Neutral Citation Number: [2022] EWCA Civ 421

Case No: CA-2021-000410
Formerly C2/2021/0202

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
The Upper Tribunal (Immigration and Asylum) Chamber
(Upper Tribunal Judge Coker
Upper Tribunal Judge Keith)
JR/221/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/04/2022

Before:

LORD JUSTICE PETER JACKSON
LADY JUSTICE ASPLIN
and
LADY JUSTICE ELISABETH LAING

- -

Between:

QH (AFGHANISTAN)	**Appellant/ Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent/ Defendant**

- -
- -

Sonali Naik QC and Greg Ó Ceallaigh (instructed by **Duncan Lewis Solicitors**) for the **Appellant**
Gwion Lewis QC (instructed by **Government Legal Department**) for the **Respondent**

Hearing dates: 22 February 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email, and release to BAILII. The date and time for hand down is deemed to be 10.30 a.m. on 1 April 2022.

Lady Justice Elisabeth Laing :

Introduction

1. The Appellant ('A') filed his original claim form in this case on 10 January 2018. He challenged four decisions of the Secretary of State:
    i. on 9 April 2017 to remove him from the United Kingdom ('decision 1')
    ii. on 30 March 2017 to certify his asylum claim on third country grounds ('decision 2')
    iii. on the same date to certify his human rights claim as clearly unfounded ('decision 3') and
    iv. to refuse to request A's return to the United Kingdom from Germany ('decision 4').

2. A's claim for judicial review succeeded. This is an appeal against a subsequent determination of the Upper Tribunal (Immigration and Asylum) Chamber ('the UT') promulgated on 5 November 2020 ('the Determination'). The UT was considering issues relating to A's damages claims against the Secretary of State which were still in dispute after A's successful application for judicial review.

3. A asked for permission to appeal to this Court on four grounds. By an order dated 11 October 2021, Popplewell LJ gave permission to appeal on grounds 2 and 3, which challenged the UT's conclusions that
    i. a declaration was just satisfaction for the admitted breach of A's private life rights caused by his removal to Germany and
    ii. the breach of EU law which was admitted by the Secretary of State was not sufficiently serious to entitle A to an award of '*Francovich*' damages (*Francovich v Republic of Italy* (Cases C-6/90 and 9/90) [1993] 2 CMLR 66).

   Popplewell LJ refused permission to A to argue that the Secretary of State had breached his article 8 rights to respect for his family life, and to argue that the UT erred in law in its approach to costs.

4. On this appeal, A has been represented by Ms Naik QC and by Mr Ó Ceallaigh. The Secretary of State was represented by Mr Lewis QC. We thank counsel for their written and oral submissions. I will consider the substance of the appeal first. At the end of the judgment I will consider four procedural issues.

5. Paragraph references are to the Determination, unless I say otherwise.

The background

6. I have taken this summary of the facts from the judgment of William Davis J (as he then was) handed down on 4 December 2018 after a hearing on 11 October 2018, supplemented, where appropriate, by the material in the UT's age assessment and in the Determination. With one or two exceptions, it seems that the facts were not substantially in dispute.

7. A was born in Afghanistan. He seems to have lived in Afghanistan in the same household as his uncle, D, in 2000, but not, it seems, for very long. D was present at

A's birth. D was an adult and left Afghanistan in the winter of 2000. He claimed asylum in the United Kingdom and was recognised as a refugee. He became a British citizen in 2008. D returned to Afghanistan twice and A's family travelled to visit him there.

8. A left Afghanistan in the middle of 2015. He went to Greece, where his fingerprints were taken in December 2015. He then went to Germany, where his fingerprints were taken in January 2016. He entered the United Kingdom on 13 April 2016. He was detained as he was getting out of the back of a lorry near Lincoln. He claimed asylum immediately. He claimed to have seen his father being murdered and to have been kidnapped and tortured himself. He also claimed that his brother had been murdered. He said he was 16.

9. On 27 April 2016 A's age was assessed by social workers from Lincolnshire County Council ('the Council'). The Council decided that A was 19, and had been born in September 1996. William Davis J was to comment adversely on this assessment in his judgment. By the time of the Determination, the Council had withdrawn the assessment (paragraph (8)).

10. A's account of how he contacted D was different from D's. D's evidence was that the police contacted him about A's arrival and that A's mother had not told him that A had left Afghanistan. The police told D that A wanted to live with him. D initially said he could not look after A. Several weeks later the police called again and told D that A had tried to walk to London to find D and was desperate to live with D. D then travelled to Peterborough and picked A up from the police station. D was not told about the severity of A's mental health concerns. It became clear that A had been traumatised by his experiences in Afghanistan. A tried to commit suicide in May or June 2016.

11. D went to Afghanistan for 40 days in late September 2016. D felt there was little he could do for A. A would stay in his room most of the time. A would play with D's children during the day, but would retreat to his room when D returned. D said that this made it difficult to establish a strong connection with A. A relied on local health services, from 2017 on a course at a local college, and on local charities and support workers. He was very close to one support worker, whom he saw as a maternal figure, and to another support worker whom he called 'Mum'. He was said to miss his own mother very much.

12. On 13 June 2016, A provided the Secretary of State with a Taskera (an Afghan identity document). It had been issued in April 2013, and showed that A had then been 13 years old. Also in June 2016 the Secretary of State asked Germany to take responsibility for deciding A's asylum claim under the Dublin III Regulation, on the basis that A was then 19. Germany said that it needed to investigate further, but accepted responsibility in January 2017.

13. When he reported on 3 or 4 April 2017, A was detained. A decision to remove A was made on 3 April 2017. The written notice specified that he was not to be removed until 10 April. Had the notice been served on A on the date when that decision was made, he would have had five working days' notice of his removal. In fact, the notice was served on 9 April, which was a Sunday. It notified A of a 3-month removal

window, which began the next day (10 April 2017). A was removed at 10 am on 11 April 2017.

14. On 16 April 2017, A's solicitors sent a pre-action protocol letter to the Secretary of State. They said that A had been unlawfully removed from the United Kingdom, that he was a disputed minor and that his mental health problems had got worse since his removal to Germany. They had not seen the Council's age assessment at that stage, and they referred to the Taskera which had been sent to the Secretary of State on 23 June 2016 by recorded delivery, and signed for. They enclosed a further copy. They also enclosed a letter from a consultant psychiatrist, which described A's difficulties. A's removal was a breach of article 8 of the Dublin Regulation and of the Secretary of State's own policy about removal in third country cases.

15. There were two responses to that letter. The Secretary of State, first, asked for more time. The Secretary of State's second letter said that A's identity document would be retrieved from storage and referred to a specialist unit for verification, suggesting that the Secretary of State had not done that earlier, despite having had the document for months. That specialist unit was the National Fraud Document Forgery Unit ('the NFDFU'). The Secretary of State proposed replying on 4 May 2017. A's solicitors replied on 11 May 2017. They asked for A's immediate return to the United Kingdom, and for disclosure of various documents.

16. The Secretary of State replied on 23 May 2017. Germany had, on reconsideration, accepted responsibility for considering A's asylum claim. A had claimed asylum in Germany as an adult. A's 'purported' identity document had been examined by the NFDFU 'who are unable to confirm that the document is genuine, and have recommended that it should not be relied on as evidence of nationality or identity' (see further paragraph 21(iv), below). A had correctly been treated as an adult. Requests for disclosure should be made to the subject access request unit ('the SARU').

17. In a later letter dated 31 May, the Secretary of State said that he had now been told that A had claimed to be a minor in Germany. There was much further correspondence during 2017. In summary, A's solicitors were still pressing for A's return as he had been assessed by the German authorities to be a minor. The Secretary of State was not aware of that, but if it was the case, said that the German authorities could make a 'take charge' request. The Secretary of State repeated several times that any requests for disclosure must be made to the SARU. A's solicitors then asked the German authorities to make a 'take charge' request.

18. Within a few weeks of his arrival in Germany, it is said that the authorities decided that A had been born in 2000 and, therefore, was still a minor. There was no dispute that he had 'significant mental vulnerabilities' (paragraph (53)). The UT was not satisfied, however, that it had 'the full picture in terms of the nature of the discussions between D and [A's] mother in Afghanistan' (paragraph (77)).

19. On 7 December 2017, A was assessed by the German Children and Youth Services in Gera, which had been appointed as A's guardian ('the German assessment'). The German assessment described A's acutely unstable mental state, and that it was of paramount importance for A to live with D.

20. At the date of the hearing of his claim for judicial review (11 October 2018) A was still in Germany.

A's application for judicial review

21. In an application for judicial review filed on 10 January 2018, A challenged decision 1 on four grounds.
    i. It was a breach of the Secretary of State's relevant policy.
    ii. It was a breach of articles 27(1) and 27(2) of the Dublin III Regulation (see paragraphs 74 and 75, below).
    iii. It was a breach of article 6 of the Dublin III Regulation, which provides that the best interests of a child 'shall be a primary consideration' (article 6.1) and that member states must closely co-operate with each other, listing the factors of which they must, in particular, take due account. Those include family reunification possibilities, the minor's wellbeing and social development, safety and security considerations, and the views of the minor (article 6(2)).
    iv. It was a breach of article 8.2 of the Dublin III Regulation, which applies when the applicant is a unaccompanied minor who has a relative living in another member state, and who, it is established, based on an individual examination, can take care of him. It requires the member state to unite the minor with that relative, and stipulates that that member state shall be the member state responsible, provided that is in the best interests of the minor.

The decisions of the UT on the application for judicial review

22. A applied for urgent consideration. On 12 January 2018, the UT refused that application, and ordered the Secretary of State to file her acknowledgement of service within 14 days. It considered that A's delay in making the application meant that it was not appropriate to make an immediate order for his return. On 17 April 2018, the UT refused permission to apply for judicial review on the grounds of delay. On 27 July 2018, after an oral hearing, the UT granted permission to apply for judicial review.

23. On 4 December 2018, William Davis J granted the application for judicial review. He made six relevant findings.
    i. The decision to remove A was actually made on 3 April 2017. The accompanying notice said that A was not to be removed until 10 April, but he was not served with the notice until 9 April (paragraph 6).
    ii. The Secretary of State did not follow his own instructions and guidance (Chapter 60 of the Enforcement Instructions and Guidance) in removing A. This was said to be 'an administrative error' but there was 'no evidence substantiating this proposition'. The Secretary of State conceded that the lack of notice was a breach of article 27.1 and 27.2 of the Dublin Regulation. A's removal was unlawful (paragraph 8).
    iii. Section 15(5) of the Tribunals Courts and Enforcement Act 2007 ('the 2007 Act'), which applies section 31(2A) of the Senior Courts Act 1981 to the UT, was not a reason for refusing relief. It could not be

said that the outcome for A would not have been substantially different if he had not been removed when he was. The Secretary of State should have realised that the age assessment by Lincolnshire County Council was flawed, and the UT would have held that decision 1, which was based on that age assessment, was also flawed (paragraphs 13-18).

iv. The NFDFU was not able to point to any feature of the Taskera which suggested that it was bogus. It had no similar document which was known to be genuine with which to compare it. The assessment of its authenticity was 'inconclusive'. The third country unit reported that outcome to the litigation section thus: 'Document are not found to be genuine following a document examination'. The UT would have considered that the Secretary of State's approach to the Taskera was flawed (paragraphs 19-20).

v. Decision 1 would not have survived 'proper scrutiny' (paragraph 21). The UT would have quashed all the decisions which were based on the premise that A was an adult. The Secretary of State would have been required to use his best endeavours to return A to the United Kingdom in order for there to be a hearing of a challenge to the age assessment (paragraph 22).

vi. Delay was not a reason for refusing relief (paragraphs 23-24). Nor was the fact that A was now an adult (paragraph 25).

24. An order dated 3 December 2018 declared that the Secretary of State unlawfully removed A without proper notice and in breach of his policy and of article 27 of the Dublin Regulation. Decisions 1, 2 and 3 were quashed. Paragraph 4 of the order provided for A's return to the United Kingdom. Paragraph 9 required A to particularise his damages claim within 14 days. The parties were then to try to agree that claim. If they could not agree, they were to file written submissions and the UT was to decide what directions to give. The parties were not able to agree. On 20 December 2018, A was returned to the United Kingdom into the care of his uncle D.

The UT's determination of A's age

25. In a determination promulgated on 14 May 2020, the UT decided that it was more likely than not that A was born on 14 May 2000. It followed that A was child when he was removed from the United Kingdom. The UT accepted the evidence of A's uncle, which the Secretary of State did not challenge, that he had been present at A's birth. A's uncle corroborated 'the prompt disclosure of [A's] age when [A] arrived in the UK and explains the earlier claimed date of birth in the NHS records'. The UT observed that the source of all the different strands of material which suggested A had been born in 1996 was what he was said to have told the German authorities in 2016. A had been seeking to retract that ever since. A's explanation was that if he had told the German authorities that he was a minor, they would not have allowed him to travel any further. He was also threatened by an agent. D's evidence was, further, corroborated by other material, such as the Taskera. Having declared A's age, the UT made further directions, which led to a hearing on 22 and 23 September 2020.

The issues for the UT at the September hearing

26. The UT recorded, in paragraph (12), that the Secretary of State conceded that A's removal was a breach of his article 8 private life rights. She had removed A unlawfully before he had a chance to challenge her decision. She did not accept that there was family life between A and his uncle. The UT said that it had to decide three issues (paragraph (15)).
    i. Was an award of damages necessary to give A 'just satisfaction' for the breach of A's article 8 rights (whether private, or family life)?
    ii. Was A entitled to *Francovich* damages? The Secretary of State conceded, both, that article 27 of the Dublin Regulation conferred rights which were enforceable by an individual, and that there was a causal link between her breach of A's rights and the damage A suffered. The sole issue, therefore, was whether the breach was 'sufficiently serious'.
    iii. If an award of damages was appropriate under either head, how much should be awarded?

27. The UT did not hear live evidence.

The reasoning of the UT on the damages claims

1.Article 8

(1) Did A have family life with D?

28. The UT dealt with this issue in paragraphs (17)-(78). It concluded that, when he was removed, A did not have family life with D.

(2) Was the UT satisfied that an award of damages was necessary to afford just satisfaction to A?

29. The UT quoted section 8 of the Human Rights Act 1998 ('the HRA'). It noted that no award of damages was to be made unless it was satisfied that an award was necessary to afford just satisfaction to A (section 8(3) of the HRA). The Secretary of State had to take A as she found him; that is, he was a minor, and he had 'significant mental health difficulties and vulnerabilities'. The first impact was the harm caused to the relationship which was developing between A and D. There had been significant difficulties in establishing a strong relationship. The UT thought it unlikely that it was 'a particularly strong relationship, albeit that [A] missed D as part of his private life'. He also missed the two volunteers.

30. The German assessment was that D had the interpersonal skills to care and to offer A 'a bit of a family'. A was reported in Germany to be having to start back at square one, and to be scared that, when he was an adult, he would be deported to Afghanistan. The assessment was that it would be better for his mental health to be living with D. It described suicidal thoughts and flashbacks. He appeared happier when talking about England, his uncle, and, most of all, about one of the support workers, who was 'very important' to him (paragraph (89)). 'What is the most important for [A] is to be able to be back with his uncle in England and to make a living together with him'. A felt 'trapped' in the facility in Germany. He was 'suffering incredibly'. The separation from D 'has affected his life all round and it has limited it immensely' (paragraph (90)).

31. The UT considered that A's separation from 'his support network' in the United Kingdom had had a 'profound effect' on him, which caused him distress, but there was no evidence of long-lasting effects on his mental health, or on his relationship with the support worker (paragraph (91)). His distress was obvious. He felt that he was living a kind of 'half-life' in Germany. He was separated from his friendships and support network from 11 April 2017 until 20 December 2018.

32. The period of absence was 'not insignificant' but a lot of the delay had to 'seen in the context of the pre-action litigation and the…judicial review proceedings' (paragraph (92)). There was a 'notable lack of urgency on the part of those representing [A] to seek enforcement of his immediate return' (paragraph (93)). The UT referred, in paragraph (94), to a dispute between A's solicitors and Secretary of State for the Home Department about disclosure. A's solicitors repeatedly ignored the Secretary of State's advice to make a subject access request. They had not explained why they had never made such a request. A's solicitors stopped asking for disclosure of the Council's age assessment after the positive German age assessment of 21 August 2017 (paragraph (95)).

33. There was therefore 'conflict and confusion' between the responsible authorities about the resolution of the dispute about A's age. The German authorities had maintained that A was an adult and had been correctly transferred to them until 4 December 2017. The Secretary of State had the Council's unchallenged assessment, claims by A about the German assessment, and the contrary stance of the German authorities. The fact that the Secretary of State and the German authorities thought that A was an adult was 'key to the process'. If he had been an adult he could have been removed under the Dublin Regulation (paragraph (96)).

34. There was a 'lack of progress (and frankly, sustained initiative) by [A's] solicitors in 2017' (paragraph (97)). The UT made other criticisms of A's solicitors in paragraphs (98)-(100). The UT's summary was that A's solicitors had not challenged the Council's age assessment, had delayed in applying for judicial review and in liaising with the German authorities, the Secretary of State and the German authorities agreed that the Dublin Regulation had been applied correctly, they could not agree about how to challenge this, and the Taskera had not been assessed properly. These 'procedural complexities did not make resolution simple'. The Secretary of State could be criticised for relying on the Council's age assessment but not for ignoring the German assessment (paragraph (101)).

35. The UT's conclusion was that 'in these far from straightforward circumstances, while we do not in any way condone or justify [A's] unlawful removal, the delay in return reflects the complex process involved in resolving matters (paragraph (102)).

36. The UT then considered the way in which A was removed. His evidence was that he was handcuffed and pulled onto the aeroplane 'like an animal'. His trousers were taken off and he had scars from cuts caused by the handcuffs. The UT decided not to take that part of A's claim at its highest. The German authorities did not refer to any scarring or ill treatment in their detailed reports which described A's other recollections of unkindness. There was no scarring evidence (paragraph (103)). A was no doubt 'highly distressed' when he was removed, but the UT did not accept that he had been subject to a 'serious physical assault' (paragraph (104)).

37. The UT took into account the effect of any declaration, that A had already been returned to the United Kingdom, the fact of his unlawful removal and the period during which he was outside the United Kingdom, that A was distressed but had suffered no long-term ill effects, and that the delay was explained, at least in part, by the complexity of the procedures to challenge a return in the absence of any challenge to the Council's age assessment. In the circumstances, a declaration was just satisfaction.

2. Francovich damages

38. The UT repeated that it was agreed that article 27 conferred direct rights on individuals and that there was a causal link between the loss and damage suffered by A and the breach of his rights. The UT recorded that 'Both parties agreed that [sic] the factors set out in *R v Secretary of State for Transport ex p Factortame Limited (No 5)* [2000] AC 524 [('*Factortame*')] by Lord Clyde' (paragraph (106)).

39. The Secretary of State submitted that article 27 provided a specific procedural safeguard, an effective remedy, which A 'had at all times'; that is, the ability to apply for judicial review of the age assessment. A had failed to use that remedy. The real failure was that A had not been given enough time to challenge his removal beforehand. Article 27(2) did not define a 'reasonable amount of time'. That lack of precision militated against an award of damages. The suggestion that the lack of notice had been deliberate was not made out. It was 'reasonable, indeed natural, to infer that there had been an administrative clerical error'. As soon as it was evident that the infringement had occurred (that is, after the judgment of William Davis J) A was promptly returned to the United Kingdom. A had continued to have access to his friends and D while he was in Germany ('albeit not in the same way'). The breach was not sufficiently serious to 'meet the relatively high threshold for an award of *Francovich* damages' (paragraph (107)).

40. The UT quoted extensively from Lord Clyde's speech (paragraphs (108)-(110).

41. In paragraph (111), the UT accepted that article 27.2 did not 'include any specific guidance on how much time should be provided in order to exercise an effective remedy, because to do so would infringe the rights of different Member states to issue and comply with their own guidance'. The UT accepted that the Secretary of State had breached her own guidance, but said that 'the Article itself did not have sufficient clarity'. The UT also accepted the Secretary of State's submission that 'there was an ability for [A], albeit limited, given the curtailment of time to challenge the removal, to have applied for an immediate injunction to prevent his removal' or to have applied for an immediate injunction requiring his return. A was legally represented, the Council's age assessment was nearly a year old, and A had been told about its conclusion the next day.

42. The UT accepted that A was removed deliberately, that the Secretary of State had the Taskera, and had failed to consider A's age in the light of it, but said that there had been no legal challenge to the Council's assessment. The Secretary of State should have realised that the Council's assessment was defective, but that did not mean that he had to treat A as a child, especially since the German authorities treated him as an

adult. 'There was not a wilful disregard by the [Secretary of State] or intention to remove [A] knowing him to be a child'. The breach was not sufficiently serious, even though it was, by the time of the hearing, known that A was a child, and that removal was not in his best interests (paragraph (112)).

43. No award of aggravated damages was appropriate, as the UT had not awarded any damages (paragraph (113)).

44. The UT made two declarations.
    i. A's right to respect for his family life was not engaged by the Secretary of State's unlawful actions.
    ii. A's removal breached A's right to respect for his private life and his right under article 27 of the Dublin III Regulation.

Submissions

45. There was a certain amount of skirmishing about the role of this Court on this appeal. For reasons which will become clear, I do not consider that it is necessary to rehearse those submissions.

46. For A, Ms Naik, referring to sections 2 and 8 of the HRA and the decision of Green J (as he then was) in *DSD v Commissioner of Police for the Metropolis* [2014] EWHC 2493 (QB); [2015] 1 WLR 1833, made eight points.

    i. The Court must take into account the 'principles' applied by the European Court of Human Rights ('the ECtHR') when deciding whether to award damages.
    ii. The facts must be assessed 'equitably'.
    iii. There is no right to compensation. A court will only award it when it is necessary to provide just satisfaction.
    iv. The ECtHR tries, so far as possible, to put the applicant in the position he would have been in if the requirements of the Convention had been complied with.
    v. There must be a causal connection between the loss/damage and the relevant violation of the Convention which is appropriately reflected in an award of compensation as well as a declaration.
    vi. The violation must be of a type which should be reflected in an award of damages.
    vii. The ECtHR has a 'broad brush' approach to compensating non-financial loss.

47. The Secretary of State only conceded that A's removal was a breach of his article 8 private life rights 14 months after the judgment of William Davis J. A's removal severed him not just from his developing relationship with D but from other significant relationships. A was a vulnerable child, who was seeking asylum. He was entitled to be in the United Kingdom while his asylum claim was considered. The ECtHR has awarded compensation for procedural breaches of article 8. She drew attention to several factors in the reasoning of the UT which pointed in the direction of an award of damages. She submitted that the only lawful conclusion open to the UT was that an award of damages was necessary in this case.

48. She accepted that an award of *Francovich* damages could not enable A to recover twice for the same loss. *Delaney v Secretary of State for Transport* [2015] EWCA (Civ) 172; [2015] 1 WLR 5177 suggests that it does not matter whether the focus of this Court is the approach of the first instance judge, or to ask, itself, whether the breach is sufficiently serious. She submitted that reliance on the conduct of A's solicitors as a reason not to award damages was perverse. The circumstances were 'extraordinarily serious'. A was separated from his uncle for over a year. It was 'difficult to imagine a more serious unlawful removal without a breach of Article 3 ECHR'.

49. Specifically, the UT erred in law
    i. in not taking into account the Secretary of State's refusal to engage with A's case over many months, and his insistence that A had to engage with the German authorities,
    ii. in holding against A that the Secretary of State had delayed A's return by insisting on that approach,
    iii. in not holding against the Secretary of State his insistence that A use the unsuitable process of making a subject access request,
    iv. in treating A's failure to challenge the Council's age assessment as relevant to article 8 or *Francovich* damages; no public authority could reasonably have relied on that assessment, and
    v. in blaming the delay on A's legal representatives.

50. A also relied on those factors in support of his argument that he was entitled to *Francovich* damages. On any proper view, the seriousness threshold was met. The UT also erred in law in assuming that R's actions were a simple error when there was no evidence to that effect.

51. The focus of the Secretary of State's submissions was that in deciding not to award damages under the HRA and *Francovich* damages, the UT was making a discretionary judgment with which this Court should be very reluctant to interfere. The UT's decision not to award damages for the disruption to A's relationship with D was rational, given the UT's comments on the nature of that relationship, and that the order requiring the Secretary of State to return A to the United Kingdom was enough.

52. So it was rational for the UT to take into account, in relation to the HRA claim, the length of the separation of A from D, the substantial delay by A and his solicitors in challenging the Council's age assessment (and in challenging A's removal), and the position of the central German authorities that A was an adult. The UT's view that the Secretary of State had not intended to transfer a child, and had not wilfully disregarded A's age was also rational. A's assertion about the seriousness of the removal was 'hyperbole'. The lack of challenge to the Council's age assessment was relevant. The issue of A's age was not straightforward. The Taskera did not resolve that question. The 'dilatoriness' of A's solicitors was relevant, as was their entrenched refusal to make a subject access request.

53. The Secretary of State submitted that the UT directed itself correctly 'as to the long list of criteria to consider' (by that, the Secretary of State means the list in Lord Clyde's speech in *Factortame*).

54. Both the 'just satisfaction' and 'sufficiently serious' tests were 'vague'; and the vaguer a test, the more reluctant a court is to interfere with the decision of a trial judge.

The law

Francovich damages

55. *Francovich* concerned the failure of a member state, Italy, to implement Council Directive 80/987 on the approximation of the laws of member states relating to the protection of employees in the event of the insolvency of their employer ('the Directive'). The Directive was not sufficiently clear and precise to enable the claimant to rely on it directly in a national court; in other words, it was not directly effective. One issue was whether the claimant, who had been harmed by the failure to implement the Directive, could claim compensation from Italy for the loss he suffered as a result of its failure to implement the Directive. Advocate General Mischo noted that a failure to implement a directive was of itself a breach of articles 5 and 189 of the EEC Treaty, and an unlawful act which must be made good by the member state when it has caused harm to an individual (Opinion, paragraph 68). In paragraph 71, he suggested that the minimum threshold for the liability of member states should be the same as the rules for the liability of Community institutions.

56. In paragraph 34 of its judgment, the Court of Justice said that the liability of a member state for compensation is indispensable where 'as in this case, the full effectiveness of Community rules is subject to prior action on the part of the State and consequently individuals cannot, in the absence of such action, enforce the rights granted to them by Community law before the national courts'. It therefore followed that there was such a principle of Community law (paragraph 37).

57. The conditions for liability depended on the nature of the breach of Community law giving rise to the harm (paragraph 38). 'Where, as here, a member-State fails to fulfil its obligations under article 189(3) EEC to take all the measures necessary to achieve the result prescribed by a directive, the full effectiveness of that rule of Community law requires that there should be a right to compensation where three conditions are met' (paragraph 39). Those are listed in paragraph 40.

    i. The result prescribed by the directive should entail the grant of rights to individuals.
    ii. The content of those rights should be identifiable from the terms of the directive.
    iii. There must be a causal link between the breach of state's obligations and harm suffered by individuals.

58. *Brasserie du Pêcheur SA v Federal Republic of Germany* and *R v Secretary of State for Transport ex p Factortame (No 4)* Joined cases C-46/93 and C48/93 [1996] QB 404 concerned successful infringement proceedings in which the claimants challenged domestic legislation. The question was whether member states were liable to pay damages for the failures of their domestic legislatures correctly to implement community law.

59. In his Opinion Advocate General Tesauro noted (paragraph 63) that the law about the liability of community institutions was so restrictive that there had, to date, been only eight awards of damages against them. He considered that the liability of member states should be less when they have a margin of discretion, but that, if they do not, liability should be imposed more readily (paragraph 67). He also noted that the fact that a community measure was unlawful was not enough to make a community institution liable unless there was a 'sufficiently serious breach of superior rule of law for the protection of the individual' (paragraph 72). He considered that a member state should be liable where it is constrained to produce a precise result, such as the implementation of a directive by a particular date (paragraph 80).

60. In paragraph 42 of its judgment the Court of Justice said that the conditions under which a state might incur liability for damages caused to individuals by a breach of community law could not, in general, differ from the liability of the community's institutions. Individuals' rights could not vary depending on whether a national authority or the community was responsible for the damage. In paragraphs 44 and 45, the Court of Justice explained why it had adopted a strict approach to the liability of the community, in particular for legislative measures. Essentially, particularly in areas involving choices of economic policy, community institutions have a wide discretion. The exercise of legislative functions should not be inhibited by fear of actions for damages. Where the legislative context is characterised by the exercise of a wide discretion, the Community cannot incur liability unless it has 'manifestly and gravely disregarded the limits on the exercise of its powers'.

61. However, in paragraph 46, the Court of Justice said that, in some contexts, a national legislature does not have 'a systematically wide discretion'. Community law may reduce its margin of discretion, 'sometimes to a considerable degree'. In contrast, where a member state has a wide discretion, 'comparable to that of Community institutions in implementing Community policies, the conditions under which it incurs liability must, in principle, be the same as those under which the Community institutions incur liability in a comparable situation'.

62. The Court of Justice observed that in both the cases it was considering, the two legislatures had a wide discretion (paragraphs 48 and 49). They had choices similar to the choices made by Community institutions (paragraph 50). In such cases, damages are available if three conditions are met (the rule of law in question must be intended to confer rights on individuals, the breach must be sufficiently serious, and there must be a direct causal link between the breach of the state's obligation and the damage sustained by the injured party).

63. In paragraph 55, the Court of Justice re-stated the test it described in paragraph 45. It added that it was 'the decisive test for finding that a breach of Community law is sufficiently serious whether the member state…manifestly and gravely disregarded the limits on its discretion'. The factors which a competent court may take into account are 'the clarity and precision of the rule breached, the measure of discretion left by that rule to the national …authorities, whether the infringement and the damage caused was intentional or involuntary, whether any error of law was excusable or inexcusable; the fact that the position taken by a Community institution may have contributed towards the omission, and the adoption or retention of national measures or practices contrary to Community law'(paragraph 56). 'On any view' a

breach will always be sufficiently serious if it has persisted despite judgment finding an infringement or a preliminary ruling, or settled case law from which it is clear that it is an infringement (paragraph 57).

64. In paragraph 58 the Court of Justice said that it was for the national court to decide whether there was a sufficiently serious breach. It added, in paragraph 67 that '…the state must make reparation for the consequences of the loss and damage caused in accordance with domestic rules on liability, provided that the conditions for reparation of loss and damage laid down by national law must not be less favourable than those relating to similar domestic claims and must be not be such as in practice to make it impossible or excessively difficult for individuals to exercise their right to reparation, as guaranteed by Community law, of loss and damage resulting from the breach of Community law'.

65. It is again clear, from the answer to the questions asked by the referring courts which was given by the Court of Justice in paragraph 74, that a premise of its reasoning was that each member state in that case was 'acting in a field in which it has a wide discretion to make legislative choices'.

66. In paragraphs 75-80 the Court of Justice considered whether a national court could make fault 'whether intentional or negligent' a condition of liability, when it is acting in a field in which it has a wide discretion to make legislative choices. Both referring courts had asked about this (questions (4)(a) and the second question, respectively). The Court of Justice said that '...certain objective and subjective factors connected with the fault under a national legal system may well be relevant' to the question whether a breach is serious (78). It referred to paragraphs 56 and 57 of the judgment (see paragraph 63, above). But liability cannot be based on any concept of fault going beyond that of a sufficiently serious breach of Community law. In other words, liability cannot be made conditional on intentional or negligent fault going beyond that of a sufficiently serious breach, as explained in paragraphs 56 and 57 of the judgment.

67. The Court of Justice considered the extent of compensation in paragraphs 81-90. It decided that reparation must be commensurate with loss or damage suffered (paragraph 82). If there are no relevant community provisions, it is for the domestic legal system to set criteria for extent of reparation.

68. In paragraph 84 the Court of Justice said that the national court may inquire whether the injured person showed reasonable diligence in order to avoid the loss or damage, or to limit its extent, or he would have to risk having to bear damage himself. It was for the national court to rule on heads of damage within the domestic law which it applies, subject to paragraph 83 (paragraph 88). It added, in paragraph 89, that an award of exemplary damages could not be ruled out if such damages could be awarded pursuant to a similar claim or action founded on domestic law.

69. In *Factortame* the House of Lords considered whether the United Kingdom was liable to pay damages to the applicants in that case. The Divisional Court and this Court had both held that the Secretary of State was liable. The House of Lords agreed. The issue was whether the breach in question was 'sufficiently serious'.

70. Lord Slynn and Lord Hope each gave speeches. Lord Nicholls and Lord Hoffmann each agreed with both speeches. Lord Hope also agreed with Lord Slynn's speech. Lord Clyde also gave a speech. None of the members of the Appellate Committee agreed with that speech. It does not, therefore, express the ratio of the decision of the Appellate Committee. It is unfortunate that the UT were given no more help on this aspect of the case than the parties' agreement that Lord Clyde's speech stated the relevant law.

71. Lord Slynn summarised the principle in *Brasserie du Pêcheur*. He said that it was 'particularly to be borne in mind' that the subject of the challenge was a decision to adopt legislation' though there was also a complaint about its application (pp 538H-539A). He described the development of 'the strict approach' to state liability for legislative acts. It was due to the need not to hinder legislative action and, in those cases where a national legislature is not required to achieve a particular result, in order to respect the wide discretion which a legislature may have (p 539A-540H). He gave examples of cases in which the legislature did, and did not, have a discretion (p 541D-F).

72. He described the nature of the United Kingdom's legislative discretion at p 541G-H. The United Kingdom had deliberately adopted legislation which discriminated on grounds of nationality. That was a breach of 'a clear and fundamental' provision of the EEC Treaty. It would seriously affect the rights of people who were not British. It was done in good faith and after careful consideration. The Government took legal advice. Lord Slynn described the events which led to the enactment of the legislation, including counsel's advice, and two apparently favourable opinions of Advocate General Mischo, balanced against statements by the Commission that the proposed legislation was contrary to EEC law. He described factors which suggested that the Government wished to press ahead despite doubts and opposition (p 545E-F.). Despite the Government's arguments, the legislation was a 'grave breach of the Treaty'. It was not excusable, and despite the Advocate General's opinions, was a sufficiently serious breach of EEC law as respects nationality (p 345H-355A), domicile (p 546B) and residence (p 546G).

73. At p 549H-550C Lord Hope summarised paragraphs 55-58 of the judgment of the Court of Justice. He said that the list of factors in paragraph 56 was 'helpful but not exhaustive'. He emphasised that the Court of Justice had held that it was for the national court to decide whether the breach was sufficiently serious (p 550B-C). He considered that three factors, in particular, were significant: a direct breach of a fundamental principle of the Treaty; the potential of the breach to cause damage, and the Government's use of primary legislation, which made it impossible for the respondents to get interim relief, coupled with the fact that the transitional period was short and inflexible, so that the issue could not be decided by a reference to the Court of Justice. The breach was more than trivial or technical and was sufficiently serious (p 550E-551F).

Article 27 of the Dublin III Regulation

74. Article 27.1 of the Dublin Regulation gives an applicant a right to an effective remedy against a decision to remove him. Article 27.2 requires the Secretary of State to

provide 'a reasonable period of time within which' an applicant can exercise the right conferred by article 27.1.

75. So article 27.2 imposes a duty on the Secretary of State to give a person time in which to exercise his right to an effective remedy. It also confers a limited discretion on the Secretary of State to decide what length of time is reasonable for that purpose. The Secretary of State has exercised that discretion by promulgating her published policy, which obliged her to give an applicant 5 working days' notice of removal.

Discussion

76. My provisional view is that, in relation to both damages claims, the UT was not making a discretionary decision, but was deciding whether or not a specific threshold was met on the facts ('necessary' or 'sufficiently serious'). But for reasons which will become clear, this is not a case in which the test for intervention by this Court matters. Even if the relevant decisions were discretionary decisions, I consider that they are both flawed by errors of principle. For what it is worth, I also accept Ms Naik's submission that this was not a case in which there was a 'sea of evidence' so that this Court should pay particular deference to the UT's factual assessments (cf *Fage UK Limited v Chobani UK Limited* [2014] EWCA (Civ) 5); [2014] FSR 29. The UT heard no evidence. This Court has exactly the same materials as the UT. Nor, as should be obvious, is this a challenge to the assessment of the amount of damages.

Damages under the HRA

77. It is clear from the first paragraphs of its reasoning on article 8 damages that the UT well understood that the interference with A's private life rights was very significant. He was a vulnerable child, who was trying to establish a relationship with D, his uncle, and to whom his relationships with the support workers were very important. He was suffering from mental health difficulties, and felt he was living a 'half-life' in Germany. The contemporaneous assessment was that it would be better for him to be living with D. He was separated, at this critical time, from his few friendships and his support network for about 19 months. This was not a technical procedural breach of article 8. It had significant practical consequences for A. The finding by William Davis J that section 15(5) of the 2007 Act did not apply (see paragraph 23.iii., above) is significant in this context.

78. It might be thought that this was a case in which, on the face of it, damages were necessary to provide A with just satisfaction. The question then is whether the UT was entitled to dilute the powerful force of the factors I have just summarised by criticising the conduct of A's solicitors, and by relying on the 'conflict and confusion' between the relevant authorities about how to resolve the dispute about A's age, and on the complexity of the procedures involved.

79. I consider that the UT erred in principle in at least two significant respects.

80. First, whether a young person is a child or not is a question of fact for the court, even in a context governed by public law (see *R (A) v Croydon London Borough Council* [2009] UKSC 8; [2009] 1 WLR 2557). The UT had assessed A's age. That finding was not simply a forward-looking assessment. The legal consequence of that finding was that A was, and should have been treated as if he was, a child, both when he was

removed, and for some months after that, until he reached the age of 18. The Secretary of State acted unlawfully in removing A, because he was a child (and because he was not given reasonable notice of his removal). The fact that the Secretary of State did not then know that A was a child is immaterial, as is the fact that the Secretary of State relied on the Council's age assessment.

81. Second, I consider that the UT erred in principle in attributing to A's solicitors any responsibility for the length of the disruption of A's private life, and in attributing the length of that disruption to the complexity of the procedures for sorting things out. A's solicitors wrote many pre-action protocol letters to the Secretary of State, pointing out that the Secretary of State had acted unlawfully by removing A. It turns out that they were correct. It is irrational to blame them for not starting proceedings sooner, when the Secretary of State could, at any time, have brought that disruption to an end by correcting his unlawful act and returning A to the United Kingdom.

82. Not only did the UT err in principle in refusing to award damages, but, I consider, the only conclusion which was open to the UT in this case was that an award of damages was necessary to afford just satisfaction to A. The dispute about whether A's removal was an interference with his family or private life rights, was, in this case, an arid distraction. A had fled Afghanistan. He was a troubled and distressed child. He had tried to commit suicide. The gradual, and no doubt difficult, development of a relationship with D, and A's relationships with his support network, could not have been more important to him, not least to his mental stability. As a consequence of A's unlawful removal, they were disrupted for many months. His distress at the time was well documented. I must assume that A's relationship with D was not family life for the purposes of article 8, but it was, nevertheless, the closest thing to family life which he had in Europe. It, and his relationships with his support network were, in any event, private life which to which very significant respect was due.

Francovich damages

83. Despite the wider terms of the grounds for judicial review (see paragraph 21, above), the only provision of EU law on which A relied in the UT was article 27 of the Dublin III Regulation, perhaps because of the terms of the declaration made by William Davis J (see paragraph 24, above). A was notified of a removal window on a Sunday. The removal window began the next day; so A was not even given a single working day's notice of the start of that removal window. A could have been removed in accordance with the notice on the next day, 10 April. In the event, A was removed on 11 April, so he had what turned out to be one working day's notice of his actual removal. The Secretary of State cannot be heard to argue that the notice she gave in this case was reasonable, given the terms of her own policy. There might be scope for argument about whether the five working days' notice for which her policy provides is, as a matter of EU law, reasonable notice. There is no scope for any such argument here. This case is not about the outer edges of what might be considered to be reasonable notice. No one, not even the Secretary of State, suggests that one working day's notice (or even less) was reasonable notice. On the facts, it could not be clearer that, by removing A on 11 April 2017, the Secretary of State breached article 27.2.

84. Both the cases which the Court of Justice considered in *Brasserie du Pêcheur* concerned legislative acts by member states which were incompatible with EU law.

For that reason, the Court of Justice drew on its case law about the liability of Community institutions for damage caused by unlawful legislative measures. This case is not about policy issues, or a broad power to legislate within boundaries set by EU law. For the reasons given in the previous paragraph, I do not consider that this is a case in which the Secretary of State had any relevant discretion. The rule of EU law was clear, at least at its inner margin, and the Secretary of State broke it by giving notice which, on any view, was unreasonably short. The error of law was not excusable. Nor had it been explained by any evidence, as William Davies J observed. The Secretary of State did not adduce any at the UT, inviting the UT, instead, to infer that A's removal was the result of 'an administrative *clerical* error' (see paragraph 39, above; my emphasis). A's removal was not an accident. It was a deliberate act.

85. Did the factors on which the UT relied (see paragraphs 41 and 42, above) entitle it to decide that this was not a sufficiently serious breach of EU law? For the reasons I have already given, I consider that, in this case, there was no relevant lack of clarity in article 27.2. The suggestion that A, a vulnerable child, could have challenged his removal in the course of one working day is, I am sorry to say, ridiculous. Article 27 is concerned with an effective remedy to challenge a removal decision before a person is removed. It follows that an injunction after removal is not, for the purposes of article 27, an effective remedy. The fact that A had been told about the outcome of the Council's age assessment is nothing to the point, as was the fact that A had not challenged it. The UT's approach, again, was to try to exonerate the Secretary of State by applying public law principles to the decision-making about A's age. The factual and legal position, as a result of the UT's own assessment of A's age, was that A was, at all material times, and, in fact, a child, and should have been treated as a child. Moreover, the Secretary of State was given many opportunities, over several months, to return A to the United Kingdom, and did not do so.

86. On these facts, for those reasons, it was not open to the UT to hold that this breach of EU law was not sufficiently serious. A is, therefore, entitled to *Francovich* damages.

Conclusion

87. For the reasons I have given, I would allow this appeal. A is entitled to damages under the HRA for breach of his article 8 private life rights, and to *Francovich* damages for breach of article 27 of the Dublin III Regulation.

Procedural issues

88. There are four consequential procedural issues.

89. The first procedural issue is whether the Secretary of State should be granted relief from sanctions so as to permit her to rely on her skeleton argument which was served late. The Secretary of State's application for relief was also late. Ms Naik's sensible position was that, if the Court was helped by the Secretary of State's skeleton argument, she would not oppose the grant of relief from sanctions. The reason for the late service of the skeleton argument was, in short, that the Secretary of State's counsel, who had represented the Secretary of State in the UT, was heavily engaged on other matters, including a long inquiry, which meant that he did not have time to produce the skeleton argument in compliance with the directions set by the Court in a

letter dated 13 October 2021. In the light of the fact that A did not oppose the grant of relief, Peter Jackson LJ indicated during the hearing that the Court would grant it.

90. The second procedural issue concerns the appropriate forum for the assessment of A's damages. The parties told the Court that they had agreed that, if it was minded to allow the appeal, it should assess the amount of damages to which A is entitled. Peter Jackson LJ indicated, during the hearing, the Court's view that this would not be right. The assessment of damages is pre-eminently a task for a fact-finder, and not for an appellate court. Although the Secretary of State has conceded a causal link between the breach of EU law and the damage suffered by A, there are a number of issues which the fact finder will have to consider, and may well need to hear evidence about, before deciding what the amount of damages should be. I should make it clear, that, as Ms Naik accepts, A is not entitled to recover twice for the same loss.

91. The Court was told that A has brought a claim for unlawful detention in the County Court. This Court was also told that the Secretary of State had resisted the suggestion that the detention claim and these damages claims should be joined and considered together by the County Court. There is a close factual and legal connection between the detention claim and these damages claims. The overriding objective is not served by the concurrent litigation of such closely connected claims in two different courts. One consequence is that there is a risk of inconsistent decisions. I consider the County Court is the appropriate forum for all these claims. It should therefore assess the article 8 and *Francovich* damages in this case. If the parties are concerned about the further costs of this litigation, they should consider trying to agree the amount of damages to which A is entitled, rather than litigating this issue still further.

92. The third procedural issue is costs. This has two aspects. The first aspect is A's application dated 11 January 2022 ('the application') for an order that, irrespective of the outcome of the appeal, the Secretary of State should not be able to recover her costs of the appeal, and that, in any event, the Secretary of State should pay A's costs of the application. In the light of what I say in the next paragraph of this judgment, and subject to any submissions which the parties wish to make on consequential matters, I consider that the first part of the application is now likely to be academic. Subject to the same proviso, I consider that the Secretary of State should be ordered to pay the costs of the application.

93. The second aspect of the costs issue is the costs of the hearing in the UT. Despite the fact that the Secretary of State contested the age assessment, and A succeeded on the age assessment, the UT ordered A to pay all of the costs of the application for judicial review from 3 March 2020, that is, 3 working days from the date when the Secretary of State conceded that A's removal was a breach of his article 8 private life rights. A was refused permission to challenge the UT's costs order on this appeal, as I have already said. It is common ground that this Court has no power to set aside that refusal of permission. But, in the light of my decision on the merits of this appeal, and if Peter Jackson LJ and Asplin LJ agree, I do not consider that that refusal of permission would be a bar to the exercise by this Court of the powers conferred by CPR Part 52.20(2)(a) to set aside the UT's costs order, and to re-visit it. As I understood it, Mr Lewis sensibly accepted that this was the right approach. I also consider, provisionally, that, subject to any submissions the Secretary of State may make about the costs of this appeal, she should, on normal principles, be ordered to

pay those costs, as (if Peter Jackson LJ and Asplin LJ agree with my conclusions) she has lost this appeal.

94. The fourth procedural issue concerns paragraphs (103)-(104) of the Determination. In those paragraphs, the UT rejected A's account of the way in which he was removed. A was not cross-examined. The UT had not heard any evidence which contradicted the account in A's witness statement. As I understood the Secretary of State's position, as articulated at the hearing by Mr Lewis, she accepts that the County Court should not be bound by the findings in paragraphs (103)-(104), and should be free to make such findings on these issues as it considers are appropriate on the evidence which the parties put forward in that court. I consider that the Secretary of State's position on this point is correct.

Lady Justice Asplin

95. I agree.

Lord Justice Peter Jackson

96. I also agree. The overall circumstances, and in particular the undoubted impact on A of an unlawful removal lasting 18 months, made this a very clear case for damages. Declarations were insufficient and, as Elisabeth Laing LJ has shown, the UT's reasons for concluding otherwise were unsound. I also particularly agree with what she says at paragraph 82. Too much time was spent arguing about whether the belatedly admitted breach of Article 8 concerned family life or private life, when the emphasis should have been on the reality of the breach, not its legal taxonomy. In this case, the outcome will not depend on whether A was deprived of a fledgling family life or a precarious private life: he was the same vulnerable young person whichever way it is analysed. Now that the assessment of damages is to be remitted to the County Court alongside the claim for damages for unlawful detention, it is to be hoped that this protracted litigation might yet end in agreement.