CASE NOTE:
R (oao HA, AA and NA v SSHD) v SSHD, JR/10195/2017

This case concerns Art. 17(2) of Regulation EU 604/2013 'Dublin III', which enables 'take charge' requests between EU Member States *'in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations'*. This note is being shared in the hope that arguments being advanced in this case may be useful to practitioners engaged in factually similar cases.

UK Approach: Art. 17(2) where the UK family member is a British Citizen

We are aware of several cases where families have been refused under Art. 17(2) where:

- An asylum-seeker (often with minor children) seeks to be reunited with their spouse;
- The spouse is a British Citizen, resident in the UK;
- A 'take charge' request ('TCR') is made to the UK under Art. 17(2) of Dublin III;
- The UK refuses the TCR on the basis that the family members should instead use the 'entry clearance' (visa application) process.

In our view, the 'entry clearance' process is wholly unsuitable for these cases. It is outside the expertise of non-British lawyers. There is no provision for applying for entry clearance in order to claim asylum in the UK and applying for a family settlement visa is not simple as the process is lengthy and complicated, legal aid is only available on an exceptional basis, the family often do not meet the requirements in these cases and large fees are payable.

The Queen (oao HA, AA and NA v SSHD), JR/101095/2017

AA is a pregnant, stateless, Kuwaiti Bidoon woman living with her British child, NA, in Greece. HA is a British Citizen living in the UK. They all seek reunion in the UK. AA and NA are suffering from post-traumatic stress disorder (PTSD). AA suffers from depression. NA has regressed developmentally since arriving in Greece. The timeline of the case is:

- July 2017: AA & NA registered asylum claims in Greece;
- August 2017: Greece made a TCR to the UK under Art. 17(2);
- September 2017: TCR refused by UK.
- October 2017: TCR refused by UK following reconsideration request.
- December 2017: Legal proceedings begin in the UK.
- January 2017: Further refusal letter sent by UK to Greece.
- 19 February 2018: Preliminary 'permission' hearing.
- A final hearing is scheduled to take place on 28/29 March 2018.

In their legal challenge, HA, AA & NA are asking the Court to:

- Declare that the UK Government has acted unlawfully;
- 'Quash' (invalidate) the decisions to refuse to accept the TCR;
- Declare that AA and NA should be admitted to the UK ; or
- Order the UK Government to admit AA and NA to the UK forthwith.

Tribunal's order of 19 February 2018 following 'permission hearing'

This was a preliminary hearing where HA, AA & NA had to show that that their case was 'arguable'. It was argued that the refusal decisions were unlawful as they:

- Failed to treat the **best interests of the child** as a primary consideration, contrary to Art. 6 of Dublin III and Art. 24 of the EU Charter.
- Failed to engage properly or at all with **humanitarian grounds based on family considerations, provided for in Article 17(2) of Dublin III Regulation.**
- Failed to properly or at all consider **the right to family life** under Article 8 ECHR and Article 7 of the Charter of Fundamental Rights of the EU.
- The UK was applying an **unlawful heightened threshold test of requiring an "exceptional circumstance"** to accept the TCR under Article 17(2).
- The fact that an **entry clearance application could in principle be made is not a relevant consideration** in the circumstances. Alternatively, it is not a consideration that can reasonably or inevitably outweigh all other considerations.
- **Dublin III is a system for allocating responsibility for asylum claims not about entry clearance** or being granted leave to remain in the UK. Being transferred under Dublin III results in 'temporary admission' to have an asylum claim considered; in order to have a right to remain the applicants still have to meet the requirements of UK immigration law.
- **Dublin III would be seriously undermined if the UK's approach in this case** was upheld. Requiring applicants to first apply for entry clearance would seriously undermine a fundamental objective of Dublin III – swift access to asylum procedures.
- It was **unreasonable to suggest that Greece provide "conclusive evidence**" that the entry clearance avenue is unavailable to the applicants. This has no connection with Art.17(2) humanitarian grounds and it is unreasonable to expect Greece to have detailed knowledge of UK immigration law provisions.
- The decision was unlawful because it **is inconsistent with other cases where the UK has accepted TCRs under Art. 17** where the UK family member is British.

The particular facts of the particular case that were highlighted were the best interests of the child, in particular that she is separated from her father, she is British yet unable to travel to the UK without separating from her mother, she is severely traumatised and urgently requires stability and treatment.

The decisions themselves did not address the family's circumstances in Greece, the psychiatric report, the pregnancy or the closeness of the relationships. Overall, the UK did not carry its burden of justifying the interference with their family life, given the extreme vulnerability of the applicants.

Permission was granted on the basis that the UK arguably erred in law by not engaging sufficiently or at all with Article 8 ECHR, relevant articles of the Charter, and the best interests of the child. A copy of the full order is attached to this note.

UTIJR4

JR/10195/2017

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of HA, AA and NA

Applicants

v

Secretary of State for the Home Department

Respondent

Before The Hon. Mr Justice Lane, President
And Upper Tribunal Judge Dawson

Having considered all documents lodged and having heard the parties' respective representatives, Miss M Knorr and Ms C Kilroy, of Counsel, instructed by Migrant Law Project, on behalf of the Applicants and Miss Masood, of Counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 19 February 2018.

Decision: permission is granted

(1) This is an application by three applicants under the designation HA, AA and NA for permission to bring judicial review proceedings to challenge decisions of the Respondent dated 26 September 2017, 24 October 2017 and 24 January 2018, firstly deciding pursuant to Dublin III not to accept the take-charge request made by the Greek authorities under that instrument and the two other later decisions maintaining the Respondent's stance in that regard.

(2) We have heard submissions from Ms Kilroy on behalf of the applicants and Miss Masood on behalf of the Respondent. Miss Masood has energetically sought to persuade us that there is no arguable merit in the challenge. Notwithstanding her efforts which have been considerable we consider that the matter is properly arguable. We do so by reference to the amended grounds for judicial review which it is common ground should form the basis of the

challenge as it has developed and we grant permission to amend those grounds.

(3) In our view the Respondent has arguably erred in law in not engaging sufficiently or at all with relevant matters, that is to say, the position of the second and third applicants by reference to Article 8 of the ECHR, the corresponding provisions in the Charter of Fundamental Rights of the European Union and insofar as the third applicant is concerned by reference to her best interests, as also underpinned by the Charter.

(4) The Respondent's pressures in decision-making are well-known and are accepted. We have noted what Miss Masood has said in that regard in considering the terms used in the letters. We have to say, however, that it is arguable that the defects we have identified are arguably present. Insofar as the Respondent's stance has been to rely upon the ability of the second and thirds applicants to make entry clearance applications, we see the arguable force of Ms Knorr's submission that this cannot be done in isolation but has to be done through the prism of the instruments to which we have just made reference.

(5) We therefore grant permission and we will hear submissions on the issue of expedition and if there is to be expedition what the timescale may be.

Costs

(6) Reserved.

Case Management Directions

1. Not later than 12 March 2018, the Respondent shall disclose all documentary material not previously filed and served upon which she intends to rely or which is required to be disclosed compatibly with her duty of disclosure. Such material shall include any witness statements.

2. Not later than 19 March 2018, the Respondent shall file and serve her detailed grounds of defence. Unless otherwise directed the parties' pleadings shall stand as their respective skeleton arguments.

3. Any reply from the Applicants shall be filed and served not later than 23 March 2018.

4. Not later than 26 March 2018, the Applicants shall file and serve supplementary hearing bundles and bundles of authorities, with continued pagination.

5. Case to be listed before Upper Tribunal Judge Dawson (plus another) on 28 March 2018. Time estimate: 1.5 days.

Signed: _____

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber

Dated: **19 February 2018**

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the Applicant, Respondent and any interested party / the Applicant's, Respondent's and any interested party's solicitors on (date): 20/02/18

Solicitors:
Ref No.
Home Office Ref:

Notes for the Applicant

- To continue the proceedings a further fee of £770.00, or an Application for Fee Remission if appropriate, must be lodged within 9 days of the date this order was sent (see above). Failure to pay the further fee or lodge such an Application within that period will result in the proceedings being automatically struck out. If, however, the required fee has already been paid in respect of a request by you for a decision of the Tribunal on permission to be reconsidered at a hearing, then the further fee payable is £385.00.

- You are reminded of your obligation to reconsider the merits of your judicial review application on receipt of the Respondent's evidence.