R (on the application of RM) v Secretary of State for the Home Department (Dublin; Article 27(1); procedure) [2017] UKUT 00260 (IAC)

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of
RM

Applicant

v

Secretary of State for the Home Department

Respondent

Decision of Upper Tribunal Judge O'Connor:

The application for judicial review is GRANTED

On this application for judicial review following consideration of the documents lodged by the parties and having heard Mr R Toal, instructed by Wilson Solicitors LLP, on behalf of the applicant and Ms C Rowlands, instructed by the Government Legal Department, on behalf of the respondent, at a hearing on 24 March 2017.

(1) The scope of a challenge to a transfer decision brought, pursuant to art. 27 of Regulation 604/13 (Dublin III), on the basis that the decision infringes the second subparagraph of art. 19(2) of Dublin III is limited to 'traditional' public law grounds.

(2) Section 15(5A) of the Tribunals, Court and Enforcement Act 2007 applies to applications for judicial review, in which the application for permission to bring such proceedings was received by the Upper Tribunal on, or after, 8 August 2016.

Anonymity Direction

I make an anonymity order, pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Unless the Upper Tribunal or other appropriate Court or Tribunal orders otherwise, no report of these proceedings or any form of

publication thereof shall directly or indirectly identify the applicant. This prohibition applies to, amongst others, all parties and their representatives.

DECISION AND REASONS

Introduction

(1) This is a decision on an application for judicial review lodged on 5 April 2016 and brought with the permission of Upper Tribunal Judge Coker (23 November 2016).

(2) There are two decisions under challenge. The first ("the transfer decision") is a decision taken by the Secretary of State for the Home Department ("SSHD") on 30 November 2015 (but not served until 23 March 2016), which displays the following features:

(i) Notification to the applicant that the Secretary of State has declined to examine her asylum application;

(ii) Certification of the aforementioned asylum application, pursuant to paragraphs 4 and 5 of Part 2 of Schedule 3 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004; and

(iii) Identification of the Secretary of State's intention to remove the applicant to France (the applicant not being a citizen of France, but a citizen of the Democratic Republic of the Congo).

(3) The second decision is dated the 22 March 2016 (served on 23 March 2016) and headed "Removal Directions". This decision provided notice to the applicant that her removal to France was to take place on the 6 April 2016.

(4) Centre stage in these proceedings is Council Regulation (EC) No 604/2013 ("Dublin III"). The cornerstone of the applicant's challenge is underpinned by two matters:

(i) The applicant's factual assertion that, having made an application for asylum in France (in April 2013), she subsequently left the territory of the Member States of the European Union ("EU") and, thereafter, resided outwith the EU for a period exceeding three months prior to re-entering (the point of re-entry being the United Kingdom); and,

(ii) That the SSHD had misrepresented the position to the French authorities by stating that the applicant had not asserted that she had left the territory of the Member States, subsequent to making her asylum application in France.

Factual Matrix

(5) The facts underlying the challenge by the applicant are essentially uncontroversial, save in the limited respect identified in paragraph 4(i) above.

(6) The applicant is a national of the Democratic Republic of Congo ("DRC"), born in 1979. She claimed asylum in France on 23 April 2013 and was then fingerprinted. She asserts that she is a victim of trafficking. The applicant claims to have left France and returned to the DRC on 22 December 2014, as a consequence of her asylum claim having been refused. She further asserts that she left the DRC on 10 May 2015 and travelled to the United Kingdom.

(7) The SSHD does not believe the applicant's claim to have left France, travelled to the DRC and to have thereafter travelled from the DRC to the United Kingdom. What is beyond dispute is that the SSHD has no record of the applicant's arrival in the United Kingdom and that the applicant claimed asylum on 27 October 2015 at Bourneville police station.

(8) A check had been undertaken on the EURODAC database and in consequence the SSHD ascertained that the applicant had previously claimed asylum in France.

(9) In an "*Initial Interview*" which took place around midday on 28 October 2015 the applicant stated, *inter alia*, that she arrived in the United Kingdom on 25 October 2015, having left DRC on 24 October 2015. She had then travelled from DRC to an unknown destination using Air Ethiopia, changed planes and thereafter travelled to the UK.

(10) During a "*Third country case – travel history interview*", also conducted by the SSHD on 28 October 2015 (starting at 19.00 hours), the applicant was notified of the outcome of the search on the EURODAC database and she subsequently accepted that she had claimed asylum in France. The applicant further asserted that: (i) she had stayed in France for eighteen months having arrived there from Greece, (ii) she had thereafter returned to DRC (arriving on 22 December 2014), (iii) she had left the DRC on 10 May 2015 and (iv) that she had travelled directly to the United Kingdom from the DRC using a red passport that had been provided to her by an agent.

(11) On 9 November 2015, the SSHD made a formal request to the French authorities to 'take back' the applicant (pursuant to Article (1)(b) of Dublin III), using the appropriate form (found in Annex III of Commission Implementing Regulation (EU) 118/2014).

(12) The early sections of the completed form are unremarkable, recording the applicant's personal information. However, the same cannot be said of the box headed "*Previous procedures*". In answer to the first question therein (question 12 of the form) the SSHD noted the fact of the applicant's international protection claim in France (made on 23 April 2013) and that it was not known whether a decision had been taken by France on that application.

(13) Question 13 then asks: "*Does the applicant state that he left the territory of the Member States?*" In answer to this the SSHD ticked the box marked "*No*". This, of course, was inaccurate.

(14) The form ends with a blank space headed "*Other useful information*". As completed, this space contains ten paragraphs (albeit some of them being

formed of only one sentence) of information the SSHD presumably thought would be useful to the French authorities. By far the longest of these paragraphs relates to the applicant's travel history. Consistent with the information disclosed in answer to question 13, there is no reference within this section to the applicant's assertion to have left France and to have travelled to the DRC prior to coming to the United Kingdom. The relevant paragraph summarises the travel history provided by the applicant during her "Initial Interview" i.e. that she arrived in the United Kingdom on 25 October 2015 having initially travelled by Air Ethiopia to an underknown destination and thereafter changed planes. However, even this summary omits the applicant's assertion, made during her "Initial Interview" that the aforementioned journey had begun in the DRC.

(15) On 20 November 2015, the French authorities notified the SSHD of their agreement to take charge of the applicant, pursuant to Article 18(1)(d) of Dublin III. Ten days later the SSHD made the decisions under challenge which, as identified above, were not served on the applicant until 23 March 2016.

(16) The applicant's legal representatives served a pre-action protocol on the SSHD, by facsimile on 1 April 2016 (although this letter is dated 4 April the Home Office *"GCID Case Record Sheets"* confirm receipt on 1 April). They annexed documents purportedly supporting the applicant's contention to have left the territory of the Member States for the period claimed. As already identified, these proceedings were issued on the following day. This led to the cancellation of the directions for the applicant's removal.

(17) A response to the pre-action letter was drafted on 15 April 2016 incorporating, *inter alia*, a consideration of the applicant's human rights 'claim'. The following passage of importance is to be found at [11] of this letter:

> "You have stated in your letter that the United Kingdom has made no attempt to inform the French authorities that your client claims to have left France to travel back to Kinshasa in 2014. We have been informed by the French authorities that they are satisfied that your client was in France between December 2014 and January 2015. This implies that your client could not have returned to Kinshasa as she claims."

Immediately thereafter reasons are provided as to why the SSHD maintains the rejection of the applicant's assertion to have returned to Kinshasa as claimed.

(18) It is useful at this stage to set out the file notes made on the SSHD's *"GCID – Case Record Sheet"* on 4 April and 5 April 2016:

> "…04-Apr-2016
>
> In the correspondence from the legal representatives they have stated that we did not inform the French authorities amount [RM] returning to France (sic).
>
> I have checked her TCU Travel History and she has stated that after being in France she flew to Kinshasa and then went from there to the United Kingdom.
>
> Her asylum claim in France is in 2013 she claims she went to Kinshasa in 2014…

…05-Apr-2016

> The applicant stated in her travel history interview that she returned to Kinshasa on 22/12/14 and remained there for four months, but this information was not disclosed to the French authorities when the take back request was made. I spoke to … (Head of Dublin Unit in France) and he informed me that he is satisfied that between December 2014 and January 2015 the applicant was still in France. This implies that she could not have returned to Kinshasa and remained there as she claims. Removal should go ahead as planned."

Grounds

(19) As ultimately formulated the applicant brings two grounds of challenge to the SSHD's decision to transfer her to France, and not to accept that she left the territory of the Member States of the European Union for a period exceeding three months after last being in France. The challenge to the directions for the applicant's removal to France is now academic, given that the applicant was not removed on 6 April. It is also consequential upon the success of the challenge made to the transfer decision.

(20) The first ground brings a challenge to the SSHD's factual conclusion that the applicant did not leave the territory of the Member States of the European Union for a period exceeding three months after last being in France. The applicant's primary case is that the SSHD was wrong in her conclusion in this regard. In the alternative, and as a backstop, it is asserted that such conclusion was irrational. The second ground brings a challenge to the process by which this conclusion was reached.

Legal Framework

Council Regulation No 604/2013 (Dublin III)

(21) Recital 19 to Dublin III provides:

> "In order to guarantee effective protection of the rights of the persons concerned, legal safeguards and the right to an effective remedy in respect of decisions regarding transfers to the member state responsible should be established, in accordance, in particular, with Article 47 of the Charter of Fundamental Rights of the European Union. In order to ensure that international law is respected, an effective remedy against such decisions should cover both the examination of the application of this Regulation and of the legal and factual situation in the member state to which the applicant is transferred."

(22) Given the thrust of the applicant's legal challenge, reference must also be made to Articles 3(1), 3(2), 7, 13(1), 18(1)(d), 19, 23(1), 23(3), 23(4) and Article 27 of Dublin III which provide:

> "CHAPTER II
> **Article 3: Access to the procedure for examining an application for international protection**
>
> 1. Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the

territory of any one of them, including at the border or in the transit zones. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.

2. Where no Member State responsible can be designated on the basis of the criteria listed in this Regulation, the first Member State in which the application for international protection was lodged shall be responsible for examining it.

CHAPTER III

Article 7: Hierarchy of criteria

1. The criteria for determining the member state responsible shall be applied in the order in which they are set out in this Chapter.

…

3. In view of the application of the criteria referred to in Articles 8, 10 and 16, member states shall take into consideration any available evidence regarding the presence, on the territory of a member state, of family members, relatives or any other family relations of the applicant, on condition that such evidence is produced before another member state accepts the request to take charge or take back the person concerned, pursuant to Articles 22 and 25 respectively, and that the previous applications for international protection of the applicant have not yet been the subject of a first decision regarding the substance."

Article 13: Entry and/or stay

1. Where it is established, on the basis of proof or circumstantial evidence as described in the two lists mentioned in Article 22(3) of this Regulation, including the data referred to in Regulation (EU) No 603/2013, that an applicant has irregularly crossed the border into a Member State by land, sea or air having come from a third country, the Member State thus entered shall be responsible for examining the application for international protection. That responsibility shall cease 12 months after the date on which the irregular border crossing took place. …

CHAPTER V

Article 18: Obligations of the Member States responsible

1. The Member State responsible under this Regulation shall be obliged to:

…

(d) take back, under the conditions laid down in Articles 23, 24, 25 and 29, a third-country national or a stateless person whose application has been rejected and who made an application in another Member State or who is on the territory of another Member State without a residence document.

Article 19: Cessation of responsibilities

…

2. The obligations specified in Article 18(1) shall cease where the Member State responsible can establish, when re- quested to take charge or take back an applicant or another person as referred to in Article 18(1)(c) or (d), that the person concerned has left the territory of the Member States for at least three months, unless the person concerned is in possession of a valid residence document issued by the Member State responsible.

An application lodged after the period of absence referred to in the first

subparagraph shall be regarded as a new application giving rise to a new procedure for determining the Member State responsible. …

CHAPTER VI

Article 22 : Replying to a take charge request

1. The requested Member State shall make the necessary checks, and shall give a decision on the request to take charge of an applicant within two months of receipt of the request.
2. In the procedure for determining the Member State responsible elements of proof and circumstantial evidence shall be used.
3. The Commission shall, by means of implementing acts, establish, and review periodically, two lists, indicating the relevant elements of proof and circumstantial evidence in accordance with the criteria set out in points (a) and (b) of this paragraph. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 44(2).
   (a) Proof:
   (i) this refers to formal proof which determines responsibility pursuant to this Regulation, as long as it is not refuted by proof to the contrary;
   (ii) the Member States shall provide the Committee provided for in Article 44 with models of the different types of administrative documents, in accordance with the typology established in the list of formal proofs;
   (b) Circumstantial evidence:
   (i) this refers to indicative elements which while being refutable may be sufficient, in certain cases, according to the evidentiary value attributed to them;
   (ii) their evidentiary value, in relation to the responsibility for examining the application for international protection shall be assessed on a case-by-case basis.
4. The requirement of proof should not exceed what is necessary for the proper application of this Regulation.
5. If there is no formal proof, the requested Member State shall acknowledge its responsibility if the circumstantial evidence is coherent, verifiable and sufficiently detailed to establish responsibility.

Procedures for take back requests

Article 23: Submitting a take back request when a new application has been lodged in the requesting Member State

…

4. A take back request shall be made using a standard form and shall include proof or circumstantial evidence as described in the two lists mentioned in Article 22(3) and/or relevant elements from the statements of the person concerned, enabling the authorities of the requested Member State to check whether it is responsible on the basis of the criteria laid down in this Regulation.

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. …

Charter of Fundamental Rights ("the Charter")

(23) Article 47 of the Charter provides, in relevant part:

> "**Article 47: Right to an effective remedy and to a fair trial**
>
> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a Tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial Tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. …"

GROUND 1

The parties' respective cases

(24) As identified above, by her first ground the applicant brings direct challenge to the SSHD's factual conclusion that she did not leave the territory Member States of the European Union for a period exceeding three months after last being in France. The applicant's primary case is that the SSHD was wrong in the conclusion she reached. In the alternative, and as a backstop, it is asserted that such conclusion was irrational.

(25) The intertwining elements underpinning the former assertion are conveniently précised in paragraph 25 of Mr Toal's skeleton argument:

> "The A's case is that the remedy provided by Article 27(1) requires the Tribunal in these proceedings:
>
> a. to determine whether, as a matter of fact, the A left the territory of the Member States for more than three months, i.e. between December 2014 and May 2015; and
>
> b. to decide that issue on the basis of the evidence placed before the Tribunal, including evidence that was not before the Secretary of State when she made her decision."

(26) The underlying rationale deployed by Mr Toal in support of the submissions identified above can be summarised thus:

(i) There is no obstacle as a matter of principle or law to the Tribunal determining factual and legal issues in the context of a judicial review (R (A) v Croydon London Borough Council 1 WLR 2557);

(ii) A plain reading of Article 27(1) of Dublin III leads to the inexorable conclusion that the Tribunal is obligated to review the legal and factual basis of the SSHD's conclusion that the applicant had not left the territory of the EU Member States for a period exceeding three months;

(iii) Article 47 of the Charter of Fundamental Freedoms of the EU protects the applicant's right to an effective remedy. The right to an effective remedy prohibits the application of procedure rules and rules of evidence that render virtually impossible or excessively difficult the exercise of rights conferred by Community law. A rule excluding reliance by the applicant on post decision evidence would make it excessively difficult for her to secure her Community law rights.

(iv) Whilst Article 7(3) of Dublin III imposes restrictions on evidence that may be considered in certain circumstances, those circumstances do not extend to an assessment under Article 19(2).

(v) The issue of whether the applicant left the territory of the Member States for more than three months prior to entering the UK is one of precedent fact (see Article 19(2));

(vi) Dublin III specifies clear and objective criteria by which decisions as to the Member State responsible are to be made. They are not criteria that include or depend on the opinion or judgment of a particular authority. The issue is whether the applicant has been absent from the EU for at least three months, not whether she has been absent for more or less than three months in the SSHD's opinion. There is therefore no room for any deference to be given to a particular authority.

(vii) Requiring the Tribunal to consider the best and fullest evidence would promote the objective of effective implementation of European Union law expressed in Article 197(1) of the Treaty of the Function of the European Union;

(viii) If the applicant is unable to establish that the UK is responsible for her asylum claim and she is returned to France then Directive 2013/32/EU (the Recast Procedures Directive) will apply in such circumstances. Given that her asylum application has already been refused in France, a further protection application might be treated as inadmissible.

(27) The SSHD responded on this ground as follows:

(i) It is accepted that Article 27(1) of Dublin III is on its face, and read in isolation, opaque.

(ii) Reading Dublin III as a whole and in light of relevant case law, the Tribunal should determine this application for judicial review on the basis of traditional public law principles, not undertaking a re-assessment of the relevant facts either on the basis of the information that was before the SSHD or on the basis of information that had not been produced to the SSHD at the date she made her decision[1].

(iii) It is Article 7(3) of Dublin III and not Article 27 thereof that dictates what

[1] A submission made orally. At paragraph 34 of the Detailed Grounds of Defence the SSHD had previously submitted that: *"The Tribunal can make its own decision on the evidence that was before the decision maker."*

evidence the Court or Tribunal can look at in its consideration of the application of Article 18(1)(d) and Article 19;

(iv) The overarching objective of the Dublin system is to speed up the handling of claims in the interests of both asylum seekers and participating states (see Ghezelbash Case C-63/15; [2016] 1 WLR 3969);

(v) The essence of the principle of effectiveness required by European Union law is that national law should not make it *"practically impossible or excessively difficult"* for a person aggrieved to exercise European Union law rights (see Unibet [2007] ECR I-2271 at [4]);

(vi) Once responsibility has been accepted, there is no ongoing right in the context of Dublin III for the applicant to seek to provide further evidence, or any obligation on the SSHD to consider it (see AA (Somalia) v SSHD [2006] EWCA Civ 1540 at [23] to [27]);

(vii) Article 27 of Dublin III is, in any event, limited by what is said in Article 22 thereof as to the type of evidence that can be taken account of when consideration is being given to the determination of the Member State responsible – Article 22, in combination with Annex II of Commission Implementing Regulation No. 118/2014, lists exhaustively the type of evidence that is capable of being probative and indicative;

(viii) Even on the evidence now produced by the applicant, she cannot establish that she left the territory of the Member States of the European Union for the period asserted or at all.

Conclusions and Reasons - Ground 1

(28) Article 3 of Dublin III dictates that, *"Member states shall examine any application for international protection"*. The objective of Dublin III is to establish a clear and workable method based on objective, fair criteria both for the Member States and for asylum seekers for determining the Member State responsible for examining an asylum application. In practical terms, the overarching objective of the Dublin system is to speed up the handling of asylum applications in the interests of both asylum seekers and participating states (R (NS (Afghanistan)) v SSHD [2013] QB 102).

(29) In furtherance of its overarching objective, Dublin III restricts examination of an asylum application to one EU member state – the responsible state being determined by the application of the criteria set out in Chapter III thereof. Chapter III contains criteria for determining the member state responsible and the hierarchy of those criteria, the starting position being that the member state the asylum seeker first entered is responsible for determining the asylum application.

(30) By the second subparagraph of Article 19(2) of Dublin III (found in Chapter V thereof) an asylum application lodged in a member state by an asylum seeker who has been absent from the territory of the Member States for at least three months, shall be regarded as a new application giving rise to a new procedure

for determination of the member state responsible.

(31) A significant feature of Dublin III, which was not present in its predecessors, is found in Article 27; the provision of a right for an asylum seeker to challenge a transfer decision in a court or tribunal.

(32) In Ghezelbash the CJEU concluded that Article 27(1) must be interpreted as meaning that an asylum seeker is entitled to plead, in an appeal or review against a transfer decision, the incorrect application of one of the criteria for determining responsibility laid down in Chapter III of Dublin III. It had not been permissible under Dublin II to challenge the equivalent provisions therein (Abdullahi v Bundesasylamt [2014] 1 WLR 1895 (CJEU)).

(33) In its later decision of Karim v Migrationverket [2017] 1 C.M.L.R. 7, the Grand Chamber, when faced with a factual scenario akin to that in the instant case, concluded:

> "[26] … in order to satisfy itself that the contested transfer decision was adopted following a proper application of the process for determining the Member State responsible laid down in that regulation, the court dealing with an action challenging a transfer decision must be able to examine the claims made by an asylum applicant who invokes an infringement of the rule set out in the second subparagraph of art. 19(2) of that regulation.
>
> [27]… an asylum applicant may, in an action challenging a transfer decision made in respect of him, invoke an infringement of the rule set out in the second subparagraph of art. 19(2) of that regulation."

(34) The first issue for determination in the instant proceedings is the scope of the remedy to be afforded to the applicant.

(35) The applicant's case, put in its simplest form, is that Article 27(1) of Dublin III makes mandatory the requirement for a court or tribunal charged with determining a challenge to a transfer decision to establish for itself the relevant facts underpinning such decision and that it must do so based on all of the evidence before it, even if that evidence was not available to the primary decision maker (the SSHD in the instant case) when the transfer decision was made.

(36) Article 27(1) of Dublin III must be read in light of recital 19, which identifies that an "*effective remedy in respect of decisions regarding transfers to the member state responsible should be established, in accordance, in particular, with Article 47 of the Charter of Fundamental Rights of the European Union.*" Taken together Article 27(1) and recital 19 are intended "*to ensure, in particular that the criteria for determining the member state responsible laid down in Chapter III of the Regulation are correctly applied*" (Ghezelbash at [44]).

(37) Broken down into its component parts, Article 27(1) makes obligatory the provision by Member States of a mechanism for asylum applicants to challenge transfer decisions made pursuant to Articles 18(1)(c) or 18(1)(d) of Dublin III. That mechanism of challenge must be: (i) an effective remedy; (ii) before a court of tribunal; (iii) by way of appeal or review; and, (iv) in both fact and in law.

(38) Components (i) and (ii) can be considered together. Although it is for each member state to establish its own system of legal remedies and procedures, EU law requires states to do so in a way that ensures respect for the right to effective judicial protection. The well trodden, and fundamental, principle of effective judicial protection is enshrined Article 47 of the Charter, and reflected in Articles 6 & 13 of the Human Rights Convention (see Tariq v Home Office [2011] UKSC 35).

(39) The irreducible minimum requirements flowing from Article 47 are twofold. The rules governing actions for safeguarding rights which individuals derive from EU law must not: (i) be less favourable than those governing similar domestic actions (the principle of equivalence); and, (ii) must not make it impossible in practice or excessively difficult to exercise rights conferred by EU law (the principle of effectiveness) (see Unibet (London) Ltd v Justitiekanslern (Case C-432/05) [2008] All ER (EC) 453; [2007] ECR I-2271).

(40) It is not asserted, nor could it be, that the principle of equivalence is breached by the remedy (judicial review) the United Kingdom has chosen to put in place for asylum applicant's seeking to challenge a transfer decision made pursuant to Dublin III.

(41) As regards the principle of effectiveness, judicial review is a flexible remedy capable of meeting any demands put upon it (see R v SSHD ex parte Khawaja [1984] AC 74 and R(A) v Croydon London Borough Council [2009] UKSC 8, [2009] 1 WLR 2557). Save in limited circumstances, judicial review of a public authority's decision concerns considerations of whether that decision, or the procedure leading thereto, was irrational, illegal or made in the face of procedural irregularity/procedural unfairness ("traditional judicial review grounds").

(42) Mr Toal submits that in the instant scenario the principle of effectiveness is breached if the Tribunal fails to exercise its jurisdiction so as to encompass within it an independent fact-finding role because, it is said, excluding reliance on post decision evidence would make it excessively difficult for asylum applicants to secure their Community law rights. I reject this submission.

(43) First, albeit in a different scenario, I observe that the European Court of Human Rights has considered the 'effectiveness' of judicial review (in the United Kingdom) as a remedy. In Bensaid v United Kingdom (2001) 33 EHRR 10, a "health" case in which in which it was claimed that removal would breach articles 3 and 8 ECHR, the following was said at [56]:

> "The Court is satisfied that the domestic courts gave careful and detailed scrutiny to claims that an expulsion would expose an applicant to the risk of inhuman and degrading treatment … The Court is not convinced … that the fact that this scrutiny takes place against the background of the criteria applied in judicial review of administrative decisions, namely rationality and perverseness, deprives the procedure of its effectiveness."

(44) Returning to the present context, at the heart of the justification underpinning the claimed requirement for the Tribunal to admit post decision evidence is the

assumption that it is excessively difficult, within the limited timeframe available under the Dublin III regime prior to the transfer decision being made, for asylum applicants to produce the necessary evidence in support of a claim that the second paragraph of Article 19(2)) applies.

(45) I do not accept that such an assumption is justified. There is no evidence before me to support the making of such an assumption and, in reality, each case will be highly fact sensitive. In any event, there are in my conclusion sufficient safeguards in place in the application of traditional judicial review principles, for example the requirement for the decision-making process to be procedurally fair, to lead me to the conclusion that the provision of such a remedy does not, in the present context, breach the principle of effectiveness.

(46) Moving on to components (iii) and (iv) of the remedy set out in Article 27(1), i.e. that it must be in the form of "*an appeal or a review, in fact and in law*", Mr Toal submits that the use of the words "*review... in fact*" denote a requirement for something more than the application of traditional judicial review principles to the factual assessments made by the primary decision maker. Once again, I reject this submission.

(47) On its face the wording of Article 27(1) is clear, a review is an appropriate redress procedure and a full appeal procedure is not required. In my conclusion, the expression "*review…in fact*" says nothing about the intensity or extent of the review that must be put in place by the Member States. It is entirely possible for a court or tribunal to examine (or review) the facts on which the transfer decision was based, without undertaking a primary fact finding exercise for itself.

(48) Although both parties relied upon the terms of Article 7(3) of Dublin III in support of their respective positions as to the intensity of the review to be undertaken by a court or tribunal when consideration is being given to a challenge to the correct application of the second paragraph of Article 19(2), I see nothing in the text of Article 7(3) that materially bears on the issue in this case.

(49) Article 7(3) provides that for the purposes of a consideration of those matters identified in Articles 8, 10 and 16 a Member State can only take account of evidence produced prior to the acceptance of a take back or take charge request; however, no reference is made therein to Article 19(2) and for this reason alone Ms Rowlands' submission as to the relevance of Article 7(3) falls for rejection.

(50) It is the absence of a reference to Article 19(2) within Article 7(3) that Mr Toal relies upon, asserting that such absence is indicative of the fact that there is no temporal restriction on the production of evidence when the application of Article 19(2) is being considered.

(51) Article 7(3) relates only to the procedure, and criteria, to be applied in the consideration of whether to make a transfer decision. As such, even if inference could be drawn from the silence in Article 7(3) as to any temporal restriction on evidence relating to a consideration of Article 19(2) - and I do not accept that it can be – the tentacles of such an inference cannot extend beyond the date of the

transfer decision, as Mr Toal submitted they should.

(52) For all the reasons given above, and having considered Article 27(1) of Dublin III in the context of the wording of the Regulation as a whole, its general scheme, its objectives and its context, I conclude, as Advocate General Sharpston did in Karim (at [AG44]) that the, *"intensity of any appeal or review process is not laid down in the [Dublin III] regulation and must therefore be a matter for national procedural rules..."*.

(53) I am satisfied that adherence of the Tribunal to traditional principles of judicial review does not, either in this case or more generally in challenges brought to decisions made in relation to the second sub-paragraph of Article 19(2), result in a breach of either Article 27 of Dublin III or Article 47 of the Charter.

(54) Anticipating the possibility that the Tribunal would conclude as above, Mr Toal pursued the alternative submission that under 'national procedural rules' there is a requirement for the Tribunal to undertake an independent fact-finding exercise based on all of the evidence before it, including the post decision evidence.

(55) Underpinning this limb of the Mr Toal's submissions is the assertion that the issue of whether the applicant was outside the territory of the Member States for a period exceeding three months prior to entering the United Kingdom is one of precedent fact.

(56) It is uncontroversial that in judicial review proceedings where the challenged power that the decision maker purports to exercise is dependent on the prior establishment of a (precedent) fact, the court will, if called upon to do so in case of dispute, itself rule whether such fact is established to the requisite standard. In doing so it can admit post-decision evidence in so far as it relates to this limited issue (see for example R(A) v Croydon London Borough Council [2009] 1 WLR 2557 (SC)).

(57) On Mr Toal's submission the SSHD's power to make a transfer decision in the context of Dublin III is dependent on the establishment of the fact that the applicant was not outwith the territory of the Member States for a period exceeding three months prior to entering the United Kingdom. Although not determinative of the issue under consideration, it is difficult to comprehend how the existence of a power divested in the SSHD can sensibly be dependent on the prior establishment of a negative.

(58) More significantly, however, is my view that Mr Toal's submission does not align itself with the structure and application of Dublin III. There are three stages to the process leading to a transfer decision, to be undertaken by a member state in which an asylum applicant is present (i.e. the United Kingdom in the instant case).

(59) First, it is for that member state to determine for itself which member state is responsible for considering the asylum applicant's claim. This assessment is to be undertaken based on the criteria in Chapter III of Dublin III. The *"second subparagraph of* [Article] *19(2)* of Dublin III] *establishes the framework within which*

[the] *process* [of establishing the member state responsible] *must be conducted"* (Karim at [23]).

(60) Second, if it is concluded that another member state is responsible, the member state in which the asylum applicant is present may make a take back or take charge request to this second member state (in the instant case, France). After making the necessary checks this second member state (France) must decide either to accept, or reject, the request made of it. A failure to decide within the time limits specified within Dublin III is treated as being "*tantamount to accepting the request*". In the case of dispute between the two member states the matter may be referred to a 'conciliation committee', which will impose a final and irrevocable solution in relation to the disputed issue.

(61) A transfer decision (the third stage) can only be made by the member state in which the asylum applicant is present (the UK) where there has been an actual, or deemed, acceptance by another member state (France) to the take back/take charge request, or if such a solution has been imposed by a conciliation committee.

(62) On this analysis, it is plain that the structure and application of Dublin III does not support the contention that the power of a member state to make a transfer decision is dependent on the prior establishment of the matters identified in Article 19(2); rather, the power to make a transfer decision in relation to an asylum applicant present on the territory of a member state is dependent on the actual or deemed acceptance by another member state of a take back/take charge request made in relation to that applicant, or if such a solution has been imposed by a conciliation committee.

(63) In the instant case, there is no dispute that France responded affirmatively to the take back request made by the United Kingdom. Consequently, in conclusion the SSHD had power to make the transfer decision.

(64) For all the reasons given above, I conclude that it is for this Tribunal to determine the challenge made to the lawfulness of the SSHD's transfer decision, on traditional public law principles. For the purposes of ground 1 that requires determination of the issue of whether the applicant has established, on the evidence before the SSHD, that the SSHD's conclusion that she was not outwith the territory of the Member States of the EU for a period exceeding three months prior to her entry into the United Kingdom was irrational, in the *Wednesbury* sense.

(65) I have set out at [9] and [10] above a summary of the discrepant evidence provided by the applicant during the two interviews conducted with her in the UK on the 28 October 2015. The SSHD also had available to her, at the date the transfer decision was made, the acceptance by the French authorities on 20 November 2015 of the take back request made by the SSHD on 9 November 2015.

(66) I conclude, based on the evidence that was available to the SSHD when she made the transfer decision, that such decision was plainly rational.

GROUND 2

The parties' respective cases

(67) Centre stage in ground 2 is the inaccurate information provided by the SSHD in the take back request made to the French authorities on the 9 November 2015. In particular, it is to be recalled that it was incorrectly stated therein that the applicant had not asserted that she had *"left the territory of the Member States"* subsequent to her having claimed asylum in France.

(68) The applicant submits that this is *"a striking failure by the Secretary of State to comply with the procedural requirements of Article 23(4)* [of Dublin III]*"*, the consequences of which are that: (a) the applicant had been deprived of the opportunity for the French authorities to corroborate her account of having left the territory of the member States as claimed; and, (b) the SSHD wrongly attached weight, or irrational weight, to the fact that the French authorities accepted responsibility for taking charge of the applicant's asylum claim, in support of her conclusion that France was the responsible member state.

(69) It is further asserted by the applicant that the Tribunal should disregard, or attach little weight, to the evidence produced by the SSHD of a post-decision exchange between the Dublin Unit in the United Kingdom and the Head of the Dublin Unit in France - there being a dearth of evidence before the Tribunal as to the exact nature of the information that was provided by the United Kingdom authorities during such exchange.

(70) In response, it was accepted by the SSHD, for the first time during oral submissions, that her failure to provide the French authorities with the appropriate information in the request of 9 November 2015 constituted a failure to comply with the requirements of Article 23(4) of Dublin III. It was asserted, however, that this failure should not lead the Tribunal to quash the transfer decision because:

(i) Article 23(4) is not justiciable;

(ii) Dublin III does not identify any consequences of a states failure to comply with the requirements laid down in Article 23(4); and, in any event;

(iii) Given that: (i) the SSHD has now provided the French authorities with the relevant information (which should be inferred from the GCID notes produced to the Tribunal); and, (ii) the French authorities responded to provision of such information confirming that the applicant was in France in December 2014 and January 2015, the failure to comply with article 23(4) is now academic.

Conclusions on Ground 2

(71) I accept, as Ms Rowlands submits, that Dublin III does not provide for any consequences for a failure to comply with the requirements of Article 23(4) in the making of a take back/take charge request. If, however, by submitting that Article 23(4) is not justiciable it is being asserted that the failure to comply with

its requirements is not a matter that can be taken into consideration when determining the lawfulness of the transfer decision, I disagree.

(72) A judicial review of the transfer decision, guaranteed by Article 27(1) of Dublin III (and Article 47 of the Charter), requires an assessment of the lawfulness of the grounds upon which such a decision is taken. This, in my conclusion, must incorporate matters of procedure and those matters which may impact on the probative value to be given to evidence before the decision-maker. The procedural requirement in Article 23(4) falls within this category. Furthermore, as previously identified, the intensity and scope of the appeal or review of a transfer decision is a matter to be determined by national procedures. Taking account of an irrelevant matter, or attaching irrational weight to an aspect of the evidence, in the making of a decision (as Mr Toal puts the applicant's case) clearly fall within the scope of the Tribunal's jurisdiction to determine a challenge to such decision on traditional public law grounds.

(73) In my conclusion, the transfer decision, which is expressed by the SSHD in writing in her decision letter of the 30 November 2015, is legally flawed for the reasons identified by Mr Toal.

(74) The process by which it was reached is flawed by procedural irregularity, that being the failure to comply with the procedural requirement set out in Article 23(4) of Dublin III. Alternatively, and this is the flip side of the same coin, the SSHD's decision letter does not disclose whether the acceptance of responsibility by the French authorities was treated as a relevant matter when the ultimate assessment of whether to make a transfer decision was being undertaken. It is a reasonable inference that it was viewed as supportive of the conclusion that France is the responsible state, and as undermining the applicant's assertions that she had left France and travelled to the DRC as claimed, particularly in the absence of any reasons in the decision letter or a witness statement from the decision maker (or indeed any other relevant Home Office official) bearing on the issue of the relevance attached to the French authorities' acceptance of responsibility.

(75) I further conclude that there can be no question but that the mistake made by SSHD in her take back request was, in its context, of sufficient possible consequence to render the SSHD's subsequent transfer decision unlawful.

(76) Judicial review is, though, a discretionary remedy.

(77) When considering the exercise of discretion, it is important to observe that this is not a case to which section 31(2A) of the Senior Courts Act 1981 ("1981 Act") applies, for the following reasons. Section 84(1) of the Criminal Justice and Courts Act 2015 ("2015 Act") introduced the new section 31(2A) into the 1981 Act. Consequently, the High Court must, save for reasons of exceptional public interest, refuse relief on an application for judicial review if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. This applies to applications for judicial review brought in the Upper Tribunal by virtue of section 15(5A) of the Tribunals Courts and Enforcement Act 2007

("2007 Act")). However, as a consequence of paragraph 6 of The Criminal Justice and Courts Act 2015 (Commencement No. 4 and Transitional Provisions) Order 2016 (SI 2016/717), the requirements set forth in section 15(5A) of the 2007 Act are limited to cases in which the application for permission to bring judicial review proceedings was received by the Upper Tribunal on, or after, 8 August 2016. This is not such a case.

(78) I must, therefore, consider the exercise of my discretion on a basis outwith the regime identified above, and do so by asking myself whether the SSHD would have reached the same decision had she not fallen into error. At this stage of the proceedings the SSHD submits that I should take account of the communication between the UK and French authorities on 4 or 5 April 2016. I agree that this is so. Ms Rowlands asserts that the transfer decision should not be quashed because the error in providing misleading information to the French authorities was rectified in a subsequent communication with the head of the Dublin Unit in France - the French authorities stating that they were satisfied that the applicant had been in France in December 2014 and January 2015. The only information regarding this communication is to be found in a file note on the "*GCID – Case Record Sheet*" dated 5 April 2016 (see [18] above). Reference is also made to the communication in the response to the pre-action protocol letter, of the 15 April 2016 (see [17] above).

(79) Even though only limited information can be gleaned from the Case Record Sheet, and that there is no witness statement from the Home Office official who undertook the abovementioned communication, had this been the only additional evidence relevant to the determination of whether I should exercise my discretion in favour of quashing the SSHD's decision, I would have declined to do so. I can, however, see no reason why account should not also be taken at this stage of all the evidence before me capable of bearing on the SSHD's discretion as to whether to make a fresh transfer decision, should the decision under challenged be quashed, including evidence produced by the applicant. Whilst this evidence is primarily in the form of witness statements, it also includes other 'circumstantial evidence'[2] such as a laissez-passer said to relate to a journey made by the applicant between Kinshasa and Brazzaville on 1 April 2015, which is in the name that the applicant is known to the French authorities by. Although in her skeleton argument Ms Rowlands subjects this evidence to forensic attack there has, thus far, been no rounded assessment of it by the SSHD.

(80) Looking at the evidence in the round and in its proper context i.e. that any decision must be made within the framework established by Dublin III, I conclude that it is appropriate to exercise my discretion so as to quash the transfer decision made by the SSHD, the manifestation of which is reduced to writing in the letter of the 30 November 2015.

(81) This application for judicial review is allowed.

[2] Of the type identified in Annex II of Regulation 118/2014

Order

1. This application for judicial review is allowed;
2. The decision of 30 November 2015 declining to consider the applicant's claim for asylum; issuing a certificate under Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, Schedule 3, paragraph 4 and proposing to remove the Applicant to France is quashed;
3. For reasons given orally – the respondent is to pay 75% of the applicant's costs of, and incidental to, these proceedings, to be assessed if not agreed;
4. There be detailed assessment of the applicant's publicly funded costs;
5. Permission to appeal to the Court of Appeal is refused. The respondent did not seek permission to appeal and, having considered all the circumstances of the case, I conclude that it is not appropriate to grant permission.

Signed:

Upper Tribunal Judge O'Connor