vitiated for a failure to consider all relevant information, including the reports from Dr. Giller;*
>
> *(iii) The decision-maker erred in the analysis of the applicant's right to private life. Whereas the Article 17 Decision referred to the ECtHR and ECJ jurisprudence as endorsed by the Supreme Court in MK (Albania), the decision erred in simply stating that it was "clear that the Irish state has a public interest in maintaining the integrity of international protection system and the Dublin Regulations" without engagement in any proportionality analysis under Article 8(2) ECHR;*
>
> *(iv) The decision-maker gave inadequate regard, in light of the Country of Origin Information furnished, to the Applicant's claim that he would be at risk of homelessness without access to adequate healthcare if returned to France;*
>
> *(v) The decision-maker failed to consider, for the purposes of an Art.7 CFEU/Art.8 ECHR assessment, the fact that the Applicant had been*

diagnosed with "severe symptoms of PTSD and anxiety" and had "developed suicidal ideation at the thought of being returned to France" where he was "rendered homeless and vulnerable" and from where he was certain he would be returned to Georgia where he fears he will be killed. The decision-maker gave no adequate regard to Dr. Giller's opinion that, if deported to France, he would "present a high risk for suicide.""".

53. Additional amending grounds are set out, *inter alia*, at paragraphs 25 to 42 of the Amended Statement of Grounds, which include a chronological update after the decision of the High Court on 19th December 2023 refusing the applicant's application for an injunction or stay in *RG v IPAT (No.1)* [2023] IEHC 742 and a re-emphasis and further details of the grounds set out at paragraphs 3 and 4 of the Amended Statement of Grounds (quoted above) in the context of the Article 17(1) ministerial decision dated 12th February 2024.

54. In April 2024, the respondents filed an Amended Statement of Opposition which was verified by Ms. Elaine Houlihan, Assistant Principal Officer in the Repatriation Division of the Department of Justice, in an Affidavit sworn on 12th April 2024.

55. An Affidavit of Detective Garda Donal Ryan of the Garda National Immigration Bureau dated 9th April 2024 addressed the circumstances of the applicant's arrest on 8th February 2024, at a location in Dublin city, following his failure to turn up at Dublin Airport and describes how the applicant became violent after being initially co-operative and was required to be handcuffed upon his arrest. This Affidavit also set

out D/G Ryan's involvement as part of the escort team on the morning of 13th February 2024 tasked with taking the applicant from Cloverhill to the airport to be put on a flight to France.

56. D/G Ryan also avers in response to the allegation that the applicant self-harmed when in Garda custody that he "*did not observe the applicant to be injured and at no time*" did the applicant inform D/G Ryan "*of any injuries*" and that the applicant "*did not harm himself whilst in garda custody and he was not left unsupervised at any time whilst in garda custody.*"

57. A response to the Affidavits of Ms. Houlihan and D/G Ryan is set out in the fourth Affidavit, dated 24th April 2024, of the applicant's solicitor, Ms. Christina Stamatescu, of CSHR Solicitors. This addresses *inter alia* observations in respect of the transfer of data including health data and the applicant's instructions in respect of his arrest, detention and transfer.

58. A second Affidavit is sworn by Ms. Houlihan on 24th May 2024 in response to the fourth Affidavit of Ms. Stamatescu dated 24th April 2024.

59. An Affidavit of Stephen Nolan, Assistant Governor at Cloverhill Prison, sworn on 22nd May 2024, in further response to the fourth Affidavit of Ms. Stamatescu dated 24th April 2024, rejects the suggestion that the applicant was treated inappropriately or in breach of his rights while in Cloverhill Prison.

60. The applicant's third affidavit sworn on 5th June 2024 responds to the Affidavits of Assistant Governor Nolan sworn on 22nd May 2024 and the second Affidavit of Ms. Houlihan sworn on 24th May 2024.

61. This, in turn, is responded to by the second Affidavit of Assistant Governor Nolan sworn on 17th June 2024. Ms. Stamatescu swore a fifth Affidavit dated 18th June 2024 exhibiting a decision by the Irish Prison Services to partially grant a Subject Access Request in relation to copies of electronic medical records held on the Prisoner Healthcare Management System (PHMS) in relation to the applicant.

62. The matter was heard before me on 20th June 2024.

ASSESSMENT & DECISION

63. For the following reasons, I am of the view that the applicant has not established the "*exceptional circumstances*" or "*exceptional situation*" required or "*a cogent evidential basis*" which would warrant a departure from the "*rebuttable presumption*" that the treatment of the applicant as an asylum seeker, and the decision-making process which resulted in his transfer to France pursuant to the Dublin III Regulation, complied with the EU Charter, the Geneva Convention and the ECHR and was fair and lawful.[6]

[6] *BK v The Minister for Justice* [2022] IECA 7 per Collins J at paragraph 39. The judgment of Court of Appeal in *BK* analyses many of the authorities referred to in this application, including Case C-578/16 *CK v Republika Slovenija*, ECLI:EU:C:2017:127.

64. In this regard, in assessing the exercise by the Minister of her discretionary decision-making power in the context of *inter alia* – (a) the medical & psychological reports from Dr. Giller which were before the Minister; (b) the Article 17(1) ministerial decision dated 12th February 2024; and (c) the giving effect to the Dublin III Regulation – the applicant has, in my view, failed to establish a real and proven risk that the decision to transfer him to France exposed him to inhuman and degrading treatment which was linked to the risk of a significant and permanent deterioration in the state of his health, insofar as he had underlying mental and physical conditions.

65. I now address each of these matters, including the contention on behalf of the applicant that Mr. Dineen lacked legal authority to make the Article 17 ministerial decision of 12th February 2024.

Medical & psychological reports

66. First, the core part of the applicant's claim centres on two of the three reports from Dr. Giller. Put simply, it is claimed that there was an unfairness visited upon the applicant which constituted a breach of his human rights by the failure to communicate to the French authorities the assessment in the second report (dated 30th January 2024) from Dr. Giller.

67. One of the main consequential arguments made on behalf of the applicant in this context is the contention that his legal advisors would have been enabled to bring a second or subsequent injunction application before the High Court arising from the alleged changed situation (which is stated to be set out in Dr. Giller's second report), subsequent to the judgment of this court (Hyland J.) in *RG v The IPAT & Ors (No.1)*

[2023] IEHC 742, which was delivered on 19th December 2023 prior to the applicant's removal on 13th February 2024.

68. I do not believe, however, that this contention is well-founded and is in fact undermined when the reports of Dr. Giller are examined (the third report from Dr. Giller post-dates the applicant's removal on 13th February 2024).

The first report dated 16th April 2023

69. The first report in time is dated 16th April 2023 and is entitled "*Medico-Legal Report*" and states on its face that it was on the instructions of the applicant's Solicitor. This report records at paragraph 2.2 (page 6) that the applicant's then current medical and psychological complaints were insomnia, headaches, scarring on body and fearfulness. The report makes no reference to the Applicant being persecuted because he was gay. There is a change in the applicant's account of what occurred in the hostel in France and his engagement with other persons from Georgia as relayed to Dr. Giller (paragraph 2.4.6, page 8) in contrast to the initial Statement of Grounds. Further, there is no reference to back-pain in Dr. Giller's first report and in relation to the applicant's concerns about the medical facilities in France, the IPAT decision states that the applicant had stated that he had suffered from haemorrhoids and he did not receive medical treatment for same in France and believed it unlikely he would obtain satisfactory treatment, but no mention of this is made in Dr. Giller's first report.

70. At page 14 (paragraph 4.5) of the First Report, Dr. Giller finds that the applicant "*is not currently displaying severe suicidal ideation, but when his application for asylum*

in Ireland was rejected, he became very suicidal. He has expressed to me that he would take desperate measures rather than return to France, where he is certain that he would face deportation to Georgia. In my opinion, if he is returned to France, where he faces likely return to Georgia, he would present as a serious risk of suicide".

71. Dr. Giller recommends (at paragraph 5) of the Report as the applicant "*is currently very isolated and distressed and has no support, not even a GP as he has no medical card, I am referring him to Spirasi, the national centre for the treatment of torture victims, for psychological and social support*".

72. Dr. Giller's opinion is set out in the sub-heading "*Conclusion*" at paragraph 6 where at page 15, it is *inter alia* stated "[i]*n my opinion, all the clinical evidence is highly consistent with* [RG's] *history of torture in Georgia, his re-traumatisation by an incident in a hostel in France and his fear of being returned to France, where he is terrified of deportation to Georgia. If he is returned to France, he would, in my opinion, present as being at a high risk of suicide*".

<u>The second report dated 30th January 2024</u>

73. The second medical report is dated 30th January 2024. This updated second report post-dated the judgment of this court (Hyland J.) dated 19th December 2023 on the applicant's injunction application and also post-dates the decision of the IPAT dated 20th September 2023 affirming the notice of the decision to transfer the applicant to France made by the IPO.

74. The argument is made on behalf of the Minister, that apart from certain discrete matters, there has, relatively speaking, been little change in the applicant's medical condition between the date of the first report on 16th April 2023 and the date of this second report on 30th January 2024.

75. The further observation is made that, apart from Dr. Giller agreeing to give the applicant psychological support and having talked to the applicant on a regular basis since April 2023, there does not appear to have been any further referrals or details of the referral to Spirasi, which was recorded in the first report dated 16th April 2023.

76. The second report states that the applicant "*continues to suffer from lower back pain and severe tension headaches*" and at the date of this second report on 30th January 2024, the applicant "*has developed*" suicidal ideation at the thought of being returned to France:

> "*He has continued to suffer from severe symptoms of PTSD*[7] *and anxiety: recurrent nightmares, episodes of fear and dread, severe restlessness, poor concentration, insomnia, and panic attacks with sweating, heart palpitations and difficulty breathing. He has developed suicidal ideation at the thought of being returned to France, where his application for international protection was refused and where he was rendered homeless and vulnerable, and from where he is certain that he would be returned to Georgia, where he fears that he will be killed. He has said repeatedly that he would prefer to die than to be returned there. He has become increasingly*

[7] Post-traumatic stress disorder.

hopeless about his situation. In my opinion, if he is deported to France or Georgia, he will present a high risk for suicide."

77. Insofar as the applicant is concerned, the issue which arises in this judicial review relates to the processing and consideration of Dr. Giller's updated (or second) medical and psychological report dated 30th January 2024 in which she *inter alia* expressed her opinion that if the applicant was deported to France or Georgia, he would present a high risk for suicide.

78. Previously, in the context of the applicant's application for an injunction or stay, Hyland J. in refusing the application in *RG v The IPAT (No.1)* [2023] IEHC 742 made the following observations at paragraphs 64 and 65 of the judgment which reflected the applicant's case at *that* point – *i.e.*, in the period prior to 19th December 2023:

"*(64) Moreover, there are some inconsistencies in the applicant's evidence relating to his experiences in France. The Statement of Grounds refers to the submission made to the IPO by his solicitor that he had been detained and beaten by the individuals from whom he had fled from Georgia, that his room was broken into, that people were waiting for him, and he feared for his life. The decision of the IPO refers to the detention of the applicant as does the decision of the IPAT. However, in his account to Dr. Giller, and the affidavits before this Court, no reference is made to a detention or beating. No details are given as to the identity of the men, or what he understood their intentions to be.*

(65) In relation to his concerns about the medical facilities in France, the IPAT decision records that before the Tribunal he argued that he suffered from haemorrhoids and he did not receive medical treatment for same in France and believed it unlikely he will obtain satisfactory treatment. In my view, this does not approach the kind of likely prejudice he would be required to show".

79. As stated, Dr. Giller's first report of April 2023 was before the High Court when the applicant was refused an injunction (or stay). In that December 2023 judgment, Hyland J. noted that there was no evidence that the medical services in France would be unable to address the risk of suicide that Dr. Giller considered would arise, should the applicant be returned to France. The central difference between the first report from Dr. Giller in April 2023 and the second report in January 2024 was her reference in the latter report that the applicant *had developed* (*i.e.*, by January 2024) suicidal ideation at the thought of being returned to France, whereas the April 2023 Report found that the applicant was not *at that time* displaying severe suicidal ideation. As just mentioned, the observation was made, on behalf of the respondent, at the hearing before me, that with the exception of the development by the time of the second report in January 2024 of suicidal ideation by the applicant at the thought of being returned to France, there had been no referral to a GP or to a psychiatrist, and very little appeared to have been done in that context between the report in April 2023 and January 2024 for somebody who was believed to be at a high risk of suicide. Further, it was submitted that in general, there was very little difference between the report in April 2023 and that in January 2024.

80. In addition, as referred to later in this judgment, in Ms. Elaine Houlihan's second Affidavit sworn on 24th May 2024, it is pointed out that Dr. Giller's report dated 30th January 2024 refers to a diagnosis of severe symptoms of complex PTSD and general anxiety disorder but did not outline any specific medication or treatment which was required by the applicant on an ongoing basis and the Minister was not put on notice of any specific ongoing treatment plan or medical intervention or assistance that would be required on arrival, other than to notify the French authorities that he had a psychiatric condition and had a suicidal tendency. This was in fact communicated via the (Article 32(1)) Common Health Certificate, which notified the French authorities that the applicant was suffering from a psychiatric condition, namely suicidal tendency (as was indicated in the report of Dr. Giller dated 30th January 2024), and as no further details of treatment or medication were included because none had been furnished to the Minister.

<u>The third report dated 29th February 2024</u>

81. On 29th February 2024, Dr. Giller wrote to the applicant's solicitor expressing her concern regarding the applicant who was transferred to France on 13th February 2024. The first part of this letter sets out what Dr. Giller has been informed of by the applicant. She *inter alia* states, for example, that the applicant informed her of the following matters: he had not been given any accommodation by the French authorities despite having registered with them on his arrival; he had no passport; he had no access to medical care; he had no right to work (and could not obtain casual work without an address and papers); he had no money to feed himself or buy a change of clothes; he did not speak French; he had been sleeping rough for over two weeks and was in constant fear of attack.

82. Dr. Giller then states in this third report that when the applicant left Ireland he was suffering from very severe symptoms of PTSD, anxiety and depression, with serious suicidal ideation and that "[t]*hese symptoms have continued and he is now having constant intrusive thoughts about the torture that he suffered at the hands of the military in Georgia and his fear that he will be sent back there. He is frightened of any Georgian that he meets in France after his previous experiences in the country. Since he arrived in France, I have been giving him what psychological support and encouragement I can via text message but I am concerned that this is not going to be enough to keep him going in his current predicament. Both his mental and physical health appear to be deteriorating in his current circumstances (he says that he is finding it difficult to eat when he does get some food and is losing weight); he is increasingly hopeless about the future. I am writing to ask if there is any more that can be done to return him to Ireland where, as I understand it, he still has an ongoing legal case. I have always found him to be a very compassionate and sincere young man with a strong sense of social justice and would strongly advocate on his behalf if there is anything else that I can do in the current situation*".

83. On behalf of the Minister, it is pointed out by counsel that when the applicant swore his Affidavit in these proceedings on 5th June 2024, with the assistance of a Georgian translator, he did not mention any of the matters (set out above) – including the reference to suicidal ideation – which he relayed to Dr. Giller and as set out in the letter (report) of 29th February 2024.

84. As mentioned earlier, in terms of the applicant's legal challenge, this (third) report (letter dated 29th February 2024) in fact post-dated the Article 17(1) decision on 13th

February 2024 and is, therefore not directly relevant to the applicant's central contention that events had changed in the period between the judgment of the High Court on 19th December 2023 and the date of the Article 17(1) decision on 12th February 2024.

85. At the time of the Article 17(1) decision on 12th February 2024, the Minister had not been notified of any ongoing treatment plan or medical intervention or assistance that the applicant would require upon arrival in France other than to notify the French authorities that he had anxiety, PTSD and a suicidal tendency which, as stated, *was communicated* to the French authorities via the Common Health Certificate pursuant to Article 32(1) of the Dublin III Regulation.

86. Whilst the Minister accepted that the applicant had suffered trauma and had mental health issues, she decided that he did not meet the threshold or standard of exceptional circumstances (which is a high bar) that would be required for a departure from the presumption that the treatment of the applicant as an asylum seeker, and the decision-making process which resulted in his transfer to France pursuant to the Dublin III Regulation, complied with the EU Charter, the Geneva Convention and the ECHR and was fair and lawful, *i.e.*, the applicant's health condition did not reach the standard of a real and proven risk his transfer to France would expose him to inhuman and degrading treatment linked to risk of serious impairment to the deterioration of his health.

Ministerial Decision dated 12th February 2024

87. Second, the Minister's decision was entitled "*Decision of the Minister for Justice in regard to* [the] *exercise of discretion in accordance with Article 17(1) of Regulation (EU) No.604/2013*" ("the Article 17(1) decision"). It was dated 12th February 2024 and was signed by Luke Dineen, Officer of the Minister, Dublin Unit, International Protection Office.

88. This demonstrates a detailed engagement with the arguments and grounds advanced on behalf of the applicant, and accordingly, the scope for interference with the exercise of that discretion in this application for judicial review is very limited. There are, for example, no demonstrable or significant error or errors of assessment.

89. In this regard, the decision addressed issues under the following sub-headings: the authority to exercise discretion under Article 17 of the Dublin III Regulation (pages 2 to 4), which deals with the arguments raised by the applicant in relation to the *Carltona* principle; access to healthcare in France (pages 4 to 8); access to accommodation and reception conditions in France (pages 8 to 15); and right to private life under Article 7 CFREU[8] and/or Article 8 ECHR[9] (pages 15 to 19).

90. The decision specifically addressed the question as to the applicant's access to health care in France *inter alia* as follows:

> "*Having read and considered the most recent medico-legal report prepared by Dr. Joan Giller, which your legal representative has*

[8] The Charter of Fundamental Rights of the European Union.

[9] The European Convention on Human Rights.

supplied, it is accepted that you have experienced trauma in the past and that you suffer from mental health issues as a result. However, your legal representative has provided no evidence that the necessary healthcare and/or treatment would be unavailable to you in France as an asylum seeker. Moreover, when assessing whether your transfer to France would infringe upon your rights under Articles 3 & 8 European [Charter][sic.][10] *of Human Rights (ECHR) and/or Articles 4 & 7 of [the Charter of Fundamental Rights of the European Union (CFREU), it is important to establish the legal threshold that must be reached for this to happen in the context of medical issues and access to healthcare*".

91. The Article 17(1) decision then refers to extracts from a number of judgments, including the judgment of the ECtHR in *MT v The Netherlands* (2021, Case Application No. 46595/19), *AB & Others v Finland* (2021, Case Application No. 41100/19), *DE v The Minister for Justice and Equality* [2018] IESC 16; [2018] 3 I.R. 326 and *RG v The International Protection Appeals Tribunal & Ors (No. 1)* [2023] IEHC 742.

92. The decision continues as follows on pages 7-8:

"*To reiterate, it is accepted that you have suffered traumatic experiences in the past giving rise to mental health problems which may require treatment. But it is noteworthy that Dr. Giller's most recent report does not conclude that you would be exposed to*

[10] The reference should have been to "*Convention*".

significant or irremediable consequences or to a serious, rapid and irreversible decline in your health with no access to healthcare (physical or mental/psychiatric), resulting in intense suffering and/or a significant reduction in your life expectancy, were you transferred to France. Furthermore, on the basis of the medical documentation provided, it cannot be established that your transfer would expose you to inhuman and degrading treatment under Articles 3 & 8 ECHR and/or Articles 4 & 7 CFREU [Footnote reference supplied].

It is vital to know that you will be able to access any necessary treatment for your mental health issues in France because asylum seekers have the same right to access to healthcare in the country as French nationals have. Those under the regular procedure, like any other third-country nationals below a certain income level, have access to healthcare in France thanks to the Universal Health Protection Scheme (PUMA). Individuals with low income still awaiting health insurance who need healthcare quickly can turn to Access to Health Care (PASS) centres (which are easily accessible and free) at their nearest public hospital. This is also a possibility for asylum seekers under the accelerated and Dublin procedures. PASS centres will provide care and, if necessary, the medical letter needed to speed up the processing of their application for public health insurance. According to the law, all public hospitals are required to offer PASS services. Asylum seekers can, in theory, benefit from psychiatric or psychological counselling thanks to their health care coverage [Footnote reference supplied].

Accordingly, it is not accepted that you would not have access to healthcare in violation of your rights to be free from harm, torture, inhuman and/or degrading treatment under Articles 3 ECHR and/or 4 CFREU as well as your right to a private life under Articles 7 CFREU and 8 ECHR were you transferred to France".

93. Under the sub-heading "*Access to accommodation and reception conditions in France*", the Article 17(1) decision (at page 10) *inter alia* stated that:

"*Your legal representative has asserted that 'there is a real risk' that you would be 'rendered homeless and without healthcare if returned to France' with reference to country of origin information on France, specifically the updated 2023 AIDA report. However, the same report makes clear that while the reception system in France is certainly under pressure, it meets the minimum human rights standards established by the relevant legal instruments and charters. It is therefore not accepted that you would inevitably be homeless with no access to healthcare in violation of you*[r] [sic.] *rights under Articles 3 & 8 ECHR and Article 4 & 7 CFREU*".

94. The Article 17(1) decision (at pages 12 and 13) *inter alia* stated that:

"*In France, Dublin returnees are treated as regular asylum seekers and therefore benefit from the same reception conditions granted to asylum seekers under the regular or the accelerated procedure. The total number of asylum seekers accommodated in these accommodation centres has increased from 98,564 in 2020 to 108,814*

in 2023. Asylum seekers receive an address certificate (Attestation de Domiciliation) which is valid for one year and can be renewed if necessary".

95. The decision (at page 14) *inter alia* stated that:

"*It is relevant that France, unlike Ireland, has signed up to the 2013 Reception Conditions Directive of the European Parliament and has transposed it into domestic French law. The directive ensures that reception conditions for asylum seekers cannot fall below a minimum legal and human rights standard by mandating the following:*

- *That applicants have access to housing, food clothing, healthcare, education for minors and employment (within a maximum period of nine months)*
- *That particular attention is paid to vulnerable persons, especially unaccompanied minors and victims of torture. EU countries must conduct an individual assessment to identify the special reception needs of vulnerable persons and to ensure that vulnerable asylum seekers can access medical and psychological support.*
- *That there ar*[e] [sic.] *rules regarding the detention of asylum seekers and that member states fully consider alternatives to detention in full respect of the fundamental rights of the asylum seeker* [Footnote reference supplied]".

96. Under the sub-heading "*Right to private life under Article 7 CFREU and/or Article 8 ECHR*", the Article 17(1) decision *inter alia* stated that "[i]*t is relevant, therefore, that*

your legal representative has not provided any evidence that your rights under Article 7 CFREU and Article 8 ECHR would be infringed upon were you transferred to France".

97. The observations of Collins J., in the Court of Appeal, in *BK v The Minister for Justice* [2022] IECA 7 at paragraph 48, echoing those of the High Court (Ferriter J.) in that case, are equally applicable when adapted to the facts of this case.

98. Thus, in this case also, it was open to the Minister to exercise her discretion and conclude that the applicant's stated concerns did not provide grounds for exercising the Article 17(1) discretion in his favour. In rejecting the suggestion in *BK* that the Minister wrongly addressed only issues of legal rights and had not assessed the applicant's concerns from a humanitarian perspective, Collins J. also added that the "[a]*rticle 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*". In my view, when that is done in this case, the Minister's decision of 12th February 2024 was lawful and fair in the consideration of the applicant's circumstances.

The giving effect to the Dublin III Regulation

99. Third, a number of different travel arrangements were made for the applicant. On each of these occasions, the prescribed form for the transfer of data, pursuant to Article 31(4) of the Dublin III Regulation, was sent to the French authorities and each reflected the evolving circumstances regarding the applicant's transfer.

100. On 17th January 2024 at 12:38, the Irish authorities had emailed their French counterparts and despatched the requisite completed Annex VI "*Standard form for the transfer of data prior to a transfer pursuant to Article 31(4) of Regulation (EU) 604/2013*" and, in addition, provided a laissez-passer in relation to the applicant.

101. The first such arrangement was booked for 1st February 2024, but as the applicant failed to present at Dublin Airport on that date, as directed, the transfer could not proceed as scheduled.

102. The digital dates on the standard form for the transfer of data prior to transfer pursuant to Article 31(4) of Regulation (EU) 604/2013 reflected the date on which the actual form was downloaded and invariably in each of the forms this was recorded as "*Date:- 2023.12.13*".

103. Therefore, attempts were made on 17th January 2024 to transfer the applicant on 1st February 2024 to Charles de Gaulle airport in Paris. A similar attempt was made (via boat) on Thursday 25th January 2024 and Thursday 8th February 2024 – on this occasion, the French authorities said that they could not accept the transfer in Cherbourg as there were no border police available in Cherbourg.

104. Subsequently, by email dated Monday 12th February 2024, sent at 11:52, arrangements were made for the transfer of the applicant from Dublin airport to Charles de Gaulle airport in Paris. As mentioned, the applicant was transferred to France on 13th February 2024.

105. Of particular relevance in this regard was the completion of the "*Annex IX, Standard Form for Exchange of Health Data prior to a Dublin Transfer pursuant to Article 32(1) of Regulation (EU) 604/2013 (Common Health Certificate*)" ("the Annex IV document" or "common health certificate") which is a prescribed form annexed (at Annex IX) to Commission Implementing Regulation (EU) No.118/2014 (of 30th January 2024).[11]

106. In relation to this applicant, under sub-heading (I) of the Annex IX document "*Information provided by the transferring Member State*", the general evaluation of the person's health is set out and a box was ticked which indicated that the applicant was suffering from a psychiatric condition and under the sentence stating "*please specify whether the evaluation was based on the person's self-assessment or provided by medical staff*", the answer was given: "*suicidal tendency*" "*(information given by medical staff)*". The applicant's solicitor raised in her second Affidavit whether this was a reference to Dr. Giller's medical report, and it was confirmed on behalf of the Minister that it was.

107. Under the box which referred to "*Medical diagnosis (if applicable)*" and to specify the treatment and medication, the answer was given "*no*". Further, the sub-heading which addresses – "*specify whether treatment needs to continue upon arrival in the responsible Member State*" – was left uncompleted.

[11] Commission Implementing Regulation (EU) No.118/2014 amends Regulation (EC) No 1560/2003 laying down detailed rules for the application of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national.

108. Under sub-heading (II) of the Annex IX document – "*Information relevant during the transfer*" – the information in relation to whether "*the person is accompanied/assisted during the transfer*", was completed by ticking the box that said – "*by a security personnel*". The box which addressed "*Medical intervention/assistance required during the transfer*" was ticked "*no*". The box which stated that "*If the person is subject to medication which might influence/alter the state of the person during the transfer*" was also ticked "*no*".

109. Under sub-heading (III) of the Annex IX document – the form set out the consideration to be taken into account upon arrival and the question which asked, whether medical assistance or assistance for special needs was required upon arrival, was ticked "*no*".

110. Under sub-heading (IV) of the Annex IX document – the standard form referred to the "*Explicit consent of the person transferred or of his/her representative for the transmission of the health information*" – this was completed by ticking the box "*yes, by representative of the person concerned*".

111. These matters are further addressed in the second Affidavit of Ms. Elaine Houlihan, Assistant Principal Officer in the Repatriation Division of the Department of Justice, sworn on 24th May 2024. She states, for example, that Dr. Giller's report had outlined the applicant's psychiatric condition to the Minister and further at paragraphs 7-11 avers as follows:

> "*(7) In the report of Dr. Giller dated 30th January 2024 she states that she first saw the Applicant in April 2023… and she outlined a*

diagnosis of severe symptoms of complex PTSD and general anxiety disorder. The report did not outline any specific medication or treatment which was required by the Applicant on an ongoing basis.

(8) In this instance, the Minister was not put on notice of any specific ongoing treatment plan or medical intervention or assistance that would be required on arrival other than to notify the French authorities that he had a psychiatric condition and had a suicidal tendency.

(9) This notification was done by way of the Article 32(1) Common Health Certificate-Standard form for exchange of Health data (Exhibit EH5) which set out that the Applicant was suffering from a psychiatric condition namely suicidal tendency as was indicated in the report of Dr. Giller dated 30th January 2024. The reference to medical staff is a reference to Dr. Giller. There was no information put into the form about any treatment or any medication required because none had been indicated to the Minister.

(10) The Applicant's Solicitor appears to conflate the need for GNIB escorts with the need for ongoing medical assistance. While the communication of the 9th February 2024 from the Dublin Transfer Unit of the Department (exhibit EH2) did suggest that he was being escorted by the Garda Síochána because of his psychiatric condition, this was in fact incorrect. The Applicant was escorted as a result of the risk of absconding and the violent behaviour exhibited by the Applicant in the course of his arrest as outlined in the Affidavit of Donal Ryan sworn on 9th April, 2024. Had it been considered that his

mental health posed a risk on the transfer then a mental health professional would also have been accompanying him.

(11)….by letter dated the 31 January 2024, as exhibited to the Third Affidavit of Ms. Stamatescu, the Applicant's then Solicitors did "demand immediate proof of compliance" with Articles 31 and 32 which was understood by the Department to constitute the necessary consent to the sharing of information in accordance with those articles".

112. As set out above, under sub-heading (IV) of the Annex IX document, reference is made to the "*Explicit consent of the person transferred or of his/her representative for the transmission of the health information*", and the answer given is "*Yes, by representative of the person concerned*". The applicant's solicitor raised a query over this answer in her third Affidavit and was informed that this confirmation was contained in the pre-action letter prior to the challenge to the "*Article 17*" decision. On behalf of the applicant it was submitted, at the hearing before me, that the pre-action letter demanded proof that the health certificates had been complied with in accordance with Articles 1 and 32 of the Dublin III Regulation and it is contended that it did not amount to 'consent' being furnished on behalf of the applicant.

113. I am of the view, however, that it was open to the Minister, as set out in the second Affidavit of Ms. Elaine Houlihan sworn on 24th May 2024 to consider the pre-action

letter, sent on behalf of the applicant, as the furnishing of consent on behalf of the applicant. [12]

114. There is, therefore, no basis for seeking to impugn the Common Health Certificate under Annex IX or any of the completed forms or process, which dealt with the transfer of data, including in particular health data, prior to a transfer pursuant to Article 31(4) of the Dublin III Regulation. Furthermore, even if there was an infirmity in the documentation completed (and in my view there was no such infirmity), Article 32(6) of the Dublin III Regulation provides that, "*the rules laid down in Article 34(8) to (12) shall apply to the exchange of information pursuant to this Article*", which involves 'notification' that information is inaccurate and 'correcting' or 'erasing' such information.[13]

115. Additionally, in relation to the applicant seeking an order in these proceedings that he be returned to Ireland pursuant to Article 29(3) of the Dublin III Regulation, whilst Mr. Dornan BL submits that there is no authority dealing with "*the outworkings of Article 29(3)*" and that it is a matter for "*first impression*" by any court, I have determined in these proceedings that the applicant was not "*transferred erroneously*" and the relief sought in relation to Article 29(3) is necessarily claimed by the applicant

[12] Further, Article 32(2) of the Dublin III Regulation also *inter alia* provides that "*The lack of consent, including a refusal to consent, shall not constitute an obstacle to the transfer.*"

[13] In *BS & RS v The Refugee Appeals Tribunal & Ors* [2019] IESC 32, the Supreme Court (with judgments delivered by Dunne J. and Charleton J.) determined in that case that there has been no breach of Article 34(4) or Article 34(2) of the Dublin III Regulation in relation to the sending of fingerprints of the appellants to the UK with the relevant information requests and that the question of the erasure of any data processed in breach of the Regulation pursuant to Regulation 34(9) did not arise.

in the Amended Statement of Grounds, and in the arguments made during the hearing on his behalf, as a *consequential order* which is conditional upon the applicant succeeding in the primary reliefs sought.

116. Further, Article 29(3) of the Dublin III Regulation addresses transfers under Article 29 in the context of *modalities* and *time limits* and provides – under the particular circumstances prescribed by Article 29 – that "[i]*f a person has been transferred erroneously or a decision to transfer is overturned on appeal or review after the transfer has been carried out, the Member State which carried out the transfer shall promptly accept that person back.*" In this case the applicant was transferred to France on 13th February 2024 (*i.e.*, before 19th or 20th February 2024).

117. At paragraphs 2 and 3 of her judgment refusing the applicant's application for an injunction, Hyland J. in *RG v The IPAT & Ors (No.1)* [2023] IEHC 742 observed that the relevant date was six months from the final decision of the IPAT, being either 19th or 20th February 2024 and concluded that any court-ordered stay or injunction on the transfer decision would not stop the six month time limit running from the date of the IPAT decision because Articles 27 and 29 of the Dublin III Regulation set out a self-contained regime that provides both for an effective remedy and time limits within which a transfer must take place.

118. Consistent with the views expressed by Hyland J. in *RG (No.1)*, some months later, the subsequent decision of the CJEU in Case C-359/22 *AHY v Minister for Justice* ECLI:EU:C:2024:334, delivered on 18th April 2024, (arising from an Article 267 TFEU preliminary reference from the High Court (Ferriter J.) on a number of

questions in relation to the exercise of the ministerial discretion in Article 17 of the Dublin III Regulation in the context of Articles 17, 27, 29 and 47 of the CFREU), the CJEU addressed Article 17 of the Dublin III Regulation in the context of a Somali national and confirmed that asylum-seekers did not have an EU law right to bring a legal challenge against a Member State's decision not to exercise that option, because it was wholly discretionary and neither did the EU Charter confer a right to challenge such decisions, or to suspend or stay their implementation. The CJEU held that the time limit to carry out a transfer ran from the time another Member State accepted it, or an appeal with suspensive effect was rejected, and did not run from the date of refusal to trigger Article 17 of the Dublin III Regulation.

119. In the hearing before me, the applicant was, therefore, left to contend that the extension of time provisions in Article 29 *could have been* invoked if he had been deemed by the Irish authorities to be an 'absconder'. The response on behalf of the Minister was that at no stage was the applicant deemed to be an absconder. Ms. Elaine Houlihan had referred to 'the risk' of absconding as the applicant did not turn up for his flight on 1st February 2024 but thereafter the applicant was in fact transferred to France on 13th February 2024.[14]

[14] While not directly relevant to the facts of the proceedings before me (and not argued but simply referred to in the closing arguments made on behalf of the Minister), by way of *obiter dictum*, I note that in Case C-163/17, *Abubacarr Jawo v Bundesrepublik Deutschland*, ECLI:EU:C:2019:218, in the context of a case where the transfer could not be carried out, the CJEU *inter alia* held that the reference to 'absconding' within the meaning of the second sentence of Article 29(2) of the Dublin III Regulation, meant that an applicant 'absconds' where he deliberately evades the reach of the national authorities responsible for carrying out his transfer, in order to prevent the transfer and that Article 27(1) of the Dublin III Regulation must be interpreted as meaning that, in

120. Turning to a separate issue, on behalf of the Minister, it is pointed out that the applicant's case, as pleaded, was that he was transferred to France without his health data being provided to the French authorities, as per the requirements in Article 31 of the Dublin III Regulation and, as I have set out in this judgment, that data was in fact submitted to the French authorities. The point is made that the legal argument presented on behalf of the applicant, at the hearing before me, went beyond that which was pleaded and was to the effect that the Minister had transferred the applicant to France, but had failed to send the reports of Dr. Giller with the common health certificate and that this point could not be 'pleaded', as the applicant's lawyers only received that information when the Minister furnished her Amended Statement of Opposition and verifying Affidavits.

121. It is well-settled that in a judicial review application, the Statement of Grounds (as amended in this case) and the Statement of Opposition (as also amended) fixes the issues between the parties. This issue in relation to the furnishing of Dr. Giller's reports was not in fact pleaded.[15]

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proceedings brought against a transfer decision, the person concerned may rely on Article 29(2) of that regulation by claiming that, since he had not absconded, the six-month transfer time limit had expired.

[15] *AP v Director of Public Prosecutions* [2011] IESC 2; [2011] 1 I.R. 729; *Reid v An Bord Pleanála (No.7)* [2024] IEHC 27 per Humphreys J. at paragraphs 48 to 58; *Environmental Trust Ireland v An Bord Pleanála & Others* [2022] IEHC 540 per Holland J. commencing at paragraph 211; *Concerned Residents of Treascon and Clondoolusk v An Bord Pleanála & Ors* [2024] IESC 28 per Murray J. at paragraphs 41, 42 and 43. These principles apply to both the Statement of Grounds and to the Statement of Opposition and I have not considered any observations on Dr. Giller's reports made during the hearing other than those set out in the Amended Statement of Opposition and affidavits filed on behalf of the Respondents.

122. Further, Article 32 of the Dublin III Regulation is "[f]*or the sole purpose of the provision of medical care or treatment*", and in this case Dr. Giller's reports do not provide any details of specific ongoing medical care or treatment.

123. In addition, the information which was provided in the Common Health Certificate (as set out earlier in this judgment) *did convey* to the French authorities that the applicant was suffering from a psychiatric condition, namely suicidal tendency.

The argument in relation to the application of "the Carltona principle"

124. Fourth, the Minister's Article 17(1) decision dated 12th February 2024 was entitled "*Decision of the Minister for Justice in regard to* [the] *exercise of discretion in accordance with Article 17(1) of Regulation (EU) No.604/2013*" and was signed by Luke Dineen, Officer of the Minister, Dublin Unit, International Protection Office.

125. The applicant contends that Mr. Dineen did not have the authority to make this Article 17 decision arising from the application of the judgment of the English & Welsh Court of Appeal in *Carltona Ltd. v Commissioners of Works* [1943] 2 All E.R. 560. The *Carltona* judgment has been applied in this jurisdiction in a number of Superior Court decisions,[16] and is the seminal authority addressing the constitutional status of the 'executive' decision-making relationship between civil servants and the relevant Minister.

[16] These authorities are set out in the judgment of the Supreme Court (MacMenamin J.) in *ASA v Minister for Justice & Equality* [2022] IESC 49.

126. Similar to the argument made by Mr. Dornan BL (for the applicant) in this case, it had been argued in the *Carltona* case that an order for the requisition of a factory under the Defence (General) Regulations 1939, which was to be made by the Commissioners of Works in England, should have been made by a commissioner 'personally'. The First Commissioner of Works was in fact the Minister of Works and Planning and the decision was made by that departmental or ministerial Assistant Secretary on behalf of the Commissioners of Works. It was argued that this was unlawful and that application of the principle of *delegatus non potest delegare* meant that as a holder of a delegated power, the Minister could not himself delegate its use. However, Lord Greene MR rejected this argument and the following quoted extract has become known as the *Carltona principle* and has been applied throughout common law jurisdictions, including Ireland:

> "*In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them. To take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministers. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is*

responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer for that in Parliament. The whole system of departmental organisation and administration is based on the view that ministers, being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them."

127. It has been observed that the *Carltona* judgment establishes the (constitutional) principle that a decision made on behalf of a minister by one of her officials is constitutionally the decision of the Minister herself. It is, accordingly, not one of agency (as that term is understood in private law) and nor is it, strictly speaking, one of delegation, since a delegate is a person who exercises the powers delegated to him or her in their own name, whereas in this case, the action of the official was not a 'delegated' act, it was, rather, a ministerial act: see the similar observations of Hamilton CJ. in *Devanney v Shields* [1998] 1 I.R. 230 (see also *R (Bourgass & Anor) v Secretary of State for Justice* [2015] UKSC 54 per Lord Reed at paragraphs 48-51; see the application of *Carltona* in *In re Golden Chemicals Products Ltd* [1976] Ch 300; *R v Secretary of State for the Home Department, ex p. Oladehinde* [1991] 1 AC 254; see also the discussion of the *Carltona* principle and questions surrounding its continued applicability in the judgment of Lord Kerr in *R v Adams* [2020] UKSC 19).

128. In *NVU v Refugee Appeals Tribunal* [2020] IESC 46 Charleton J. (with whom Clarke CJ., O'Donnell, MacMenamin and O'Malley JJ. agreed), held that the discretion in Article 17(1) of the Dublin III Regulation was exercisable by, and only by, the Minister and not the IPO (who was responsible for determining the Member State responsible under the criteria in Chapter III of the Dublin III Regulation) and on appeal, the IPAT: see also the discussion of these matters in the earlier decision of the Court of Appeal in *TAO v Minister for Justice and Equality* [2021] IECA 293 and by the High Court in *AHY v The Minister for Justice* [2022] IEHC 198. As the IPAT has no appellate jurisdiction from a ministerial decision taken pursuant to the exercise of an Article 17(1) discretion, an application for judicial review pursuant to O. 84 RSC 1986 is the appropriate remedy to seek, when challenging an Article 17(1) decision.

129. The Article 17 decision in this case was taken by a civil servant acting under ministerial authority, in much the same way that in *Carltona*, private property had been requisitioned by a civil servant acting under the authority of the Minister pursuant to war-time regulations. As with *Carltona*, the Minister here had not taken the decision personally, but the observations of Lord Greene (set out earlier) equally apply to the decision in this case. In *Carltona Ltd v Commissioners of Works* [1943] 2 All E.R. 560 at 563, Lord Greene M.R. had rejected the argument that the decision to requisition the property was invalid because the Minister had not 'personally' made the decision, observing that in the administration of government "*the functions which are given to ministers...are functions so multifarious that no minister could ever personally attend to them. To take the example of the present case, no doubt there have been thousands of requisitions in this country. It cannot be supposed that this regulation meant that, in each case, the minister in question should direct his mind to*

the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of ministers by responsible officials of the department. Public business could not be carried on if that were not the case."

130. The ministerial decision here was made by a departmental official on her behalf – in this case, Mr. Dineen. It was not a decision made by the IPO as one of the range of decisions that the IPO makes as part of the statutory process and which then can be appealed to the IPAT. While reference to the 'International Protection Office' can lend to some confusion, Mr. Dineen's involvement was on behalf of the Minister, *i.e.*, as an officer of the Minister.

131. Given the range of executive responsibilities the Minister for Justice has, it would be impossible in practice for her to carry out all the legal duties required of her. The application of the *Carltona* principle recognises the similar nature of the functional challenges of executive government (and discretionary decision-making powers) in Ireland and the UK and, by analogy, Ireland has adopted the structural architecture of the Ministers and Secretaries Act 1924 (as amended) where, for such purposes, civil servants and their departmental ministers have no separate legal identity (section 2 of the Ministers and Secretaries Act 1924 provides for the designation of ministers as corporations sole). Accountability is maintained through the 'chain of authority': civil servant to Minister, and Minister to Dáil Éireann. Whilst the *Carltona* principle can be defeated expressly or impliedly by statutory language (as per the decision of the Supreme Court (MacMenamin J.) in *WT v Minister for Justice* [2015] IESC 73; [2015] 2 I.L.R.M. 225 per MacMenamin J. at paragraph 3; the decision of the High Court in *LAT & Ors v Minister for Justice and Equality & Ors* [2011] IEHC 404 per

Hogan J. at paragraph 7), there is no such statutory preclusion here nor is there language used to indicate that the Minister must make the decision 'personally'.

132. In the circumstances, therefore, I refuse the applicant's application for relief by way of judicial review.

PROPOSED ORDER

133. I shall make an order refusing the applicant's application for the reliefs claimed by way of judicial review set out in the Amended Statement of Claim dated 8th March 2024.

134. I shall put the matter in for mention on Wednesday 23rd October 2024 at 10:30 to address the question of costs and any ancillary or consequential matters which arise and, in the event that any party wishes to do so, written submissions to a maximum of 1,500 words can be exchanged and filed on or before 16:30 on Wednesday 16th October 2024 to address the question costs and any ancillary or consequential matters.