Upper Tribunal
(Immigration and Asylum Chamber) Case Number: JR/467/2020 (P)

THE IMMIGRATION ACTS

Heard at Field House by *Skype for Business*
On 21 and 22 May 2020

Judgment promulgated

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Before

THE HON. MR JUSTICE LANE, PRESIDENT

Between

THE QUEEN ON THE APPLICATION OF
BAA (A CHILD BY HIS LITIGATION FRIEND, TAA)
TAA
(ANONYMITY DIRECTION MADE)

Applicants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Applicants: Ms M Knorr, Counsel, instructed by Bhatt Murphy Solicitors
For the Respondent: Ms H Masood, Counsel, instructed by the Government Legal Department

JUDGMENT

Covid-19: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10.30 a.m. on Tuesday 23 June 2020

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A. INTRODUCTION

1. The first applicant, BAA ("A1") is an unaccompanied asylum-seeking child (now aged 17). He left Syria, the country of his nationality, making his way to Greece, where he currently resides in a hostel.

2. A1 claimed asylum in Greece. He told the authorities there that he had been forcibly recruited at the age of 13 to fight with the Kurdish Army against ISIS. A1 said he was ill-treated by the Kurdish Forces.

3. On 7 October 2019, Greece requested the United Kingdom to take charge of A1's asylum claim, pursuant to Article 17(2) of regulation 604/2013 of the European Parliament and of the Council (the Dublin III regulation). The request stated that A1's cousin, TAA ("A2") resides in the United Kingdom and that A1 wished to be reunited with him.

4. The respondent refused Greece's request on 5 November 2019. Greece asked the respondent to reconsider. Having done so, the respondent again refused on 16 January 2020 to exercise her discretion under Article 17(2). Greece made a further request for reconsideration. The respondent considered that this request was not formally within the scope of the Dublin III Regime. The respondent told Greece "your request for re-examination is an invalid request. Nonetheless, the UK has taken this opportunity to consider the evidence provided to her and reassess her previous decisions to date in the form of a supplementary response". The outcome was, however, that the respondent refused again to take responsibility pursuant to Article 17(2) for the consideration of A1's asylum claim and, thus, for A1 to be transferred to the United Kingdom for that purpose.

5. On 3 February 2020, the applicants filed an application for judicial review of the respondent's decisions of November 2019 and January 2020. Permission to bring judicial review proceedings was granted by the Upper Tribunal on 18 March 2020. By consent, the grounds of application were subsequently amended in order to encompass a challenge to the respondent's decision of April 2020.

6. Certain other elements of the amended grounds were not agreed by the respondent but, by order dated 4 May 2020, I gave the applicants permission to rely upon the amended grounds, as submitted.

B. THE HEARING

7. The hearing took place on 21 and 22 May 2020, by means of *Skype for Business*. I conducted the hearing from court 4 at Field House. Counsel, A2 and members of the public attended remotely via video. Although there were some intermittent issues regarding sound on 21 May, no substantial technical problems were encountered during the hearing and I am satisfied counsel were able to make their respective cases by the chosen means. I am grateful to Ms Knorr and Ms Masood for their detailed and clear oral and written submissions.

8. At the hearing, Ms Knorr, on behalf of the applicants, applied for permission to adduce a witness statement of A2 (who had already produced two such statements). This latest statement seeks to address two matters: the contention in Ms Masood's skeleton argument that A2 had met A1 for the first time in Greece in June 2019; and that A1 was recorded by the Greek authorities as saying that A1 was 2 years old when A2 left Syria.

9. For the respondent, Ms Masood objected to the introduction of A2's third statement. I decided *de bene esse* to admit this statement and to rule later on its admissibility.

10. Ms Masood applied for permission to adduce a supplementary witness statement of Ms Julia Farman of the European Intake Unit, UK Visas and Immigration, in which Ms Farman seeks to explain the policy of the EIU, with regard to requests under Article 17(2) on whether and, if so, when the EIU would request a family assessment from a relevant local authority in the United Kingdom. Although Ms Knorr did not formally object to the admission of Ms Farman's supplementary statement, I decided to treat it in the same way as the third witness statement of A2.

11. In the event I decided to admit both statements. Whilst cognisant of the need to maintain the requisite degree of procedural rigour in judicial review proceedings, I decided to admit the statements, in the light of my conclusion that Article 27 of Dublin III applies, so as to ensure that the requirements of EU Law for the proceedings to provide an "effective remedy" for proper compliance with Dublin III; but that, in any event, the proceedings involve the determination of human rights within the ambit of ECHR Article 8/Charter of Fundamental Rights Article 7. I concluded that neither the applicants nor the respondent were, thereby, placed at any procedural disadvantage.

C. LEGISLATION AND GUIDANCE

12. The Annex to this judgment sets out the relevant provisions of the Dublin III Regulation, the two Implementing Regulations and the Home Office Guidance on Dublin III.

D. LEGAL ISSUES

13. Before embarking upon an examination of the detailed grounds of challenge to each of the three decisions of the respondent, it is necessary to address a number of general issues.

(1) The nature of Article 17(2) and its place within the Dublin III system

14. Article 7 of Dublin III establishes a hierarchy of criteria. At the top of that hierarchy sit unaccompanied minors. Article 8 provides that where a family member or a sibling of the unaccompanied minor is legally present in a Member State, it is that

Member State which shall be responsible for examining the minor's application for international protection. "Family members" are defined by Article 2. Article 8 provides that it must be in the best interests of the minor to have his or her claim examined by the Member State in which such a family member or sibling is legally present.

15. Article 8(2) places responsibility (again, subject to the best interests of the minor) on the State in which a relative is legally present, where that relative can take care of the minor. Article 2 defines "relative" as the applicant's adult aunt or uncle or grandparent (subject to certain procedural requirements).

16. The effect of Article 8(4) is that, in the absence of a family member, sibling or relative, the Member State responsible for the examination of the minor's application for international protection shall be the one where the unaccompanied minor has lodged their application; again, provided that is in the best interests of the minor.

17. Importantly, as Ms Knorr points out, Article 8(4) departs significantly from the mechanism of Dublin III, as it applies to adults, in that an unaccompanied minor who has been present in Member State A but who travels to Member State B and makes an application there, is not subject to any general requirement to return to Member State A in order to have the application considered.

18. Article 17(2) concerns a request by one Member State to another for that other Member State to exercise its discretion to examine an application for international protection, whether made by a minor or adult, "in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations". This judicial review is concerned with the respondent's decision-making under Article 17(2).

19. The expression "family relations" is undefined in Dublin III. It is clearly wider than "family members" and "relative". It does, however, require there to be some relationship that is of a "family", as opposed to merely a social, nature. This is so, even though Article 17(2) goes on to speak about the humanitarian grounds for bringing together the family relations being based on "family or cultural considerations".

20. The words "even where that other Member State is not responsible under … Articles 8 to 11 and 16" make it plain that, although "family relations" can include "family members" and "relatives", Article 17(2) is not to be invoked in their cases, since they are covered in the hierarchy set out in those other Articles.

21. Unlike Articles 8 to 11 and 16, where, subject to the best interests requirement, the presence in an EU State of "family members" or a "relative" is legally determinative of that State's obligation to examine an asylum claim, in the case of Article 17(2), the obligation of examination does not arise unless and until the EU State decides to exercise its discretion and become responsible.

22. What this means is that the other provisions of Dublin III and the Implementing Regulations are relevant in an Article 17(2) case, only to the extent that those provisions do not concern the mechanism for establishing pre-existing responsibility.

As a result, the provisions which deal with the identification, etc of family members, siblings or relatives have no application to Article 17(2).

23. Thus, contrary to Ms Knorr's submission, Article 3 of the First Implementing Regulation has no bearing on Article 17(2); nor does Article 5. Although Article 13(2) and (3) of that Regulation were relevant, in relation to Dublin II, they have now been subsumed within Article 17(2) of Dublin III itself and do not call for separate consideration. So far as the Second Implementing Regulation is concerned, the provisions added by it to Article 12 of the First Implementing Regulation are to do with family members, siblings or relatives, none of whom are relevant in the case of Article 17(2).

24. Ms Masood submitted that, read correctly in its own terms, Article 17(2) contains a very broad discretion. In support, she pointed to the judgment of the First Chamber of the CJEU in MA & Others v International Protection Appeals Tribunal & Others (C-661/17 (23 January 2019)). Albeit speaking about Article 17(1), the Court said as follows:-

> "58. It is clear from the wording of Article 17(1) of the Dublin III Regulation that that provision is optional in so far it leaves it to the discretion of each Member State to decide to examine an application for international protection lodged with it, even if that examination is not its responsibility under the criteria defined by that regulation for determining the Member State responsible. The exercise of that option is not, moreover, subject to any particular condition (see, to that effect, judgment of 30 May 2013, *Halaf*, C-528/11, EU:C:2013:342, paragraph 36). That option is intended to allow each Member State to decide, in its absolute discretion, on the basis of political, humanitarian or practical considerations, to agree to examine an asylum application even if it is not responsible under the criteria laid down in that regulation (judgment of 4 October 2018, *Fathi*, C-56/17, EU:C:2018:803, paragraph 53).
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> 59. In the light of the extent of the discretion thus conferred on the Member States, it is for the Member State concerned to determine the circumstances in which it wishes to use the option conferred by the discretionary clause set out in Article 17(1) of the Dublin III Regulation and to agree itself to examine an application for international protection for which it is not responsible under the criteria defined by that regulation.
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> 60. That finding is also consistent, first, with the case-law of the Court relating to optional provisions, according to which such provisions afford wide discretionary power to the Member States (judgment of 10 December 2013, *Abdullahi*, C-394/12, EU:C:2013:813, paragraph 57 and the case-law cited) and, second, with the objective of Article 17(1), namely to maintain the prerogatives of the Member States in the exercise of the right to grant international protection (judgment of 5 July 2018, X, C-213/17, EU:C:2018:538, paragraph 61 and the case-law cited).
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> 61. In the light of all the foregoing considerations, the answer to the first question is that Article 17(1) of the Dublin III Regulation must be interpreted as meaning that the fact that a Member State, designated as 'responsible' within the meaning of that regulation, has notified its intention to withdraw from the European Union in accordance with Article 50 TEU, does not oblige the determining

> Member State to itself examine, under the discretionary clause set out in Article 17(1), the application for protection at issue."

25. It is, however, in my view plain that the discretion afforded to an EU State by Article 17(2) is not as wide as the respondent contends in the present proceedings. Unlike Article 17(1), Article 17(2) involves two Member States. Member State A triggers the mechanism by asking Member State B to take responsibility for an applicant for international protection. If Member State B refuses the request, it must "state the reasons on which the refusal is based". No practical purpose would be served by the requirement to give reasons, if the Article 17(2) discretion were so wide as to be unchallengeable.

26. Furthermore, Recital (39) to Dublin III makes it plain that the Regulation respects fundamental rights, as set out in the Charter of Fundamental Rights of the European Union. Recital (39) specifically mentions Article 7 of the CFR (Respect for Private and Family Life), which parallels Article 8 of the ECHR. It also mentions Article 24, which provides that in "all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration".

27. In R (on the application of HA & Others) v Secretary of State for the Home Department (Dublin III; Articles 9 and 17.2) [2018] UKUT 00297 (IAC), the Upper Tribunal (UTJ Rintoul and UTJ Rimington) concluded that, whilst the Article 17(2) discretion is wide, it is not untrammelled. It was, the Tribunal found, necessary to consider an Article 17(2) application "through the lens of Article 7 CFR and/or Article 8 ECHR, taking account of the best interests of a child". I respectfully concur.

(2) Does Article 27 apply to Article 17(2)?

28. Article 27 (Remedies) provides that the applicant for international protection shall have the right to an effective remedy, in the form of an appeal or review, in fact and in law, against a transfer decision, before a court or tribunal. Given its position within Dublin III, it is hard to see why Article 27 does not encompass appeals or reviews of negative decisions under Article 17(2). It would, for example, be remarkable if a negative decision under Article 17(2), which gave as its reason that the refusing State declined to exercise its discretion in favour of a particular racial group, could avoid legal challenge, on the basis that Article 27 does not apply to it.

29. Once that point is accepted, as I consider it must be, then the principle of effective remedy is established as regards Article 17(2). As we shall see, this will be relevant when we come to examine Ground 2 of the applicants' challenge to the respondent's decisions in the present case, which concerns Article 7 CFR/Article 8 ECHR. However, as we shall also see, it is not essential for the applicants that Article 27 applies, in order for them to rely upon and make good that ground.

(3) The scope of judicial review of Dublin III decisions

30. Before me, there was no issue between Ms Knorr and Ms Masood that, like any other public law decision, a decision of the respondent to refuse an Article 17(2) request is susceptible to challenge on ordinary United Kingdom public law grounds.

31. In R (ZT (Syria)) v Home Secretary [2016] 1 WLR 4894, the Court of Appeal rejected the respondent's suggestion that Article 17 of Dublin III might not be subject to challenge on such grounds:-

> "85. A further reason for rejecting Mr Eadie's submission in its absolutist form is Article 17 of the Dublin III Regulation. Since the relevant officials in the second member state have power to assume responsibility in a case in which the Regulation assigns it to another member state, it cannot be said that it is never open to an individual to request that state to do that. Mr Eadie suggested, or came close to suggesting, during the course of the hearing that a refusal to exercise the power under article 17 was not justiciable. That, in my judgment, is unsound in principle and also finds no support in the authorities. *Abdullahi v Bundesasylamt* (Case C-394/12) [2014] 1 WLR 1895 recognised only that the second member state has a wide margin of discretion in deciding whether to assume responsibility pursuant to the provision in the Dublin II Regulation that is the equivalent of article 17. In a context in which the exercise of power relates to relations between two member states as to the operation of a treaty arranging for the allocation of responsibility for examining applications for asylum between member states, this is clearly correct. There will be a wide range of relevant considerations for the decision-maker to take into account: see all the factors that the UT stated were relevant to the assessment of proportionality. But subject to the effective scope of judicial review being narrower for this reason, the exercise by the Secretary of State of her discretion is subject to the ordinary public law principles of propriety of purpose, relevancy of considerations, and the longstop *Wednesbury* unreasonableness category (*Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223) and, because of the engagement of article 8 of the European Convention, the intensity of review which is appropriate in the assessment of the proportionality of any interference with article 8 rights." (Beatson LJ)

32. The applicants contend that the respondent's decisions are, for various reasons, infected by public law errors of the kind described by Beatson LJ. Ground 2 is, however, of a different nature. It alleges that the decisions are incompatible with A1 and A2's protected family life rights under Article 7 CFR/Article 8 ECHR. In order to determine if this is so, Ground 2 submits that the Upper Tribunal "must assess for itself whether the ongoing interference with the applicants' right to family life under the CFR/ECHR is proportionate, if necessary taking into account evidence that was not before the decision-maker".

33. As I understand her, Ms Masood's submission regarding Ground 2 is that the nature of the challenge articulated in Ground 2 remains rooted in Beatson LJ's "ordinary public or principles of propriety of purpose, relevancy of considerations, and the longstop *Wednesbury* unreasonableness category", albeit acknowledging what he describes as the "intensity of review demanded in the human rights context". The logic of this submission means it is not limited to challenges to Article 17(2)

discretionary decisions. It applies to all challenges to Dublin III decisions of the respondent.

34. In order to address this issue, it is necessary to examine in detail the judgment of the Upper Tribunal (UTJ Grubb and UTJ Blum) in R (on the application of MS) (a child by his litigation friend MAS) v Secretary of State for the Home Department (Dublin III; duty to investigate) [2019] UKUT 00009 (IAC). The Upper Tribunal's judgment in MS was appealed to the Court of Appeal: [2019] EWCA Civ 1340. Although the respondent's appeal was dismissed on the ground that the challenge to the relevant part of the Upper Tribunal's judgment was academic, and did not satisfy the criteria for the Court to engage substantively with the matter, the judgments of Hickinbottom LJ and the Master of the Rolls will nevertheless need to be examined.

35. The applicant in MS claimed asylum in France, which requested the United Kingdom to take charge of the examination of his claim, on the basis that MS had an older brother in the United Kingdom. The respondent did not consider MS and the individual in question were brothers. It therefore rejected the request, in a number of decisions, which were challenged by way of judicial review in the Upper Tribunal.

36. The Upper Tribunal found what I shall describe as conventional public law errors in each of the three decisions of the respondent; and quashed them. At paragraph 171 of its judgment, the Tribunal then engaged with another ground of challenge, based on the submission of MS that the Tribunal "should, for itself, decide whether the 'criteria' for determining responsibility in Article 8 of the Dublin III Regulation are met on the facts".

37. As advanced by Ms Kilroy, MS's case was predicated on Article 27 of Dublin III requiring there to be an effective remedy, in fact and law, in respect of the respondent's decisions in MS's case. Before the Upper Tribunal, the respondent took the stance that a "transfer decision" in Article 27 did not include the rejection of a take charge request.

38. The Upper Tribunal rejected the respondent's submission that a "transfer decision" did not include a refusal to take charge. At paragraph 187, the Upper Tribunal noted that Recital (19) to Dublin III recognises the need for an "effective remedy in respect of decisions regarding transfers …" (Upper Tribunal's emphasis). Furthermore, the decisions of the Grand Chamber in Ghezelbash v Staatssecretaris van Veiligheid en Justite (Case C-63/15) and Mengestead v Bundersrepublik Deutschland (Case C-670/16) acknowledged both the breadth of Recital (19) and the judicial remedy envisaged in Article 27. The Upper Tribunal was in "no doubt that the Grand Chamber contemplated an individual being entitled to challenge the correctness in application of the "criteria" to determine which Member State is responsible under the Dublin III Regulation whether the effect of the decision led to the individual's transfer to another Member State or, as in this case, left him or her in the Member State in which he or she currently was present" (paragraph 188).

39. At paragraph 190, the Upper Tribunal noted that, in Ghezelbash, the Grand Chamber had affirmed that the effective remedy covered questions of both fact and law. There was no suggestion that a court or tribunal determining whether the Dublin III Regulation had been correctly applied was limited to determining the legality of the

decision based upon public law principles. On the other hand, the Advocate General in Ghezelbash, in her opinion at paragraphs 90 and 91, had found it was for the national court's procedural rules to govern the intensity of the review process and its outcome. The effectiveness of a judicial review guaranteed by Article 47 nevertheless required an assessment of whether there was a "sufficiently solid factual basis" for the transfer decision.

40. At paragraph 193, the Upper Tribunal, whilst finding the Advocate General's opinion to be "far from an unambiguous statement of the approach that Ms Kilroy invites us to take", held that it provided some support for the view that a challenge was not restricted to legality alone, as regards the requirement for the decision to have a "sufficiently solid factual basis". The Upper Tribunal concluded that the application of Article 27 meant that an individual "must have the ability to challenge the application of the criteria not only as legally wrong, but also as factually wrong" (paragraph 193).

41. The Upper Tribunal, however, was at some pains to point out that its conclusion on Article 27 was compatible with domestic public law. At paragraph 194, citing cases from Edwards v Bairstow [1956] AC 14 to R (Al-Sweady & Others) v Secretary of State for Defence [2009] EWHC 2387 (Admin), by way of Anisminic v Foreign Compensation Commission [1969] 2 AC 147, the Upper Tribunal observed that, whilst fact-finding in a judicial review, including by reference to post-decision evidence, was rarely undertaken, it was not unknown; and that there was "no insurmountable procedure or obstacle to a factual enquiry being undertaken in judicial review proceedings" (paragraph 195). Indeed, in some cases involving "precedent fact", the judicial review proceedings inevitably had to take this form: R v SSHD, ex parte Khawaja [1984] AC 74 and R (A) v Croydon LBC [2009] UKSC 8.

42. All this led the Upper Tribunal to the following conclusion:-

> "200. In our judgment, the approach in the Croydon case provides a strong, and indeed compelling, basis for the approach taken by the CJEU in respect of Art 27 of the Dublin III Regulation and which we analysed above. The application of the hierarchy criteria in the Dublin III Regulation, in particular in this case whether MAS and MS are brothers, is a 'hard-edged' fact. As the CJEU jurisprudence signals, whether those criteria have been correctly applied is intended ultimately to be a factual issue for a court or tribunal to be determine.
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> 201. Although we were invited to treat the application of the hierarchy criteria as being a 'precedent' or 'jurisdictional fact', it is unnecessary for us to decide that issue given our view, based upon the CJEU's jurisprudence of the scope of Art 27. Suffice it to say, that there may not be an altogether easy analogy between cases where the "fact" arises prior to, and in order to give jurisdiction to, a decision-maker to exercise the power or duty vested in that decision-maker and cases involving the hierarchy criteria under the Dublin III Regulation where the criteria, in effect, are likely to occupy the whole of the decision-making required of the relevant State, here the requested State in accepting a TCR. But, as we say, it is unnecessary for us to decide this issue and we do not."

43. Crucially for our purpose, beginning at paragraph 202, the Upper Tribunal engaged with the proposition, advanced by MS, that where Article 8 of the ECHR and/or Article 7 of the CFR is in issue, the nature of any judicial review is different from the situation that pertains when those or any other human or fundamental rights are not in play:-

> "202. Ms Kilroy also prayed in aid of her argument that we should decide the factual issue of the relationship between MS and MAS, the case law concerning a court or tribunal's role in determining whether a decision has breached an individual's human rights. She, of course, placed reliance upon Art 8 of the ECHR and Art 7 of the CFR, in particular (but not exclusively) the procedural/fairness dimension of those provisions. She reminded us that Art 47 of the CFR also creates an obligation to provide "an effective remedy" for breaches of the CFR.
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> 203. It is now well-recognised that an "intense" review or, arguably, merits assessment arises in cases where the judicial review claim is that the decision in determining whether the challenged decisions are contrary to section 6 of the Human Rights Act 1998 (see, e.g., R (Nasseri v SSHD [2009] UKHL 23, Bank Mellat v HM Treasury (no. 2) [2013] UKSC 38 and 39 , and R (Lord Carlile of Berriew) v SSHD [2014] UKSC 60) . The court or tribunal must, for itself, determine whether a breach of the relevant Convention right has occurred.
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> 204. The principle was encapsulated by Underhill LJ in R(Caroopen & Myrie) v SSHD [2016] EWCA Civ 1307, where he stated at [73] that:
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> > "… where the issue raised by a judicial review challenge is whether there has been a breach of Convention rights, the Court cannot confine itself to asking whether the decision-making process was defective but must decide whether the decision was right."
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> 205. That language – whether the decision was "right" – echoes the approach of the CJEU to scope of the 'effective remedy' required by Art 27 of the Dublin III Regulation.
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> 206. In Belfast City Council v Miss Behavin' Ltd [2007] UKHL 19 Lady Hale said, at [31]:
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> > "The role of the court in human rights adjudication is quite different from the role of the court in an ordinary judicial review of administrative action. In human rights adjudication, the court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision-maker properly took them into account."
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> 207. Consequently, where a breach of Art 8 is alleged, the court must for itself determine whether the challenged decision is a proportionate interference with the individual's art 8 rights. It is not constrained only to determine whether it has been lawfully applied (see, e.g. Miss Behavin' Ltd and R (SB) v Governors of Denbigh High School [2006] UKHL 15). It was this approach which was adopted by the UT in the HA case (at [53]-[56]).

208. We do not consider that this approach is limited to the issue of proportionality under Art 8.2. It must also apply to establishing that the right, upon which reliance is placed, is actually engaged. We accept this approach must be applied to Art 8, whether relied upon for its procedural/fairness' dimension or substantively. It was not suggested before us that any different approach should be applied in respect of Art 7 of the CFR. Whether, therefore, family life exists between MAS and MS based upon their claimed relationship as brothers is also a matter which a court or tribunal must determine for itself. We reject Mr Lewis' submission that this, in effect, puts the 'cart before the horse'. Only if the right is engaged can the court indulge in a merits review. To say otherwise would effectively remove from the court or tribunal in cases where 'engagement' was the, or an, issue, determination of a vital part of the individual's claim that his Art 8 right was breached. We see no basis in the case law for it. Indeed, in the Al-Sweady case, a strongly constituted Divisional Court (Scott Baker LJ and Silber and Sweeney JJ) made plain that the factual enquiry extended in that case to the underlying facts of one individual's claim under Arts 2 and 3, namely whether he had been killed on the battle-field or, as he alleged, in a camp under the control of British forces in Iraq (see [16]). The Court accepted that cross-examination of witnesses was necessary in order for the Court to resolve that 'hard-edged' factual issue. *Mutatis mutandis* , we conclude, so it was in this case for us to resolve the 'hard-edged' issue of fact of whether MAS and MS are related as claimed as an aspect of their reliance upon Art 8 of the ECHR (and Art 7, CFR)."

44. At paragraph 210, the Upper Tribunal therefore decided "Issue IV in the applicant's favour".

45. In view of what transpired when MS reached the Court of Appeal, it is necessary to see what Issue IV comprised and its relationship with the three previous issues. At paragraph 86, the Upper Tribunal summarised the principal legal issues as follows:-

"86. We can summarise the principal legal issues raised in this case as follows:

I. Is the Secretary of State under a duty to investigate the relevant circumstances when considering a TCR under the Dublin III Regulation?

II. If there is such a duty, what is the proper scope of that duty? Does any duty include a duty to facilitate and/or secure the obtaining of a DNA sample from an individual in the requesting state?

III. If there is such a duty, does that duty continue once the Dublin III Regulation process is concluded?

IV. How should a court or tribunal approach a challenge in judicial review proceedings to a refusal to accept a TCR? Is it restricted to considering a challenge based upon public law principles or is it required to decide for itself whether the criteria for determining responsibility under the Dublin III Regulation have been correctly applied?"

46. The Upper Tribunal determined Issues I, II and III in favour of the applicant. Having done so, it applied its findings in those issues to the facts and circumstances of the three decisions under challenge. The Upper Tribunal found that those decisions fell

to be quashed on conventional public law principles. It was at this point in its judgment that the Upper Tribunal turned to examine Issue IV. In the light of its conclusion on that matter, it made findings of fact, by reference to evidence adduced at the hearing (including oral evidence), upon which it held, on the balance of probabilities, that MS was the brother of the individual present in the United Kingdom.

47. We can now look at what happened in the Court of Appeal. Hickinbottom LJ introduced the case as follows:-

> "5. The tribunal gave the Secretary of State permission to appeal to this court on two grounds, as follows.
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> i) The tribunal erred in holding that, for the purposes of article 27 of Dublin III, "transfer decision" includes the rejection of a take charge request, which involves no transfer. Therefore, it is submitted that the requirement of article 27, that an asylum applicant should have "the right to an effective remedy, in the form of an appeal or a review, in fact and law, against a transfer decision, before a court or tribunal", does not apply in this case where there has been no decision to transfer MS.
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> ii) Even if "transfer decision" does include a rejection of a take charge request, the tribunal erred in proceeding on the basis that the tribunal itself must determine, as a matter of preliminary fact, whether the relevant Dublin III criteria (including any required relationship) are met.
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> I will call these "Ground 1" and "Ground 2" respectively."

48. By the time the matter came before the Court of Appeal, a DNA test had established that MS and the other individual were, indeed, brothers and the Secretary of State accepted that fact. MS therefore contended that, although the Upper Tribunal had been right to hold that Article 27 applied, the matter was academic and the Court should dismiss the appeal on that basis.

49. At paragraph 13, Hickinbottom LJ described Ground 1 as "narrow, turning upon the proper construction of Article 27". Hickinbottom LJ noted that Ground 2 was "effectively conceded by the Secretary of State in the course of the hearing before us". The Secretary of State accepted that, if Article 27 of Dublin III applies, the domestic Court, "which is conducting the Article 27 review of the transfer decision should (i.e. is able to and required to) determine whether there is a 'sufficiently solid factual basis' for it, the quotation coming from the opinion of Advocate General Sharpston in [Ghezelbash]". Therefore, if the Secretary of State failed on Ground 1 "he therefore conceded Ground 2 by accepting that the Tribunal did not err in its approach to the factual question of whether the relevant Dublin III criteria (including any required relationship) had been met".

50. At paragraph 40 of his judgment, Hickinbottom LJ observed that, before the Upper Tribunal, "the core issue with regard to lawfulness was the extent to which the Secretary of State had an 'investigative duty' which extended to facilitating and securing the provision of a DNA sample from an asylum applicant in France". He

then noted the reasons why the Upper Tribunal had quashed the three decisions of the Secretary of State. At paragraph 41, Hickinbottom LJ said this:-

> "41. The tribunal therefore found the three decisions unlawful and quashed them without reference to article 27 of Dublin III. No reference to that provision was made until, having quashed the decisions, the tribunal dealt with the submission by Ms Kilroy (who also appeared below) that article 27, read with article 47 of the Charter, applied to a decision of the Secretary of State to reject a take charge request; and it required the tribunal to determine for itself whether MS met the relevant criteria in Dublin III notably that he is MAS's brother."

51. Hickinbottom LJ proceeded to set out the competing arguments of Ms Giovannetti (for the Secretary of State) and Ms Kilroy (for MS) on the Article 27 issue. At paragraph 53, he said that "I see the force in Ms Kilroy's submission on the substantive issue of the construction of article 27 in Ground 1". However, because he found that the matter was "now entirely academic as between the parties, I would exercise the court's discretion not to determine it".

52. Sir Terence Etherton MR gave a short judgment, with which both of the members of the Court agreed. He did so in order "to add … a short amplification of the place of article 8 of the ECHR and ordinary domestic law principles of judicial review in the proceedings below and on this appeal" (paragraph 59).

53. At paragraph 60, the Master of the Rolls noted that MS's grounds of judicial review:-

> "… stated that the Secretary of State owed a domestic duty to act compatibly with article 8 of the ECHR pursuant to section 6 of the Human Rights Act 1998, and those duties existed alongside Dublin III and were not subsumed or replaced by it".

54. At paragraph 62, the Master of the Rolls noted Ms Giovannetti as accepting "that there could be judicial review under ordinary domestic law principles even if the alleged unlawfulness arose under Dublin III itself".

55. The remainder of the judgment needs to be set out in full:-

> "63. It is apparent from the judgment of the tribunal that its decision to quash the Secretary of State's refusal to accept France's take charge requests was made on that basis (see the way the tribunal summarises MS's case in paragraphs 44 and 45). The issue of article 27 arose only in the context of the subsequent question whether, having concluded that the decisions of the Secretary of State should be quashed, the tribunal should decide for itself whether the criteria for determining responsibility under article 8 of Dublin III were met on the facts.
>
> 64. Hickinbottom LJ has set out in paragraph 5 above the two grounds of appeal. In her arguments for dismissing the appeal on the footing that it is academic Ms Kilroy relied upon, among other things, the right to challenge refusals by the Secretary of State of take charge requests as infringements of article 8 of the ECHR, irrespective of rights and obligations under Dublin III, applying ordinary domestic law judicial review principles and also bearing in mind the Secretary of State's acceptance on the appeal that (1) there is residual power in judicial review proceedings to make findings of fact, and (2) when called upon to determine whether there is a breach of article 8 of the ECHR, the court has to decide

proportionality for itself, and it may be required to resolve issues of disputed fact.

65. ZT (Syria) and RSM (Eritrea), cited in the Grounds of Defence and in the arguments before us on the appeal, are not relevant to that line of argument and are plainly distinguishable on their facts as cases in which the applicants were seeking to bypass or override express procedures under the Dublin process which would otherwise have applied.

66. Ms Giovannetti, perhaps rather surprisingly in view of the way matters proceeded in the tribunal below and the concession by the Secretary of State on Ground 2 of the appeal, urged us to express no view about the application of ordinary domestic law principles of judicial review in a case such as the present one as, she emphasised, that is not the subject of the notice of appeal. It is sufficient, therefore, to conclude this description of the way the issue arose in this case and on the appeal by recording that nothing was said to us to indicate that the tribunal was wrong to approach the case as it did, by reviewing the Secretary of State's decision on the basis of ordinary judicial review principles."

56. As can be seen from the above recitation of the judgment of the Upper Tribunal in MS, it is by no means apparent that the Upper Tribunal determined Issue IV in the applicant's favour and embarked upon the resulting fact-finding exercise to establish whether he and his alleged sibling were, indeed, brothers, *only because* the Upper Tribunal had decided, for other reasons, to quash the challenged decisions. As the Master of the Rolls observed, that was certainly not the way in which MS had put the challenge in his judicial review grounds, where the Article 8 ECHR/section 6 HRA duties were described as existing "alongside Dublin III".

57. The fact that the Upper Tribunal chose to address Issue IV only after it had addressed the other grounds of challenge that led to the quashing of the decisions is explicable in terms of the structure of the judgment. But that does not mean the Upper Tribunal regarded Issue IV as relevant *only because* it had quashed the decisions on other grounds. There is no statement in the judgment that even begins to suggest this. On the contrary, as we have seen, the Upper Tribunal was concerned to justify its conclusions on Issue IV by reference to domestic case law including, importantly, the House of Lords judgments in Denbigh High School and Miss Behavin' as well as the judgment of Underhill LJ in Caroopen. There would have been no point in such a justification if Issue IV were not regarded by the Upper Tribunal as a free-standing ground of challenge.

58. As I read the judgment of the Master of the Rolls, he was concerned to make the point, so far as he was able to do so in the light of the way in which matters unfolded in the Court of Appeal, that the Upper Tribunal in MS was not wrong to approach the case in the way it did "on the basis of ordinary judicial review principles". It is plain from paragraph 64 of his judgment that the Master of the Rolls regarded those principles as encompassing the determination by the Tribunal of issues of proportionality, wherein "it may be required to resolve issues of disputed fact".

59. The principle that issues of disputed fact may require to be decided in judicial review proceedings involving a human rights ground of challenge has been emphatically confirmed by the judgment of Underhill LJ in R (Balajigari) v Home Secretary [2019]

1 WLR 4647; [2019] EWCA Civ 673. The case involved the nature of a judicial review against a decision of the respondent that an individual had acted dishonestly in respect of financial information provided, respectively, to the respondent and to Her Majesty's Revenue and Customs. Where Article 8 was in play, and the issue involves the proportionality of the respondent's decision, Underhill LJ was in no doubt that the allegation (of dishonesty) had to be determined by the Tribunal, by means of its own factual investigation:-

> "104. If such an article 8 challenge does proceed by way of judicial review in the UT, and the claimant's article 8 rights are found to have been engaged, the tribunal will, as already noted, have to consider for itself whether the alleged dishonesty on the part of the claimant has been proved and whether removal is proportionate, which in most cases is likely to be determined by the question of dishonesty. It will not be confined, as would usually be the case and as in these proceedings thus far, to reviewing the facts only on the ground of irrationality. This is because, where a claim for judicial review includes a pleaded ground that the Secretary of State's decision either does or would violate article 8, that amounts to an allegation that there has been or will be unlawful conduct contrary to section 6 of the 1998 Act. That allegation has to be adjudicated by the tribunal on its merits: it is an argument based on illegality and not simply irrationality. For a recent summary of the law in this regard see *R (Caroopen) v Secretary of State for the Home Department* [2017] 1 WLR 2339, paras 68-83, per Underhill LJ."

60. At paragraphs 68 to 83 of Caroopen, Underhill LJ undertook an analysis of the case law, including Denbigh High School, Naseri, Bank Mellat No 2, Miss Behavin' and Lord Carlile's case, similar to that undertaken by the Upper Tribunal in MS. Indeed, as we have seen, at paragraph 204 of its judgment, the Upper Tribunal cited the passage at paragraph 73 of Caroopen, where Underhill LJ held that, in challenges of this kind, "the Court cannot confine itself to asking whether the decision-making process was defective but must decide whether the decision was right".

61. It is, therefore, established that in a judicial review which challenges a decision on the ground that it actually or potentially violates a person's protected human right, the court or tribunal must determine that issue for itself (albeit ascribing weight to the decision-maker's expertise and statutory or other relevant functions). Where there is a dispute as to the primary facts that must be ascertained before that issue can be determined, the court or tribunal must resolve that dispute.

62. The legal principle I have just stated is part of our domestic law of judicial review. It has been reached by the domestic courts applying section 6 of the Human Rights Act 1998, which prohibits a public authority from acting incompatibly with an ECHR right. Where an ECHR right is in play, this legal principle is not dependent on Article 27 of Dublin III or, indeed, any other piece of EU legislation regarding the availability of an effective remedy, even where the challenged decision is made under EU law. Nor is the principle dependent upon there being some other public law error in the impugned decision.

63. The fact that a decision of the respondent, which is otherwise free from public law error, may fall to be quashed, as a result of a fact-finding exercise of the kind undertaken in MS and the present case, needs to be seen in context. In most

instances, there is unlikely to be any dispute as to the primary facts. The issue in contention will, rather, be about what weight should be ascribed to particular factual elements in order to strike the proportionality balance. A decision which is free from public law error, where the evidence available to the respondent does not disclose a reason why the decision might be in breach of section 6 of the Human Rights Act 1998, will not get past the "permission" stage on judicial review. Although there is no legal requirement for there to be an independent public law error, a genuine dispute as to primary facts is likely to arise only where there has, in practice, been some such error, such as a breach of procedural fairness (as in Balajigari).

64. Before attempting a summary of the position, it is necessary to return to what the Upper Tribunal said at paragraph 208 of MS. Although the issue of whether a decision is contrary to section 6 of the 1998 Act will usually arise in the context of whether the decision was a proportionate interference with a right that is accepted to exist, the primary fact-finding which may be necessary is not limited to the issue of proportionality but must, as the Upper Tribunal held in paragraph 208, "also apply to establishing that the right, upon which reliance is placed, is actually engaged". In that case, the issue was whether MS and the alleged sibling were brothers. If they were not, then Article 8(1) would not have been engaged. If they were, then not only was Article 8 engaged; on the facts of the case the refusal of the respondent to take charge was plainly unlawful in terms of Article 8(2).

65. In the present case, as we shall see, a similar approach is required. A1 must show, on balance, that he enjoys a family life with A2. That does not merely require showing that A1 and A2 have the alleged relationship of cousins. It also involves demonstrating that an Article 8(1) family life exists between them. The factors that will be relevant in determining that question, whilst closely related to issues of proportionality under Article 8(2), are, nevertheless, conceptually distinct.

66. It is time to draw these threads together:

(1) Although Article 17(2) of Dublin III confers a wide discretion on the respondent, it is not untrammelled.

(2) As is the case with any other discretionary power of the respondent in the immigration field, Article 17(2) must be exercised in an individual's favour, where to do otherwise would breach the individual's human rights (or those of some other person), contrary to section 6 of the Human Rights Act 1998.

(3) An Article 17(2) decision is susceptible to "ordinary" or "conventional" judicial review principles, of the kind described by Beatson LJ in paragraph 85 of ZT (Syria) as "propriety of purpose, relevancy of considerations, and the longstop *Wednesbury* unreasonableness category".

(4) Where the judicial review challenge involves an allegation of violation of an ECHR right, such as Article 8, it is now an established principle of domestic United Kingdom law that the court or tribunal must make its own assessment of the lawfulness of the decision, in human rights terms.

(5) If, in order to make that assessment, the court or tribunal needs to make findings of fact, it must do so.

(6) None of the above is dependent upon Article 27 of Dublin III applying to the facts of the case.

(7) Nevertheless, what the Upper Tribunal held in MS regarding the scope of Article 27 is correct and nothing in the Court of Appeal judgments in that case suggests otherwise. The reference to a "transfer decision" in Article 27 encompasses a refusal to take charge of a Dublin III applicant. That includes a refusal to take charge under Article 17(2).

(4) The legality of the Secretary of State's Dublin III Regulation Guidance (18 April 2019)

67. The applicants contend that the respondent's Guidance to Caseworkers is unlawful. Ms Knorr submitted that the references to "exceptional circumstances", and to it being "rare and on an exceptional basis" that a regulation 17(2) request would be accepted, involved the setting of an unlawful threshold.

68. I do not accept this criticism. Since Huang v Secretary of State for the Home Department [2007] UKHL 11, those working in the immigration field have known that the use of "exceptional" in the context of Article 8 ECHR is not to be used as setting a particular (high) threshold but, rather, as predictive of the outcome of the application of the principles of proportionality to the facts of a particular case. There is, in my view, nothing in the Guidance that suggests its author is telling the respondent's caseworkers to do anything other than follow the settled law on this topic. My conclusion is reinforced by the statement in the Guidance that the situations where it would be appropriate to exercise discretion will be "rare". The juxtaposition of "rare" and "exceptional" within the sentence containing that statement makes plain the correct approach is being applied.

69. It is also necessary to make the following point. Although Article 17(2) relates to the bringing together of "family relations", the fact that this may be "on humanitarian grounds based … on … cultural considerations" makes it clear that the ambit of Article 17(2) encompasses cases that may elicit a favourable response, even where Article 8 ECHR/Article 7 CFR is not engaged. Just as Ms Masood correctly points out that the Guidance covers applicants who may not be children (whether or not accompanied), the fact that it extends beyond the classic Article 8 scenarios must be borne in mind, when reading it.

70. As can be seen from the extensive extracts from the Guidance set out in the Annex to this judgment, it does, contrary to Ms Knorr's submissions, appropriately reference the best interests of children. I therefore reject the challenge to its validity, insofar as the applicants allege a deficiency in this regard.

71. I do not accept that the Guidance errs in law in requiring the requesting EU State to demonstrate what the exceptional circumstances or compassionate factors are said to be. I agree with Ms Masood it is plain from Article 17(2) that the requesting State

needs to cite the humanitarian grounds upon which it relies and provide "all the material in the possession of the requesting Member State to allow the requested Member State to assess the situation". That is clearly not incompatible with the requirement in Article 17(2) for the requested Member State then to carry out "any necessary checks to examine the humanitarian grounds cited".

72. Although, as I have earlier held, Article 12 of the First Implementing Regulation (as amended by the Second Implementing Regulation) does not formally apply to a request under Article 17(2) of Dublin III, it is clear that the relevant local authority in the United Kingdom, in whose area the alleged relation resides, still needs to be involved in the process; not least in order to determine whether an unaccompanied minor's best interests would be served by reuniting the minor with that individual. For the respondent, Ms Masood accepts as much.

73. Ms Knorr took issue with the reference in the Guidance to caseworkers in Article 17(2) cases acting "consistently with the immigration rules and policies on family members, for example the Immigration rules Appendix FM - Family Members". I see no problem here. Acting consistently with the immigration rules, in particular Appendix FM, entails being aware of the elements of those provisions that are intended to ensure compliance with the United Kingdom's obligations under the ECHR. It also entails being aware of the fact that, as was finally settled by the Supreme Court in Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60, the respondent's caseworker must still conduct an Article 8 exercise outside the rules, to ensure that, on the particular facts, section 6 of the 1998 Act is not breached.

74. In considering the challenge brought by the applicants to the respondent's Guidance, I have had regard to their criticisms of the way in which the respondent's caseworkers reached the decisions that are challenged in these proceedings. Although, as I shall explain, I agree with the criticisms levelled at those decisions, I do not find that they are indicative of any failing in the Guidance itself.

75. For these reasons, I reject the applicants' challenge to the Guidance.

(5) Duty of investigation; involvement of relevant local authority

76. In MS, the Upper Tribunal followed the judgment in R (MK, IK) v Secretary of State for the Home Department (Calais: Dublin III Regulation – investigative duty) (IJR) [2016] UKUT 00231, holding that an EU State considering a take-charge request under Dublin III has a duty to investigate the basis upon which the request is made and whether the requirements of Dublin III are met. I have no hesitation in endorsing that conclusion, insofar as it applies to Article 17(2). There is, in my view, no principled reason why it should not; and I did not understand Ms Masood to argue to the contrary.

77. Although Article 17(2) lacks some of the formal requirements as to verification etc, which derive from the Implementing Regulations, it would be remarkable if the respondent's investigatory responsibilities were materially narrower in an Article

17(2) case which concerns an unaccompanied minor and his or her best interests, than they would be in respect of any other take-charge request.

78. But this is not to say that the precise nature of the investigatory obligation bears no relationship with the nature of the request to take charge made under Article 17(2), and the information supplied in connection with it. Given the breadth of Article 17(2), there may well be some cases in which what the respondent and, by extension, the relevant local authority, are expected to do would be less than in other cases. Where, however, the request in respect of an unaccompanied minor raises issues that involve an asserted family life within Article 8/Article 7, then, in the normal course of events, the respondent's degree of engagement with the relevant local authority should be no less than in the case of any other unaccompanied minor where the take-charge request is made under Article 8 of Dublin III on the basis that the relation in the United Kingdom is a sibling or a "family member" or "relative", as defined. Unless the respondent is satisfied that the relevant local authority's assessment could not possibly cast any relevant light on whether the alleged family relationship exists, or upon the alleged humanitarian grounds, I consider that, in an Article 8/Article 7 case of this kind, the respondent should seek an assessment from the relevant local authority.

79. Ms Julia Farman, of the European Intake Unit, UK Visas and Immigration, has filed two statements in the current proceedings. She is the Head of the EIU, a position she has held since 2016, when the Unit was created. Ms Farman says in her first statement that a family assessment is requested from the local authority only "once the family link has been established", since the purpose of the assessment "is to ascertain the ability of an individual in the UK to take care of a minor and, if necessary, to source appropriate accommodation should they qualify under the terms of the Dublin III Regulation". In her supplementary witness statement, which I decided to admit, she says that, in the context of Article 17(2), the EIU will request a family assessment "only once we are satisfied that the claimed family relationship has been established and the requirements of Article 17(2) have been met (i.e. it has been decided to exercise the discretion under Article 17(2) on the basis of the humanitarian grounds and/or cultural considerations". The purpose of the assessment is, therefore, to address whether there would be "any overarching safeguarding or security concerns that would mean the transfer would not be in the child's best interests".

80. As will be apparent, I do not consider these statements of the respondent's practice to be compatible with the requirements of Dublin III, as they bear on the issue of Article 7 CFR/Article 8 ECHR, where the best interests of an unaccompanied minor are at issue. There are likely to be circumstances in which information from the relevant local authority, deriving from direct engagement with the asserted United Kingdom relation, will inform the making of the respondent's decision, both as to the existence of the claimed relationship and as to the way in which the Article 17(2) discretion should be exercised.

81. Although I have rejected the specific challenges brought by the applicants to the respondent's Guidance, it may be useful for the respondent to consider adding a provision to that Guidance, which reflects what I have held at paragraph 78 above.

(6) "Minded to refuse" communications

82. In MS, the Upper Tribunal held that the respondent's public law obligation to act fairly may require that an individual knows the "gist" of what is being said against him or her, so as to be able to make representations and/or adduce evidence, before the actual decision is taken. The Upper Tribunal cited, in this regard, the judgment of Lord Phillips MR in R (Q & Others) v Secretary of State for the Home Department [2004] QB 36. The Upper Tribunal considered that this domestic obligation was not inconsistent with Dublin III. On the contrary, it was "patently focussed on enhancing or maintaining the integrity of the system in reaching lawful and correct decisions" (paragraph 124).

83. Ms Masood points out that "what fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects" (R Doody) v Secretary of State for the Home Department [1994] 1 AC 531, per Lord Mustill. Thus, Ms Masood submits, the Upper Tribunal's decision in MS, which was that the applicant in that case should have been informed of the respondent's concerns before the refusal decision was issued, cannot and should not bind the Upper Tribunal in this case. On the contrary, Ms Masood submits that in this Article 17(2) case, neither common law fairness nor Dublin III required the respondent to inform A1 or A2 of the reasons why she was not satisfied that there were no humanitarian grounds for exercising discretion in A1's favour.

84. In Balajigari, Underhill LJ undertook a comprehensive review of the case law regarding procedural fairness, as it bears on the question of whether a person is entitled to some form of advance notification of the decision-maker's adverse thinking. At paragraph 45, Underhill LJ referred to the judgment of Singh LJ in R (Citizens UK) v Secretary of State for the Home Department [2018] 4 WLR 123.

85. In that judgment, Singh LJ derived from Doody the principles that the standards of fairness are not immutable and that what fairness demands is dependent on the context. Nevertheless, fairness "will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on its own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both". Since the person affected usually could not make worthwhile representations without knowing what factors may weigh against his interests, "fairness will very often require that he is informed of the gist of the case which he has to answer" (paragraph 69 of Citizens UK).

86. At paragraph 48, Underhill LJ cited R v Secretary of State for the Home Department ex parte Fayed [1998] 1 WLR 763. That case involved applications for naturalisation by brothers settled in the United Kingdom, which were refused on the basis of concerns about their good character. Those concerns were not, however, raised with the applicants or even disclosed at the time of the decisions. Underhill LJ regarded the judgment in ex parte Fayed as instructive, in the context with which the court was concerned in Balajigari. The applicants had no legal entitlement to a favourable decision; nor any pre-existing right, which was adversely affected by a public

decision. Although they had applied for a discretionary benefit to be conferred upon them, this did not prevent the Court of Appeal in ex parte Fayed from holding that, where the Secretary of State had concerns, these needed to be put to the applicant before a concluded decision was taken to refuse the application.

87. At paragraph 51, Underhill LJ noted the seriousness of the allegation made against Mr Balajigari; namely, that he had acted dishonestly in relation to financial matters. The consequences of refusal were also likely to be very serious (paragraph 53).

88. At paragraph 55, Underhill LJ concluded that, where the Secretary of State was minded to refuse indefinite leave to remain on the basis of an applicant's dishonesty or other reprehensible conduct, the Secretary of State was required as a matter of procedural fairness to indicate clearly to the applicant that he had that suspicion; and to give the applicant an opportunity to respond, both as regards the conduct itself and as regards any other reasons relied on as regards "undesirability". Any response had to be taken into account before drawing the conclusion that there had been such reprehensible conduct.

89. At paragraph 60, Underhill LJ held that, unless the circumstances of a particular case made it impracticable, the ability to make representations only after a decision had been taken "will usually be insufficient to satisfy the demands of common law procedural fairness". The rationale for this result lay in the fact that it is conducive to better decision-making because it ensures the decision-maker is fully informed at the point when a decision is still at a formative stage. It also shows respect for the individual whose interests are affected. Furthermore, "human nature being what it is, a decision-maker may unconsciously and in good faith tend to be defensive over the decision to which he or she has previously come".

90. At paragraph 61, Underhill LJ held that "more fundamentally, it is a central feature of the administrative review procedure [which applied in Mr Balajigari's case] … that the reviewer will not consider any evidence that was not before the original decision-maker except in certain specified cases". That meant the applicant would normally only be able to assert that he or she had been dishonest but would not be permitted to adduce evidence in support of that assertion. Underhill LJ considered that this limited type of legal review "is clearly inadequate here" (paragraph 61).

91. I do not accept Ms Masood's submission that, in Article 17(2) cases, domestic common law fairness principles mean the respondent is never required to provide an indication or gist, to an applicant or his alleged United Kingdom relation, of matters of concern that may lead to a refusal to take charge of the applicant. No principled basis has been advanced for this proposition. Like Underhill LJ in Balajigari, I find ex parte Fayed is instructive. The power to refuse naturalisation is no less wide than the power conferred by Article 17(2). The present case also shares similarities with the position of Mr Balajigari. As we shall see, the consequences of refusal could well have profound consequences for A1.

92. Even more importantly, like Mr Balajigari, A1's Article 8 ECHR rights are potentially at issue. In an Article 17(2) case, where the requesting State has advanced a case that raises the issue of Article 8 and, if established, the prospect of serious (and potentially disproportionate) consequences if family reunion is not effected, I find

that the respondent is potentially under a duty to provide the requesting State and the applicant with an indication of the respondent's concerns. Whilst the ability of the requesting State to seek reconsideration from the requested State of an initial adverse decision may diminish or even remove the potential obligation in respect of the initial decision, as a general matter there is likely to be an actual obligation to give the necessary indication, prior to a second refusal, where the concerns harboured by the requested State are not ones that have been ventilated by it.

93. It must be emphasised that this is an area where one cannot lay down hard and fast rules. Even in a case in which Article 8 ECHR is in play, there may be exceptions. Furthermore, the process must not become so elaborate as to defeat the aim of expeditious decision-making, particularly where the best interests of minors are concerned. I agree with Ms Masood that one is not necessarily looking for the sort of detail one might find in, for example, a "Reasons for Refusal" letter accompanying a decision of the respondent to refuse leave to remain or to refuse a human rights claim. On the other hand, it is difficult to see what legitimate purpose is served where the respondent has a specific concern that the requesting State or relevant individual may be able to address but which – because no forewarning is given – has to be addressed in judicial review proceedings, with all the expense and effort these entail.

94. I do not consider that Ms Masood can distinguish Balajigari on the basis that the reconsideration process referred to by Underhill LJ prevents additional evidence from being put forward, after the decision is made. On the contrary, the logic of this submission seems to be to favour judicial review as the forum for resolving matters, when a relatively simple administrative step could have done so.

E. THE RESPONDENT'S DECISIONS

95. I now address each of the three decisions of the respondent.

(1) Decision of 5 November 2019

96. The initial take-charge request from Greece included the United Kingdom residence permit of A2 (who lives in Glasgow), his bank statements and tenancy agreement, photographs of A1 and A2 together when A2 went to visit A1 in Greece, evidence of A2's travel to that country and A1's consent to the request.

97. The request described how, during an examination with A1, he said that his cousin, A2, resided in the United Kingdom as a recognised refugee. A1 said his father was dead and his mother and two siblings were in Syria. Three more siblings were in Lebanon and two more were missing. The caseworker, Ms Tsaknaki, drew attention to the findings in the best interests assessment report, that A1 had suffered from the kidnapping and death of his father and had himself been a victim of physical violence. A2 had helped him resettle in Greece and had visited him there, as well as keeping in daily contact with him. A2 was willing and able to take A1 under his care. Ms Tsaknaki drew attention to the importance of the best interests of the child, as articulated in Dublin III.

98. Greece supplied the following further information. Before the loss of A1's father, the family was living in a place in Syria and A1's uncle had a house next door. After the death of A1's father, the family moved to another place. The whole family of A1 was taken care of by his paternal uncle, the father of A2.

99. A1 himself described being conscripted into what he described as the army. After going on leave, he burnt his military clothes and he and his family left for the home of his maternal uncle. He then left Syria. A1 described escaping from the army many times and being beaten, after his family had been threatened and beaten to reveal where A1 was. The assessor noted that life was extremely difficult for A1 as a child. He seemed to have suffered a lot in the past. After the loss of his father, his maternal uncle initially took the role of a father figure, followed by A2.

100. Asked about his relationship with A2 while in Syria, A1 was recorded as saying that:

> "our relationship in Syria was very good, although he [A2] left when I was about 2 years old. It was a long time ago but we were family, and we were talking on the phone with every chance. After my compulsory military conscription, we lost contact, I had no way to communicate with him. When I got to Turkey we talked again. He advised me through my travel and was expecting me to come to Greece to visit me".

101. A1 described that when he arrived in Athens he called A2 and after ten days A2 appeared in front of him. A2 stayed in Athens for fourteen days. He found A1 an apartment and paid for everything. He also organised meetings with a lawyer and a social worker and bought A1 clothes and shoes. With A2's help, A1 got an asylum card.

102. Asked about his current relationship with A2, A1 said "he is the person who protects me and he helps me with everything I need … He is like a father to me". A2 repeated that last phrase in section 4 of the form.

103. A2 was recorded in the form as saying that A1:

> "is like a son for me. Since he left Syria I am trying to help. I promised to his mother that I will protect him and do everything to keep him safe. From the first moment he reached Greece, I was here to help him, find a house for him and do everything to make him happy".

104. A2 said that coming with him to the United Kingdom "would be the best thing for him, he is a young boy without family, how is it possible for him to live without his family?".

105. The form included an assessment by Othon Christophilis, a psychologist. He described in detail the problems faced by A1 whilst in Syria. Although A1 had witnessed death and other traumatic events, he was not able to talk openly about these yet. The psychologist said that A1 was "focussed on his education" in Greece. However, A1 had shown "signs of cognitive and memory difficulties". These had not yet been assessed. Overall, the psychologist deemed it necessary and in A1's best interests "to live in a safe, secure, loving and caring environment that would help him fully reintegrate into society, develop the skills that would help him cope

with the traumatic events that he had experienced and acquire all the necessary knowledge he did not have an opportunity to learn". The recommendation was that A1 be reunited with A2 in the United Kingdom, since A2 "seems to be the only person that can provide [A1] with such an environment".

106. The Greek assessor concurred. The assessor described the cousin as being extremely cooperative in having responded to anything that A1 requested. A1 "refers to his cousin by defining him as his family now, and emphasising how important the family is to any human being". The assessor considered that staying in a home with a family member, A2, who had been a role model for A1 would be "the appropriate environment for the child, to deal with the traumatic stress he is suffering from and will also help him to evolve his social skills". In summary, it was considered that it would be in A1's best interests to move to the United Kingdom with his relative who would provide him "with the most appropriate environment to begin his life as an [adolescent]".

107. The EIU notified Glasgow City Council of the "transfer notification" from Greece. Glasgow City Council Social Work Department replied on 29 October 2019 to ask if the EIU would:

> "process via the referral process by going to Social Care direct". The same day, the EIU responded to say that "the case has not been allocated to a caseworker yet, however, we have forwarded an initial notification to yourself for your information only. Therefore the actual referral process will be dealt at another time when the family link has been established. If you feel that we should contact the Social Care direct, I will be grateful if you would forward their contact email and telephone number for further communication".

108. The EIU documents sent to Glasgow City Council stated:-

> "**The Home Office is <u>NOT</u> requesting completion of a Family Assessment at this time.**
>
> However should you hold any evidence to assist in verifying the claimed family link or possess any other information that you believe should be considered when assessing this application, please do forward this within 14 days. …
>
> The European Intake Unit will contact you further should it be satisfied that the claimed family link has been demonstrated. At this point we will request completion of a Family Assessment on the UK relative which will assist with the best interests consideration and the decision on this application."

109. Also on 28 October, A2 was sent a letter by the EIU, stating that a request had been made by Greece for A1 to join A2 in the United Kingdom. A2 was sent with the letter a questionnaire, in which he was asked to provide as much detail as possible, and return it to the EIU no later than 11 November 2019.

110. It is common ground that A2 completed and returned the questionnaire. It is dated 29 October 2019. It appears to have been received by the EIU no later than 11 November 2019. In it, A2 set out a family tree showing that A2's father was the brother of A1's father. A2 gave an undertaking, as requested, to care for A1. He

gave details of communications between them. He also gave details of the name, address and telephone number of A1's mother. A2 described his income (derived from state benefits).

111. Disclosed in connection with the present proceedings is an email of 4 November 2019 from the EIU caseworker to the senior caseworker. The caseworker described how the Home Office interview record for A2 had been viewed "and there was no mention of either applicant's parents as the sibling [sic] to claimed cousins. Therefore relationship not established. Furthermore, the family tree anagram provided with BIA from Greece does not mention his claimed UK relative to be a paternal or maternal relative".

112. The decision of 5 November 2019 stated that A2 was not considered to fall under the category of "relative" as described in Article 8 of Dublin III. Reference was then made to Article 17(2). Although it was noted that Greece had said the best interests of A1 would be to join A2, the decision said: "However no evidence has been provided which would support the assertion that their relationship would have the strength to compare to that of a sibling relationship". The letter ended by saying that "additionally, the applicant's claim and evidence provided do not have merit to warrant discretion of the criteria needed in the exceptional case of a 17.2 application". Accordingly, the request was refused.

Discussion

113. I have no hesitation in finding that the decision of 5 November 2019 is legally flawed. The alleged requirement to show that the family relationship for the purposes of Article 17(2) should be of a strength to compare with that of siblings finds no support in Dublin III, or any published Guidance to which my attention has been drawn. On examination, the reasoning of the decision letter is simply incoherent. If what was meant was that the relationship of cousins is not the same as the relationship between siblings, that is plainly obvious. The relationships are different. If, however, what was meant was that cousins cannot have a bond that is as strong as the bond between siblings then that is, again, wrong. Many siblings have strained or, indeed, non-existent bonds. By contrast, it is far from inconceivable that cousins who have, for instance, grown up together might have a relationship of real strength.

114. The final part of the letter, referring to the claim and evidence not having merit to warrant discretion, takes the respondent no further.

115. The respondent cannot rely on the GCID email of 4 November. On the contrary, this makes the mistake that one of the applicant's parents should be the sibling of A2. It was, of course, A2's father who was the sibling of A1's father, making them first cousins.

116. The grounds contend that the decision of 5 November 2019 is unlawful because it was made without the benefit of a local authority assessment. As I have found, in Article 17(2) cases there may be circumstances in which a lawful decision might be reached without calling for such an assessment.

117. That is not, however, the position here. Leaving aside the respondent's apparent confusion about what familial relationship was, in fact, in issue, the materials from Greece that accompanied the initial take-charge request, although somewhat sparse, nevertheless raised the issue of there being an Article 8 family life between A1 and A2, as cousins, by reference to the emotional and material dependency of A1 upon A2. Given that there is no question but that A1 is an unaccompanied minor, there was no reason for the respondent to depart from her normal policy, as set out in the Guidance, of requesting an assessment. As I have already held, I consider that the practice of the respondent in Article 17(2) cases, as disclosed in Ms Farman's statements, is incompatible with the respondent's obligations under Dublin III, the ECHR and the CFR. Such an assessment could have shed light on the relevant issues in this case.

118. The decision is irrational, takes account of irrelevant matters, fails to take account of relevant ones, was reached without proper investigation and was contrary to the respondent's policy.

119. I quash the decision of 5 November 2019.

(2) Decision of 16 January 2020

120. Following the communication to Greece of the respondent's decision of 5 November 2019, Greece supplied two further reports, respectively dated 15 and 18 November 2019 from, respectively, Ms Makrynioti, a social worker, and Mr Christofilis, the psychologist who had opined in the earlier submissions.

121. Ms Makrynioti's report noted that A1 had been forced to join the PKK Party of Kurdistan. He had tried to escape and disobey their orders but had been ill-treated, as had his family. Initially homeless after his arrival in Greece, A2 had arrived and supported him as much as possible. Ms Makrynioti described A2's interest as "pure and real and I can vouch that he care as deeply about his nephew (sic) because I have met him in person". A1 was said to need support "in all the factors of his life". His experiences had left him "an irresolute and weak person. He is very frightened and isolated. He is unable to take care of himself and it is not easy for him to trust anyone apart from members of his family".

122. Ms Makrynioti described A1 as being "calm and peaceful around his cousin and this is something I witnessed with my own eyes". Overall, she strongly recommended their unification as the best option for A1's well-being and prosperity.

123. Mr Christofilis's report described A1's clinical presentation as being "very preoccupying for the psychosocial team". A1 had "absolutely no interaction with other beneficiaries of the shelter". He showed "serious cognitive difficulties and memory issues". Specifically, A1 was "unable to process and retain new information". Mr Christofilis said that it was not possible to tell if these problems pre-existed or were the result of his three-year captivity in the Kurdish military camp. Whenever they touch on the sensitive issue during sessions, A1 became "overwhelmed by his emotions and presents a physical stress response".

124. Mr Christofilis deemed it necessary that A1 "lives in a safe, secure, loving and caring environment which will help him fully reintegrate into society, develop skills that will help him cope with the traumatic events he has experienced and acquire all the necessary knowledge he did not the opportunity to learn". According to Mr Christofilis, this necessitated reunification with A2 "who seems to be the only person that can provide [A1] with such an environment".

125. The GCID notes contain a note of 8 January 2020 from an EIU caseworker to the senior caseworker. Having noted that Greece had requested a re-examination of A1's case, the caseworker said that it "falls outside the family relationships as defined in the Regulation". The senior caseworker replied by email to say: "This is approved".

126. The decision of 16 January 2020 noted the reports of the social worker and the psychologist, stating that these had been taken into consideration. The letter then said:-

> "• We have considered the social worker's and psychologist's report but we note they do not comment on the health situation of the applicant from their arrival in Greece, to show that he was not entitled to healthcare or it was not available.
>
> • Although the report states that [A1] is exhibiting serious cognitive difficulties and memory issues that cannot be attributed only to the lack of knowledge and skills acquired at a young age, it also states that it is not possible to establish if this is a pre-existing condition. Even with the psychological report itself, this does not amount to an exceptional case or humanitarian grounds to apply discretion and accept your Take Charge re-examination. Also as previously stated, the UK relative is a cousin. A cousin does not meet the relatives' definition of the Regulation.
>
> • It is noted the psychologist report does not evidence why a change of Member State will improve the current situation for the applicant.
>
> • It is our position that electing to be transferred to another Member State is in itself not a humanitarian ground."

Discussion

127. As with the previous decision, Ms Masood did her formidable best to defend the decision of 16 January. I nevertheless find myself in agreement with Ms Knorr that the letter of 16 January is profoundly problematic.

128. The question of whether A1 was entitled to healthcare in Greece is entirely beside the point. The clear thrust of the reports was that A1's cognitive and behavioural problems made it particularly important for him to enjoy the supportive relationship which his cousin, A2, could offer on more than the intermittent basis that was possible whilst A1 remained in Greece.

129. It is, I find, difficult to understand what is meant by the bullet point that refers to it not being possible to establish if A1's difficulties are the result of a pre-existing

condition. The focus of attention should have been on A1's best interests, taking account of his documented difficulties, whether they were "pre-existing" or not.

130. So far as the reference to a cousin is concerned, I do not accept that this can be explained by reference to the caseworker's attempt to deal, not only with Article 17(2) but also Article 8(2). Either the maker of the 16 January 2020 decision was of the view that a relationship of cousins was not a family relationship that came within Article 17(2), or she failed to turn her mind to whether such a relationship was within the scope of that provision. Either way, the resulting decision is legally flawed. The email exchange of 8 January 2020 leaves both possibilities open. Once again, the exchange does not assist the respondent.

131. The penultimate bullet point suffers from the defect, just described, wherein the respondent takes no proper account of what the authors of the reports were actually saying. The final bullet point is true, so far as it goes, but that is not far enough to save the decision.

132. The decision is irrational, takes account of irrelevant matters and fails to consider those that were relevant.

133. I quash the decision of 16 January 2020.

(3) Decision of 20 April 2020

134. As I have previously mentioned, this decision was made after the commencement of the judicial review proceedings challenging the two earlier decisions. The respondent, rightly in my view, chose to engage with the submissions from Greece, which led to this third decision, rather than treating those submissions as invalid. Such a course would, in the circumstances, merely have resulted in Greece making a new Article 17(2) request. The respondent, in effect, makes her main stand in these proceedings on the basis of the 20 April decision.

135. A significant amount of further evidence was supplied to the respondent, following the second refusal. There was a report by a child psychiatrist, Dr Vasiliki, dated 17 January 2020. This confirmed the psychologist's assessment of A1's problems. Dr Vasiliki identified depressed mood, anxiousness and avoidance of discussing specific matters in A1's past. A1 also had difficulties recalling details and a generally low level of mental capacity, together with memory difficulties and a low level of learning capacity. Her conclusion was that it was "necessary for [A1's] well-being to be taken care [of] by a family member due to serious medical care [sic]".

136. In addition, A2 had sent, by email to A1's shelter in Greece, a copy of A1's grandfather's family book, which showed the grandfather's first child was A2's father and the second child was A1's father. Also sent was A2's father's passport and ID, pointing out his name; and also extracts from the family book of A1's father, along with the father's ID and copy of military service book.

137. Both A2 and A2's brother, IAA, provided witness statements. A2's witness statement gave details of how A1 was related to A2. It described their family history, including that the families of A1 and A2 grew up together and that both families were supported by A2's father, after A1's father died. A2 had taken IAA to live with him in Glasgow when IAA arrived in the United Kingdom in 2016. IAA lived with A2 until IAA turned 19, when he moved to a flat of his own, one minute away from A2. A2's other brothers live in Glasgow, about ten to fifteen minutes away. The statement continued:-

> "We are a very tight family unit and I love my brothers dearly. They all very much want [A1] to join us in the UK. [IAA] is particularly close to [A1] and they call each other via WhatsApp. I think they have a kinship because they are quite close in age and lived next door to each other for so many years."

138. A2 described visiting A1 in Athens in June 2019 and the arrangements he made for A1's welfare whilst A2 was there:-

> "It was very difficult to leave [A1] and he cried when I left him. He told me that he felt like a stranger in a country he doesn't know. I have always thought of [A1] as vulnerable because of his traumatic experiences in the army and because of his difficulties with reading and writing; however in that moment when I left him in Athens he seemed particularly vulnerable. He is only a child and can't look after himself."

139. A2 described A1's reaction to the respondent's second refusal decision. It came to A1 as a tremendous shock and he "was devastated". He "cried and said something like 'I am lost I am done it's over'".

140. A2 said that he feels "a huge responsibility towards" [A1]. He had promised A1's mother that he would look after him and felt it is his duty to do so. A1 was in poor health and was quite a naïve child. A2 wants to keep him safe. A2 considered that his brothers and he could provide A1 with the family that he desperately needs. A2 has a spare bedroom in his flat that A1 could use. Social Services in Glasgow had already confirmed that A2 was capable of looking after his brother, IAA.

141. IAA's statement describes how, when they were all young, his family and that of A1 lived close to each other in Syria. A1 and IAA were of similar ages and grew up together. They would play together everyday and do everything together. A1 was like "a brother to me. The family had to separate in later years due to the conflict in Syria. [A1] was forced to join the army and suffered terribly. [A1] and I did not see or speak to each other very much during those years".

142. IAA described in his statement the family situation in Glasgow, in terms similar to those employed by A2. IAA is studying at college and hopes to go to university to study engineering. IAA and his brothers "are all here waiting for [A1] and want to offer him safety and security. In my view [A1] needs this very much … I think I could help him and think it is important that we, as a family, support each other".

143. Ms Olivia Anness of Bhatt Murphy Solicitors provided a statement in which she described her telephone conversation with A1, regarding the respondent's second refusal. A1 told Ms Anness that he had been "so worried that he had not eaten

anything since he heard the news. He said it was the worst news he had ever received". The prospect of living his life alone without A2 felt meaningless to him.

144. The respondent's decision letter of 20 April 2020 is considerably longer and more detailed than its predecessors. It makes it clear that the decision is concerned only with Article 17(2).

145. The letter states that "some documentary evidence has been provided to evidence the claimed link of first cousins". The letter then, however, goes on to note that the name of the father of A1, described in the statement of A2, does not appear from the translated information in the family book and ID documents. Accordingly "it has not been possible to verify the familial relationship between [A1] and [A2]". The letter states that the respondent would request "that further translations of all the documents be provided in order for us to fully consider this evidence". As matters stood, however, "[this] time it has not been possible to verify the claimed family link from the evidence provided".

146. Because the family link was not established to the satisfaction of the respondent, the accompanying reports did not, according to her, take matters any further.

147. The letter continued, however, that "regardless of the above position" the respondent had, in fact, considered the evidence and information submitted but concluded that "even if it was in fact corroborated that the two parties were related as claimed as first cousins, discretion would not be exercised in the applicant's favour given the specific facts of the case".

148. The first reason for reaching that conclusion was that the psychological conditions of A1 were "historic. The evidence has not established a clear causal link between the applicant's conditions and his separation from the UK sponsor".

149. The pedopsychiatric report, which did not make "a confirmed diagnosis of PTSD or epilepsy", concluded that A1 needed to transfer to the United Kingdom; but the reports did not elaborate on how the sponsor, A2, would be able to respond to the serious needs or indeed what the needs were.

150. The letter noted that it was not explained how A2 would be in a better position than professionals in Greece to provide for the care needs of A1.

151. Even if the respondent were to accept that A1 and A2 were first cousins, the letter stated that it was not accepted they shared family life within the meaning of Article 8. In order for such family life to exist, there needed to be "elements of dependency involving more than the 'normal emotional ties' as outlined in **Kugathas**".

152. On the issue of dependency and, hence, whether Article 8(1) family life exists between A1 and A2, the letter had this to say:-

> "Whilst it is accepted that there may be some degree of emotional ties, a natural concern and affection between a minor and his adult cousin, it is not accepted that there is evidence in this case of elements of dependency involving more than the normal emotional ties.

> The UK sponsor has been residing in the UK since 2013. The best interests assessment submitted in support of a take charge request detailed that the UK sponsor left Syria when the above applicant was aged just 2. The ties built in this period are not likely to have been significant given the age of the applicant.
>
> The best interests assessment suggests that after the UK based sponsor left Syria, the applicant and UK based sponsor spoke on the phone. But there is no evidence of dependency on the UK based sponsor during this period involving more than the normal emotional ties between family members.
>
> After the applicant left Syria, and arrived in Turkey, and later Greece, again they have maintained contact by phone. We note that the UK based sponsor visited the applicant in Athens in June 2019, helped him find accommodation and provided him with material assistance, including money. It is not accepted that this establishes dependency involving more than normal emotional ties, even when considered in the context of the issues described in the pedopsychiatric report and psychological report.
>
> Given it is not accepted that there is family life between the two parties the rejection of the take charge request does not result in a breach of the applicant's Article 7 CFR and Article 8 ECHR rights."

153. Before examining the legality of the decision of 20 April 2020, it is convenient to describe further evidential material, adduced after that decision. WAA made a witness statement. He is the brother of A2 and IAA. He lives in Glasgow, having been granted refugee status, and works as a self-employed delivery driver. As well as confirming the family relationship, WAA describes his family as living with and helping A1's family. This included sharing their crops and money. IAA was close to A1 and they would play together. When the family heard that A1 was in Athens, they raised money to pay for A2 to visit him. WAA described how he and his brothers feel that A1 "is our responsibility, so we were all very upset and worried for [A1] after the refusals". The brothers would "all support [A1] as much as we can if he were able to come to the UK. We would help him to develop skills so that he can study and find a job and build a life here. We would look after him just like we looked him in Syria after his father died – we would do exactly the same. We are family".

154. A similar witness statement was filed by RAA, another brother of A2.

155. Ms Anness provided a further statement dated 28 April 2020, in which she explained that translations of the family books could have been provided, so as to satisfy the respondent of the first cousin relationship between A1 and A2, had the applicants known that they were required by the respondent.

156. Finally, there is a report from Peter Horrocks, an independent social worker, produced on 9 May 2020. He conducted interviews by remote video means with A1, A2, RAA, WAA and IAA, as well as with Mr Christofilis.

157. Mr Horrocks's interview with A2 is significant, in that it touches upon the issue of whether A1 was only 2 years old when A2 left Syria. According to Mr Horrocks's report, A2 said that A1 would have been aged about 9 or 10 when A2 left Syria: "In the best interests assessment [A1] states he was aged about 2 years old when [A2] left

and that is clearly incorrect". A1 would play with IAA all the time and they would spend most of their time playing together. A2 would see A1 every day during this period and sometimes A1 would sleep over in their house or vice versa. The houses of the two families were isolated from the rest of the village by about a kilometre. A2 said that, because of their family background, the Kurds saw the families as Arabs, whilst the Arabs saw them as Kurds. The result of this was that their interactions were with "extended families as opposed to other local residents and this was relevant in terms of the children's playmates as well".

158. Mr Horrocks's interview with A1 was problematic. A1 was in tears and very distressed. A1 told Mr Horrocks that he could not live where he was. The other young people swore at him and beat him up. A1 emphasised that he wanted to be with his family.

159. Mr Horrocks concluded that A1 and A2 were paternal cousins. He further concluded that there "is a big difference in the importance and meaning of the family between the UK and Syria and they have a very different concept whereby in Syria, the extended family has a much greater importance". Asked to comment on the strength of the relationship/level of dependency between A1 and A2, Mr Horrocks stated that the evidence he had gathered "underpins the important nature of [A1's] relationship and level of dependency on his extended family members". A1 was "desperate to be reunited with his family members in the UK. He considers [A2] to be like a father and his other cousins to be his brothers and they see him in the same way". A1 had grown up alongside his cousins "almost in a large family unit and from a historical, social, cultural and family perspective they are his brothers".

160. Mr Horrocks considered that the experiences of IAA, when he came to live with A2, were "a first-hand account of [A2's] abilities to meet all aspects of [A1's] practical and emotional care needs. In Mr Horrocks's professional opinion, A2 "has both the experience and knowledge to care for [A1] and to meet all aspects of his practical and emotional care needs". A1 will be treated by his cousins in the United Kingdom as his brothers.

161. So far as best interests were concerned, Mr Horrocks found that A1 "is a very vulnerable and damaged young person, whose current situation is contributing to a deterioration in his mental health, because of the refusal of his application for unification with his family in the UK". A contributing factor was A1's "fixation on the outcome of reunification and his refusal to make any efforts to integrate and interact with other residents and staff in the hostel". Mr Horrocks considered that this fixation had some form of cognitive/emotional element, whereby A1 was unable to accept any alternative outcome. This meant that further refusal would lead to a deterioration of A1's emotional situation and would compound his mental health difficulties. Overall, Mr Horrocks shared the findings of the reports from the Greek professional that it was "strongly in [A1's] best interests to be reunited with [A2]". A1 faced "most certainly the likelihood of suffering harm to his emotional, his physical, his social and his educational development and a very high risk that this harm will be long term and permanent".

162. I have referred to the third witness statement of A2, filed at the hearing, which I have decided to admit into evidence. In this, A2 clarifies what is indicated in Mr Horrocks's report; namely, that A1 was not 2 when A2 left Syria, but, rather, around 9 or 10 years old.

Discussion

163. I find the letter of 20 April 2020 suffers from the defect that it raises, for the first time in the respondent's decisions, the issue that Greece has not shown that A1 and A2 are first cousins. The 20 April decision does so on a narrow basis, which could readily have been addressed, had the respondent seen fit to raise it with Greece and/or the applicants. This is demonstrated by the fact that it was satisfactorily dealt with by the subsequent material, as Ms Masood very properly acknowledged. Indeed, she told me on instruction that the familial relationship was now accepted by the respondent.

164. I consider that this is a paradigm example of a situation where procedural fairness required the respondent to alert the applicants and/or Greece to her concerns, before proceeding to make a decision. In so finding, I am aware of the fact that the respondent is entitled to expect evidence accompanying an Article 17(2) request to be "coherent, verifiable and detailed", as described in the Guidance. I am further aware that it is not for the respondent to assume general responsibility for the translation of documents. Nevertheless, particularly in the light of the history of this matter and the narrowness of the point in issue, it was plainly necessary for the respondent to give an advance indication of her thinking. This is particularly so, given that this thinking had markedly changed so that, for the first time, the existence of the cousin relationship was being called into question.

165. This error will not, however, be material if there is nothing legally wrong with the alternative finding in the letter of 20 April, on the basis that A1 and A2 are related as claimed.

166. The respondent's treatment of the pedopsychiatric report is, I consider, legally flawed. It suffers from similar deficiencies to those contained in the earlier decisions, in that it adopts the wrong focus, thereby leading the respondent to consider what is irrelevant and ignore what is relevant. The question is not whether or how A2 would clinically address the psychiatric and cognitive conditions, from which A1 suffers. Rather, given those conditions, the question is whether it would be in A1's best interests to be living with a person, A2, whom he trusts and regards as a father figure, alongside the other cousins, who regard him as members of their family. Although the evidence in that regard has further developed since the date of the decision, even on the evidence available to the decision-maker in April 2020, the treatment of the reports is so deficient as to be legally flawed.

167. This brings me to the final element of the 20 April decision; namely, the conclusion that Article 8(1) family life does not exist between A1 and A2. As we have seen, the writer of the decision alights on the statement in the original material submitted by Greece, that A1 said he was 2 years old when A2 left Syria. If that were right, there

might be legitimate cause for questioning the existence of family life, in terms of Article 8(1)/Article 7, as between the cousins. In particular, it would be hard in such a scenario to see how A1 could legitimately regard A2 as a father figure, and equally hard to see how A2 could legitimately see himself in that role. If, on the other hand, A2 had left A1's orbit when the latter was 9 or 10 years old, the position is likely to be very different. In particular, there would be a ready explanation for A2's high level of communications with A1 and, especially, for A2's decision to go to Athens and spend his own time and the family's money helping A1.

168. The problem for the respondent is that the issue regarding A1's age has been raised by her in a decision that was generated only after the commencement of judicial review proceedings. This matter could and should have been raised by her much earlier. In all likelihood it would have been, but for the serious errors of approach contained in the two earlier decisions. In particular, in the light of what I have found regarding the failure of the respondent to ask for a local authority assessment before taking the 5 November 2019 decision, it is a matter which is highly likely to have been dealt with in such an assessment. The respondent's alternative finding is, therefore, itself legally erroneous.

169. For these reasons, I quash the decision of 20 April 2020.

(4) Ground 2

170. Irrespective of the public law errors I have identified in the three decisions of the respondent, I need to consider whether, on the totality of the evidence before me in these proceedings, including the witness statements that post-date the third decision and the report of Mr Horrocks, (i) whether Article 8(1) ECHR/Article 7 CFR family life has been shown to exist, on the balance of probabilities, between A1 and A2; and, if so, (ii) whether the decisions represent a disproportionate interference with Article 8 rights. For the reasons I have given, Ground 2 is not dependent upon my having found independent legal errors in the decisions, of a "conventional" public law nature, which led me to quash those decisions. As the Upper Tribunal concluded in MS, in deciding Ground 2 I am not confined to looking at the evidence which was before the respondent when she made the decisions that are under challenge.

171. I see no reason to give Mr Horrocks's report only limited weight. The fact that he undertook his interviews by remote video means is not, in the circumstances, a reason to discount or diminish his findings. Mr Horrocks is well-versed in the advantages and disadvantages of conducting interviews by these means. There is nothing in his report that suggests he was materially impaired in reaching his conclusions by speaking with A1 and the others only by video link.

172. Mr Horrocks, in his interview with A2, explained the age at which A1 would have been when A2 left Syria. A2 also told Mr Horrocks details about the situation of the families in Syria which strongly supports the earlier evidence. The fact that the families were regarded as neither Kurdish nor Arab by the local community, and so drew in on themselves in what might be described as a small compound comprising their two houses, isolated from the rest of the village, has much to say about the

claimed relationship between A1 and A2 and the latter's brothers. It provides a clear rationale for A1's current view of, and relationship with, A2 and his brothers; and vice versa.

173. I find, on the totality of the evidence, that family life exists between A1 and A2, for the purposes of Article 8(1)/Article 7.

174. Each of the decisions is, therefore, legally flawed, being based on the incorrect factual assumption that such protected family life does not exist.

175. As I have earlier explained, although the existence of family life is conceptually separate from whether there has been a disproportionate interference with the right to respect for it, on the facts of the present case the two are closely intertwined. The extreme emotional dependency that A1 has on A2 is not only a factor that helps establish the existence of family life between them. It also goes to the question of whether the respondent's decisions, refusing to exercise discretion under Article 17(2), represent a disproportionate interference with that family life.

176. I find that each of the decisions, including that of 20 April 2020, constitutes such a disproportionate interference. The first two decisions do not begin to address the balancing exercise inherent in a proportionality exercise. The third decision likewise fails in this regard, because it wrongly assumes that no protected family life exists. The totality of the evidence shows, on balance, that A1 and A2 have a very close bond; that A2 occupies the position of father-figure for A1; and that A1 needs the support of A2 and the latter's siblings. To deny reunion in those circumstances would amount to an unjustified interference with the Article 8/Article 7 rights of A1 and A2. I so find, having full regard to the provisions of the immigration rules on which the respondent relies and, more generally, to the importance of maintaining the system of immigration controls.

177. I have assessed the proportionality of the interference on the basis that A1's admission to the United Kingdom pursuant to Dublin III is not for the purpose of settlement, or even as a possible precursor to settlement, but for the purpose of having A1's asylum claim examined and decided by the respondent. Each of the parties alights on that point as an argument in their favour. I consider that the applicants' argument is to be preferred. It is a commonplace of human experience that a person's need for the support of their family is likely to be greatest at times of challenge for that person. Being in a supportive environment, of the kind that A2 and his siblings would provide, while A1 undergoes the application process is, on the facts of this case, of extreme importance to A1's wellbeing. To deny him this is disproportionate.

178. Each of the decisions, accordingly, falls to be quashed on Ground 2.

F. REMEDY

179. The final matter to address is the issue of remedy. Ms Knorr submits that mandatory relief is appropriate, since the only rational way in which the respondent could react

to the evidence now before her, is to exercise her discretion under Article 17(2) in favour of A1's admission to this country in order to be united with A2. This is, in other words, a case where human rights considerations turn the respondent's discretionary power into a duty.

180. I note that, at paragraph 84 of its judgment, the Tribunal in HA & Others cited Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997 as authority for the proposition that "a court should not compel any authority to do more than consider the exercise of a power which is merely permissive and does not impose an obligation to act". Padfield was, however, a case decided well before the enactment of the Human Rights Act 1998. In the field of human rights, there may be circumstances in which a court or tribunal will be fully satisfied that an administrative discretion cannot be lawfully exercised otherwise than in a particular way. I do not, therefore, consider the Padfield doctrine to stand in the way of Ms Knorr's submission.

181. It is, however, necessary for me to consider whether, despite the findings I have made on the evidence before me, it would be appropriate to deprive the respondent of the ability, acting in the public interest, to check whether there is, as matters now stand, any circumstance that may affect the exercise of Article 17(2) in A1's favour. I remind myself, in particular, of the need to give effect to the best interests of A1. I am also aware, of course, that the local authority has not had the opportunity of confirming, from its expert standpoint, A2's ability to take charge of and care for A1. The fact that we are without such an assessment is due to the fault of the respondent is nothing to the point, save that it means there is now a pressing need to act with extreme expedition, given A1's circumstances in Greece.

182. Accordingly, I decline to make a mandatory order. However, as well as quashing the decisions, I consider it appropriate to make a declaration that each of the decisions was unlawful as it breached A1's Article 8 ECHR/Article 7 CFR rights.

183. I will hear counsel on the form of the order, if the same cannot be agreed.

184. Likewise, I invite submissions on the issue of damages.

Direction Regarding Anonymity – rule 14 of the Tribunal Procedure (Upper Tribunal) rules 2008

Unless and until a tribunal or court directs otherwise, the applicants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the applicants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed: *Mr Justice Lane* Date: 23 June 2020

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber

ANNEX

Dublin III Regulation

Recitals

"(13) In accordance with the 1989 United Nations Convention on the Rights of the Child and with the Charter of Fundamental Rights of the European Union, the best interests of the child should be a primary consideration of Member States when applying this Regulation. In assessing the best interests of the child, Member States should, in particular, take due account of the minor's well-being and social development, safety and security considerations and the views of the minor in accordance with his or her age and maturity, including his or her background. In addition, specific procedural guarantees for unaccompanied minors should be laid down on account of their particular vulnerability.

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

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

…

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

…

39. This Regulation respects the fundamental rights and observes the principles which are acknowledged, in particular, in the Charter of Fundamental Rights of the European Union. In particular, this Regulation seeks to ensure full observance of the right to asylum guaranteed by Article 18 of the Charter as well as the rights recognised under Articles 1, 4, 7, 24 and 47 thereof. This Regulation should therefore be applied accordingly.

(40) Since the objective of this Regulation, namely the establishment of criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Regulation, be better achieved at Union level, the Union may adopt measures in accordance with the

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principle of subsidiarity as set out in Article 5 of the Treaty on European Union (TEU). In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.

Article 2 -
Definitions

For the purposes of this Regulation -

"…

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

- the spouse of the applicant or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals,

- the minor children of couples referred to in the first indent or of the applicant, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law,

- when the applicant is a minor and unmarried, the father, mother or another adult responsible for the applicant, whether by law or by the practice of the Member State where the adult is present,

- when the beneficiary of international protection is a minor and unmarried, the father, mother or another adult responsible for him or her whether by law or by the practice of the Member State where the beneficiary is present;

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

(i) 'minor' means a third-country national or a stateless person below the age of 18 years;

(j) 'unaccompanied minor' means a minor who arrives on the territory of the Member States unaccompanied by an adult responsible for him or her, whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such an adult; it includes a minor who is left unaccompanied after he or she has entered the territory of Member States;

…

Article 3

Access to the procedure for examining an application for international protection

"1. Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.

2. Where no Member State responsible can be designated on the basis of the criteria listed in this Regulation, the first Member State in which the application for international protection was lodged shall be responsible for examining it.

Where it is impossible to transfer an applicant to the Member State primarily designated as responsible because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible.

Where the transfer cannot be made pursuant to this paragraph to any Member State designated on the basis of the criteria set out in Chapter III or to the first Member State with which the application was lodged, the determining Member State shall become the Member State responsible.

…

Article 6

Guarantees for minors

1. The best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation.

2. Member States shall ensure that a representative represents and/or assists an unaccompanied minor with respect to all procedures provided for in this Regulation. The representative shall have the qualifications and expertise to ensure that the best interests of the minor are taken into consideration during the procedures carried out under this Regulation. Such representative shall have access to the content of the relevant documents in the applicant's file including the specific leaflet for unaccompanied minors.

This paragraph shall be without prejudice to the relevant provisions in Article 25 of Directive 2013/32/EU.

3. In assessing the best interests of the child, Member States shall closely cooperate with each other and shall, in particular, take due account of the following factors:

(a) family reunification possibilities;

(b) the minor's well-being and social development;

(c) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking;

(d) the views of the minor, in accordance with his or her age and maturity.

4. For the purpose of applying Article 8, the Member State where the unaccompanied minor lodged an application for international protection shall, as soon as possible, take appropriate action to identify the family members, siblings or relatives of the unaccompanied minor on the territory of Member States, whilst protecting the best interests of the child.

…

Article 7
Hierarchy of criteria

1. The criteria for determining the Member State responsible shall be applied in the order in which they are set out in this Chapter.

…

Article 8
Minors

1. Where the applicant is an unaccompanied minor, the Member State responsible shall be that where a family member or a sibling of the unaccompanied minor is legally present, provided that it is in the best interests of the minor. Where the applicant is a married minor whose spouse is not legally present on the territory of the Member States, the Member State responsible shall be the Member State where the father, mother or other adult responsible for the minor, whether by law or by the practice of that Member State, or sibling is legally present.

2. Where the applicant is an unaccompanied minor who has a relative who is legally present in another Member State and where it is established, based on an individual examination, that the relative can take care of him or her, that Member State shall unite the minor with his or her relative and shall be the Member State responsible, provided that it is in the best interests of the minor.

…

4. In the absence of a family member, a sibling or a relative as referred to in paragraphs 1 and 2, the Member State responsible shall be that where the unaccompanied minor has lodged his or her application for international protection, provided that it is in the best interests of the minor.

…

Article 17
Discretionary clauses

1. By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-

country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation.

The Member State which decides to examine an application for international protection pursuant to this paragraph shall become the Member State responsible and shall assume the obligations associated with that responsibility. Where applicable, it shall inform, using the 'DubliNet' electronic communication network set up under Article 18 of Regulation (EC) No 1560/2003, the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of, or to take back, the applicant.

…

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

The request to take charge shall contain all the material in the possession of the requesting Member State to allow the requested Member State to assess the situation.

The requested Member State shall carry out any necessary checks to examine the humanitarian grounds cited, and shall reply to the requesting Member State within two months of receipt of the request using the 'DubliNet' electronic communication network set up under Article 18 of Regulation (EC) No 1560/2003. A reply refusing the request shall state the reasons on which the refusal is based.

Where the requested Member State accepts the request, responsibility for examining the application shall be transferred to it.

…

Article 22
Replying to a take charge request

1. The requested Member State shall make the necessary checks, and shall give a decision on the request to take charge of an applicant within two months of receipt of the request.

2. In the procedure for determining the Member State responsible elements of proof and circumstantial evidence shall be used.

…

4. The requirement of proof should not exceed what is necessary for the proper application of this Regulation.

5. If there is no formal proof, the requested Member State shall acknowledge its responsibility if the circumstantial evidence is coherent, verifiable and sufficiently detailed to establish responsibility.

…

Article 27
Remedies

1. The applicant or another person as referred to in Article 18(1)(c) or (d) shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.

…"

Commission Regulation (EC (1560/2003) (The first Implementing Regulation)

…

"*Article 3*
Processing requests for taking charge

1. The arguments in law and in fact set out in the request shall be examined in the light of the provisions of Regulation (EC) No 343/2003 and the lists of proof and circumstantial evidence which are set out in Annex II to the present Regulation.

2. Whatever the criteria and provisions of Regulation (EC) No 343/2003 that are relied on, the requested Member State shall, within the time allowed by Article 18(1) and (6) of that Regulation, check exhaustively and objectively, on the basis of all information directly or indirectly available to it, whether its responsibility for examining the application for asylum is established. If the checks by the requested Member State reveal that it is responsible under at least one of the criteria of that Regulation, it shall acknowledge its responsibility.

…

Article 5
Negative reply

1. Where, after checks are carried out, the requested Member State considers that the evidence submitted does not establish its responsibility, the negative reply it sends to the requesting Member State shall state full and detailed reasons for its refusal.

2. Where the requesting Member State feels that such a refusal is based on a misappraisal, or where it has additional evidence to put forward, it may ask for its request to be re-examined. This option must be exercised within three weeks following receipt of the negative reply. The requested Member State shall endeavour to reply within two weeks. In any event, this additional procedure

shall not extend the time limits laid down in Article 18(1) and (6) and Article 20(1)(b) of Regulation (EC) No 343/2003.

…

Article 12
Unaccompanied minors

1. Where the decision to entrust the care of an unaccompanied minor to a relative other than the mother, father or legal guardian is likely to cause particular difficulties, particularly where the adult concerned resides outside the jurisdiction of the Member State in which the minor has applied for asylum, cooperation between the competent authorities in the Member States, in particular the authorities or courts responsible for the protection of minors, shall be facilitated and the necessary steps taken to ensure that those authorities can decide, with full knowledge of the facts, on the ability of the adult or adults concerned to take charge of the minor in a way which serves his best interests.

   Options now available in the field of cooperation on judicial and civil matters shall be taken account of in this connection.

2. The fact that the duration of procedures for placing a minor may lead to a failure to observe the time limits set in Article 18(1) and (6) and Article 19(4) of Regulation (EC) No 343/2003 shall not necessarily be an obstacle to continuing the procedure for determining the Member State responsible or carrying out a transfer.

Article 13
Procedures

1. The initiative of requesting another Member State to take charge of an asylum seeker on the basis of Article 15 of Regulation (EC) No. 343/2003 shall be taken either by the Member State where the application for asylum was made and which is carrying out a procedure to determine the Member State responsible, or by the Member State responsible.

2. The request to take charge shall contain all the material in the possession of the requesting Member State to allow the requested Member State to assess the situation.

3. The requested Member State shall carry out the necessary checks to establish, where applicable, humanitarian reasons, particularly of a family or cultural nature, the level of dependency of the person concerned or the ability and commitment of the other person concerned to provide the assistance desired.

…"

Commission implementing Regulation (EU) No. 118/2014 ("The second Implementing Regulation")

"…

Article 1

Amendments to Regulation EC No. 1560/2003

Regulation (EC) No. 1560/2003 is amended as follows:

…

(7) In Article 12, the following paragraphs are added:

'3. With a view to facilitating the appropriate action to identify the family members, siblings or relatives of an unaccompanied minor, the Member State with which an application for international protection was lodged by an unaccompanied minor shall, after holding the personal interview pursuant to Article 5 of Regulation (EU) No 604/2013 in the presence of the representative referred to in Article 6(2) of that Regulation, search for and/or take into account any information provided by the minor or coming from any other credible source familiar with the personal situation or the route followed by the minor or a member of his or her family, sibling or relative.

The authorities carrying out the process of establishing the Member State responsible for examining the application of an unaccompanied minor shall involve the representative referred to in Article 6(2) of Regulation (EU) No 604/2013 in this process to the greatest extent possible.

4. Where in the application of the obligations resulting from Article 8 of Regulation (EU) No 604/2013, the Member State carrying out the process of establishing the Member State responsible for examining the application of an unaccompanied minor is in possession of information that makes it possible to start identifying and/or locating a member of the family, sibling or relative, that Member State shall consult other Member States, as appropriate, and exchange information, in order to:

(a) identify family members, siblings or relatives of the unaccompanied minor, present on the territory of the Member States;

(b) establish the existence of proven family links;

(c) assess the capacity of a relative to take care of the unaccompanied minor, including where family members, siblings or relatives of the unaccompanied minor stay in more than one Member State.

5. Where the exchange of information referred to in paragraph 4 indicates that more family members, siblings or relatives are present in another Member State or States, the Member State where the unaccompanied minor is present shall cooperate with the relevant Member State or States, to

determine the most appropriate person to whom the minor is to be entrusted, and in particular to establish:

(a) The strength of the family links between the minor and the different persons identified on the territories of the Member States;

(b) the capacity and availability of the persons concerned to take care of the minor;

(c) the best interests of the minor in each case.

6. In order to carry out the exchange of information referred to in paragraph 4, the standard form set out in Annex VIII to this Regulation shall be used.

The requested Member State shall endeavour to reply within four weeks from the receipt of the request. Where compelling evidence indicates that further investigations would lead to more relevant information, the requested Member State will inform the requesting Member State that two additional weeks are needed.

…

Home Office: Dublin III Regulation Version 2.0: Transferring asylum applicants into and out of the UK where responsibility for examining an asylum claim lies with the UK or with another EU Member State or Associated State (18 April 2019)

"Background

…

The Dublin III Regulation is consistent with the principle of family unity in accordance with the European Convention for the Protection of Human Rights, the Charter of Fundamental Rights and the best interests of the child. The provisions on family unity and the best interests of the child are primary considerations which may result in the State responsible for examining the asylum claim being the State where an asylum claimant's family members or relatives, as defined in the Dublin III Regulation, are legally present or resident (depending on the circumstances of the case). The determination of responsibility for examining an asylum claim based on family links does not anticipate the outcome of the examination of the claim, only that the merits of that claim will be examined by the responsible Dublin State.

The criteria determining responsibility also reflect the basic principle that the State which played the greatest part in the applicant's presence in the area to which the Dublin III Regulation applies should normally be responsible for examining his or her asylum claim.

The Dublin III Regulation gives Dublin States discretion to derogate from the responsibility criteria. It does so through the 'discretionary clauses', which permit a Dublin State to examine an asylum claim lodged with it, or when asked to do so by another Dublin State, even if such examination is not its responsibility under the Regulation's responsibility criteria. A Dublin State may ask another Dublin State to accept responsibility for an asylum claim to bring together family relations on

humanitarian grounds based in particular on family or cultural considerations in cases where the strict application of the Regulation would keep them apart.

…

Policy intention

The policy intention is to deliver a fair and effective Dublin III Regulation transfer process both into and out of the UK, which supports the principles enshrined within the Dublin III Regulation by:

- applying its criteria and mechanisms so that an asylum claim is examined by a single responsible State
- reinforcing the principle that asylum seekers should claim in the first safe country and as soon as they enter the territory of the Dublin States
- ensuring fair, objective criteria are applied in the determination of responsibility for examining asylum claims
- ensuring consideration of the principles of family unity in respect of determining the Dublin State responsible for examining an asylum claim
- ensuring respect for family life and the best interest of a child are a primary consideration when applying the Dublin III Regulation

…

- allowing for derogation from the responsibility criteria, on humanitarian grounds, in order to bring together family relations and examine a claim for international protection, even if such examination is not the responsibility under the binding criteria laid down in the Dublin III Regulation
- ensuring that the fundamental human rights of those who are subject to the Dublin III Regulation procedures are not breached
- ensuring cases are dealt with as expeditiously as possible, particularly in cases involving unaccompanied children

Application in respect of children

Section 55 of the Borders, Citizenship and Immigration Act 2009 requires the Secretary of State to make arrangements for ensuring that immigration, asylum and nationality functions are discharged having regard to the need to safeguard and promote the welfare of children who are in the UK.

Although section 55 does not apply to children outside the UK the statutory guidance, Every Child Matters: Change for Children, clarifies the approach to be taken by requiring staff to take into account the spirit of the duty and to abide by any international or local agreements that are in place. The application of the spirit of the duty means that when a claim or request has been received that requires a response

you must be alert to any indications that the child may be in need of assistance, support or protection from harm that may be best provided by the authorities in the country where the child is present. If this is the case and wherever possible the normal providers of relevant services to children in that country should be informed where there are safeguarding or welfare needs that require attention.

The requirement to abide by any international or local agreements in place means just that. When considering a 'take charge' request under the Dublin III Regulation, the presumption must be that those making the request are doing so having taken into account the safety and welfare needs, and well-being in the form of best interests of the child who is the subject of the request. However, acting in a way that takes account of these interests is a shared responsibility at this point and you must carefully consider all of the information and evidence provided as to how a child will be affected by a decision and this must be addressed when assessing whether an applicant meets the criteria in the Dublin III Regulation. In addition, you must demonstrate that all relevant information and evidence provided about the best interests of a child, such as a sibling or other relative, in the UK have been considered. This is required as a particular obligation under section 55 as well as by the more general provisions of the Dublin III Regulation. You must carefully assess the quality of any evidence provided. Original documentary evidence from official or independent sources must be given more weight in the decision-making process than unsubstantiated statements about a child's best interests.

…

Charter of Fundamental Rights of the European Union

Article 24 of the Charter concerns children. It reads:

> 'Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.'

European Convention on Human Rights

Not all Dublin State human rights obligations are explicitly covered by the responsibility criteria set out in the Dublin III Regulation, but these broader human rights obligations must still be taken into account when applying the Dublin III Regulation. The European Convention on Human Rights (ECHR) provides the framework for ensuring the rights and fundamental freedoms of individuals in European signatory states.

…

Article 17 – Discretionary clauses

Article 17(1) is known as the 'sovereignty clause'. It permits a Dublin State to decide to examine a claim for international protection lodged with it even if it is not responsible for any other reason laid down in the Dublin III Regulation. In other words, this provision concerns a situation where, for example, a claimant is in the UK and has lodged a claim here and, although another Dublin State is responsible for examining the claim, there are exceptional compassionate circumstances, such as individual human rights considerations, that justify the exercise of discretion to examine the asylum claim in the UK.

…

Article 17(2) also concerns the exercise of discretion, but in different circumstances. It makes specific reference to the situation where either a Dublin State carrying out the procedure to determine responsibility or the responsible Dublin State itself may, at any time before a first decision on the substance of the protection claim is made, request another Dublin State to bring together any family relations on humanitarian grounds based in particular on family or cultural considerations. For this reason this provision is sometimes known as the 'humanitarian clause' (compared to the 'sovereignty clause', above).

Unlike the terms 'family member' and 'relative', the term 'relations' is not defined in the Dublin III Regulation. The reference to family and cultural considerations in Article 17(2) allows Dublin States to exercise their discretion to bring together individuals who are part of an extended family group recognised in other cultures. The persons concerned must consent in writing.

In all Article 17 cases – either the sovereignty clause in 17(1) or the humanitarian clause in 17(2) - the evidence submitted with the request to exercise discretion must be coherent, verifiable and detailed. Situations in which it would be appropriate to exercise discretion to examine the claim(s) in the UK when the UK is not otherwise responsible will be rare and on an exceptional basis. Any decisions to exercise discretion must be agreed by a manager (minimum SEO).

…

Unaccompanied children

Unaccompanied children may lodge an asylum claim in one Dublin State when they have family in another Dublin State. In such cases the Dublin III Regulation provides that the State responsible for examining the asylum claim will be that where the family member, sibling or relative (as defined in the Dublin III Regulation) is legally present, provided this is in the best interests of the child (and that in cases involving relatives, that the relative is able to take care of the child). The purpose of the transfer is for the asylum claim to be examined on its merits and does not anticipate the outcome of the consideration of the asylum claim or permission to remain in that State.

In 2013 the Court of Justice of the European Union (CJEU) ruled in MA and others v Secretary of State for the Home Department C-648/11 that where an unaccompanied child with no family members legally present in the territory of a Dublin State has lodged an asylum claim in more than one Dublin State, the Dublin III Regulation

should be interpreted so that responsible State is the State in which the most recent claim for asylum is lodged and this is in the best interests of the child. Although there is provision for the transfer of unaccompanied children this is only appropriate in family related circumstances where the bringing together of the child with his or her family member, sibling or relative is considered to be in the best interests of the child. Any case where there is evidence that it may be in the best interests of an unaccompanied asylum-seeking child to request that another Dublin State accept responsibility for examining his or her asylum claim on family grounds must be discussed with a senior caseworker in TCU, who may then wish to seek further advice from Asylum Policy.

…

Family tracing: special provisions for unaccompanied children

Article 6 of the Dublin III Regulation concerning guarantees for minors (children) provides that for the purposes of applying the provisions relating to responsibility for examining an asylum claim the Member State where the unaccompanied child has lodged his or her claim shall take appropriate action to identify family members, siblings or relatives on the territory of the Dublin States. The Commission Implementing Regulation includes a specific form for this purpose. The aim of the standardised information exchange related to unaccompanied children is, in line with the child's best interest as a primary consideration, to identify the child's family members, siblings or relatives present on the territory of the Dublin States, establish the existence of proven family links between them, to assess the capacity of a relative to take care of the child and where relevant, determine the most appropriate person to whom the child is to be entrusted.

…

Rejected requests

In the event of a **negative reply** to a take charge or take back request, it is open to the requesting State to challenge the refusal if it feels that the refusal was based on a misappraisal, or when it has additional evidence to put forward, by asking that its formal request be re-examined. This must be done within 3 weeks of the receipt of the negative reply. The requested Dublin State shall strive to reply to a re-examination request within 2 weeks. However, a lack of an answer within 2 weeks is not the same as accepting the request as acceptance by default is not possible at this stage in the procedure. Further information on this can be found in Article 5(2) of the Implementing Regulation 1560/2003 as amended by Implementing Regulation 118/2014.

…

Dublin process: requests for transfer into the UK

…

Both Articles 8(1) and 8(2) require the transfer to be in the best interests of the child. The best interests of the child must always be a primary consideration when applying the Regulation in family unity cases. When assessing a child's best interests, Dublin

States should cooperate with each other taking due account of factors such as family reunification possibilities, the child's well-being and social development, safety and security considerations and the views of the child in accordance with their age and maturity, and background.

The European Intake Unit (EIU) will work with the local authority in which the family member, sibling or relative of the child is residing. Local authorities will be requested to undertake an assessment with the family or relative(s) once the family link has been established, in addition to the checks undertaken by EIU, which will inform a recommendation to EIU as to whether the request should be accepted or rejected. The checks and assessment to be undertaken by the local authority will be outlined in the Department for Education's forthcoming Friends and Family Guidance. All decisions on whether to accept a request to take charge of a child's asylum application (and so accept the transfer of a child to the UK) will be the responsibility of the Home Office; however, these decisions will be informed by the assessment and recommendation provided by local authorities.

…

Unaccompanied children: notifying local authorities and or social services

You must ensure that both local authority children's social care services at the child's point of entry and where the child's family member, sibling or relative reside are notified of the transfer request under the Dublin III Regulation. This must be done as soon as possible after the formal request to take charge is received from the requesting State.

You must engage local authorities' children's social care teams throughout the process, seeking their advice in every case. You must keep accurate records of what information is relayed, who is spoken to, when and by whom. Article 12 of the Implementing Regulation 1560/2003, as amended by Implementing Regulation 118/2014 refers to the role of authorities responsible for the protection of children having full knowledge of the facts to consider the ability of the adult or adults concerned to take charge of the child in a way which serves their best interests.

Article 12 also acknowledges that there may be cases where family members, siblings, or relatives stay in more than one Dublin State, in which case the State in which the child is present must cooperate with the State(s) concerned to determine:

- the strength of the family links between the child and the different persons identified across the Dublin States
- the capacity and availability of the persons concerned to take case of the child
- the best interests of the child in each case

…

When considering a request to transfer an unaccompanied child to the UK under the Dublin III Regulation, you must adhere to the spirit of the section 55 duty and careful consideration must be given to their safeguarding and welfare needs in assessing their best interests. You must work with local statutory child safeguarding agencies in the

UK in order to develop arrangements that protect children and reduce the risk of trafficking and exploitation.

The re-establishment of family links would normally be regarded as being in accordance with the section 55 duty, but this may not always be the case. Whilst a non-exhaustive list, the re-establishment of family links would not be in accordance with section 55, for example, if it is identified that:

- the safety of the child or their family will be jeopardised
- the child has a well founded fear of relevant family members
- the relevant family members are the alleged actors of persecution within the claim for asylum which has not yet been finally determined
- the child is a recognised or potential victim of trafficking in which the family were knowingly complicit
- the child has shown to have been previously exploited or abused or neglected by their family, or claims to have been previously exploited or abused or neglected by their family and this has not been conclusively discounted

…

Sponsorship undertaking in cases involving unaccompanied children (Article 8 of the Dublin III Regulation)

A sponsorship undertaking form must be sent to their family member or relative in the UK and representative (where notification is given) as soon as a transfer request is received. Five working days must be given to complete and return the form. If it is not returned within this time limit you must pursue return by telephone, if a number is available, or by sending a further letter requesting a response.

Whilst not a legal requirement of the Dublin III Regulation or Implementing Regulation, the sponsorship undertaking form will require the family to state clearly whether they are willing and able to receive the child. It will bring to the attention of the UK family member or relative, their obligations and responsibilities, and it will provide them the opportunity to raise any issues or questions about their obligations or responsibilities prior to a child's arrival.

Confirming the status of the family member, sibling or relative

Under Article 8 of the Dublin III Regulation you must be satisfied when considering a transfer request that the parties are related as claimed and that the claimant's family member, sibling or relative is legally present in the UK. Where the subject of the request is an unaccompanied child in addition to the family member, sibling or relative's legal status in the UK having been confirmed, the transfer must also be in the child's best interests.

…

Dependency and discretionary provisions

…

Article 17 is a discretionary clause which sits outside of Chapter III of the hierarchy criteria. It allows a Dublin State to exercise discretion and examine an asylum claim even if it is not its responsibility under the criteria laid out in the Dublin III Regulation. Article 17(2) is relevant to family unity cases where an applicant for asylum is in another Dublin State (a formal asylum claim must have been lodged) and there are family relations in the UK. Article 17(2) can only be applied if all persons give their consent and a formal request by the Dublin State in which the applicant is present/the responsible State, must be made before a first decision on the claim for asylum is taken.

Article 17(2) provides that a Dublin State may (at any time before a first decision regarding the substance is taken) request another to take charge of an applicant in order to bring together any family relations on humanitarian grounds. Written consent is required from the persons concerned in Article 17(2) as part of the request.

Where an Article 17(2) request is received from another Dublin State, caseworkers should consider whether there are any exceptional circumstances or compassionate factors which may justify the UK exercising discretion and accepting responsibility for the claim, notwithstanding that the UK is not bound to do so under the Dublin III Regulation. There may be exceptional circumstances raised by the evidence submitted with the request from the other Dublin State which would result in unjustifiably harsh consequences for the applicant or their family relations. It is for the requesting Dublin State to demonstrate what the exceptional circumstances or compassionate factors are in their case: the evidence submitted with the request to exercise discretion must be coherent, verifiable and detailed in line with the Dublin III Regulation's general provisions on evidence.

Each request must be decided on its individual merits . However, situations in which it would be appropriate to exercise discretion will be rare and on an exceptional basis. In considering whether or not to exercise discretion caseworkers should act consistently with the Immigration Rules and policies on family members, for example the Immigration Rules Appendix FM – Family Members.

Caseworkers must discuss with a senior caseworker any case where the exercise of discretion under Article 17(2) may be appropriate before accepting a request.

Confirming the relationship

…

The onus is on the applicant and their qualifying family member, sibling, relative or relations in line with the relevant provisions in the Dublin III Regulation (Articles 8-11, 16 and 17(2) Dublin Regulation (EU) No. 604/2013) in the UK to prove their relationship and satisfy you that they are related as claimed.

…

In addition to elements of proof, circumstantial evidence or indicative evidence may also be submitted with a transfer request, such as:

- verifiable information from the applicant:
    - any documents an applicant wishes to rely upon should be provided in English, or accompanied by English translations
    - the onus is on the requesting Dublin State to provide the translation, however you have the discretion to arrange for an untranslated document to be translated at Home Office expense where this is justifiable in the individual circumstances of the case – the expectation is that this will be justified only in rare, exceptional cases and only after consultation with a senior caseworker
- statements from the family members concerned
- statements or information from the authorities with responsibility for the child in the requesting Dublin State
- reports or confirmation of the information by an international organisation such as UNHCR, International Committee of the Red Cross or Save the Children

…

As above, you must be satisfied that the applicant and family member, sibling, relative or relations in the UK are related as claimed if the UK is to accept a request to acknowledge responsibility for examining an asylum claim lodged in another State. The applicant and their UK-based qualifying family member, sibling or relation should provide sufficient evidence to prove their relationship and satisfy you that they are related as claimed. You must consider whether, on the 'balance of probabilities'(the civil law standard), there is sufficient information to accept that the parties are related as claimed. In other words, you must decide whether, after looking at all the evidence, it is more likely than not that the applicant and the person in the UK are related as claimed.

…

You must, having considered the evidence submitted by the requesting State (proof or circumstantial evidence, as above, including information provided on standard forms which aim to establish the proven family link and the dependency link between the applicant and his or her child, sibling or parent, as well as to establish the capacity of the person concerned to take care of the dependent person), information contained in Home Office records and evidence submitted by the person in the UK, be satisfied that the parties are related as claimed.

You must be mindful of the difficulties that people may face in providing documentary evidence of their relationship. Those fleeing conflict zones or dangerous situations may not have time to collect supporting documents and may not realise they may be required. However, depending on the circumstances and country of origin it may well be possible for documents to be sent by post, faxed or emailed.

…"