Upper Tribunal
Immigration and Asylum Chamber

JR/221/2018
Field House,
Breams Buildings
London
EC4A 1WR

Heard on: 22nd and 23rd September 2020

BEFORE

UPPER TRIBUNAL JUDGE COKER
UPPER TRIBUNAL JUDGE KEITH

Between

The Queen (on the application of 'QH')
(Anonymity direction continued)

Applicant

v

Secretary of State for the Home Department

Respondent

Direction Regarding Anonymity — Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the applicant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. Failure to comply with this direction could lead to contempt of court proceedings.

Having considered all documents lodged and having heard *Ms Sonali Naik QC* and *Mr Greg Ó Ceallaigh*, instructed by Duncan Lewis Solicitors on behalf of the applicant and Mr Gwion Lewis, instructed by the Government Legal Department on behalf of the respondent at a hearing at Field House, London on 22nd and 23rd September 2020 and upon judgment being handed down on 5th November 2020, the application for judicial review having previously been granted by Mr Justice William Davis in a Judgment dated 4th December 2018.

- - - - - - - - - - - - -

APPLICATION FOR JUDICIAL REVIEW
JUDGMENT

- - - - - - - - - - - - -

Previous orders and judgments

(1) The applicant applied on 10th January 2018 for judicial review of the respondent's decision to remove him from the UK; and for the linked decisions in which the respondent certified his asylum claim on third country grounds and certified his human rights claim as clearly unfounded, to be quashed. He also sought damages for breach of his rights under Article 8 of the European Convention on Human Rights ('ECHR') and under EU law, including under the Dublin III Regulation.

(2) In the previous order and judgment of Mr Justice William Davis on 4th December 2018, sitting as a Judge in the Upper Tribunal (IAC), which is not recited in full for the sake of brevity, he granted the applicant's claim for judicial review; declared that the respondent had unlawfully removed the applicant from the UK without proper notice, in breach of the respondent's own policy on notice and in breach of Article 27 of the Dublin III Regulation; and ordered that the decisions to remove the applicant from the UK, to certify the applicant's asylum claim on third country grounds, and to certify the applicant's human rights claim as clearly unfounded, were quashed. The same orders required the return of the applicant from Germany, to where he had been removed, back to the UK.

(3) Mr Justice William Davis did not carry out an age assessment judicial review, but nevertheless made adverse findings on the adequacy of a third-party age assessment, on which he said that the respondent ought not to have relied in treating the applicant as an adult, when removing him. The applicant has never sought permission to apply for judicial review of the third-party (Lincolnshire County Council) age assessment.

(4) Mr Justice William Davis also did not determine the issue of whether the applicant's removal breached his rights under Article 8 of the ECHR and the resumed hearing was relisted to consider liability and the applicant's claim for damages on 5th March 2020.

(5) In advance of the resumed hearing, staff of this Tribunal wrote to both parties' representatives on 2nd March 2020 in the following terms:

"In light of a forthcoming Presidential panel which will be considering the issue of damages for breach of Dublin III in other separate cases, the Tribunal is considering whether the determination of an award of damages in the above application should be linked to that Presidential Panel considering those other cases or adjourned pending the decision in those cases. The Tribunal therefore intends that only questions of "Article 8 liability" should be addressed and considered at the hearing on Thursday. The parties' representatives should attend, ready to:

1) make submissions on the remaining areas of liability in dispute;
2) to discuss, and if possible, agree, case management directions for future conduct of the litigation, on the issue of damages."

(6) In the respondent's written skeleton argument dated 27th February 2020 (§[2(1)]) the respondent conceded that the applicant's removal did breach his rights to respect for his private life under Article 8 ECHR, but asserted that no damages were required to give just satisfaction for the breach.

(7) Nevertheless, the respondent continued to dispute that the applicant had a family life with his uncle in the UK, respect for which was capable of engaging Article 8, which the applicant's removal had breached.

The hearing in the upper Tribunal on 5th March 2020

(8) The sole issue that had been identified to be resolved at the hearing was whether the applicant had a family life with his uncle capable of engaging Article 8 ECHR. If such family life did exist, then just as the applicant's removal had breached his right to respect for his private life, it would similarly breach his right to respect for his family life. It became apparent, in the context of whether there was family life, that the applicant's age, and whether he had been a minor at the time of his interactions with his uncle, remained in dispute. Lincolnshire County Council confirmed on 27th November 2019 that the age assessment which it had carried out, dated 27th April 2016, assessing the applicant as 19 years' old, had been withdrawn, following Mr Justice William Davis's conclusion that that assessment was flawed. The applicant asserted that he was a minor at the relevant time. The respondent did not accept this, notwithstanding the flaws in the age assessment.

(9) This Tribunal regarded it as necessary to determine the applicant's age and the hearing had not been scheduled for an age assessment. The applicant was now living with his uncle in the London Borough of Sutton. This Tribunal therefore directed both parties to write to both local authorities, asking for their position on the applicant's age, with a further direction then seeking the respondent's position.

Case management hearing by telephone on 25th March 2020

(10) The respective Councils (Lincolnshire and Sutton LBC) did not express a view on the applicant's age, and Covid-19 subsequently intervened. With the assistance of the parties' representatives, a case-management hearing took place and directions were issued, which are not set out in full here, but which permitted the respondent to contact Sutton LBC again to ascertain if they would be willing to carry out a new age assessment; and to set out the basis of any continuing dispute on the applicant's age, in the context where a German local authority had since determined the applicant to be a minor. In the absence of subsequent agreement between the parties on the applicant's age, this Tribunal directed that it would reach a decision on the applicant's age on the papers, without the need for a hearing, following which a further case management hearing would take place. Sutton LBC subsequently indicated that it had no view on the applicant's status as a minor, and it became necessary for this Tribunal to

determine the applicant's age, in light of a continuing dispute on that issue between the parties.

The age assessment decision and directions

(11) By a decision dated 14th May 2020 and reissued on today's date, to replace a typographical error, this Tribunal declared that the applicant had a date of birth of 18 January 2000, for the written reasons set out in that decision. The consequence was that the applicant was a minor when he lived with his uncle in the UK from in or around 28th April 2016, and prior to being removed to Germany on 11th April 2017, after which he has since been returned to the UK. The decision also included directions for future conduct of the litigation. The directions included seeking clarification on the remaining issues, including:
   a. whether the respondent continued to dispute that the applicant had a family life with his uncle, the respect for which was capable of engaging Article 8 ECHR; and
   b. in light of the Court of Appeal's decision in Secretary of State for the Home Department v R (on the application of FTH) [2020] EWCA Civ 494, whether the respondent maintained or sought to withdraw her previous concession that her decisions breached the applicant's right to respect for his private life, for the purposes of Article 8 of the ECHR.

(12) In correspondence dated 29th May 2020, the respondent subsequently confirmed that she maintained her previous concession that her removal of the applicant (as opposed to the other decisions - certification of the applicant's asylum and human rights claims) was in breach of the applicant's right to respect for his private life under Article 8 ECHR, distinguishing 'R (FTH)' on the basis that she had removed the applicant unlawfully before he had a chance to properly challenge that decision (which had resulted in its quashing by Mr Justice William Davis), and so was more serious than circumstances where the Dublin III procedure for an unaccompanied child to be reunited with a relative remained available.

(13) The respondent also confirmed that she continued to dispute the existence of family life between the applicant and his uncle. The respondent referred to the authority of Paradiso and Campanelli v Italy (2017) 65 EHRR 22 on the relevance of the limited duration of cohabitation and other qualities in the relationship between and a minor and relatives other than their parent.

(14) The applicant confirmed in correspondence dated 11th June 2020 that he continued to pursue damages for both the acknowledged breach of his private life and the asserted breach of his family life, as well as under EU law.

The issues to be resolved

(15) We identified and agreed with the parties that we needed to decide on the following issues:

a. Liability: while the respondent accepted that her removal of the applicant from the UK to Germany had breached his rights under Article 8 ECHR with regard to respect for his private life, we still needed to decide whether the applicant had family life with his uncle in the UK, respect for which had been infringed as a result of his removal to Germany. The respondent accepted that if we were to find that family life did exist prior to his removal, then the applicant's removal did breach his right to respect for that family life for the purposes of Article 8 ECHR.
b. Damages:
    i. Whether an award of damages was necessary for just satisfaction of a breach of Article 8, (whether private life and/or family life), or whether a declaration was just satisfaction for the respondent's breach of his Article 8 rights;
    ii. Whether the applicant was entitled to 'Francovich' damages. The respondent accepted that Article 27 of the Dublin Regulations conferred individually enforceable rights (see the opinion of Advocate General Sharpston in Ghezelbash v Staatssecretaris van Veiligheid en Justitie (Court of Justice of the European Union ("CJEU") Case No C-63/15) [2016] 1 WLR 3969 ("Ghezelbash")). The respondent also accepted that there was a causal link between her breach of the applicant's rights and the damage suffered by him, so that the sole issue was whether the conceded breach was sufficiently serious.
    iii. Assuming that an award of damages was appropriate, what should the quantum of damages be? The applicant claimed damages for breach of his Article 8 ECHR and EU rights of £15,000; damages for the delay in vindicating his right under EU law of £5,000; and aggravated damages of £6,000. The respondent asserted that the claim for delay had been impermissibly added as a head of claim without any application to amend the claim and it was too late to make such an application at this late stage of proceedings.

(16) We deal in this Judgment with each of the issues in turn: the existence of family life; whether Article 8 ECHR damages should be awarded; whether 'Francovich' damages should be awarded; whether aggravated damages should be awarded; and if damages are awarded on any of the heads, the amount of such damages.

Family life

The applicant's submissions

(17) In the particulars of claim dated 18th January 2019 (§[8]) the applicant asserted (and it is not disputed) that he was living with his uncle at the time of his removal and given his minority and his vulnerability, their relationship constituted family life for the purposes of Article 8 ECHR.

(18) In the written skeleton argument dated 20th February 2020, the applicant asserted that the situation was, on any view, exceptional. He was (i) extremely vulnerable; (ii) highly reliant on his uncle; (iii) a child; and (iv) both he and his uncle had fled persecution, which was relevant to the existence of family life: see Entry Clearance Officer, Addis Ababa v H (Somalia) [2004] UKIAT 00027; Tuquabo-Tek1e and others v Netherlands (Application no: 60665/00).

(19) The applicant distinguished his case from those relied upon by the respondent where family life had been deliberately created by adults at a time when one party was living in the UK unlawfully. He had a family life with his uncle. The respondent's assertion that the applicant and his uncle would have known about the age assessment conducted by Lincolnshire County Council, which assessed the applicant as an adult and consequently they could not have assumed that the applicant would be allowed to remain with his uncle, was not consistent with the reality of the situation, specifically that the applicant and his uncle could not have known that the respondent would unlawfully fail to apply the Dublin III Regulation in removing him.

(20) While the authority of Kugathas v SSHD [2003] EWCA Civ 31 remained good law, the applicant's case fell within the narrow paradigm of a child and a blood relative caring for him. There was no need to consider whether there were more than normal emotional ties between the applicant and his uncle, as that analysis applied to adult relatives. The alternative case of Paradiso and Campanelli v Italy (Application number: 25358/12) was not relevant, noting in that case that there was neither a biological relationship between the putative parents and child, nor a legally recognised relationship. It was in those circumstances that the Strasbourg court had considered the duration of cohabitation and quality of the putative parental relationship.

(21) Instead, we should focus on the ordinary ties between the applicant and his uncle as being "real" and "normal" within the meaning of Marckx v Belgium [1979] 2 EHRR 330. The respondent's denial of the existence of family life was at odds with the wider recognition of the expanded concept of family life beyond those limited to consanguinity or marriage and included opposite sex couples (Whittington Hospital NHS Trust v XX [2020] UKSC 14); foster care arrangements (AU v SSHD [2020] EWCA Civ 338); and extended family relationships (Singh v Entry clearance officer New Delhi [2004] EWCA Civ 1075). Family life had been held to exist between an uncle and niece or nephew, for example, see: Boyle v UK (1994) 19 EHRR 179.

(22) Even if it were suggested that the applicant's relationship with his uncle fell outside the quintessential family paradigm, the requirements of Kugathas, specifically a dependency amounting to more than emotional ties was plainly met, noting his exceptional vulnerability and the background of both fleeing Afghanistan because of persecution. While Mr

Justice William Davis made no finding as to the applicant's vulnerability, he doubted the validity of the respondent's argument that the applicant's relationship with his uncle gave no rise to a significant level of dependency, (§[25] of that judgment).

(23) The two had been part of the same household in Afghanistan and the uncle had looked after the applicant within less than a fortnight after the applicant entered the UK.

(24) When we canvassed whether there was a necessity for reciprocity in a familial relationship between the applicant and his uncle, specifically in the context of assertions about the initial reticence on the part of the uncle to help the applicant in any way, Ms Naik submitted that this was not a claim by the uncle of a family relationship with the applicant, as one might have in family reunion cases, but instead a claim by the applicant and we should consider the claim solely from the child's perspective. The existence of family life did not require reciprocity - a baby could not, for example, reciprocate in any way. In any event, the applicant's relationship with his uncle was a paradigm case of cohabitation and dependency.

(25) The fact that the applicant might have close relations for an equal length of time with a wider network of those supporting him in the UK such as two volunteer workers, one of whom he addressed as "mum," did not take away from the dependency between the applicant and his uncle. Any reference to "mum" might be reflective of culturally explicable respect for older adults.

(26) Moreover, as confirmed by the uncle's first witness statement, the uncle, "DD", initially lived with the applicant and his mother in 2000 in Afghanistan and had since visited Afghanistan on two further occasions prior to the applicant coming to UK in 2016. Whilst the respondent suggested that DD had been reticent in becoming involved with the applicant, as indicated at §[12] of DD's witness statement, DD had not ruled out helping the applicant and had merely said that he could not look after the applicant and that the applicant should remain in his accommodation "*for the time being*".

(27) Whilst DD had then left the UK in late September 2017 for 40 days to visit Afghanistan, it was reasonable to suppose that the applicant was cared for by DD's wife, although there was no evidence on this, whether in terms of a witness statement from DD's wife, DD's children; in the correspondence from volunteer workers; from the applicant himself in his two witness statements, in DD's two witness statements; or in the various medical reports.

(28) This Tribunal needed to evaluate the applicant's family life of cohabitation as a minor with an older family relative, in contrast to the case of Entry Clearance Officer, Sierra Leone v Kopoi [2017] EWCA Civ 1511, where there was an absence of cohabitation prior to the refusal of entry clearance. In that case, there was no dependency between the applicant and the

sponsor, despite emotional ties felt on both sides which did not go beyond normal emotional ties experienced in very many families.

(29) When we asked Ms Naik whether the applicant asserted that he had a family life with DD before the applicant's arrival in the UK in April 2016, she indicated that the applicant did not need to show the existence of such family life before that date. We knew that DD was present at the applicant's birth and briefly cohabited with him. While we do not know the nature of their relationship between 2000 to 2016, what was relevant was the existence of family life at the date of the applicant's removal. The argument that because of the precariousness of the status of the applicant in the UK, there was no such family life, ignored the context that the applicant was entitled to claim asylum as an unaccompanied minor with a family member in the UK under the Dublin III Regulation. He was therefore not removable pending a decision on that claim and the respondent's reference to precariousness ignored that context.

(30) Referring to the case of Uddin v SSHD 12020] EWCA Civ 338, the Court of Appeal re-emphasised the need for real and effective family ties; and also at §[31] that "dependency" was not a "term of art", but a matter of substance over form. There was no rigid test of exceptional dependency (§[32]).

(31) The case of R (Ahmadi & Ahmadi) v SSHD [2005] EWCA Civ 1721 demonstrated the limited role that duration of cohabitation could play - the brothers in that case had only cohabited for weeks.

The Respondent's submissions

(32) The respondent disputed that there was a family life between the applicant and DD prior to the applicant's removal to Germany on 11th April 2017, despite their cohabitation in the UK from in or around 28th April 2016. In summary, the respondent asserted as follows:

a) the applicant was not a member of DD's immediate family as opposed to an extended family member, applying the authority of Kugathas and there was no pattern of support provided by DD prior to the applicant's unlawful entry to UK;

b) co-habitation for a ten-month period (taking into account DD's absence in Afghanistan) was not long enough to constitute a family life, see the authority of Paradiso and Campagnelli v Italy (application no: 25358/12); which could be distinguished from the case of D and others v Belgium (application no: 29176/13), where there had been a direct biological tie between at least one of the parents and the child;

c) the applicant did not have a previous history of family life with DD before he moved in with him and DD had initially refused to help the applicant;

d) prior to his time living with DD, the applicant was aware that the arrangement was precarious, given that he had entered the UK illegally and had not established the right to remain in the UK for any period. In the circumstances, the applicant could not assume that the arrangement of living with DD had 'sufficient constancy' to constitute family life;

e) the applicant's position became especially precarious when he was assessed, albeit inaccurately, as an adult by Lincolnshire County Council;

f) the applicant must also have been aware that his fingerprints had previously been recorded in both Germany and Greece, in which countries he had, by his own admission, lied and claimed to be an adult, making a transfer back under the Dublin III Regulation to those countries at least a realistic prospect.

(33) Kugathas confirmed that neither blood ties nor natural affection between family members was sufficient to establish family life and there was no presumption that a person had a family life with relatives, even within their immediate family (§[19] and §[24]). The claim of family life in Kopoi had been rejected as the applicant was not a member of her cousin's immediate family, was not dependent on them; and had not established a pattern of support from them (§[20]). The case of Boyle, where there was family life between uncle and nephew was in sharp contrast to the applicant's facts. In Boyle the uncle had had contact throughout the nine-year old's life; the nephew would often stay with his uncle at weekends; the uncle saw his nephew every night for the first five years of the child's life; lived only a short distance away from him and both were British citizens.

(34) In the case of Paradiso, the court rejected the assertion of a family life when considering other *de facto* family ties. The court had assessed the existence of family ties, and relevant factors included whether the relationship had sufficient constancy (§[40]). Ms Naik's submission of a clear demarcation line between Kugathas and Paradiso was not sustainable. The court accepted in Paradiso that there could be *de facto* family life in the absence of biological or legal ties including foster parents and even where the court refused to recognise an adoption order made by a court of another country. Pulling the strands together, the court in Paradiso at §[151] stated that it was necessary to consider the quality of ties, the roles played by the applicant vis-a-vis the other family member and the duration of cohabitation. Whilst Paradiso confirmed that it was inappropriate to define a minimum duration of shared life, the duration of the relationship was an important factor. In the case of Paradiso, the putative father's mistaken belief that he was the biological father did not compensate for the short duration of the cohabitation of eight months.

(35) Whilst there was a need to scrutinise the facts carefully, it was a trap to say that the legal authorities provided no guidance on the broad parameters in which family life existed, as otherwise there would be no difference between family and private life.

(36) Considering the authorities referred to in Paradiso at §[149], the court considered Moretti and Benedetti v Italy (application number 16318/07) of family life between a baby and carers where cohabitation began when the child was a month old; the cohabitation had endured and had now reached 19 months and the carers had shared the first important stages of the baby's young life.

(37) In Kopf and Liberda v Austria (application number 1598/06) there was family life between the foster family and looked-after child where the care had started when the child was aged two and had now lasted 46 months.

(38) In Wagner and JMWL v Luxembourg (application number 76240/01) close family ties had existed for over 10 years.

(39) However, as Paradiso emphasised, the duration of cohabitation was not the sole factor, but the quality of ties was also important. Paradiso went on to assess whether there could be private life in the absence of family life and private life was a broad concept.

(40) Returning to Kugathas, Lady Justice Arden reiterated that it was necessary to scrutinise the precise facts. On any legal analysis, no Article 8 family life existed between the applicant and DD prior to the applicant's arrival in the UK in April 2016. The case of R (Ahmadi and Ahmadi) [2005] EWCA Civ 171 was not on all fours with the applicant's case, as in that case, the sibling family relationship was in the context of one of the brothers suffering from schizophrenia with florid symptoms and the other brother acting as his protector. Taking the applicant's and DD's witness statements at their highest, the applicant had been born in January 2000; DD had left Afghanistan in the winter of 2000, when the applicant was not even a toddler, and DD left as an adult. They next lived together sixteen years later. DD had the opportunity to see the applicant regularly as soon as he obtained British citizenship and visited Afghanistan but saw him briefly, twice in those 16 years, not staying with the applicant's family and the applicant's family travelling to visit him.

(41) Contrary to the applicant's case, the evidence did not support heavy dependency on DD once the applicant entered the UK. DD had initially refused to help him (see §[12] of DD's first witness statement), in contrast to the uncle in Boyle who was ready and willing from the outset and over a nine-year period to assist. Moreover even after the initial refusal, DD took no initiative in offering further help or enquiring after the applicant and it was only when the police contacted DD again, following a change in the applicant's accommodation, that he agreed to accommodate the applicant.

(42) In terms of interactions between the two when they were cohabiting, as DD's first witness statement confirmed at §[15] to [19], DD felt that there was very little he could do to support the applicant. Most of the day, the applicant isolated himself in his room alone; the applicant would play with DD's children and on DD's return home, would then withdraw away from DD. DD stated that this behaviour meant it was difficult for a strong connection to be established between the two. In reality, the applicant relied much more on local health services; from 2017, an English language course at college; and local charities and support workers. He was getting external support which was in contrast to the limited support provided by DD. Bearing in mind that DD had initially refused to help him, prior to the applicant's entry to the UK, the applicant could have no reasonable expectation that DD would help him. This suggested an absence of constancy of family life. The absence of unwavering support (contrast Boyle); the limited support that was eventually provided; and the limited duration of cohabitation (11 months, less a period of 40 days when DD left the applicant and there is no evidence of who cared for the applicant while DD was away) demonstrated a lack of reciprocity. It was this reciprocity that distinguished family life from private life. The former was a mutual enjoyment of a collective unit whereas the latter was the exploration of other relationships which may or may not be reciprocated.

(43) Contrary to the applicant's assertions, it was also relevant that the applicant had entered the UK irregularly and not through the Dublin III channel.

Family Life - the Law

(44) We considered first of all the scope of Kugathas v SSHD [2003] EWCA Civ 31, and whether it supported the proposition that consanguinity, cohabitation and dependence were sufficient to form the basis of family life without the need for consideration of real, effective or committed support; the quality of the relationship; a consideration of wider ties; and the duration of cohabitation. The Court in Kugathas quotes, at §[14], the case of S v United Kingdom (1984) 40 DR 196:

> *"Generally, the protection of family life under Article 8 involves cohabiting dependents, such as parents and their dependent, minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults, a mother and her 33 year old son in the present case, would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties."*

(45) Kugathas involved a single adult male challenging refusal of entry clearance. The Court noted that when assessing family life, the analysis was different between entry and removal cases (§[14]) and at §[17] that there was no requirement of dependency, particularly in an economic sense. However, there was an irreducible minimum of real, committed or

effective support for family life to engage Article 8. The Court went on to state at §[19]:

"*Returning to the present case, neither blood ties nor the concern and affection that ordinarily go with them are, by themselves or together, in my judgment enough to constitute family life. Most of us have close relations of whom we are extremely fond and whom we visit, or who visit us, from time to time; but none of us would say on those grounds alone that we share a family life with them in any sense capable of coming within the meaning and purpose of Article 8*".

(46) It continued at §[24]:

"*There is no presumption that a person has a family life, even with the members of a person's immediate family. The court has to scrutinise the relevant factors. Such factors include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life.* "

(47) The Court of Appeal in Uddin v SSHD [2020] EWCA Civ 338 reaffirmed and applied Kugathas, in the context of the applicant becoming an adult while living with foster parents. At §[31], the Court began:

"*[31] Dependency, in the Kugathas sense, is accordingly not a term of art. It is a question of fact, a matter of substance not form. The irreducible minimum of what family life implies remains that which Sedley LJ described as being whether support is real or effective or committed.*

[32] Subsequent case law has built upon but not detracted from Kugathas. In Ghising v Secretary of State for the Home Department [2012] UKUT 160 (IAC), Lang J sitting with UT Judge Jordan in the UT considered the authorities since Kugathas, They observed that family life between adult children and their birth parents will readily be found without evidence of exceptional dependence. In so far as it has been suggested that Kugathas had ever described a rigid test of exceptional dependency, this was dispelled and I respectfully agree with their conclusion that each case is fact sensitive. "

(48) At §[34], the Court continued:

"*The Secretary of State goes further and submits that foster care is a "special category", in which it is incumbent upon an applicant to prove family life in a way that would otherwise be presumed in a birth family. I can find no support for this proposition in the case law. The principles in Kugathas, as described in the judgments to which I have referred, are of general application. I can discern no intention, articulated or implied, to limit the test of real or effective or committed support to birth families. Rather, at para 18 of Kugathas the court describes the special case which is the converse of that asserted by the Secretary of State, namely that in some cases a natural tie between parent and infant may displace the principle of general application that a family life will need to be proved based on the substance of the relationship asserted.* "

(49) At §[40], the Court drew together the following principles:

> *"(i) The test for the establishment of Article 8 family life in the Kugathas sense is one of effective, real or committed support. There is no requirement to prove exceptional dependency.*
>
> *(ii) The test for family life within the foster care context is no different to that of birth families: the court or tribunal looks to the substance of the relationship and no significant determinative weight is to be given to the formal commerciality of a foster arrangement. It is simply a factual question to be considered, if relevant, alongside all others.*
>
> *(iii) The continued existence of family life after the attainment of majority is also a relevant question of fact. No negative inference should be drawn from the mere fact of the attainment of majority, while continuing cohabitation after adulthood will be suggestive of ongoing real, effective or committed support which is the hallmark of a family life."*

(50) Whilst Kugathas gave the example of a paradigm case as an adult and their dependent minor children and referred, in discussing further dependency, to adult children, we accept the respondent's submission that there is no hard-line between on the one hand, consanguineous, cohabiting and dependent relatives (whether immediate family members or otherwise), beyond which no further enquiry need to be made as to the extent of real or effective or committed support; and on the other hand, cases where the three criteria (consanguinity etc.) are not all met and a wider analysis is necessary. We are fortified in this conclusion not only by the reference at §[19] of Kugathas to consanguineous relations where family members are fond of one another and may visit one another (without any stipulation as to the duration of that visit); but also the Court of Appeal's clear direction that the principles in Kugathas are of general application; without the need for exceptional dependency and with a careful scrutiny of the facts. We accept that factors such as lack of consanguinity; lack of cohabitation; and the lack of dependency, particularly in a financial sense will be relevant to a pattern of real, effective or committed support but we do not accept that we should exclude from our analysis the duration of cohabitation; nor, while noting the duty to promote the best interests of children under section 55 of the Border, Citizenship and Immigration 2009, of which we have taken full account, should we limit our analysis because the applicant in question is, or was at the time of his removal, a child.

(51) We further accept the respondent's submission that the support, which is the irreducible minimum for family life to engage Article 8 ECHR, is one which is typically reciprocal in nature, but it is important not to confuse reciprocity with equivalence. In the paradigm case of consanguineous parents and their child, contrary to Ms Naik's submission that there could not be reciprocity between a baby and their parents because the child is unable to reciprocate, being wholly dependent, in fact the support can properly be analysed as being two-way: an absolute dependency by the

child from its perspective; and an acceptance by the parents of responsibility. To draw a different distinction, where there is a desire by a child, even a minor one, for parental or familial support, (which we remind ourselves does not need to be a high level of dependency) but the parent refuses to accept such responsibility, there may not be the real, effective or committed support which is necessary as the irreducible minimum of family life. That is equally consistent with the absence of Article 8 ECHR family life between, for example, an uncle and nephews and nieces where there might be real affection and even, on occasion, a willingness to provide assistance, but not as part of a committed pattern of support.

(52) It is in the context of our analysis that the case of Paradiso is consistent with Kugathas and provides additional guidance on the nature of support. The analysis in Paradiso of the duration of cohabitation and the quality of the relationship is consistent with the irreducible minimum requirement and is an example of the wider assessment of facts which is not only permissible, but may be necessary in cases of consanguineous relations, just as for those lacking consanguinity. The Court in that case was careful to note that there was no minimum period of cohabitation.

Discussion and conclusions on family life

(53) We discussed with Ms Naik the extent of the findings which we needed to make to decide the issue of family life. The context of the discussion is that the applicant has yet to have a substantive asylum interview, prior to which the respondent would then be able to decide whether his outstanding protection claim is accepted or resisted. Ms Naik indicated that it was necessary for us to make findings on whether the applicant's father and brother had been murdered, which the applicant had witnessed and as result of which he had fled Afghanistan. She argued that we need to do so because of Afghan culture, of which we needed to take judicial notice, that the loss of the applicant's father would in turn contextualise the applicant's desire to be reunited with his sole older male relative, DD, in the UK. She asserted, but did not direct us to any evidence, that there would be a *de facto* transfer of patriarchal responsibility from deceased father to DD as 'head of the family', so that greater weight should be placed on the applicant's relationship with DD as his *de facto* father. We discussed with Ms Naik the alternative that it would be possible to take the applicant's case at its highest for the purposes of this judicial review, except where necessary, so that we do not impinge on any subsequent possible decisions or appeal against an asylum claim which has yet to be assessed by the respondent. On the one hand, we were conscious that the applicant cannot be criticised for the fact that the respondent has yet to assess his claim. On the other hand, large parts of the applicant's claim before us are undisputed, in particular his significant mental vulnerabilities. We regard it as appropriate that we take the remainder of his claim at its highest, without making any findings in relation to issues which might impinge on an assessment of his protection claim, unless it is

necessary for us to do so. We note, in any event, that the invitation to take judicial notice of what was submitted to be, but without evidence to which we were directed, a general cultural aspect of Afghan society that there is an assumption of parental responsibility by a surviving maternal male relative on the loss of a male parent appears inconsistent with the facts here, where DD initially refused to help the applicant and where he had not been informed of the applicant's imminent arrival in the UK.

(54) As we had previously found, the applicant was born in Afghanistan on 18th January 2000. DD lived briefly with the applicant and his parents in a shared home and was present at the applicant's birth. DD describes at §[4] of his first witness statement (page E78 of the applicant's bundle ("AB")) leaving Afghanistan in the winter of 2000 when the applicant was crawling. The cohabitation was therefore very brief (a matter of months) and the applicant would have had no recollection of DD at that time.

(55) DD then left Afghanistan in the winter of 2000 and claimed asylum in the UK and was recognised as a refugee in 2001. It follows from the recognition of his refugee status that DD did not simply abandon his relatives out of choice but had a genuine fear of persecution and we take this into account in assessing whether family life subsequently existed between the applicant and DD.

(56) DD applied for indefinite leave to remain and was subsequently granted British citizenship on 15th February 2008, following which he visited Afghanistan on three occasions, two of which were prior to the applicant leaving Afghanistan. The first occasion was in July 2008 and the second was in July 2011. DD confirmed that he did not visit the applicant's home but instead remained at his "own" family's home in Mazar-e-Sharif. He drew the distinction between his family and the applicant's. The applicant and his family visited DD's family in Mazar-e-Sharif and it was common for them travel to that city to visit relatives.

(57) The applicant arrived in the UK clandestinely on 13th April 2016. He was encountered by the authorities almost straightaway; confirmed to them that he was a minor; and was taken to nearby Lincolnshire County Council's childrens' services staff for assessment. During that time until 28th April 2016 he was accommodated by Lincolnshire County Council's childrens' services. The applicant claims that through a person whom the applicant had met in Peterborough, he contacted DD. DD's account is different, stating that he received a call from the police explaining that the applicant asked to stay with him. At §[11] of DD's first witness statement, he continued:

"[11] As a result of conversations with [the applicant] and his mother, [S], after [the applicant] arrived in the UK, I have become aware of the terrible experiences which he went through in Afghanistan, where his father and brother were killed and he himself was tortured. [The applicant] has also told me about how he fled Afghanistan and travelled to the UK. [The applicants'] family had not told me

that he had fled from Afghanistan, and it was only made aware he was in the UK after I was contacted by the police.

[12] In April or June 2016, I received a call from the police, telling me that [the applicant] had arrived in the UK. The police explained that [the applicant] had asked to stay with me. When I first talked to [the applicant], I told him I couldn't look after him. I explained to him that he should stay in his current accommodation for time being. I was concerned I couldn't afford to look after the applicant, as I have two young children. At that point I didn't know anything about his case. As the police explained to me that [the applicant] had applied for asylum, I was also concerned that I did not have the money to pay for a solicitor to assist with his claim.

[13] *Several weeks later the police called me again and explained that the applicant had tried to walk to London to find my house and desperately wanted to stay with me. I travelled to Peterborough that evening and picked [the applicant] up from the police station.*

[14] *When [the applicant] first came under my care, I was not aware of the severity of his mental health condition prior to his arrival in Sutton. We were not informed by the police or by the council that had been responsible for his care since his arrival in the UK about the severity or complexity of his mental health concerns. I do not think his mental health was ever examined by social services when he originally arrived in the UK.*

[15] When I first [the applicant] [sic] he was very happy to see me, and appeared normal. But it was only after the first several nights that I realised that [the applicant] was suffering greatly from the trauma had experienced in Afghanistan. I often would find him awake in the middle of the night, and he would tell me that he was having flashbacks where he could see the death of his brother and finding his father's body. I felt like I could not help [the applicant], and I did not know what to do."

(58) Prior to the initial telephone call, either from the police or the acquaintance with whom the applicant made contact in Peterborough, it is clear at §[11] of DD's witness statement that he was not aware that the applicant had left Afghanistan or that he was the focus and proposed end-destination for the applicant. Ms Naik suggested in submissions that there had been an agreement between the applicant's mother and DD for the transfer of responsibility. Even taking DD's evidence at its highest, that is an assertion unsupported by any evidence to which we were directed and is contradicted by DD's lack of knowledge of the applicant's arrival in the UK, which also explained his clear unwillingness, at least initially, to look after the applicant. Just as DD drew the distinction between his own family and that of the applicant's family in his prior visits to Afghanistan in 2008 and 2011, so he also drew the distinction between the applicant on the one hand and his own two young children on the other when explaining his refusal. He makes clear in his statement at §[11] that he did not know anything about the applicant's case until after the applicant arrived in the UK.

(59) Ms Naik submitted that DD then accepted responsibility for the applicant because he had taken into account the applicant's mental health issues. That is not an assertion that, once again taking DD's evidence at its highest, is supported by evidence, because as DD's witness statement made clear, he did not know anything about the applicant's mental health issues until after the applicant began living with him.

(60) Ms Naik also submitted that the initial refusal was also qualified as being for the "time being." She submitted that DD's refusal to assist the applicant was only intended to be temporary, whilst he made arrangements in order to assist the applicant and that this refusal was only maintained for a couple of weeks until DD took the applicant in on 28th April 2016. In particular, Ms Naik argued against any suggestion that DD was only willing to assist the applicant because of pressure from the police.

(61) The timing of DD's willingness to assist the applicant is explained in three events in around late April 2016. The first was a Eurodac search on 28th April 2016 (page D32, AB) which confirmed that the applicant had been fingerprinted in both Germany and Greece and had claimed to be aged 20 to those authorities. The second was an age assessment conducted by Lincolnshire social services as recorded in the GCID records (page D33 AB), albeit an assessment that was subsequently regarded as deficient by Mr Justice William Davis. The consequence of that age assessment was that the applicant was informed by social workers that he was no longer their responsibility and that he was going to be moved into new, adult, accommodation. Third, the applicant then sought assistance from social services; who contacted the police, who in turn contacted DD. None of this was at the instigation of DD and there is no suggestion or evidence that DD communicated with the applicant in the meantime to check on his welfare, even though he knew the applicant was a minor.

(62) Ms Naik suggested that the question of whether family life existed prior to the applicant's entry to the UK was not relevant and that we should consider family life at the date on which the applicant was subsequently removed on 11th April 2017. We agree that family life needed to have existed at the date on which it is said that his removal engaged the protection of Article 8, namely 11th April 2017, but we do not regard it as impermissible for us to consider the history and quality of the applicant's relations with DD and in particular whether there was a pattern of support over part or the whole of that period up to 11th April 2017.

(63) Even taking DD's evidence at its highest, it does not support any contention that family life, so as to engage protection under Article 8 ECHR, existed prior to the applicant's entry to the UK in 2016. We conclude this for the following reasons: first, although we accept that DD left Afghanistan, not of his own choosing, nevertheless DD's cohabitation with the applicant was for a very brief period in 2000 when the applicant was an infant and would not have remembered DD living with him. Second, while we make no criticism of DD, on obtaining British

citizenship, he almost immediately returned to Afghanistan to visit, but he did not subsequently recommence cohabitation with the applicant or his family and they merely visited one another on two occasions in 2008 and 2011. We do not regard such brief visits as the recommencement of family relations in the sense that they would engage Article 8 ECHR. Using Ms Naik's own test, whilst they remained "blood relations", there was no cohabitation; nor is there any suggestion of any dependency, for example by way of financial remittances or any particular emotional or other pattern of committed support.

(64) The absence of a pattern of support in a real, effective or committed sense is illustrated by the fact that DD was entirely unaware of the applicant's arrival in UK or his journey to the UK beforehand, notwithstanding the fact that DD had remained in contact with the family previously and there is no suggestion that DD was unable to speak with the applicant's mother prior to the applicant leaving Afghanistan. There was no prior acceptance by DD of the transfer of responsibility as part of a wider pattern of committed support. There is no evidence that DD was even particularly close to the applicant's family prior to 2016.

(65) When analysing the relationship in the context of reciprocity, there is no evidence that the applicant was dependent on DD prior to entering the UK, as he travelled from Afghanistan across the world during the course of 2015/2016. There could be no reciprocity on DD's part as DD was entirely unaware of the applicant's intentions or travel.

(66) Once again, while we do not criticise DD, we regard his initial refusal to assist the applicant as telling in analysing family life. We do not accept the DD's refusal was qualified by the phrase "for the time being." DD's concern that he would be unable to support his own family financially (with two young children) does not suggest DD was seeking to make alternative arrangements to help the applicant while refusing him support for a temporary period.

(67) We accept that there is no suggestion that the police pressured DD into helping the applicant, but it is clear from §[13] of DD's first witness statement, where he records the applicant as having tried to walk to London to find his house and desperately wanting to stay with him, that DD felt he had little choice but to accept the applicant.

(68) The applicant then lived with DD and his family until his subsequent removal on 11th April 2017. We come on to consider whether, even if there was not Article 8 family life on the applicant's arrival in the UK, family life subsequently was established and developed between the applicant and DD on living together. DD accepted a willingness to help him. He also attempted to register the applicant with the local GP when the applicant attempted suicide, fairly early on in their cohabitation in May or June 2016.

(69) The evidence also suggests that while accommodating the applicant, the relationship between DD and the applicant was strained and their contact was in fact very limited. As DD recorded at §[19] of his first witness statement, most of the day, when the applicant was in the family home, he would sleep and stay in his room alone. He played games with DD's children when they came back from school. DD said that while from the beginning, he tried to treat the applicant as his own son, whenever DD's children were absent, the applicant reverted to the same withdrawn state, within a room alone. DD candidly admitted to it being difficult to establish a strong connection with the applicant.

(70) DD then visited Afghanistan in late September 2016 for 40 days including visiting his own family, at which point he met with the applicant's mother. The period of DD's absence from the UK was a not insignificant period during which time there was no evidence about the basis of ongoing support or contact between DD and the applicant; or how his undoubted mental health issues and vulnerability were supported. On DD's return to the UK which would have been in November 2016, DD did make efforts to register the applicant with an English language college but it is unclear whether DD paid for this. The suggestion is that his limited finances made this impossible, but there was then some form of fee remission which made the applicant's attendance possible.

(71) DD refers at §[23] to the applicant's mental health improving after attending college and making friends through the Refugee Network and contacts at a support group. In particular, one volunteer at that support group, "JH", had become a strong maternal figure for the applicant. It is noteworthy that when interacting with such volunteers, the applicant would project familial relationships on to those who could not be seen as Article 8 family members, particularly in respect of a matriarchal relationship. JH refers in correspondence at page E6, AB to a relationship akin to a mother and son; and a running theme of how much the applicant missed his mother in Afghanistan and a teacher at the college referred to his only wish being to wanting to find his mother. JH stated:

"My relationship with [the applicant] became one more synonymous with mother/son. He shared with me his journey to the UK and how difficult it was, in particular the treatment towards him by the agent responsible for bringing him here…. There were a couple of running themes with [the applicant] - how much she missed his mum, if he ever met the agent that brought him to the UK he would kill him because of what he had done to [the applicant] and that he wanted to kill himself."

(72) A second volunteer worker, 'PP', referred to being a maternal figure and the applicant calling her "mum". Whilst Ms Naik suggested that references to "mum" might be explicable because of cultural respect (although we were not directed to such evidence that supports such a cultural context), what in fact is clear is a pattern of the applicant projecting onto others forms of maternal relationships, where Article 8 family relationships

plainly do not exist. We note that there is no evidence before us of the relationship between DD's wife and the applicant, despite them living in the same house for a number of months. We accept Ms Naik's submission that the closeness of these relationships with volunteers does not detract in any way from whatever relationship the applicant might have with DD. However, just as it is not asserted, nor could it be said, that the applicant has family relationships with the volunteers who met the applicant on a weekly basis, there is a sense in which the applicant was projecting a desired dependency on others, when it was clearly not reciprocated. The example is of the applicant travelling across the world to stay with DD, who at least initially disclaimed any responsibility and when accepted, was limited in its scope.

(73) Whilst DD refers in his witness statement to the contact from the respondent, while awaiting the progress of his protection claim, there is equally no evidence or suggestion that DD himself chased for any progress, or assumed any form of guardianship or representation. He would have been aware of the process of an asylum appeal and there is limited evidence of his involvement in it when, given the applicant's young age, that might have been expected. While DD did attend on the first occasion when the applicant was examined by a psychiatrist, Dr Belea, on 21st February 2017, he did not on the second occasion. We do, however, note that DD attempted to assist in preventing the applicant's removal by visiting him on two occasions at Brook House IRC prior to the applicant's removal; in seeking to instruct solicitors and indeed he visited Germany once, for an unspecified period, after the applicant was removed to Germany, but the sole reference to contact after the applicant's removal was telephone calls between the two for the first two or three months after April 2017, after the applicant was removed to Germany, and by the time of DD's witness statement in December 2017, it is unclear how often there was telephone contact.

(74) The assessment dated 7th December 2017 made by the German Children and Youth Services, Gera who were appointed the applicant's Guardian, refers to the applicant's acutely unstable mental state and in the assessment of the German doctors, it being of paramount importance for the applicant to be allowed to live together with DD. The report continues (page E40, AB):

"He often emphasises that he appreciates what is being done for him in Germany, but at the same time, it causes him a great deal of suffering to have to live in separation from his uncle, who is his last remaining relative and who acted as his reference person [our emphasis] when [the applicant] lived in England.... As reported by [the applicant] the worries around not being able to live with his uncle are consuming his thoughts every single day... He is having nightmares and misses his remaining relatives, which is causing him suffering…. In the United Kingdom as [the applicant] reports he was allowed to meet people in whom he confided. Thanks to this he felt mentally better and able to concentrate on other things rather than his trauma and fears…."

(75) Considering all of the facts in the round, on the one hand, up to his arrival in the UK, the relationship between the applicant and DD would have been very remote, to the extent that DD was unaware that he was the intended destination. DD initially did not accept responsibility for the applicant although he was subsequently willing to accommodate the applicant and indeed lived with him for a not insignificant period, namely ten and a half months. Moreover, following discussions between DD and the applicant's family including his mother in Afghanistan in late September 2016 (which does not sit easily with the applicant being unable to contact his mother after leaving Afghanistan in 2015, as reported by Dr Belea at page E3, AB) DD arranged for an English language course and provided support in registering the applicant with his GP. Support was also provided through the volunteering networks to which we have already referred. However, as we have also already recorded, DD's relationship with his nephew appears to be remote. This could well be a function of the applicant's undoubted vulnerability, but beyond accommodating the applicant during the period prior to the applicant's removal on 11th April 2017, all of the evidence points against there being any meaningful emotional relationship between the applicant and DD. The letter from Gera Children and Youth Services also refers to the relationships the applicant has formed with those in whom he confides, which is reflected in the letters from the volunteers. Indeed the correspondence from third parties refer to the applicant continually referring to his wish to be in contact with his mother with whom it appears he was not in contact or had only indirect contact, whereas DD had met her. There appears to be a real disconnect between the quality of the communications between the applicant and DD, as it appears that the applicant was not even aware that DD had met the applicant's mother in late 2016.

(76) In terms of those with whom the applicant was able to speak and open up with in the UK, the German Guardian report does not record this as relating to DD, and it is more consistent as referring to his close relations with volunteers and also with Dr Belea. In other words, the applicant has benefited from the support from volunteers which he has found critical to improving mentally, as opposed to his UK relatives.

(77) While there is no requirement for dependency to be of a particularly serious or exceptional level, or even for there to be dependency at all, we conclude that there is an absence of evidence of real, committed or effective support between DD and the applicant prior to his removal on 11th April 2017. DD accommodated the applicant; he accompanied him to a local GP surgery; and following discussions with the applicant's mother in Afghanistan, (with whom the applicant claimed to have lost contact or, alternatively, had only indirect contact), registered him with a local English-language school and finally attempted to arrange for legal assistance. The applicant's projection of dependency was not limited to DD, but extended to a wider group of volunteers in the UK. The projection of dependency, while entirely understandable, was not reciprocated by an

acceptance of real, effective or committed support by DD. We are also far from satisfied that we have the full picture in terms of the nature of the discussions between DD and the applicant's mother in Afghanistan; nor we do not accept that there has been a transfer, as asserted, of parental responsibility from the applicant's mother to DD. When assessing the quality of the relations between DD and the applicant, we must consider the wider ongoing relations between the applicant and his continuing family members in Afghanistan and there is a clear gap in evidence in relation to that.

(78) We therefore concluded the applicant did not, at the relevant time (his removal from the UK), have family life with DD, respect for which would engage Article 8 of the ECHR.

Article 8 damages

(79) We nevertheless needed to consider whether in principle we should award the applicant damages for the conceded breach of right to respect for his private life, including with DD in the UK, as just satisfaction for that breach or whether a declaration to that effect was sufficient.

The applicant's submissions

(80) In initial written submissions, the applicant asserted that damages were necessary for just satisfaction on the basis that the declaration was not sufficient. The breach was not only in respect of his removal, but the manner of his removal (which Ms Naik confirmed was not included in a separate false imprisonment claim being pursued in the County Court), as set out in the applicant's witness statement, in particular the effect of handcuffs and restraints on a flight to Germany, when he was a child; and the delay in the respondent facilitating his return. The respondent relied on an 'obviously' flawed age assessment; ignored fresh evidence (specifically a Taskera) that the applicant was a child for almost a year; ignored repeated requests to assess evidence including whilst he was in detention; summarily and irrationally rejected that evidence; breached her own policy by preventing him from challenging his removal and tried to prevent him from bringing a claim in the UK by first insisting that he had to contact the German authorities. The medical evidence supported the applicant's vulnerability and his heavy reliance on DD. There was no challenge on causation and there was a sufficiently serious breach to make an award of damages appropriate.

(81) In relation to Article 8 damages, the applicant referred to the comparable authorities where awards had been made of Kaushal and Others v. Bulgaria, no. 1537/08; Gapaev and Others v. Bulgaria (41887/09); Guliyev and Sheina v. Russia (App no. 29790/14); Zezev v. Russia (application no. 47781/10). The applicant was particularly vulnerable as an asylum seeker, was a child, had suffered from trauma and had been entitled to consideration of his asylum claim in the UK. We were also referred to the unreported judgment of the Family Court in Medway Council v M and T

(by her Children's Guardian) (Case No: ME15C00859), which included a table of cases where Article 8 damages had been awarded.

(82) The correct approach to damages was as set out in DSD and Anor v Commissioner of Police of the Metropolis [2014] EWHC 2493 (QB) at §[18]:

"18. In relation to any claim for an award of compensation the starting point for the analysis is to answer the question whether a non-financial remedy is necessary for "just satisfaction"? In the present case I have already made declarations in favour of each Claimant to the effect that their Convention rights have been violated: Liability Judgment paragraphs [298] and [313]. The importance of declaratory relief in an appropriate case is not to be underestimated. It provides a formal, reasoned, vindication of a person's legal rights and an acknowledgment in a public forum that they have been wronged. It is an integral part of the democratic process whereby a public body can be called to account. Case law suggests that there are (at least) two components to the question whether a financial award should supplement a declaration. First, it is necessary to consider whether there is a causal link between the breach and the harm which should appropriately be reflected in an award of compensation in addition to a declaration? Secondly, and regardless of the answer to the first question, it is necessary to consider whether the violation is of a type which should be reflected in a pecuniary award?"

(83) This Tribunal had evidence of the impact of removal from witness statements and uncontested medical evidence. This was in contrast to the case of Lazoriva v Ukraine - (application no: 6878/14) where the limit of a remedy to a declaration was in the context of a purely procedural breach. There had been no attempt by the respondent to recognise or engage with the seriousness of what had happened. The seriousness of the respondent's actions was not only in relation to the applicant's removal but a catalogue of errors in failing to acknowledge and review the Taskera which had been provided and treating him as an adult unless other evidence was provided, as recorded in the GCID notes; the recording that the applicant had no family in the UK (page D34, AB) while later in the record, there were notes suggesting that the applicant was living in accommodation paid for by DD (page D38, AB). The applicant had been detained and his protection claim was certified without evaluation of his Taskera and even when it was evaluated, it was merely rejected on the basis that there were no comparable documents with which to assess it.

(84) Following the applicant's unlawful removal there was frequent and extensive pre-action correspondence, as a result of which the respondent not only attempted to resist any assistance to the applicant but positively sought to persuade the German authorities that the applicant was an adult.

(85) Finally, there was no presumption under section 8 of the Human Rights Act that damages should not be awarded. Section 8 specified a requirement to consider whether a financial award was necessary.

The respondent's submissions

(86) Section 8(3) of the Human Rights Act 1998 provided the starting point that there should be no damages at all unless, taking into account other available remedies, this Tribunal is satisfied that an award is necessary to afford just satisfaction. Noting the authority of R (Greenfield) v SSHD [2005] 1 WLR 673, the court stressed that the remedy of damages played a less prominent role in actions for breaches of the ECHR than for private law obligations, where in the latter case often the only remedy was damages. The declaration had been sufficient in the authority of Lazoriva. The applicant had secured his return from Germany and had remained in the UK ever since.

(87) The applicant's case was weaker than in Lazoriva given the precariousness of the applicant's living arrangements with DD from the outset, having entered the UK illegally. In any event, transfer of the applicant to Germany did not affect the applicant's ability to remain in contact with DD and indeed DD had on one occasion visited the applicant. The assertion that the applicant was heavily reliant on DD when they were living together was not borne out in the evidence.

Discussion and conclusions - Article 8 damages

(88) We take as our starting point section 8 of the Human Rights Act 1998:

> *"(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.*
>
> *(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.*
>
> *(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including —*
>
> > *(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and*
> >
> > *(b) the consequences of any decision (of that or any other court) in respect of that act,*
>
> *the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made."*

(89) We accept the respondent's submission that a declaration would ordinarily be sufficient as a remedy, unless an award is necessary in addition. We have considered the loss or harm caused to the applicant by his removal and the manner of that removal. In that context, the respondent must take the applicant as she finds him, in the sense that she was removing a minor, with significant mental health difficulties and vulnerabilities. Dealing first with the fact of removal and its impact, the

first impact was the harm to the relationship between the applicant and DD, which the applicant had begun to develop while cohabiting with him. However, as we have already recorded, and as DD accepts, there had been significant difficulties in establishing a strong relationship between the two; and we think it unlikely that there was a particularly strong relationship, albeit that the applicant missed DD as part of his private life. The applicant missed DD just as he missed (and contacted) a volunteer, PH after his removal, between August and September 2017, indicating that what she had written to him made him felt strong and saying that he missed her and another volunteer, JH; his teacher; and DD (page E35, AB). The reports from the German Guardian and social workers refer to this, missing *"remaining relatives"* (although no express reference to DD) and grappling with suicidal thoughts, although these have now settled. The report continues that DD has the interpersonal skills to care and offer him a *"bit of a family"* (page E42, AB). A separate report while the applicant was in Germany recorded his suicide attempt in the UK (in 2016, while living with DD), but referred to the importance that that the applicant placed in his later attainments in English language proficiency (page E47, AB), and which presumably helped his mental health. When in Germany, the applicant was now having to start back at square one, and was scared that on becoming an adult, he would be deported to Afghanistan. The assessment was that it would be *"better for his mental health to live together with his uncle."* It describes suicidal thoughts and flashbacks, and that the applicant appears happier when talking about England and his uncle and *"talks most of all about his friend [JH]. He is closely and constantly in touch with her. She is very important to him and he wants to see her again at all costs."*

(90) At page E51, AB, the report continues:

"What is the most important for [the applicant] is to be able to be back with his uncle in England and to make a living together with him. He is only "physically" in Germany but everyday his heart and his head are with his family in England. Here at our facility [the applicant] feels trapped and is unable to lead a carefree life. Thoughts about his uncle in England are bothering him on a daily basis and he is suffering incredibly because of this. He is finding it difficult to concentrate on things, as his thoughts are constantly revolving around the one thing. The separation from his uncle has affected his life all round and it has limited it immensely. "

(91) What is reflected in the German report is the profound effect that the applicant's separation from his support network in the UK had on him and the distress that this had caused, which meant that he had only a limited life in Germany. However, there is no evidence the removal had a long-lasting effect on the applicant's already significant mental health issues. There is no evidence of any long-lasting, wider impact on the applicant's private life and in particular his close friendship and support with his friend, 'JH', about whom he spoke most of all.

(92) We considered not only the type of loss or effect on the applicant, which in this case was his obvious distress and sense that he was living some form of half-life in Germany, but also the period of time during which the applicant was separated from his friendships and support network. This was the period from 11th April 2017 until his eventual return, following the judgement of Mr Justice William Davis, on 20th December 2018. The period of absence is therefore not insignificant. However, a large part of that delay has to be seen in the context of the pre-action litigation and the subsequent judicial review proceedings.

(93) We set out as an Annex to these reasons a chronology, summarising the correspondence between the applicant's solicitors, the respondent and the German authorities during the period from the date of the applicant's removal on 11th April 2017 until the applicant's solicitors issued these judicial review proceedings nearly 9 months later, on 8th January 2018, when the applicant then sought expedited relief. Whilst Mr Justice William Davis made clear that the respondent ought not to have relied upon an age assessment which he regarded as flawed, there was a notable lack of urgency on the part of those representing the applicant to seek enforcement of his immediate return.

(94) In the context of a suggestion that the respondent was obstructive, one initial theme of the correspondence was the applicant's solicitors repeatedly seeking disclosure of the Lincolnshire County Council age assessment and respondent's case records (so-called 'GCID' records). Two points emerge. First, in response to the disclosure requests, the respondent repeatedly referred the applicant's solicitors to its subject access request unit, which the applicant's solicitors repeatedly ignored. The applicant's solicitors never explained their unwillingness to do so to the respondent, only later referring, in their judicial review application to this Tribunal, 9 months after the applicant's removal, to the respondent 'refusing disclosure' (which the respondent would clearly dispute) '*in reliance on the Subject Access Bureau procedure, particularly in circumstances where the applicant is overseas and providing identification acceptable to the SAB is difficult*' (page A12, AB). We do not criticise the respondent for requiring the applicant's solicitors to make document requests to a dedicated unit, nor have the applicant's solicitors provided any evidence that the subject access request unit was uncooperative or that the process was difficult. Indeed, the unit can hardly be criticised, when they were never contacted in this case. The lack of explanation by the applicant's solicitors to the respondent of why using the subject access request unit was not appropriate is more indicative of the applicant's solicitors, regrettably, becoming more entrenched in their position.

(95) A second point is that while the applicant's solicitors continued to ask for copies of the GCID notes until their last correspondence dated 28th December 2017, they stopped asking for a copy of the Lincolnshire County Council age assessment after 21st August 2017, after the German local authority (Gera) age assessment of the applicant, which was favourable to

him. The applicant's solicitors' focus was clearly on the positive Gera local authority age assessment, rather than challenging the conflicting Lincolnshire County Council age assessment.

(96) The consequence of both points is that there emerged a conflict and confusion between the authorities responsible for, and processes by which, the dispute over the applicant's age, which was the central basis of the applicant's removal, could be resolved. The respondent was informed, on 17th August 2017, that the German central authorities (as opposed to the Gera local authority) continued to regard the applicant as an adult, notwithstanding the Gera authority's assessment of the applicant as a child on 8th June 2017. The German central authorities maintained that the applicant was an adult and had been correctly transferred back to them as late as 4th December 2017, when they refused the applicant's solicitors' request to make a 'take charge' request to the respondent. The respondent was therefore faced with the Lincolnshire County Council assessment, as yet (and indeed never) challenged; the applicant's assertion of the Gera local authority assessment to the contrary; and indications, when she checked with the German central authorities, that they still regarded the applicant as an adult. It was the fact that the applicant was regarded as an adult by both the respondent and German central authorities which was key to the process. If he were an adult, that would have made him removable under the Dublin III Regulation, with certification of the asylum claims on safe third country grounds being entirely appropriate.

(97) The lack of progress (and frankly, sustained initiative) by the applicant's solicitors in 2017 can be seen following the initial intense period of activity between late April and the end of May 2017, at the end of which the respondent confirmed that it believed the German authorities were in the process of carrying out an age assessment. While the age assessment was carried out on 8th June 2017, there was no further activity for over two months until the applicant's solicitors wrote to the respondent on 14th August 2017 and indeed they did not have any direct contact at all with the applicant, even by telephone, until 21st September 2017, which they later asserted was due to '*complications in securing legal aid finding to travel to Germany,*' (page C64, AB), although this fails to explain why no telephone contact was possible earlier, when DD had been able to be in contact in the three months after the applicant's removal in April 2017.

(98) The attempts by the applicant's solicitors to seek assistance from the German authorities from 15th September 2017 will have been hampered by their sending correspondence to an incorrect email address, although it remains unclear why it took the applicant's solicitors until 27th November 2017, more than two months later (perhaps by way of a simple telephone call) to rectify this mistake.

(99) The applicant's solicitors did then seek to speed up the process in January 2018 by seeking urgent consideration of their application for judicial review, albeit the application for urgent consideration was rejected by this

Tribunal on 12th January 2018, and the process of judicial review litigation then took its course, for the remainder of 2018.

(100) Indeed it was this delay in applying for judicial review which formed the basis of the refusal of the application for judicial review on the papers by Upper Tribunal Judge Kekić on 6th April 2018, albeit later reversed by Upper Tribunal Judge McWilliam following an oral renewal application on 19th July 2018. Whilst there was a further delay as a result of the respondent's application to file the detailed grounds of defence, a lawyer of this Tribunal accepted as adequate the reasons given by the respondent for needing an extension, namely a response from the German authorities to give the full picture.

(101) In summary, the gist of the course of events between the applicant's removal on 11th April 2017 and his return in December 2018 was a lack of any challenge to the age assessment; the delay in applying for judicial review between April 2017 and January 2018; the delay in liaising with the German central authorities and their reaffirmed view of the applicant as an adult; the common view of the respondent and the German central authorities that the Dublin III process had been applied correctly; and the apparent confusion over the appropriate channel to challenge that common view, with the respondent believing this to be via the German authorities; and the German authorities believing the opposite, complicated by the fact of a Taskera which was not assessed properly. The procedural complexities did not make resolution simple and we conclude on balance that while the respondent has been criticised for relying on the Lincolnshire County Council age assessment, the respondent cannot be criticised for not relying on the Gera local authority age assessment, when the German central authorities regarded the applicant as an adult.

(102) In these far from straightforward circumstances, while we do not in any way condone or justify the applicant's unlawful removal, the delay in return reflects the complex process involved in resolving matters.

(103) The final aspect we considered was the manner of the applicant's removal. He described at §[86] onwards of his witness statement (at page E69, AB) having handcuffs put on him and being pulled onto a plane like an animal; he had his trousers pulled off and still had scarring from deep, bloody cuts on his wrists from the use of handcuffs. We do not take this element of his claim at its highest. While he referred at §[54] of the judicial review application to injuries sustained to his leg and arm, we take into account the absence of any reference by the German authorities to the scarring or ill-treatment in their subsequent, detailed social services reports which recounted the applicant's other recollections of ill-treatment or unkindness (for example being sworn at by drivers as he attempted to kill himself whilst in London); we also take into account the absence of any scarring evidence, with which this Tribunal is very familiar and which is frequently available. Instead, the detailed Gera medical assessment notes at: page E51, AB:

"On bad days, [the applicant] also mentions leg pains and stomach aches.... The doctors have been unable to determine anything medically in relation to his leg and stomach problems. They say that these are related to his mental health."

(104) On balance, we are not prepared to accept that element of the applicant's account as reliable. Whilst we have no doubt that he was highly distressed during the course of his removal, we do not accept the claim of what amounts to a serious physical assault, in the absence of scarring evidence which was obviously open to the applicant, with legal representation, to adduce; and in the context of the Gera authority's assessment, which found no physical cause of any leg pains.

(105) We take into account the effect of the declaration where the applicant has already been returned to the UK; the fact of his unlawful removal and the consequential period in which he was absent from the UK, in circumstances which were obviously distressing to him but where there was no evidence of long-lasting impact and in circumstances where the delay is explicable, at least in part, by the complexity of the procedures to challenge a return, in the absence of any challenge to the Lincolnshire County Council age assessment. In these circumstances, we regard a declaration as just satisfaction of the applicant's claim.

Francovich damages

The applicant's submissions

(106) In respect of EU damages, the parties accepted that Article 27 of the Dublin III Regulation conferred direct individual rights and there was a causal link between the loss and damage suffered by the applicant and the breach of his rights. Therefore, the sole question was whether that breach was a sufficiently serious one. In that context, both representatives agreed that the factors set out in R v Secretary of State for transport ex p Factortame (No. 5) [2000] 1 AC 524 by Lord Clyde. Adopting those criteria, the breach was one of a general and superior principle of community law, of a right to an effective remedy in the context of the applicant's removal where the applicant was a minor. The right to an effective remedy could not be clearer and the respondent had provided no explanation beyond an assertion without evidence of an administrative error. The respondent simply broke the law. The respondent deliberately removed the applicant and refused to facilitate his return and the behaviour was more egregious in fighting the matter right to the end.

The respondent's submissions

(107) Adopting the same criteria set out by Lord Clyde, Article 27 provided a specific, narrow procedural safeguard in the context of the Dublin III Regulation and related to the applicant being provided an effective remedy, which he had at all times, namely the ability to judicially review the age assessment, which he failed to utilise. The real failure was that the applicant had not been given sufficient time to challenge his removal

before it took place. Article 27(2) did not define what was meant by a reasonable amount of time and the lack of such precision militated against an award of damages. The suggestion of a deliberate intention of inadequate notice was not sustained and it was reasonable, and indeed natural, to infer that there had been an administrative clerical error. There was no relevant judgment on the question of what was a reasonable period within Article 27(2) and after it became evident that the infringement had occurred, i.e. after the judgment of Mr Justice William Davis, the applicant was promptly returned to the UK. In terms of the effect on the applicant, he continued to have access, albeit not in the same way, to his friends and DD while in Germany. There was no other EU guidance which the respondent had breached. In summary, the breach, while acknowledged, was not sufficiently serious to meet the relatively high threshold for an award of Francovich damages.

The Law

(108) R v Secretary of State for transport ex p Factortame (No. 5) [2000] 1 AC 524 provides the following guidance at page 538, paragraph C:

"Liability to compensate - the principle

My Lords in the Francovich case [1995] I.C.R. 722, 772, para. 37, where there had been a failure to implement a directive, the European Court said: "it is a principle of Community law that the member states are obliged to make good loss and damage caused to individuals by breaches of Community law for which they can be held responsible." The court did not indicate what were the conditions for such liability or what if any defences would be available to a member state in breach of Community law obligations, save that in the case of a directive liability was conditional on there being a grant of rights to individuals by the directive, that the contents of those rights were clear, and that the loss suffered was shown to be caused by the state's breach. The further scope of the remedy was left to be worked out in subsequent cases as it has been in Factortame III""

(109) Paragraph G continues:

"The basic approach is clear. Before a member state can be held liable, a national court must find (i) that the relevant rule of Community law is one which is intended to confer rights on individuals; (ii) the breach must be sufficiently serious; (iii) there must be a direct causal link between the breach and the loss or damage complained of....."

(110) At page 554, paragraph E provides additional guidance:

"1. In paragraph 38 of its judgment in Factortame III, at p. 497, the court has affirmed that the liability of a member state for damages for a breach of Community law depends on the nature of the breach. This gives rise to consideration of a number of more particular matters, one of the most prominent of which is the importance of the principle which has been breached. Thus in Mulder v. Council and Commission of the European Communities (Joined Cases C-104/89 and C-37/90) [1992] E.C.R. I-3061 the court founded upon the fact that

the breach in question was of a general and superior principle of Community law, namely the protection of legitimate expectations.

2. Another consideration relating to the nature of the breach is the clarity and precision of the rule breached. If the breach is of a provision of Community law which is not framed in clear language and is readily open to construction, then the breach may be the less serious. Questions of the clarity of the rule may require to be associated with questions of the complexity of the factual situation. The application to complex facts even of a rule which is reasonably clear in itself may render the situation open to doubt.

3. Closely related to that last consideration is the degree of excusability of an error of law. (That could arise on account of the ambiguity of a Community text. It could also arise out of the uncertainty of the law in some particular area, where there is little or no guidance and evident room for difference of opinion.

4. Another factor relating to the clarity of the law is the existence of any relevant judgment of the on the point. If there is settled case law, the failure to follow it may add to the seriousness of the breach. On the other hand if the point is novel and is not covered by any guidance from the then liability should less readily follow.

5. It is also relevant to look at the state of mind of the infringer, and in particular whether the infringer was acting intentionally or involuntarily. A deliberate intention to infringe would obviously weigh heavily in the scales of seriousness. An inadvertent breach might be relatively less serious on that account. Liability may still be established without any intentional infringement. More broadly, the purpose of the infringer should be considered. If the purpose was to advance the interests of the Community a breach committed with that end in view might be seen as less serious than one committed with the purpose of serving merely national interests.

6. The behaviour of the infringer after it has become evident that an infringement has occurred may also be of importance. At the one extreme the immediate taking of steps to undo what has been done and correct any error which has been committed may operate to mitigate the seriousness of the breach. At the other extreme a persistence in the breach, the retention of measures or practices which are contrary to Community law, especially where they are known so to be, will add to the seriousness of what has been done. Indeed, in paragraph 57 of the judgment in Factortame III, at p. 499, the court stated that persistence in a breach despite a judgment finding an infringement or clear case law on the point, "will clearly be sufficiently serious."

7. Another aspect relates to the persons affected by the breach. In the Mulder case [1992] E.C.R. I-3061 the court also founded upon the fact that there had been a complete failure to take account of the specific situation of a defined economic group, namely the producers of milk. The fact that the exclusion of the producers from the allocation of a reference quantity was not foreseeable and was beyond the limits of ordinary economic risk made the breach all the more obvious (pp. 3132, 3133, paras. 16 - 17).

8. A further consideration is the position taken by one of the Community institutions in the matter. It may be that one of the institutions has, to use the language of the court in the judgment in Factortame III [1996] QB. 404, 500, para. 56 "contributed towards the omission." In the present context this is not to be seen as bearing upon the third of the three necessary conditions for liability which the court has prescribed, namely the existence of a direct causal link between the breach and the damages sustained. Here it is a factor relating to the seriousness of the breach. As phrased in para. 56 it is presented as a mitigating factor and it is wide enough to include various kinds of actions on the part of the institution concerned. But it also includes the giving of information or advice and in that connection the factor could operate in either direction so far as the seriousness of the breach is concerned. Advice from the Commission that the state would not be acting in breach of Community law in taking a particular step would plainly be a mitigating factor. The decision to persist in a proposed step in the face of warnings from the Commission that the state would be in breach of Community law in so doing would add to the seriousness of the state's action.

What then remains is the application of the test to the facts of the case. In para. 58 at p. 500 of the judgment the court records that the national courts have the sole jurisdiction to find the facts and to decide how to characterise the breaches in question. But the court then states that it will be helpful to indicate a number of circumstances which the national courts might take into account." The first of these appears to be a plain indication that at least the nationality condition was manifestly contrary to Community law. But it is still for the national court alone to determine whether there was a sufficiently serious breach……"

Discussion and conclusions

(111) Applying the guidance above, we accept the respondent's submission that whilst it expresses a general principle of the right to effective remedy, in practice, Article 27(2) does 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. Whilst the respondent breached her own guidance, the Article itself did not have sufficient clarity. We also accept the respondent's submission that there was an ability for the applicant, albeit limited, given the curtailment of time to challenge removal, to have applied for an immediate injunction to prevent his removal; or alternatively to have applied for an emergency order requiring his return, shortly after his removal. DD had visited the applicant while the applicant was in detention prior to his removal; the applicant was legally represented prior to his removal (DD had instructed, possibly different, solicitors to apply for bail); and the applicant's removal took place nearly a year after Lincolnshire County Council's age assessment on 27th April 2016, of which the applicant was verbally informed the following day.

(112) Whilst the fact of removal was deliberate and whilst the respondent plainly had the Taskera document and had failed to consider the applicant's claimed age in light of it, the age assessment of Lincolnshire

County Council had not been challenged legally. While the respondent ought to have appreciated that the Lincolnshire County Council assessment could not be relied upon, that did not mean that she ought to have treated the applicant as a minor, given the German central authorities' treatment of the applicant as an adult. There was not a wilful disregard by the respondent or intention to remove the applicant, knowing him to be a child. In the circumstances, we do not accept that the breach was sufficiently serious, even noting that it is now known that the applicant was a child and his best interests were breached by his removal, so as to engage a right to damages under the 'Francovich' principle.

Aggravated damages

(113) For completeness, having declined to award damages under Article 8 ECHR or damages under the Francovich principle, we decline to award aggravated damages. It would be clearly inappropriate to make an aggravated award where we have declined to do so for the underlying claims.

Declaration

(114) We make a declaration that the applicant's right to respect for family life under Article 8 ECHR was not engaged by the respondent's unlawful actions.

(115) We make a declaration that the respondent's removal of the applicant breached his right to respect for his private life under Article 8 of the ECHR and his right under Article 27 of the Dublin III Regulation.

(116) We regard our declarations as just satisfaction of the applicant's claims and decline to award him any damages.

Signed: J Keith

Upper Tribunal Judge Keith

Dated: **5th November 2020**

JR/ 221/2018

The Queen (on the application of 'QH')
(Anonymity direction continued)

Applicant

v

Secretary of State for the Home Department

Respondent

CHRONOLOGY OF CORRESPONDENCE BETWEEN PARTIES' REPRESENTATIVES AFTER THE APPLICANT'S REMOVAL

Date	Description
13th April 2016	The applicant enters the UK.
27th April 2016	Lincolnshire County Council assesses the applicant as an adult and informs him verbally the following day, as a result of which he is transferred to adult accommodation.
28th April 2016	The applicant is collected by DD, to live with him.
Late September 2016	DD returns to Afghanistan for 40 days without the applicant, returning to the UK in November 2016 (the actual dates are unclear.
11th April 2017	The applicant is removed from the UK to Germany
26th April 2017	Duncan Lewis writes to the respondent, as a pre-action protocol letter, pointing out the applicant's unlawful removal; that his age was disputed and his mental health problems had worsened since his removal to Germany; and requiring a response within 14 days. The letter referred to Lincolnshire CC's age assessment, which Duncan Lewis had not seen, but provided a further copy of the Taskera, previously sent to the respondent and asserted that the applicant had not had the opportunity to challenge the age assessment. Duncan Lewis sought the applicant's return as a matter of urgency and a copy of the age assessment.
3rd May 2017	The respondent sends a holding response, proposing a reply by 10th May 2017.
10th May 2017	The respondent sends a further holding response, pending further enquiries. The respondent proposes a new response date of 24th May 2017.
11th May 2017	Duncan Lewis writes to the respondent, disputing the need for

	further enquiries, requesting immediate confirmation of the applicant's return, and copies of the age assessment, GCID notes relating to the applicant's detention and removal; and documents relating to the German authorities' initial refusal of the respondent's 'take back' request under the Dublin III Regulation.
19th May 2017	Duncan Lewis writes to the respondent, asserting that while no formal age assessment has been carried out by the German authorities, they accepted him as a minor; and seeking the applicant's return, together with relevant documentation and consideration of his Taskera, by 24th May 2017, failing which the applicant would be advised to pursue remedies in the Upper Tribunal.
23rd May 2017	The respondent writes to Duncan Lewis setting out the events from her perspective; indicating that the German authorities regarded the applicant as making no claim nor offering any evidence that he was a minor, since returning to Germany; disputing the Taskera as reliable evidence of the applicant's age; pointing out the option of an out-of-country right of appeal against the refusal of the asylum claim; and, in response to the requests for evidence, requesting that the request be made to its subject access request team.
31st May 2017	The respondent writes to Duncan Lewis, confirming that it now understands that the German authorities are carrying out a formal age assessment and it would not be appropriate to anticipate the outcome of that assessment.
8th June 2017	The German local authorities (Gera) accept the applicant as a child, following an interview with him on 2nd June 2017.
14th August 2017	Duncan Lewis writes to the respondent, providing a copy of the applicant's German identity card confirming his age as a minor and referring to the detrimental effect on health and his mental health treatment in Germany. Duncan Lewis reiterates their request for his return and provision of the previously requested documents by 29th August 2017.
21st August 2017	Duncan Lewis writes to the respondent, enclosing the German identity document. They seek the GCID notes, but no longer seek the Lincolnshire Count Council age assessment documents.
21st August 2017	The respondent writes to Duncan Lewis, providing a substantive response; disputing that the German authorities had accepted claimed age; if they later did so, asserting that it would be for the German authorities to issue a 'take charge' request; and directing the document requests to be made to the respondent's subject access request unit.
25th August 2017	The respondent writes to Duncan Lewis, acknowledging receipt of the photocopy of the German ID card, but not accepting the photocopy as it could not be verified; and being contrary to the information provided to the respondent by the German central authorities on 17th August 2017, as to the applicant's accepted age. The respondent once again directs that any document requests be

	sent to its subject access request unit.
15th September 2017	Duncan Lewis writes to the German central authorities, using an incorrect email address, requesting their assistance to make a 'take charge' request. They refer to his poor treatment during the transfer, for the first time.
22nd September 2017	Duncan Lewis writes to the respondent, asking them to liaise with the German authorities to verify the German ID document; confirming that they have written to the German authorities, asking them to make a 'take charge' request and are awaiting a response, which will provide the respondent with the opportunity to verify the ID document; asserting that the respondent's failure to disclose documents requested amounts to a breach of her duty of candour, and saying that Duncan Lewis is in the 'process of making a request' to the respondent's subject access request unit. The letter requires a response by 29th September 2017.
27th September 2017	The respondent writes to Duncan Lewis, asserting that it is the applicant's obligation to provide original, verifiable ID document, rather than there being an onus on the respondent to liaise with the German authorities. The respondent notes that it remains open to the German authorities, having previously accepted the applicant as an adult, to then make a 'take charge' request, should they now regard him as a minor. The respondent disputes failing to disclose documents; rather it had asked for any document request to be made to its subject access request unit.
15th October 2017	Duncan Lewis writes again to the German central authorities, using an incorrect email address, reiterating their request for a 'take charge' request. They refer to contact with the applicant's German Guardian on 23rd August 2017, introducing themselves and providing details obtained of the applicant's mental health. The letter refers to the only direct contact with the applicant being on 21st September 2017 by telephone.
24th October 2017	Duncan Lewis writes to the respondent, enclosing the documentation received from the applicant's German Guardian and asking them to verify the applicant's age; and referring to the lack of disclosure by the respondent; and requiring a response by 31st October 2017.
1st November 2017	The respondent writes to Duncan Lewis, disputing the lack of disclosure and referring to the subject access request process; noting that the German ID pre-dates the German central authority's confirmation of a different date of birth; and relies on the availability of the German authorities to be able to make a 'take charge' request.
27th November and 3rd December 2017	Duncan Lewis chase the German central authorities.
4th December 2017	The German central authorities write to Duncan Lewis, pointing out they have been writing to the wrong email address; and

	declining to issue a 'take charge' request on the basis that the applicant was transferred to them as an adult and should be treated as an adult, and if the transfer is unlawful, it should be raised with the UK authorities.
28th December 2017	Duncan Lewis writes to the respondent, enclosing substantial documentation and asserting that the burden should not be on the German central authorities and that the respondent remains under a duty to investigate the applicant's age, if not satisfied that he is a minor; the letter again refers to the respondent's failure to disclose documents; and requires the respondent to make a 'take charge' request.
8th January 2018	The respondent writes to Duncan Lewis, in similar terms to its letter dated 1st November 2017.
10th January 2018	The applicant issues his judicial review application, seeking an extension of time, partly on the basis that the German authorities only refused to issue a 'take charge' request on 4th December 2018; and citing lack of disclosure and not utilising (or suggesting a 'refusal') by the respondent on the basis of the subject access request unit because it is slow and cumbersome and difficult to access from overseas. The application seeks interim relief within '48 days'. That application is later initially refused.

UTIJR6

JR/221/2018

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review – preliminary issue and case management directions

The Queen (on the application of 'QH')

(anonymity direction continued)

Applicant

v

Secretary of State for the Home Department

Respondent

Before
Upper Tribunal Judge Coker
Upper Tribunal Judge Keith

Order

(1) The Tribunal makes a declaration that the applicant has a date of birth of 18 January 2000.

Case management directions

(2) Within 14 days of these directions being sent to the parties' representatives, in light of the Tribunal's declaration as to the applicant's date of birth, the respondent is directed to confirm to the Tribunal and the applicant's representatives whether she accepts or disputes that the applicant has a family life with his uncle, to the extent that respect for which is capable of engaging article 8 of the European Convention on Human Rights ('ECHR').

(3) Within 14 days of these directions being sent to the parties' representatives, in light of the Court of Appeal's decision in Secretary of State for the Home Department v R (on the application of FTH), [2020] EWCA Civ 494, the respondent is directed to confirm to the Tribunal and the applicant's

representatives whether she maintains or seeks to withdraw her previous concession that her decisions, which were determined as unlawful by William Davis J, breached the applicant's rights to respect for his private life, for the purposes of article 8 of the ECHR.

(4) Within 28 days of these directions being sent to the parties' representatives, and provided that the respondent has complied with the directions set out in (2) and (3) above, the applicant's representatives are directed to confirm to the Tribunal and the respondent's representatives:

a. in the event that the respondent seeks to withdraw the previous concession, whether she objects to such a withdrawal and if she does, the basis of such an objection;

b. whether the applicant continues to pursue a claim for damages on the basis of a breach of article 8 of the ECHR, both in respect for his family and private life.

(5) Following receipt of the parties' submissions in response to directions (2) to (4), the Tribunal has reached the provisional view that it would, in this case, be appropriate to determine the following questions without a hearing:

a. whether the respondent's impugned actions breached the applicant's rights to respect for his family and private life under article 8 of the ECHR;

b. whether the applicant should be able to recover damages for any breach of article 8 of the ECHR (as opposed to the amount of such damages).

(6) Any party who considers that despite the foregoing directions a hearing is necessary to consider the questions set out in paragraph (5) (or either of them) above may submit reasons for that view and they will be taken into account by the Tribunal if received no later than 42 days after this notice is sent out. The directions in paragraphs (2) to (5) above must be complied with in every case.

(7) The Tribunal proposes to list a hearing for any remaining issues on the quantum of damages, including as a result of breach of the Dublin III regulations, via Skype for Business, for one day in the period between 29 June and 14 August 2020. The parties' representatives are directed to confirm within **14 days** of these directions being sent to the parties:

a. whether they object to the hearing being conducted by Skype for Business;

b. if they agree to such a hearing, the email address and contact details for their representatives to join the hearing via Skype;

c. any unavailable dates in the listing window.

(8) Documents and submissions filed in response to these directions may be sent by, or attached to, an email to [email] using the Tribunal's reference number (found at the top of these directions) as the subject line. Attachments must not exceed 15 MB. This address is not generally available for the filing of documents.

(9) Costs remain reserved.

Reasons

Background

(10) The applicant applied on 10 January 2018 for judicial review of the respondent's decision to remove him from the UK; and for the linked decisions in which the respondent certified his asylum claim on third party grounds, and certified his human rights claim as clearly unfounded, to be quashed.

(11) In the previous order and judgment of William Davis J, which is not recited in full for the sake of brevity, he granted the applicant's claim for judicial review; declared that the respondent had unlawfully removed the applicant from the UK without proper notice in breach of her policy and article 27 of the Dublin III regulations; and ordered that the decisions to remove the applicant from the UK; to certify the applicant's asylum claim on third country grounds; and to certify the applicant's human rights claim as clearly unfounded, were quashed. The same orders required the return of the applicant from Germany, to which he had been removed, back to the UK.

(12) William Davis J did not determine the issue of whether the applicant's removal breached his rights under article 8 of the ECHR and the resumed hearing was relisted to consider the applicant's claim for damages on 5 March 2020.

(13) In advance the resumed hearing, Tribunal staff wrote to both parties' representatives on 2 March 2020, in the following terms:

> *"In light of a forthcoming Presidential panel which will be considering the issue of damages for breach of Dublin III in other separate cases, the Tribunal is considering whether the determination of an award of damages in the above application should be linked to that Presidential Panel considering those other cases or adjourned pending the decision in those cases. The Tribunal therefore intends that only questions of "Article 8 liability" should be addressed and considered at the hearing on Thursday. The parties' representatives should attend, ready to:*
>
> *1) make submissions on the remaining areas of liability in dispute;*
>
> *2) to discuss, and if possible, agree, case management directions for future conduct of the litigation, on the issue of damages."*

(14) In the respondent's written skeleton argument dated 27 February 2020, the respondent conceded that the applicant's removal did breach his rights to respect for

his private life under article 8 ECHR, but asserted that no damages were required to give just satisfaction for the breach. Nevertheless, the respondent continued to dispute that the applicant had a family life with his uncle in the UK, capable of engaging article 8, which the impugned decisions had breached.

(15) At the hearing on 5 March 2020, in identifying the issues between the parties, it became apparent that the respondent did not accept the applicant's claimed date of birth; his claim to have been a minor when he entered the UK; and that he was a minor when he began living with his uncle in the UK from in or around June 2016, prior to being removed to Germany on 1 April 2017. Instead, the respondent referred to evidence which was said to demonstrate a year of birth of 1996, which would mean that the applicant was an adult when entering the UK and living with his uncle, which in turn was one of the grounds for disputing the existence of family life between the two. If such family life did exist, then just as the impugned decisions had breached the applicant's right to respect for his private life, the respondent accepted that they would similarly breach his rights to respect for his family life. We confirmed to the representatives that in assessing the existence of family life, it was necessary for us to decide what assigned date of birth the applicant has. Lincolnshire County Council had previously confirmed on 27 November 2019 that its age assessment of 27 April 2019 had been withdrawn and the representatives at the hearing before us had not come prepared to participate with regard to an age assessment. As a result, the hearing on 5 March 2020 was adjourned and we issued directions, which included requiring the parties to correspond with two local authorities (Lincolnshire CC and Sutton LBC) in whose localities the applicant had lived, to establish their position on the applicant's age, in preparation for a resumed hearing over two days on 22 and 23 April 2020, the first day of which could deal with an age assessment.

(16) Following the outbreak of Covid-19, the resumed hearing did not take place and by consent of the parties, instead, a case management hearing took place by telephone on 25 March 2020. The gist of the directions issued was that the respondent would write to Sutton LBC, within whose area the applicant currently lived, to seek their view on the applicant's date of birth; both parties were then to confirm their positions on the applicant's date of birth; and in the absence of an agreement between the parties, this Tribunal would then reach a decision on the applicant's date of birth, without the need for a further hearing, following which a further case management hearing would then take place.

(17) In response to the directions, Sutton LBC indicated that it had no view on the applicant's status as a minor, as he was not and had not been in their care; and could not form a view, given the passage of time and the fact that he was now, on any view, an adult.

(18) In her submissions dated 15 April 2020, the respondent asserted that there was credible and clear documentary evidence that the applicant had an allocated date of birth of 1996, specifically Eurodac records, when the applicant's fingerprints were

taken in Greece and Germany, in which he had given 1996 as his year of birth. The earlier date of birth was further recorded in NHS records and in a report of a consultant psychiatrist, Dr Belea, which the respondent said should have more weight attached to it, together with the other documentary evidence, than a witness statement of the applicant's uncle, which was said to be subjective, as he was not trained in age assessments; and an assessment carried out by the German authorities (Gera City Council), which had assessed the applicant's date of birth as being in 2000, i.e. as the applicant had claimed, on the basis that the respondent could not know the robustness of Gera City Council's methodology.

(19) We are conscious that in assessing the applicant's age, our role is not to choose between the ages claimed by the applicant or the respondent. The burden is a neutral one and we must decide the applicant's age on the available evidence, as best we can. The standard of proof is the balance of probabilities. While we refer to specific evidence, we have considered it all in the round. Lincolnshire CC have withdrawn their age assessment. The applicant's uncle provides a categoric statement about having been present at the applicant's birth. In that context, we conclude that any lack of experience in age assessments is irrelevant, contrary to the respondent's submissions. In his evidence, the uncle corroborates the prompt disclosure of the applicant's age when the applicant arrived in the UK and explains the replication of the earlier claimed date of birth in NHS sources. His account is, in turn, corroborated in that regard by Dr Belea. The respondent does not dispute the uncle's evidence based on his lack of honesty or integrity.

(20) The impression given by the respondent of multiple sources corroborating a year of birth of 1996, confuses references in various sources, with them each containing an independent assessment of the applicant's year of birth. They in fact draw from the same source, namely what the applicant told the German authorities in 2016. Reference to 1996 as the applicant's year of birth in the NHS records and Dr Belea's report stems from the information originally in the Eurodac records, (as confirmed in Dr Belea's letter of 7 March 2017, when she says that the respondent does not have the correct date of birth and she understands him to be 17, at the date of the report; and her supplementary report dated 4 May 2020). The Eurodac records in turn confirm what the applicant told the German authorities in 2016. Other than the withdrawn age assessment by Lincolnshire CC, the sole evidence pointing to the applicant's date of birth being 1996 is what the applicant himself told the German authorities in 2016, which is what he has been seeking to retract ever since arriving in the UK in 2016 and following his removal back to Germany.

(21) Reliance on the applicant's self-reported age to the German authorities in 2016, as reflected in the Eurodac records, ignores the applicant's explanation in his witness statements that: if he had revealed that he was a minor in 2016 to the German authorities, he would not be able to travel across Europe and would have been kept in childrens' accommodation in Germany, with serious implications for his family in Afghanistan; and that he was threatened by the agent who was trafficking him not to reveal his true age. Such reliance also ignores the applicant's prompt revealing of his

claimed age when he entered the UK, as confirmed in the uncle's witness evidence, when the uncle attempted to register the applicant with a GP.

(22) The uncle's witness evidence is corroborated by, or is at least consistent with, evidence from other sources: the Taskera or identification document for the applicant, the translation of which was made on 2 June 2016 and provided to the respondent; and the Gera City Council childrens' services assessment of the applicant as having a date of birth of 18 January 2020. While the respondent raises concerns about the robustness of the methodology of the assessment in as much as she states that its robustness is unknown, the report was clear and transparent in its methodology. It referred to an interview having been conducted with the applicant on 2 June 2017, during which the applicant repeatedly and confidently stated his date of birth of 2000; provided coherent and credible descriptions; and described a comprehensible sequence of events. While the interview notes have not been provided, the description of the methodology does not appear markedly dissimilar from age assessments carried out by UK Councils. The respondent does not seek to assert that the process by which German age assessments are undertaken cannot be relied upon in general and offers no substantial or sustainable critique of the process utilised by them. In the circumstances, we do not accept the respondent's proposition that we should attach no weight to the Gera City Council report.

(23) Having considered all of the above evidence in the round, which supports the applicant's allocated date of birth being 18 January 2020, and the only evidence of an alternative date of birth being satisfactorily explained, we find it more likely than not that the applicant's date of birth is 18 January 2000.

J Keith

Signed: _____

Upper Tribunal Judge Keith

Dated: **5th November 2020**

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on: 06 November 2020

UTIJR6

JR/221/2018

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen (on the application of 'QH')

(Anonymity direction continued)

Applicant

v

Secretary of State for the Home Department

Respondent

BEFORE
UPPER TRIBUNAL JUDGE COKER
UPPER TRIBUNAL JUDGE KEITH

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the applicant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. Failure to comply with this direction could lead to contempt of court proceedings.

Having considered all documents lodged and having heard *Ms Sonali Naik QC* and Mr *Greg Ó Ceallaigh,* instructed on behalf of the applicant and *Mr Gwion Lewis,* instructed by the Government Legal Department on behalf of the respondent at a hearing at Field House, London on 22nd and 23rd September 2020 and upon judgment being handed down on 5th November 2020, and the application for judicial review having previously been granted by Mr Justice William Davis in a Judgment dated 4th December 2018

Declaration

(1) In accordance with the Judgment attached, we make a declaration that the applicant's right to respect for family life under Article 8 ECHR was not engaged by the respondent's unlawful actions.

(2) We make a declaration that the respondent's removal of the applicant breached his right to respect for his private life under Article 8 of the ECHR and his right under Article 27 of the Dublin III Regulation.

(3) We regard our declarations as just satisfaction for the applicant's claims and decline to award him any damages.

Costs

(4) We note the principles set out in M v London Borough of Croydon [2012] EWCA Civ 595.

(5) Mr Justice William Davis had awarded the applicant his costs up to the date of his orders of 4th December 2018, as set out in §2 of the attached Judgment. The applicant continued his application, seeking a declaration that the respondent's acts, assessed by Mr Justice William Davis as in breach of Article 27 of the Dublin III Regulation, also breached his right to respect for his family and private life, for the purposes of Article 8 of the ECHR. The applicant sought damages for those breaches, asserting that declarations were not just satisfaction for them.

The respondent's position

(6) The respondent, in a written skeleton argument filed on 27th February 2020, (prior to a hearing before us on 5th March 2020), conceded that the respondent's unlawful removal of the applicant had breached his right to respect for his private life, but asserted that a declaration was just satisfaction; that his right to respect for his family life was not breached; and no damages were due under EU law (so-called 'Francovich' damages).

(7) While the respondent accepts that she should be liable for the applicant's reasonable costs up to and including 3rd March 2020, (3 working days after 27th February 2020, which was enough time to have proposed settlement of the application), the respondent should now be awarded her costs after that date, on the basis that the respondent's position on the above issues has been vindicated. The respondent seeks that her liability for the applicant's costs up to 3rd March 2020 should be set off against the respondent's costs after that date.

The applicant's position

(8) The applicant asserts that he should be awarded his costs up 14th May 2020, when we concluded, as a preliminary issue, that the applicant was a minor at the time of his removal; and this amounted to a significant success as the declaration of breach of article 8 ECHR in respect of his private life was as a child. The applicant argues that there should be no order as to costs after that date, as the respondent repeatedly delayed in complying with directions (for example in serving a late Acknowledgement of Service) and had succeeded in resisting the transfer of this application to the County Court, to be considered together with his civil action for false imprisonment, thereby needlessly duplicating costs. Any set-off of costs would not be appropriate, given that the applicant is publicly funded, with the implication of set-off of costs for publicly funded practices.

Discussion on costs

(9) We accept the respondent's submission that the bases of her continuing resistance to the application, after her concession on 27th February 2020, have all been in the respondent's favour. In that specific sense, the respondent has 'succeeded'. Any delay between the initial order of Mr Justice William Davis dated 4th December 2018 and the concession by the respondent of 27th February 2020 is reflected by the award of the applicant's costs up to 3rd March 2020. We do not accept that our declaration of the applicant's date of birth on 14th May 2020 represents a 'success' for the applicant. The application did not seek to challenge an earlier age assessment of the applicant (by Lincolnshire County Council) as an adult, and it was only at our initiative, at the hearing on 5th March 2020, that we regarded it as necessary to determine the applicant's age, for which neither party had come prepared; both appeared to suggest that it was unnecessary to carry out a further age assessment; and having determined that it was, we had to adjourn that hearing. Also, even in light of our age assessment, (which the applicant had never sought), the applicant was unsuccessful in the aspects of his application that he had continued to pursue.

(10) We do not accept that in this case, any breaches by the respondent in complying with the timescales for directions, and subsequent grants of extensions of time, should prevent the respondent from being awarded her costs. As we noted at §100 of the Judgment, while there were delays and the respondent applied to file detailed grounds of defence, the reasons for that delay were accepted as adequate by a Lawyer of this Tribunal in granting the respondent's application.

(11) We also accept that, notwithstanding that the applicant is legally aided, it is appropriate that the respondent's liability for the applicant's costs should have set off against it the applicant's liability for the respondent's costs, as permitted by the Court of Appeal in R (Burkett) v London Borough of Hammersmith and Fulham [2004] EWCA (Civ) 1342, particularly §[67] to [73]). We do not accept that ZN (Afghanistan) v SSHD [2018] EWCA Civ 105, particularly §[87] to [94], to which the appellant refers, supports the proposition that the fact that the applicant is legally aided is a bar, or material factor, against set-off.

(12) We further do not accept that no order for costs should be made because the respondent had successfully resisted a transfer of these proceedings to the County Court, to be considered with other proceedings there. The proceedings are separate, as are the issues, which Ms Naik confirmed to us when we discussed with her whether there was any overlap, at §80 of our Judgment. It was fortunate that Mr Justice William Davis allowed this application to remain in this Tribunal, noting our later identification of the need to carry out an age assessment, and this Tribunal's specialist expertise on that issue.

Decision on costs

(13) **The respondent is to pay the applicant's reasonable costs of the proceedings up until and including 3rd March 2020.**

(14) **The applicant is to pay the respondent's reasonable costs of the proceedings since 4th March 2020, subject to regulation 16 of the Civil Legal Aid (Costs) Regulations 2013, (as he has the benefit of cost protection under section 26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012).**

(15) **These costs are to be subject to detailed assessment if not agreed, with the applicant's publicly funded costs subject to detailed assessment in any event, in accordance with the Civil Legal Aid (Costs) Regulations 2013 and CPR 47.18.**

(16) **The amount in costs which the applicant is required to pay under paragraph (14) above is to be set-off against the costs that the respondent must pay under paragraph (13) above, with the respondent then to pay the balance to the applicant (if any).**

Permission to appeal to the Court of Appeal

(17) The applicant seeks permission to appeal to the Court of Appeal against our Judgment on three grounds:

a. Ground (1): this asserts that we have erred in concluding that the applicant's relationship with his uncle, 'DD', did not engage his rights to respect for family life under article 8 of the ECHR.

   i. The ground asserts that we assessed the relationship as though the two were not related, impermissibly considering the authority of Paradiso and Campanelli v Italy (2017) 65 EHRR 22. Contrary to the ground, we did not ignore the fact that DD and the applicant were related; rather, as we explained at §§50 and 52, there was not a 'hard-line' between those cases of blood-relatives and other cases, and that a wider, careful scrutiny of the facts may be necessary.

   ii. We did not, as the grounds assert, base our conclusions on the fact that DD had been unwilling to return to his country of origin to cohabit with his family. We recognised that DD had not abandoned his family out of choice (§55) and had a genuine fear of persecution. There was, however, no arguable error in us considering DD's return to Afghanistan after his grant of British citizenship and his stay with his 'own' family (his evidence) rather than the applicant's (§56).

   iii. We did not arguably err in considering DD's initial lack of awareness that the applicant was travelling to be with him or his willingness to support the applicant. We were entitled to consider this in the context of the absence of reciprocity in the relationship between the two (§§51; 58; and 62 to 64).

   iv. Contrary to the grounds that we treated the strained relationship between the applicant and DD as 'determinative' when DD took "full responsibility for the applicant's care, accommodation, health, financial support", we did not regard it as 'determinative'; we considered all of the factors, including their relationship prior to cohabitation (§64); DD's initial reaction when asked to help the applicant (§66); DD's assistance with a GP and accommodation (§69); DD's help in arranging a psychiatrist at §73; college attendance (§70); as well as the absence of evidence of support while DD was in Afghanistan for 40 days (§70) and we expressly considered all of the facts in the round (§75). We also expressly stated that the applicant's friendships with others did not detract from our appraisal of his relationship with DD (§72). We drew our consideration of all of the factors in the round together, at §77.

b. Ground (2): this asserts that we have erred in finding that a declaration was just satisfaction for the breach of the applicant's Article 8 ECHR right to respect for his private life.

   i. The ground refers to us ignoring to the length of separation between the applicant and DD, as a child; the respondent's repeated refusal to engage with the applicant's case over many months and her attempt to frustrate his attempts to secure his return. Contrary to this ground, we analysed not only the period of separation, but the reasons for the length of that separation (including delay on the part of the applicant's solicitors - §§92 to 93); the effect on the applicant (§§89 to 91) and whether the respondent was obstructive (§94).

   ii. We considered the issue of the respondent's request that a subject access request be made for documents, and the applicant's solicitor's lack of pursuit of this at (§94). Contrary to the grounds, the impossibility of complying with a specific requirement for a certified photograph, in order to make a subject access request, was not drawn to our attention and we did not err in not considering that proposition.

   iii. Contrary to the ground that we erred in criticising the applicant's solicitors for not challenging Lincolnshire County Councils' age assessment, we considered the reason why they did not, after the applicant received the German local authority assessment which was favourable to him at §95, but we then explained that the lack of challenge had consequences, at set out at §§96 to 97. In that context, contrary to the assertion that we ignored the respondent's refusal to assist, we considered the respondent's interaction with the German central authorities, who maintained that the applicant was an adult (§96).

   iv. In summary, we approached the issue of whether to award damages, recognising the period of separation between the applicant and his friends and DD; we considered in detail the context of the period of separation and the far from straightforward circumstances of this case; the manner of the applicant's removal; and the effect of the appellant's removal and separation on him, which we drew together at §105. There is no arguable error in our analysis.

c. Ground (3): this asserts we have erred in our conclusion not to award Francovich damages, in presuming that the respondent's actions were as a result of a simple administrative error, without considering evidence to that effect; and ignoring the respondent's various errors,

referred to above. As already noted, we explained fully our analysis of the assertion that the respondent refused to engage with the German authorities. We explained why we concluded that the applicant could have applied for an immediate injunction to prevent his removal (§111) and why we did not accept that the respondent had removed the applicant, knowing him to be a child (§112), in the absence of a challenge to the age assessment, about which the applicant was informed months earlier.

Decision on permission

For the above reasons, we do not regard the grounds as disclosing any arguable error in our decision. We therefore refuse permission to appeal to the Court of Appeal.

J Keith

Signed: _____

Upper Tribunal Judge Keith

Dated: **5th November 2020**

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on: 06 November 2020

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an applicant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).