Case No: C4/2014/2829

Neutral Citation Number: [2016] EWCA Civ 166

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT
Ms GERALDINE CLARK (SITTING AS A DEPUTY)
HIGH COURT JUDGE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/03/2016

Before :

LORD JUSTICE LAWS
LORD JUSTICE DAVIS
and
SIR TIMOTHY LLOYD

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Between :

R on the Application of CK (Afghanistan) & Others	**Appellant**
- and -	
The Secretary of State for the Home Department	**Respondent**

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Mr Greg Ó Ceallaigh (instructed by **Samars Solicitors**) for the **Appellant**
Miss Catherine Rowlands (instructed by **The Government Legal Department**) for the **Secretary of State for the Home Department**

Hearing date: 9 February 2016

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Judgment

LAWS LJ:

INTRODUCTION

1. This is an appeal, with permission granted by Sharp LJ on 17 June 2015, against the decision of Ms Geraldine Clark sitting as a Deputy High Court Judge in the Administrative Court on 30 July 2014. The Deputy Judge dismissed the appellants' applications for judicial review brought to challenge the refusal of the Secretary of State to exercise her discretion (as the Deputy Judge put it) under the Dublin II Regulation to allow their asylum claims to be examined in the United Kingdom.

2. The appellants are Sikhs of Afghan nationality. The first and second appellants, born in the 1980s, are man and wife. The third appellant is one of their daughters. Her attributed date of birth is 1 January 2009. They claim to have been victimised by the Taliban in Afghanistan on account of their religion. It is said in particular that the second appellant was raped by members of the Taliban in front of her husband and mother-in-law. The first appellant's father is said to have been murdered, and the first appellant himself kidnapped and only released after payment of a bribe. The Deputy Judge summarised their fortunes after leaving Afghanistan as follows:

> "2… Following a long and difficult journey from Afghanistan, they arrived in France in August 2012 where they were briefly detained and fingerprinted as asylum seekers.
>
> 3. However they chose not to remain in France. The First Claimant had an adult brother and sister living in London who had come to the United Kingdom as refugees some 16 years ago and who are now British citizens. The First Claimant entered the United Kingdom using a false passport and, when his presence in London was discovered on 23 September 2012, he claimed asylum here. He was subsequently joined by the Second and Third Claimants who entered the United Kingdom on 29 October 2012 and immediately claimed asylum here. Around November 2012 the Second Claimant became pregnant with her second child, who was born on 19 August 2013. She discovered that she was pregnant in mid-December 2012. On 16 December 2012 the Claimants moved to accommodation in Bolton."

DUBLIN II

3. The Dublin II Regulation (Council Regulation (EC) No. 343/2003) laid down, in the words of Article 1, "the criteria and mechanism for determining the Member State [of the European Union] responsible for examining an asylum application lodged in one of the Member States by a third-country national". A hierarchy of criteria for determining the responsible Member State is set out in Chapter III (Articles 5 – 14). While the overall aim of the Regulation was to establish an effective regime constituted by these criteria (see in particular Recitals (1), (3) and (4)), provision was made for departures from the regime in certain circumstances. Thus Article 3, which appears in Chapter II ("General Principles"), provides:

> "1. Member States shall examine the application of any third country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one that the criteria set out in Chapter III indicate is responsible.
>
> 2. By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third country national, even if such examination is not its responsibility under the criteria laid down in this Regulation. In such an event, that Member State shall become the Member State responsible within the meaning of this Regulation and shall assume the obligations associated with that responsibility…"

Chapter IV is headed "Humanitarian Clause". Its only content is Article 15, paragraphs (1) and (2) of which provide:

> "1. Any Member State, even where it is not responsible under the criteria set out in this Regulation, may bring together family members, as well as other dependent [*sic*] relatives, on humanitarian grounds based in particular on family or cultural considerations. In this case, the Member State shall, at the request of another Member State, examine the application for asylum of the person concerned. The persons concerned must consent.
>
> 2. In cases in which the person concerned is dependent on the assistance of the other on account of pregnancy or a new-born child, serious illness, severe handicap, or old age, Member States shall normally keep or bring together the asylum seeker with another relative present in the territory of one of the Member States, provided that family ties existed in the country of origin."

THE APPELLANTS' REPRESENTATIONS AND THE SECRETARY OF STATE'S DECISION

4. Under the ranked criteria set out in Chapter III of Dublin II it was France, where the appellants had first entered the European Union, which was responsible for examining their asylum claims. In those circumstances the appellants were liable to be removed to France under powers conferred by the Asylum and Immigration (Treatment of Claimants etc.) Act 2004. On 1 October 2012 in the case of the first appellant and 31 December 2012 in the case of the second and third appellants, France accepted responsibility for examining their claims. Directions for their removal to France were issued on 26 February 2013.

5. On 28 February 2013 the appellants' solicitors made written representations to the Secretary of State. They sought a decision that their clients' asylum claims be dealt with in this jurisdiction, having regard to Articles 3 and 15 of Dublin II. They relied also on Article 8 of the European Convention on Human Rights, and on s.55 of the

Borders, Citizenship and Immigration Act 2004. They stated that the second appellant was then 16 weeks pregnant and had been suffering from "severe symptoms of stress and anxiety". The solicitors' letter continued:

> "[The first appellant] has a brother… and a sister… in the United Kingdom. Both are British citizens who were originally recognised as refugees… Our clients have received considerable comfort from their family members in the United Kingdom and are anxious not to be returned to a country in which they know no one and have no familial support."

6. The appellants' applications were refused by the Secretary of State on 15 March 2013. As regards Article 3.2 of Dublin II, the Secretary of State considered that there were no "exceptional circumstances" to justify an exercise of discretion in the appellants' favour. Article 15 did not arise because it only fell for consideration upon a request being made by the State that would otherwise be responsible. As for Article 8, the Secretary of State observed that the first and second appellants had "only been in the UK since September 2012 and in such a short time it is not accepted that your client[s have] established any meaningful or significant private life in the UK". I should also set out this passage cited by the Deputy Judge at paragraph 43 of her judgment:

> "Your client [has] not been financially, physically, or emotionally dependant on her brother in law and sister in law as they had clearly been apart for a considerable time. There is not any evidence of anything beyond what is usually expected of adult relatives. Your client can maintain contact with her brother in law and sister in law by way of telephone calls and emails. Your client's brother in law and sister in law can also visit your client in France as they are British Citizens."

The Secretary of State certified the human rights claims as clearly unfounded, with the consequence that the appellants might not appeal against the decision while they remained in the United Kingdom.

THE JUDGMENT BELOW

7. The Deputy Judge concluded, in light of authority which she summarised, that "decisions taken under the Dublin II Regulation are not susceptible to challenge by judicial review proceedings save where the enforcement of the decision would lead to inhuman or degrading treatment, which is not alleged in this case" (paragraph 17). However, in case she was wrong about that, she proceeded (paragraphs 31 ff) to consider the merits of the case. She accepted that the Secretary of State had made a legal error in concluding that Article 15 of Dublin II only fell for consideration upon a request being made by the State that would otherwise be responsible: the decision of the Court of Justice of the EU in *K v Bundesasylamt* [2013] 1 WLR 883 (to which I will come) showed that that was so as regards Article 15.2. However, the Deputy Judge concluded (paragraph 38) that even if the Secretary of State had proceeded to a decision under Article 15.2 it was "inevitable" that she would still have declined to examine the asylum claims in the UK; and as I have indicated the Judge cited (paragraph 43) the passage from the decision letter which I have set out above. Overall the Deputy Judge concluded that had the appellants been entitled to bring a

judicial review claim, it would have failed on the merits. She addressed Articles 3.2 and 15.2 of Dublin II, ECHR Article 8 and s.55 of the 2009 Act.

THE ISSUES IN OUTLINE

8. In his skeleton argument (paragraph 60) Mr Ó Ceallaigh for the appellants submitted that "the decision as to whether to apply the humanitarian clause in Article 15.2 is subject to challenge on ordinary public law grounds". This was somewhat refined at the hearing, where he argued that a Dublin II decision to remit an asylum claim to another Member State is justiciable on *Wednesbury* grounds ([1948] 1 KB 223) or by reference to ECHR Article 8. The position taken by Miss Rowlands for the Secretary of State was, with respect to her, a little difficult to discern precisely. She was at pains to insist that a decision taken under Dublin II was not justiciable at the suit of the affected individual; but there might – in theory, I think she would say – be an Article 8 claim if it did not depend on or imply a putative violation of Article 15 of Dublin II. She submits that no such claim can lie in the present case. Both parties accepted (correctly on the authorities) that a claim might lie under ECHR Article 3 if it were shown that the asylum seeker's transfer to another Member State would expose him to a real risk of inhuman or degrading treatment: in such a case the very premise of Dublin II – that every Member State may be relied on to administer asylum claims properly – would be negated.

9. These rival contentions, refined and qualified as they were, expose an issue of principle which, as I shall show, is a recurrent theme in the cases. ECHR Article 3 aside, what if any is the scope for challenge to the removal of the affected individual to another Member State following a decision under Dublin II that the other State is responsible for the examination of his asylum claim? The issue is one of principle because its resolution requires the court to find an accommodation between two competing legal imperatives: (1) the vindication of Dublin II as a regime for the distribution at an inter-State level between the Member States of responsibility for the determination of asylum claims, and (2) the vindication of individual claims of right which might be denied by a rigorous enforcement of the inter-State regime. Miss Rowlands says the first of these predominates; Mr Ó Ceallaigh the second. The learning, unfortunately, swims between the two.

10. If the court concludes that it is open to the appellants to challenge the Secretary of State's certificate that their Article 8 claims were clearly unfounded, there remains an issue as to the substantive merits of the case.

THE INTER-STATE REGIME

11. Here I will give some account of the cases which apparently favour the view that a Dublin II decision cannot be challenged by an individual (save in effect on ECHR Article 3 grounds). In *AR (Iran) v Secretary of State* [2013] EWCA Civ 778 Sir Richard Buxton (with the agreement of Underhill and Moore-Bick LJJ) stated at paragraph 29:

> "The whole point of the Dublin II arrangements is that they assume that it will not matter to the outcome where in the Community an asylum application is heard. If… the member states cannot pick and choose amongst themselves as to the

> validity and reliability of particular state systems, *a fortiori* an individual applicant cannot do so."

And at paragraph 31:

> "The whole point of the Dublin II jurisprudence is that while member states may complain of defects in procedure the asylum seeker may not do so."

12. In *G v Secretary of State* [2005] EWCA Civ 546 the question was whether the appellant's removal from this country to Italy for her asylum claim to be examined in that jurisdiction would violate her rights guaranteed by ECHR Article 8. It was submitted that the decision to remove her "flew in the face" of Article 15 of Dublin II. Maurice Kay LJ (with whom Neuberger and Buxton LJJ agreed) stated at paragraph 25: "[t]he effect of Article 15 is not to confer a freestanding substantive right on individual applicants. Rather, it is to regulate the relationship between two or more Member States". I shall have to return to the case of *G.* It was cited by Stadlen J in *Kheirolliahi-Ahmadrogani v Secretary of State* [2013] EWHC Admin 1314, in which the judge undertook a comprehensive review of the authorities. At paragraph 47 he stated:

> "… [T]he words 'only insofar as those provisions affect the course of proceedings between Member States' in paragraph 2.2 of Com (2001) 447 final [a reference to the *travaux préparatoires* of Dublin II] are to my mind powerful support for the proposition that the intention was that [Dublin II] should not confer rights on individuals and it was not intended that alleged breaches of the provisions of [Dublin II] should be actionable at the suit of asylum seekers or other individuals."

13. As regards the English authorities Stadlen J concluded (paragraph 166):

> "In my judgment as a matter of construction of the Dublin II Regulation and in the light of the *travaux preparatoires,* the Regulation does not confer on individuals a right to require Member States to allocate responsibility for examining their asylum application in accordance with the provisions of the Regulation and alleged breaches of those provisions are not actionable at the suit of an individual. Further I do not consider that there is binding Court of Appeal authority which would compel the contrary conclusion…"

Other first instances decisions are *Habte* [2013] EWHC 3295 (Admin) (Lewis J) and *Jeyarupan* [2014] EWHC 386 (Admin) (Mr Philip Mott QC sitting as a Deputy High Court Judge).

14. Ms Clark giving judgment in the present case also cited the decision of the Court of Justice in *Abdullahi v Bundesasylamt* (Case C-394/12). It is instructive to note the facts. Having travelled through Greece and Hungary the applicant, a Somali national, claimed asylum in Austria. The Austrian authorities mistakenly believed that Hungary had been the first Member State she had entered. Hungary agreed to take

charge of her. She claimed that Greece, not Hungary, was responsible for her asylum application; but because of Greece's human rights record the Austrian authorities should examine her case. The Austrian court referred to the Court of Justice the question whether an asylum claimant was entitled to seek a review of the determination of the responsible Member State on the ground that the Chapter III criteria in Dublin II had been misapplied.

15. The judgment of the Court of Justice has these passages:

> "57. Thus, article 3(2) of [Dublin II] … and article 15(1)… are designed to maintain the prerogatives of the member states in the exercise of the right to grant asylum, irrespective of the member state responsible for the examination of an application on the basis of the criteria set out in that Regulation. These are optional provisions which grant a wide discretionary power to member states…
>
> 60… [T]he only way in which the applicant for asylum can call into question the choice of that criterion [sc. under Article 10(1)] is by pleading systematic deficiencies in the asylum procedure and in the conditions for the reception of applicants for asylum in that latter member state, which provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment…"

16. It can be seen, then, that there is a consistent line of authority demonstrating that the choice of responsible Member State for the purpose of Dublin II is ascertained and regulated at the inter-State level. This learning supports the view that Dublin II confers no rights on individual asylum-seekers to challenge the decision as to the responsible Member State or to require a particular Member State to examine their asylum application. But that is not the only line of authority which bears on this appeal.

INDIVIDUAL CLAIMS OF RIGHT

17. At paragraph 28 of her judgment the Deputy Judge noted Mr Ó Ceallaigh's submission that "this line of authorities cannot survive the decision in *K v Bundesasylamt* Case C-245/11 [2013] 1 WLR 883", and indeed this was the first authority referred to by Mr Ó Ceallaigh in argument before us. In that case the Austrian authorities rejected the applicant's asylum application on the ground that Poland was the responsible Member State. On the applicant's appeal the Austrian court sought a preliminary ruling on the interpretation of Dublin II Article 15, asking (*inter alia*):

> "whether Article 15 of [Dublin II] must be interpreted as meaning that, in circumstances such as those in the main proceedings, in which the daughter-in-law of the asylum seeker is dependent on the asylum seeker's assistance because that daughter-in-law has a new-born baby and suffers from a serious illness and handicap, a Member State which is not the State

> responsible for examining the asylum request according to the criteria laid down in Chapter III of that regulation can automatically become the responsible State on humanitarian grounds. If the answer to that question is in the affirmative, [the Austrian court] wishes to know whether that interpretation remains valid where the Member State which is responsible in accordance with those criteria did not make any request pursuant to the second sentence of Article 15(1) of the regulation."

18. The Court of Justice held (paragraph 38) that the scope of Article 15 was not limited to ties between the asylum-seeker and "family members" as defined in Article 2(i) of Dublin II (which I will not set out). The court's essential conclusions are effectively given at paragraphs 47 and 54:

> "47. Where the conditions stated in Article 15(2) are satisfied, the Member State which, on the humanitarian grounds referred to in that provision, is obliged to take charge of an asylum seeker becomes the Member State responsible for the examination of the application for asylum.
>
> 54. In the light of all the foregoing considerations, the answer to the first question is that, in circumstances such as those in the main proceedings, Article 15(2)… must be interpreted as meaning that a Member State which is not responsible for examining an application for asylum pursuant to the criteria laid down in Chapter III of [Dublin II] becomes so responsible. It is for the Member State which has become the responsible Member State within the meaning of that regulation to assume the obligations which go along with that responsibility. It must inform in that respect the Member State previously responsible. This interpretation of Article 15(2) also applies where the Member State which was responsible pursuant to the criteria laid down in Chapter III… did not make a request in that regard in accordance with the second sentence of Article 15(1) of that regulation."

19. Mr Ó Ceallaigh referred to some observations of mine in *AA (Afghanistan)* [2006] EWCA Civ 1550:

> "13… I certainly accept in general terms that an asylum claimant cannot challenge (save perhaps on human rights grounds) the allocation of responsibility between States for the determination of his claim where that has been effected by proper application of Dublin I or II. But it by no means follows that where as here there has been a gross breach of the time limit given by Article 11(5) of Dublin I yet the receiving State continues to accept responsibility for the claim, there can be no challenge on *Wednesbury* grounds to the Secretary of State's decision to send the claimant back…

> 14. In the course of his submissions before us Mr McCullough accepted that if in a case such as this the decision to transfer the claimant to the other State were shown to be irrational, then it would be unlawful and open to challenge as such; but he opined that it was difficult (I think he would say impossible) to find an instance where that might be so which did not engage ECHR rights. That may be correct. In any event it is common ground that if the respondent's transfer to Austria would violate his Convention rights, it would be unlawful and the court could interfere…"

20. *AM (Somalia)* [2009] EWCA Civ 114 is an important case from Mr Ó Ceallaigh 's point of view. The appellant was a Somalian national who came to the UK after having claimed asylum in Italy. He had mental health difficulties and was very reliant on his two brothers and sister-in-law who were in this country. The Italian authorities accepted responsibility for the examination of his asylum claim, and the Secretary of State proposed to remove him to Italy. The appellant appealed to the tribunal, asserting a prospective violation of ECHR Article 8. The Secretary of State issued a statutory certificate that the appellant's objection to removal to Italy was manifestly unfounded, so that (if the certificate were good) he would have no in-country right of appeal. The appellant sought judicial review of the certificate.

21. This court entered into the merits of the Article 8 case. However, given that the challenge was to the validity of the certificate, "the question for the court [was] not whether in all the circumstances removal is nevertheless proportionate: it is whether the Home Secretary can properly decide that the contrary argument is bound to fail" (*per* Sedley LJ at paragraph 20). Sedley LJ continued:

> "22. The Dublin system has nothing to do with the merits of individual cases: it is designed simply to prevent forum-shopping while ensuring that every asylum claim is properly processed. By itself it does not address the problem of removals which may violate Convention rights. That is catered for by the separate obligation of the Home Secretary not to act inconsistently with such rights.
>
> 23. Thus the question in the present case is whether an independent adjudication could find substance in the contention that to follow the Dublin procedure in this appellant's case would be disproportionate. In my judgment it undoubtedly could.
>
> …
>
> 25… [I]f, as is distinctly possible…, he is given asylum in Italy, all that will lie ahead there is a life of isolation and probable relapse. In other words, this is a case in which, on appeal, an immigration judge might well hold that the lawful purpose of the Dublin Regulation was not sufficient to justify the damaging effect on this appellant of disrupting what is now

> his private and family life by compelling him to present his asylum claim in Italy rather than here."

Jacob and Lloyd LJ agreed, and the certificate was quashed.

22. The last case I need cite is a recent decision of the Upper Tribunal in judicial review proceedings, *ZAT & Ors v Secretary of State* [2016] UKUT 00061 (The President, McCloskey J, and Mr Ockelton, Vice President). There were seven applicants, all Syrian nationals. The first four, having fled Syria and got as far as Calais, desired to join the last three, who had been granted asylum in this country. All seven were related, had previously enjoyed family life in Syria, and sought to be reunited in the UK.

23. At paragraph 31 of the determination McCloskey J observed that it was "common ground among the parties… that all of the applicants are entitled, in principle, to invoke Article 8…; and the central question to be determined is whether the Secretary of State's refusal is a proportionate means of achieving [the] legitimate aim [of effective and orderly immigration control]". It is at once to be noted, however, that the case proceeded under Dublin III, which entered into force as the successor to Dublin II on 1 January 2014. Article 27 of Dublin III confers an express right of "an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal". In setting out the tribunal's conclusions at paragraphs 49 ff McCloskey J addressed in terms the relationship between the two regimes of the Dublin Regulation and of the ECHR. Though *ZAT* was concerned with Dublin III the discussion is, with respect, of some value for present purposes:

> "50. It is not suggested, correctly in our view, that either of these regimes has any inherent value or status giving one precedence over the other. They are not in competition with each other. However, as this litigation demonstrates, they may sometimes tug in different directions. Where this occurs full cohesion, or harmonisation, is unlikely to be achievable and some accommodation, or compromise, must be found.
>
> 51… [T]he question to be determined in [a] case of this kind is whether a disproportionate interference with the Article 8 rights of a person claiming to be a victim within the compass of s.7 of the Human Rights Act 1998 is demonstrated.
>
> 52. What is the correct approach to the Dublin Regulation in a case of this kind? We consider that the Dublin Regulation, with its rationale and overarching aims and principles, has the status of a material consideration of undeniable potency in the proportionality balancing exercise. It follows that vindication of an Article 8 human rights challenge will require a strong and persuasive case on its merits. Judges will not lightly find that, in a given context, Article 8 operates in a manner which permits circumvention of the Dublin Regulation procedures and mechanisms, whether in whole or in part. We consider that such cases are likely to be rare."

McCloskey J's observation that the Dublin and ECHR regimes "may sometimes tug in different directions" is in line with my reference in paragraph 9 to the need to find an accommodation between two competing legal imperatives.

CONCLUSIONS ON THE ISSUE OF PRINCIPLE

24. At paragraph 9 I described the issue of principle in the case thus: ECHR Article 3 aside, what if any is the scope for challenge to the removal of the affected individual to another Member State following a decision under Dublin II to the effect that the other State is responsible for the examination of his asylum claim?

25. Stadlen J was surely right to state at paragraph 67 of *KA* that there is "a fundamental inconsistency between the proposition that the Regulation is designed to prevent asylum shopping and the proposition that at the same time the Regulation was intended to confer rights on asylum seekers to require a particular Member State to examine their asylum application". However the difficulty in this case, and the explanation of the apparent tension between the two lines of authority I have discussed (on the inter-State regime and on individual claims of right), arises from a *non sequitur* which needs to be exposed: the proposition that Dublin II confers no right on the affected individual to challenge a decision as to which Member State is responsible for the determination of his asylum claim does not entail the further proposition that the decision to remove him to the responsible State may not be challenged on grounds *other than* the terms of Dublin II.

26. The cases on the inter-State regime vouch the first proposition, not the second. Thus in *G* at paragraph 25: "[t]he effect of Article 15 is not to confer a freestanding substantive right on individual applicants". In *KA* at paragraph 166: "alleged breaches of those provisions [sc. of Dublin II] are not actionable at the suit of an individual". In *Abdullahi v Bundesasylamt* at paragraph 60: "T]he only way in which the applicant for asylum can call into question the choice of that criterion [sc. under Article 10(1)] is by pleading systematic deficiencies in the asylum procedure…" These formulations deny the conferment of individual rights by Dublin II. I have considered whether *K v Bundesasylamt* is to contrary effect, and allows for a challenge by the affected individual to the Dublin II decision as to the responsible State, on the footing that the proceedings giving rise to the preliminary ruling in that case were by way of an appeal by the applicant against the Austrian authorities' refusal of her asylum application on the ground that Poland was the responsible Member State; and the Court of Justice did not conclude that the questions asked of them did not arise because the issue raised was not justiciable.

27. But this, I think, would be to misread *K v Bundesasylamt*. The fact that the asylum seeker's daughter-in-law was dependent on the asylum seeker's assistance was a given – a premise – of the first question asked of the court (which I have cited at paragraph 17), not an issue which fell for decision. The Court of Justice then had to decide whether the referring Member State (Austria) "can automatically become the responsible State on humanitarian grounds". The issue was as to the interpretation of Article 15(2). The court's judgment opens no door to the possibility of a merits challenge to the Dublin II determination. In the course of argument my Lord Davis LJ posed the question, what the position would be if the Dublin II decision maker reached a wholly unsustainable conclusion that Article 15(2) had no application when on the facts it plainly did. This is not, of course, the *K v Bundesasylamt* case; but

were it to arise I think the court would consider it through the prism of ECHR Article 8, to whose viability in the Dublin II context I now turn.

28. The cases on the inter-State regime are in my judgment perfectly consistent with the enjoyment of a right in the hands of the affected individual to challenge his removal to the responsible State on grounds having nothing to do with Dublin II – notably Article 8; and the cases on individual claims show that in principle such a challenge may be brought.

29. The distinction between a challenge to the Dublin II decision itself, which is not justiciable, and an Article 8 claim directed to the affected person's removal, which is, has not been altogether lost in the cases, though it is not always spelt out. It is uncovered in Sedley LJ's reasoning at paragraph 22 of *AM (Somalia)*, which I have cited above. In *G*, to which I said I would return, the question for this court concerned the appellant's claim that her removal to Italy would violate her rights guaranteed by Article 8, though I have cited the case for Maurice Kay LJ's observation at paragraph 25 that "[t]he effect of Article 15 is not to confer a freestanding substantive right on individual applicants. Rather, it is to regulate the relationship between two or more Member States". However the learned Lord Justice so stated in rejecting the submission for the appellant recorded in the previous paragraph, "that the certificate that the claim by reference to Article 8 of the ECHR is clearly unfounded is defective, because there is an interference with G's family life which is not 'in accordance with the law' because is flies in the face of Article 15 of the Regulation." At paragraph 27 he concluded that "G is wholly unable to point to any contravention of Article 15"; but he proceeded at once to consider (paragraphs 28 ff) issues appertaining to Article 8 – legitimate aim and proportionality. Thus in *G* the distinction between a right purportedly arising under Dublin II and a right arising otherwise is implicit, though not, I think, articulated in terms. The distinction is also apparent in the reasoning of McCloskey J in *ZAT*: see in particular paragraph 50 of the determination, which I have cited above at paragraph 23.

30. This duality – a right under the ECHR to challenge a removal decision alongside the absence of any right to challenge a Dublin II determination as to the responsible State – is wholly unsurprising. It cannot conceivably have been the intention of the European legislature in enacting Dublin II, or of the Court of Justice in passing judgment upon it, to prohibit the autonomous application of ECHR Article 8 to decisions to remove persons from one Member State to another. If it were, we should have to consider whether such a prohibition would be repugnant to the Human Rights Act 1998 and therefore of no legal effect in this jurisdiction. I am inclined to think that would be the position, though of course a final decision would require the benefit of argument. It would be no answer to claim, by analogy with *Factortame (No 1)* [1990] 2 AC 85 (*per* Lord Bridge at 140), that the Act of 1998 must give way to the European enactment, since the Human Rights Act establishes basic rights which the European Communities Act 1972 does not authorise the European institutions to abrogate.

31. The existence of the Dublin II regime, however, has in my judgment a profound impact on the application of Article 8 to a case where the claimant is to be removed to another Member State following a decision that the other State is responsible for the determination of his asylum claim. McCloskey J described the Regulation as "a material consideration of undeniable potency in the proportionality balancing

exercise" in such a situation (*ZAT* paragraph 52). He continued (I repeat the passage for convenience):

> "Judges will not lightly find that, in a given context, Article 8 operates in a manner which permits circumvention of the Dublin Regulation procedures and mechanisms, whether in whole or in part. We consider that such cases are likely to be rare."

I would express the force of the Regulation in stronger terms. It is a legal instrument of major importance for the distribution of responsibility among the Member States for the administration of asylum claims. If it were seen as establishing little more than a presumption as to which State should deal with which claim, its purpose would be critically undermined. In my judgment an especially compelling case under Article 8 would have to be demonstrated to deny removal of the affected person following a Dublin II decision.

32. I should add this. As I have said, Dublin II has now been succeeded by Dublin III which includes the right of appeal or review given by Article 27. In a helpful note submitted after the hearing counsel has provided some information concerning outstanding Dublin II cases. There are some 231 of these, of which however the "vast majority" raise issues of "systemic deficiency" (see *Abdullahi v Bundesasylamt* at paragraph 60). There are apparently two outstanding cases awaiting judicial determination which raise issues of the decision's justiciability. So the present case is not quite of historic interest only.

CONCLUSIONS ON THE MERITS

33. Given (if my Lords agree) that it is in principle open to the appellants to assert Article 8, we are required to consider the merits of their claim. Because the Secretary of State has certified the human rights claims as clearly unfounded, the question on this part of the case is (as it was in *AM (Somalia)*) whether the Secretary of State could properly decide that the Article 8 claim was bound to fail; or, to put it another way, whether a reasonable immigration judge might uphold the claim. On the approach to Article 8 which I have outlined, an especially compelling case would have to be established.

34. In my judgment there is no reasonable possibility of such an outcome. The Article 8 case is unsustainable. I have already cited the passage from the decision letter addressed to the second appellant, set out by the Deputy Judge at paragraph 43 of her judgment:

> "Your client [has] not been financially, physically, or emotionally dependant on her brother in law and sister in law as they had clearly been apart for a considerable time. There is not any evidence of anything beyond what is usually expected of adult relatives. Your client can maintain contact with her brother in law and sister in law by way of telephone calls and emails. Your client's brother in law and sister in law can also visit your client in France as they are British Citizens."

I do not consider that a reasonable immigration judge could depart from this view to any substantial extent. The appellants' solicitors' statement in their letter of 28 February 2013 that "[o]ur clients have received considerable comfort from their family members in the United Kingdom" does not, with respect, advance the case by any significant distance. Nor, in my view, does the witness statement of the first appellant's elder brother. Paragraphs 8 and 9 certainly describe frequent family contact and assert the appellants' need of emotional support and reassurance. But in my judgment there is nothing which could justify a refusal on Article 8 grounds to give effect to the Dublin II determination that France should be responsible for their asylum claims.

35. I would dismiss the appeal.

Lord Justice Davis

36. I agree.

Sir Timothy Lloyd

37. I also agree.