Neutral Citation Number: [2021] EWCA Civ 88

Case No: C2/2020/0014

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
The Upper Tribunal (Asylum and Immigration Chamber)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/01/2021

Before :

LORD JUSTICE DAVIS
LORD JUSTICE FLAUX
and
LADY JUSTICE ELISABETH LAING

- -

Between :

The Secretary of State for the Home Department	**Appellant**
- and -	
The Queen on the application of FWF & Anr	**Respondents**

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- -

Mr Rory Dunlop QC and Ms Jo Moore (instructed by **the Government Legal Department** for the **Appellant**

Ms Charlotte Kilroy QC and Ms Michelle Knorr (instructed by **Bhatt Murphy Solicitors**) for the **Respondents**

Hearing dates : 8 and 9 December 2020

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Approved Judgment

Lady Justice Elisabeth Laing DBE :

Introduction

1. The Respondents ('Rs') are brothers from Afghanistan. They made asylum claims in France when both were under the age of 18. They wished to join their elder brother, NF, in the United Kingdom. He left Afghanistan before they were born, and they had never lived with him. Although Rs were transferred to the United Kingdom within the overall time limit provided for by Regulation 604/2013 ('Dublin III'), the Secretary of State, as she now concedes, acted unlawfully along the way, in various respects, and there were avoidable delays.

2. This is an appeal against an order made by the Upper Tribunal (Asylum and Immigration Chamber) (Upper Tribunal Judge Kamara – 'the Judge') on 15 August 2019 ('the Order'). The Judge decided that the Secretary of State had breached Rs' article 8 rights. After considering further submissions, she later awarded them £15,000 damages each as just satisfaction for those breaches. I emphasise that this is not an appeal against that award. Indeed, the parties do not agree whether the order making that award has been handed down.

3. On this appeal, the Appellant ('the Secretary of State') was represented by Mr Rory Dunlop QC and Ms Jo Moore. The Respondents were represented by Ms Charlotte Kilroy QC and Ms Michelle Knorr. We thank counsel for their written and oral submissions.

4. This appeal concerns the obligations imposed by Dublin III, and the relationship between those obligations, and the EU Charter of Fundamental Rights ('the CFR') and article 8 of the European Convention on Human Rights ('the ECHR'). The provisions of Dublin III which are most significant in this appeal are the provisions about take charge requests ('TCRs') and their consequences. The question at the heart of this appeal is whether, if a member state acts unlawfully in any way in the course of discharging the obligations imposed on it by Dublin III, that is *ipso facto* a breach of article 8 of the ECHR (and of article 7 of the CFR). I will refer to such unlawfulness as 'incidental unlawfulness'. For the purposes of this appeal, I will treat the obligations imposed by article 8 of the ECHR and by article 7 of the CFR as equivalent.

5. As Ms Kilroy explained in her reply, Dublin III is a system which has been set up to respect article 8 rights. That means, she submits, that unlawfulness in the discharge of Dublin obligations which interferes with rights under article 8 is not 'in accordance with the law' for the purposes of article 8.2. Any such unlawful conduct is, therefore, a breach of article 8.

The grant of permission to appeal

6. The Secretary of State asked for permission to appeal against the Order on five grounds. Davis LJ gave permission to appeal on the papers in an order sealed on 12 June 2020. He did not limit that grant of permission. He made three points in his observations.

    i. It was arguable that the remedy for failure to comply with the two-month limit set by Dublin III is provided by Dublin III itself; the request (that is, the TCR) is deemed then to be accepted.

ii. There were potential inconsistencies between three relevant decisions of the Upper Tribunal ('the UT'). It was desirable that these be considered by the Court of Appeal.

iii. It was arguable that the Judge was not justified in treating the individual failures and non-compliance with Dublin III as being, *ipso facto*, breaches of article 8 and meriting awards of damages of £15,000, each, as well as declaratory relief.

The underlying facts in outline

7. At the date of claim, FWF was just 18, and FRF was 15. Their case was that they had fled Afghanistan over three years earlier. They arrived in France in December 2017 and registered an asylum claim there on 8 November 2018. They told the authorities that they wished to join their brother, NF, in the United Kingdom. On about 15 November 2018, the French authorities asked the United Kingdom to assume responsibility for deciding their asylum claims by making a TCR.

8. According to Rs' grounds of claim in the UT, NF left Afghanistan in 2001, before either of the Rs was born. He is now a British citizen. He met them twice in Afghanistan, in 2008, and in 2014. Their parents are said to have died in 2014. Rs then lived with their older sister, who took them from Afghanistan in 2016, and left them in Hungary in 2017, where they are said to have 'made contact' with NF, who agreed to take care of them. On 7 February 2018, NF travelled to France and met Rs. He visited them again in France in July and December 2018. Paragraph 2.9 of the grounds lists the evidence which was said to support the TCRs.

9. The Secretary of State wrote two letters to NF in December 2018, enclosing forms for him to fill in about his relationship with Rs. The Secretary of State refused FWF's TCR on the grounds that the Secretary of State did not consider that the link between him and NF had been sufficiently established.

10. On 12 February 2019, NF provided the Secretary of State with further documents. These are listed in paragraph 2.17 of Rs' grounds of claim in the UT.

11. Rs' pre-action protocol letter dated 1 March 2019 asked the Secretary of State urgently to accept responsibility for Rs' claims and to arrange their transfer to the United Kingdom. It was submitted that having failed to investigate and respond to the TCR within two months, the United Kingdom was the responsible member state. The refusal of the TCRs was too late to have any effect, and, further, unlawful, because the Secretary of State had not complied with the investigative duty and had not given Rs or NF an opportunity to make representations. The letter claimed compensation.

The relevant provisions of Dublin III

12. It is convenient to summarise the relevant provisions of Dublin III at this point, as this summary will make it easier for the reader to understand the arguments in the UT, and the Judge's judgment.

13. The broad purpose of Dublin III is to continue the EU's system for regulating the allocation of responsibility between member states for deciding claims for international protection made in different member states, particularly where one person makes such a claim in more than one member state.

14. Both parties relied on the recitals. Recitals (2) - (12) refer to the Common European Asylum System, to its components, and to its relationship with Regulation (EC)

343/2003 ('Dublin II') and to the need to improve Dublin II. Recitals (3) and (4) refer to the Tampere Conclusions, and (4) and (5) to the need to establish a clear and workable way of deciding which member state is responsible for examining an asylum application which is fair, and gives an applicant quick access to procedures for granting international protection.

15. Recital (13) says that in accordance with the CRC, and the CFR, the best interests of the child should be a primary consideration. Specific procedural guarantees for unaccompanied minors ('UMs') should be laid down 'on account of their particular vulnerability'. Recital (14) declares that, in accordance with the ECHR and the CFR, 'respect for family life should be a primary consideration for Member States when applying this Regulation'. The processing together of applications for international protection of the members of one family by a single member state makes for better decisions and ensures that families are not separated (recital (15)).

16. 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 an applicant is a UM 'the presence of a family member or relative on the territory of another Member State who can take care of him or her should become a binding responsibility criterion' (recital (16)).

17. Recital (17) says that 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 …' Recital (24) says that transfers may be voluntary, by supervised departure, or under escort. Member States should promote voluntary transfers, complying fully with fundamental rights and respect for human dignity as well as the best interests of the child. Recital (32) provides that 'With respect to the treatment of persons falling within the scope of [Dublin III], Member States are bound by their obligations under instruments of international law, including the relevant case-law of the European Court of Human Rights'. Recital (35) describes the scope of the Commission's power to provide supplementary rules. Finally, recital (39) declares that 'This Regulation respects fundamental rights and observes the principles which are acknowledged, in particular, in the [CFR]. In particular, this Regulation seeks to ensure full observance of …the rights recognised under Article…7' of the CFR. 'This Regulation should be applied accordingly'.

18. Article 1 is headed 'Subject matter'. It declares that Dublin III 'lays down the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person'.

19. Article 2 is headed 'Definitions'.

20. Article 2(g) defines 'family members' as meaning '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' by reference to a list. The list includes

i. the applicant's spouse or partner in a stable relationship (if such relationships are treated as equivalent to marriage under the law or practice member state relating to third-country nationals);

ii. the minor children of couples referred to in (i) or of the applicant, provided that they are not married, and whether or not they were born in wedlock or legally adopted;

iii. when the applicant is an unmarried minor, 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;

iv. when the beneficiary of international protection is an unmarried minor, the father, mother or another adult responsible for him whether by law practice of the member state where the beneficiary is present.

21. Article 2(h) defines 'relative' as meaning the applicant's 'adult aunt or uncle or grandparent who is present in the territory of the Member State, regardless of whether the applicant was born in or out of wedlock or legally adopted'.

22. Article 6 is headed 'Guarantees for minors'. By article 6(1), 'The best interests of the children shall be a primary consideration for Member States with respect to all procedures provided for by this Regulation'. Article 6(3) makes detailed provisions about the factors member states must take into account when assessing the best interests of children. They include 'safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking'. For the purposes of applying article 8 (see below), the member state where a UM lodges an application for international protection 'shall, as soon as possible, take the appropriate action to identify the family members, siblings or relatives of the [UM] on the territory of Member States, whilst protecting the best interests of the child'.

23. Article 3(1) imposes an obligation on member states to examine any application for international protection made by a third-country national or stateless person who applies on the territory of any one of them. The application is to be examined by a single member state, 'which shall be the one which the criteria set out in Chapter III indicate is responsible'. By article 7(1), the criteria for deciding which member state is responsible for examining an application for international protection are to be applied in the order in which they appear in Chapter III.

24. Article 8(1) describes the first criterion. It applies when an applicant for international protection is a UM. In such a case, the member state responsible for deciding the asylum claim is the member state 'where a family member or a sibling is legally present, provided that it is in the best interests of the minor…'

25. Article 21 is headed 'Submitting a take-charge request'. When a member state ('member state 1') in which a person has made an application for international protection considers that another member state ('member state 2') is the member state which is responsible for examining that application, 'it may, as quickly as possible, and, in any event, within three months of the date on which the application was lodged within the meaning of Article 20(2), request that other Member State to take charge of that applicant'.

26. Article 22 is headed 'Replying to the take charge request'. Article 22.1 requires member state 2 to 'make the necessary checks' and to reply to the TCR 'within two

months of receipt of the request'. Article 22.7 provides that failure to 'act' within that period of two months 'shall be tantamount to accepting the request, and entail the obligation to take charge of the person, including the obligation to provide for proper arrangements for arrival'.

27. Article 29 is headed 'Modalities and time limits'. Article 29.1 requires that the transfer of the applicant is to be carried out in accordance with the national law of member state 1, after consultation between the member states concerned, 'as soon as practically possible, and at the latest within six months of acceptance' of the TCR. If the transfer does not take place within the six months' time limit, member state 2 'shall be relieved of its obligations to take charge of…the person concerned and responsibility shall then be transferred to' member state 1 (article 29.2).

28. Annex A is headed 'Information about the Dublin Regulation for applicants for international protection…' It contains a list of questions. One of those is 'How long will it be before my application is examined?' The answer if, it is decided that another country is responsible for the claimant's application, '…The entire duration of the Dublin process, until you are transferred to that country, **may, under normal circumstances, take up to 11 months**…' (emphasis in the original).

29. Regulation (EC) 1560/2003, the Implementing Regulation ('the IR') was enacted so as to bring Dublin II into effect (recital 9 of the IR). Article 7 is headed 'Practical arrangements for transfers'. By article 7.1, transfers to member state 2 can be done, at the request of the applicant, 'by a certain specified date', or by 'supervised departure' or 'under escort'. Article 7.2 deals with identity documents. Article 8.1 requires member state 2 to 'allow the asylum seeker's transfer to take place as quickly as possible and to ensure that no obstacles are put in his way…' Article 8.2 requires the member state 'organising the transfer' to 'arrange transport for the asylum seeker and his escort and to decide, in consultation with [member state 2] on the time of arrival and, where necessary, on the details of the handover to the competent authorities'.

30. Article 10.1 of the IR makes for provision for cases in which there is a deemed acceptance of responsibility, pursuant to article 18(7) of Dublin II (the provision of Dublin II which was the equivalent of article 22.7 of Dublin III). In such a case, member state 1 'shall initiate the consultations needed to organise the transfer'. Although the IR was amended in some respects when Dublin III came into force, article 10.1 was not amended so as to refer to the relevant provision of Dublin III.

The proceedings in the Upper Tribunal

31. On 21 March 2019, Rs issued proceedings in the UT, applying for judicial review of the 'failure to accept the [TCRs] made by France in relation to the [Rs] (see Grounds 2-3), failure to provide disclosure and failure to clarify his position to France as requested in the [pre-action protocol letter] (see Ground 1)' (claim form, section 3). The dates of the failures were said to be unknown.

32. The grounds were 27 pages long. The facts were described. Rs inferred that the Secretary of State did not respond to the TCRs within the two-month time limit provided for by Dublin III. The consequence was that responsibility for considering their asylum claims automatically transferred to the Secretary of State. In late January or early February 2019, the Secretary of State refused the TCRs on the grounds that Rs had not established their relationship with NF.

33. A pre-action protocol letter was sent on 1 March 2019. It said that the United Kingdom was, pursuant to articles 8(1) and 27 of Dublin III, the member state responsible for deciding Rs' asylum claims.

34. Rs claimed that the Secretary of State's actions were 'in breach of Dublin III, and of the [Rs'] Article 7 CFR and Article 8 EHCR rights, informed by the Convention on the Rights of the Child ('the CRC') and the best interests principle, which called for the swiftest possible positive response to the TCR. There is no justification for having failed to promptly and properly investigate the TCR and for exceeding the longstop timeframes in the Dublin III Regulation…'

35. In section 3 of the grounds, Rs submitted that the effect of Dublin III, the CFR, the duty to act compatibly with article 8 rights, the CRC, the international framework for the protection of refugees and the Secretary of State's policy guidance was that the Secretary of State was obliged to

    i. facilitate the re-union of NF and the Respondents

    ii. treat the Respondents' best interests as a primary consideration in any procedures affecting their interests

    iii. take reasonable steps to investigate a TCR and

    iv. avoid undue delay and ensure that the Respondents' applications were 'examined rapidly, attentively and with particular diligence'. The two-month time limit is referred to.

The judgment on liability

36. Ms Kilroy submitted that it was important to read the whole of the Judge's judgment, in particular, her summary of the rival arguments. I therefore summarise it more fully that might otherwise be necessary. The Judge said that there were three issues.

    i. Did the Secretary of State fail to give reasons for refusing the TCRs and/or to correct a wrong impression held by the French authorities?

    ii. Was the Secretary of State's delay and failure to accept responsibility for Rs' asylum claims unlawful, a breach of EU law, common law and article 8?

    iii. Did the Secretary of State breach Rs' fundamental rights (as the United Kingdom was the member state responsible for their asylum claims by default from 15 January 2020)?

37. The Judge recounted some of the facts I have summarised at paragraphs 7 and 8, above. She said that Rs had approached the Red Cross in France, saying that they wanted to be 'reunited' with their brother NF in the United Kingdom. The Judge recorded that (by that stage) it was accepted that NF was Rs' elder brother.

38. The French authorities registered Rs' asylum claim on 8 November 2018. France made a TCR under article 8(1) of Dublin III on 15 November 2018. Rs were then 17 and 15 years old. On 28 January 2019 the Secretary of State rejected the TCR in relation to FWF. The Secretary of State was not satisfied that he was NF's brother. The Secretary of State also decided to refuse the TCR in relation to FRF, but did not communicate that decision. Rs' solicitors sent a pre-action protocol letter on 1 March 2019. The Secretary of State did not reply.

39. On 8 March 2019 the Secretary of State sent the taskeras (identity documents from Afghanistan) on which Rs relied to the FCO in Kabul for verification. On about 23 March, the Secretary of State asked the French authorities to send new TCRs. The proceedings were issued on 21 March 2019. The Secretary of State received further TCRs on 25 March 2019.

40. Permission to apply for judicial review was given by UT Judge Allen on 4 April 2019. He said that the grounds were arguable and accepted that the claim was not academic. On 22 May 2019, the Secretary of State accepted the relationship which Rs claimed to have with NF.

41. On 3 June 2019, the Secretary of State told the French authorities that she/he had accepted the TCRs. The Secretary of State then wrote to Rs' solicitors to say that he considered the claim was academic. The Secretary of State said that part of the second ground was the subject of a second case, *FA and others* (which was decided after the end of argument in this case, but before the Judge handed down her judgment: *R (FA) v Secretary of State for the Home Department* JR /5523/2018 ('*FA*')), and that the other grounds had been overtaken by events.

42. The Judge gave Rs permission to rely on further evidence on 7 June 2019. On 10 June 2019, Rs' counsel sent a note to the UT about the scope of hearing. This 'robustly challenged' the Secretary of State's attempt to have the claim dismissed as academic or to restrict the scope of the claim by reference to the issue in *FA*. Rs referred to four similar cases in which permission to apply for judicial review had been given.

43. The Judge set out the relevant provisions of Dublin III in paragraphs 16-19, and the relevant provisions of the IR in paragraphs 20-22. She referred to the Sandhurst Treaty in paragraph 23 and to the Secretary of State's relevant policy in paragraph 24.

44. She described Rs' case in paragraphs 27-53, the Secretary of State's in paragraphs 54-82 and Rs' reply in paragraphs 72-82.

45. In paragraph 28 the Judge explained that Rs had objected to a new argument by the Secretary of State that there was no family life between them and NF. That issue was not pleaded by the Secretary of State and the Secretary of State had not applied to amend his detailed grounds. The Judge decided that she would not consider that issue. She returned to this point in paragraph 52, saying that she had decided not to summarise the Secretary of State's arguments on this point, because the Secretary of State had not relied on this argument before.

46. The Judge summarised the failings on which Rs relied in ground 2 in seven points in paragraph 30.

    i. 'The inertia' of the EIU [the European Intake Unit] when it got the TCR and its failure to consider the TCR until after the deadline.

    ii. The unlawful refusal of the TCR in FWF's case (it was unlawful because the deadline had passed).

    iii. The failure to investigate the relationship 'properly or in line with published policy'.

    iv. The failure to consider the admission of the Respondents for DNA testing when the United Kingdom was already responsible.

v. The failure to respond at all to the TCR in FRF's case.

vi. The unlawful failure to reconsider the refusals of the TCRs when new material was presented.

vii. The failure to refer to the relevant local authority.

viii. The insistence on verifying documents with the FCO in Kabul. Three months were wasted and the documents were not verified.

47. Rs distinguished *FA*. In this case, the Secretary of State did not contact the relevant local authority, did not send holding letters to France before the expiry of the deadline, no attempt was made to place the Respondents and, in FWF's case, the Secretary of State refused the TCR. Regulation 12(2) was a red herring because it was the Secretary of State's inactivity, and not the length of the placements, which caused the delay. As the Secretary of State did not tell the French authorities that he needed more time, responsibility for Rs transferred to the United Kingdom. The justification for invoking regulation 12(2) was to check that NF was not a trafficker, but that was not the reason why the Secretary of State refused the TCR. The Sandhurst Treaty was not engaged because the Secretary of State did not contact the relevant local authority. The only feature this case shared with *FA* was that the Secretary of State's unlawful conduct caused delay.

48. The Secretary of State could not explain how a letter sent after the deadline could re-transfer responsibility to France, and the Secretary of State had not sent any correspondence which suggested that he had tried to do that. The relevant TCR was the first one. Member states could not derogate from the time limits in the Dublin Regulation. A holding response cannot be sent. The time limits were longstops and they should be shorter for children. Article 3(2) of the IR imposed a duty to investigate and article 5(1) required detailed reasons to be given for any refusal.

49. Article 12(2) did not make delay lawful. Article 22(7) could not be reversed. Article 12(2) was intended to protect a child's best interests, but only where strictly necessary. The delays in this case had not been strictly necessary. The TCRs were overlooked until the caseworker was reminded that they had not been replied to. Article 12(2) did not permit a member state to 'fail to act promptly'. Updating Implementing Regulation No 118/2014 ('the UIR') made it clear that family links had to be investigated before the deadlines. Article 12(2) did not exonerate a member state which had failed to act promptly. Article 12(2) did not apply. Procedures for placing children did not extend the time limits. It was not in the Respondents' best interests for the United Kingdom not to accept the TCRs. A member state could not carry on considering a TCR after the deadline had passed with a view to rejecting it. After the Secretary of State received the TCR, there was no activity for nearly a month. NF's file was retrieved on 12 December 2018. Nothing more happened until the French liaison officer chased the matter on 24 January 2019. The case was re-allocated on 25 January and the Secretary of State refused the TCR on 28 January 2019.

50. Article 12(2) was not referred to in the contemporaneous documents. The TCR was rejected 'in a panic'. The Secretary of State did not contact FWF to ask for more evidence. Rs submitted that, even if the Secretary of State could have refused the TCRs after the expiry of the time limit, the decision was cursory and unlawful (see further, paragraph 42 of the judgment). When NF 'realised that there was an issue with the evidence, he swiftly rectified this by sending a large quantity of material

relating to the relationship …on 12 February 2019'. There was then no activity on the GCID (the Secretary of State's digital case record). It was not until after Rs' solicitors sent the pre-action protocol letter that the Secretary of State decided to send the documents to Kabul. The Secretary of State was obliged to use his best endeavours to investigate. The GCID notes showed that the Secretary of State had not considered whether to admit Rs in order to have a DNA test. The Secretary of State should have told NF that he was going to reject the TCRs unless he sent more information. When it was sent, the Secretary of State should have considered it. Rs had provided more than enough information to show that they were likely to be related.

51. In *FA*, the Secretary of State had made a positive decision that there was a family link and was waiting for an assessment by the local authority. The Secretary of State's blanket policy of not contacting local authorities until a family link was made was a breach of the Secretary of State's guidance on Dublin III. The Secretary of State's policy team knew that the local authority was important in assessing whether there was a family link. Once contacted, the local authority in this case had provided a report within 17 days.

52. The Secretary of State's failures had caused some trauma, in part because FWF had reached the age of 18 during the period of the delay and the brothers had then been separated. Rs were 'extremely vulnerable' and should swiftly be 'reunited' with their brother. The delay made their mental states worse and caused a risk of suicide and damage.

53. In view of the fact that many of the Secretary of State's arguments were not repeated in the appeal, I will only note the main points made by the Secretary of State, as recorded by the Judge. The Secretary of State's main argument was that the claims were academic. It is convenient to record here what the Secretary of State now accepts (supplementary skeleton argument, paragraph 8). He argued in the UT that the United Kingdom was not deemed to have accepted responsibility on 15 January 2019. She now accepts that that argument is wrong.

54. The Secretary of State had not pleaded that there was no family life, but it was for Rs to prove it. If family life were presumed, the delay was far too short to be a breach of article 8. Rs should be transferred by 24 June 2019. Even if all the delay was the fault of the Secretary of State, 'there would be no breach'. Some of the delay was inevitable as NF did not submit all the documents. On delay and article 8, the Secretary of State referred to *R (Mambakasa) v Secretary of State for the Home Department* [2003] EWHC 319 (Admin), upheld by the Court of Appeal in *Anufrijeva v Southwark LBC* [2004] QB 1124. The Secretary of State argued that since the overall time limit of 11 months had not passed it was hard to see how there could be a breach of article 8. The sanction for a breach of the time limit was an automatic transfer of responsibility. There was no breach of article 29 if the transfer took place in six months. According to the Secretary of State, the other arguments relied on by Rs were common law arguments and did not sound in damages.

55. In their reply, Rs pointed out that the Secretary of State's argument on delay had changed. The Secretary of State now argued that the delay made no difference, 'the defence run in *FA*' separating article 8 from breaches of Dublin III, and relying on an overall timescale of 11 months. The skeleton argument, by contrast, accepted that findings on Dublin III were necessary to see whether there had been a breach of

article 8. The case did not only raise issues of common law fairness. *FA* was different because the family link was accepted.

56. Denial of family reunion under Dublin III is an interference with family life. The issue was whether it was proportionate. There was delay, and there were various unlawful actions. Article 12(2) was not a blanket permission to extend the time limit. It was not in the best interests of the child for time to be extended because the Secretary of State forgot about the case. As a result of the Sandhurst Treaty, the transfer should have been done by the end of January or early February 2019. The Respondents could have been admitted months ago for a DNA test. The delay was not in accordance with law and not proportionate. Enough evidence of the link had been provided, or, if not, enough to trigger the duty to investigate. The TCRs should not have been refused. The substantive breach was the failure to 'reunify' (see *TP and KM v United Kingdom* (2002) 34 EHRR 2 at paragraph 83).

57. The Judge gave her reasons between paragraphs 85 and 107.

58. She said that the permission decision addressed the question whether the claims were academic. It was considered arguable that they were not. The acceptance of the TCRs shortly before the hearing did not make the claim academic. The second ground was relevant to the claims for declarations and damages. The Secretary of State's detailed grounds suggested that the focus of the claim should be the determination of the substantive issues.

59. The Judge decided that the first ground was not made out.

60. In paragraph 86, the Judge announced her finding that '[t]he Secretary of State's processing of the TCRs was unlawful and in breach of EU, common law and Article 8 ECHR'. She gave her reasons for this in paragraphs 87-100.

61. The Secretary of State was obliged to reach a decision on the TCRs within two months and did not do so (article 22(1)). As a result, the Secretary of State was obliged to take charge of Rs under article 22(7). The Secretary of State did not argue that the transfer of responsibility did not take place. The Secretary of State did not make a decision on the TCRs within a reasonable time. She referred to the evidence. It showed that there was no activity between 15 November and 9 December 2018. There was no urgency about processing the TCRs. The 'dilatory approach' continued after the file and forms were received. No decision was made until after responsibility transferred automatically on 15 January 2019.

62. Ms Villanueva's query on 24 January prompted the Secretary of State to say that the EIU were making inquiries and doing safeguarding checks. There was no evidence in the GCID notes or elsewhere that those happened, then, or later. Instead, there was 'an almost immediate decision … made to refuse both applications' on 25 January 2019. There is no evidence of any thought about whether further investigation was necessary. 'That there is a duty of investigation is established in *MS* and *MK*, *IK*.'

63. The Judge listed further failings in connection with the TCRs in paragraph 91. The Judge described the Secretary of State's argument about the relationship between article 22(7) of Dublin III and the Sandhurst Treaty as 'not …attractive.' The aim of the Sandhurst Treaty was to speed things up, not to enable the Secretary of State to get around the strict time limits in article 22(7). In any event it was not relevant here because the Secretary of State never referred the case to a local authority. Article

12(2) did not help the Secretary of State given 'the series of failings by the EIU which led to the delays in this case or the resulting damage to the mental health of [Rs]'. The purpose of article 12(2) was to protect the best interests of the child. It was for the Secretary of State to show why it was in best interests of Rs to exceed the timescales. 'That argument has not been made'.

64. In paragraph 94, the Judge said that 'The evidence before the Secretary of State sufficed to establish the family link in this case, even if not all the evidence sent by NF was provided by France with the TCRs'. The Judge's conclusion rested on two points: (1) the fact that NF and the Respondents had the same family name and (2) the absence of any strict requirement in Dublin III 'for proof of a family link to be submitted with the TCRs'. The Secretary of State's refusal of the application without investigating or referring the case to a local authority was 'unreasonable'.

65. The Judge continued, in paragraph 95, that the Secretary of State had no information undermining the family link. The Secretary of State could have done more. If he had, 'the [Secretary of State] would have been bound to accept the TCRs in a prompt manner'. The Secretary of State had not explained why a DNA test was not considered and had no defence to this part of the case. 'Consequently, the claim made in the grounds that the [Secretary of State] failed to give the applicants and NF the opportunity to respond to concerns and failed to consider admitting the [Rs] for DNA tests amounts to procedural failings'.

66. In paragraph 96, she said that the Secretary of State caused further delay by asking the FCO in Kabul to verify the Afghan taskeras, 'notwithstanding that certified translations had been provided and there was no reason to doubt the family link'. The Secretary of State pursued the verification of the taskeras for two months until told that there was no prospect of this. 'By contrast, admitting the applicants for DNA tests would have addressed the family link without the need for such an unproductive delay'.

67. The Secretary of State failed to engage with the local authority in this case, in breach of his own policy. Referral to a local authority was central to the Secretary of State's duty to investigate when he received the TCRs, yet no reference to a local authority was made. In a letter dated 26 April 2019, the Government Legal Department said that the Secretary of State was taking his usual position and only referring the case to a local authority once he had accepted a family link. The result of this approach was that the Secretary of State made a negative decision without hearing from any local authority. If the Secretary of State had engaged with the local authority from the start, as the policy requires, 'the assessment was likely to have been available within the two-month deadline and it is further highly likely that the TCRs would have been accepted' (paragraph 99).

68. The Secretary of State's breach of policy was not inadvertent. It is unlawful on normal public law principles. The policy was expressly approved by the Minister. The justification for the breach in the detailed grounds was plainly wrong. It would be nonsensical for the Secretary of State to do no more than to tell the local authority about the TCR and not to follow that with a request for an assessment of the family link and of the best interests of the children.

69. The Judge started her consideration of ground 3 by saying that under Dublin III, Rs had a right to an effective remedy. 'In view of the above findings, it is the case that

their fundamental rights have been breached by the UK, as the responsible member state, as of 15 January 2019' (paragraph 101).

70. In paragraph 102, she said, 'There were never any safeguarding concerns raised by either the French or the UK social services regarding [Rs] and in any event, [the Secretary of State] belatedly accepted the TCRs on 3 June 2019. There have, in this case, been a series of breaches of article 8 of the ECHR/ article 7 of the CFR'. NF and Rs were siblings. Despite the fact that they were born after NF left Afghanistan, there was family life between them. Rs were orphans and NF had 'stepped into the breach'. He was willing and able to care for them, had visited them in France, and given them financial and emotional support. 'Were it not for the [Secretary of State]'s failure to act promptly at all times including in accepting the TCRs, the [Rs] would have been transferred to the UK far earlier and most likely within the usual timescales of two months for a decision and 15 days for their transfer' (paragraph 103).

71. In paragraph 104, the Judge said that the Secretary of State's 'multiple breaches of Dublin III led to a more prolonged delay to family reunion than was necessary'. Rs were minors. They were vulnerable because they were orphans and because of their experiences after leaving Afghanistan, having been abandoned by another sibling. The unchallenged medical evidence was that both Rs suffered from complex PTSD and that FWF also had a major depressive disorder. The psychiatric report described the effect of the delay and uncertainty on Rs' mental health, including distress, risks of harm and suicide, and a loss of trust in NF. FRF expressed suicidal thoughts and refused to eat for days when he heard that the TCRs had been refused.

72. It was apparent from the many documents disclosed in *FA* that the Secretary of State was advised of the serious risks caused by delays in processing the claims of unaccompanied minors, but 'failed to prioritise [Rs'] welfare', instead causing delay…'

73. In paragraph 106, the Judge rejected the Secretary of State's argument that there was 'no breach of Dublin III because the overall 11-month time frame has yet to be exhausted. There is no merit to this argument because each member state is responsible for compliance with the particular timescales imposed on them under the regulations. There is no provision for a member state to use the entire time frame for its own purposes. To ignore these timeframes would render Dublin III meaningless and unenforceable'.

74. The Secretary of State's conduct, the Judge held, in paragraph 107, was 'a clear interference with [Rs'] rights under Article 8 ECHR. As at the date of the hearing the interference was ongoing. Given the breach of Dublin III, this interference cannot be said to be in accordance with the law. Nor is the breach necessary or proportionate given that the TCRs were accepted. Indeed, [the Secretary of State] did not argue that it was'.

75. The Judge made two declarations.

    i. The Secretary of State's delay in responding to the TCRs and his failure to properly investigate and accept responsibility for the Respondents' asylum claims was unlawful.

    ii. The Secretary of State breached his obligations under EU law (Dublin III and the CFR) and article 8.

76. The Judge ordered the parties to produce written submissions on damages if they could not agree their amount.

The judgment on damages

77. The Judge considered the parties' written submissions and made a further decision dated 2 October 2019 ('the judgment on damages'). As I have said, there is no appeal against the judgment on damages, but I will summarise it, nevertheless. She decided that damages were in principle appropriate. Section 8(4) of the Human Rights Act 1998 provided that the United Kingdom courts were to have regard to the principles applied by the European Court of Human Rights ('the ECtHR') in deciding whether to award damages. The ECtHR 'routinely awards damages for Article 8 breaches (including procedural breaches) that *result in* family separation, even in circumstances where the family separation was short'. The victims of the breach were vulnerable and suffered 'further psychiatric harm as a consequence of the *prolonged* separation' [my emphases]. The Judge said that 'in view of '[the Secretary of State's] breaches, applying the principles of the ECtHR, damages should be awarded'.

78. She said that the nature and seriousness of the breach 'is [sic] apparent from my judgment which I will not replicate here. It suffices to say that the said breach results from unlawful implementation of Dublin III. There is therefore, a direct causal link between the breach of the obligation and the damage, in the form of delay in reunification and further psychiatric harm sustained'. This is a telegraphic way of announcing a finding of a breach of EU law which merits damages. She did not apply the tests in *Francovich v Italy* [1995] ICR 722. She did not explain how the relevant provisions of Dublin III conferred rights on the Rs, or why any breach was sufficiently serious to attract an award of damages. Such a finding would be surprising in this context, when the overall time limit for a transfer under Dublin III had not been exceeded.

79. In the two Strasbourg cases to which she had been referred, the starting point was between £4,500 to £17,600, and there was no medical evidence of psychiatric damage. The aggravating features were Rs' vulnerability and the risks to them which the Secretary of State's conduct created. If not for the breach, Rs would have been 'reunited' with their relative four months and five days earlier. The Secretary of State was advised about the general risks to children and about the specific damage caused to Rs.

80. The Judge said that *TP and KM v United Kingdom* (2001) 34 EHRR 42 (the citation in paragraph 6 of the judgment on damages is wrong) was 'useful guidance'. The award in that case, updated for inflation, was £16,600 for each applicant. The Judge said that this was an 'analogous case for loss of a chance of swifter reunification where there was a one-year separation alongside distress, anxiety, and feelings of frustration'. In addition, the Respondents suffered psychiatric harm, although the period of separation was about a third of that suffered by TP and KM. The Judge awarded £5000 to each Respondent for the delay. In that case, I observe, a young child was removed from her mother.

81. Rs' PTSD also got worse 'while they were awaiting reunification'. Despite the various background factors to which the Secretary of State referred in his submissions, the Judge accepted that 'the harm caused by the [Secretary of State's] actions or failure to act was significant'. Taking into account the Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases, the

appropriate bracket was 'moderately severe'. She awarded the Respondents £15,000 each to reflect the fact that the Secretary of State was not responsible for many of the difficulties suffered by the Respondents.

The grounds of appeal

82. The grounds of appeal assert that there are five errors in the UTs' approach.

    i. This case does not involve an interference with article 8 rights. It is a 'positive obligation' case.

    ii. The 'in accordance with law' requirement in article 8(2) does not apply in a positive obligation case.

    iii. The UT should not have treated each of the Secretary of State's administrative failings and delays as breaches of article 8 ECHR/article 7 CFR and failed to acknowledge that failings or delays in effecting family reunion only breach article 8 in exceptional cases.

    iv. The UT should not have held that there was any remedy for those failings/delays beyond that provided by Dublin III.

    v. The UT did not give any or adequate reasons for failing to follow the decision of UTJ Frances in *FA*.

The cases on the relationship between Dublin III and article 8 ECHR

ZT (Syria)

83. In *R (ZT (Syria)) v Secretary of State for the Home Department* [2016] EWCA (Civ) 810; [2016] 1 WLR 4894 three of the claimants were UMs who were in a camp in France and wished to join older siblings in the United Kingdom. They refused to make an application for asylum in France, however, and had not applied to the Secretary of State for asylum or for leave to enter. They asked the Secretary of State to take charge of their applications and to consider their applications. They did not make a formal application. Their request was only made in a letter before claim. The Secretary of State refused. They challenged that decision, claiming that it breached their rights under article 8.

84. In paragraph 56 of his judgment, Beatson LJ (which whom the other members of the Court agreed) described research by the United Nations Commissioner for Refugees ('the UNCHR'), which considered 17 case files, and other material. The UNHCR found that the average time taken to deal with cases was 202 days (which is less than 11 months). The process lasted less than six months in only ten of the cases. The research described the reasons for the delays.

85. The Secretary of State argued that, while, in theory, Dublin III and article 8 existed in parallel, it should not be possible to by-pass an initial procedural mechanism provided for by Dublin III, other than in a case in which member state 1 could not be relied on to act in accordance with Dublin III, including its reflection of the importance of family life. This is because Dublin III itself strikes a proportionate balance for the purposes of article 8 and there is a strong presumption that member states comply with the CFR and with the ECHR. Dublin III 'allows for the orderly and proper consideration of family life' by a process which, if it is followed, complies with article 8. Those processes take time, but the authorities did not suggest that those sorts of delays breached article 8 (see paragraphs 5, and 59 of the judgment).

86. The Secretary of State distinguished between the 'anterior procedural stage' of the operation of the Dublin Regulation, in which the member state responsible for considering the asylum claim was identified, and the substantive effect on article 8 rights, which might arise after that member state was identified.

87. The claimants argued that the French authorities had failed to vindicate their rights, and that, in any event, they had a freestanding right under article 8 to require the Secretary of State to admit them to the United Kingdom (see paragraphs 5, and 61-62 of the judgment).

88. Beatson LJ said that the question concerned the circumstances in which the processes and procedures of Dublin III could be 'by-passed' because of rights under article 8 of the ECHR (judgment, paragraph 4).This Court held that an applicant in such a case could only by-pass the processes of Dublin III in an especially compelling case, if, for example, he could show that there were systemic deficiencies in the way in which a member state dealt with asylum applications (see the summary in paragraph 8 of the judgment).

89. In paragraph 84, Beatson LJ summarised cases which show that article 8 can impose a 'positive obligation' on a state to admit a person for the purposes of family reunion. Those cases did not concern the relationship between the Dublin Regulation and article 8. Beatson LJ rejected the 'absolutist' strand in the Secretary of State's submissions that the Dublin Regulation itself struck the right proportionality balance (paragraphs 83 and 85). He accepted, in some cases, the need for speed in the case of UMs. Delay in family reunification, if long enough, could itself interfere with article 8 rights. He accepted that 'particular circumstances' might require a shorter period than the longstop periods in the Dublin Regulation (paragraph 84). The facts that article 8 could be engaged by delay in reunification, that a procedural rule could operate disproportionately, and the existence of the 'sovereignty clause' all meant that it was important to resolve the possible tension between the Dublin Regulation and article 8 rights (paragraph 86). An orderly process is important in cases involving UMs because of the needs for verification and to guard against people trafficking (paragraph 87). In paragraph 88 he described the difficulties which the pressure of cases could create for legal systems, 'including ours' and how hard it is for courts to make decisions about those difficulties, particularly in an application for judicial review.

90. Beatson LJ's conclusion was that the UT had set 'too low a hurdle' for permitting the procedures in the Dublin Regulation to be displaced by article 8 considerations. He endorsed the view of Laws LJ in *CK (Afghanistan) v Secretary of State for the Home Department* [2016] EWCA (Civ) 166 that only 'an especially compelling case under article 8' would displace the procedures under Dublin, because the existence of that regime 'has a profound impact on the application of article 8' (paragraph 93). He considered that applications such as the applications in that case should only be made in exceptional circumstances, such as the Syrian baby who was left behind in France when a lorry door closed behind his mother, and only after it was shown that there was no effective way of proceeding in France (paragraph 95). In paragraph 100 he described new arrangements which had been made between the French and British authorities. These suggested that it was only in cases such as that of the Syrian baby that it would be appropriate to by-pass the initial procedural stage of the Dublin Regulation.

91. So this Court rejected the Secretary of State's submission that article 8 could only be relied on in order to circumvent Dublin III to be by-passed when member state 1 could not be relied on to act in accordance with Dublin III. This Court did not accept that Dublin III struck the relevant proportionality balance. It did, however, accept that it was only 'an especially compelling case' under article 8 which would 'displace' the provisions of Dublin III, because of the close relationship between Dublin III and article 8.

RSM

92. In *RSM v Secretary of State for the Home Department* [2018] EWCA (Civ) 18 a UM claimed asylum in Italy ('C1'). His aunt ('C2'), who had refugee status in the United Kingdom, asked the Secretary of State to take responsibility for deciding C1's asylum claim under article 17 of Dublin III. The Secretary of State did nothing. The claimants applied for judicial review and claimed a mandatory order requiring the Secretary of State to admit C1 to the United Kingdom. The UT announced that it had found in the claimants' favour and that its reasons would follow. Before it handed down its judgment, however, the United Kingdom accepted a TCR from Italy. The UT nevertheless made a mandatory order requiring the Secretary of State to admit C1 to the United Kingdom. The Secretary of State appealed. The Court of Appeal allowed the appeal, holding that the discretion conferred by article 17(1) applied to an asylum claim lodged by a person who was present in the United Kingdom, so as to enable the Secretary of State to decide that claim even if the United Kingdom was not, under the Dublin Regulation, the member state responsible for deciding that claim, but did not give the Secretary of State a power to intervene so as to override the operation of the Dublin Regulation when an asylum claim had been lodged in another member state. The discretion conferred by article 17(2) was not engaged because Italy had not asked the United Kingdom to deal with the asylum claim. Where the Dublin Regulation applied, an article 8 claim would only override that regime in an especially compelling case.

93. In paragraph 120, Arden LJ commented (in the context of article 17) that it was necessary for member state 1 to carry out its own checks. There is a risk that UMs have been separated from their families for trafficking purposes. 'It is essential in the vast majority of cases that the appropriate checks are carried out. [The Court of Justice of the European Union] has itself held that transfers of [UMs] should be avoided where possible. [Member state 1] must be able to make enough inquiries to fulfil its obligations under the UN Convention and to be satisfied that it is in the child's best interests to be transferred to another state…It is obvious that Dublin III does not prescribe all the detailed requirements for applications, and that the process for making detailed inquiries relating to the best interests of a child falls within the procedural autonomy of states'.

94. In paragraph 121 she rejected an argument that the Dublin Regulation gave effect to additional rights of protection for rights guaranteed by the [ECHR] (or indeed the [CFR])'. The Dublin Regulation was not a 'mechanism for giving effect to the rights arising purely from those obligations which does not exist under the [ECHR] or the [CFR] as the case may be'. In paragraph 122 she said that article 8(2) of the Dublin Regulation was not 'self-executing'. The mechanism for implementing the obligation imposed by article 8(2) had to be found in another provision, such as article 17.

95. In paragraphs 135 and 138 she described the Secretary of State's submission that C1's case was not 'especially compelling'. At the outset, C1 had one relative near him, SB.

He had never previously lived with C2, and was not being accommodated and cared for in a makeshift camp. The Secretary of State also submitted (see paragraph 138) that the question of ' "compelling circumstances" for *ZT (Syria)* purposes' has to be answered in the context of UMs generally. It is a very high threshold, because being an asylum seeker at that age is bound to involve trauma (paragraph 138). Arden LJ accepted the submission that the high threshold in *ZT (Syria)* was not met in that case. There is a risk that by prioritising one child in the queue, the position of 'other needy [UMs] is prejudiced'.

Citizens UK

96. *R (Citizens UK) v Secretary of State for the Home Department* [2018] EWCA (Civ) 1812; [2018] 4 WLR 123 and the related appeal, *R (AM) v Secretary of State for the Home Department* [2018] EWCA (Civ) 1815; [2019] 1 All ER 455, concerned the fairness at common law of the operation of an 'expedited process' agreed between the Secretary of State and the French authorities in response to the impending demolition of a camp near Calais, known as 'the Jungle'. The Secretary of State agreed by that process to assess the eligibility of UMs for transfer from France to the United Kingdom. *Citizens UK* was an appeal from a decision of Soole J sitting in the Administrative Court. *AM* was an appeal from a decision of the UT in four linked cases.

97. The Court of Appeal recognised in *Citizens UK* that this process operated outside the Dublin Regulation and that the Secretary of State did not breach EU law by adopting it. In paragraph 103 of his judgment, Singh LJ, with whom Hickinbottom LJ and Asplin LJ agreed, said, obiter, it was not necessary for him to express a view about the procedural requirements of article 8. It could not give greater rights than the common law in this context. The judgment in *ZT (Syria)* put considerable difficulties in the way of such an argument. In paragraph 183 of his concurring judgment (with which Asplin LJ agreed), Hickinbottom LJ pointed out that as the children were on French soil, the Secretary of State had no legal responsibility to any of them unless and until they applied for asylum in France and a TCR was made under Dublin III.

98. The UT held in *AM* that in using the expedited process, the Secretary of State had breached European law, common law requirements of fairness and the procedural requirements of article 8. Singh LJ, with whom the other members of the court agreed, held that the UT erred in law in holding that article 8 and its procedural requirements were essentially interchangeable with the procedural requirements of Dublin III. He followed the approach of this Court in *ZT (Syria)* that article 8 'will only have a role to play in very exceptional circumstances. In particular it must be shown that the French legal system had systemic deficiencies in it which rendered it incapable of providing an effective remedy to the Respondent children' (judgment, paragraph 88). Further, the UT had not given enough recognition to the fact that the children were under the jurisdiction of the French care system. Singh LJ accepted the Secretary of State's submission that 'art 8 of the ECHR had no applicability in these cases' (judgment, paragraph 93).

MS

99. The Claimant in *R (MS) v Secretary of State for the Home Department* [2019] EWCA (Civ) 1340 was an Afghan national who claimed asylum in France when, he claimed, he was a minor. He also claimed that his brother, MAS, lived in the United Kingdom. The Secretary of State refused three TCRs between 27 July 2017 and March 2018, on the grounds that MAS was not MS's brother. The Secretary of State gave weight to

the fact that MAS had denied having any siblings when he had claimed asylum in 2003. MS applied for judicial review of those refusals.

100. The UT quashed those decisions and found that MS and MAS were brothers. The UT remitted the matter to the Secretary of State. Hickinbottom LJ recorded that the 'core issue' at the UT hearing was the extent to which the Secretary of State had a duty to investigate which extended to facilitating and securing the provision of a DNA sample from an asylum applicant who was in France. The UT held that each refusal was unlawful because the Secretary of State had not taken reasonable steps to find out whether DNA evidence could be obtained. It held that the third refusal was also unlawful because the Secretary of State had not taken into account relevant evidence (judgment of the Court of Appeal, paragraph 40).

101. The UT gave the Secretary of State permission to appeal on two grounds. The first was whether the phrase 'transfer decision' in article 27 of Dublin III included the refusal of a TCR. Article 27, which is new to the Dublin regime, gives applicants a right to an effective remedy. The second ground was, if that phrase did include the refusal of a TCR, whether the UT had erred in holding that it had to decide, as a question of primary fact, whether or not MS was MAS's brother. The UT refused permission to appeal on five other grounds which related to the nature of the Secretary of State's obligations when she receives a TCR. The Court of Appeal also refused permission to appeal on those grounds (judgment, paragraph 11). Hickinbottom LJ said that the Secretary of State had effectively conceded ground 2 at the hearing in the Court of Appeal (judgment, paragraph 13).

102. After the claim was brought, the Secretary of State asked France to send a further TCR, which she had accepted shortly after the date of the UT's determination. MAS and MS were then reunited in the United Kingdom. Indeed, a DNA test showed that they were brothers, as they had claimed. By the time of the hearing in this Court, the Secretary of State's appeal, as it related to MS, was, therefore, academic. The first issue on the appeal was whether *MS* was one of the rare cases in which the Court should exercise its discretion to decide an academic appeal. In a judgment with which all three members of the Court agreed, Hickinbottom LJ decided that it was not such a case. The Master of the Rolls made some further observations in a short second judgment, with which the other members of the Court agreed.

103. Hickinbottom LJ described the factual, legal and procedural backgrounds in paragraphs 1-44 of his judgment, and the parties' submissions in paragraphs 46-52. It was the primary submission of Ms Kilroy, who also appeared for the UM in that case, that the Court of Appeal should decline to decide the appeal because it was academic. Hickinbottom LJ said that he saw the force of Ms Kilroy's submissions on the construction of article 27. He held, nevertheless, that the Court should not decide the question. He was not persuaded that it was in the public interest. Article 27 had been in force since 2013 and there was no evidence that it had led to problems. In any event, domestic remedies might, as Ms Kilroy submitted, be sufficient (judgment paragraph 54).

104. The Master of the Rolls said that he wanted to add 'some amplification on the place of article 8…and ordinary domestic law principles of judicial review in the proceedings below and on this appeal'. MS pleaded that the refusals were unlawful and contrary to the Secretary of State's obligations imposed by the CFR, article 8, and the CRC. He pleaded that the duty to act compatibly with article 8 'existed alongside Dublin III'

and was 'not subsumed or replaced by it'. The Secretary of State relied on *ZT (Syria)* to argue that Dublin III should only be 'circumvented by recourse to article 8 in very exceptional circumstances'. Article 8 could only be engaged if the decisions that MS and MAS were not brothers were based on a material error of fact, wrong in law or irrational.

105. Ms Giovannetti QC (who represented the Secretary of State) had accepted in her oral submissions that judicial review was available under normal domestic principles even if the alleged unlawfulness 'arose under Dublin itself'. That was why the UT quashed the Secretary of State's decision. Article 27 was only relevant to a later question, which was whether the UT should have decided for itself whether the criteria for determining responsibility under article 8 were met on the facts (judgment, paragraphs 62-63).

106. Ms Kilroy, arguing that the appeal was academic, submitted that refusals of TCRs could be challenged because they infringed article 8 'irrespective of rights and obligations under Dublin III, applying ordinary domestic law judicial review principles and also bearing in mind' that the Secretary of State had accepted that there is a residual power to find facts on an application for judicial review and that if it is alleged that article 8 has been breached, the court has to decide proportionality for itself (judgment, paragraph 64).

107. The Master of the Rolls said, in paragraph 65, that *ZT (Syria)* and *RSM* were 'not relevant to that line of argument'. They were plainly distinguishable 'as cases in which the applicants were seeking to bypass or override express procedures under the Dublin process which would otherwise have applied'. He expressed surprise that, in the light of what had happened in the UT and the concession by the Secretary of State of ground 2, Ms Giovannetti had asked the Court to express no view about the application of domestic judicial review principles in a case like the present case. It was not the subject of the notice of appeal. It was enough to record that nothing had been said to the Court of Appeal which showed that the UT had been wrong to approach the case on ordinary judicial review principles.

FTH

108. *Secretary of State for the Home Department v FTH* [2020] EWCA (Civ) 494 was another appeal from the UT. The background to the claim was, again, the expedited process which led to the appeals in *Citizens UK* and in *AM*. The judgment of this Court records that most of the UMs in that camp, including the appellant, had not made asylum claims in France. The United Kingdom had no legal obligations to the children there but agreed a process with the French government which reflected the provisions of Dublin III but did not require the UM to have made an asylum claim in France. This Court quoted paragraphs 93-98 and 103 of the judgment in *Citizens UK*, and summarised the earlier cases. The respondent in that case sought to distinguish the *ZT (Syria)* line of cases by arguing that he was 'not seeking to bypass Dublin III' (judgment, paragraph 35 iii). He had been deprived, by a procedural breach of article 8, of the chance to be with his brother for nearly two years (ibid, paragraph 35 iv). The UT awarded the respondent £12,000 damages.

109. The Secretary of State appealed on the basis that the UT's decision was inconsistent with *AM*. The Secretary of State 'properly' accepted that article 8 was engaged, but submitted that it was not breached (judgment, paragraph 40). She further submitted that the principle, as regards the article 8 rights of UMs in France who have close

relatives in the United Kingdom, is that the availability of the Dublin III process (taken with the supportive judicial process) 'sufficiently respects that child's right to family life, so long as the process is effective. Generally, those procedures strike an effective balance between the public interest in a coherent immigration system and the article 8 rights of asylum seekers. The fact that the respondents in *ZT (Syria)* tried to bypass Dublin III was not the point. At all material times, that process was available' (judgment paragraph 43). Ms Kilroy, who again represented the respondent, submitted that the other cases were distinguishable, because in this case the respondent had used the available procedure. The Secretary of State, not the respondent, had bypassed Dublin III. The very exceptional circumstances test had no role because the delay was the fault of the Secretary of State and not of the French authorities. She accepted that it was difficult to distinguish *AM* but sought to do on the facts.

110. This Court said that the question was not whether article 8 was engaged, but whether it was infringed, and whether *AM* was binding authority that it was not (judgment, paragraph 53). In paragraph 55, this Court described the ratio in *AM*. It was that even though the expedited process operated outside Dublin III, the Secretary of State's article 8 obligations to a UM in France were limited to the very exceptional circumstances described in *ZT (Syria)* even where the child has used that process. 'That was because, where the Dublin III procedure (including the enforcement procedures available through the French judicial system) was available... that would usually have provided sufficient protection for his…article 8 rights by (amongst other things) providing an effective remedy. The Secretary of State's independent obligations under article 8 would only have arisen if, for some reason, it could be shown that there was a deficiency in the system which meant that the [UM] was denied such a remedy by that route'.

FA

111. The claimants were children. They were the subject of TCRs by France. The Secretary of State accepted the family link which they claimed, but initially sent a holding letter and did not formally accept responsibility for their cases until more than two months after the TCRs. They were transferred to the United Kingdom within the overall eight-month time limit. UTJ Frances found that the Secretary of State had failed properly to investigate their cases, and that the holding letter was unlawful. In short, the UT held that the failure to respond within 2 months did not breach either Dublin III or article 8. The transfer in that case took place within the overall Dublin time limit.

R (KF) v Secretary of State for the Home Department (JR/1642/2019)

112. KF's uncle was a British citizen from Afghanistan. KF travelled from Afghanistan to Greece via Turkey. He claimed asylum in Greece on about 20 July 2018. The Secretary of State purported to reject a TCR on 24 December 2018. On 25 March 2019, the Secretary of State decided that KF and his uncle were related, and asked the relevant local authority to do a family assessment. On 10 April 2019, the Secretary of State told the Greek authorities that the United Kingdom would accept KF's transfer. UTJ Blum assumed that the transfer took place on 17 September 2019 (judgment, paragraph 14). He held that the delay in transferring KF breached the long-stop time limit, which started to run not from the actual acceptance by the Secretary of State of the TCR, but from the date on which it was deemed to have been accepted, pursuant to article 22(7). The breach of the long-stop time limit distinguished *KF* from *FA*.

UTJ Blum also held that the Secretary of State breached her investigative duty. UTJ Blum held, on the facts, that the delay in KF's transfer was not an interference with KF's private or family life.

113. In a further judgment promulgated on 18 September 2020 the UT considered whether or not to make an award of damages for breach of EU law. In a detailed decision, UTJ Blum held that no such award should be made because the rules of EU law which the Secretary of State had infringed did not confer rights on individuals. He did not consider any further issues in relation to damages.

Article 8 and positive and negative obligations

114. As Baroness Hale explained, giving the judgment of the Supreme Court in *MM (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10; [2017] 1 WLR 771, the European Court of Human Rights ('the ECtHR') has always distinguished between cases in which a state expels a settled migrant, and those in which it either expels, or refuses to admit, a person with no such rights. The former involves an interference with rights protected by article 8, and must be justified under article 8.2. The latter does not. The legal question in the second type of case is whether the state has a positive obligation, imposed by article 8. Some of the approach which applies in a negative obligation case can be transposed to positive obligation cases, such as the question whether a fair balance has been struck between the state's interests and those of the migrant, and a margin of appreciation for the state (judgment, paragraphs 38 and 40-43).

115. Domestic courts have used article 8.2 as a useful analytical tool in such cases. The issue is 'always whether the authorities have struck a fair balance between the individual and public interests, and the factors identified by the Strasbourg have to be taken into account, among them the "significant weight" which has to be given to the interests of the children' (judgment, paragraph 44). Her analysis of positive and negative obligations in *R (Bibi) v Secretary of State for the Home Department* [2015] UKSC 58; [2015] 1 WLR 5055 is similar (see, in particular, paragraphs 25-29 of her judgment). In both cases, Baroness Hale's reasoning is expressly based on the decision of the Grand Chamber in *Jeunesse v Netherlands* (2014) 60 EHRR 789.

The submissions

116. The parties made extensive written and oral submissions. I will not describe these at any length. I will summarise the main strands of their arguments.

The Secretary of State

117. The Secretary of State acknowledges that there were failings in the response to the TCR, and that she should have responded to it within two months. The sanction for that is specified in article 22.7 of Dublin III, however: the United Kingdom is deemed to have accepted the TCR. At that point, under the terms of the IR, France became responsible for arranging the transfer of the respondents to the United Kingdom. France had six months in which to do that, and complied with that time limit: the Respondents were transferred to the United Kingdom on 25 June 2019. The court should look at the overall process and ask whether the outcome was a breach of Dublin III, or of article 8, rather asking whether the Secretary of State had acted unlawfully along the way. Mr Dunlop accepted the findings of incidental unlawfulness by the Secretary of State in the judgment.

118. The Respondents have no article 8 claim as respects the discharge by the United Kingdom of the obligations imposed on it by Dublin III. The delay was too short to

breach article 8, and any claim as respects delay in arranging the transfer should have been made against France, as the member state responsible for any such delay. Dublin III goes further than article 8 requires in several respects; for example, article 8 does not require a response to a TCR within two months. Mr Dunlop accepted that its recitals show that Dublin III is intended to be consistent with article 8. But it could be consistent with article 8 while going further than article 8 requires. Dublin III does not represent an international legal consensus, unlike the Hague Convention, and it follows that it is not relevant to the interpretation of article 8 in the way that the Hague Convention might be.

119. The Secretary of State argues that the obligation to admit for family reunion is a positive obligation, and so a breach of that obligation or a delay in complying with it cannot sensibly attract the requirement, imposed by article 8.2 of the ECHR, that it should be 'in accordance with law', but that, even if that requirement does apply, the Secretary of State complied, overall, with the obligations imposed by Dublin III. The decision of the Strasbourg Court in *Jeunesse*, followed by the Supreme Court in *MM (Lebanon)* and in *Bibi* clarifies the approach to cases involving positive and negative obligations. It does not decide that the 'in accordance with law' criterion applies in a positive obligation case. Mr Dunlop accepted that it can be hard to draw the line between cases in which article 8 imposes positive and negative obligations, but that, wherever that line was properly to be drawn, and whether or not he had drawn that line correctly in his submissions, this case was self-evidently a case in which, if any obligations were imposed by article 8, they were positive obligations, because Rs were outside the United Kingdom and had no right to enter the United Kingdom.

120. The Secretary of State also submits, in any event, that the Judge's approach is inconsistent with the approach in several decisions of this Court. That is that, in the context of Dublin III, member state 2 will only breach article 8 in 'very exceptional circumstances' where systemic deficiencies in the legal system of member state 1 mean that it cannot provide an effective remedy (*Secretary of State for the Home Department v ZAT* [2016] EWCA (Civ) 810, at paragraph 95, *R (RSM) v Secretary of State for the Home Department* [2018] EWCA (Civ) 18, at paragraphs 142-144 and 173-175), *R (AM) v Secretary of State for the Home Department* [2018] EWCA (Civ) 1815, at paragraph 88, and *Secretary of State for the Home Department v R (FTH)* [2020] EWCA (Civ) 494 at paragraph 55.

The Respondents

121. Rs submit that the Secretary of State has mischaracterised their case, and the Judge's reasoning. This is not a case about delay, but a case about the Secretary of State's unlawful refusal of the TCRs. The Secretary of State's case on appeal must be that none of the breaches of Dublin III which were found by the Judge can be a breach of article 8 ECHR or of Dublin III. Dublin III gives Rs a right to an effective remedy. Rs are enforcing, not seeking to circumvent, Dublin III. The Secretary of State breached Dublin III by not accepting the TCR sooner, and by purporting to refuse the TCR after the two-month time limit had expired.

122. He had also acted unlawfully by breaching his investigative duty and by breaching his express policy about contacting the relevant local authority. Several decisions of the UT show that the Secretary of State has an investigative duty in the context of Dublin III. The UT found that the Secretary of State was guilty of procedural failings both under Dublin III and under article 8. Rs did not submit that the Secretary of State was not entitled to investigate the alleged family link, but, rather, that the Secretary of

State had taken too long. The Secretary of State had also failed to explain his concerns to Rs and to NF.

123. They submit that the Secretary of State has misrepresented the effect of a series of judgments of this Court: *ZT (Syria)*, *RSM*, *AM*, and *FTH*. None of them applies to the question in this case, which is whether and if so in what circumstances unlawful decisions made in relation to Dublin III breach article 8 ECHR. The cases are all about decisions outside the Dublin III framework. It is only in that context that there is an exceptionality test. Only one case, *MS v Secretary of State for the Home Department* [2019] EWCA (Civ) 1340 concerns decisions taken under Dublin III and this situation is clearly distinguishable.

124. Ms Kilroy submitted that there was 'a clear interference because the TCR was unlawfully refused; that refusal engaged article 8 and was not put to an end'. The purpose of proceedings under the Human Rights Act was to put breaches of Convention rights to an end. She accepted that there is, for the purposes of article 8, a distinction between positive and negative obligations. The Secretary of State had drawn the line between positive and negative obligations incorrectly, however, because the Secretary of State's submission did not reflect where the Strasbourg Court had drawn that line. The Strasbourg Court does not distinguish between removal and admission. *Osman v Denmark* (2015) 61 EHRR 10 is an example of a case in which the Strasbourg Court expressly did not find it necessary to distinguish between the two types of obligation, instead, saying, at paragraph 53 of the judgment, that the boundaries between the two cannot be precisely defined and that in both types of case 'the state must strike a fair balance between the competing interests of the individual and of the community as a whole'. I observe that, on examination, and contrary to Ms Kilroy's submission, *Osman* is not a straightforward entry clearance case, as the applicant had lived in Denmark for several years and had had a residence permit. When I asked Ms Kilroy whether there was any Strasbourg case in which the Court had applied this analysis to a person who was seeking entry to a contracting state, she said that *Osman* was the only case which she knew about.

125. If the state sets up a system to discharge positive obligations to respect family life and acts unlawfully under that system, and if the unlawful act interferes with family life, it is not in accordance with the law or does not strike a fair balance. She submitted that article 8 must be interpreted in the light of any relevant international instruments, such as the Hague Convention. Dublin III was an 'expression of what member states had decided to fulfil their obligations under article 8 and other obligations'.

126. The requirement to act 'in accordance with law' includes a requirement to act in accordance with the common law, and in accordance with EU law.

127. *ZT (Syria)* and the cases following it do no more than to establish that a person to whom Dublin III applies but who relies on article 8 instead of Dublin III for admission to the United Kingdom must establish exceptional circumstances in order to get a remedy. They do not establish that a person who relies on Dublin III, and who alleges that a member state has breached article 8 in discharging its obligations under Dublin III, has to establish exceptional circumstances. That would make no sense at all. That line of authority only applies where a claimant is criticising the actions (or inaction) of member state 1. The decision of the Court of Appeal in *MS* is that it was not in the public interest for the Court of Appeal to hear that appeal because it was in

any event open to the appellant to rely on article 8. That decision is binding in this case.

128. When asked, Ms Kilroy did not accept that Dublin III went further than article 8. She was asked by my Lord, Davis LJ, whether, absent Dublin III it would be a breach of article 8 for the Secretary of State not to admit Rs on the facts of this case. In due course she submitted that it 'would'. Recitals 13-17 of Dublin III show that the provisions at issue in this case are 'required' by article 8.

129. She accepted that a domestic court would have been entitled, and right, to decide that the Secretary of State had acted unlawfully in this case in various ways without invoking article 8, and that the only difference which article 8 could make was that it might give rise to damages, rather than simply a declaration or a quashing order.

Discussion

130. There are four issues.

i. Did the Secretary of State breach Dublin III in this case?

ii. Was any such breach of Dublin III, or any other incidental unlawfulness, *ipso facto* a breach of article 8?

iii. If not, can Rs nevertheless rely on article 8 in the context of the discharge by the United Kingdom of its obligations under Dublin III?

iv. If Rs can rely on article 8 in the context of Dublin III, did the delay in this case breach article 8?

Did the Secretary of State breach Dublin III?

131. The Secretary of State argues that he/she did not breach Dublin III in this case, because Rs were transferred from France to the United Kingdom within eight months of the date they lodged their asylum claims in France. The Secretary of State now accepts, in effect, that the purported refusal of the TCR outside the two-month period laid down by article 22.1 was unlawful. The legal remedy for the failure to reply to the TCR is, however, provided for by article 22.7. It is that the United Kingdom was deemed to have accepted the request, and became obliged to take charge of Rs. Rs rely on an unlawful refusal outside the two-month period, and delays during the first two months and in the following six months. The UT found (in the damages judgment) that were it not for that unlawful refusal and those delays, Rs would have been transferred four months and five days earlier than they were transferred in fact. The UT also found, for example, that the Secretary of State breached her investigative duty and her own Dublin policy; but the 'many failings' described by the UT had the same legal and factual result, which is that period of delay, as the Judge acknowledged in paragraph 104 of the judgment on liability.

132. The real question is whether that period of delay involves a breach of Dublin III by the Secretary of State. The obligation imposed by article 22.1 is not to reply to the TCR as soon as possible, but to reply to it within two months. There is no obligation to reply to the TCR within a reasonable time. Moreover, if that obligation is breached, the sanction is that member state 2 is deemed to have accepted the TCR. The next step in the process is the transfer, which is to be carried out in accordance with the law of member state 1, 'as soon as practically possible, and, at the latest within six months of acceptance'. Where member state 2 is deemed to have accepted responsibility, member state 1 must initiate the consultations needed to organise the

transfer. If asked to do so by member state 1, member state 2 must confirm in writing that it acknowledges responsibility. The Court's attention was not drawn to any other evidence about communications between France and the Secretary of State's practical arrangements for the transfer. There is no evidence that France asked for that acknowledgement in this case. What we do know is the date when the transfer took place.

133. Dublin III, the IR and the UIR impose general obligations on member states. I do not consider that it is possible to spell out of their express provisions sufficiently clear sub-rules which would enable a court to decide that a member state which had complied with the overall time limits had nevertheless breached Dublin III by delay within those overall limits. This is particularly the case as respects delays in the period between deemed acceptance and the transfer, as member state 1 and member state 2 both have responsibilities during that period. It may, of course, be possible, in a particular case, to say that one of the two member states was responsible for all the delay, but that will not be possible in every case. One evident purpose of the scheme, which is that clear and uniform rules should apply to all member states, would be defeated if it is necessary to investigate, and attribute responsibility for, delays in that period in order to see whether one or other state had breached Dublin III. Such an approach is inimical to legal certainty. I therefore consider that, provided that a transfer has taken place within the overall time limit provided for by Dublin III, member state 1 and member state 2 have complied with Dublin III, whether or not there was incidental unlawfulness, 'failings' or other errors. The Secretary of State's purported refusal of the TCR outside the two-month period was unlawful, but it had no legal effect. If my approach to the obligations imposed by Dublin III is correct, then the Secretary of State did not breach Dublin III.

Is a breach of Dublin III or incidental unlawfulness ipso facto a breach of article 8?

134. I consider, second, whether any breach by a member state of the obligations imposed by Dublin III, or any incidental unlawfulness by a member state, is a breach of article 8 because it is 'not in accordance with the law' for the purposes of article 8.2. That question involves two linked issues. The first is whether every provision of Dublin III mirrors the obligations imposed by article 8. The second issue is whether the court should ask, not whether a public authority has interfered with the rights protected by article 8, or whether a public authority has failed to discharge a positive obligation imposed by article 8, but whether article 8 is engaged in the overall operation of the Dublin scheme, and then to ask whether the Secretary of State has acted unlawfully in the discharge of the obligations imposed by that scheme.

135. As its recitals and structure show, the main purpose of Dublin III is to create a system for the allocation of responsibility between member states for the examination of claims for international protection made anywhere within the EU, and to set out a procedure and time limits for the determination of that allocation. The Dublin Convention dealt with claims under the Refugee Convention; Dublin III now includes both such claims (ie asylum claims) and claims for humanitarian protection (broadly, claims under article 3 of the ECHR). Dublin III creates a hierarchy for the allocation of that responsibility. That hierarchy permits a claimant to have his claim considered in the territory of a member state in which a member of his family is lawfully 'present': see the definitions of 'family members', and of 'relative', and the fact that there is no limitation on the siblings referred to in article 8(1). Dublin III imposes an overall time limit of 11 months on the process of transfer from the date when the

asylum claim is registered in member state 1, and a period of eight months from the date when member state 1 makes the TCR.

136. The Strasbourg cases relied on by the Secretary of State show that in some cases article 8 may impose a positive obligation on a contracting state, if a person is settled in that state, to admit a member of his family to that state. The cases all concern close family relationships, such as parents and children, and recognise that such reunion may, compatibly with article 8, take some time (see, for example, *Tanda-Muzinga v France* (Application No 2260/10, 10 July 2014)). There is no Strasbourg case, however, which has recognised a positive obligation to admit them within the relatively short time limits prescribed by Dublin III. Moreover, no Strasbourg case has derived an obligation from article 8 to admit a person to a contracting state in order to enable that state to consider his claim for international protection.

137. It is therefore obvious that the obligations imposed by Dublin III are not a mirror image of the obligations imposed by article 8. The references in the recitals to article 8 and to article 7 CFR show, not that Dublin III mirrors article 8, but, rather, that in framing Dublin III, the legislator has had the importance of family links well in mind, no doubt because it was thought that if an application for international protection succeeds, it will help the successful applicant to settle in his new country if any member of his wider family is lawfully present there. Recital (32) recognises the significance of the Strasbourg caselaw, but does not oblige member states to go further than that caselaw indicates (for example, no member state other than the United Kingdom is bound by the Supreme Court's decision in *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 AC 621 to overrule *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471). For those reasons, I consider that the provisions of Dublin III do not individually mirror the obligations imposed by article 8.

138. I turn to the second issue. The Strasbourg cases do not decide that if a contracting state establishes an administrative scheme (such as Dublin III) which is designed, in part, to recognise or to respect the rights protected by article 8, any incidental unlawfulness in the operation of such a scheme is a breach of article 8. Such an approach is similar to the approach which a court takes when considering an allegation of discrimination contrary to article 14. That approach is to ask, if a state is acting 'within the ambit' of a Convention right, whether an applicant has been treated differently on the grounds of his status. Article 14 does not require an interference with Convention rights. There is no warrant for such an approach to article 8. A breach of article 8 depends, in the case of a negative obligation, on an interference with rights protected by article 8, and, in the case of a positive obligation owed to that person, a breach of that positive obligation.

139. It follows that, even if I am wrong and the Secretary of State's 'failings', or any of them, amounted to a breach of any provision of Dublin III, that breach was not *ipso facto* a breach of article 8. The same analysis applies to incidental unlawfulness, such as the Secretary of State's failure to follow his policy, and his breach of his investigative duty.

Can Rs nevertheless rely on article 8 in the context of Dublin III?

140. This brings me to third issue, which requires me to consider *ZT (Syria)* and the cases which have followed it. Both sides relied on these cases, as I have explained. Ms Kilroy is right that this case differs from the other cases, because it is a case in which

applicants who have invoked and relied on Dublin III have also sought to rely on article 8. The *ZT (Syria)* line of cases concerns applicants who either tried to avoid Dublin III, or who relied on a different scheme which occupied similar ground (the expedited scheme). The question, however, is not whether that distinction is factually accurate. It is. The question, rather, is whether that factual distinction affects the principle which underlies the *ZT (Syria)* line of cases. That principle is that when a UM makes a claim for family reunion to which Dublin III applies, he cannot rely on article 8 to supplement, or to increase, the rights which Dublin III gives him as against member state 2, unless his circumstances are very exceptional (for example, he is in the territory of a member state which systematically fails to comply with the obligations imposed by Dublin III). The reason why he cannot do so is that if a member state complies with Dublin III, which goes significantly further than article 8 requires, that member state will, in all but the most exceptional circumstances, also comply with article 8, and that that can be assumed at a high level of generality, without the need to examine the circumstances of an individual case. I therefore reject Ms Kilroy's argument that the distinction between the facts of this case and the facts of the *ZT (Syria)* line of cases has any legal significance.

141. Whether or not this Court is strictly bound by the *ZT (Syria)* line of cases, I consider that the principle on which they rest, which in turn derives from the characteristics of Dublin III which I have described above, should be applied to this case, unless there are very exceptional circumstances. I reject Ms Kilroy's submission that there are such circumstances here. The question whether there are very exceptional circumstances must be asked in the context of a UM who has made an asylum claim in France, as Miss Giovannetti QC submitted in *RSM*. Most, if not all of those children, have, by definition, a history in which trauma, separation from their close families, an arduous and dangerous journey, and mental health difficulties all feature.

142. That reasoning is decisive of this appeal. I have not found it easy to understand the observations of the Master of the Rolls in *MS*. I do not understand him to have decided that the UM in that case had any free-standing rights under article 8; but if he did, his remarks were obiter, and inconsistent, if not with the rationes of the *ZT (Syria)* line of cases, then with the principle which underlies them (see paragraph 140, above). The ratio of *MS* is that the Court declined to entertain the Secretary of State's appeal about the construction of article 27 because it was academic. Mr Dunlop may be right to submit that the point the Master of the Rolls was making was a procedural point; that is, that part of why the appeal about the meaning of article 27 did not matter was because the availability of judicial review in this jurisdiction meant that all the arguments which could be raised pursuant to article 27 could, in any event, in theory, at least, be raised on an application for judicial review, even if some might not succeed.

143. My reasoning depends in part on a view that this is a case in which, if article 8 does apply, it can, at the most, impose a positive obligation on the Secretary of State. I should explain that view. It is obvious that article 8 may be engaged in a case to which Dublin III applies. But the mere engagement of article 8 is not enough, in my judgment, to mean that any breach of the provisions of Dublin III, or any incidental unlawfulness, amounts to a breach of article 8. I consider that Mr Dunlop is right to submit that the Grand Chamber in *Jeunesse* has recently endorsed the distinction between cases imposing positive and negative obligations, and that it has not endorsed the application of the 'in accordance with law' criterion in positive obligation cases. I

consider that he is also right to submit that that approach has now been accepted by the Supreme Court in *MM (Lebanon)* and in *Bibi*.

144. The distinction between positive and negative obligation cases may be difficult to apply to borderline cases, as the Supreme Court has recognised in many recent decisions, and as the Strasbourg Court acknowledged in *Osman*. But wherever the line may be drawn, the facts of this case are clearly some distance from it. Absent Dublin III, it could not be argued that by failing to admit Rs to the United Kingdom, the Secretary of State was interfering with their article 8 rights, as they had no right to be in the United Kingdom, and the Secretary of State was not responsible for the fact that they were in France and their brother was in the United Kingdom, or for the fact that their brother, with whom they had never lived, appears to be the only surviving and identifiable member of their family. I consider that this is a case in which, if article 8 applied, it could only impose a positive obligation on the Secretary of State, that the 'in accordance with the law' criterion would not apply to the discharge of that positive obligation, and that there is no Strasbourg case which begins to suggest that family reunion preceded by the delay which occurred in this case, could be a breach of any positive obligation. I accept the Secretary of State's submission that whether or not the Secretary of State complied with any positive obligation depends on the overall outcome. If article 8 imposed any positive obligation on the Secretary of State in this case, he complied with it.

If Rs can rely on article 8 in the context of Dublin III, did the delay in this case interfere with Rs' article 8 rights?

145. I will assume that my answer to the previous question is wrong, that the Rs can rely on article 8 in this context, and that the question is whether the delay in this case was an interference with the Rs' article 8 rights. This question was considered by UTJ Blum in *KF*. The facts were similar to the facts in this case, except that in *KF,* the delay in effecting the transfer breached the long-stop time limit in Dublin III. When the TCR was made in this case, the Rs had never lived with NF. He left Afghanistan before they were born. Their contact with him, before they came to France, was very limited. There was some delay before they were transferred from France to the United Kingdom, but it did not exceed the Dublin III long-stop limit. They are now in the United Kingdom and living with NF. For reasons which are similar to those given by UTJ Blum in *KF*, I do not consider that the delay in this case did interfere with the Rs' article 8 rights. I consider that this conclusion is the only decision on this issue which a reasonable judge could reach.

Conclusion

146. The Judge found incidental unlawfulness by the Secretary of State in the discharge of the functions imposed by Dublin III. The Secretary of State does not challenge those findings. For the reasons I have given, that unlawfulness was not a breach of EU law, or of article 8. The Judge erred in law in holding otherwise. If the question arose, I would also hold that a reasonable judge could not decide that the delay in this case stated in transferring the Rs was an interference with their article 8 rights. I would allow the Secretary of State's appeal.

LORD JUSTICE FLAUX

147. I agree with the judgment of Elisabeth Laing LJ.

LORD JUSTICE DAVIS

148. I also agree with the judgment of Elisabeth Laing LJ. As I see it, the fundamental flaw in the arguments advanced on behalf of the respondents (and as accepted by the judge) is to seek to make the obligations imposed by Dublin III co-extensive with obligations asserted to arise by reason of Article 8. But, as explained by Elisabeth Laing LJ, they are not. Article 8 does not have the effect of requiring all the provisions set out in Dublin III. Dublin III thus sets out its own procedural scheme. That scheme, among other things, specifies that failure on the part of a contracting state to deal with a TCR within the initial two-month period means that the TCR is then deemed to be accepted and that state is deemed to take charge. On the facts of this case, that was on 15 January 2019. Notwithstanding initial false points thereafter taken by the Secretary of State, the TCRs were in fact ultimately formally accepted on 3 June 2019 by the Secretary of State; and the transfer of the Rs to the UK then took place on 25 June 2019. That was within the time-limits allowed by Dublin III. Thus this claim could not succeed.