In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

JR-2022-LON-000555

In the matter of an application for Judicial Review

The King on the application of
MH

(ANONYMITY ORDER MADE)

Applicant

versus

Secretary of State for the Home Department

Respondent

ORDER

BEFORE Mrs Justice Lang DBE, siting as a Judge of the Upper Tribunal

HAVING considered all documents lodged and having heard Mr B. Bundock of counsel, instructed by Wilson Solicitors LLP, for the applicant and Ms M. Bayoumi of counsel, instructed by Government Legal Department, for the respondent at a hearing on 19 October 2022;

IT IS ORDERED THAT:

(1) The application for judicial review is refused for the reasons in the attached judgment.

(2) The Applicant do pay the Respondent's costs. The Applicant having the benefit of cost protection under section 26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the amount that the Applicant is to pay shall be determined on an application by the Respondent under regulation 16 of the Civil Legal Aid (Costs) Regulations 2013. Any objection by the Applicant to the amount of costs claimed shall be dealt with on that occasion.

(3) There shall be a detailed assessment of the Applicant's publicly funded costs.

(4) The application by the Applicant's solicitors for an extension of time to make a possible application for permission to appeal at a later date is refused, for these reasons. The Applicant's solicitors have not been able to make contact with the Applicant since the draft judgment was sent to the parties on 4 November 2022, and therefore they have no instructions. I consider there is a real risk that the Applicant will not make contact, either in the near future or at all. The note below explains that the Upper Tribunal must determine whether or not to grant permission to appeal when the order disposing of the claim is made, whether or not any application for permission has been made. However, if the Applicant makes contact within 28 days of the date on which this decision is sent, he can apply for permission to appeal to the Court of Appeal.

(5) Permission to appeal is refused, as the judgment of the Upper Tribunal does not disclose any error of law and an appeal has no real prospect of success. The decision of the Respondent turned on the particular facts in this case, and does not raise any issues of principle or wider importance.

Signed: Mrs Justice Lang

Mrs Justice Lang

Dated: **14 November 2022**

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): **21/11/2022**

Solicitors: Wilson Solicitors LLP Ref No.
Home Office Ref: EIU/5388621

Notification of appeal rights

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

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

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

Case No: JR-2022-LON-000555

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London,
EC4A 1WR

21 November 2022

Before:

MRS JUSTICE LANG DBE

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Between:

THE KING
on the application of
MH
(ANONYMITY ORDER MADE)

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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

Benjamin Bundock
(instructed by Wilson Solicitors LLP), for the applicant

Mona Bayoumi
(instructed by the Government Legal Department) for the respondent

Hearing date: 19 October 2022

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J U D G M E N T

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Mrs Justice Lang:

1. The Applicant, who is a national of Afghanistan, aged 17, seeks judicial review of the Respondent's decision ("the Decision"), dated 27 January 2022, in which she rejected a "Take Charge Request" ("TCR") from the French authorities to the United Kingdom ("UK") under Article 8.1 of the Dublin III Regulation ("Dublin III"), Council Regulation (EU) No. 604/13, in respect of the Applicant's application to be reunited with his brother, RH, in the UK.

2. Permission was granted on the papers by Upper Tribunal ("UT") Judge Macleman on 7 June 2022. Although he gave permission on all grounds, he expressed reservations about Grounds 1(i) and (iii), 2 and 3. He considered that Ground 1(ii) "shows scope for debate on whether the evidence before the SSHD led to a duty to facilitate DNA testing of MH and RH".

3. The Respondent's decision made on 27 January 2022 was a reconsideration following a judicial review challenge to an earlier rejection decision ("the first decision"), made on 12 February 2021, which the Respondent withdrew after permission was granted by UT Judge Rimington on 20 July 2021.

History

4. The Applicant is an unaccompanied asylum-seeking minor ("UASM"), currently residing in France. He was born on 13 January 2005 in Afghanistan.

5. RH is the Applicant's sponsor. He is a British citizen, resident in Birmingham. He owns his own home and runs a takeaway food business. He was born in Afghanistan on 2 May 1993. RH's family fled from Afghanistan in 2008. RH became separated from his parents and siblings and travelled to the UK alone in 2008 where he was granted refugee status. He subsequently obtained indefinite leave to remain and naturalised as a British citizen.

6. In 2013, RH sponsored an application for family reunion by his brother AMR. AMR was granted entry clearance for family reunion with RH in the UK, and now resides in the UK.

7. RH submitted a statement, dated 10 December 2020, in support of the TCR. He stated that he was born and grew up in Khumdan village, Takhar province, Afghanistan. He lived with his parents, F and A, his two sisters and his brother, AMR. RH claimed that he did not know that the Applicant was also his brother until recently because the Applicant was brought up by his grandparents until they died, and then by RH's aunt Ane and her husband Hashim. According to Ane, RH's parents did not want the financial burden of another child and so they gave the Applicant to his grandparents and aunt to raise.

8. RH also stated that since the Applicant left Afghanistan, they had been in regular contact with each other, and RH visited MH in Turkey for 3 to 4 days in August 2020.

9. RH made a further statement on 11 May 2021, to clarify his previous statement, in which he explained that his parents lived in the same village as his grandparents, and Ane and her family. His grandparents and Ane and her family lived in adjoining houses on the same plot of land. When he visited his grandparents and Ane and her family, he believed that the Applicant was Ane's son. It was not unusual for families to have many children and for children to stay at different people's houses.

10. RH stated that Ane told him that the Applicant was in fact his brother in about 2015 or 2016. RH did not try to speak to the Applicant about this at that time. The Applicant left Afghanistan for Iran with Ane and her family in 2018. In Iran, Ane told the Applicant of his true parentage and that was when RH began speaking to the Applicant regularly on the telephone.

11. RH reiterated the evidence he gave in his first statement to the effect that he was unable to obtain a Taskera (identity document) because the area where he lived was under Taliban control. However, a new online process was available and he and AMR had used it to apply for a Taskera for AMR. Subsequent evidence indicated that AMR had obtained one before the online process closed. The Applicant does not have a Taskera either.

12. In his statement dated 8 November 2021, RH described his visit to the Applicant in Paris in 2021. RH's parents are in Pakistan and RH is still in touch with them. However, he stated that his mother's memory has been affected by traumatic experiences, and over the past year she has had difficulty in remembering family members, and so might not be able to remember the Applicant.

13. The Applicant made a statement in the first judicial review challenge on 11 May 2021. He stated that he was raised by his maternal grandmother and grandfather in Khumdan village, Takhar province Afghanistan. His grandfather died when he was very young. His grandmother died when he was about 14 years old. After her death, he was cared for by Ane and Hashim who lived next door, with their five children. He grew up believing that Ane and Hashim were his parents, and that their children were his siblings.

14. The Applicant stated that when he was 14 years old, Hashim fled to Iran and Ane followed a few months later with the children, including the Applicant. In Iran, Ane told the Applicant that she and Hashim were not his parents. His biological parents were F and A. The report of the Independent Social Worker, Mr Horrocks, stated that the Applicant told him that when growing up he would see F and A regularly, and considered them to be his aunt and uncle. The Applicant filed a witness statement on 12 October 2022 stating that this was a mistaken account. I address this under Ground 3 (Article 8) as it post-dates the Respondent's decision.

15. Ane also told him that his two biological brothers, RH and AMR, were living in the UK, and the Applicant began to speak to them on the telephone. However, the Applicant decided not to make contact with his biological parents.

16. Ane arranged for the Applicant and her eldest son to travel from Iran to Turkey. RH visited him whilst he was in Turkey. The Applicant then travelled alone to Europe, so that he could join RH in the UK. When he arrived in France he claimed asylum, and applied to be reunited with RH in the UK. As an unaccompanied minor, he has been supported by French social services. The Applicant is still in contact with Ane and her eldest son.

17. In his second witness statement dated 7 November 2021, the Applicant provided updating details about his ongoing contact with RH, including RH's visit to Paris in 2021.

18. Mr Horrocks, an Independent Social Worker, was commissioned by the Applicant's representatives to provide an assessment on 1 October 2021. He advised that the Applicant was seeing a psychologist because of his confusion about his family, which was likely to affect his mental health in future. If his application for reunion with RH did not succeed, he would remain isolated in France where he has no family and he does not want to live. He recommended that it was in the best interests of the Applicant to be reunited with his brother RH.

The TCR

19. Safe Passage International, a charity which supports UASMs with family reunion applications, prepared the application in support of the TCR. The application was supported by a statement from Medecins Sans Frontieres setting out the Applicant's case.

20. Under cover of a letter from Safe Passage, dated 10 December 2020, the French authorities submitted a TCR to the Respondent, under Article 8(1) of Dublin III, for MH to be reunited with his brother RH in the UK. The Respondent's records indicate that the request was in fact made on 24 December 2020.

21. The Respondent rejected the request on 12 February 2021 on the ground that there was insufficient evidence to demonstrate the family link between the Applicant and RH.

22. The Applicant filed a claim for judicial review which the Respondent resisted. UT Judge Rimington granted permission to apply for judicial review on 20 July 2021.

23. On 21 September 2021, the Respondent confirmed that she was withdrawing the decision of 12 February 2021. In a consent order dated 11 October 2021, the Respondent agreed to make a fresh decision and the Applicant withdrew the claim.

24. The GCID Case Record Sheet for 2 September 2021 records that an officer was asked to look at the evidence in the judicial review claim and decide whether a relationship could be established between the Applicant and RH. The officer concluded that it was difficult to confirm the relationship on the evidence. He advised that it would be appropriate to facilitate DNA testing to confirm the relationship. This was followed by a note on 27 September 2021 stating "[i]n light of the current litigation involved in this matter, this is only a recommendation without the benefit of legal advice from GLD and is subject to SMT approval and other internal stakeholders such as policy and HOLA".

25. In a letter dated 27 January 2022, the Respondent rejected the request by the French authorities to take charge of the Applicant in the UK. Having conducted an investigation and considered all the evidence, the Respondent was not satisfied that the claimed family link between MH and RH was established. I shall consider the reasons given by the Respondent under the grounds of challenge.

Legal and policy framework

Dublin III

26. Dublin III establishes the criteria and mechanisms for determining which EU Member State is responsible for examining a third country national's asylum claim. It reflects the principle that those seeking international protection should usually seek asylum in the first safe country they reach. However, if a Member State where an asylum application is lodged considers, on the basis of strict criteria, that another Member State is responsible for determining the claim, the first State (the "requesting State") must ask the second State (the "requested State") to take charge of the applicant's claim. Dublin III is supplemented by Commission Implementing Regulation (EC) No. 1560/2003, as amended by Regulation (EU) No. 118/2014, ("the Implementing Regulation") which provides more detailed provisions for the operation of Dublin III.

27. On 31 December 2019, Dublin III was revoked by regulation 54 of and paragraph 3(h) of Schedule 1 to the Immigration, Nationality and Asylum (EU Exit) Regulations 2019 ("the 2019 Regulations"). However, in relation to a request made to the UK before that time to take charge or take back a person to whom, when the request was made, the Dublin family provisions (including Article 8 - Minors) applied and a final decision on the request had not been taken, certain saved provisions of Dublin III and implementing regulations continue to apply with modifications: see paragraph 9 of Schedule 2 to the 2019 Regulations. Article 27, which conferred the right to an effective remedy, has not been saved.

28. Dublin III (as saved in the UK) provides materially as follows:

"Article 6 (Guarantees for minors)

1. The best interests of the child shall be a primary consideration for Member States …."

"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.

…."

"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.

3. ……

(a) Proof

(i) This refers to formal proof which determines responsibility pursuant to this Regulation, as long as it is not refuted by proof to the contrary;

(ii)…..

(b) Circumstantial evidence:

(i) This refers to indicative elements which while being refutable may be sufficient, in certain cases, according to the evidentiary value attributed to them;

(ii) their evidentiary value, in relation to the responsibility for examining the application for international protection shall be assessed on a case-by-case basis.

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."

29. Annex II, List A of the Implementing Regulation is entitled 'Means of Proof'. This provides:

"I. Process of determining the State responsible for examining an application for international protection

> 1. Presence of a family member, relative or relation (father, mother, child, sibling, aunt, uncle, grandparent, adult responsible for a child, guardian) of an applicant who is an unaccompanied minor (Article 8)
>
> Probative evidence
>
> - written confirmation of the information by the other Member State;
>
> - extracts from registers;
>
> - residence permits issued to the family member;
>
> - evidence that the persons are related, if available;
>
> - failing this, and if necessary, a DNA or blood test.
>
> ……..”

30. List B in Annex II is headed “Circumstantial Evidence”. This provides:

> “I. Process of determining the State responsible for examining an application or international protection
>
> 1. Presence of a family member (father, mother, guardian) of an applicant who is an unaccompanied minor (Article 8)
>
> Indicative evidence
>
> - verifiable information from the applicant;
>
> - statements by the family members concerned;
>
> - reports/confirmation of the information by an international organisation, such as the UNHCR.
>
> ……”

Policy

31. The Respondent has adopted a policy titled “Requests made to the UK under the Dublin 3 Regulation prior to the end of the Transition Period” (Version 1.0) (“the transitional policy”).

32. The transitional policy (at page 21) requires the European Intake Unit (“EIU”) to invite the local authority to provide any information that they hold that will allow a decision to be taken on the family link. If the family link is established, the EIU will then ask the relevant authority to undertake a full safeguarding assessment of the family member.

33. The transitional policy (at page 24) explains that, under Article 8 of the Dublin III Regulation, when considering a transfer request from an unaccompanied child, the decision maker must be satisfied that the parties are related as claimed, the sponsor is legally present in the UK and that the transfer is in the child’s best interests.

34. At page 26 of the transitional policy, under the heading “Confirming the relationship,”

reference is made to Annex II of the Implementing Regulation.

35. The transitional policy provides at page 27:

> "The onus is on the applicant and their qualifying family member … to prove their relationship and satisfy you they are related as claimed. Although not expected to provide DNA evidence, an applicant and their UK family may choose to submit a DNA test at their own expense from an organization that is International Organization for Standardisation (ISO) accredited in order for it to be accepted as having evidential weight. Please refer to the DNA Collections Standard section of the DNA Policy Guidance (DNA Policy Guidance 16 March 2020)".

36. At page 27, decision makers are given guidance that the applicant and sponsor must provide sufficient evidence to prove their relationship to the civil law standard. Having considered all the evidence, including information contained in the Home Office file and evidence submitted by the person in the UK, the decision maker must be satisfied that the parties are related as claimed. In assessing the evidence, decision makers "must be mindful of the difficulties that people may face in providing documentary evidence of their relationship…" (page 28).

37. Page 29 of the transitional policy provides:

> "In some cases, where a caseworker forms a preliminary view that the TCR should be refused they may, depending on the nature of the proposed reasons for refusal and the time remaining within the Dublin III timeframes, consider it appropriate to notify the claimed family member(s) of the proposed reasons for refusal so as to give them an opportunity to respond….In deciding whether to afford such an opportunity, it may be relevant to consider the extent to which family member(s) have already been given the opportunity to be involved in the process…"

38. The DNA Policy Guidance (referred to at page 27 of the transitional policy) states at page 4:

> "The Home Office cannot require that DNA evidence is provided as part of an immigration application. This is reflected in the fact that the department has no specific statutory power to require DNA evidence. Officials can give applicants the opportunity to provide DNA evidence as one of a range of options to prove a relationship, but it is voluntary, and it is the applicant's choice as to whether they wish to provide it in further support of their application. If an applicant chooses not to provide DNA evidence, no negative inferences can be drawn from this. In the absence of DNA evidence, an application must be determined on the basis of the available evidence."

Case Law

The investigative duty

39. I was referred to the relevant authorities, including R (MS) v Secretary of State for the Home Department (Dublin III; duty to investigate) [2019] UKUT 00009 (IAC), [2019] EWCA Civ 1340; R (MK & Ors) v Secretary of State for the Home Department (Calais; Dublin

III Regulation – investigative duty) [2016] UKUT 00231 (IAC), R (Safe Passage International) v Secretary of State for the Home Department [2022] 1 WLR 165 and R (BAA & Anor) v Secretary of State for the Home Department (Dublin III: judicial review; SoS's duties) [2020] UKUT 00227 (IAC); [2021] EWCA Civ 1428, [2021] 4 WLR 124; FWF v Secretary of State for the Home Department JR/1626/2019; [2021] EWCA Civ 88.

40. On receipt of a TCR, the Respondent has "duties of enquiry, investigation and evidence gathering": MK, at [38] and [40]; MS, at [88]-[124].

41. The Respondent has a duty "to carry out relevant investigations into the claimed family relationship": SPI, at [62].

42. Duties of "enquiry, investigation and evidence gathering course through the veins of the Dublin Regulation and its sister instrument, the 2003 Regulation as amended": MK at [38].

43. The "discharge of these duties will be factually and contextually sensitive and is governed by the principle that the Respondent is obliged to take reasonable steps": MK, at [40]; SPI, at [62].

44. In MK, at [39], the tribunal rejected the Respondent's contention that she had no investigative duty and the onus to provide all necessary evidence was on the applicant.

45. The Respondent's duty to treat the best interests of children as a primary consideration is central to, and formative of, her investigative duty: MS, at [95], [121], [122], [126], [158], [159]; SPI, at [62].

46. In MK, the Upper Tribunal held that the Respondent erred in failing to investigate the viability or availability of DNA testing (at [36]), thus failing to discharge her investigative duty, on the facts of that case (at [44], [45]).

47. In MS, the Upper Tribunal held that the Respondent's duty to take reasonable steps in discharging the investigative duty could include the options of DNA testing in the requesting State or the UK, in the light of all the circumstances of the particular case (at [126], [127]).

48. In SPI, the Divisional Court held that the Respondent's previous policy guidance (v.3), indicating that the local authority should only be contacted once a family link was involved, was erroneous (at [77]). Local authorities should generally be involved as soon as possible (at [80]). However, v.4 of the policy guidance which required a full safeguarding assessment only if the family link was established (at [80]) was not erroneous, as a full safeguarding assessment could only be meaningful if it was clear the family link was established.

49. In BAA, the Upper Tribunal held that the investigative duty will usually include an obligation to obtain an assessment by the relevant domestic local authority, derived from direct contact between the local authority and the UK-based relative, unless the Respondent is satisfied that such an assessment could not possibly cast any relevant light on whether the alleged family relationship exists (at [78]). On appeal in the Court of Appeal, Sir Stephen Irwin said *obiter* that he agreed with the Upper Tribunal, based on the facts of the particular case (at [36]).

50. An assessment of the family link and the best interests of the child by the local authority is "central" to the Respondent's duty to investigate: FWF in the Upper Tribunal, at [98] – [100].

51. In MS, the Upper Tribunal held that, in judicial review proceedings challenging a Member State's refusal to accept a TCR, it was not limited to public law grounds of review, and it is for the court or tribunal to decide for itself whether the criteria for determining responsibility under the Dublin III Regulation have been correctly applied. It found that the decision was flawed on public law grounds, and quashed it. It then embarked on its own fact-finding mission on the basis of the evidence before it, and concluded that the applicant and sponsor were brothers [171] – [225]. The Tribunal reached this conclusion in reliance upon Article 27 of Dublin III which provides that "the applicant …. 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" (at [172] – [173]). On appeal to the Court of Appeal, the Court did not determine this issue, as it had become academic. In BAA, the Upper Tribunal endorsed the approach of the Upper Tribunal in MS in the context of Article 17(2) of Dublin III.

52. In my view, as Article 27 of Dublin III has been revoked by the 2019 Regulations, and not saved for transitional cases, the Upper Tribunal's conclusion in MS that its role was not limited to public law grounds of review and should include a fact-finding exercise to determine eligibility under Dublin III, is no longer correct in law. The tribunal is limited to a review on public law grounds. Different considerations arise in respect of a claim under Article 8 ECHR, which are considered below.

Fair procedure

53. An applicant and family member must know the 'gist' of what may be held against them, and the Respondent's concerns regarding the TCR or relationship, and must have an opportunity to make representations on the issues and material being relied on before an adverse decision is taken: MS at [137], [159].

54. The ability to make representations after a decision has been taken "will usually be insufficient to satisfy the demands of common law procedural fairness": R (Balajigari) v Secretary of State for the Home Department [2019] EWCA Civ 673; [2019] 1 W.L.R. 4647, at [60].

55. In any event, the requirements of procedural fairness, will "readily" be implied into a statutory framework, even where legislation is silent and does not require any particular procedure: R (Citizens UK) v Secretary of State for the Home Department [2018] EWCA Civ 1812; [2018] 4 W.L.R. 123, at [68].

56. What fairness demands is dependent on the context of the decision, "and this is to be taken into account in all its aspects": R v Secretary of State for the Home Department ex p. Doody [1994] 1 AC, 531, 560. An affected person "usually cannot make worthwhile representations without knowing what factors may weigh against [their] interests": ex p. Doody, 560. The requirements of fairness are reactive to "the nature of the process, the purpose for which it is undertaken and the importance to the parties of the outcome": JA (Afghanistan) v Secretary of State for the Home Department [2014] EWCA Civ 450; [2014] 1 W.L.R. 4291, at [17]. It is a "fundamental requirement" of procedural fairness "to give an opportunity to a person whose legally protected interests may be affected by a public authority's decision to make representations to that authority before (or at least usually before) the decision is taken": R (Talpada) v Secretary of State for the Home Department [2018] EWCA Civ 841, at [57].

Article 8 ECHR

57. Generally, where an application for judicial review includes an allegation that Article 8 ECHR is breached, the court or tribunal will determine the issue for itself, rather than simply

reviewing the decision-maker's decision on public law grounds. In an appropriate case, its role may extend to making findings of fact: see Kiarie v Secretary of State for the Home Department [2017] UKSC 42, [2017] 1 W.L.R. 2380, per Lord Wilson JSC at [43] – [47]; Caroopen v Secretary of State for the Home Department [2016] EWCA Civ 1307, [2017] 1 W.L.R. 2339, per Underhill LJ at [63] – [83].

58. However, where the Dublin III procedure is available to an UASC, this usually provides sufficient protection for his or her Article 8 rights and it cannot be bypassed. The Secretary of State's independent obligations under Article 8 only arise if, for some reason, it can be shown that there are "very exceptional circumstances" such as systemic deficiencies in the state machinery: R (ZT (Syria)) v Secretary of State for the Home Department [2016] EWCA Civ 810, [2016] 1 W.L.R. 489, applied in R (AM) v Secretary of State for the Home Department [2018] EWCA Civ 1815, R (FTH) v Secretary of State for the Home Department [2020] EWCA Civ 494, and FWF.

59. In FWF, the Court of Appeal considered whether, if a member state acts unlawfully ('incidental unlawfulness') in any way in the course of discharging the obligations imposed on it by Dublin III, that is *ipso facto* a breach of Article 8, at [4]. The court held that it was not. Incidental unlawfulness in the operation of an administrative scheme such as Dublin III, including the failure by the Secretary of State for the Home Department to follow her policy and breach of the investigative duty, is not automatically a breach of Article 8 ECHR (per Elisabeth Laing LJ at [130]- [139]). A breach of Article 8 depends, in the case of a negative obligation, on an interference with protected rights and, in the case of a positive obligation, a breach of that obligation. Where, absent Dublin III a UASC has no right to be admitted to the UK, it cannot be argued that the Secretary of State is interfering with their Article 8 rights.

60. Elisabeth Laing LJ explained the reasons for these conclusions at [140] – [148]:

> "Can Rs nevertheless rely on article 8 in the context of Dublin III?
>
> 140. This brings me to third issue, which requires me to consider *ZT (Syria)* and the cases which have followed it. Both sides relied on these cases, as I have explained. Ms Kilroy is right that this case differs from the other cases, because it is a case in which applicants who have invoked and relied on Dublin III have also sought to rely on article 8. The *ZT (Syria)* line of cases concerns applicants who either tried to avoid Dublin III, or who relied on a different scheme which occupied similar ground (the expedited scheme). The question, however, is not whether that distinction is factually accurate. It is. The question, rather, is whether that factual distinction affects the principle which underlies the *ZT (Syria)* line of cases. That principle is that when a UM makes a claim for family reunion to which Dublin III applies, he cannot rely on article 8 to supplement, or to increase, the rights which Dublin III gives him as against member state 2, unless his circumstances are very exceptional (for example, he is in the territory of a member state which systematically fails to comply with the obligations imposed by Dublin III). The reason why he cannot do so is that if a member state complies with Dublin III, which goes significantly further than article 8 requires, that member state will, in all but the most exceptional circumstances, also comply with article 8, and that that can be assumed at a high level of generality, without the need to examine the circumstances of an individual case. I therefore reject Ms Kilroy's argument that

the distinction between the facts of this case and the facts of the *ZT (Syria)* line of cases has any legal significance.

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

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

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

144. The distinction between positive and negative obligation cases may be difficult to apply to borderline cases, as the Supreme Court has recognised in many recent decisions, and as the Strasbourg Court acknowledged in *Osman*. But wherever the line may be drawn, the facts of this case are clearly some distance from it. Absent Dublin III, it could not be argued that by failing to admit

Rs to the United Kingdom, the Secretary of State was interfering with their article 8 rights, as they had no right to be in the United Kingdom, and the Secretary of State was not responsible for the fact that they were in France and their brother was in the United Kingdom, or for the fact that their brother, with whom they had never lived, appears to be the only surviving and identifiable member of their family. I consider that this is a case in which, if article 8 applied, it could only impose a positive obligation on the Secretary of State, that the 'in accordance with the law' criterion would not apply to the discharge of that positive obligation, and that there is no Strasbourg case which begins to suggest that family reunion preceded by the delay which occurred in this case, could be a breach of any positive obligation. I accept the Secretary of State's submission that whether or not the Secretary of State complied with any positive obligation depends on the overall outcome. If article 8 imposed any positive obligation on the Secretary of State in this case, he complied with it. If Rs can rely on article 8 in the context of Dublin III, did the delay in this case interfere with Rs' article 8 rights?

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

Conclusion

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

Lord Justice Flaux

147. I agree with the judgment of Elisabeth Laing LJ.
Lord Justice Davis

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

61. In R (BAA & Anor) v Secretary of State for the Home Department [2021] EWCA Civ 1428, the Court of Appeal confirmed the principle that an unaccompanied minor could not rely on Article 8 to supplement or increase the rights which Dublin III gave him as against the Member State receiving a TCR while he was still within the Dublin process unless his circumstances were very exceptional: R (FWF) v Secretary of State for the Home Department [2021] EWCA Civ 88. However, the situation was different where the Dublin III process was complete and legal action could not be characterised as an avoidance of the Dublin process. Where a proper case could be made that public law errors (other than incidental errors which did not affect the outcome) brought the Dublin III process wrongly to a conclusion, then an applicant was entitled to assert his rights under Article 8 in the course of the judicial review once illegality was established. The correct course was to identify the public law errors, give declaratory relief and set a timetable for a fresh decision pursuant to Dublin III, subject to whether further delay would breach those rights.

62. Sir Stephen Irwin (with whom Bean LJ and Phillips LJ agreed) set out his conclusions at [93] – [101]:

> "93. As Laing LJ outlined in paragraph 140 of her judgment, the critical principle is that an unaccompanied minor "cannot rely on Article 8 to supplement, or to increase, the rights which Dublin III gives him as against member state 2, unless his circumstances are very exceptional." I fully accept the principle. If it were otherwise, then registering a claim under Dublin III might arbitrarily add weight to such a claim.
>
> 94. *FwF* is of course binding authority on this court unless the case is properly distinguishable. However, in my view, the case is properly distinguishable for one important reason. In *FwF* the unaccompanied minors were still within the Dublin process. Because of the failure of the SSHD to respond in time, the Secretary of State had by default acquired responsibility for the claims for international protection. Under the Dublin III process, the responsibility remained with the United Kingdom for at least the six months provided, under Article 29.2 of Dublin III, to effect transfer. At the time of the hearing before the Upper Tribunal in *FwF*, the Dublin process was incomplete. Further, the timeframe

for completion of the process was unexpired, and as Elisabeth Laing LJ rightly emphasised, a decision about performance in pursuance of a positive obligation under ECHR Article 8 falls to be judged by the outcome.

95. The position in this case is different. From the time when BAA sought judicial review, through to the time of the hearing before the Upper Tribunal, the Dublin III process was complete. Had legal action not been instigated, there is no reason to think it would have been resumed. This is the nub of Ms Kilroy's "circularity" proposition, which seems to me a point justly made. Thus, the legal action taken here cannot be characterised as an avoidance of the Dublin process. The illegalities of approach by the SSHD here cannot properly be thought to be "incidental", since they led to the refusal of the TCR and the ostensible end of the Dublin process, until they were challenged and exposed. If through illegality, the child claimant is deprived of "the rights which Dublin III gives him against member state 2" (to adopt Elisabeth Laing LJ's phrase), then he must be entitled to assert his Article 8/Article 7 rights in the course of a judicial review, once an illegality is established. This echoes the way the matter was phrased by the Court in *R(FTH)* at paragraph 42, quoted in paragraph 69 above: "…so long as the process is effective". With great respect to Elisabeth Laing LJ, it seems to me that this approach is also consistent with the judgment of the Master of the Rolls in *R(MS)*.

96. The fact that such obligations as may arise in these cases are to be characterised as positive rather than negative obligations, seems to me inadequate to undermine the conclusion I have just expressed. It is in any event a deeply unattractive argument to submit that an unlawful decision which defeats the claimant's rights under Dublin III should go without remedy, or at best bring declaratory relief and further delay. But there is a further contradiction in the argument. It is accepted that, where the system in "member state 1" (to adopt the jargon) is ineffective, then the UAM may invoke his or her Article 8/Article 7 rights here, despite the fact that any obligation on the United Kingdom must be a positive obligation, not a negative obligation. Is it to be said that the United Kingdom acquires more readily such obligations where a foreign system is ineffective, than in a case where the United Kingdom has unlawfully shut out a child from the Dublin III process?

97. As we have seen, Lane J entered into his Article 8/Article 7 merits assessment on two bases: firstly, public law errors causative of a wrongful refusal of the TCRS (and the end of the Dublin III process) and secondly on the basis that those rights were in question in any event, and the court was required to make its own assessment. In my judgment, the first basis for his assessment is unimpeachable.

98. In such a situation what is the proper course to be taken on behalf of an unaccompanied minor? This may be a generally academic point, given the end of the Dublin III process in January

> 2021. However, in principle, where a proper case can be made that public law errors brought the process wrongly to a conclusion, a public law challenge can be made. If a public law error is established, other than an 'incidental' error which did not alter the outcome, then the court will consider evidence as to the underlying Article 8/Article 7 rights. If, on the facts, the transitional provisions enfranchise a resumed Dublin III process, then it would be consistent with the approach of this court in *FwF* to identify the public law errors, give declaratory relief and set a timetable for a fresh decision pursuant to Dublin III. The court will have to consider whether, on the facts, the delay involved in that process would breach those rights. That delay would itself be a consequence of the illegality.
>
> 99. What if there are no public law errors, or they were mere "incidental illegalities"? It seems to me then that the principle formulated by Elisabeth Laing LJ must be applied, and the approach to any claim based on rights said to arise pursuant to Article 8/Article 7 will be unaffected by Dublin III: the rights of the unaccompanied minor cannot be supplemented or increased by the fact that he or she has gone through that process, by that point unsuccessfully.
>
> 100. In any such case it will be open to the Upper Tribunal to admit fresh evidence bearing on the Article 8/Article 7 issue.
>
> 101. For those reasons, I would dismiss the appeal on Ground 2.
>
> Phillips LJ
>
> 102. I agree.
>
> Bean LJ
>
> 103. For the reasons given by Sir Stephen Irwin I too would dismiss the appeal on all three grounds."

63. In my view, there is a tension between the judgments of Elisabeth Laing LJ and Sir Stephen Irwin, which is not fully explained by the differences in the factual matrix between the two cases. A further difficulty is that the legal framework has changed since the UK has exited the EU. The right to an effective remedy in Article 27 of Dublin III, which formed the basis of the reasoning by the Upper Tribunal in MS, and was subsequently endorsed by the Upper Tribunal in BAA, has been revoked by the 2019 Regulations. Article 7 of the Charter of Fundamental Rights of the European Union (referred to in Sir Stephen Irwin's judgment as "article 7") is no longer in force in the UK, though of course Article 8 ECHR remains in force.

64. However, in my view both judgments confirm that, if no public law error is identified in the decision made pursuant to Dublin III, the rights of an unaccompanied minor under Article 8 ECHR cannot be supplemented or increased by the fact that he has gone through the Dublin III process which confers wider obligations on the UK than Article 8.

Grounds of challenge

65. The Applicant's grounds of challenge may be summarised as follows.

Ground 1

66. The Respondent breached her duties to investigate and act fairly, under Dublin III and at common law in that she:

    i) took inadequate steps to involve the local authority;

    ii) took inadequate steps to consider or facilitate DNA testing;

    iii) failed to give MH or RH an opportunity to respond to unusual adverse points which were held against them in the decision.

Ground 2

67. The Respondent committed other public law errors in making her decision, in that she:

    i) she failed to take specific and highly material evidence into account;

    ii) she gave inadequate reasons in relation to, or otherwise treated irrationally, an expert Independent Social Worker assessment;

    iii) she failed to carry out an adequate assessment of the Applicant's best interests, or to treat those best interests as a primary consideration;

    iv) she drew irrational adverse inferences.

Ground 3

68. The Respondent's decision was a breach of the Article 8 rights of the Applicant and RH.

Ground 1

Paragraph (i): the local authority

69. The Respondent wrote to the Chief Executive of Birmingham City Council and Birmingham Children's Trust on 4 January 2021, in the following terms:

> "**Notification of Dublin III Regulation Transfer Application to Join Relative in Your Area**
>
> Our reference: EIU/5388621
>
> [Applicant's name, location, date of birth and nationality]
>
> [Relative's name, address in Birmingham, and telephone number]
> Name:
>
> Dear Sirs,
>
> Please be advised that the Home Office (European Intake Unit) has received an application from a European Member State under the terms the Dublin III Regulation requesting that the above named unaccompanied asylum seeking child is transferred to the UK to join the above named claimed UK based relative (who resides in your area) whilst the child's asylum application is considered.

> **No specific action is requested by your Local Authority 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. Additionally should you possess alternative contact details or if there is another local authority who may have responsibility/an interest in the case please advise us as soon as possible.**
>
> 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.
>
> Please feel free to contact us on the details provided for additional information.
>
> Yours faithfully,
>
> …."

70. The Applicant submitted that the tone and content of the letter dissuaded the local authority from taking any action. He further submitted that the Respondent should have asked the local authority to undertake a full assessment at this initial stage, not only once she was satisfied that the claimed family link had been demonstrated.

71. In my judgment, the Respondent's letter did discharge the Respondent's Dublin III obligation at the initial stage. The letter was addressed to the local authority for the area in which RH, the Applicant's claimed relative, was living. It set out in clear terms the information which Birmingham City Council needed in order to check for information in their records. The passage typed in bold helpfully highlighted for the busy Council officer, who was charged with dealing with this matter, that this was a request to send any relevant information, not a request for an assessment or other formal step. In my view, the recipient of this letter would have understood this, and would not have read it in the negative way suggested by the Applicant.

72. The relevant case law on approaching local authorities as part of the investigative duty is set out above. In SPI the Divisional Court upheld the lawfulness of the Respondent's policy of requiring a full safeguarding assessment from a local authority only if the family link was established as it could only be meaningful if there was a family link (per Dingemans LJ at [80]). Clearly if an adult family member was offering to sponsor an unaccompanied minor, there would have to be a full safeguarding assessment and a best interests assessment to ensure the minor's safety and well-being. But until a family link was established, there would be no purpose in undertaking such an assessment.

73. The Court in SPI formed this view (correctly in my respectful opinion) despite having had the benefit of considering the Upper Tribunal's decision in BAA where Lane J. held that the investigative duty will usually include an obligation to obtain an assessment by the local authority, unless the Respondent is satisfied that such an assessment could not possibly cast any relevant light on whether the alleged family relationship exists (at [78]).

74. In my judgment, on the facts of this particular case, it was highly unlikely that an assessment by the Council could cast any light on whether the Applicant was RH's brother. A social

worker would only be able to repeat what he was told by RH about his family history in Afghanistan. He would not be able to check or verify RH's account. In my view, the Respondent's reasoning, in the decision letter of 27 January 2022, was perfectly sound:

> "15. Part 42 of the Dublin Regulations policy clearly outlines that if the family link is established, the SSHD will then ask the relevant authority to undertake a full safeguarding assessment of the family member which will inform a recommendation to the SSHD as to whether the request should be accepted or rejected. In this case the family link between MH and RH has not been confirmed, therefore, it was not necessary to contact the local authority and request an assessment. Given the circumstances of the case further consideration was given as to whether an assessment could cast any relevant light on the alleged family relationship, as outlined in *R (BAA) [2020] UKUT 00227 Lane P*. Given that all the evidence of the family relationship available in this case is circumstantial and dated from 2020 onwards, it is deemed the findings of a family assessment would only add to this circumstantial, recent evidence, and would still not provide enough value to establish the family link."

75. Therefore, I do not accept the Applicant's Ground 1(a) that the Respondent took inadequate steps to involve the local authority.

Paragraph (ii): DNA testing

76. The Applicant submitted that the Respondent took inadequate steps to consider or facilitate DNA testing, in breach of her investigative duty. On the facts of this case, as in MK and MS, the Respondent's investigative duty included a duty to consider and pursue the option of DNA testing.

77. An offer of DNA testing by a member state is not a requirement under Dublin III. The option of DNA testing, failing other evidence and if necessary, is included in the list of probative evidence in Annex II List A of the Implementing Regulation (see paragraph 29 above).

78. The Respondent's DNA Policy Guidance in immigration applications states, at page 4:

> "The Home Office cannot require that DNA evidence is provided
>
> as part of an immigration application. This is reflected in the fact that the department has no specific statutory power to require DNA evidence. Officials can give applicants the opportunity to provide DNA evidence as one of a range of options to prove a relationship, but it is voluntary, and it is the applicant's choice as to whether they wish to provide it in further support of their application. If an applicant chooses not to provide DNA evidence, no negative inferences can be drawn from this. In the absence of DNA evidence, an application must be determined on the basis of the available evidence."

79. This DNA Policy Guidance is cross-referenced in the transitional policy under Dublin III which states, at page 27:

> "The onus is on the applicant and their qualifying family member … to prove their relationship and satisfy you they are related as claimed. Although not expected to provide DNA evidence, an

> applicant and their UK family may choose to submit a DNA test at their own expense from an organization that is International Organization for Standardisation (ISO) accredited in order for it to be accepted as having evidential weight. Please refer to the DNA Collections Standard section of the DNA Policy Guidance (DNA Policy Guidance 16 March 2020)."

80. In MK, the Upper Tribunal held that the Respondent erred in failing to investigate the viability or availability of DNA testing (at [36]), thus failing to discharge her investigative duty, on the facts of that case (at [44], [45]).

81. In MS, the Upper Tribunal agreed with the judgment in MK and held that the Respondent's duty to take reasonable steps in discharging the investigative duty could include the options of DNA testing in the requesting State or the UK, in the light of all the circumstances of the particular case. It said, at [126]:

> "….We agree that the emphasis in the Dublin III Regulation (see in particular Art. 6(1) and (3)) and, indeed elsewhere in the law, on the child's best interests is a powerful pull in favour of the duty to investigate including in an appropriate case investigating the potential for DNA testing in the requesting state, or if not possible or practicable, admitting the child to the UK to do so. We do not consider this would impose an unreasonable burden of insufficient certainty upon the respondent. The duty to investigate … would be one to act reasonably in the light of all the circumstances. It would, as the UT pointed out in MK be "factually and contextually sensitive" (at [40])."

82. In this case, the TCR was accompanied by a request by Safe Passage International that the Respondent should facilitate DNA testing if further evidence of the family link was required, and that the testing should be in the UK as there could be legal obstacles to an unaccompanied minor obtaining a DNA test in France. The sponsor RH volunteered to take a DNA test and asked the Respondent to facilitate this as he understood that there were difficulties in obtaining a DNA test in France (statement of 10 December 2020). The Applicant also volunteered to take a DNA test in his statements.

83. The first decision dated 12 February 2021 did not refer to DNA testing. The first claim for judicial review challenged the decision on the grounds that the Respondent failed to consider or facilitate DNA testing, and referred to the authorities. UT Judge Rimington also referred to the authorities when granting the Applicant permission to apply for judicial review on this ground.

84. The Decision dated 27 January 2022 dealt with DNA testing at paragraphs 16 and 17, as follows:

> "16. It is not essential for DNA evidence to be provided (DNA Policy Guidance Version 4.0 published for Home Office staff on 16 March 2020), as within the list annexed to the Implementing Regulation the issue of DNA evidence is mentioned in the context of it being necessary only in the absence of other satisfactory evidence to establish the existence of proven family links that are referred to elsewhere in Articles 11 and 12 of Implementing Regulation (EC) No 1560/2003 as amended by (EU) No.118/2014. 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 the receiving Member State that they are related as claimed. Although not expected to provide DNA evidence (as above), an Applicant and their UK family may wish to submit a DNA test at their own expense from an organisation that is International Organization for Standardisation (ISO) accredited in order for it to be accepted as having evidential weight. Please refer to the "DNA Collection Standards" section of the DNA Policy Guidance (DNA Policy Guidance 16 March 2020).
>
> 17. We are aware that it is our duty to 'act reasonably' and take 'reasonable steps' to carry out our investigative duty, including (where appropriate) the option of DNA testing in the requesting Member State and, if not, in the UK, as outlined in R (on the application of MS) v SSHD (Dublin III; duty to investigate) [2019]. However, as outlined in point 14 of this letter, the evidence provided up to this stage does not come near to establishing the family link. As such we do not consider it appropriate to consider the options of DNA testing, whether in France or the UK. We also observe that if the applicant was given permission to come to the UK for DNA testing, it is possible that he would claim asylum on arrival in the UK. This would make the UK legally responsible for his asylum claim, even if he has no family members in the UK."

85. The Respondent correctly set out the applicable law and policy in the Decision letter. The Respondent had the benefit of seeing the pleaded grounds in the first judicial review claim, and UT Judge Rimington's permission decision, and so was well aware of the case law and submissions relied upon.

86. The Respondent's investigation and findings were set out in the decision letter as follows:

> "1…..As outlined in the consent order dated 07 October 2021 under JR/663/2021, we have made a fresh decision on the Take Charge Request (TCR) received on 24 December 2020, considering all the evidence submitted to date, including all evidence submitted through the Judicial Review (JR) proceedings.
>
> 2. The Applicant, [MH] (MH), claims to have a brother, [RH] (RH), residing in the UK who he wishes to join. RH has previously sponsored his other brother, [AMR] (AMR), to join him in the UK in 2013.
>
> 3. In response to your request, the UK has considered the following evidence:
>
> - TCR
>
> - Witness statement of RH dated 10 December 2020
>
> - Public Health passenger locator form
>
> - Eurotunnel booking email

- Photos of RH and MH in Turkey

- Legal submissions of Safe Passage

- Form of authority for RH

- British Passport for RH

- WhatsApp call logs

- Statement of RH, dated 10 December 2020

- Medecins Sans Frontieres letter, dated 24 November 2020

- Bank statements for RH

- Family Tree

- Safe Passage emails with Home Office, including UT letter and further evidence of phone and video communication

- Assessment Report prepared by Peter Horrocks, dated 01 October 2021

- Further statement from MH, dated 07 November 2021

- Further statement from RH, dated 08 November 2021

- 4x photographs of RH and MH in France, September 2021

- Further bank statements for RH (30 June 2021 – 29 September 2021),

- WhatsApp Contact info

- RH physical and digital Home Office files

- AMR physical and digital Home Office files

4. Having considered all the evidence outlined above, the UK is still not satisfied that the family link between MH and RH has been established.

5. In addition to the above detailed information, the UK has conducted its own evidence gathering exercise by contacting Birmingham City Council on 04 January 2021, sending an undertaking letter to RH on 04 January 2021 and inviting RH to provide any further information to help establish the family link on 12 January 2021. The UK has also reviewed the Home Office physical files and digital records for RH and AMR.

6. MH and RH claim they did not know they were brothers until 5 years ago and prior to this believed they were cousins. The Red Cross letter, dated 22 December 2020 outlines “Before he had to leave Afghanistan, [MH] lived with his aunt, her husband and 5 children and his grandmother...When his grandmother died during

the year 2018 [MH] followed his family's aunt and went to Iran". The relationship is further explained in RH's statement, dated 10 December 2020, "I did not know [MH] was also my brother until approximately 5 years ago. This is because he grew up with my grandparents, my aunt and my aunt's husband… I remember seeing [MH] at my aunt and grandparent's place when I was in Afghanistan and he was very small – he could barely walk. However, I always thought he was my aunt's son." He further goes on to state "Please note, for this reason, I did not mention [MH] in my Home Office asylum interview or appeal as I was not aware that he was my brother at this stage." Peter Horrocks Assessment Report, dated 01 October 2021 names the aunt and her husband as Ane and Hashim, and the grandparents as Khalbinesa and Khuda Ayarzi, the grandparents are noted as "Deceased. Primary carers for [MH]".

7. The predominant and only argument for the complete lack of mention of MH, RH's aunt, grandparents, or other cousins in any of the Home Office files, both digital and physical for RH and AMR is that they did not know MH was their brother until 5 years ago. Yet at no stage during any of the historical interviews or request for information were any of the family members living in Afghanistan mentioned, as further detailed below.

8. We have reviewed the physical and digital Home Office files for RH. In his Home Office Screening interview, dated 30 December 2008, RH names his parents as Faizi (also named as Nazi on the Personal Information form) and Abdul Rashid Gharlagh. He names his sisters as Roeya Rashidi and Roeina Rashidi and his brother as Abdul Maler. When asked if he had any other immediate family he answered no. There is no mention anywhere of his grandmother, aunt, her partner and their 5 children plus MH in Afghanistan.

9. The Home Office files for AMR's application for Family Reunion in 2013/2014 have also been reviewed. In his Family Reunion application AMR named his parents as Nazi Rashidi and Abdul Rashid Rashidi. His siblings other than RH are named as Roya Rashidi (2001) and Royina Rashidi (1998) and he states he has not seen them since 2007. He said he has no other close family. In a statement made in support of AMR's Family Reunion application dated 14 July 2014, RH states "I am one of four siblings (comprising two sisters as well as the Appellant; I am the oldest of the sibling group…we are one another's only known surviving close relatives". This is despite their now claimed grandmother and aunt still being alive and residing in Afghanistan at the time. A further statement was made by RH and AMR's cousin, Hafiz Qarloq, on 14 July 2014 which states "[AMR] has nobody in Turkey or Afghanistan now". Again, this would point to their being no family members in Afghanistan, despite supposedly their grandmother, aunt, her partner and their 5 children plus MH living in Afghanistan at the time.

10. We also reviewed an application made by AMR in 2017 for a travel document. The document was for travel to Afghanistan, and

in 2017 AMR should have been aware he was brothers with MH, yet there is no mention of MH or any of the other family members.

11. We also reviewed AMR's application for LTR/LTE in 2019. AMR was asked "Do you have any family in your country of birth, nationality or any other country where you have lived for more than 5 years?" He answered "Yes, I have an uncle, Basir, in Afghanistan. I am in contact with him occasionally. I don't have any family in Pakistan or Turkey. I have a brother and cousin in the UK." A further question was asked "Do you have any friends in your country of birth, nationality or any other country where you have lived for more than 5 years?" AMR answered "Yes, I have some friends in Afghanistan who I am in contact with online I also have a friend in Turkey. I don't have any friends in Pakistan. I have lots of friends in the UK."

12. Though the Peter Horrocks Assessment Report, dated 01 October 2021, the witness statements of MH and RH, dated 07 & 08 November 2021 have been reviewed, they do nothing to counteract the fact there is no mention of MH, his previous carers Ane, Hashin and their 5 children, and his grandparents Khalbinesa and Khuda Ayarzi in any of the historical Home Office records from 2007 to 2019.

13. All the evidence provided is circumstantial. The only circumstantial evidence that could help to establish the family link is dated from 2020 onwards and was provided with the TCR, despite RH and MH claiming they understood they were brothers 5 years ago. Prior to that, it is claimed they believed they were cousins. Yet, in all the historical documents examined in RH and AMR's physical and digital Home Office files, there is no mention of MH, whether as a brother or a cousin. There is no mention of MH's carer, their claimed Aunt, Ane, any of the other family members MH lived with including their Grandmother, Ane's 5 children, who would also be RH and AMR cousins, or Ane's partner, Hashim.

14. Whilst all the evidence submitted in support of the Take Charge Request has been considered, it is concluded that the evidence is not sufficient to demonstrate the family link. The Home Office has serious doubts about the claim RH and MH are brothers and is not satisfied to the civil law standard that the family link has been established.

15. [see above]

16. [see above]

17. [see above]

18. This decision was taken with due regard to the guarantees of minors set out in Article 6 of the Dublin III Regulation. However, for the reasons given above, the requirements of Article 8.1 have not been met, and your formal request to take charge of MH's

> claim for international protection to be considered in the United Kingdom remains rejected."

87. In my judgment, it was reasonable for the Respondent to conclude, upon investigation, that the evidence of the claimed family link was so weak, and fell so far short of what was required, that DNA testing was not appropriate. As counsel for the Respondent confirmed at the hearing, the Respondent did not accept that this was a genuine application. This was a permissible conclusion under the terms of Dublin III, the domestic case law, and the Respondent's own policy. There is no absolute duty to undertake DNA testing whenever the other evidence is found to be insufficient to establish the familial link. The Respondent is entitled to exercise her discretionary judgment on the facts of each case. Even if the best interests of the child weigh in favour of DNA testing where other evidence is insufficient, the best interests are a primary and not a paramount consideration, which may be outweighed by the countervailing factors.

88. The Respondent was aware from RH and Safe Passage International that there were difficulties in obtaining DNA tests in France, and that although RH and MH were willing to take tests, their representatives had not been able to arrange this. On behalf of the Applicant, Ms Hacker of Wilson's Solicitors LLP, filed a witness statement on 12 October 2022 giving details of her investigation into the availability of DNA testing in France, Switzerland and Belgium. However, this material was not before the Respondent and therefore I did not admit it in evidence in this part of the claim.

89. In the light of the Respondent's conclusions, I consider it was reasonable for the Respondent not to agree to the Applicant entering the UK for the purpose of DNA testing, since as soon as he was in the UK, the Respondent would be legally responsible for his asylum claim, regardless of any family link. This would potentially subvert the Dublin III process.

90. The Applicant relied upon the GCID notes disclosed by the Respondent in which a caseworker commented that DNA testing would be appropriate: see paragraph 24 above. However, the subsequent entry in the notes indicates that this comment was not accepted by the Respondent and was made without legal advice or direction. In my view, it carries little weight.

91. For these reasons, Ground 1(ii) does not succeed.

Paragraph (iii)

92. The Applicant submitted that the Respondent unlawfully failed to give MH or RH an opportunity to respond to "unusual adverse points" which were held against them in the Decision, namely, the information provided by RH and AMR to the Respondent in their immigration applications.

93. The case law on the duty of fairness relied upon by the Applicant is set out at paragraphs 53 to 56 above.

94. The Applicant and the sponsor were informed in January 2021 that there was insufficient evidence to establish the familial link and they were provided with an opportunity to respond.

95. On 17 January 2021, RH submitted his UT form in which he repeated what he had said in paragraph 3 of his statement dated 10 December 2020:

> "….please note, I did not mention [MH] in my Home Office asylum interview or appeal as I was not aware that he was my

> brother at this stage. I did not find out [MH] was my brother until approximately 5 years ago….."

96. This comment indicates that RH was well aware of the discrepancies between the information about his family that he had previously given to the Respondent and the account that he was now providing. He also had the benefit of advice from an experienced organisation.

97. In the first decision the Respondent found that there was insufficient evidence to establish the family link, and referenced RH's explanation.

98. It was a term of the consent order in the first judicial review claim that the Applicant and sponsor could submit further evidence in support of the application, which they did.

99. The Decision, dated 27 January 2022, stated that the predominant and only explanation for the absence of reference to other members of the family in the information previously given to the Respondent was that they did not know MH was their brother until 5 years ago.

100. The Applicant has still not been able to identify any other evidence that he would have wished to rely upon even if the Respondent had given him the advance notice for which he contends.

101. In my judgment, there was no unfairness in the decision-making process as RH had the opportunity to address the failure to mention other family members in the immigration applications made by him and AMR, whom he sponsored. The Respondent was not under any obligation to give RH and MH a further opportunity to respond before making the decision, and the best interests of the child did not require him to do so.

Ground 2

Paragraph (i): witness statements of 10 and 11 May 2021

102. The Applicant submitted that the Respondent failed to take into account the witness statement of MH dated 10 May 2021 and the witness statement of RH dated 11 May 2021 ("the May statements") which contained highly material evidence. This can be inferred from the fact that they are not listed in the bullet-point list, nor mentioned in the remainder of the Decision.

103. In my view, it cannot fairly be inferred that the Respondent failed to take the May statements into account.

104. At paragraph 1 of the Decision rejection letter of 27 January 2022, the Respondent stated that "the fresh decision had been taken considering all the evidence submitted to date, including all evidence submitted through the Judicial Review (JR) proceedings." The May statements were made in the course of the first judicial review claim, and so were part of the evidence referred to in this paragraph.

105. At paragraph 14 of the Decision, the Respondent stated that "all the evidence submitted in support of the Take Charge Request has been considered". It can be inferred that this evidence included the May statements since they were submitted in support of the TCR.

106. The Applicant correctly submits that the May statements were not included in the bullet-list of evidence considered in paragraph 3, and then referred to in paragraph 4 of the Decision. It is possible that this was an administrative error made when typing up the list, since I see that other mistakes were made; for example, the witness statement of RH dated 10 December 2020 is listed twice.

107. The Decision is brief and does not purport to set out all the history given by MH and RH in their five witness statements, so nothing can be inferred from the absence of reference to the contents of the May statements.

108. Overall, I am not satisfied that the May statements were overlooked and not taken into account.

Paragraph (ii): Independent Social Worker assessment

109. The Applicant submitted that the Respondent failed to engage with the important evidence of Mr Peter Horrocks, Independent Social Worker, and failed to give adequate reasons to demonstrate that the Respondent had rationally taken it into account and given it appropriate weight.

110. The Respondent referred to Mr Horrocks' report at paragraphs 3, 6 and 12 of the Decision, so she clearly took it into account.

111. However, the report was of limited probative value on the threshold question as to whether MH and RH were biological brothers. Mr Horrocks conducted interviews with RH and MH and summarised their accounts in his report, and drew a family tree. But he was not asked to assess the reliability or accuracy of their accounts, and did not do so. He did not have access to the Home Office records of the earlier interviews with RH and AMR, and he did not ask RH why he had not provided information about other members of his family when he claimed asylum in the UK. He did not interview RH's parents or his aunt Ane and uncle Hashim who presumably would have had first-hand knowledge of MH's parentage and who had responsibility for MH while he was growing up in Afghanistan. His instructions were to assess the strength of the relationship between MH, RH and AMR; whether it was in MH's best interests to remain in France or transfer to the UK, and to comment on the effect of any decision to refuse entry to MH. He did so on the basis that the Applicant and RH's account was genuine.

112. The request was rejected because the Respondent was not satisfied that RH and the Applicant were biological brothers. Unless or until that threshold question was determined, Mr Horrocks' report was of limited value to the Respondent. Therefore the Respondent was not required to deal with it in any greater detail than she did.

Paragraph (iii): Best interests of the child

113. The Applicant submitted that the Respondent failed to carry out an adequate assessment of the Applicant's best interests or to treat those interests as a primary consideration

114. At paragraph 18 of the second rejection letter, the Respondent expressly stated:

> "This decision was taken with due regard to the guarantees of minors set out in Article 6 of the Dublin III Regulation."

115. The saved part of Article 6 provides:

> "Article 6 (Guarantees for minors)
>
> 1. The best interests of the child shall be a primary consideration…."

116. In my view, it can be safely assumed that the Respondent was well aware that the decision- maker must treat the best interests of children as a primary consideration, though

not the paramount consideration, and that she did so in making her decisions in this case.

Paragraph (iv): Irrational adverse inferences

117. The Applicant submitted, at paragraphs 104 and 117 of his Statement of Facts and Grounds, that the inferences which the Respondent drew from the Home Office records were irrational. It was reasonable for RH and AMR not to mention their grandparents, aunt Ane and uncle Hashim, and their children, including the Applicant, in response to the questions asked.

118. In my judgment, it was reasonable for the Respondent to draw adverse inferences from the lack of any reference to RH's and AMR's other family members who lived in the same village as them in Afghanistan, in response to the questions about their relatives. The existence of relatives is highly relevant when applications for leave to remain are made by unaccompanied minors. In my view, the Respondent was entitled to exercise her discretionary judgment in the way in which she did, and the high threshold for a successful irrationality challenge has not been met. This ground is essentially a disagreement with the Respondent's reasoning, which does not disclose an error of law.

Ground 3

119. The Applicant submitted that the rejection of the TCR, and the continued separation of the Applicant from RH, is a breach of Article 8 ECHR. They are biological brothers, and family life exists between them because of the emotional and practical support that RH has given the Applicant. Their relationship is particularly significant as MH is alone and without family in France. It is in MH's best interests to be reunited with RH in the UK.

120. The Applicant submitted that it was necessary for the Tribunal to determine this issue on the evidence before it, applying the authorities referred to at paragraph 57 above and paragraph 66 of the Applicant's skeleton argument.

121. I refer to my analysis of the law on Article 8 ECHR and Dublin III, at paragraphs 58 to 64 above. As no public law error has been identified in the decision made pursuant to Dublin III, the Applicant's rights under Article 8 cannot be supplemented or increased by his unsuccessful claim under Dublin III, which confers wider obligations on the UK than Article 8. Therefore I intend to treat the pleaded claim under Article 8 ECHR as a freestanding claim, independent of Dublin III law and procedure.

122. The first step is to establish whether the Applicant and RH enjoy or have enjoyed family life, within the meaning of Article 8.

123. On the evidence before me, I am not satisfied on the balance of probabilities that MH and RH are biological brothers. I agree with the concerns and reasoning of the Respondent in regard to the evidence on this issue, as set out in the second rejection letter dated 27 January 2022.

124. In addition to the discrepancies identified by the Respondent in her letter, I am also troubled by other inconsistencies in the accounts given by MH and RH. RH describes visiting his grandparents and his aunt Ane, and seeing MH. The account apparently given by the Applicant to Mr Horrocks was that the two families and the grandparents did mix. The Applicant would see F and A regularly and considered them to be his aunt and uncle. I observe that this seems plausible as according to RH they were all living in the same village. But in his statement of 12 October 2022, the Applicant states that this account is mistaken and the true position is that the Applicant has no recollection of ever meeting or speaking to F and A in Afghanistan. The Applicant first became aware of them when Ane

told him that they were his biological parents. It may be that the Applicant cannot remember whether he saw F and A because he was too young at the time. But presumably Ane would have been able to tell him whether or not he saw F and A in Afghanistan.

125. I am also concerned by the fact that RH and the Applicant have no first-hand knowledge of the claimed adoption of the Applicant, and there is no corroborative evidence from the adults who do have first-hand knowledge of those events, even though RH is still in touch with his aunt Ane and with his parents. In his statement dated 8 November 2021, RH appeared to be trying to pre-empt any difficulties that might arise if his mother were interviewed by stating for the first time that she had recently developed problems with her memory and would not be able to remember MH (paragraphs 20 to 22). If that is the case, her illness ought to have been supported by objective evidence e.g. medical evidence. The Applicant relies upon the fact that RH provided telephone numbers for Ane and his parents in his undertaking form, but in a freestanding claim under Article 8, it is his responsibility to adduce the relevant evidence to the Tribunal. The Applicant cannot rely upon the Dublin III duty to investigate, and the Tribunal does not have an investigative role.

126. It appears from the witness statement of Ms Hacker, dated 12 October 2022, that it may be possible to obtain a DNA test in Switzerland or Belgium, if not in France. However, in a freestanding claim under Article 8, the responsibility rests on the Applicant and RH to submit a DNA test to the Tribunal, if they wish to do so. The Applicant cannot rely upon the Dublin III duty to investigate and the Tribunal does not have an investigative role.

127. Further or alternatively, I am not satisfied that family life has ever existed between MH and RH even if they are biological brothers. They did not grow up together and they have never lived together, or spent significant time together. Their relationship was unknown to them prior to 2015. RH left Afghanistan in 2008, when the Applicant was a young child, and since then they have only met twice, in Turkey and in Paris, for a few days on each occasion. I accept that in recent years they have been in frequent communication and developed a relationship, but that is not sufficient to amount to family life.

128. I accept that the Applicant is lonely and isolated in France and it would be in his best interests to be with family members, but he has not established that RH is his brother, nor that he has ever enjoyed family life with him. The Applicant enjoyed family life with his grandparents (now deceased) and Ane, Hashim and their children.

129. For these reasons, the claim under Article 8 ECHR does not succeed.

Final conclusion

130. The claim for judicial review is dismissed on all grounds.

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