JR/1642/2019

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of KF
(a child by his litigation friend MN)

Applicant

v

Secretary of State for the Home Department

Respondent

Upper Tribunal Judge Blum

Application for judicial review: substantive decision

Having considered all documents lodged and having heard the parties' respective representatives, Ms C Kilroy QC and Mr J Kirk, of Counsel, instructed by Simpson Millar Solicitors, on behalf of the applicant and Mr G Lewis, of Counsel, instructed by the Government Legal Department, on behalf of the respondent, at a hearing at Field House, London on 9 September 2019.

Decision: the application for judicial review is granted

Background

1. The applicant is a male national of Afghanistan born in August 2002. He is the nephew of MN, a British citizen of Afghan origin who arrived in the UK in September 2001 and made an asylum claim. MN visited Afghanistan around 2010 and spent time with the applicant who was, at that time, receiving medical treatment in respect of a heart condition.

2. According to a 'Best Interests Assessment' (BIA) prepared by the Greek authorities the applicant left Afghanistan and travelled to Pakistan where he remained for 3 to 4 weeks before moving to Iran and then Turkey. He claims he was kidnapped by smugglers at the border between Iran and Turkey, held for 3 months and beaten every day (in a psychiatric assessment dated 6 August 2019 the applicant described a period of "detention" in Turkey when he was held by "agents"). He managed to escape and made his way to Istanbul. Following his arrival in Turkey the applicant's mother contacted MN asking him to help the applicant. MN contacted the applicant and met him in Turkey in 2017 and maintained regular contact thereafter. The applicant remained in Turkey for one

year and three months working in a bakery shop. The BIA referred to the applicant's "vulnerability (because of his health issues - the applicant had a heart condition and successfully underwent surgery 8 years previously) and lack of any supportive environment in Greece." The general lack of a well-developed support system for unaccompanied minors in Greece would, according to the BIA, "have a very negative effect on the child's health and future." In its conclusions the BIA referred to conversations the assessor had with MN and with the applicant's parents, who expressed their trust in MN and were supportive of the applicant's reunification with him.

3. On or around 20 July 2018 the applicant registered his asylum claim in Greece. On 11 October 2018 Greece made a Take Charge Request (TCR) to the UK pursuant to Council Regulation (EU) No 604/2013 (Dublin III). The TCR asserted that the applicant was MN's nephew. It was accompanied by the BIA, untranslated Afghan ID documents relating to the applicant, his father, his mother and MN, and the untranslated marriage certificate of the applicant's parents.

4. The TCR was logged by the European Intake Unit (EIU) on 19 October 2018. On the same day the respondent informed MN in writing of the applicant's application and directed him to complete and return an enclosed form entitled "Consent to care for a child wishing to enter the United Kingdom." The EIU received MN's Home Office file on 23 October 2018 and MN's completed form was received on 1 November 2018.

5. On 3 December 2018 an EIU caseworker noted that, during his asylum application, MN did not identify the applicant's mother as his sibling. According to a General Case Information Database (GCID) note "the MS [Member State] has not provided any further evidence to show the link between the claimed uncle and the minors [*sic*] mother." A 'rejection letter' and 'hold letter' were sent to a Senior Case Worker for approval.

6. On 6 December 2018 a Senior Caseworker advised that a new version of the EIU 'consent' form be sent to MN before rejecting the TCR. MN never received this second 'consent' form. In a witness statement dated 19 July 2019 Ahmed Ibrahim, the Dublin III Operational Lead of the EIU, stated that there was no available evidence that it was sent to MN.

7. On 12 December 2018 (although the letter was dated 3 December 2018) the respondent sent a 'holding letter' to Greece indicating that the UK was

> … currently investigating the requested take charge request. Once the UK has arrived at a decision it shall inform yourselves. The UK wishes to remind you that in the best interest of the children, we request that you do not transfer the minor.

<u>The refusal of the TCR</u>

8. The respondent purportedly refused the TCR on 24 December 2018. The decision read, in material part,

> The UK has attempted to substantiate the family link and has consulted the minor's uncle's Home Office submissions. Having examined the information provided within the Home Office records the UK has not been able to identify

any evidence supporting a familial link. In his previous submissions the claimed uncle mentions his siblings and gives their names. However on that occasion he did not give the name of the minor [*sic*] mother as one of his siblings.

The UK has also considered all the information within the Take Charge Request, including; a supporting letter from the UK-based Uncle and his written consent, and copies of supporting documents including,

- BIA for the Minor
- mothers ID card (NOT Translated)
- Uncle Id [*sic*] card (NOT Translated)
- Father Id [*sic*] card (NOT Translated)
- Minors ID (NOT Translated)
- Medical Documents

However, we have been unable to find any evidence to support the claim that the above named minor is related to his claimed Uncle.

9. On 11 January 2019 Greece requested that the UK re-examine the TCR and provided further evidence in support of the relationship including photographs of the applicant with MN and English translations of the identity documents. The applicant's previous solicitors sent chase-up letters inquiring about the progress of the reconsideration application.

10. A Pre-Action-Protocol Letter was issued by the applicant's current solicitors on 1 March 2019. This challenged the lawfulness of the decision of 24 December 2018 and the respondent's ongoing refusal to accept the TCR. The solicitors arranged for a DNA test and the results received on 20 March 2019 indicated that it was "125.08 times more likely" that MN was the applicant's biological uncle as opposed to being unrelated. This was not however served on the respondent prior to the issue of proceedings on 22 March 2019.

11. On 25 March 2019 a caseworker concluded that the applicant and MN were related as claimed, and a senior caseworker agreed. An email was then sent to MN's Local Authority to undertake a "family assessment". On either 8 or 10 April 2019 the local authority issued a positive family assessment and, on 10 April 2019 the respondent carried out security checks and informed the Greek authorities that it was now satisfied that the claimed family link was established and that the UK would accept the applicant's transfer. The respondent asked the Greek authorities to advise of the arrangements to transfer the applicant to the UK at least 3 working days in advance of the transfer. In both her Acknowledgment of Service and Supplementary Summary Grounds of Defence the respondent contended that the challenge was now academic.

12. On 15 May 2019 Upper Tribunal Judge Kopieczek granted permission to proceed with the JR observing, *inter alia*, that "the claim for damages seems to me to be an obstacle to the conclusion that the claim is academic."

13. In amended judicial review grounds dated 5 July 2019, and in light of the respondent's acceptance of the family link and purported acceptance of the TCR, the applicant sought declarations that the respondent breached her obligations under EU law (Dublin III and the Charter of Fundamental Rights – CFR) and under Article 8 ECHR, and damages for the said breaches. In Detailed Grounds of Defence dated 19 July 2019 the respondent maintained, in reliance on the

recently promulgated Upper Tribunal decision in **R(FA, AT, TT) v SSHD** (JR/5523/2018, JR/5405/2018, JR/5406/2018) (**FA**), that it was not necessary to grant any declaration in relation to the late response to the initial TCR or in respect of the time taken for the respondent to accept the re-examination request as any such declaration would be academic given that all that remained was for Greece to make arrangements to transfer the applicant and Greece had up to 10 October 2019 to do so. Any unlawfulness in respect of the decision of 24 December 2018 was equally academic following the decision of 10 April 2019. Given that the overall time-frame had not been exceeded damages were not required to give just satisfaction, even if the Tribunal were to find some failings.

14. At the commencement of the hearing on 9 September 2019 I was informed by Ms Kilroy that the applicant's transfer to the UK had been set for 17 September 2019. I proceed on the basis that transfer did occur on that date.

Relevant legislative framework

The Dublin III Regulation

15. Council Regulation (EU) No 604/2013 sets out the criteria and mechanisms for determining which EU Member State is responsible for examining a third country national's asylum application. The criteria establish a hierarchy for determining responsibility. If a Member State where an asylum application is lodged considers 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.

16. Chapter II of the Dublin III Regulation deals with 'General Principles and Safeguards'. Article 3 states, so far as is relevant:

> 1. Member States shall examine an application for international protection by a third-country national […] who applies on the territory of any one of them. […] The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.

17. Article 6 provides guarantees for minors:

> 1. The best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation.
>
> ….
>
> 3. In assessing the best interests of the child, Member States shall closely cooperate with each other and shall, in particular, take due account of the following factors:
>
> (a) family reunification possibilities;
> (b) the minor's well-being and social development;
> (c) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking;
> (d) the views of the minor, in accordance with his or her age and maturity.
>
> 4. For the purpose of applying Article 8, the Member State where the

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

5. With a view to facilitating the appropriate action to identify the family members, siblings or relatives of the unaccompanied minor living in the territory of another Member State pursuant to paragraph 4 of this Article, the Commission shall adopt implementing acts including a standard form for the exchange of relevant information between Member States. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 44(2).

18. Article 7 explains that the hierarchical criteria for determining the Member State responsible shall be applied in the order in which they are set out in the Chapter. Article 7 (3) states:

> In view of the application of the criteria referred to in Articles 8, 10 and 16, Member States shall take into consideration any available evidence regarding the presence, on the territory of a Member State, of family members, relatives or any other family relations of the applicant, on condition that such evidence is produced before another Member State accepts the request to take charge or take back the person concerned, pursuant to Articles 22 and 25 respectively, and that the previous applications for international protection of the applicant have not yet been the subject of a first decision regarding the substance.

19. Article 8(2), which is headed 'Minors', reads, in material part:

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

A relative includes an uncle (Article 2(h) Dublin III).

20. The procedures relating to TCRs are contained in Articles 21 and 22. Article 21 states, in material part:

> 1. Where a Member State with which an application for international protection has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible and in any event within three months of the date on which the application was lodged within the meaning of Article 20(2), request that other Member State to take charge of the applicant.
>
> …
>
> 3. In the cases referred to in paragraph[s] 1 …, the request that charge be taken by another Member State shall be made using a standard form and including proof or circumstantial evidence as described in the two lists mentioned in Article 22(3) and/or relevant elements from the applicant's statement, enabling the authorities of the requested Member State to check whether it is responsible on the basis of the criteria laid down in this Regulation. …

21. Article 22 deals with the reply to a TCR. It reads, in material part:

> 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.

22. Article 22(3) requires the Commission to establish two lists, indicating the relevant elements of proof and circumstantial evidence in determining which Member State is responsible:

> (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.

23. Article 22(4) states,

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

24. Article 22(5) - (7) reads:

> 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.
>
> 6. Where the requesting Member State has pleaded urgency in accordance with the provisions of Article 21(2), the requested Member State shall make every effort to comply with the time limit requested. In exceptional cases, where it can be demonstrated that the examination of a request for taking charge of an applicant is particularly complex, the requested Member State may give its reply after the time limit requested, but in any event within one month. In such situations the requested Member State must communicate its decision to postpone a reply to the requesting Member State within the time limit originally requested.
>
> 7. Failure to act within the two-month period mentioned in

> paragraph 1 and the one-month period mentioned in paragraph 6 shall be tantamount to accepting the request, and entail the obligation to take charge of the person, including the obligation to provide for proper arrangements for arrival.

25. Art 29(1) falls under Section VI relating to 'Transfers' and is headed 'Modalities and time limits'. It reads,

> The transfer of the applicant or of another person as referred to in Article 18(1)(c) or (d) from the requesting Member State to the Member State responsible shall be carried out in accordance with the national law of the requesting Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request by another Member State to take charge or to take back the person concerned or of the final decision on an appeal or review where there is a suspensive effect in accordance with Article 27(3).

26. If the transfer is not effected within 6 months of the acceptance then (subject to certain exceptions) responsibility for the asylum claim is transferred back to the transferring state (Art 29(2)).

The Implementing Regulations

27. The Implementing Regulations (IRs) make further provision generally for how the Dublin III Regulation framework is to work in practice. These are contained in Regulation (EC) No 1560/2003 (the "2003 Regulation"), which is amended by Regulation (EU) No 118/2014 (the "2014 Regulation").

28. Article 3 of the 2003 Regulation, under the heading "Processing Requests for Taking Charge", provides:

> 1. The arguments in law and in fact set out in the request shall be examined in the light of the provisions of Regulation (EC) No 343/2003 and the lists of proof and circumstantial evidence which are set out in Annex II to the present Regulation.
>
> 2. Whatever the criteria and provisions of Regulation (EC) No 343/2003 that are relied on, the requested Member State shall, within the time allowed by Article 18(1) and (6) [now Arts 22(1) and (6) of Dublin III] of that Regulation, check exhaustively and objectively, on the basis of all information directly or indirectly available to it, whether its responsibility for examining the application for asylum is established. If the checks by the requested Member State reveal that it is responsible under at least one of the criteria of that Regulation, it shall acknowledge its responsibility.

29. Article 5 of the 2003 Regulation provides for a negative reply to a TCR and the possibility of the requesting State requesting that the TCR be re-examined.

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

> 2. Where the requesting Member State feels that such a refusal is based on a misappraisal, or where it has additional evidence to put forward, it may ask for its request to be re-examined. This option must be exercised within three weeks following receipt of the negative reply. The requested Member State shall endeavour to reply within two weeks. In any event, this additional procedure shall not extend the time limits laid down in Article 18(1) and (6) and Article 20(1)(b) of Regulation (EC) No 343/2003.

The reference to Art 18(1) and (6) and Art 20(1)(b) should now be taken to refer to the equivalent articles of the Dublin III Regulation, i.e. Arts 22(1) and (6) and Art 23(2).

30. Art 8(1) of the 2003 Regulation (Art 8(1) IR) obliges the Member State responsible for determining the asylum claim "to allow the asylum seeker's transfer to take place as quickly as possible and to ensure that no obstacles are put in his way."

31. Article 10 of the 2003 Regulation (Art 10 IR), under the heading 'Transfer following an acceptance by default', reads,

> 1. Where, pursuant to Article 18(7) or Article 20(1)(c) of Regulation (EC) No 34/2003 as appropriate, the requested Member State is deemed to have accepted a request to take charge or to take back, the requesting Member State shall initiate the consultation needed to organise the transfer.
>
> 2. If asked to do so by the requesting Member State, the Member State responsible must confirm in writing, without delay, that it acknowledges its responsibility as a result of its failure to reply within the time limit. The Member State responsible shall take the necessary steps to determine the asylum seeker's place of arrival as quickly as possible and, where applicable, agree with the requesting Member State the time of arrival and the practical details of the handover to the competent authorities

Art 18(7) of Dublin II now corresponds to Art 22(7) of Dublin III.

32. Article 12 of the 2003 Regulation (Art 12 IR), as amended by the 2014 Regulation, applies to unaccompanied minors. It reads in material part,

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

<u>The Charter of Fundamental Rights</u>

33. Recital 39 of Dublin III indicates that it respects and observes the "fundamental rights" and "principles" of, *inter alia*, the CFR. Article 7 of the CFR relates to respect for private and family life.

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

34. Article 47 of the CFR relates to the right to an effective remedy and 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.

The Human Rights Act 1998 and Article 8 ECHR

35. Section 6(1) of the Human Rights Act 1998 makes it unlawful for any public authority to act in a manner incompatible with a Convention right. Article 8 of the ECHR provides:

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The legal challenge

36. I summarise the arguments advanced by each party, as detailed in the grounds, the skeleton arguments and the oral submissions.

37. There is some agreement between the parties. The respondent does not now dispute that there was default acceptance of the TCR by operation of law. This shift follows the handing down of **FA** on 24 June 2019. Prior to this decision it was the respondent's position that a breach of the 2-month time-limit in Art 22(1) Dublin III did not necessarily trigger deemed acceptance and that the respondent was entitled to reject a TCR after the completion of the 2-month long stop (see paragraph 16 of the Supplementary Summary Grounds of Defence, 8 April 2019). The UK therefore became responsible for determining the applicant's asylum claim on 11 December 2018.

38. The respondent accepts, on a fair reading of the 24 December 2018 decision, that she referred only to having checked the evidence provided with the TCR against Home Office records. No reference was made to the evidence provided by MN in his completed form returned on 1 November 2018.

39. The respondent additionally accepts that there was a divergence, at the material time between the respondent's guidance and operational practice in relation to

engaging local authorities.

The applicant's submissions

40. Ms Kilroy submits that the respondent failed to properly investigate the TCR within a reasonable time and, in any event, within the maximum two-month deadline established by Art 22(1) Dublin III (**X and X v Staatssecretaris van Veiligheid en Justitie** (Regulation (EU) No 604/2013) Joined Cases C-47/17 and C-48/17). The respondent breached her obligations under Dublin III by failing to recognise responsibility by way of default acceptance under Art 22(7) Dublin III and by failing to provide for proper arrangements for the applicant's arrival. The respondent was dutybound to facilitate the applicant's transfer "as soon as practically possible" (Art 29(1) Dublin III) and "to allow the asylum seeker's transfer to take place as quickly as possible and to ensure that no obstacles are put in his way" (Art 8(1) IR). The respondent's subsequent rejection of the TCR was unlawful as responsibility for considering the applicant's asylum claim had already passed to the UK. The respondent acted unlawfully by issuing a 'holding letter' on 12 December 2018 and by purporting to refuse the TCR on 24 December 2018 given that the UK was already responsible. The purported refusal was, in any event, procedurally unfair. The delays in not acknowledging the family relationship until 25 March 2019 and in not acknowledging responsibility for determining the asylum claim until 10 April 2019 were also unlawful.

41. Ms Kilroy identifies an 8 day delay between receipt of the TCR and the logging of the applicant's case on the EIU's file and the request for MN's Home Office file, a delay of 1 month and 2 days between receipt of MN's completed form on 1 November 2018 and consideration of the TCR on 3 December 2018 (which was 8 days before the expiry of the two-month deadline), and a delay in responding to the TCR before the expiry of the long-stop deadline on 11 December 2018. There was said to be a 4-month delay between the expiry of the Art 22(1) Dublin III deadline and the eventual purported acceptance of the TCR on 10 April 2019.

42. Ms Kilroy strongly resisted the respondent's reliance on Art 10 IR. Although this provision was set out in the Detailed Grounds of Defence under the general heading "the law" it had not been relied on by the respondent in the section containing her submissions. Specific reliance on Art 10 IR first appeared in Mr Lewis's skeleton argument dated 2 September 2019. It was unfair for the respondent to now raise Art 10 IR and such reliance was, in any event, inconsistent with the argument advanced by the respondent in **FA**. There was no 'election' by Greece not to proceed by way of default acceptance as the respondent actively instructed Greece not to organise a transfer based on the applicant's 'best interests'. The applicant should not be placed in a worse position because of the respondent's own unlawful reliance on Art 12(2) IR and her instruction to Greece in the 'holding letter'. Even if Greece had initiated consultations pursuant to Art 10 IR the respondent, consistent with her view of Art 12(2) IR at the time, would have rejected an assertion of default acceptance. Although there was a reconciliation procedure (Art 37 Dublin III) in the event of a disagreement between Member States Ms Kilroy was not aware of the procedure ever being used and, in any event, it would have left the applicant without any effective remedy against the respondent's unlawful conduct. The only place the applicant could realistically challenge the respondent's conduct was in the UK. The fact that Greece had not initiated consultations was not

enough to relieve the respondent of her liability for the delay in transferring the applicant that amounted to a breach of Dublin III and/or Art 8 ECHR.

43. Ms Kilroy submitted that the facts of the cases considered in **FA** were materially different to those in the present case, which most closely resembled those in **R (on the application of FwF & FrF) v SSHD** JR/1626/2019 (**FwF**), handed down on 16 August 2019. In **FA** the family relationships had been accepted prior to the expiry of the Art 22(1) Dublin III time limit and the Tribunal was only concerned with delays in formal acceptance of the TCRs. The purported initial rejection of the TCR in the present case was caused by a breach of the respondent's investigative duty and occurred after the expiry of the two-month time limit. In **FA** there had been no cessation of activity and arrangements for transfer continued to be made and were ultimately made within 6 months of default acceptance. The Upper Tribunal in **FA** found that the overall delays were not unreasonable and that was why there was no breach of either Art 8 ECHR or Dublin III. **FA** did not suggest that the unlawful refusal of a TCR that delayed family reunification could not breach Dublin III and/or Art 8 ECHR. Nor was it authority for the proposition that all unlawfulness taking place within the longstop timescales did not matter. Ms Kilroy submitted that the UK could not 'borrow time' from Greece's six-month transfer window, or from any other Dublin III stage, in order to comply with its investigative obligations or to fix its own unlawfulness and supported this submission by reference to **FwF** (at [106]). In this case the maximum 8-month timeframe (2 months for responding to the TCR and then 6 months for transferring the applicant) expired on 11 June 2019 and the applicant remained in Greece.

44. Ms Kilroy submitted, further or alternatively, that the initial failure to accept responsibility and the 24 December 2018 decision were unlawful because the respondent breached her investigative duty and acted in a procedurally unfair manner:

    (1) by refusing the TCR without first giving the applicant or MN an opportunity to address the respondent's specific concerns (including a failure to send a new undertaking letter to MN);

    (2) by confining her investigation to consideration of MN's Home Office file and failing to make further enquiries, including a failure to investigate or facilitate DNA testing and a failure to translate the ID documents or to inform the applicant or MN that they were not translated so as to give them an opportunity to provide translations or DNA evidence. Dublin III did not require that documents provided by the requesting State be translated and the respondent's investigative obligation to take "reasonable steps" required her to translate documents provided by a UAM (Unaccompanied Asylum-seeking Minor) or, at the very least, to raise the matter with the requesting State or the applicant or MN in good time and prior to any refusal in order to afford the applicant opportunity to obtain translations;

    (3) by failing to engage with the Local Authority following receipt of the TCR and prior to refusing it, given that the Local Authority could have obtained evidence relevant to the family link; and

    (4) by reaching the irrational and unreasoned conclusion that she was "unable to find any evidence" to support the claimed relationship.

45. The respondent's unlawful conduct delayed family reunification and warranted relief through a declaration of unlawfulness and damages for breaches of Article 8 ECHR and/or Dublin III. If the respondent had not acted unlawfully the applicant would most likely have entered the UK on an earlier date. Ms Kilroy submitted that the applicant had a right to an effective remedy under Dublin III and the CFR and the Tribunal was required to determine whether his fundamental rights had been breached. There was family life between the applicant and MN. The facts of **Entry Clearance Officer, Sierra Leone v Kopoi** [2017] EWCA Civ 1511, relied on by the respondent, were not remotely similar to the facts of the present case. There had been an interference with the family life between the applicant and MN due to the unlawful delay. Ms Kilroy sought to distinguish the decision in **R(Mambakasa) v SSHD** [2003] EWHC 319 (Admin) on the basis that the unlawful refusal in the present case caused the delay and the facts of that case were very different.

46. The applicant was left in limbo in Greece in circumstances that did not meet his developmental and emotional needs causing an interference with his private life. He was suffering from post-traumatic and depressive symptoms which caused him functional impairment and significant psychological distress. The delay in reunification was a major contributory and exacerbating feature to his current low mood and distress and increased his vulnerability to further psychiatric symptoms. It was likely that the applicant's mental health would deteriorate the longer he remained in his current position and there was also the possibility that self-harm and/or suicidal thoughts would emerge. The failure by the respondent to acknowledge responsibility for the TCR and to start making arrangements for the applicant's arrival constituted an interference with his Art 7 CFR and Art 8 ECHR rights. This interference was neither in accordance with the law in light of the breach of Dublin III, nor was it justified as necessary or proportionate. Any reliance by the respondent on resource constraints was misplaced given the requirement in Art 35(1) Dublin III to ensure that resources were placed to comply with the Art 22(1) deadline.

47. There was a public interest in determining whether there was a breach/violation of Dublin III and/or Art 8 ECHR and this should be reflected in the form of declaratory relief (applying **R(First Stop Wholesale Ltd) v Revenue and Customs Commissioners** [2012] EWHC 1106 (Admin)). The applicant was also entitled to damages for breach of his EU law rights and his Article 8 ECHR rights.

<u>The respondent's submissions</u>

48. Mr Lewis submitted that **FA** left little scope for pursuing claims seeking only declarations and damages for alleged breaches of Dublin III, and the issue of seriousness was relevant in respect of both forms of relief sought. No purpose would be served by granting a declaration that the decision of 24 December 2018 was unlawful as the TCR was ultimately accepted and the applicant is to arrive in the UK. Any declaration would be academic.

49. Mr Lewis identified the two core propositions established in **FA**:

    (i) a failure to make a decision on a TCR within the 2 months required by Dublin III does not result in a "breach" of the Regulation that needs to be

the subject of a formal declaration because the regulation itself (in Art 22(7)) provided for the consequence of that failure; and

(ii) when assessing whether a failure to comply with a time limit in the Dublin III Regulation was sufficiently serious to warrant relief (including damages), it was appropriate to have regard to whether the overarching time frame had been exceeded overall.

50. Mr Lewis invited me to follow **FA** as a decision of coordinate jurisdiction unless there was a powerful reason for not doing so (**Willers v Joyce (No 2)** [2016] 3 WLR 534). Although there had been no official reporting of the decision the three cases were linked to enable the Tribunal to provide guidance and neither side appealed the decision. I was invited not to follow the more recent case of **FwF**, decided by Judge Kamara. Judge Kamara's references to **FA** were in the context of **FA** being a live and undetermined case and no reference was made to the judgement ultimately given in **FA**. The factual differences between **FA** and the present case were minor and the Secretary of State was in the process of seeking permission to appeal **FwF**.

51. Between the expiry of the Art 22(1) Dublin III time limit and the re-examination request on 11 January 2019 Greece did not seek to initiate the consultations needed to organise the applicant's transfer to the UK, as required by Art 10(1) IR. Greece elected not to rely on or enforce the default provision in Art 22(7) Dublin III and the provisions of Art 10 IR and instead made a re-examination request with better evidence. The applicant was wrong to submit that the re-examination request was irrelevant to this case as Art 10 IR made clear that it was for Greece to decide whether to give practical effect to the default provision. The respondent was required to respond to the re-examination request and the applicant has not suggested that the eventual acceptance of the TCR was void in law. In order for the current transfer to have legal validity the six-month period had to run from 10 April 2019. It was not open to the Tribunal to speculate as to how Greece might have responded had there been an earlier acceptance of the TCR and the Tribunal was not in a position to determine what was likely to have happened if Greece had informed the UK that there had been acceptance by default. The judgement in **X & X** contained no discussion of Art 10 IR, the CJEU having apparently heard no argument on it. The fact of Greece not applying Art 10 IR was the most operative factor in any delay and the absence of any initiation of consultations was critical to the exercise of the Tribunal's discretion. Mr Lewis submitted that this was not a case in which the Tribunal needed to reach a definitive view of the interaction between Art 22(7) Dublin III and Art 10 IR or what would happen where there was default acceptance but the requesting Member State placed the default acceptance to one side and instead made a request for reconsideration.

52. My attention was drawn to Annex X of the Implementing Regulations (as highlighted in **X & X**) which contained information for applicants under Dublin III and which indicated that, under normal circumstances, the entire duration of the Dublin III procedure can take up to 11 months. Even taking the aspirational period for responding to a re-examination request as 2 weeks (Art 5(2) IR), the total period allowed for all stages of the Dublin III procedure was some 11 months and 5 weeks, a period broadly in the region of a year. A period of almost 13 months and 3 weeks was, in Mr Lewis's submission, not significantly in excess of the timeframe envisaged in Dublin III.

53. Any challenge to the lawfulness of the decision of 24 December 2018 was entirely academic following the subsequent acceptance of the family link. As there is no practical relief that can be granted the Tribunal should not determine questions that have become academic between the parties, applying **R v SSHD ex p Salem** [1999] 1 AC 450 and **R v SSHD ex p Goloshvili** [2019] EWHC 614. It was not, in any event, irrational for the respondent to reject the TCR as MN failed to mention his sister when asked to identify his family members as part of his asylum claim. There was nothing in Dublin III or the IRs suggesting that the requested Member State was required to translate documents sent to it in support of a TCR. It was for Greece to make good its own TCR and ensure that it was in a fit state to be assessed by the UK. In so far as the translations were "indirectly available" (Art 3(2) IR), it was not reasonable to expect the respondent to correct the deficiencies in the evidence provided by Greece by translating the documents.

54. Although the decision of 24 December 2018 only referred to the respondent having checked the evidence provided with the TCR against Home Office records and failed to refer to the evidence provided by MN in his completed pro forma, this was not so much a failure to comply with the investigative duty as a failure to expressly consider the information that resulted from compliance with that duty. It was accepted that MN did not receive a second undertaking form but there was insufficient evidence that the letter was not sent. A fair conclusion was that there was probably a postal failure. It was unnecessary for me to reach a view as to the lawfulness of Mr Ibrahim's current endorsement of the use of holding letters as the letter in the present case was sent before **FA** was handed down.

55. Whilst it was accepted that there was a divergence at the material time between the respondent's published policy "Dublin III Regulation Version 1.0", 2 November 2017 and operational practice in relation to engaging local authorities this did not result in a breach of Dublin III or Art 8 ECHR, as found in **FA**. There could in any event be no practical consequences from a declaration as the respondent had now modified her policy. Whilst it was accepted that the respondent did not, before rejecting the initial TCR, consider the possibility of admitting the applicant to the UK to have his DNA tested, there were no restrictions on DNA testing in Greece.

56. Mr Lewis submitted that there was no breach of either Article 8 ECHR or its equivalent in Art 7 CFR. **ECO v Kopoi** [2017] EWCA Civ 1511 indicated that Article 8 was only likely to be engaged by a refusal of entry clearance involving a relationship between husband and wife or other close life partners or a parent and minor child. There had been no refusal of entry clearance, as there was in **Kopoi**, and the only complaint of 'delay' related to the period of just under 3 months between the receipt of the TCR on 11 October 2018 and its acceptance following re-examination on 10 April 2019. A delay of less than 3 months in the context of a relationship between a teenage child and an uncle, where there was no evidence of the child being previously unusually dependent on the uncle, was not enough to breach Article 8 ECHR (relying on **Askar v UK**, Application no. 26373/95, 16 October 1995) and **R(Mambakasa) v SSHD** [2003] EWHC 319 (Admin), upheld in **Anufrijeva** [2004] Q.B. 1124). The total length of the Dublin III process in this case had not substantially exceeded the total timeframe envisaged by the Dublin III framework.

57. I was reminded that although it was accepted that there were some errors of law in this case there was no automatic entitlement to damages. Damages would only be due if there were "serious breaches" of EU law and breaches of human rights.

Analysis

58. Both parties rely on **FA**, a decision promulgated by Upper Tribunal Judge Frances on 24 June 2019. **FA** and two other claimants were minors who had been the subject of TCRs issued by France under Art 8(1) Dublin III. The UK accepted the family link. 'Holding letters' were issued in respect of two of the claimants. In each case the 2-month deadline in Art 22(1) Dublin III expired before a formal acceptance by the UK. Judge Frances found that, in all three cases,

    (i) The Secretary of State failed to properly investigate safeguarding issues to assess whether it was in the claimants' best interests to be transferred to the UK [64];

    (ii) the practice of sending 'holding letters' acknowledging receipt of TCRs but failing to give a formal response was not in accordance with Dublin III [65];

    (iii) Art 12(2) IR only applied in "extreme cases" where there was a "best interest reason" for not complying with the time limits.

59. Although the Secretary of State failed to act in accordance with Art 22(1) Dublin III without good reason the claimants were all transferred within the 8-month period envisaged by that Article (2 months for the Requested Member State to make a decision on the TCR) and Art 29 Dublin III (6 months to effect transfer following acceptance). At [69] the Judge explained,

> However, no breach of Dublin III flows from this because of the deeming provision in Article 22(7) and, on the facts of these cases, the transfers all took place within 8 months of the TCR being received…. Therefore, even if the TCR had been accepted immediately, the transfer took place within the six-month time limit. There was no challenge to the validity of the transfers.

60. At [70] the Tribunal stated,

> In these cases, the UK failed to accept the TCR's within two months and therefore responsibility automatically transferred to the UK along with the obligation to provide for proper arrangements for arrival. At this stage it was open to the French authorities to notify the applicants of the deemed acceptance and the UK's obligations.

61. And at [72] the Tribunal stated,

> I accept, as Miss Giovannetti does, that the process could have been quicker, if the Respondent had contacted the local authorities sooner and had followed up any lack of response, but any delay was not unreasonable in the circumstances. There was no provision in Article 22

that the TCR is accepted as soon as possible and, given the deeming provision, the timetable continued regardless of any delay. Any delay in requesting the file or contacting the local authority did not prevent the process from continuing and, in all three cases, a transfer was effected within a reasonable time. The failure to accept the TCRs had not prevented the arrangements that should have been made in the transfer period from taking place within the time limit provided in Article 29.

62. At [73] the Tribunal found that the transfers were made within the overall time limit envisaged by Dublin III. Although the Secretary of State's delay in accepting the TCR's was unlawful, "on the particular facts of these three cases, there was no unreasonable delay in transferring the Applicants to the UK. There was no breach of Dublin III" [75].

63. It was central to Judge Frances' decision that there was no provision for 'holding letters' in Dublin III, that Article 12(2) IR only applied in "extreme cases", and that by operation of Art 22(7) Dublin III responsibility was automatically transferred to the UK "… along with the obligation to provide for proper arrangements for arrival" [69]. The delays in each of the cases did not however breach the longstop period limited for transfer under Dublin III.

64. The respondent now accepts there was default acceptance of the TCR on 11 December 2018 in the present case by operation of law. She argues however that Greece elected not to pursue the path of default acceptance and instead requested reconsideration under Art 5(2) IR. Greece failed to comply with its mandatory obligation under Art 10 IR to initiate consultations to organise the applicant's transfer and any delay in transferring him was attributable to the actions of the Greek authorities. The respondent submits that, following the reconsideration request the 6-month time period for transfer commenced on 10 April 2019 when she formally accepted the TCR.

65. The provisions of Art 10 IR were set out in the respondent's Detailed Grounds of Defence but did not form part of her actual submissions. Particularised reliance on Art 10 IR in respect of whether the delay in accepting the TCR breached Dublin III first appeared in Mr Lewis's skeleton argument received by the Upper Tribunal on 3 September 2019. It is not appropriate for the respondent to place significant reliance on a legislative provision where this provision did not previously form part of her submissions. The applicant has a right to know what case the respondent is advancing and to be given sufficient opportunity to engage with the arguments upon which she relies before the substantive hearing. Although the Detailed Grounds of Defence (paragraphs 28 and 29) did highlight and comment on the relevant wording of Art 10 IR, it was not clear how this related to the issues in contention. Art 10 IR is however a relevant provision in the application of the Dublin III framework and, despite being put on short notice, Ms Kilroy was still able to make oral submissions on Art 10 IR and, following the hearing, produced a note arguing that the respondent's reliance on Art 10 should not be entertained but also making substantive submissions in response. I am satisfied that Art 10 IR is relevant in this judicial review and that the applicant has, by reference to the additional note, been given a sufficient opportunity to respond to the respondent's submissions.

66. According to Mr Lewis there has been no judicial consideration of Art 10 IR. Art 10 IR was referred to by Counsel for the Secretary of State in **FA** (at [45]) but it

did not form any part of the Tribunal's reasoning. There is nothing on the face of the decision to suggest that France initiated consultations under Art 10 IR but the Secretary of State's belated (and unnecessary) formal acceptance had the practical consequence of enabling transfer of the claimants. I note the absence of any time limit contained in Art 10 IR to initiate consultations, although the overall structure of Dublin III and the IRs aim to facilitate a rapid transfer, especially when dealing with UAMs.

67. Art 10(1) IR obliged Greece to "initiate the consultations needed to organise the transfer" following an acceptance by default. Art 10(2) IR obliged the UK to confirm in writing that it acknowledged its responsibility as a result of its failure to reply to the TCR within the time limit, but this obligation only arose if the UK was asked by Greece. There is no evidence before me that Greece formally initiated consultations under Art 10. Instead Greece requested that the TCR be re-examined and provided further evidence, most notably the translated ID documents. This was unnecessary given the default acceptance. The respondent however contends that, through its actions, Greece 'elected' not to pursue or enforce the default acceptance and that the default acceptance essentially fell by the wayside following the request for reconsideration. For the following reasons I do not find that the failure by Greece to initiate consultations under Art 10 IR and its request for re-examination of the TCR renders the default acceptance otiose.

68. It is unclear whether Greece appreciated there had been default acceptance of the TCR. Mr Lewis indicated at the end of the hearing that there was no further correspondence between Greece and the UK to disclose pursuant to the respondent's duty of candour. There is however no mechanism by which any misapprehension by Greece can have the legal effect of cancelling or obviating the operation of Art 22(7) Dublin III. Art 10 IR itself does not provide that, if Greece failed to initiate consultations responsibility for determining the applicant's asylum claim would somehow revert to it, or that any subsequent application for reconsideration would enable the Requesting State and the Requested State to disregard the fact of default acceptance. It remained open to Greece to initiate consultations within the time limits prescribed in Art 29 Dublin III. Nor is there any mechanism in Art 10 IR or Dublin III by which the purported reconsideration request could revert responsibility for considering the applicant's asylum claim back to Greece. I additionally note that an automatic transfer of responsibility requires no reaction by the relevant Member States (**Shiri v Bundesamt Fur Fremdenwesen Und Asyl**, C-201/16, [2018] 2 C.M.L.R.3).

69. The legal consequences flowing from the default acceptance cannot be disregarded by the failure by Greece to initiate consultations or by requesting reconsideration. As there was default acceptance of the TCR the formal rejection on 24 December 2018 had no legal effect. As there was no rejection of the TCR that was capable of being the subject of a request for reconsideration there was no basis for Greece to make a reconsideration request. It must also follow that the subsequent acceptance was also otiose.

70. In light of the above assessment default acceptance of the TCR occurred on 11 December 2018. The respondent cannot then point to the purported acceptance of the TCR on 10 April 2019 as commencing the six-month time limit in Art 29 Dublin III. Greece should have transferred the applicant by 11 June 2019. This

did not occur. There has therefore been a breach of the longstop time limits of Dublin III. I appreciate that this calls into question the lawful basis for the applicant's transfer on 17 September 2019 given the consequences of the expiry of the 6-month time limit in Art 29 Dublin III. Ms Kilroy, in her further written note, contended that it was not open to the respondent to resist the applicant's actual transfer by relying on her own default. It is not however necessary for me to determine whether the actual transfer had a lawful basis.

71. The breach of the Dublin III time limits materially distinguishes the present case from **FA** where there was no breach of the longstop time limits. Even if one takes the overall time limits, including the initial 3-month period in which Greece has to make the TCR and the three-week period for lodging a reconsideration request under Art 5 IR (which, on the facts of this case, I find do not apply), and a period of 2 to 5 weeks, as suggested by Mr Lewis, for the UK to respond to the reconsideration request (again, periods that do not apply in the present case), the overall time limit in Dublin III would have been breached. It was central to the Upper Tribunal's decision in **FA** that no breach of Dublin III occurred, "because of the deeming provision in Article 22(7) and, on the facts of these cases, the transfers all took place within 8 months of the TCR being received." That simply is not the case on the facts before me.

72. Mr Lewis relied on the general information provided to applicants under Dublin III relating to the duration of the procedure and submitted that it was broadly in the region of a year. As the applicant lodged his asylum claim in Greece on or around 20 July 2018 and given that he was due to be transferred on 17 September 2019, it has taken almost 14 months to bring about his transfer. Even if I was to accept the overall period as being broadly a year (which, on the facts of the present case, I do not), there has been a further period of approximately 2 months during which the applicant has remained in a Greek refugee camp due to the delay in his transfer. Mr Lewis submits that this additional period is not significantly in excess of the indicative timeframe envisaged by Dublin III. One must however take into account, when determining both whether to grant declaratory relief and any award of any damages for a breach of EU law and/or the ECHR, not only the length of any delay but also the applicant's particular circumstances including his age, his state of health and the conditions in which he has lived during any period caused as a result of delay attributed to a breach of Dublin III. I have, in any event, found that the breach of the Dublin III time limits, on the facts of this particular case amounted to a delay of 3 months and 6 days (the period between 11 June 2019, when the applicant should have been transferred, and 17 September 2019).

<u>Consequences of Greece's failure to initiate consultations under Art 10(1) IR</u>

73. Greece should have appreciated that there had been default acceptance and it should have initiated consultations pursuant to Art 10(1) IR. It did not. It was potentially open to the applicant following default acceptance to ask Greece to initiate these consultations and to mount a legal challenge in the Greek Courts if the Greek authorities failed to respond or refused to initiate consultations. Ms Kilroy however submits that even if this was done it would have made no difference as the respondent did not, at that stage, accept that default acceptance had occurred.

74. Mr Lewis contends that it is inappropriate to speculate as to what might have

happened had Greece initiated consultations pursuant to Art 10(1) IR. Whilst there is always some degree of speculation I am assisted by the respondent's clearly stated position at the time. Until promulgation of **FA** the respondent believed she was not bound by the two-month time limit in Art 22(1) Dublin III. This is readily apparent from paragraph 16 of the Supplementary Summary Grounds of Defence. It was the respondent's position that Art 12(2) IR modified the application of Art 22 Dublin III in the context of unaccompanied children (see paragraph 18 of the Supplementary Summary Grounds of Defence). This position was maintained until after promulgation of **FA** in June 2019. **FA** rejected this proposition and found the respondent's reliance on Art 12(2) IR unlawful. Had consultations been initiated I find it more likely than not that the UK would have rejected any assertion by Greece that there had been default acceptance.

75. Following a rejection by the UK it would have been open to Greece to resolve the dispute through the reconciliation process in Art 37 Dublin III. Under the reconciliation procedure the chairman of a committee established under Art 44 Dublin III would appoint three members representing Member States not connected with the matter and, after receiving arguments from the parties, would propose a solution within one month. No provision is made within Art 37 for time limits in respect of the appointment of the committee or in respect of the length of time for parties to make their submissions. Any decision to use the reconciliation procedure appears to be one for the Member States themselves. It is not apparent that there is any basis for an individual to compel a Member State to use the procedure. No time limits are set for the initiation of the reconciliation procedure, and the Member States are "… to take the utmost account of the solution proposed" (Art 37(2)). There is therefore no obligation on the State parties to adopt the solution proposed. In light of the forgoing I find, on the facts of this particular case, that the applicant would not have an effective remedy (with reference to Art 47 CFR and Art 27 Dublin III) in the enforcement of the allocation of responsibility under Art 22(7) Dublin III even if Greece used the Art 37 Dublin III procedure.

76. Although Greece should have initiated the consultations in Art 10(1) IR, given the respondent's stated position at the material time in respect of the time limit in Art 22(1) Dublin III, I find that the failure by Greece to comply with its duty was not in itself a principal cause of the delay that constituted a breach of the Dublin III time limits. The respondent's unlawful reliance on Art 12(2) IR is more likely than not to have resulted in a rejection of any attempt by Greece to initiate consultations under Art 10(1) IR, and consequently the breach of the Dublin III time limits.

<u>The decision of 24 December 2018 and the subsequent delay in accepting the family relationship</u>

77. Although default acceptance occurred on 11 December 2018, and the UK could no longer accept or reject the TCR, the practical opportunity to facilitate the applicant's transfer presented itself when the respondent did make a decision on the TCR.

78. The TCR was made on 11 October 2018, it was logged 8 days later on 19 October 2018 and an "undertaking" form was sent to MN and a request made for MN's Home Office file. MN's Home Office file was received on 23 October 2018 and MN's completed undertaking form was received on 1 November 2018. There

was a subsequent unexplained delay of just over one month until a caseworker decided to reject the TCR on 3 December 2018 and sent a draft 'holding letter' to a Senior Caseworker for approval. MN had not mentioned the applicant's mother as a sibling in either his asylum interview or his asylum statement. The respondent was rationally entitled to attach weight to this omission. The length of one month was however excessive given the strict time limits imposed by Dublin III and the fact that the applicant was a minor. MN's file should have been considered earlier and the omission upon which the respondent relied in purportedly rejecting the TCR should have been identified earlier.

79. The respondent accepts that she referred only to having checked the evidence provided with the TCR against Home Office records. No reference was made to the evidence provided by MN in his completed form returned on 1 November 2018.

80. On 6 December 2018, 5 days before the expiry of the 2-month time limit, the caseworker was advised to send a new version of the undertaking form to MN. The respondent accepts that this second undertaking form was not received by MN but maintains that this was most likely due to a postal problem. I have considered the statement of Mr Ahmed Ibrahim. The decision-maker advised him that the undertaking form was sent and he accepted that in good faith but the evidence available did not include a record that the second undertaking letter was sent. Ms Kilroy makes the valid point that there was no evidence from the caseworker concerned regarding the sending of the second undertaking form. Nor do the GCID records record the sending of the second undertaking form, and there is no reference to the decision-maker awaiting its return. In the circumstances I find it more likely than not that the second undertaking form was not actually sent. This would have been in breach of a new policy dated 30 November 2018 requiring further "undertaking" forms to be sent to UK relatives to afford them the chance to provide further information to substantiate a claimed family link. The new policy came into being following the decision in **R (on the application of MS) (a child by his litigation friend MAS) v Secretary of State for the Home Department (Dublin III; duty to investigate) [2019] UKUT 00009** (IAC). At [123] and [124] the Tribunal stated,

> 123. Third, it was not suggested before us that in reaching a decision in respect of TCR, the Secretary of State was not required to act lawfully according to public law principles (see R(RSM and ZAM) v SSHD [2018] EWCA Civ 18, especially *per* Singh LJ at [171]). The Tameside duty on a decision-maker "to acquaint himself with the relevant information" to enable him to reach an informed decision self-evidently provides a basis for the duty. Finally, the respondent's obligation to act fairly may require investigation and permit an individual to know the 'gist' of what is being said against him or her and to make representations and/or evidence on issues central to the decision to be taken (see, e.g. R v SSHD, ex parte Doody [1994] 1 AC 531 *per* Lord Mustill at p.560). The obligation is succinctly stated by Lord Phillips MR (as he then was) in R(Q and others) v SSHD [2004] QB 36 at [99]:
>
> > "The second defect is not unconnected with the first and was identified by the Judge in [2003] EWHC 195 (Admin) at [20]. He stressed that it was important that the applicant should be given a reasonable opportunity to deal with and to explain any matter which was to be relied on against him. We agree. Before the decision maker concludes that the applicant is not telling the truth he must be given the opportunity of meeting any concerns or, as Lord Mustill put it in *R v Secretary of State for the Home Department, Ex p Doody*, [1994] 1 AC 531,560, he should be

> informed of the gist of the case against him. We should add that we also agree with the Judge that at the very least the applicant must be given the chance to rebut a suggestion of incredibility and to explain himself if he can. As the Judge put it [2003] EWHC 195 (Admin) at [20]: "All that may be needed is a warning that the account is too vague or is incredible having regard to known practices at ports or it was not reasonable to rely on advice or to obey instructions." The fact that the burden rests on the applicant makes such a warning more, not less, necessary."
>
> 124. None of this is, in our judgment, inconsistent with the Dublin III Regulation and the regime for reaching decisions based upon the criteria for determining responsibility. Rather than adversely affecting the integrity of that system, in our judgment, it is patently focused on enhancing or maintaining the integrity of the system in reaching lawful and correct decisions.

81. Neither the applicant nor MN were informed of 'the gist' of the respondent's belief that the family relationship was not made out before the purported decision was made to reject the TCR. It would not have imposed an onerous burden on the respondent to have informed MN and the applicant. It would have given both an opportunity to explain why no reference was made to the applicant's mother during MN's asylum claim and would have given them the opportunity, if informed in sufficient time, of obtaining further evidence prior to the purported rejection.

82. A related matter concerns the untranslated Afghan ID documents provided by Greece with the TCR. I acknowledge that neither Dublin III nor the IRs specify which Member State should undertake translations. I do however see merit in the respondent's argument that it is for the Requesting Member State to make good its own TCR and ensure it is in a proper state to be assessed by the Requested Member State. I do not consider that the investigative duty to take "reasonable steps" extends to translating documents accompanying the TCR. Whilst the ID documents in this case were relatively short there is always the possibility that many untranslated documents may be provided. It would pose an unduly onerous burden to expect the Requested Member State to make its own translations. The investigative duty and the principles of common law fairness, considered in **MS** (at [123], [137] and [159]), and in **Citizens UK, R (On the Application Of) v Secretary of State for the Home Department** [2018] EWCA Civ 1812 (at [68] to [102]) did however require the respondent to inform MN and the applicant that the ID documents were not translated. The respondent was unarguably aware that the TCR was accompanied by a small number of untranslated ID documents and a marriage certificate relating to the applicant's parents. The BIA specifically identified the birth certificates of the applicant's mother and MN. It would have been a straightforward matter for the respondent to have informed the applicant and MN that these ID documents were untranslated. This would have given MN and the applicant an opportunity to have the documents translated. Given that the eventual acceptance of the family relationship appears to have been based on the translated documents, I find it more likely than not that if MN or the applicant were informed in sufficient time translations could have been provided and that the respondent would not have purportedly rejected the TCR.

83. The respondent accepts that, prior to the purported rejection of the TCR she did not consider the possibility of admitting the applicant to the UK to have his DNA tested. The respondent properly notes that, unlike the situation in France (considered in *MS*), there were no such restrictions on DNA testing in Greece. As

acknowledged by Ms Kilroy in her skeleton argument, DNA testing could be obtained without difficulty in Greece and consideration of the applicant's admission to the UK was unlikely to be necessary. It was however open to the applicant to have obtained DNA evidence if he had been made aware in sufficient time prior to the purported rejection of the TCR that the respondent did not accept the claimed familial relationship. The applicant was deprived of the opportunity of potentially providing such evidence by the respondent's delay in considering MN's Home Office file and the failure to inform the applicant and MN that the relationship was doubted.

84. The respondent accepted that there was a divergence, at the material time between her guidance and operational practice in relation to engaging local authorities. The relevant guidance (Dublin III Regulation Version 1.0) required the local authority where MN resided to be notified of the TCR and for there to be engagement with the Local Authority's children's social care teams "throughout the process, seeking their advice in every case." Mr Lewis submitted that, as was the case in **FA**, not acting in accordance with the published guidance did not result in a breach of Dublin III or a breach of Art 8 ECHR. In **FA** however there was no breach of Dublin III because the actual transfer occurred within the 8-month time limit. The information that was eventually contained in the Local Authority's assessment indicated that social workers spoke to both MN and his wife and that both would be jointly responsible for caring for the applicant, as they did their own children. It was noted that MN and his wife have supported the applicant in the last year and that MN had travelled to Turkey to see him. No safeguarding concerns were identified. Both MN and his wife indicated that they could support the applicant emotionally. Had the respondent complied with her written policy and engaged with the Local Authority the Local Authority's findings may have been of relevance in determining the family relationship.

85. For the reasons I have given above I find, in addition to the respondent's concessions, that she failed in her investigative duty to inform MN and the applicant of her concerns with the family relationship and to give them an adequate opportunity to provide further evidence, and that she unreasonably delayed consideration of MN's Home Office file until 3 December 2018, just 8 days prior to the expiry of the 2 month deadline. This unreasonable delay is, in all the circumstances, unlawful, as is the respondent's breach of her investigative duty. Had this unlawfulness not occurred the applicant is more likely than not to have been able to obtain translations for the ID documents that ultimately proved decisive for the respondent prior to the decision of 24 December 2018, and it is more likely than not that the respondent would not have purportedly rejected the TCR.

86. Following the 11 January 2019 request to reconsider the purported rejection, which was accompanied by the translated Afghan ID documents, it took the respondent a further 2 months and 2 weeks to accept that the applicant was related to MN. During this time Wesley Gryk Solicitors emailed the respondent on 1 February 2019 and 21 February 2019 seeking confirmation that the documents sent with the reconsideration request had been received and asking for an indication of when a decision would be made. A Pre-Action-Protocol Letter was sent by the applicant's current legal representatives on 1 March 2019 and the judicial review was lodged on 22 March 2019. Under Art 5(2) IR the respondent was only required to "endeavour to reply" to the purported re-

examination request within 2 weeks. As held in **X & X**, it was not the purpose of the provision to create a legal obligation to reply to a re-examination request. In the present case there had however already been default acceptance by operation of law. No explanation has been provided for the further delay of 2 months and 2 weeks. Given that the applicant was a minor I find that this further delay was unreasonable.

87. In **FA** the Tribunal found that the "failure to accept the TCRs had not prevented the arrangements that should have been made in the transfer period from taking place within the time limit provided in Article 29." On the facts of the present case the unlawful purported rejection of the TCR did prevent the arrangements that should have been made in the transfer period from taking place within the time limit provided in Article 29, as did the unreasonable delay in finally accepting the family relationship.

88. Judge Francis found that the "key date" in the minds of the claimants in **FA** was the date of transfer and that all transfers had taken place within 8 months of receipt of the TCR. That has not occurred in the present case. In my judgement the respondent's unlawful conduct caused a delay of 3 months and 6 days that constituted a breach of Dublin III that distinguishes the present case from **FA**.

FwF

89. In **FwF** Judge Kamara rejected the Secretary of State's argument that there had been no breach of Dublin III because the overall 11-month time limit had not yet been exhausted. The Upper Tribunal judge found that each Member State was responsible for compliance with the particular timescales imposed on them under the regulations and that there was no provision for a Member State to use the entire time frame for its own purposes. This is potentially inconsistent with the decision in **FA**.

90. In **FwF** France made a TCR on 15 November 2018 and the Secretary of State purportedly refused the TCRs on 28 January 2019. There had however been default acceptance on 15 January 2019. On 23 March 2019 the Secretary of State asked France to send new TCRs and these were received on 25 March 2019. The Secretary of State accepted the relationships on 22 May 2019 and, on 3 June 2019, the French authorities were informed that the TCRs were accepted.

91. As default acceptance occurred on 15 January 2019, France had until 15 July 2019 to transfer the claimants. The hearing was on 12 June 2019 and the decision was handed down on 16 August 2019. It is not apparent from the decision in **FwF** whether the applicant's transfer had been processed by 15 July 2019. I note the submission made by Counsel for the **SSHD** that, if the French authorities complied with the Sandhurst Treaty, the claimants would be transferred by 24 June 2019.

92. To the extent that there is any difference in reasoning between **FA** and **FwF**, it is not necessary for me to resolve the difference in light of my reasons for distinguishing **FA** from the present case.

Article 8 ECHR and Art 7 CFR

93. There is no general obligation on Member States to allow non-nationals into

their country to reunite with their family (**Sen v Netherlands** (2001) 36 EHRR 7). A state may however owe a positive Article 8 obligation to admit individuals to its territory for family reunification, although the extent of that obligation will vary according to the particular circumstances of the persons involved and the general interest (**Secretary of State for the Home Department v ZAT & Ors** [2016] EWCA Civ 810).

94. The biological relationship between the applicant and MN is no longer disputed. Although the applicant has only physically met MN on two occasions his physical isolation from his immediate family since he left Afghanistan, his vulnerability as a minor in a Greek Refugee camp, and the regular communication and financial and moral support provided by MN, as evidenced in MN's statement of 23 March 2019, the translated Messenger extracts, the Local Authority check list and the BIA, is sufficient to establish an Article 8 family life relationship. The same applies in respect of Art 7 CFR.

95. The respondent relies on **Entry Clearance Officer, Sierra Leone v Kopoi** [2017] EWCA Civ 1511 but the facts of that case are markedly different from the present case. **Kopoi** concerned a citizen of Sierra Leone who wished to visit members of her extended family in the UK for a temporary period, not a minor seeking to join and be supported by a family member 'in loco parentis' for an indeterminate period. The dynamics of the family relationships in **Kopoi** are wholly different, as is the nature of the interference with those family relationships.

96. I have found that the respondent's unlawful conduct delayed family reunification by 3 months and 6 days in excess of the Dublin III longstop time limits. But for the respondent's unlawful conduct, this delay would not have occurred. As a result of the delay the applicant was unable to establish a direct 'in loco parentis' relationship with MN at an earlier opportunity and remained physically isolated from any family member. By the time this decision is handed down the applicant will however have been reunited with his uncle. The respondent's unlawful conduct did not prevent the applicant from being reunited with MN, although it did postpone the reunification.

97. When assessing whether the period of unlawful delay amounted to an interference with Article 8 ECHR and Article 7 CFR I take into account the applicant's age (he was 16 years and 4 months old at the date of default acceptance, and 17 years old when actually transferred to the UK) , the fact that he and MN only physically met briefly in 2010 and 2017, that the applicant was not previously unusually dependent on his uncle and that the applicant was at all times able to maintain contact with MN and his immediate family in Afghanistan through social media. I note that he had lived for one year and 3 months in Turkey without any physically close family support. Although MN visited the applicant once in Turkey, he does not appear to have visited him in Greece.

98. I have additionally considered the psychiatric assessment dated 6 August 2019 undertaken by Dr S Fairweather. Dr Fairweather found that the applicant was suffering from impairing post-traumatic and depressive symptoms but that he did not fulfil the full diagnostic criteria for either psychiatric disorder. The applicant's "…delayed reunification is currently a major contributory and exacerbating feature to his current low mood and distress." The applicant lived

in a container he shared with other young boys, he was paid €15 every fortnight, he played football and he attended school. He had about 8 or 9 friends and was able to maintain his own personal hygiene (although he possibly suffered from scabies). He was in contact with his family and his uncle by telephone and social media. The psychiatrist noted that the applicant remained in an environment that met his basic needs for shelter and food and in which he received some education and social contact, but it did not meet his other needs and he felt under threat. Dr Fairweather found the applicant was struggling with the impact of the delay in being transferred to the UK and it was very likely that the applicant's mental health would deteriorate further the longer he remained in the situation, with the emergence of full psychiatric disorder. Dr Fairweather explained,

> There is no doubt the delay [in being transferred to the UK] will have been detrimental to [the applicant]. His most pressing need is social stability in an environment that meets his developmental needs, which his current situation does not. This delay will have contributed to and exacerbated his mental health leading to his low mood. What is more challenging to understand is whether [the applicant's] prolonged transfer process has led to the expression of identifiable post-traumatic symptoms specifically (as a result of his traumatic experiences prior to his arrival in Greece) and whether a prompt transfer process with early resettlement in the UK with his uncle could have moderated against the symptoms are emerging. There is research evidence that indicates that post-migration resettlement-related stressors are the most important correlates of mental health in humanitarian migrants, accounting for both direct and indirect associations. [The applicant] did not give me a detailed enough account of his mental health over time to determine whether he already had the symptoms pre-TCR application or whether they emerged consequently as he remained in a situation of extended limbo and threat. Given his limited ability to articulate his state and everything he has been through over time, which will also affect his memory for such information, it is probable this will not be possible to determine accurately.

99. In Dr Fairweather's opinion the refusal of the TCR had a detrimental impact but the degree of impact was difficult to determine. In assessing the consequences of the ongoing separation from MN Dr Fairweather considered that the applicant's mental health would deteriorate the longer he remained in his situation and she spoke of the "potential impact" on the applicant's daily functioning and the "possibility" that self-harm or suicidal thoughts may emerge. There was no evidence that, by the date of the applicant's transfer to the UK, he was unable to care for himself, or that there were any self-harm issues, or that a full psychiatric disorder had emerged.

100. Mr Lewis relied on **R(Mambakasa) v SSHD** [2003] EWHC 319 (Admin) in submitting that any delay in reuniting the applicant with MN did not result in a breach of Article 8 or Art 7 CFR. **Mambakasa** was a case involving the unlawful delay in the issue of the claimant's status letter that ultimately delayed his reunification with his family whose entry clearance was dependent upon the issuance of the status letter. The delay was caused by several serious administrative failings but there was no other decision obstructing the achievement of family reunification. Mr Justice Richards (as he was then) considered the decision in **Askar v United Kingdom** (application no 26373/95, decision of 16 October 1995), where the European Commission of Human Rights rejected at the admissibility stage an application by a Somali refugee who applied in July 1990 for family reunion with family members living in refugee

camps in Ethiopia and in Somalia but whose application was refused in November 1992. In an extract from **Askar** [101] the Commission noted that Mr Askar had not seen his family members for at least 6 years and that the nature of his ties with some of his family members had not been specified. It was not apparent that the delay had any prejudicial effect on the eventual determination of the family members' application or that the passage of time prevented the proper and fair examination of the merits of their case. At [102] Richards J stated,

> 102. I accept that the present case is on all fours with *Askar*. Indeed, if anything the reasoning in *Askar* applies all the more strongly to it. The delay in this case plainly did not prejudice the eventual determination of the family's applications: whereas in *Askar* the application was still pending at the time of the Commission's decision, in this case the applications are known to have succeeded. The period of delay in this case was substantially shorter than in *Askar*: it is true that I have held that the delay in issuing the claimant's status letter was unreasonable and that there was no equivalent finding in *Askar*; but the very basis of the complaint was that the delay was excessive in that case too. The time for which the claimant and the members of his family had been apart was somewhat shorter in this case than in *Askar*, but not materially so. I reject Mr Nicol's suggestion that the Commission's decision in *Askar* was influenced by doubt as to whether real family life existed. The Commission may have had such doubts in relation to some of the family members, but there is nothing to show that that was the case in relation to all the family members, and the decision proceeded on the express basis that there was no violation of Article 8 even if the relationships did fall within the protection of that article. The determinative point must have been the lack of prejudice to the eventual determination of the claims.

101. At [109] to [111] Richards J stated,

> 109. In relation to such matters I think it better to go back to the language of Article 8(1) and to the interests that it seeks to protect, and to ask myself in simple terms whether what happened in this case can fairly be said to have involved a lack of effective respect for the claimant's family life.
>
> 110. My answer to that question is 'no'. There were numerous administrative failings; everything took much longer than it should have done; and some, but far from all, of the delay was the responsibility of the authorities. But in January 2001, at the very beginning of the period on which the case has focused, the Presenting Officer showed himself to be sympathetic to the claimant's wish to be reunited with his family and requested details with a view to speeding things up once the IAT's determination was promulgated. The general picture thereafter is not of people obstructing the applications by the claimant or his family (the September 2001 visit to the British Embassy in Kinshasa being the low point in that respect) but of people trying, albeit often inadequately, to provide responses and to move things along when the matter came to their attention. Then at the end of the period, in November 2002, a discretion was exercised in the family's favour so as to enable them to be reunited without further delay. Looking at what happened over the period as a whole, in my judgment it did not involve any lack of respect for the claimant's family life.
>
> 111. I should spell out that, although I have found earlier in this judgment that there was unlawful delay in the issue of the claimant's status letter, that does not lead automatically to a finding of breach of Article 8. The issues are not the same

> and the application of Article 8 must be analysed separately. The fact that, as a matter of domestic law apart from the Convention, damages are not available for the unlawful delay (though an ex gratia payment of compensation might be appropriate) is not a good reason for seeking to accommodate the case within the scope of Article 8.

Richards J was upheld on this point in **Anufrijeva v London Borough of Southwark** [2003] EWCA Civ 1406.

102. In the present case the respondent's conduct, at least until her acceptance of the family relationship on 25 March 2019, did constitute an intentional (in the sense that she purposely refused to accept the applicant's transfer) and unlawful obstruction to the achievement of family reunification. It was not simply a matter of inadequate attempts to try and 'move things along.' In **Mambakasa** the focus was on the impact on the Article 8 rights of the claimant and not his family members outside the UK, and, although there was medical evidence that the delay was having a prejudicial effect on the claimant, this did not form any part of Richards' J reasoning in respect of whether there was a breach of Article 8. Nor was **Mambakasa** a case involving strict time limits such as those within the Dublin III framework. **Mambakasa** does however indicate that the length of any delay will be of particular relevance in determining whether there has been an interference with Article 8.

103. I additionally note that in **ZAT** the Court of Appeal stated, "Delay to family reunification may in itself be an interference with rights under ECHR Article 8: see *Tanda-Muzinga v France* (Application No. 2260/10) 10 July 2014, although it should be noted that in that case the delay was of three years." Once again, the length of delay was a significant factor in determining whether delay of itself can be sufficient to constitute an interference with Article 8.

104. Having taken account of the findings in the psychiatric report, and having taken into account the quality and nature of the Article 8 ECHR and Article 7 CFR relationship between the applicant and MN, including their limited physical contact and their ability to continue to communicate with each other during the period of the delay in much the same way as they did since the applicant reached both Turkey and Greece, and noting the relatively short period of the delay and the applicant's circumstances in the Refugee camp, I am not satisfied that there has been an interference in the applicant's private life (his moral and physical integrity) and his family life relationship with MN. Whilst the applicant lost the opportunity to have been reunited with his uncle sooner the relationship that had been established was able to continue until his transfer, and the unlawfulness did not prevent his eventual transfer. During the period of the delay the applicant had accommodation and attended school, he had the support of friends in the refugee camp and his basic needs of food and shelter were being met. While the delay has impacted upon his mental health there is some uncertainty as to whether his existing symptoms were caused by the delay or whether they pre-existed. The applicant has been aware since 10 April 2019 that he will be joining his uncle and there is no evidence that his ability to function daily has actually been affected, or that he has actually self-harmed.

105. Having found that the respondent's unlawful conduct did not constitute an interference with the applicant's Article 8 ECHR rights or his Article 7 CFR rights, it follows that there is no scope for a declaration that Article 8 ECHR or Article 7 CFR have been breached or for the award of damages. I note that in

FwF the Upper Tribunal found there had been a breach of Article 8 and Article 7 CFR. That case concerned a relationship between orphaned siblings which, on its face, constituted a stronger family relationship than in the present case, and the applicants in **FwF** were suffering from complex PTSD and one additionally suffered from a Major Depressive Disorder and had expressed suicidal ideation after learning of the refusal of the TCRs. I find that these facts are sufficient to distinguish the present case from **FwF**.

Conclusion

106. For the reasons given above I will issue a declaration in a separate order that the respondent's unlawful reliance on Art 12(2) IR and her unlawful conduct in relation to the decision of 24 December 2018 and her unlawful delay thereafter in accepting the family relationship gave rise to a breach of Dublin III.

107. For the reasons given above I decline to make a declaration in respect of Article 8 ECHR and Article 7 CFR.

108. The parties are to provide written submissions on the question of quantum of damages in accordance with the order issued in respect of this decision.

D. Blum

Signed: _____

Upper Tribunal Judge Blum

Dated: **8 October 2019**

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

Notification of appeal rights

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

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing

whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an 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.

UTIJR6

JR/1642/2019

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of KF
(a child by his litigation friend MN)

Applicant

v

Secretary of State for the Home Department

Respondent

Upper Tribunal Judge Blum

ORDER

Having considered all documents lodged and having heard the parties' respective representatives, Ms C Kilroy QC and Mr J Kirk, of Counsel, instructed by Simpson Millar Solicitors, on behalf of the applicant and Mr G Lewis, of Counsel, instructed by the Government Legal Department, on behalf of the respondent, at a hearing at Field House, London on 9 September 2019.

IT IS ORDERED THAT:

1. **The judicial review application is granted.**

2. **It is declared that the respondent's unlawful reliance on Article 12(2) of Regulation (EC) No 1560/2003 (as amended by Regulation (EU) No 118/2014) and her unlawful conduct in relation to the decision of 24 December 2018 and her unlawful delay thereafter in accepting the family relationship gave rise to a breach of Regulation (EU) No 604/2013 (Dublin III).**

3. **The parties are to provide written submissions on the question of quantum of damages for the breach of Dublin III, if not agreed, as follows:**

   (a) The applicant shall file submissions by 18 October 2019;

   (b) The respondent shall file submissions by 28 October 2019;

   (c) The applicant shall file any submissions in reply by 4 November 2019.

4. **Costs are reserved pending the Upper Tribunal's decision on damages.**

5. **Any application for permission to appeal in these proceedings may be made at the hearing when the decision on damages is handed down, which disposes of all remaining issues in these proceedings.**

Signed: D. Blum

Upper Tribunal Judge Blum

Dated: **8 October 2019**

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