IN THE UPPER TRIBUNAL

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)

Field House
London

28 March 2018

Before

UPPER TRIBUNAL JUDGE RINTOUL

UPPER TRIBUNAL JUDGE RIMINGTON

Between

HA (1)

AA (2)

NA (3)

(ANONYMITY ORDER MADE)

Applicants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Ms C Kilroy and Ms M Knorr instructed by Migrant's Law Project Islington Law Centre appeared on behalf of the Applicants.
Ms H Masood, instructed by the Government Legal Department appeared on behalf of the Respondent.

(1) Article 9 provides:

> *Where the applicant has a family member, regardless of whether the family was previously formed in the country of origin, who has been allowed to reside as a*

beneficiary of international protection in a Member State, that Member State shall be responsible for examining the application for international protection, provided that the persons concerned expressed their desire in writing.

The phrase "who has been allowed to reside as a beneficiary of international protection" in Article 9 of Dublin III is in effect the same as the phrase formerly used in paragraph 352D of the Immigration Rules and following ZN (Afghanistan) [2010] UKSC 21 at [35]. Acquisition of British citizenship by a family member does not alter the fact that he was in receipt of international protection and so article 9 would still apply.

(2) Article 17.2 of Dublin III does not set any specific criteria, but the Dublin Regulations themselves and the CFR provided the general parameters within which decisions must be taken, albeit that the general provisions set out in articles 21 and 22 do not apply. There is, we accept, a wide discretion available to the respondent under the article, but it is not untrammelled, it is for the respondent to consider an application made under article 17.2 through the lens of article 7 CFR and/or article 8 ECHR, taking account also of the best interests of a child. That approach is consistent with the normative provisions in article 16 that where there are issues of dependency within a family life context, the family should be brought together.

(3) The decision impugned in this case was one arising from the exercise of a discretion conferred on the respondent. On that basis, and following Padfield v Ministry of Agriculture, Fisheries and Food [1968] AC 997, 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.

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JUDGMENT

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INTRODUCTION

1. The applicants who have been anonymised challenge 3 decisions of the respondent to refuse to accept a take charge request ("TCR") made by the Republic of Greece pursuant to Article 17.2 of EU Regulation 604/2013 ("Dublin III"). Permission for judicial review was granted by the President of the Upper Tribunal, Mr Justice Peter Lane, and Upper Tribunal Judge Dawson on 19 February 2018. The applicants have been granted anonymity, given the age of the youngest, and the sensitive nature of their circumstances. This is a

decision of the Upper Tribunal to which both members of the panel have contributed.

Background:

2. The factual matrix which gave rise to the application is highly unusual, if not unique, and is unlikely to occur again. There are three applicants, HA, AA and NA whom we refer to as A1, A2 and A3 respectively. A1 and A2 married in January 2005; A3 is their child. A1 is a British Citizen; A2 is a stateless Bidoon from Kuwait seeking asylum in Greece with A3 who, it is the applicants' case, is a British Citizen.

3. A1 was originally a stateless Bidoon from Kuwait. Prior to his flight from Kuwait in 2005, he married A2 who is also a stateless Bidoon. On arrival in the United Kingdom A1 applied for asylum. Although that claim was rejected he was granted Humanitarian Protection in October 2005 for a period of three years. Subsequent to that, and a successful application for ILR granted in 2011, he was on 25 January 2013 naturalised as a British Citizen. He then returned to Kuwait where he was reunited with A2. The couple's first child, A3 was born on 15 December 2013. By operation of section 2 of the British Nationality Act 1981, A3 appears to be a British Citizen although that issue is as yet unresolved.

4. In April 2014 A2 and A3 travelled to Lebanon where they made an entry clearance application to the United Kingdom for family reunion with A1 on the basis that A1 was a refugee. The respondent refused that application on the basis that A1, having been naturalised, was no longer a refugee.

5. In 2015, an application was made for a British passport for A3. That application was refused on the basis that the documents provided were insufficient to show her entitlement to British citizenship.

6. In June 2017, A2 and A3 travelled to Greece, initially overland through Turkey. They then crossed from Turkey to Greece by sea, arriving in Chios. That journey was traumatic, given that water surged into the boat, and they feared they would drown. It is the applicants' case, relying on the report of Dr Manolesou, that the current diagnoses that both A2 and A3 suffer from PTSD result from that event.

7. On 6 July 2017, A2 and A3 claimed asylum in Greece. Subsequent to that, the Greek authorities made a TCR to the British Government on 21 August 2017. That application was refused on 26 September 2017 in the following terms:

Directorate of Immigration – GREECE

Date: 26th September 2017

Dear Colleagues,

COUNCIL REGULATION (EU) No. 604/2013 of 26th June 2013

Re: Ms A[..] A[…] Stateless Person (Article 1 of 1954 Convention) 24 December 1978 & dependant

A[…] N[…] – 15/12/2013

You have requested that the United Kingdom take charge of the above named and her dependant under the terms of Council Regulation (EU) NO.604/2013 of 26th June 2013.

We have examined your request dated 21/08/2017, under Article 17(2) and have noted the following:

- *The claimed husband, A[…] H[…], of the above name applicant became Naturalised British Citizen on 5th November 2012, and therefore not a beneficiary of International protection.*

- *Persons wishing to enter the United Kingdom to be re united with a relative who has residence in the UK can obtain the relevant Entry Clearance.*

- *You have not shown conclusive evidence that this avenue was not available to the UK relative as part of your request.*

I regret to inform you that your request to take charge of the above named is respectfully denied.

Yours faithfully

R[…] B[…]

European Intake Unit

8. That refusal was followed on 16 October 2017 by a reconsideration request by the Greek government pursuant to article 5 of the Dublin III Implementing Regulation 1560/2003. That request was refused on 24 October 2017 in the following terms:

Secretary of State's Decision dated 24th October 2017

Directorate of Immigration – GREECE

Date: 24th October 2017

Dear Colleagues,

COUNCIL REGULATION (EU) No. 604/2013 of 26th June 2013

Re: Ms A[…] A[…] Stateless Person (Article 1 of 1954 Convention) 24 December 1978 & dependant

A[…] N[…] – 15/12/2013

You have requested that the United Kingdom take charge of the above named and her dependant under the terms of Council Regulation (EU) NO.604/2013 of 26th June 2013.

We have re examined your request dated 16th October 2017, and noted the relevant documents sent with your request under Article 17(2).

You have sent evidence of refusal paperwork of the family reunification visa Rule 352A of the Immigration Rules. As the applicant is a British Citizen he is entitled to make a spouse visa Rule 281 of Immigration Rules.

We do not consider that the applicant's case warrants an exceptional circumstance in line with Article 17(2).

I regret to inform you that your request to take charge of the above named is respectfully denied.

Yours faithfully

S[…] K[…]

European Intake Unit

9. The first step taken by the applicants to challenge the decisions was the service on 31 October 2017 of a pre-action protocol letter, annexing a number of documents including copies of the refusal decisions referred to above, and drawing the respondent's attention to the fact that A1 had been granted Humanitarian Protection in 2005. It was also pointed out that A1 had been granted Indefinite Leave to Remain in 2011. The pre-action protocol letter was copied to the Greek Government's Dublin Unit.

10. There was no substantive response to the pre-action protocol letter and on 6 December 2017, this application was lodged, containing a request for expedition which was refused on the same day.

11. On 22 December 2017, the applicants' representatives served on the respondent a copy of a DNA test confirming that A1 and A2 were the biological parents of A3.

12. On 19 January 2018, the applicants' solicitors made a further request for expedition supported by a psychiatric report on A2 and A3. The report was copied to the respondent's lawyers.

13. On 24 January 2018, the respondent made a further decision refusing to take charge of A2 and A3's asylum applications.

Directorate of Immigration – GREECE

Date: 24th January 2018

Dear Colleagues,

COUNCIL REGULATION (EU) No. 604/2013 of 26th June 2013

Re: Ms A[…] A[…] Stateless Person (Article 1 of 1954 Convention) 24 December 1978 together with her minor child: N[…] […] 15 December 2013

You have provided further information requesting the reconsideration of the UK's refusal of your request to take charge of the above named and her minor child under the terms of Council Regulation (EU) No. 604/2013 of 26th June 2013.

You have stated that the husband of the above named – H[…] A[…] – is a British Citizen. As such they are neither recipients of or requesting international protection. They are therefore outside the Dublin III Regulation and thus Articles 9 and 10 are not engaged.

As the spouse of a British Citizen it is for the above named to utilise the Entry Clearance process; you have provided evidence that the application was made and subsequently denied because it was made under the wrong article. Further applications can be made by the above named under the correct scheme (Reunion with a British Citizen) with every chance of success.

No further evidence has been provided to show why Article 17.2 should be engaged in this case.

Consequently, I regret to inform you that your request to take charge of the above named remains, respectfully, denied.

Yours sincerely,

J[…] B[…]

European Intake Unit

UK Visas and Immigration

14. The applicant's grounds have been amended with permission to challenge that decision also.

15. For the avoidance of doubt, except for anonymising those involved, what is set out above reproduces the letters in their original form with all the errors they contain.

16. It is, we consider, appropriate to set out the decisions in full, given that the respondent has elected not to provide any further evidence, save for the brief CID notes submitted only on the date of hearing.

Summary of Grounds of Challenge and response

17. The applicants submit that the decisions are unlawful on the grounds that the respondent acted unlawfully in:

    (1) Failing to address the best interests of the child (A3);
    (2) Taking into account irrelevant considerations: A1's status as a British Citizen; the possibility of making an application for entry clearance; and, in referring to provisions of Immigration Law no longer in force;
    (3) Failing to take into account material factors, in particular the circumstances in which the applicants find themselves and A2 and A3's mental ill-health;
    (4) Failing to comply with her obligations and duties under Dublin III, the European Charter of Fundamental Rights and Freedoms ("CFR"), and, article 8 of the European Convention on Human Rights; and in applying an improper test in assessing the latter, incorrectly requiring exceptional circumstances;
    (5) Taking a decision inconsistent with other decisions.

18. The respondent resists these assertions, arguing that although she accepts that Dublin III and CFR are engaged, the application should be dismissed as the respondent:

    (1) Has a wide discretion within Dublin III under reg 17(2) as it is a derogation from article 3(1) and was entitled to ask herself if there were exceptional circumstances justifying an assumption of responsibility for asylum applicants for whom the United Kingdom is not strictly responsible;
    (2) Was not obliged to take into account material not provided by Greece, in this case the psychiatric report and the DNA test results;
    (3) Was entitled to conclude that there were no humanitarian reasons to take charge.
    (4) Is not under a continuing obligation to keep under review the applicant's position, nor is there an ongoing refusal

19. The respondent contends also that even if the decision were unlawful, the appropriate remedy would be by way of a declaration and not a mandatory order.

20. Following directions issued by Upper Tribunal Judge Dawson, this application was listed before the President of the Upper Tribunal, Mr Justice Peter Lane, and Upper Tribunal Judge Dawson on 19 February 2019. They granted permission and the hearing of the substantive application was listed to be heard on 28 March 2018 before us.

21. The grant of permission, so far as is relevant, states:

> *'In our view the Respondent has arguably erred in law in not engaging sufficiently or at all with relevant matters that is to say, the position of the second and third applicants by reference to Article 8 of the ECHR, the corresponding provisions in the Charter of Fundamental Rights of the European Union and insofar as the third applicant is concerned by reference to her best interests, as also underpinned by the Charter.*
> *The Respondent's pressures in decision-making are well-known and are accepted. We have noted what Miss Masood has said in that regard in considering the terms used in the letters. We have to say, however, that it is arguable that the defects we have identified are arguably present. Insofar as the Respondent's stance has been to rely upon the ability of the second and thirds [sic] applicants to make entry clearance applications, we see the arguable force of Ms Knorr's submission that this cannot be done in isolation but has to be done through the prism of the instruments to which we have just made reference.*
>
> *We therefore grant permission and we will hear submissions on the issue of expedition and if there is to be expedition what the timescale may be'.*

THE LAW

22. Dublin III provides in its 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 vulnerabilities

(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

(19) In order to guarantee effective protection of the rights of the persons concerned, legal safeguards and the right to an effective remedy in respect of decisions regarding transfers to the Member State responsible should be established, in accordance, in particular, with Article 47 of the Charter of Fundamental Rights of the European Union. In order to ensure that international law is respected, an effective remedy against such decisions should cover both the examination of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred

(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

23. These are reflected in the following articles of Dublin III:

Article 6

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

Article 9

Where the applicant has a family member, regardless of whether the family was previously formed in the country of origin, who has been allowed to reside as a beneficiary of international protection in a Member State, that Member State shall be responsible for examining the application for international protection, provided that the persons concerned expressed their desire in writing.

Article 17 Discretionary Clauses

17.2. 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.

24. Dublin III are subject to the EU Implementation Regulations 1560/2003 (as amended by EU Regulations 118/2014). These, amongst other matters, set out the forms to be used and the means of proof by which the State responsible for examining an application for international protection is determined.

25. Given the provisions of recital (39) we consider it appropriate to set out articles 7, 24 and 47 of the CFR:

Article 7 Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 24 - The rights of the child

1. 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.

2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

3. 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

Article 47 - Right to an effective remedy and to a fair trial

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

26. As noted above, the respondent accepts that this is an application to which Dublin III and the CFR apply. As we are thus applying European law, we take a purposive approach to interpretation in the light of the recitals.

27. Article 17.2 does not set any specific criteria, but the Dublin Regulations themselves and the CFR provided the general parameters within which decisions must be taken, albeit that the general provisions set out in articles 21 and 22 do not apply. There is, we accept, a wide discretion available to the respondent under the article, but it is not untrammelled. As was said in ZT Syria [2016] EWCA Civ 810 at [85]:

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* 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 Upper Tribunal 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 and, because of the engagement of ECHR Article 8, the intensity of review which is appropriate in the assessment of the proportionality of any interference with Article 8 rights.

Ground (i) Best interests of the child

28. We begin our analysis of the decisions in considering first the best interests of the child. We bear in mind that if she is, as is contended, a British Citizen, then Dublin III cannot apply to her as she is not a third country national. That is, not, however material as in assessing the position of A2, the respondent's duty is still to take A3's best interests into account as a primary consideration. It is not contended that she could be separated from her mother.

29. Ms Masood submitted that in assessing any public law error, it was to be borne in mind that A1's status as a British Citizen, meant that the alternative route to family reunion through an entry clearance application was open to them, and still would be even were the TCR made. It was not, however, conceded that the application would succeed. It would be for the applicants to show in an entry clearance application that there were insurmountable obstacles to family life that could not be overcome and, in this case, that EU Free Movement rights could not be exercised. This, it was submitted, is what was meant by "exceptional circumstances" in the second refusal letter. Those were, however, to be distinguished from the very exceptional circumstances identified in ZT (Syria). It was implicit in the decision that the best interests of the child were taken into account, but that said, this does not necessarily mandate accepting the TCR.

30. While we accept the respondent's submission that the best interests of A3 cannot "trump" other considerations, there is no evidence either in the decision letters or in the CID notes provided that there had been any assessment of the child's best interests. As the initial request expressly referred to a minor, and referred to compassionate circumstances, that is a significant defect. We consider that this was a failure to take into account a relevant matter.

Grounds (ii) and (iii)

Irrelevant matters

31. The sole basis for refusal in the first letter - failure to provide conclusive evidence that entry clearance could not be obtained – is not one which is adequately explained in the context, nor does it flow from Dublin III. As we observed during submissions, a TCR under article 9 would be susceptible to the same argument as regards (as is the case here) pre-flight spouses and children of those granted international protection in the United Kingdom as they could always request family reunion.

32. There is, we accept, a difference between article 17 and articles 7 to 16 in that the provisions are not discretionary, albeit that article 16 permits of exceptions. We accept that it is for the respondent to consider an application made under article 17.2 through the lens of article 7 CFR and/or article 8 ECHR, taking account also of the best interests of a child. That approach is consistent with the normative provisions in article 16 that where there are issues of dependency within a family life context, the family should be brought together.

33. The respondent's argument, based on her policy, is that only if (in summary) it could be shown that there were insurmountable obstacles to family unity, in essence an article 7 or 8 case, that an Article 17.2 application should be entertained. In effect, it would only be acceded to in a situation where a viable article 8 application could be made. The submission that an application could be rejected on the basis that such an application could be made is a circular argument. Further, if a proper consideration of article 7/article 8 and the best interests of the child requires discretion to be exercised to accede to a request, then whether an application for entry clearance could be made is not relevant if it precludes overall/further consideration under Article 7/8.

34. Whether or not an application could be made in Greece at all is a matter on which we have received post-decision evidence and submissions. We conclude that there is no legal bar to an application being made, albeit that there may be requirement to pay a fee (which may or may not be waived). Further, the application that would be made would be to join A1 in the United Kingdom with a view, presumably, to settlement, is for a different purpose from that behind Dublin III.

35. The respondent sought to persuade us also that it would be open to A1 to use his right of free movement to live with his family in Greece, and on that basis, there would be no obstacles to them being united during the asylum determination process. We find that an unattractive argument. There is nothing to suggest that A1 could exercise his free movement rights to reside in Greece. He is not seeking a job, and moreover, there appears to be no prospect of him finding employment given his limited skills and inability to speak Greek. On the basis of Dano v Jobcentre Leipzig [2014] EUECJ C-333/13, he has no right of residence in Greece. We observe also that the purpose of Dublin IIIs is not just ensuring family unity but also (recital (15)) that decisions taken in respect of the members of one family should be taken by a single member state to ensure consistency. In any event, the duration of the process is not an issue on which we received any evidence, and that would make A1's staying in Greece precarious at best.

36. Accordingly, we accept Ms Kilroy's submission that in concluding that an application for entry clearance could be made, the respondent has taken into account an irrelevant matter.

(iii) Failure to take into account relevant matters.

37. Ms Masood submitted that it should be borne in mind that the A2 could have applied for family reunion after 2007 when the Immigration Rules had changed and after A1 had been granted ILR in 2011. All that had been done was an application on the wrong basis which was not appealed.

38. Further, it was submitted that little information had been provided to the Respondent (but see for example the schedules to Dublin Implementation as a comparator). Ms Masood defended the decision letters asserting they were in some respects lacking in clarity, but their essential meaning was clear. It was to be noted also that in respect of the third decision this had not come about as a result of a formal request by the Greek authorities but by what was expressly an informal request.

39. It was also submitted that the psychiatric report had been submitted in support of an application for the matter to be expedited, indicative of the manner in which information had trickled towards the respondent.

40. The application has evolved, however, and there is some merit in the respondent's submission that information has trickled to her; and, that it was brief. The initial application from the Greek government was succinct, stating

> "This family is a single parent family with one minor child and without supportive environment in Greece That's why the alien is totally dependent on her husband and needs his support so as to be in a safe and emotionally supportive environment. For this reason the alien wishes to be transferred to the United Kingdom with her child, and her application for asylum to be examined by your authorities so that the family members be reunited"

41. While brief this contains a significant amount of information. Its brevity is also to be considered in the context of what is required under the Implementation Regulations. It does, we find, set out the relevant information, and importantly how the Greek government had assessed the family.

42. We were referred also to R (on the application of MK, IK (a child by his litigation friend MK) and HK (a child by her litigation friend MK) v Secretary of State for the Home Department (Calais; Dublin Regulation - investigative

duty) IJR [2016] UKUT 231 (IAC) at [39] to [41] in terms of the respondent's duties on receipt of a TCR.

> (39) It follows that we reject the Secretary of State's contention (as pleaded) that she had no duty of investigation upon receipt of the "take charge" requests and the associated contention that the onus to provide all necessary evidence rested on the Applicants. These contentions are, in our judgment, confounded by the provisions of the Dublin Regulation and its sister instrument considered as a whole. We further reject the Secretary of State's selective reliance on one of the various components of Article 22, namely Article 22(5), of the Dublin Regulation, for the same reason.
>
> (40) We must now consider the Secretary of State's modified position at this stage of the hearing. This entailed an acknowledgement that there was a duty of investigation under the Dublin Regulation when the initial "take charge" request was received. What did this duty require of the Secretary of State? We consider that the investigative and evidence gathering duties imposed on Member States by the Dublin Regulation are unavoidably factually and contextually sensitive. The content and scope of such duties will vary from one context to another. While we did not receive detailed argument on this discrete issue, we are inclined to the view that these duties are not absolute, in the sense that they apply irrespective of considerations such as excessive or disproportionate burden. It seems to us that implicit in the Dublin Regulation is the principle that these duties require the Member State concerned to take reasonable steps. The court or tribunal concerned will, having regard to its duty under Article 6 TEU, be the arbiter of whether this duty has been acquitted in any given case.
>
> (41) We find nothing in either the Dublin Regulation or its sister instrument to support the argument that the Secretary of State's acknowledged duty of investigation was extinguished once the initial refusal decision had been made. There is nothing in this regime to suggest that a decision on a "take charge" request is in all cases final and conclusive, subject only to legal challenge under (*inter alia*) Article 27. Furthermore, this would be entirely inconsistent with the concept of practical and effective protection and the broader context of the real world of asylum claims. The phenomenon of renewed "take charge" requests and successive "take charge" decisions by the requested State is, in our view, implicitly recognised in the Dublin Regulation. Furthermore, it was not argued that the Secretary of State's reconsidered decision, made pursuant to a renewed "take charge" request, was in some way a voluntary act of grace, as opposed to the discharge of a decision making duty. Nor was it argued that the Secretary of State's later decisions, made in

the course of these proceedings, were in some way divorced from the Dublin Regulation context.

(42) The present cases are a paradigm illustration of the truism that, in certain contexts, there may be a series of formal requests by one Member State and a series of formal decisions by the requested Member State. We are in no doubt that all such decisions and associated decision making processes are governed by the Dublin Regulation and its sister instrument, the 2003 Regulation as amended.

43. This duty was, Ms Kilroy submitted, set out in the respondent's policy entitled "Dublin III Regulation" of 2 November 2017 at in particular page 44 and that in this case the respondent was arguing to the contrary. We find that is so. The policy provides:

> 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 Dublin III. 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 Dublin III's general provisions on evidence.
> …
>
> 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.(emphasis added)

44. Drawing these strands together, we find no merit in the submission that the respondent was bound only to take into account information submitted by the Greek government. While there is some merit in the observation that the psychiatric report was submitted under cover of a letter which did not emphasise its importance to the substance of the decision, we consider that the respondent should have taken it into account. The third decision was at that

point in draft, but equally as the CID notes show, legal advice was being taken, and it was to the legal advisers that the report was sent. This is not a requirement even to investigate, which might have been expected bearing in mind the grant of humanitarian protection, but merely to take into account relevant factual information which had been forwarded to the respondent prior to the last decision.

45. There are in addition, a number of concerns about the decision letters themselves. They are barely coherent and in the first two make no reference to humanitarian issues, or the best interests of the child. Viewed cumulatively or individually, the letters lack any proper reasoning, and make several errors including the reference to paragraph 281 of the Immigration Rules, and the factually incorrect assertion in the third letter that A2 and A3 were not seeking international protection because A1 is British.

46. Accordingly, for these reasons, we find that the respondent's decision is flawed on standard public law grounds.

Ground (iv)

47. We turn next to the more complex issue of whether the decision is incompatible with article 7 of the CFR and article 8 of the ECHR. It is not suggested to us that the effect of these provisions is different. Given article 52(3) of the CFR, and the established jurisprudence of the CJEU that they should be treated as equivalent, we accept that is so, and we remind ourselves of recital (39) in assessing this issue which we have cited at paragraph 22 above. Further, in light of NS [2011] EUECJ C-411/10 at [116] – [122], it is not arguable that protocol 30 of the CFR prevents us from so doing, and in that respect we rely also on the observations of Mostyn J in R (oao) AB v SSHD [2013] EWHC 3453.

48. We find that there is no effective difference between article 7 and article 8 but bearing in mind it was accepted that the CFR was engaged we find little purpose in exploring issues under article 8 because there is no rivalry between the schemes of Dublin III and the CFR on the one hand and ECHR (article 8) on the other. The CFR, as accepted by Ms Masood, was engaged. We have cited the caselaw in relation to Article 8 to underline, by analogy, that we as the Tribunal must consider proportionality as a result of article 7.

49. We consider that the factual matrix in this application is very different from that in RSM or ZT (Syria) about which there was much argument. In those cases, the Dublin III process had not been engaged and what was being considered were the respondent's duties and obligations under article 8. Here, the Dublin process has begun and the issue is how article 7 (or article 8 ECHR)

duties and obligations affect the exercise of discretion exercised under Dublin III. It is thus a situation different from that identified in ZT (Syria) at [65]. We accept also, bearing in mind that this is a case involving human rights, that article 27 (right to an effective remedy) of Dublin III applies here. It was not properly argued before us that it is not applicable and we find that interpreting that article in the light of recital (19) that it is. It follows that, the intensity of review must be commensurate with the issues involved. The scope of the review is addressed by Beatson LJ at [76] – [77] and we apply that guidance.

50. Unlike in ZT (Syria) we are not being asked to evaluate the asylum determination system of another member state. We consider also that as was held in RSM at [121], Dublin III does not have as its object to give effect to additional rights of protection for rights guaranteed by the Convention – see also paragraph 122. In that case a TCR had not been initiated and so article 17.2 had no application [126]. There is here no interference with the Greek authorities and the observations of Singh LJ in RSM at [174] are not applicable. It is not the case that we are giving effect to 'additional rights' but only respecting those rights expressed in the Recital of Dublin III as being applicable and to which 'full observation is to be given' in the exercise of the incorporated rights.

51. Further, we note that at [83] of ZT (Syria) Beatson LJ rejected the respondent's argument that Dublin III strikes the proportionate balance for the purposes of article 8.

52. We were taken at some length to CK (Afghanistan) [2016] EWCA Civ 166 which Ms Kilroy submitted was also to be distinguished as in that case, there had been no request from France to take charge, and as it had been decided under Dublin II which differs from Dublin III in that the latter expressly introduces remedies for those affected. In this regard we note what Laws LJ at held [31] to [32], and we agree that that can, in the light of Article 27 of Dublin III and the observations of Beatson LJ in ZT(Syria) referred to above, be distinguished.

53. Ms Kilroy submitted that as the unlawfulness here was not just in the public law sense, but also in terms of section 6 of the Human Rights Act 1998, following Begum v Denbigh High School [2006] UKHL 15 and Belfast City Council v Miss Behavin [2007] UKHL 19, it is for the Upper Tribunal to make a finding on whether there has been a breach of article 8 (or, for that matter, article 7 of the CFRR). As we have identified above we consider that the approach courts must take to address proportionality in the caselaw cited below have equal applicability to Article 7.

54. In Denbigh High School Lord Bingham held [30]:

> 30. Secondly, it is clear that the court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting. The inadequacy of that approach was exposed in *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, para 138, and the new approach required under the 1998 Act was described by Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532, paras 25-28, in terms which have never to my knowledge been questioned. There is no shift to a merits review, but the intensity of review is greater than was previously appropriate, and greater even than the heightened scrutiny test adopted by the Court of Appeal in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554. The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time (*Wilson v First County Trust Ltd (No 2)* [2003] UKHL 40, [2004] 1 AC 816, paras 62-67). Proportionality must be judged objectively, by the court (*Williamson*, above, para 51). As Davies observed in his article cited above, "The retreat to procedure is of course a way of avoiding difficult questions". But it is in my view clear that the court must confront these questions, however difficult. The school's action cannot properly be condemned as disproportionate, with an acknowledgement that on reconsideration the same action could very well be maintained and properly so.

55. Further, in Miss Behavin' at [26] – [27] Lord Rodger held:

> 26. Of course, where the public authority has carefully weighed the various competing considerations and concluded that interference with a Convention right is justified, a court will attribute due weight to that conclusion in deciding whether the action in question was proportionate and lawful. As Lord Bingham said in *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, 116G, para 31:
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> > "If, in such a case, it appears that such a body has conscientiously paid attention to all human rights considerations, no doubt a challenger's task will be the harder. But what matters in any case is the practical outcome, not the quality of the decision-making process that led to it."
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> Similarly, having observed that head teachers and governors could not be expected to make decisions with textbooks on human rights at their elbows, Lord Hoffmann observed, at p 126C, para 68:

> "The most that can be said is that the way in which the school approached the problem may help to persuade a judge that its answer fell within the area of judgment accorded to it by the law."

27. In this case the Council did not weigh the competing human rights and other considerations in that way. So, when deciding whether their refusal of a licence interfered disproportionately with the applicant's right to freedom of expression, the court had to go about its task without that particular kind of assistance. Weatherup J concluded that, having regard to the various features of this particular locality which he mentioned, the refusal of a licence to sell pornography in the applicant's Gresham Street premises did not interfere disproportionately with its right to freedom of expression. Neither the Court of Appeal nor indeed Mr Larkin actually challenged that conclusion on its merits. But, if it is sound - as I believe it is - then the Council's decision was lawful in terms of section 6(1) of the 1998 Act and cannot be quashed on the ground of incompatibility with article 10.

56. Accordingly, we have undertaken an analysis of the proportionality of the decision, bearing in mind also the respondent's policy.

57. Ms Kilroy submitted that this case fell squarely within Dublin III. She submitted further that the sole basis of the Secretary of State's decision appeared to be that A2 and A3 can apply for entry clearance. She submitted that there is simply no evidence that the best interests of the child had been taken into account nor had the Secretary of State properly considered the circumstances of the applicants in terms of their mental health.

58. Ms Kilroy advanced further that it was worrying that the Secretary of State had, despite the terms of the grant of permission, still not provided any evidence or a witness statement explaining the reasoning behind the decisions. That was despite having asked for time so to do.

59. Ms Kilroy submitted that if the respondent's argument were correct, the A2 and A3 would be the subject of two parallel processes: an assessment of their asylum claims and applications for entry clearance, which would be inefficient. There was no rationale for the need to make an entry clearance application; and, the insistence on such procedures was contrary to the procedural duties which flowed from properly applying the best interests of the child as set out in article 24 of the CFR.

60. With respect to the best interests of a child and in particular the position of a British Citizen child, Ms Kilroy relied on ZH (Tanzania)v SSHD [2011] UKSC 4 at [32] and [33]:

> 32. Nor should the intrinsic importance of citizenship be played down. As citizens these children have rights which they will not be able to exercise if they move to another country. They will lose the advantages of growing up and being educated in their own country, their own culture and their own language. They will have lost all this when they come back as adults. As Jacqueline Bhaba (in 'The "Mere Fortuity of Birth"? Children, Mothers, Borders and the Meaning of Citizenship', in *Migrations and Mobilities: Citizenship, Borders and Gender* (2009), edited by Seyla Benhabib and Judith Resnik, at p 193) has put it:
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> > 'In short, the fact of belonging to a country fundamentally affects the manner of exercise of a child's family and private life, during childhood and well beyond. Yet children, particularly young children, are often considered parcels that are easily movable across borders with their parents and without particular cost to the children.'
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> 33. We now have a much greater understanding of the importance of these issues in assessing the overall well-being of the child. In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations. In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created. But, as the Tribunal rightly pointed out, the children were not to be blamed for that. And the inevitable result of removing their primary carer would be that they had to leave with her. On the facts, it is as least as strong a case as *Edore v Secretary of State for the Home Department* [2003] 1 WLR 2979, where Simon Brown LJ held that "there really is only room for one view" (para 26). In those circumstances, the Secretary of State was clearly right to concede that there could be only one answer.

61. Ms Kilroy submitted further that on the principles set out in Chikwamba [2008] UKHL 40, the observation by the respondent in the third decision that the applications had "every chance of success" was not a reason why A2 and A3 should not be admitted to the United Kingdom under Article 17.2 on merely procedural grounds, this serving no purpose; and, by analogy with the appellant SS in MM (Lebanon) v SSHD [2017] UKSC 10 at [102] and [104], A2 and A3 have strong cases. Here, as A2 is illiterate and dependant on A1, as well as having a child and being pregnant, the case is even stronger. It was submitted also that there was no real prospect of A1 being able to exercise EU

Free Movement rights as he does not speak Greek and is unlikely to be able to get employment.

62. Ms Kilroy submitted that A1 is, in effect, in an impossible situation: either give up the home and job he has here and be with his wife and child where his position would also be precarious; or, remain here and be separated from his family who both suffer from serious mental ill-health including PTSD. The respondent's exercise of her discretion was, it was submitted, flagrantly unlawful.

63. In addition, Ms Kilroy submitted that article 9 of Dublin III is relevant in this case as, because although it had not formed part of the request made by Greece (who could not have known on the information given to them that A1 had previously been granted Humanitarian Protection), its applicability was relevant in assessing proportionality as there was no sensible or rational basis for treating the applicants differently based on A1's nationality. The Respondent had full knowledge that he had previously been granted humanitarian protection and the dates thereto.

64. Ms Masood submitted that, as was submitted in RSM at [85], article 8 was not engaged. We do not accept that. The difference here is that article 17.2 is engaged as a result of the TCR made by Greece but there is nowhere a detailed analysis of the article 8 ECHR case made by Greece. In particular, Ms Masood accepted that CFR was engaged and thus article 7 the equivalent to article 8 was in play.

65. Ms Masood submitted that, even if the decisions were incompatible with article 8, other routes are available. It should be noted that A1 had spent significant periods of time in Greece. The date of decision is also, given that this is a judicial review case, relevant. The purpose of Dublin III is we accept to maintain family unity during the determination process and while that has occurred here to a limited extent, that is, however, not the only purpose of Dublin III.

66. Ms Masood submitted in respect of article 9 of Dublin III that that there was no case law on its meaning, and the specific point of its applicability had not been pleaded. She submitted that article 17.2 gave the requested state an extensive discretion, albeit not untrammelled, and the process was clearly optional.

67. In response, Ms Kilroy submitted that it is wrong in principle to expect the applicants to have understood the law and its intricacies in making their applications, but not to expect the same high standards of the respondent's

caseworkers in their analysis which gave no indication of any of the correct standards being applied or the proper factors taken into account.

68. The starting point for analysing the potential breach must be the best interests of the child. Given her age, and that she has already been diagnosed as suffering from PTSD, as has her mother, we find that the general rule that it is in her interest to be with both parents is all the stronger as the family unit relies to a great extent on A1 as carer and provider as detailed in the witness statements and in the psychiatric report which was not properly taken into account. The witness statements and psychiatric report are consistent with the limited references made in the TCR by the Greek authorities. Further, as A2 is pregnant, her ability to care for A3 is limited, and that ability is limited also by her own mental ill-health.

69. We do not consider that it is necessary for us to decide on A3's nationality and as an application for a British passport is pending, it would not be right for us to do so. We do, however, accept that if she is a British Citizen as appears to be the case, given that she was born within marriage after her father was naturalised, that she would fall outside the scope of Dublin III Regulation which applies only to non-EEA nationals.

70. We accept also that, for the reasons set out above, A1 cannot reside in Greece; he has no right to reside there, nor is there any realistic prospect of him being able so to do. We accept he can and does visit, but that is a precarious basis of stay, and there is no indication of when A2 and A3's situation will be resolved. Further, in this case, as A2 is assessed as stateless, and A3 is a minor, there is no third country in which they could be together as a family.

71. We also note that given A1's very low income, that there is simply no basis on which the requirements of Appendix FM of the Immigration Rules could be met; paragraph EX.1 of that Appendix does not apply in Entry Clearance Cases). There is, thus, a significant interference with the right to family life during the Dublin III process. The obstacles to family life continuing in anything other than a very precarious and unstable environment are, we consider, given the poor accommodation available, the effect on A2 and A3, and their mental ill-health are such that they do amount to compelling and compassionate circumstances.

72. A further factor in the applicants' favour arises in respect of Article 9 of Dublin III, set out above. As we have already identified and confirmed in the CID notes disclosed, A1 was granted humanitarian protection until 2011. His change of status subsequently to British citizen does not alter the fact that he was in receipt of international protection.

73. In ZN(Afghanistan) [2010] UKSC 21 the Supreme Court held:

> 35. As to policy, it may well be that it would be possible to produce a coherent policy argument for the view that applications for leave to enter or remain in the United Kingdom made by the spouse or children of those granted asylum should be dealt with under paras 352A and 352D until the other spouse or parent became a British citizen but that thereafter such applications should be dealt with under paras 281 and 297. It can be said with force that all applications by a spouse or child to join or remain with a British citizen should be subject to the same rules. On the other hand there are coherent policy reasons for applying the same principles to applications to join or remain with a spouse or parent who has been granted asylum both before and after such a sponsor has become a British citizen. An important factor in this regard is that referred to in para 25 above, namely that one of the purposes of the Refugee Convention is to protect and preserve the family unit of a refugee. The need for protection for a member of such a family unit is likely to be the same whether the sponsor obtains British citizenship or not. Moreover, the risk of persecution may be such that the need for protection for family members is particularly stark.
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> 36. The question is what policy is encapsulated in the rules, which is essentially a matter of construction of the language of the rules. For the reasons given above the Court has reached a different conclusion from the Court of Appeal. It agrees that the sponsor must have been granted asylum in order to be (1) a "refugee" within the meaning of the opening words of para 352A and of para 352E; (2) a "person granted asylum" within sub-paras (i) and (ii) of para 352A and sub-para (iv) of para 352D; and (3) a "person who has been granted asylum" within the opening words of para 352D.
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> 37. However it does not agree that there is an additional requirement, namely that the "person granted asylum" or the "person who has been granted asylum" must not have become a British citizen before the application for entry clearance is made, or perhaps determined. There is no express language to that effect and it is not, in the judgment of the Court, implicit in the language used. The fact that British citizenship has been granted to the spouse or parent does not change the fact that the spouse or parent is a person granted asylum or a person who has been granted asylum.

74. We note that the phrase "who has been allowed to reside as a beneficiary of international protection" is in effect the same as the phrase formerly used in paragraph 352D of the Immigration Rules. While we accept that the rules of construction applicable in EU law are not necessarily the same as the canons of construction applicable in domestic law, we do not accept that there would be any difference in this case. Indeed, the same policy factors identified by Lord

Clarke at [35] would be applicable here, and the interpretation would be consistent with the purposes of Dublin III which include that principle that claims of families should be determined in the same country for reasons of amongst other things consistency – see recital (15).

75. Whether the Greek government should have sought to invoke article 9 is not a matter for us, but it appears that it, unlike the UK government, it was unaware of the previous grant of leave to A1 or its basis. In these circumstances it is in fact likely that the 'responsible' member state is the UK.

76. The fact that A1 has acquired British citizenship is, we consider, not a rational or sensible basis for rejecting the request. As explained above, it is not logically related to the availability of an entry clearance route which is available to the pre-flight families of those granted international protection. A further mismatch occurs as article 9 of Dublin III includes families which came into being after the grant of protection.

77. We bear in mind that the bringing together of the family would only be for the purposes of assessing a protection claim, and that thus the interference must be all the greater to result in a breach of article 8 ECHR/article 7 CFR. We are, however, satisfied that the refusal to accede to the TCR is a breach of the applicants' article 8 or 7 rights. We reach that conclusion as, given the severity of the effect on them, it would in the light of their particular circumstances, ill-health, nationalities (or lack thereof), and article 9 of Dublin III, that it is disproportionate and not properly justified by the respondent. We therefore find that on the material before the respondent, the decisions were not compatible with article 8 of the Human Rights Convention and were thus unlawful under section 6 (1) of the Human Rights Act 1988.

78. We therefore turn to the issue of remedy.

Remedy

79. Ms Kilroy submitted that the only remedy that would be effective in this case would be a mandatory order requiring the respondent to accede to the TCR. While the use of mandatory orders was to be approached with caution, as was noted in R (ota RSM) v SSHD [2018] EWCA Civ 18 and in ZT (Syria), those cases fell to be distinguished on the basis that those cases concerned article 17.1, and more importantly, were concerned with scenarios where the Dublin III process had not commenced and the Secretary of State's article 8 obligations were being used to bypass the proper procedures whereas here, it was an alleged breach of those obligations in the operation of Dublin III which was in issue. It was also submitted that quashing the decision would be inconsistent

with the approach taken to human rights issues set out in Denbigh and Miss Behavin.

80. Ms Masood submitted that it was not appropriate to make a mandatory order in the circumstances where what was primarily in issue was an inter-state process. She relied on the protracted nature of the process, submitting that although there was no time limit relevant to Article 17.2, it was nonetheless a relevant factor.

81. Ms Masood submitted also that if, as the applicants aver, A3 is a British Citizen, then it would not be correct to order the respondent to accept a TCR relevant to her.

82. It was submitted that while the issues of remedy is one for the court's discretion, and that should, even though RSM is not directly on point, be exercised with extreme caution. While comity did not arise as it had in RSM at [176] as the Greek Courts were not involved, the Greek state is seized of the issue.

83. Ms Kilroy re-iterated that the appropriate remedy here is a mandatory order, and that comity of approach did not arise here. She submitted, that delay did not, in this context militate against a mandatory order, relying on Ghezelbash at [56] – [58]:

> 56. Furthermore, with regard to the objective of establishing a method for the swift determination of the Member State responsible without compromising the objective of processing asylum applications rapidly, referred to in recital 5 of Regulation No 604/2013, it is true that the bringing of an action may possibly postpone the definitive conclusion of the process for determining the Member State responsible.
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> 57. However, the Court has previously held, in the context of Regulation No 343/2003, that the EU legislature did not intend that the judicial protection enjoyed by asylum seekers should be sacrificed to the requirement of expedition in processing asylum applications (see, to that effect, judgment of 29 January 2009 in *Petrosian*, C-19/08, EU:C:2009:41, paragraph 48). That finding applies, a fortiori, with regard to Regulation No 604/2013, as the EU legislature significantly enhanced, by that regulation, the procedural safeguards granted to asylum seekers under the Dublin system.
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> 58. It should be observed in that regard that the risk that the conclusion of the procedure for the determination of the Member State responsible may be excessively delayed as a result of the scrutiny of the correct application of the criteria for determining responsibility is limited by the fact that such scrutiny

must be carried out within the framework established by Regulation No 604/2013, in particular Article 22(4) and (5), which provides (i) that the requirement of proof should not exceed what is necessary for the proper application of the regulation and (ii) that if there is no formal proof, the responsibility of the requested Member State should be acknowledged if the circumstantial evidence is coherent, verifiable and sufficiently detailed to establish its responsibility.

84. We remind ourselves that the decision impugned in this case was one arising from the exercise of a discretion conferred on the respondent. On that basis, and following Padfield v Ministry of Agriculture, Fisheries and Food [1968] AC 997, 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.

85. There are, we consider, other factors which militate against a mandatory order in this case. Owing to the lengthy process, we do not know the current position of the Greek authorities or whether they have decided to consider the substantive protection claims. We were given no information in this regard. Further, the position of A3 is unclear, and if (as appears to be the case) she is a British Citizen, a TCR simply could not apply to her. It also appears to us that there is the alternative remedy of a TCR under article 9.

86. As against that, we appreciate the urgency of the situation, and that there is the prospect of a child being born to A2 in the very near future. Also, there is significant merit in the submission that the respondent has made three successive unlawful decisions.

87. Nonetheless, although we accept that there has been no material change in circumstances, other than that A2 and A3's situation is more precarious and A2 is, owing to pregnancy and her continuing mental ill-health less able to care for A3, we are not persuaded that we should take the highly unusual step of making a mandatory order in respect of A2, let alone A3 who appears to be a British citizen.

88. We do, however, consider it appropriate to make a declaration that the decision was unlawful as it breached the applicants' article 7 CFR and article 8 ECHR rights, and to quash it. We also consider that it would, after seeking the parties' views, be appropriate to draw a timetable for the decision to be remade, in the light of the declaration, and in light of our decision on article 9, and to make orders to that effect.

ENDNOTE

89. There is an issue identified during the hearing which, although it does not form part of our reasoning, merits further comment. We consider that the omission of spouses from article 16 of Dublin III is problematic. It is odd that the relationship between spouses should be omitted from the list of family relationships, yet those between siblings and between adult children and a parent are included, resulting in a definition of a "family" which is somewhat at odds with how it is usually understood. Arguably, that could give rise to arguments of inequality of treatment within the meaning of article 20 of the CFR, there being no apparent justification given for distinction of treatment. While we are aware of academic arguments that article 16 should be interpreted as applying to spouses[1], such arguments would almost inevitably require a preliminary reference to the European Court of Justice.

[1] See "EU Immigration and Asylum Law", Hailbronner & Thym (Second Edition 2016) at pp. 1530 to 1532