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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY SINA TAHMASEBI FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION OF THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Frank O'Donoghue QC and Robert McTernaghan BL (instructed by Creighton & Company, solicitors) for the Applicant
Aidan Sands BL (instructed by the Crown Solicitor's Office) for the Respondent

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SCOFFIELD J

Introduction

[1] This application concerns an allegedly unlawful failure on the part of the respondent, the Secretary of State for the Home Department ("the Home Secretary"), to inform the applicant promptly of a decision to refuse his claim for asylum in the United Kingdom and issue a third country certificate requiring him to be removed to the Republic of Ireland. It is clear from the affidavit evidence in the case that there is a practice on the part of the relevant unit within the Home Office to delay notification of such decisions until such time as the immigration authorities are in a position to give effect to the removal directions. The core issue in this case is whether this complies with the respondent's obligations of fairness at common law.

[2] McAlinden J granted leave to apply for judicial review in this case and later declined to dismiss the application as academic, notwithstanding a material change in the applicant's circumstances as a result of further decisions made by the respondent in his case, on the basis that the case raised important points of general importance in relation to the potential existence and effect of the practice mentioned above.

[3] Mr O'Donoghue QC appeared for the applicant with Mr McTernaghan; and Mr Sands appeared for the respondent. I am grateful to all of the counsel involved for their helpful written and oral submissions.

Factual Background

[4] The applicant is now a 34-year-old man. He is an Iranian national. He studied computer science for two years in university in Iran and came to the United Kingdom (UK) via Germany and the Republic of Ireland. He has made an asylum claim in this country on the basis of having converted to Christianity in Iran in May 2018 and on the basis of persecution which he would face if he were required to return there.

[5] The applicant arrived at Dublin airport on 23 April 2019. He met with immigration authorities there and it is common case between the UK and Irish authorities that he made an application for international protection (asylum) whilst at Dublin airport. The applicant's position is that he did not understand that he had made such an application in Dublin and that he never intended to do so. He says that he may have completed the relevant form but that he did not understand it to be an application for asylum in Ireland. He has also averred that the interpreter present told him that if he did not sign the papers which were presented to him, he would be returned to Iran. In any event, the applicant's representatives have sensibly acknowledged that this is a contested factual issue which it would be difficult if not impossible for this court to resolve on an application for judicial review (at least without oral evidence, which is not warranted in this case). Accordingly, Mr O'Donoghue accepted that the court would proceed on the basis that such an application had been made for asylum in Ireland by the applicant, even if unintentionally.

[6] The applicant then travelled to Northern Ireland by bus the next day, on 24 April 2019, and attended at Newry PSNI Station, seeking asylum. He was served with a notice of liability for removal as an illegal immigrant but granted bail. It is common case that he made an asylum claim in the UK on that date.

[7] On 21 May 2019 the applicant attended his initial asylum screening interview and, on that same date, his case was identified as a Third Country Unit (TCU) case, as he had claimed asylum in Dublin on 23 April 2019. This was identified as a result of a Eurodac fingerprint search. There is an issue about whether the applicant was not candid about having applied for asylum in Ireland (as the respondent considered) or whether, consistent with his case described above, he was unaware that he had done so. In my view, nothing of significance turns on this issue for present purposes.

[8] On the applicant's case, he then heard nothing further about his application until January 2020. He continued to reside in Belfast during this period. The applicant, and other deponents on his behalf, have provided a range of evidence about his life in Northern Ireland since arriving here, which it is not necessary to set out in detail. In summary he says, and independent evidence appears to support,

that he is well settled in Northern Ireland and an active participant in the life of the community, including attending church and Christian organisations here.

[9] Meanwhile, on 19 July 2019 a formal request was sent to Ireland by the UK authorities calling upon it to request that it (Ireland) should take charge of the applicant's asylum application under Article 18.1(b) of the Dublin III Regulation. The respondent says that a letter was posted to the applicant by recorded delivery at that time informing him of the TCU process. Although the applicant contends that he did not receive it, again Mr O'Donoghue acknowledged that the court had little option but to proceed on the basis that this letter had been provided, or at least sent on the respondent's behalf.

[10] On 23 July 2019 Ireland accepted the UK's request to deal with the applicant's case and thereafter formally requested of the UK that it (Ireland) take charge of the case. The applicant assumes that the UK accepted Ireland's request on the same date. That was not entirely clear on the evidence and is not of particular significance in light of what later transpired. However, it suffices to note for present purposes that the request from Ireland to take the applicant back will have commenced a six month timescale within which the UK had to remove him to Ireland under the Dublin III Regulation, failing which the UK would be obliged to deal with his asylum application. It is common case that the applicant was not informed of the decision of the Irish authorities on 23 July 2019 at that point or at any point until early January 2020.

[11] This was followed on 14 August 2019 by a decision on behalf of the respondent to refuse the applicant's asylum request on the ground that there was a safe third country (Ireland) to which he could go. The respondent's evidence confirms that the asylum refusal decision (along with a certification of the applicant's claim as clearly unfounded) was made by an official in its Third Country Unit based in the Home Office in Glasgow on that date. As appears further below, the applicant was not informed of this decision at the time it was made. This is the central element of his complaint in these proceedings. There is a letter of 14 August 2019 which is addressed to the applicant but was not sent to him by the Home Office at that time. Rather, he was given a copy of this letter, along with a Notice of Removal, when he was arrested and detained almost 5 months later in January 2020. The letter of 14 August 2019 gives brief details of the applicant's application for asylum in the UK; notes that the authorities in Ireland have accepted that Ireland is the state responsible for examining his application for asylum; and refers to paragraph 345E of the Immigration Rules (which provides that the Secretary of State shall decline to substantively consider an asylum claim if the applicant is transferable to another country in accordance with the Dublin Regulation), noting that "there are no grounds for departing from this practice in your case." The letter then informed the applicant that it was proposed to remove him to Ireland and contained brief details about the right of appeal (although, in his case, this would not be an in-country appeal).

[12] In correspondence from the Crown Solicitor's Office (CSO) to the applicant's solicitor, it was also confirmed that an entry in the respondent's case information database made by an official in the TCU in Glasgow on 14 August 2019 records that the decision was made that the asylum claim be refused without substantive consideration and that it was "Served on File" at that time, "meaning that a copy was printed and placed on the Home Office file for service at a later date." In the course of the hearing of this application, I clarified with Mr Sands that the phrase "served on file" was not to be read as meaning that a copy of the letter which had been served the applicant was placed on the file; but rather that, at that time, the letter was "served" simply by being placed on the file.

[13] The respondent has explained in evidence that, on 16 December 2019, the removal of the applicant was authorised by an official within the Home Office. Arrangements were then made in mid-December 2019 to book flights to return the applicant to Ireland in a window between 15 and 23 January 2020 at the latest, in order to ensure compliance with the time limits in the Dublin III Regulation.

[14] On 6 January 2020 the applicant was informed of the decision which had been made on 14 August 2019; of the decision of the authorities in Ireland to accept the UK's request that they take charge of the case; and of the arrangements for his removal. He was arrested at the Home Office premises in Belfast, at which he had attended to report in compliance with a condition of his immigration bail. He had no pre-warning of this and expected to merely report as normal in order that his whereabouts and compliance with bail conditions could be confirmed. Instead, he was arrested and refused continuing bail on the grounds that he presented a significant risk of absconding. In the applicant's affidavit evidence, he describes that he considered this to be an "ambush".

[15] The applicant was then detained at Larne House Detention Centre between 6 and 9 January 2020. His evidence is to the effect that this also came as a complete shock to him. The respondent's decision letter was provided on 6 January 2020 along with removal directions issued under paragraphs 9 to 10A of Schedule 2 to the Immigration Act 1971 and section 10 of the Immigration and Asylum Act 1999. The direction was that he be removed on a flight from London to Dublin, which was scheduled for 15 January 2020. At this time the applicant was also (on the respondent's case) provided with an appeals form and a leaflet on how to appeal; and the notices were served on him with the assistance of a Farsi interpreter, although the applicant's solicitor has taken issue with the suggestion that the relevant information on rights of appeal was attached to the copy of the letter dated 14 August 2019 which was served upon the applicant on 6 January 2020.

[16] The notice to the applicant as a detainee giving the reasons for his detention did not rely upon the likelihood of his absconding if granted immigration bail (albeit there is some information to suggest that when his case was considered in December 2019 the applicant was considered a high risk of absconding). Rather, the reason given for his detention was simply that his removal from the United Kingdom was

imminent. The applicant therefore found himself in immigration detention on 6 January 2020 and facing removal to London within a few days and removal from the UK to Ireland within a week after that.

[17] At this point, the applicant and his current solicitor (Mr Creighton) knew nothing about each other. The applicant had previously used a solicitor whose firm had ceased practice. He was unaware that a former assistant solicitor in that firm who had been involved with this case had moved to work with another solicitor's practice. Accordingly, when he tried to contact his solicitor (which I am informed would have been done by G4S staff following his detention), he was unable to make contact. He therefore asked a friend, who happened to be a client of Mr Creighton, for some advice; and that friend got in touch with Mr Creighton and asked him to act for the applicant. As it transpired, he was representing another client and was present at the Home Office premises at the time of the applicant's arrest, although he was not engaged as the solicitor to act for the applicant until later the same evening.

[18] The applicant speaks Farsi. By happenstance, this does not pose a particular problem for Mr Creighton because his partner is Iranian and speaks Farsi and so was able to act as an interpreter for the applicant. Generally, however, a solicitor receiving a call from a non-English speaking client in immigration detention in Northern Ireland who decides to take a new case will need to arrange with the staff for permission to attend at the holding facility, to get to Larne during office hours, and to engage a telephone interpreter.

[19] During the period of the applicant's detention from 6 January 2020, there was a flurry of activity. On 7 January 2020 initial submissions were lodged by the applicant's solicitor in relation to the grant of bail. On 8 January 2020 further submissions were lodged by his solicitor alleging breach of various articles of the ECHR. On 9 January 2020 the applicant was taken to England and detained at Tinsley House Detention Centre, Gatwick. Bail was refused by an official in the TCU on behalf of the Home Secretary on 10 January 2020.

[20] On 13 January 2020 there was a letter from the Home Office rejecting the applicant's further submissions. Also on that date, the applicant's solicitor sent pre-action correspondence. On 14 January 2020 a bail application was made to the First-tier Tribunal (Immigration and Asylum Chamber) on the applicant's behalf and was refused. On that same date, the respondent rejected the applicant's further submissions by letter.

[21] On 20 January 2020 the applicant's solicitor made further submissions and sent further pre-action correspondence. On that same date, the further submissions were rejected. On 22 January 2020 these proceedings were commenced. As a result, the applicant did not travel on the flight which had then been booked for 23 January from Heathrow to Dublin. On 24 January 2020 the applicant was admitted to bail, the removal directions having been suspended following the commencement of these proceedings. The applicant returned to Belfast and has remained here since.

[22] The pleaded grounds in this application and are very different from those on which the application for leave to apply for judicial review was originally based. In his affidavit evidence on behalf of his client, Mr Creighton has explained that, when the proceedings were initially lodged as a matter of urgency on 22 January 2020 at a time when his client was expected to be removed from the jurisdiction the following day, the application was made by him without the applicant's legal aid application having been granted and without the assistance of counsel. This necessitated his paying of the court fee on the commencement of the proceedings from his own office funds.

[23] Following the grant of leave in these proceedings on 15 July 2020, the respondent wrote to the applicant's solicitor advising that his case had been reviewed and that, exceptionally, it had been decided to withdraw the Third Country Certificate dated 14 August and that the Home Office would now substantively consider the applicant's claim for asylum. In making this decision, the respondent did not concede that there had been any unlawfulness in any aspect of the prior decision-making in the case but, rather, did so on the basis of the imminence of the date on which the Dublin III Regulation would no longer apply in the UK (*i.e.* that, regardless of the outcome of these proceedings, it was increasingly unlikely that transfer could be achieved prior to 31 December 2020).

[24] At the expiry of the EU Exit Transition Period on 31 December 2020, by virtue of the Immigration, Nationality and Asylum (EU Exit) Regulations, the provisions of the Dublin III Regulation were revoked.

[25] On 25 January 2021, the applicant was granted asylum in the United Kingdom.

The Dublin III Regulation

[26] Council Regulation (EC) No 604/2013 ("Dublin III") – the third iteration of the Dublin Convention – is the EU Regulation which establishes the criteria and mechanisms for determining which EU member state is responsible for examining an asylum claim made in the European Union. Amongst other things, it permits member states to request another member state to take charge of an asylum application, subject to certain time limits. It was intended to ensure quick access to asylum procedures and also to reduce 'double handling' of asylum claims by different member states.

[27] For present purposes, Article 15 of the Dublin III Regulation is an important provision. It provides as follows:

> "Where the application for international protection is made in the international transit area of an airport of a Member State by a third-country national or a stateless

> person, that Member State shall be responsible for examining the application."

[28] In light of the common position between the London and Dublin authorities that the applicant made an application for international protection at Dublin Airport on 23 April 2019, the starting point is that Ireland was responsible for examining the application. However, Article 17 of the Regulation also confers a discretion upon the requesting state not to order removal but, instead, to consider the asylum application itself. I return to this below.

[29] The process of determining which member state is responsible for dealing with an asylum application under the Regulation is to commence "as soon as an application for asylum is first lodged with a Member State" (see Article 20). Where a member state – in this case the UK – considers that responsibility for examination of the claim lies with another member state, it has a maximum period of three months from the time upon which it first became aware of this fact within which to call upon the other member state to take charge of the case, failing which responsibility remains with the requesting member state (see Article 21). Once a request has been made, the requested state has two months to make the necessary checks and give a decision on the request to take charge, except in urgent cases where every effort should be made for the reply to be given within the time requested or, if that is not possible, within one month (see Article 22).

[30] Article 29 provides that transfer of the individual shall take place "as soon as practically possible" and in any event within six months of acceptance of the request by another member state (here, Ireland) to take charge. In the present case, there was an issue as to whether the UK had proposed to remove the applicant to Ireland outside the appropriate timescale. However, that issue is now academic (since the applicant was not, in the event, removed to Ireland at all) and I do not consider that there is any basis on which it is necessary or appropriate for the Court to enquire into it.

[31] Article 26(1) is of particular significance in the present case. It provides that, where the requested member state accepts that it should take charge of a case, the requesting member state shall notify the person concerned. It is in the following terms:

> "Where the requested Member State accepts to take charge of or to take back an applicant or other person as referred to in Article 18(1)(c) or (d), the requesting Member State shall notify the person concerned of the decision to transfer him or her to the Member State responsible and, where applicable, of not examining his or her application for international protection. If a legal advisor or other counsellor is representing the person concerned, Member States may choose to notify the decision to such legal

> advisor or counsellor instead of to the person concerned and, where applicable, communicate the decision to the person concerned."

[32] As appears from the factual summary above, the respondent did advise the applicant that Ireland had accepted to take charge of his case and of her decision to transfer him to Ireland but did not do so for several months after this decision had been made.

[33] Additional protections for the individual concerned are set out in Article 26(2) in the following terms:

> "The decision referred to in paragraph 1 shall contain information on the legal remedies available, including on the right to apply for suspensive effect, where applicable, and on the time limits applicable for seeking such remedies and for carrying out the transfer, and shall, if necessary, contain information on the place where, and the date on which, the person concerned should appear, if that person is travelling to the Member State responsible by his or her own means.
>
> Member States shall ensure that information on persons or entities that may provide legal assistance to the person concerned is communicated to the person concerned together with the decision referred to in paragraph 1, when that information has not been already communicated."

[34] Article 27 sets out a remedies regime, which requires the state to give the applicant the right to an effective remedy against the transfer decision before a court or tribunal; and to provide a reasonable period of time within which the person concerned may exercise this right. It is accepted by the applicant that the availability of judicial review satisfies this requirement.

[35] The applicant also relies upon Article 4 of the Regulation which imposes on member states an obligation to provide information. In particular, it imposes an obligation upon a member state, as soon as an application for international protection is lodged, to inform the applicant of the application of Dublin III and, without prejudice to the generality of that, to notify him in particular of the matters set out at paragraphs (a) to (f). Article 4(2) provides that the information shall be provided in writing in a language that the applicant understands or is reasonably supposed to understand.

The applicant's grounds of challenge

[36] The applicant initially sought an order of *certiorari* to quash the decisions of the respondent to arrest and detain him in custody on 6 January 2020; to act upon the request to return him to Ireland; and to remove him from the UK to Ireland. In light of how matters have developed, the focus of the application at hearing was no longer on the substance of the decisions but simply on the delay in informing the applicant of the decisions taken in his case, with a request for declaratory relief only.

[37] A key aspect of the applicant's complaint is that, notwithstanding that a number of important decisions had been taken in relation to his case by 14 August 2019 (including the decision by Ireland to request his return and the decision of the UK authorities to refuse asylum, to accept the request from Ireland for the applicant's return and to remove him there) the applicant was not informed by the respondent of any of these decisions until 6 January 2020, at which time he was arrested. The applicant contends that the UK authorities, and in particular the respondent, were under a procedural obligation to inform him of the decisions which had been taken in relation to his case on 14 August 2019 much sooner than they did. He contends that fairness required this in order to permit him proper time to seek advice in relation to the decisions and take such further steps as were necessary to make representations in relation to them and also to take such further (lawful) steps as he might in order to minimise the risk of his being arrested and detained.

[38] He further contends that the obligation to inform him promptly, within a reasonable time, of the decisions which were made in his case in August 2019 arises on a variety of bases. Firstly, as referred to above, he makes this case as a matter of common law fairness. Secondly, he contends that the respondent's actions in this case were in breach of a number of implied duties contained within the Dublin III Regulation (which applied to his case at the relevant time, albeit that it no longer applies, in light of the UK's withdrawal from the EU). He also contended that he had a legitimate expectation of being informed of the content of the decision sooner, although without particularising precisely how that legitimate expectation arose.

[39] Additionally, the applicant contended that the decision to withhold information from him until the date of his arrest and immediate detention was unreasonable in the *Wednesbury* sense and/or give rise to a breach of his rights under Articles 5 and/or 8 ECHR – although these grounds were not pressed at hearing. Finally, the applicant contended that the withholding of this information from him was infected by bad faith as this course of conduct on behalf of the respondent was specifically intended to restrict or remove the applicant's ability to challenge relevant decisions made by the UK authorities in relation to his asylum claim either in time or at all (or at least prior to his removal from the UK).

Should the application be dismissed as academic?

[40] It is common case that, as a result of the acceptance of the applicant's asylum claim by the UK authorities, these proceedings will no longer have any practical importance in the applicant's case. The challenge to the detention to which he was subject from 6 January 2020 to 24 January 2020 is no longer pursued. The issue is whether a point of principle of wider application or of more general public importance is raised by these proceedings such that, notwithstanding the fact that they are academic as between the parties, it is nonetheless appropriate for the court to devote time and resources to the resolution of the issues which they raise. For the reasons summarised briefly below, I consider that it is.

[41] Shortly after the grant of leave to apply for judicial review in this case, the respondent withdrew the Third Country Certificate and agreed to deal substantively with the applicant's asylum claim. At that stage, McAlinden J considered the question of whether these proceedings should be dismissed as academic. He concluded that they should not, in the full knowledge that by that time there was no prospect of the applicant being returned under the Dublin III Regulation. Rather, he had been released on immigration bail and his case was to be considered in this jurisdiction. McAlinden J nonetheless considered that there was a point of principle which required to be addressed in relation to the non-communication of the August 2019 decisions to the applicant within a reasonable time after they had been made.

[42] The respondent nevertheless maintains her objection that this case is academic and should not be substantively determined on the two additional bases that the applicant has now been granted asylum in this jurisdiction and, perhaps more pertinently, following the end of the Brexit transition period on 31 December 2020, the Dublin III Regulation no longer applies in this jurisdiction. In light of these developments, Mr Sands' submission was that the proceedings have become "all the more academic".

[43] I would be reluctant to depart from the view of McAlinden J, who has already considered the substance of this argument, that the issues raised by this case warrant substantive judicial scrutiny. I do not consider that the grant of the applicant's claim for asylum materially strengthens the respondent's objection. At the time when McAlinden J determined that the case should proceed, it was already clear that the applicant was no longer in peril of removal from the jurisdiction and that his objection to his prior treatment was historic. The Secretary of State's better point is that, insofar as the applicant's challenge is grounded on obligations to be found (expressly or impliedly) within the Dublin III Regulation, the legal landscape has now changed.

[44] However, it is also clear that the UK still does and will operate third country arrangements in respect of asylum seekers who have made prior claims for protection in a safe third country. I was told that the UK is hopeful that it will be able to agree replacement arrangements for the Dublin III Regulation regime in

bilateral agreements with EU member states. In any event, it is open to the UK to remove an asylum seeker to a safe third country in which they have previously made an application for asylum either on foot of such bilateral arrangements (such as exist with a variety of countries who are not EU member states) or in *ad hoc* arrangements in individual cases. The respondent provided a helpful note on the way in which third country cases would be dealt with in the United Kingdom after the end of the Dublin III arrangements. At this point, third country return cases to EU member states may be arranged through a general returns agreement or arrangement with that country, or through case-by-case agreements based on individual referrals. Arrangements for countries which were not signatories to Dublin III will simply continue as before.

[45] The Home Office has published new guidance relating to the handling of asylum claims under third country and admissibility principles. The guidance requires attempts to secure the agreement of the safe third country to be made promptly. There is a long-stop date of six months for securing such agreement. If the safe third country does not agree within six months of the date of the asylum claim to accept the applicant's return, then the asylum claim will be substantively considered in the UK. Now that the UK is no longer part of the Dublin III regime, the success of the inadmissibility rules is wholly dependent on bilateral or multilateral returns agreements with EU countries. I was informed that negotiations on returns agreements are underway but no such agreements had yet been concluded.

[46] Notwithstanding the apparent paucity of progress on this issue for the moment with EU member states, the general policy of the respondent, set out in its evidence, continues – whereby asylum claimants who already have suitable protection in another safe country from which they will not face *refoulement* will generally be expected to return to that third country from which they entered the UK (and so have their asylum claim in this country declared inadmissible). This is provided for in paragraph 345 of the Immigration Rules. The respondent's evidence confirms that, even in the event that no new agreement is reached with the EU or individual member states, then third country cases will still be dealt with under the 'Inadmissibility Rules' which are contained in paragraph 345A-D of the Immigration Rules, based on the concept of first country of asylum.

[47] In the circumstances, I am satisfied that the practice which has been highlighted by these proceedings is likely to have an ongoing and broader field of application than simply arises as part of the Dublin III regime. There will still be third country removal cases – and perhaps others – where the approach of which the applicant complains is likely to be used. Moreover, I am concerned that the issues of fairness highlighted by this case, insofar as they are (alleged to be) indicative of a culture within the Home Office of seeking to deprive asylum seekers of recourse to legal avenues open to them, are addressed.

[48] Where I agree with the respondent's objection is in relation to those elements of the applicant's claim which are grounded firmly in the text of the Dublin III

Regulation itself. That Regulation no longer has ongoing effect in domestic law. The applicant's contentions raise questions about the interpretation and effect of the Regulation, and in particular implied obligations to be read into that text, are matters of EU law. It seems to me that there is an insufficient basis, applying the principle set out in *R v Secretary of State for the Home Department, ex parte Salem* [1999] UKHL 8, for the court to seek to determine the meaning and effect of the provisions of EU legislation which no longer applies and in respect of which it would now not be possible or appropriate for a reference to the made to the Court of Justice of the European Union.

[49] Accordingly, I propose only to consider the applicant's common law grounds of challenge to the failure to inform him promptly (before 6 January 2020) of the decisions which had been made in his case.

The alleged 'practice' of deliberate non-notification of decisions

[50] The applicant contended that his case is an example of a practice on the part of the respondent whereby decisions to refuse asylum claims are deliberately kept from applicants until shortly before their removal, when they are (belatedly) informed of the relevant decision at the same time as being served with a notice of removal. The applicant referred to a paper published in August 2017 by the United Nations High Commission for Refugees entitled, 'Left in Limbo: UNHCR Study on the Implementation of the Dublin III Regulation', in which this apparent practice was referred to. At page 142 of that report, it is noted that:

> "The transfer decision is normally notified directly after the responsible Member State accepts the take back or take charge request or within a few days of such acceptance."

[51] The report goes on to say that, "Depending on the method of delivery, this may be immediately after the requested Member State accepts responsibility or at a later stage." The footnote relating to this sentence then explains that, in Italy, the Dublin Unit stated that the applicant should be informed as soon as possible but the practice depends on each *Questura* to which the decision is sent before being notified to the applicant concerned. Applicants in Italy then have a 60 day deadline from the notification of the decision to lodge an appeal. Aside from the discussion of the position in Italy (and a reference to some reported delays in Germany as to when the legal advisor receives a copy of the transfer decision), the only further reference in this footnote is to the United Kingdom, in the following terms:

> "In the United Kingdom, the notification of the transfer decision and notice of removal, including the service of removal directions, usually occurs at the same time. In the case of adults, this is at least five days before the transfer is due to occur and in the case of unaccompanied children 72 hours before the transfer is due to occur…"

[52] The applicant says that this supports the contention that there is a policy in the UK to delay the notification of the transfer decision to the last moment; that this compares unfavourably to other countries in terms of fairness to applicants; and that it is a deliberate policy to seek to minimise applicants' ability to challenge the decision before removal.

[53] Leaving aside the question of the purpose of this approach, that the respondent does operate such a practice was effectively conceded in the evidence filed on her behalf. A number of reasons for this have been put forward; and the respondent denies that there is any particular instruction (at least a written instruction) to the effect that notification of decisions should be delayed.

[54] The respondent's evidence was provided in a number of affidavits from Mr Stephen Roarty, a civil servant working in the National Returns Third County Unit of the Home Office. The key averment within Mr Roarty's first affidavit is in the following terms:

> "For operational reasons, decisions to remove to safe third countries tend not to be served at the time when they are made, if there are no immediate plans to progress to the removal stage."

[55] The reasons for this approach were then explained in the following terms:

> "Firstly, if no immediate arrangements for transfer are in place, the possibility of absconding is high. A pilot scheme had been introduced of notifying decisions at an earlier stage but the level of absconding was significantly greater as a result. Secondly, once the refusal decision is communicated to the applicant, the asylum seeker may well become ineligible for Asylum Support and would not be permitted to work in the United Kingdom. Section 94(3) of the Immigration & Asylum Act 1999 provides that a claim for asylum is determined when the Secretary of State notifies the claimant of his decision on the claim. A five day notice period will always be given prior to removal. Thirdly, because of the volume of current cases, there is simply a lack of capacity within the system and priority must be given to the most urgent cases. For these reasons, the Notice of Refusal is generally served alongside the Notice of Removal, as happened in the Applicant's case."

[56] The respondent's evidence has also confirmed that it is common practice to detain an asylum claimant in a third country case in order to secure a transfer to the

third country, on the ground that once notified of the decision to remove there is a greater likelihood of absconding.

[57] The evidence in Mr Roarty's first affidavit was sparse on detail in terms of what precisely happened as regards notification of the decision in the applicant's case which (it is accepted) was made on 14 August 2019 and, in particular, whether the decision maker had been instructed (and, if so, how and by whom) not to send the relevant letter to the applicant. The applicant's representatives sought further information in this regard. In a further affidavit, Mr Roarty confirmed that no instruction has ever issued to the effect that asylum seekers are *not* to be notified of an adverse decision until the occasion of their detention. He averred:

> "Rather, it has simply been standard practice not to serve decisions to remove to safe third countries if there are no immediate removal plans. This is for the operational reasons set out at paragraph 24 of my affidavit" [which, in turn, is set out at paragraph [55] above]

[58] In this further affidavit, the respondent's deponent also provided some further information about the reasons given for the standard practice described. The "pilot scheme" to which reference had been made was conducted in or around 2012/13. However, the TCU holds no records of the pilot scheme. In the pilot scheme, a cohort of cases were apparently selected (with no details given as to the criteria for selection) and the third country decision was then served immediately after its having been made. The respondent's evidence is that, "the conclusion reached following the pilot scheme was the decision should be served at the point of detention and service of removal notice…" Mr Roarty went on to explain that no report was produced at the end of the pilot scheme; but, rather, the team which conducted the scheme concluded that service of the removal notice at the time of making the decision only served to increase the rate of absconding. He says that:

> "I believe that the instruction to continue to serve decisions at the point when there are plans to progress removal was communicated verbally to caseworkers. Third Country Unit continues to follow this practice but there are no written instructions to reflect this."

[59] In a further affidavit touching upon this topic (his third), Mr Roarty repeats that it is standard practice not to serve decisions to remove to safe third countries if there were no immediate removal plans; but this was a practice and not a formal instruction. He also referred to the fact that individual decision-makers in the TCU follow a set of desk instructions, known as a standard operating procedure, for the actions required in the case from the moment another third country confirmed that it had accepted responsibility for the asylum claim. A copy of the relevant procedures was provided. Mr Roarty emphasised that desk instructions provide a guide and that "it is open to caseworkers to discuss cases with line managers if a different

course is necessary". The desk instructions are detailed and step-by-step instructions as to how to insert case details and produce documents using the Home Office's case information database. The relevant entry does seem to suggest, however, that the "despatch method" in a third country case should simply be to "select 'served on file'", with the "dispatched address" simply to be UKBA. This supports the contention that the standard operating practice is that asylum refusals in third country cases where a transfer decision has been taken is to keep the result of the respondent's consideration in-house until removal directions have been issued and the applicant is presented with the decision and arrangements for his or her removal as a package. As noted above, Mr Roarty's evidence also confirmed that it was common practice at that point for the applicant to be detained.

[60] Mr Roarty's third affidavit also confirmed that the relevant unit within the Home Office, TCU, holds no records of the pilot scheme which had been relied upon in establishing or continuing the practice described above. The pilot scheme had been conducted by UK Visas and Immigration, a separate department of the Home Office which had the relevant responsibility until May 2019. The respondent's evidence was again that no report was produced at the end of the pilot scheme. Mr Roarty had made extensive enquiries to discover any written record of the 2013 pilot scheme which was carried out when TCU was located in Croydon as part of UK Visas and Immigration. He had spoken directly with the grade 7 official who was in charge of TCU when in Croydon and who, in 2013, was working in a more junior grade in the unit. It was this official who had advised him about the existence of the pilot scheme. She has now advised him that the previous grade 7, who was in post when the pilot scheme was carried out, no longer works for the Home Office and that she had been unable to locate any records of the pilot scheme or to indicate where any such records may have been stored. Mr Roarty had also contacted three other officials who were employed in TCU at the time. Of these three, two did not recall the pilot scheme; and, while the third did, she was unable to locate any records in relation to it. Nor was any record of the pilot scheme retained on the "old TCU shared drive". Mr Roarty concluded that any such records which had existed in relation to the scheme no longer exist.

[61] Taking all of this evidence together, I consider that it is right for the court to proceed on the basis that there is a standard practice, at least in third country cases, by virtue of which asylum seekers are not informed of a decision to refuse them asylum until they are served with a notice of removal and removal directions (at which point they are often, if not invariably, arrested and detained). In cases such as the present, this can result in a decision on an applicant's case being kept from them for significant periods of time.

[62] The substance of the position has been set out above. Nothing much turns on the narrower question of whether or not there is a written instruction to Home Office officials not to serve the decision letter on applicants until shortly before their removal, although it seems to me that, in substance, the desk instructions provided

to officials dealing with these cases in the TCU effectively amounts to that. I return below to the question of how flexible the policy is in practice.

Common law fairness

[63] The applicant's complaint is that he was deprived of the knowledge of what had been decided in his case for a period of over 4 months and then 'ambushed' with it at a time when he was immediately taken into custody. He submits that it was only through a mix of good fortune and the determination of his solicitor that he was able to avoid being removed to Ireland against his wishes. In many cases, however, asylum seekers (perhaps with limited access to specialist legal advice and with language barriers to overcome) will not be so fortunate, particularly where they are detained and (as occurred in this case) shortly thereafter removed to another jurisdiction within the United Kingdom. The applicant further submits that, once the UK authorities have already determined to detain an asylum seeker and to issue removal directions, with practical arrangements having been made, there is either a real or perceived likelihood that any further representations are unlikely to succeed.

[64] Practically, the withholding of the decision has the effect of reducing the period of time available to the individual affected to seek advice on it, to challenge it (where appropriate), to make further representations to the respondent under paragraph 353 of the Immigration Rules or otherwise and/or to gather evidence in support of a challenge or further representations. The respondent always had a discretion to accept responsibility to deal with the applicant's claim in substance. Had the applicant been informed of the decision in his case sooner, he would have had much more time to make further representations to the UK authorities as to why it should consider (or reconsider) his application and not order his removal to Ireland. As the applicant submitted, if such representations were able to be made at a time before a decision had been made to detain him or make arrangements for his flight to Dublin, the reconsideration would have taken place in a much more neutral context.

[65] A further part of the applicant's case is that, had he been given earlier notice of the decision on his application, he would have been in a better position to avoid detention. Detention ought only to be used where necessary and proportionate. These are matters on which an applicant might well be able to make representations and/or to put in place arrangements which reduce or negate the likelihood of being detained. Agreeing to voluntary departure arrangements is one example (although not pursued by the applicant in this case); but there are others. By the time the applicant was put in possession of the respondent's decision and reasoning, his opportunity to respond was materially impaired compared to the position as it would have been had he been informed earlier.

[66] I accept the basic thrust of the applicant's complaint in this regard. In short, the delay in notifying until the last minute erodes the ability of an applicant to seek an effective remedy. The evidence suggests that, in addition to an applicant having

much less time available to take sensible and lawful steps to protect or advance their interests between the refusal decision and removal, their practical ability to take them will also (at least in very many cases) be significantly curtailed by reason of their being detained at the relevant time.

[67] It follows that I cannot accept the respondent's case that the notification to the applicant of the relevant decision in January 2020, rather than at an earlier stage, "did not impact" upon his rights to take legal advice or to challenge the decision. In a very strict sense, this may be correct: the applicant retained those rights. However, in any meaningful sense, it is plain that it was likely to be harder for the applicant to access legal advice and mount a challenge during the short period of detention before removal than during the several months he spent in the community between August 2019 and January 2020. The applicant's evidence is that he was prevented from taking legal advice until he was in immigration custody; and that he was impeded in securing evidence from within the community (such as some of the affidavit evidence which has later been provided in the course of these proceedings by leaders of Christian organisations or community groups in which the applicant has been involved). That contention is also overstated since, again, strictly speaking, from July onwards, or perhaps earlier, the applicant could have been readying himself for a possible challenge at a later stage. However, practically speaking, it is not human nature to do so; there may be difficulties in securing legal aid for general advice and assistance when there is no adverse decision in issue; and it is hard to know what steps are required before knowing of the substance of the decision, and the reasoning behind it, which one wishes to challenge.

[68] The applicant's solicitor has indicated that, if there had been additional time between the applicant being notified of the decision in his case and his removal, the applicant would have had time to make further submissions in an orderly and considered manner, including being able to assemble proper evidence in relation to his associations and any human rights or other grounds upon which he could rely. These further submissions could have been considered in a more routine, business-like manner; and the stress and anxiety to the applicant involved in a last-minute urgent challenge could have been minimised. Additionally, a judicial review application could have been considered, with the benefit of legal aid having been granted and counsel having been instructed.

[69] The respondent's position is that there is ready access to legal advice in Larne House, where a detained person is not deprived of their mobile telephone. Larne House is a 19 bed short-term holding facility used for the detention of persons for up to seven days, which is located within Larne Police Station. The legal aid agency duty advice scheme does *not* extend to short-term holding facilities in any part of the UK, whereas immigration removal centres such as Tinsley House at Gatwick operate a duty solicitor scheme and persons detained there are informed of the availability of legal aid agency surgeries during their induction. Nonetheless, at the induction which takes place on admission in Larne, detained persons are advised of their right to seek legal advice, which is conducted with the use of an interpreter where

required. Detainees are signposted to the Office of the Immigration Services Commissioner and the Law Society of Northern Ireland and are able to access their services *via* telephone or internet. Face-to-face legal visits can be arranged.

[70] As I have indicated above, however, a claimant is in a significantly and materially disadvantaged situation where they are presented with the respondent's decision and detained, with directions for their imminent removal, all at once. This approach is manifestly not in the interests of the individual affected but also appears contrary to the principle of good administration generally, for reasons outlined below and because it will inevitably result in rushed and urgent "eleventh hour" challenges.

[71] My primary concern in relation to the practice highlighted by this case is that it offends the court's basic sense of justice and propriety. A decision which was formally taken and recorded, on an application properly made by the applicant, which was likely to have a momentous effect on his life and personal circumstances and which he was likely to wish (and was entitled) to challenge in a variety of ways available to him, was, metaphorically speaking, put in a closed drawer and kept from him. That seems to me to be antithetical to the values of fair process.

[72] The respondent has made the case that it would have been perfectly lawful for the Home Office to advise the applicant of the decision in his case on or shortly after 15 August 2019 and to remove him from the jurisdiction shortly afterwards – provided that notice of no less than five days was given in accordance with the published policy of the Secretary of State. That may be so. However, it does not follow in my judgment – as Mr Sands submitted – that, because the five day notice period is not itself under challenge in these proceedings, the procedure adopted must be viewed as fair. Provided the minimum required notice period was provided, it matters not (the respondent submitted) that a more generous period *could* have been afforded because the law requires minimum standards of fairness; not the most generous procedure available.

[73] However, that analysis fails to give appropriate weight to a number of factors. First, it seems plain from the respondent's own evidence that it is rarely likely to be the case that the Home Office can act with the expedition it would ideally like, where an adverse decision is made and communicated contemporaneously and removal directions can be given at the same time or very shortly afterwards. In some cases that may be possible; and it may indeed be fair in the circumstances of the case. The issue really resolves to the question of who should take the benefit of whatever time there is between the respondent's refusal of an asylum claim on third country grounds and the practical arrangements for removal being ready. I do not consider, as a matter of general fairness, that claimants should be deprived of whatever additional benefit that may bring. It is the Home Office's duty to act with expedition and if it is not in a position to do so, that ought not to operate to the prejudice of the claimant. Second, as I have already mentioned, it simply seems wrong in principle

that the executive can hide from an individual a formal decision made in their case as a matter of its own choosing.

[74] For these reasons, I accept the applicant's case that the delay in informing him of the decision made in his case on 14 August 2019 was procedurally unfair.

The decision in *Pathan*

[75] I am significantly fortified in that conclusion by the decision of the Supreme Court in *R (Pathan) v Secretary of State for the Home Department* [2020] UKSC 41. The appellant in that case, Mr Pathan, was granted leave to enter the UK as the dependent partner of a Tier 4 (general) student on 7 September 2009, with leave to remain until 31 December 2012 (although this was later extended until 30 April 2014). Before his leave to remain expired, Mr Pathan applied for and was granted leave to remain as a Tier 2 (general) migrant from 23 March 2013 until 15 October 2015. This was so that he could be employed by a company known as Submania Limited as a business development manager. Before this period of leave was due to expire in October 2015, Mr Pathan applied again, this time on 2 September 2015, for further leave to remain in order to continue to work for Submania in the same capacity as before. This application was made within time and in the correct form; and on the basis that he would retain his Tier 2 status. Mr Pathan's wife and child were named as dependents in the application. It was also supported by a certificate of sponsorship by Submania.

[76] However, Mr Pathan's application was put on hold while a Sponsorship Compliance Team within the Home Office investigated Submania. As a result of those investigations, Submania's sponsor licence was suspended on 4 February 2016, and subsequently revoked on 7 March 2016. This had the automatic effect of invalidating Mr Pathan's certificate of sponsorship. Although his leave was automatically extended until the Secretary of State considered his individual case, he had no opportunity to take steps to deal with the impending, inevitable refusal of his application because he was not informed of the revocation of the certificate until 7 June 2016 and was therefore unaware of the impact that the decision would have on his status until three months after it had been taken.

[77] Mr Pathan challenged the decision by way of judicial review. The judgment of the majority on the key issue for present purposes – namely that there was a duty on the Secretary of State to notify Mr Pathan promptly of the revocation of his sponsor's licence, it being procedurally unfair not to do so (see paragraph [143]) – was given by Lord Kerr and Lady Black.

[78] The appellant contended that he was entitled to notice of the fact that the sponsor's licence had been revoked and a reasonable opportunity to rearrange his affairs, not necessarily to find an alternative sponsor but potentially to do other things, including making an application to the Secretary of State on an alternative

basis, for example on human rights grounds to ask for the exercise of his residual discretion or even to leave the United Kingdom voluntarily.

[79] The majority held that the duty to give notice was an accepted element of the duty to act fairly and that Mr Pathan would have had a real advantage had he been notified of the revocation as soon as that happened, with the rejection of his application occurring some time later. The conclusion that the appellant would have had an advantage did not rest on any estimate of his likely success in pursuing the chances that opened up for him because the cornerstone was procedural fairness; and the fair thing to do procedurally had been to tell Mr Pathan of the revocation as soon as reasonably possible after it happened. He would then have known that his application in its current form was bound to fail. To deny him the greater opportunity which may have been available to avoid the adverse consequences of the decision was unfair.

[80] The majority in the case were careful to emphasise that it was decided as a matter of procedural, rather than substantive, unfairness. The duty to act fairly by providing the information promptly was procedural rather than substantive; and there was a distinction between the duty to act in a procedurally fair way and the use which the beneficiary of that duty made of it. Moreover, the Secretary of State had been under no positive duty to provide the appellant with a specific period not already available under the Immigration Rules or legislation within which the opportunity to deal with the revocation decision might be exploited. However, telling him of the revocation at the earliest reasonable opportunity preserved the fairness of the procedure.

[81] In this way, it was noted at paragraph [108] of the decision that:

> "The duty to act fairly in these circumstances involves a duty not to deprive, not an obligation to create… [T]here is nothing incompatible with the legislation or the Rules in allowing the affected person to know, as soon as may be, of the circumstances which imperil their application, so that they may make use of whatever time remains to them under those provisions. This does not confer a substantive benefit. It may be properly characterised as a procedural duty to act fairly. It is not a duty to bestow. It is an obligation not to deprive."

[82] Fairness required that the Secretary of State did not take steps to frustrate or circumscribe the period during which action might have been taken if timely notice of the revocation of the licence had been given. The duty to act procedurally fairly comprehended an obligation to tell somebody such as Mr Pathan immediately about circumstances which doomed his application "so that he could avail of the full period which would then have become available to allow him to do something about it" (paragraph [109]).

[83] The applicant in the present case accepts that there are limits to this approach and that the Supreme Court was anxious to make clear that it did not follow that the compression of time was in all cases procedurally unfair. For instance, in paragraph [110] of their judgment, Lord Kerr and Lady Black said this:

> "Exigencies, as yet unforeseen, may make such a convergence of decisions and their coincident communication unavoidable. It is only where the coincidence of communication of both has been contrived in order purposely to deprive an affected person of the period between learning of the revocation of the CoS and the refusal of the application that procedural unfairness would arise."

[84] In the present case, the delay in notifying the applicant of the decision in his case until removal directions were issued was not "unavoidable"; and there appears to me to be much to be said for the contention that this approach was indeed contrived in order to purposely deprive an individual such as the applicant of the period between learning of the refusal of his application and the decision to transfer him and the putting into effect of that decision. At least in part, that was for understandable reasons (in order to seek to reduce the risk of absconding in some cases); but a necessary corollary was also that it increases the procedural disadvantage to those who simply wish to exercise lawful avenues of redress open to them.

[85] The applicant contended that the justification put forward for the approach on the part of the Secretary of State in relation to reducing the risk of flight was so weak that it plainly could not justify the procedural unfairness which arises as a result of delaying notification of decisions to asylum claimants. I do not consider the matter to be one of proportionality where the respondent's justification is to be weighed in that fashion; since it is a question simply of procedural fairness. However, as may be clear from the discussion above, the court was entirely unimpressed with the respondent's reliance on the historic pilot scheme in this regard. The concern about asylum-seeker support is also one which ought to be addressed on its merits in individual cases rather than justifying a policy of withholding decisions which is procedurally unfair.

[86] The respondent contended that the facts in the *Pathan* case bore only a superficial similarity to those in the present case and that the context of that case and the nature of the decision that was in issue in those proceedings, as compared with the present case, are wholly different. In the *Pathan* case, for a reason wholly unanticipated by the appellant and as a result of the actions of a third party, his application was bound to fail. He was deprived of the opportunity to avoid or mitigate the effects of the adverse decision relating to someone else; and at a time when his own application had not been determined. In the present case, the

respondent asserts that the applicant was entitled to make whatever representations he wished in respect of his own application, which was determined fairly on its merits, and that after it had been taken he had the facility (of which he availed) to challenge it by way of both further representations and judicial review. In the present case, during the period of which the applicant makes his complaint, his application for asylum had been refused and he had no right to be in the UK.

[87] I accept the respondent's contention that the *Pathan* case arises in a different context and cannot immediately be read across to the circumstances of the present case. Nonetheless, it remains a decision of the highest authority which in my judgment provides strong support for the applicant's case on common law fairness. That is because the Supreme Court describes the nature and effect of the duty to act in a procedurally fair manner within the immigration context and, in doing so, elaborated principles which are of wider application than merely to the facts in the case before them. It illuminates that there is a duty to provide relevant information promptly and allow the recipient to take the benefit of whatever additional time and facilities of which that permits. The observations in paragraphs [126]-[127] and [136] are, in my view, particularly apt. In the present case, it may be right that the applicant's asylum application had been refused during the period of which he makes complaint; but in my judgment it was entirely wrong that he was not given the timeous benefit of that simple piece of information.

Fettering of discretion

[88] In the course of the hearing, Mr O'Donoghue developed a new argument to the effect that the respondent had fettered her discretion by adopting a blanket policy of declining to inform asylum seekers in third country cases of decisions to remove them on third country grounds until removal directions were in place and the Notice of Removal was to be served. The applicant was given leave to amend his Order 53 statement to encapsulate this new ground in light of the court's conclusion that it could be dealt with without unfairness to the respondent (who had a further opportunity to file evidence and supplementary submissions in response for the hearing was reconvened).

[89] In light of my conclusion on the procedural fairness issue, it is not strictly speaking necessary to resolve this additional ground. However, even assuming it would be open to the respondent in some cases to delay notification of the relevant decision, I consider that the approach in this case was insufficiently flexible to represent a proper approach to the Home Secretary's functions.

[90] Although Mr Sands was right to submit that the rule against fettering of discretion does not prevent the adoption of either a policy or practice to guide the exercise of discretion, that is not an answer in this case for two reasons. First, a public authority will not be permitted to adopt a policy which is systemically procedurally unfair. Put another way, it is not a matter of discretion whether or not to act in a procedurally fair manner. Second, in any event, the court must look at the

substance of the authority's actions to determine whether or not its approach erects an unacceptably high threshold in law for the individual and/or has applied the policy too rigorously with a lack of preparedness to entertain exceptions: see *Re Herdman's Application* [2003] NIQB at paragraphs [19]-[21].

[91] Whilst the respondent maintained the position that there was no fixed policy which required decision-makers not to serve third-country decisions until removal directions were set, it was accepted that this was the standard practice. Further interrogation of the issue suggested that the approach adopted in the present case was essentially dictated as a matter of the desk instructions issued to Home Office case workers in TCU. Although it was said to be open to such officials to "discuss cases with line managers if a different course is necessary", no basis for making an exception to the general rule has been identified or articulated. Moreover, the undisclosed nature of the instructions to officials means that an applicant, even if competently represented, may not know that there is an option to seek prompt disclosure of the decision in their case: indeed, they may well not know that there is a standard approach of withholding such decisions, much less on what basis they could and should seek early (i.e. prompt) notification of the decision.

[92] The only evidence in the case suggesting that the withholding of such decisions until removal directions were issued was not an invariable, or almost invariable, practice was the reference in correspondence from the applicant's solicitor in which he referred to another case in which the third country decision was communicated in writing well before removal directions were set because he had specifically asked for this. That was put forward as an example of the fairness of the approach in doing so, rather than as evidence that there was general flexibility on the issue shown by the respondent. In that case, the refusal decision on third country grounds was communicated in correspondence; Mr Creighton's client was not detained; and, having made further submissions with the benefit of time and advice in doing so, the respondent changed her decision and did not proceed with removal. Significantly, however, this occurred in summer 2020 *after* Mr Creighton had become aware of the general practice from his involvement in this case.

[93] I also note that correspondence from the CSO in this case referred to a Home Office policy document entitled, 'Asylum Policy Instruction: Drafting, Implementing and Service Asylum Decisions' (Version 11.0, 1 May 2015). Although this document was not opened before me at the hearing, consideration of it indicates that there is a published policy on 'Serving decisions to file' (see section 11). However, the published policy suggests that this will be appropriate where the individual cannot be contacted and has no legal representative. It does not appear to support the approach adopted in the present case, or the reasons for it, and, indeed, might well lead one to conclude that in a case such as the applicant's, where he was both contactable and legally represented, the decision in his case would be served promptly and not merely placed on file instead.

Conclusion

[94] By reason of the foregoing, I do not intend to rule on the applicant's case based on breach of an implied obligation contained within the Dublin III Regulation. I accept, however, that the respondent was under a procedural obligation, arising as a matter of common law fairness, to inform the applicant promptly of the decision taken in relation to his case on 14 August 2019. Had it been necessary, I would also have held that the respondent's approach to the question of the timing of notification was insufficiently flexible to represent a lawful policy on the matter. I do not consider that the applicant has overcome the significant evidential hurdle required to establish bad faith, which was alleged but not pressed; nor improper purpose.

[95] In light of the later developments in this case after the decision of 14 August 2019, I do not have to grapple with the potentially difficult question of remedy. The unfairness arose in relation to the promulgation of the decision on the applicant's asylum claim, rather than in the process leading up to it (which is a point of distinction between this application and the *Pathan* case). Had this been in issue, the unfairness is unlikely to have led to a quashing of the decision of 14 August 2019 itself; but the court might well have been inclined to grant some intrusive relief in relation to the respondent's actions on 6 January 2020 and following, in order to seek to mitigate the disadvantage arising from the unlawful failure to notify the refusal and transfer decision promptly. I recognise that the question of the appropriate relief to be granted had the case proceeded to full hearing urgently, and how any such relief would interact with the remedies available to the applicant at that time (for instance, his opportunity to apply for bail from the First-tier Tribunal), may not be straightforward. Those issues may require to be considered in another case on concrete facts. In the present case, I intend simply to grant a declaration reflecting my finding on the applicant's procedural fairness ground.

[96] I will hear the parties on the precise terms of the declaration to be granted and on the issue of costs.