Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04998/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 06 January 2016	**On 28 April 2016**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

K A S
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms B. Zeitler, Counsel instructed by STS Solicitors
For the Respondent: Mr L. Tarlow, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity was granted at an earlier stage of the proceedings because the case involves protection issues. I find that it is appropriate to continue the order. Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

Introduction

1. This appeal, in common with the recent decision of the Upper Tribunal in *R (on the application of ZAT & Others) v SSHD (Article 8 ECHR – Dublin Regulation – interface – proportionality)* IJR [2016] UKUT 00061, requires the Tribunal to determine an Article 8 claim under the European Convention of Human Rights ("ECHR") in a Dublin Regulation (Council Regulation EU 604/2013) context and raises some interesting questions relating to the interaction between the two legal regimes.

Background

2. The facts of the claim, as put forward by the appellant, are as follows. The appellant is a 25 year old Somali woman who is from the Ashraf clan. She suffered serious harm as a result of abuse while living in a refugee camp in Ethiopia as an adolescent. She later moved to Yemen. She married but suffered further abuse and violence from her husband. She flew to France from Yemen in May 2013. Her intention was to join her brother who has been granted Humanitarian Protection in the UK. She was fingerprinted in France and an asylum claim was registered. The appellant says that she did not receive any paperwork and was not aware that a case was pending. She says that she entered the UK illegally on 29 May 2014. She attended the Asylum Screening Unit on 04 June 2014 with the intention of making an asylum claim.

3. On 24 June 2014 the respondent refused to take responsibility for examining the appellant's asylum claim under the Dublin Regulation. The appellant made further representations as part of the Pre-action Protocol procedure. The respondent treated the representations as a human rights claim. In a decision dated 10 July 2014 the respondent refused the human rights claim but decided not to certify the claim as 'clearly unfounded' under section 94 of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002"). The reasons for refusal letter states:

> "Having carefully considered all of the evidence available to her, the Secretary of State has refused your client's human rights claim however at this time we have not certified this decision and find that there are family claims that may be addressed in [an] in-country appeal. The required appeal form is attached to this letter details as to where it should be sent is also included.
>
> It remains the UK Visas and Immigration's intention to remove your client to France. However, arrangements for her transfer will not be made until after the conclusion of her in country appeal and her case has been determined."

4. First-tier Tribunal Judge T. Brown ("the judge") dismissed the appeal in a decision promulgated on 30 September 2015. The judge considered the limited medical evidence, as well as the evidence given by the witnesses, which included the appellant and her brother. The judge was satisfied that the appellant had given a consistent account of past ill-treatment where she said she was physically and sexually abused. The abuse included two abductions when she was 12 and 15 years old. She was beaten and raped. The judge also accepted that she suffered abuse at the

hands of her first husband, including marital rape. The judge accepted that the appellant complained of "relatively moderate" health concerns including "symptoms of PTSD" but found that she did not complain of any "significant or very disabling physical or psychiatric illness." The judge accepted that the DNA evidence established that the appellant and her brother were related as claimed. He accepted that the appellant had no family or other connections in France. The judge noted that the appellant lived with a Somali woman but was also emotionally dependent, and to some extent financially dependent, upon her brother. They had been separated since childhood and had established a family life in the UK, in part, because they were isolated from other family members. The judge was satisfied that the relationship had the additional elements of dependency required to establish a family life within the meaning of Article 8 of the ECHR.

5. The judge went on to consider whether removal to France would amount to a disproportionate interference with her right to family life under Article 8. He considered the five stage approach outlined in *R v SSHD ex parte Razgar* [2004] UKHL 27. The judge concluded that removal would interfere with the appellant's family life in a sufficiently grave way to engage the operation of Article 8. She would have no support network or family members around her and would be physically alone and "probably isolated". He said that she was likely to be "exiled from her family members". She had achieved "relative peace and stability" in the UK, which would be disrupted if she were removed to France.

6. The judge assessed whether the interference with the appellant's right to family life would be proportionate. He considered, in substance, the public interest considerations outlined in section 117B of the Nationality, Immigration and Asylum Act 2002 ("the NIAA 2002"). The judge referred to the Dublin Regulation and noted that Article 2(g)-(h) made provision for family members. He found that an adult sibling was not a "family member" or "relative" for the purpose of Article 2(g)-(h). He also considered the terms of Articles 9-10 of the Dublin Regulation. In assessing what weight to place on the public interest in maintaining an effective system of immigration control through the mechanism of the Dublin Regulation the judge concluded:

> "103. Given that Dublin III is concerned with applicants for international protection, it will be the case that many, perhaps most, applicants affected by it will be vulnerable and will have experienced ill-treatment or the risk of it. Yet such applicants are restricted, under Dublin III, in where they may claim international protection. Being alone, and isolated, is a common experience for refugees. That does not make it right, or good, but it means that the appellant's case is, in that sense, not especially unusual.
>
> 104. The appellant's unlawful entry to the United Kingdom therefore not only undermines domestic immigration control, but frustrates an EU mechanism for handling claims for international protection. I consider the line drawn, as a matter of policy, by the EU legislature, in respect of member states' responsibility to third country nationals to be a very important factor in assessing whether the respondent can justify its decision.
>
> 105. The nature of the proposed interference in the appellant's private and family life is serious. I accept that she is a vulnerable young woman who has, at the moment, in the

> United Kingdom, a support network, comprising family and private life ties which would be disrupted by her removal to France.
>
> 106. This is a weighty factor. But the respondent has satisfied me that the factors on which the respondent relies to justify the appellant's removal make removal proportionate in all the circumstances. The appellant is entitled to have her claim for international protection determined by France and France has undertaken to determine it. The appellant's relationships with her family and clan members in the United Kingdom are significant, but, given that the appellant is in the Untied Kingdom unlawfully, those relationships are not long-standing, and have developed in a precarious environment, the appellant's departure from France to the United Kingdom subverts the mechanism created by Dublin III, and given the other public interest considerations to which I have referred above, I consider that the appellant's right to respect for her private and family life is substantially outweighed by the public interest in securing the economic wellbeing of the United Kingdom through effective immigration control.
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> 107. Had some of the factors weighing against the appellant not been present – [had] she been able to speak English, for example, and/or if there had been evidence that the appellant would be able to quickly to achieve financial independence – then the respondent may not have satisfied me that the appellant's removal was proportionate, but considering, in the round, the factors weighing in favour of removal, I am satisfied in the circumstances which do exist, that they outweigh the interference in the appellant's right to respect for her private and family life."

7. The appellant seeks to appeal the decision on the following grounds:

   (i) The First-tier Tribunal failed to consider other provisions of the Dublin Regulation relating to family life and humanitarian issues, which were relevant to a proper assessment of the proportionality of removal under Article 8.

   (ii) The First-tier Tribunal placed undue weight on the public interest considerations contained in section 117A-D of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002"), which were arguably not relevant to the limited issue of whether the UK should take responsibility for examining her asylum claim.

8. At the conclusion of the hearing I reserved my decision. The decision of the Upper Tribunal in *ZAT* was promulgated on 29 January 2016. I considered that it may have some relevance to the issues in this case and invited both parties to serve any further written submissions before I finalised the decision. Only the appellant served further written submissions.

Legal Framework

9. I begin by examining the relevant provisions of the Dublin Regulation. The mechanism for "taking responsibility" for the "examination" (i.e. determination) of claims for asylum and other forms of international protection by non-EU nationals lies at the heart of the Dublin Regulation. The measure begins with several recitals. The relevant recitals are as follows:

(14) In accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with the Charter of Fundamental Rights of the European Union, respect for family life should be a primary consideration of Member States when applying this Regulation.

(15) The processing together of the applications for international protection of the members of one family by a single Member State makes it possible to ensure that the applications are examined thoroughly, the decisions taken in respect of them are consistent and the members of one family are not separated.

(16) In order to ensure full respect for the principle of family unity and for the best interests of the child, the existence of a relationship of dependency between an applicant and his or her child, sibling or parent on account of the applicant's pregnancy or maternity, state of health or old age, should become a binding responsibility criterion. When the applicant is an unaccompanied minor, the presence of a family member or relative on the territory of another Member State who can take care of him or her should also become a binding responsibility criterion.

(17) Any Member State should be able to derogate from the responsibility criteria, in particular on humanitarian and compassionate grounds, in order to bring together family members, relatives or any other family relations and examine an application for international protection lodged with it or with another Member State, even if such examination is not its responsibility under the binding criteria laid down in this Regulation.

10. Article 2 of the Dublin Regulation outlines definitions to be used for the purpose of interpreting the regulation. Sub-paragraphs (g)-(h) define family members as follows:

(g) 'family members' means, insofar as the family already existed in the country of origin, the following members of the applicant's family who are present on the territory of the Member States:

- the spouse of the applicant or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals,
- the minor children of couples referred to in the first indent or of the applicant, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law,
- when the applicant is a minor and unmarried, the father, mother or another adult responsible for the applicant, whether by law or by the practice of the Member State where the adult is present,
- when the beneficiary of international protection is a minor and unmarried, the father, mother or another adult responsible for him or her whether by law or by the practice of the Member State where the beneficiary is present;

(h) 'relative' means the applicant's adult aunt or uncle or grandparent who is present in the territory of a Member State, regardless of whether the applicant was born in or out of wedlock or adopted as defined under national law;

11. Chapter III establishes a hierarchy of criteria for determining which Member State is responsible for examining an asylum claim. Article 7 states:

> 7(1) The criteria for determining the Member State responsible shall be applied in the order in which they are set out in this Chapter.
>
> (2) The Member State responsible in accordance with the criteria set out in this Chapter shall be determined on the basis of the situation obtaining when the applicant first lodged his or her application for international protection with a Member State.
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> (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.

12. Article 8 sets out provisions relating to "Unaccompanied Minors" and provides for the Member State where the child's relative is lawfully resident to take responsibility if certain conditions are met. Article 9 relates to "Family members who are beneficiaries of international protection" and sets out provisions for a Member State to take responsibility where a family member has already been given international protection. Articles 10-11 deal with circumstances in which several family members have made claims that could be determined together. These provisions do not apply in the context of this appeal.

13. In addition to the hierarchy or criteria for determining responsibility for an asylum claim, Chapter IV of the Dublin Regulation outlines provisions relating to dependents as well as "discretionary clauses". Article 16 relates to dependents:

> 16(1) Where, on account of pregnancy, a new-born child, serious illness, severe disability or old age, an applicant is dependent on the assistance of his or her child, sibling or parent legally resident in one of the Member States, or his or her child, sibling or parent legally resident in one of the Member States is dependent on the assistance of the applicant, Member States shall normally keep or bring together the applicant with that child, sibling or parent, provided that family ties existed in the country of origin, that the child, sibling or parent or the applicant is able to take care of the dependent person and that the persons concerned expressed their desire in writing.
>
> (2) Where the child, sibling or parent referred to in paragraph 1 is legally resident in a Member State other than the one where the applicant is present, the Member State responsible shall be the one where the child, sibling or parent is legally resident unless the applicant's health prevents him or her from travelling to that Member State for a significant period of time. In such a case, the Member State responsible shall be the one where the applicant is present. Such Member State shall not be subject to the obligation to bring the child, sibling or parent of the applicant to its territory. ……

14. Article 17 allows Member States to exercise discretion and depart from the hierarchy of criteria for determining responsibility for asylum claims:

17(1) By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation.

……

(2) The Member State in which an application for international protection is made and which is carrying out the process of determining the Member State responsible, or the Member State responsible, may, at any time before a first decision regarding the substance is taken, request another Member State to take charge of an applicant in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations, even where that other Member State is not responsible under the criteria laid down in Articles 8 to 11 and 16. The persons concerned must express their consent in writing.

15. The central issue to be determined in this appeal is whether removal in consequence of the decision would amount to a disproportionate interference with the Article 8 rights of the appellant and her brother. In assessing what weight should be placed on "public interest considerations" as part of a proportionality assessment under Article 8(2) of the European Convention of Human Rights a court of tribunal is required to take into account the factors set out in Part 5A of the NIAA 2002 (sections 117A-D). The following sections are relevant in a non-deportation case:

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
  (a) breaches a person's right to respect for private and family life under Article 8, and
  (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—
  (a) in all cases, to the considerations listed in section 117B, and
  (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
  (a) are less of a burden on taxpayers, and
  (b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
  (a) are not a burden on taxpayers, and
  (b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or
(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
(a) the person has a genuine and subsisting parental relationship with a qualifying child, and
(b) it would not be reasonable to expect the child to leave the United Kingdom.

Decision and reasons

16. The appellant does not meet the requirements of the immigration rules. Both parties agreed that the Article 8 assessment should be undertaken outside the rules. The First-tier Tribunal's factual findings regarding the appellant's vulnerability as a result of past persecution are not challenged. Nor are the findings relating to the serious nature of the interference with the appellant's right to family life that removal to France would entail. The only issue is whether the judge's proportionality assessment under Article 8(2) discloses errors of law.

The first ground - Dublin Regulation

17. There is no right of appeal against a decision taken under the Dublin Regulation. In a statutory appeal brought on human rights grounds the context of removal under the Dublin Regulation is relevant to what weight should be given to the public interest in maintaining an effective system of immigration control. Within the legal framework controlling immigration are arrangements for allocating responsibility for asylum claims within the European Union. It is not disputed that the First-tier Tribunal was entitled to take into account the terms of the Dublin Regulation as part of the overall proportionality assessment under Article 8(2).

18. In its recent decision in *ZAT* the Upper Tribunal considered the separate regimes established by the Dublin Regulation and the Human Rights Act 1998. The Upper Tribunal found that the two regimes, while distinct, operate alongside one another. Neither regime has any inherent value or status giving one precedence over the other. I observe that within the legal structure of European law the distinction is recognised by the different roles played by the Court of Justice of the European Union ("CJEU") and the European Court of Human Rights ("ECtHR"). The first operates exclusively within the realm of EU law, while the second is concerned solely with the operation of the ECHR. The two regimes exist alongside one another but at times some tension can be found between the transnational focus of the EU law regime and the individual rights focus of the ECHR regime.

19. In *ZAT* the Upper Tribunal found that there may be some "interface" between the two regimes in individual cases. The applicants included three unaccompanied children and a vulnerable young adult living in a migrant camp in Calais. They

sought an order, by way of an application for judicial review, compelling their entry to join relatives in the UK. The judgment states at paragraph 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."

20. The factual matrix of this appeal is different from that of *ZAT*, which serves to emphasise the fact sensitive nature of every human rights claim. The appellant resists removal to France by way of a statutory appeal to the Tribunal. In my experience there are few claims where the respondent does not certify the human rights claim as 'clearly unfounded' but still maintains a decision to remove to another Member State, thereby giving an in-country right of appeal to the First-tier Tribunal on human rights grounds. No specific submissions were made on this point but it is reasonable to infer that, in the majority of cases, if the respondent considers that there are compelling family life reasons, or other compassionate reasons for an asylum claim to be considered in the UK rather than in another Member State she will usually exercise discretion under Article 17 and take responsibility for examining the claim. That would be the end of the matter in terms of removal to another Member State. This is one of the relatively small number of cases in which the respondent still intends to effect removal under the Dublin Regulation even though she accepts that the appellant's family life claim is not 'clearly unfounded'.

21. In light of the above I find that the First-tier Tribunal Judge was correct to take into account the Dublin Regulation regime as a "weighty factor" in assessing whether removal was justified under Article 8(2). In doing so he complied with the requirement outlined in section 117A(2)-(3) and 117B(1) of the NIAA 2002 to have regard to the public interest in maintaining effective immigration control. However, the appellant argues that the judge erred in failing to give adequate consideration to the internal scheme and the underlying principles of the Dublin Regulation, which recognises family life considerations as part of the hierarchy of criteria for determining responsibility for asylum claims.

22. The judge noted, correctly, that the appellant is neither a "family member" nor a "relative" within the definition contained in Article 2(g)-(h) of the Dublin Regulation. The terms of the hierarchy of criteria set out in Articles 8-11 of the Dublin Regulation (paragraph 10 above) do not assist the appellant because they refer largely to "family members". The judge's failure to consider those particular provisions was not material to a proper assessment of Article 8 in this particular case and discloses no error of law. However, the hierarchy of criteria contained in the Dublin Regulation includes provisions that are relevant to other family members who do not meet the definition outlined in Article 2(g)-(h).

23. Recital 14 emphasises that the right to respect for family life should be a "primary consideration" of Member States when applying the Dublin Regulation. In an Article 8 appeal under the human rights regime what amounts to 'family life' must be considered by reference to the relevant Strasbourg and national case law. In this case the judge was satisfied that the relationship between the appellant and her adult sibling had the additional elements of dependency required to amount to family life for the purpose of Article 8: see *Kugathas v SSHD* [2003] EWCA Civ 31 and *Singh & Anor v SSHD* [2015] EWCA Civ 630.

24. Article 7(3) of the Dublin Regulation refers to "family members, relatives **or any other family relations** of the applicant" [my emphasis]. The wording distinguishes "family members" and "relatives" and allows for other types of "family relations" to be considered subject to certain conditions relating to the timing of an asylum claim.

25. Recital 16, which echoes the terms of Article 16(1), refers to relationships of dependency between an applicant and "his or her child, **sibling** or a parent" [my emphasis]. The full text of Article 16(1) recognises that where there is a "relationship of dependency" between an applicant and sibling Member States "shall normally keep or bring together the applicant with that…sibling" subject to several specified conditions.

26. Recital 16 states that in order to show full respect for the principle of family unity the existence of a relationship of dependency of that kind "should become a binding responsibility criterion." In light of those provisions it seems clear that the Dublin Regulation recognises other types of dependent family relationships, which might require a Member State to take responsibility for a claim. In my assessment, the effect of these provisions is that relationships such as the one between the appellant and her brother should be taken into account in a human rights decision made within the context of the Dublin regime.

27. In contrast, Article 17 is a "discretionary clause", which does not bind a Member State. Nevertheless, it continues to emphasise that within the Dublin regime family relationships are of great importance. Article 17(2) allows a Member State to request another Member State to take charge of an applicant "in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations, even where that other Member State is not responsible under the criteria laid down in Articles 8 to 11 and 16". The discretionary clause does not limit family unity to the definition outlined in Article 2(g)-(h) but makes wider reference to "any family relations".

28. I draw the following conclusions from the above analysis:

    (i) There is no right of appeal against a decision taken under the Dublin Regulation. The only current in-country right of appeal to the First-tier Tribunal is against the refusal of an uncertified human rights claim.

(ii) The Dublin regime and the human rights regime are separate but co-exist. In individual cases there might be some "interface" between the two regimes.

(iii) When a court or tribunal has regard to public interest considerations as part of a proportionality assessment under Article 8(2), the Dublin regime will be a potent consideration.

(iv) In considering what weight should be placed on the Dublin regime in family life cases, in so far as it forms part of the public interest in maintaining effective immigration control, it may be necessary to have regard to the internal provisions of the regime. The Dublin Regulation emphasises the importance of the European Convention on Human Rights and makes clear that respect for family life should be a "primary consideration" when Member States apply the Dublin Regulation.

(v) The Dublin regime sets out a hierarchy of criteria for determining responsibility for an asylum claim. It includes a number of provisions relating to "family members" as defined by Article 2(g)-(h) but also includes binding provisions that take into account other dependent family relationships in specified circumstances. The discretionary clause also recognises that it may be important to consider whether it is necessary to "bring together any family relations" on humanitarian grounds.

29. It is clear that the judge gave careful consideration to the case. However, it becomes apparent from my analysis that, in confining his assessment to whether the appellant met the strict definition of "family members" under Article 2(g)-(h), the judge erred in failing to consider other provisions of the Dublin Regulation, which were relevant to a proper assessment of what weight should be accorded to family life in the context of a Dublin removal decision. The provisions underpin one of the important themes of the Dublin Regulation, which is its emphasis on the respect to be accorded to family life.

The second ground –public interest considerations

30. The second ground asserts that the First-tier Tribunal placed excessive weight on certain public interest considerations contained in section 117B of the NIAA 2002, which were not relevant to the question of whether the United Kingdom should take responsibility for examining the appellant's asylum claim. In assessing what weight to place on the public interest the judge considered the factors outlined in section 117B with some care. In the final paragraph of the decision he concluded [107]:

> "Had some of the factors weighing against the appellant not been present – had she been able to speak English, for example, and/or if there had been evidence that the appellant would be able quickly to achieve financial independence – the respondent may not have satisfied me that the appellant's removal was proportionate, but considering, in the round, the factors weighing in favour of removal, I am satisfied in the circumstances which do exist,

> that they outweigh the interference in the appellant's right to respect for her private and family life"

31. The appellant argues that the factors relating to English language and financial independence have little relevance to a proper assessment of proportionality in the context of the Dublin regime. At this stage the appellant is not necessarily asserting a freestanding right to remain in the UK under Article 8 but seeks to remain in order to benefit from the support provided by friends and relatives while she makes an asylum claim.

32. A number of recent decisions of the Upper Tribunal seek to explain various aspects of Part 5A of the NIAA 2002. In *Dube (ss.117A-117D)* [2015] UKUT 00090 the Upper Tribunal found that judges are duty bound to have regard to the specified considerations outlined in sections 117A-D. The Upper Tribunal concluded that the wording of section 117A(2) showed that the list of considerations was not exhaustive. The introduction of Part 5A of the NIAA 2002 did not detract from the need to conduct a focussed assessment of Article 8 in line with the five stage approach set out in *Razgar*. The "public interest question" outlined in those provisions form part of the "proportionality and justifiability" assessment relevant to question five of the *Razgar* approach.

33. In *AM (Section 117B) Malawi* [2015] UKUT 260 the Upper Tribunal found that the duty to consider section 117B only extended to relevant considerations. For example, it is not incumbent on a court or tribunal to consider and discount section 117B(6) where an applicant does not claim to have parental relationship with a child. The Upper Tribunal concluded that it was not an error of law if a judge failed to make reference to a specific provision as long as the relevant considerations were dealt with in substance. In considering what weight to place on the considerations relating to English language and financial independence contained in sections 117B(2)-(3) the Upper Tribunal stated:

> "We are satisfied that s117B(2), and s117B(3), were intended by Parliament to meet, and to finally dispose of, the arguments that have from time to time been advanced to the effect that the language and/or the financial requirements of the Immigration Rules should either be ignored altogether, or, should carry little weight, when the Tribunal is weighing the proportionality of a decision to remove in the context of the consideration of an individual's Article 8 rights; *Bibi* [2013] EWCA Civ 322, and *MM (Lebanon)* [2013] EWCA Civ 985."

The Upper Tribunal concluded that the considerations outlined in section 117B(2) and (3) were neutral factors that did not add to an appellant's case if the person is fluent in English and financially independent, but may be negative factors that weigh in favour of the public interest question when not satisfied.

34. The point was fortified in *Forman (section 117A-C considerations)* [2015] UKUT 00412. In that case the Upper Tribunal emphasised that the list of public interest considerations outlined in sections 117B-C are not exhaustive. A court or tribunal is entitled to take into account other considerations provided that they are relevant and have a proper bearing on the public interest question.

35. In *Deelah and others (section 117B – ambit)* [2015] UKUT 515 the Upper Tribunal analysed the considerations outlined in sections 117B(1)-(6). It identified sections 117B(4) and (5) as somewhat different in nature to the other four provisions because of the instructive nature of the language. The tribunal concluded that this did not unlawfully constrain the scope of an Article 8 assessment undertaken by a court or tribunal:

> "24. The argument advanced by Mr Malik on behalf of the Appellants explicitly acknowledges that if the statutory provisions under scrutiny are possessed of the clarity which I have found it must fail. It founders accordingly. To this I would add that there is no legal principle of which I am aware confounding the conclusion that an instruction by the legislature to a court or tribunal to attribute little weight to the matters specified in section 117B(4) and (5) either contravenes some constitutional norm or, in order to preserve the constitutional balance, must be construed as narrowly and strictly as possible and in a manner which unshackles the Judge from the constraints imposed. The United Kingdom, being one of those states which operates the so-called "dualist" doctrine, it is by statute that Article 8 forms part of the domestic law of this jurisdiction and it is by the same vehicle viz statute that Parliament has chosen to calibrate certain aspects of its operation in our legal system. I consider that this gives rise to no constitutional trespass or imbalance. …… My final conclusion is that the statutory provisions under scrutiny do not have the effect of abrogating or eclipsing any fundamental right or any principle of the rule of law. Every court or tribunal would be attributing little weight to the matters specified irrespective of the parliamentary instruction in primary legislation. Approached in this way, these new statutory provisions may be viewed both as a reinforcement of established principles, all Judge made and a reminder to Courts and Tribunals of the need to give effect to them."

36. In my judgment the following principles emerge from these decisions:

(i) The considerations outlined in Part 5A form one part of a focussed assessment of Article 8 in line with the five stage approach outlined in *Razgar*.

(ii) The "public interest question" relates to the assessment of whether an interference with a person's right to respect for private and family life is justified and proportionate under Article 8(2) i.e. the fourth and fifth questions outlined in *Razgar*.

(iii) In considering the "public interest question" a court or tribunal must (in particular) have regard to the considerations listed in section 117B (and 117C in deportation cases).

(iv) The public interest considerations outlined in Part 5A are derived from principles outlined in the immigration rules and existing case law of the Strasbourg and domestic courts.

(v) Some specified public interest considerations are more instructive in nature than others.

(vi) The considerations outlined in Part 5A are not exhaustive. A court or tribunal is able to take into account other considerations provided that they have a proper bearing on the "public interest question".

(vii) Not all of the specified public interest considerations may be relevant to the facts of a particular case.

37. How do these principles apply in a case concerning a human rights decision made within the context of removal under the Dublin Regulation? The appellant seeks to remain in the UK, in the first instance, for the narrow purpose of making an asylum application. She has not made a human rights application on the grounds of long residence or other significant ties to the UK. The human rights grounds are limited to the fact that she has family support in the UK available to her during the process of claiming asylum. The Dublin Regulation emphasises the importance of the right to respect for family life and makes provision for family unity in the hierarchy of criteria for determining responsibility for examining a claim.

38. This is to be contrasted with the vast majority of Article 8 cases whereby applicants seek leave to remain on a long term basis. GEN.1.1 of the immigration rules makes clear that the rules now incorporate consideration of private and family life issues, including the public interest considerations outlined in Part 5A of the NIAA 2002.

39. The private and family life provisions contained in the immigration rules tend to focus on long term settlement in the UK with family members or recognise long standing private life ties to the UK. In such circumstances it is clearly in the public interest that a person who lives in the UK should be able to speak a reasonable level of English and is financially independent. The stated aim is that this will enable a person "better able to integrate into society" and ensure that they "are not a burden on taxpayers". Many categories of the immigration rules require an applicant to produce evidence relating to English language or financial support. This underpins the public interest considerations contained in sections 117B(2)-(3). If a person does not meet the private and family life provisions contained in the immigration rules it is possible for Article 8 to be engaged, but only if a case discloses compelling circumstances not sufficiently recognised under the rules: see *SSHD v SS (Congo)* [2015] EWCA Civ 387.

40. In summary, the proportionality assessment in this claim has three main legal elements. The first is the provisions contained in the immigration rules. The second is a wider proportionality assessment outside the rules including consideration of the public interest factors contained in Part 5A of the NIAA 2002. As part of that assessment the third element consists of the principles underpinning the hierarchy of criteria contained in the Dublin Regulation, which include its emphasis on respect for family life as a "primary consideration". The First-tier Tribunal's decision must be evaluated through the lens of these provisions.

41. In this case the judge had regard to the public interest factors outlined in section 117B as he was required to do. He placed weight on the fact that the appellant did not speak English and was not likely to be financially independent. The weight he placed on those matters appeared to be determinative [107]. But in my judgment the considerations outlined in section 117B(2) and (3) are to be contrasted with those in sections 117(4) and (5) which require judges, in instructive terms, to place little weight on private and family life in certain specified circumstances.

42. If a person applied for leave to remain as a family member under the immigration rules, but did not meet the requirements, then failure to meet the underlying requirements relating to English language or financial independence is a matter that would be given weight as a public interest consideration. In contrast, if the appellant were to make an asylum claim in the UK she would not be required to satisfy an English language test or provide evidence of financial independence. The only requirement would be that she satisfies the criteria outlined in Article 1A of the Refugee Convention as incorporated through the Qualification Directive (2004/83/EC) and the immigration rules. While a court or tribunal is required to have regard to the considerations outlined in Part 5A it is difficult to see how English language and financial independence can have a significant bearing on the public interest considerations in the context of a Dublin Regulation removal case when, in most cases, the underlying human rights claim is limited to an application to remain in order to claim asylum.

43. I conclude that, although the judge was obliged to have regard the factors outlined in section 117B(2)-(3), when put in the narrow context of a removal decision made under the Dublin Regulation, the weight to be placed on those factors in a human rights appeal should have been limited. The combination of the First-tier Tribunal's failure to consider the family life provisions of the Dublin Regulation, and the undue weight placed on the appellant's ability to speak English and financial independence, amount to material errors of law.

44. For the reasons given above I conclude that the First-tier Tribunal decision involved the making of an error of law and I set aside the decision.

Remaking the decision

45. There is no challenge to the factual findings made by the First-tier Tribunal. I remake the decision based on those findings. The judge was satisfied that the appellant's relationship with her brother had the additional elements of dependency required to establish family life for the purpose of Article 8. He was also satisfied that her removal to France, where she had no family or other connections, would amount to a serious interference with her right to family life. Having found that removal would amount to a serious interference with the appellant's right to family life the only issue to be determined is whether removal is justified and proportionate under Article 8(2).

46. The respondent's reasons for refusal letter dated 10 July 2014 records that the appellant made clear that she came to the UK to claim asylum in order to join her brother at the screening interview that took place on 13 June 2014. She said that she suffered from severe headaches and found it difficult to sleep. In subsequent Rule 35 (detention) reports she provided further detail about past ill-treatment. Despite the fact that the appellant had family connections to the UK, and had given a brief account of traumatic experiences, there is no evidence in the documents relating to the take back request made on 17 June 2014 to suggest that the respondent considered whether to exercise discretion to take responsibility under the Dublin Regulation before the decision was made to refuse to examine the application on 24 June 2014.

47. The subsequent decision to refuse the human rights claim dated 10 July 2014 considers whether removal would breach the appellant's human rights under Article 8. The letter touches on some issues that might have relevance to the hierarchy of criteria, for example, the respondent noted that she did not live with her brother and could not be brought in line with her brother's claim for Humanitarian Protection. The respondent also noted that there was no evidence of dependency. While there is reference to the Dublin Regulation, as well as oblique references to some aspects of the hierarchy of criteria, the reasons for refusal letter is somewhat confused. The letter goes on to consider the claim under the immigration rules and makes reference to the common law. The only other reference to the Dublin Regulation is in a paragraph that appears to have been 'cut and pasted' from another decision because it refers to multiple "clients" and makes incorrect reference to removal to "Austria". The reference to the Dublin Regulation is confined to the take back request but there is little evidence to indicate that the respondent considered the import of the family life provisions contained within the Dublin Regulation in a clear or structured way as part of her proportionality assessment under Article 8.

48. In contrast to the respondent, who should consider the hierarchy of criteria and any family life or humanitarian considerations prior to making a 'take back' request (Article 7(3)), the tribunal is required to consider a human rights appeal in light of the circumstances at the date of the hearing.

49. I have had regard to the public interest considerations outlined in section 117B of the NIAA 2002. Sections 117B(4)-(6) have little relevance in this case. The appellant does not rely on a relationship with a partner. Her status has been precarious throughout the short period of time she has lived in the UK. She does not assert that she has established strong private life ties to the UK. Any limited private life must be given little weight. The appellant does not have a parental relationship with a relevant child requiring consideration under section 117B(6). Although I have had regard to the English language and financial independence considerations contained in sections 117B(2)-(3), for the reasons given above, I find that in the narrow context of a decision to remove under the Dublin Regulation, they are factors that cannot be given significant weight in favour of removal.

50. In assessing what weight to place on the maintenance of an effective system of immigration control I have also taken into account the fact that the provisions of the Dublin Regulation emphasise that the right to respect for family life should be a primary consideration. The appellant is not a family member or relative as defined in Article 2. Article 16(1) makes provision for allocating responsibility in cases where a person is dependent on a sibling. The judge accepted the appellant's account of harrowing past events. As a result he found that she was a vulnerable young woman. He concluded that there was little evidence before him to show that she suffered from a "significant or very disabling physical or psychiatric illness". As such it is questionable whether the appellant would come within the strict terms of Article 16(1) because it could not be said that she was dependent upon her brother "on account of" a serious illness or disability.

51. I have also taken into account, the CJEU decision in *K v Bundesasylamt* [2013] WLR 883 (C-245/11). In the context of a decision made under the Dublin II Regulation the court found that Article 15(2) (the equivalent now being the dependency clause under Article 16 of the current Regulation) was engaged in circumstances where the asylum applicant's daughter in law was dependent upon her as a result of serious illness and a new born baby. The court considered that the obligation to "normally" keep or bring together the asylum seeker with a relative in such circumstances was only subject to derogation if an exceptional situation had arisen [46]. Paragraph 52 states:

> "In a situation such as that at issue in the main proceedings, where what is at issue is not the 'bringing together' of family members within the meaning of Article 15(2) of Regulation No. 343/2003 but 'keeping' them together in the Member State in which they are present, the requirement of a request originating from the 'Member State responsible' would run counter to the obligation to act speedily, because it would unnecessarily prolong the procedure for determining the Member State responsible."

The decision serves to emphasise the need for all Member States to be alert to family life issues when applying the Dublin Regulation.

52. While I have expressed some doubt as to whether, on the evidence before the First-tier Tribunal, the appellant's circumstances would encompass the provisions outlined in Article 16, the judge found that additional elements of dependency gave rise to family life with a sibling who she had been separated from since early childhood. The appellant's vulnerability arising from her past experiences is a significant reason why she is so dependent upon the practical and emotional support provided by her brother. The Dublin Regulation emphasises the importance to be accorded to family life throughout the recitals, the hierarchy of criteria for determining responsibility and the dependency and humanitarian clauses. The judge recognised that there were significant elements of dependency in this case.

53. In assessing the proportionality of removal I have also found it useful to remind myself of the overarching principles outlined by the House of Lords in *Huang v SSHD* [2007] UKHL 11:

> "But the main importance of the case law is in illuminating the core value which article 8 exists to protect. This is not, perhaps, hard to recognise. Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant."

54. The public interest considerations underpinning the proposed removal must be balanced with the facts and factors highlighted above. This includes the provisions which emphasise respect for family life as a "primary consideration" in the context of decisions made within the Dublin regime.

55. The First-tier Tribunal accepted the appellant's account of harrowing past events and concluded that she was a vulnerable young woman who would face isolation if returned to France. The judge accepted that there would be a serious interference with her right to family life with her brother despite the fact that they had not seen one another since early childhood. In assessing the strength of their relationship he considered the fact that the appellant and her brother are isolated from other family members. I take into account that, at this stage, the appellant seeks to remain for a limited purpose. The respondent did not certify the claim as 'clearly unfounded'. Many of the public interest factors outlined in section 117B have little relevance to the facts of this particular case. I have already explained why little weight can be attributed to the factors outlined in sections 117B(2)-(3) in the narrow context of the Dublin regime. Having weighed all the relevant factors I find that the particular facts of this case give rise to sufficiently compelling circumstances within the meaning of the test outlined in *SSHD v SS (Congo)* [2015] EWCA Civ 387. For these reasons I find that the decision amounts to a disproportionate interference with the appellant's rights under Article 8 of the European Convention.

DECISION

The First-tier Tribunal decision involved the making of an error on a point of law

I re-make the decision and ALLOW the appeal

Signed  Date 27 April 2016

Upper Tribunal Judge Canavan