Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of Amir Khalili

Applicant

v

Secretary of State for the Home Department

Respondent

Before Mr Justice Saini
Sitting as a Judge of the Upper Tribunal

Application for judicial review: substantive decision

Having considered all documents lodged and having heard the parties' respective representatives, Simon Cox on behalf of the Applicant, and Hafsah Masood on behalf of the Respondent, at a hearing at Field House, London on 21 October 2021.

Decision

The application for judicial review is granted for the reasons in the judgment dated 27 October 2021.

Order

(1) The Respondent's decision of 20 October 2020 is quashed.

(2) The Respondent is directed to determine afresh whether to take charge of the Applicant and

   a. when doing so shall have regard to the situation of the Applicant in Greece and to any representations and evidence provided by the Applicant by 28 October 2021.

   b. shall notify the Applicant's solicitors of the fresh decision within 2 months of the date of this order.

Costs

(3) The Respondent is to pay the Applicant's costs of the claim less 50% of the Applicant's costs of the hearing of 11 January 2021. There shall be a detailed assessment of these costs, if not agreed.

(4) There be a detailed assessment of the Applicant's costs for the purposes of public funding.

(5) By 9 November 2021 the Respondent shall pay the Applicant £35,000 on account of the costs under paragraph 5 of this order within 14 days.

Anonymity

(6) Upon it appearing that non-disclosure of the identity of the Applicant's family members living in the United Kingdom is necessary in order to protect the interests of the Applicant's cousin, there shall not be disclosed in any report of these proceedings or other publication (by whatever medium) in relation to these proceedings the name or address of the family members of the Applicant living in the United Kingdom or any other matters that could lead to the identification of them.

Signed: **Mr Justice Saini**

Dated: **27 October 2021**

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on: 28/10/2021

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).

Case No: JR/1846/2020

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

In the matter of an application for Judicial Review

Field House,
Breams Buildings
London, EC4A 1WR

27 October 2021

Before:

THE HONOURABLE MR JUSTICE SAINI

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Between:

THE QUEEN
on the application of
A

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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

Simon Cox (instructed by Duncan Lewis Solicitors Ltd) for the Applicant

Hafsah Masood (instructed by the Government Legal Department) for the Respondent

Hearing date: 21 October 2021

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J U D G M E N T

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Mr Justice Saini

This judgment is in 5 main parts as follows:

I. Overview

1. Given the nature of the issues raised in this claim and the involvement of children, I made an order at the hearing of the claim providing for anonymity of all relevant parties. The persons referred to in this judgment have been given abbreviations.
2. The Applicant (A) is an Afghan boy born in Iran. He is an unaccompanied asylum seeker currently living in a container with 7 other children in the Open Refugee Camp of Eleanos in Greece. A has an uncle (Uncle K, his mother's brother) and other extended family members who are British nationals living in Prestwich, Manchester. The family wish A to join them and are capable of supporting him.
3. On 12 September 2019 A claimed asylum in Greece and asked to be united with his uncle. Greece made a "take charge request" (TCR) to the UK under EU Regulation 604/2013 ("the Dublin III Regulation"). After substantial delay caused by SSHD's refusal to accept the family relationship, the relevant TCR was refused by the Respondent (SSHD) by a decision dated 20 October 2020 (the Decision). The sole basis of the Decision was alleged "safeguarding" concerns if A was admitted to the UK to live with his family in Prestwich.

4. Permission to apply for judicial review of the Decision was granted by UTJ Blundell (on limited grounds) by order dated 12 January 2021. Although a number of arguments are made in the Amended Grounds, the main point of law before me concerns the scope and nature of the common law obligations of fairness owed to A and his family on the facts. Specifically, should SSHD have given them an opportunity to respond to SSHD's concerns before the TCR was refused?
5. At the conclusion of the hearing, I informed the parties that for reasons I would provide in due course, I would grant the application for judicial review on the procedural fairness ground, quash the Decision and direct reconsideration of the matter. There were other grounds in the claim but they do not arise for decision given the quashing order and SSHD's agreement as to the scope of her reconsideration, as I describe below.
6. These are my reasons for allowing the claim and quashing the Decision.
7. Before turning to the first main issue it is appropriate to refer to the procedural fairness ground as described in UTJ Blundell's comprehensive and impressively reasoned permission decision of 12 January 2021 at [9]:

> "(9) Having heard lengthy and well-considered submissions from Mr Cox and Ms Masood, I come to the clear conclusion that the respondent arguably fell into procedural error in reaching the fifth decision on 20 October 2020. The authorities cited at [29] of the amended grounds establish that the respondent is obliged, before reaching a negative decision on a TCR request, to provide the applicant and his family member an opportunity to respond to any concerns about whether the criteria are met. It is accepted by Ms Masood that the respondent did not do so, and also (on the evidence presently available) that she did not even consider whether to do so. That omission plainly represents an arguable public law error on the part of the respondent, and I do not accept Ms Masood's submission that it is unarguably immaterial because there is no evidence from the applicant (or [K]) to gainsay the assertions or the conclusions reached by the Local Authority, which advised the respondent that it was not in the applicant's best interests to join [K] in the United Kingdom…".

II. The Legislative Framework

8. The Dublin III Regulation has been revoked and ceased to apply on 1 January 2021, subject only to the savings in para. 9 of Schedule 2 to the Immigration, Nationality and Asylum (EU Exit) Regulations 2019. At the time of the Decision (20 October 2020), the relevant legal framework was as follows.

9. The Dublin III Regulation established the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third country national/stateless person.

10. **Chapter II** (Articles 3-6) set out 'General Principles and Safeguards.' Article 3(1) provided that an application for international protection 'shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.'

11. Article 6(1), under the heading 'Guarantees for Minors', provided that 'the best interests of the child shall be a primary consideration for all Member States with respect to all procedures provided for in this Regulation.' It is common ground that this applies to the making and handling of TCRs.

12. **Chapter III** (at Articles 8 to 14) set out the criteria for determining the Member State responsible. Article 8 provided as follows:

> "1. Where the applicant is an unaccompanied minor, the Member State responsible shall be that where a family member or a sibling of the unaccompanied minor is legally present, provided that it is in the best interests of the minor ...
>
> 2. Where the applicant is an unaccompanied minor who has a relative who is legally present in another Member State and where it is established, based on 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."

13. For these purposes, Article 2 defined "family member" as the applicant's spouse/partner in a stable relationship, children, or if a minor, his/her parents; "relative" was defined as "the applicant's adult aunt or uncle or grandparent who is present in the territory of a Member State…".

14. A key difference between Article 8(1) and Article 8(2) was that Article 8(2) assigned responsibility for an unaccompanied minor to the Member State where the "relative" (i.e. their aunt/uncle or grandparent) was present subject to the explicit condition that it be "established, based on an individual examination, that the relative can take care of [the minor]." Article 8(1) imposed no such condition.

15. **Chapter IV** of the **Regulation** (at Articles 16 to 17) identified the situations in which a Member State may take responsibility for examining a claim for international protection even if such examination is not its responsibility under the criteria in Chapter III. Article 17(2) stated:

> "The Member State in which an application for international protection is made and which is carrying out the process of determining the Member State responsible, or the Member State responsible, may, at any time before a first decision regarding the substance is taken, request another Member State to take charge of an applicant in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations, even where that other Member State is not responsible under the criteria laid down in Articles 8 to 11 and 16. The persons concerned must express their consent in writing.
>
> The request to take charge shall contain all the material in the possession of the requesting Member State to allow the requested Member State to assess the situation.
>
> The requested Member State shall carry out any necessary checks to examine the humanitarian grounds cited, and shall reply to the request Member State within two months of receipt of the request using the 'DubliNet' electronic communication network set up by Article 18 of Regulation (EC) No 1560/2003. A reply refusing the request shall state the reasons on which the refusal is based.
>
> Where the requested Member State accepts the request, responsibility for examining the application shall be transferred to it."

16. **Chapter VI** set out the procedures for TCRs. Articles 21 and 22 contained strict time limits for submitting and replying to a TCR and spelled out the consequences for failure to comply with these time limits (the time-limits did not apply to requests under Article 17(2) of Dublin III which can be made "at any time before a first decision regarding the substance [of the application for international protection] is taken" (see first paragraph of Article 17(2)). Similarly, Article 29 contained strict time limits for the transfer of an applicant from the requesting Member State to the Member State responsible.

17. The Dublin III Regulation was supplemented by Regulation (EC) No 1560/2003, as amended by Regulation No 118/2014 ("the Implementing Regulation"). Article 5 of the Implementing Regulation, entitled '*Negative reply'*, provided as follows:

> "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 . . . 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 [Articles 22(1) and (6) of the Dublin III Regulation]."

18. The SSHD's caseworker guidance applicable at the relevant time, *Dublin III Regulation*, V.4.0 (14 August 2020) ("Dublin III Guidance") stated as follows, under the heading 'Requests involving children':

> "Article 8(2) presents an additional requirement (compared to 8(1)) on being able to demonstrate they can 'take care' of the child. In order to accept the take charge request, there must be evidence the UK based qualifying relatives(s) are able to accommodate and support the child. Such evidence

should be provided by the UK based relatives to the EIU and Local Authorities.

Both Articles 8(1) and 8(2) require the transfer to be in the best interests of the child. The best interests of the child must always be a primary consideration when applying the Regulation in family unity cases. When assessing a child's best interests, Dublin States should cooperate with each other taking due account of factors such as family reunification possibilities, the child's well-being and social development, safety and security considerations and the views of the child in accordance with their age and maturity, and background.

The European Intake Unit (EIU) will work with the local authority in which the family member, sibling or relative of the child is residing.

An initial notification to the local authority should be sent as soon as possible following the receipt of the TCR. It should specify whether the application has been made under Article 8(1) or Article 8(2) and should invite the local authority to provide any information that they hold that will allow a decision to be taken on the family link. The initial notification should also relay any information held by EIU which may be relevant to any safeguarding considerations.

If the family link is established, the EIU will then ask the relevant authority to undertake a full safeguarding assessment of the family member which will inform a recommendation to the EIU as to whether the request should be accepted or rejected. The local authority should be provided with information held by the EIU which may be relevant to any safeguarding considerations.

All decisions on whether to accept a request to take charge of a child's asylum application (and so accept the transfer of a child to the UK) will be the responsibility of the Home Office. These decisions will, however, be informed by the assessment and recommendations provided by local authorities and the best interests of the child must be a primary consideration at all stages of the process."

19. Under the heading 'Best interests of the child and section 55 consideration', the Dublin III Guidance stated as follows:

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

- the safety of the child or their family will be jeopardised
- the child has a well founded fear of relevant family members

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

III. The Facts

20. I am not aware of any relevant factual dispute between the parties. My summary below is based on the documents before me, including the witness statement of 4 March 2021 served on behalf of the SSHD by the Senior Caseworker at the European Intake Unit at the Home Office. I will refer to certain redactions below but proceed on the basis that SSHD has disclosed to A and the Tribunal all relevant material in accordance with her duty of candour.

21. As I have already noted, A is an unaccompanied minor asylum-seeker. He is an Afghan boy born in Iran on 17 October 2003, now aged 18. He was raised mostly by foster parents. On 12 September 2019, then aged 15, he claimed asylum in Greece and asked to be united with his uncle in the UK. He has no family in Greece and lives in a crowded shelter for unaccompanied migrants and sleeps in a container with 7 others. There can be no dispute that these are challenging conditions for anyone let alone a child. He has now been in Greece for more than 2 years. His personal history recorded in the Greek government assessment of his "best interests" discloses what I can only describe as a very challenging early life. The details are not relevant to the issues before me but make difficult reading.

22. The uncle with whom A applied to be united is Uncle Z, now aged 50. Uncle Z moved to the UK before A was born and has been naturalized as a British citizen.

Uncle Z is the brother of A's mother. Also living in the UK are Uncle Z's mother ("Grandmother") and Uncle Z's brother ("Uncle M"), born 2 April 1976. Both are naturalized British citizens.

23. Uncle Z lives with his wife, their son X, aged 16, their daughter Y aged 13 and a further son D aged 10. Uncle M is also married and lives with his wife and their 4 children.

24. The evidence before me is clear that Uncle Z, his wife and Grandmother, all strongly support A's application to be transferred to the UK and to live with Uncle Z and his family. Uncle M also supports the application. Uncles Z and M live near each other in Prestwich, Manchester. Grandmother divides her time between the two houses.

25. The evidence before me is that they are close and loving families who wish to welcome their nephew who they say is living in the most distressing conditions. They are in contact with him regularly by telephone.

26. In 2013 and 2014, Uncle Z and his wife had some arguments. Uncle Z hit his wife. The police were called. No action was taken against Uncle Z. There is no evidence of any subsequent violence by him or between the parents. It is also notable (when one comes to the alleged safeguarding issue) that the relevant local authority does not have sufficient or indeed any identified concern that would seek them to take protective measures in respect of Uncle Z's children who all still live with their mum and dad in the home to which they wish to welcome A.

27. On 31 October 2019 (6 weeks after A's asylum claim), Greece made the first TCR to SSHD, under Article 8(2). This was refused on 23 December 2019 on the ground that SSHD was not satisfied that Uncle Z was A's uncle. Greece made a timely re-examination request on 13 January 2020 stating they were in the process

of obtaining DNA evidence to substantiate the family link and requesting that SSHD await the results. SSHD refused reconsideration on 4 March 2020, without consideration of the merits, on the grounds that the UK had failed to deal with the reconsideration within 2 weeks.

28. On 17 March 2020, Greece made a second TCR to SSHD, now under Article 17(2), and accompanied by DNA evidence. This was refused on 12 May 2020, on the same ground as before. Greece did not make a reconsideration request but, on 2 June 2020, asked SSHD to keep the case on hold while a new DNA test was obtained. On 12 June 2020, SSHD replied to Greece refusing to keep the case on hold.

29. On 31 July 2020, A's solicitors sent SSHD a pre-claim letter concerning her decisions of 31October 2019, 4 March 2020 and 12 May 2020. There was no reply. On 12 August 2020, A provided the Tribunal with the application for permission to proceed with this judicial review. On 20 August 2020, Greece made a third TCR to SSHD, again under Article 17(2), with new DNA evidence.

30. On 24 August 2020, during the lockdown, D (Uncle Z's youngest son) then aged 9, became very angry and began throwing things at home. The neighbours called the police. They came and took no further action. On 26 August 2020, D was referred to Child and Adolescent Mental Health Services due to his violent and aggressive outbursts and statements that he wants to kill himself.

31. On 27 August 2020, SSHD's caseworker decided that she was (finally) satisfied that A and Uncle Z were related as claimed, and this decision was authorized by a senior case worker on 28 August 2020. Unfortunately, this decision was not notified to A or his family.

32. On 1 September 2020, SSHD sent a request for an assessment of the proposed home to Bury Council ("Bury Social Services"). This asked for the assessment to be provided by 15 September 2020.

33. On the same day, D was seen by the CAMHS Practitioner, Katie Stafford, with his parents. In her letter of 4 September 2020 to D's GP (cc to his parents), Ms Stafford stated the advice she had given to the parents and that she would "chase up the social services referral to ensure that the family are going to be receiving support." On 3 September 2020, Bury Social Services opened a file for their assessment. I note that this recorded:

> "The family have been known to BCS previously due to a domestic incident between parents in 2019 advice was given NFA taken. In Sept 2020 challenging behaviour was reported for [redacted] mother advised support is in place NFA taken."

34. Also on 3 September 2020, SSHD filed her Acknowledgement of Service in these proceedings; this did not mention the TCR of 20 August 2020, SSHD's decision of 27/28 August 2020 to accept the family relationship or the 1 September 2020 request to Bury.

35. On 8 September 2020, Bury Social Service's social worker conducted a home visit at Uncle Z's home. On 14 September 2020, Bury Social Services recorded on their files that the social worker"has attempted on several occasions to contact the home Office to discuss this complex situation, however no reply. Advised to send a further email stating how important it was that the S/W liaise with the home office for further advice, and that we will need an extension for a further period of time in order for the S/W to have conversations with the home office."

36. On 24 September 2020, Bury sent SSHD their assessment. I note that some of the sections of this assessment were marked "Confidential". It is unclear which these are. The version of the assessment provided to the Tribunal and A has redactions of what appear to be non-confidential material. Bury's covering email with this assessment stated that "this information is highly sensitive and if disclosed to any family member would put [redacted] at significant harm and also [redacted]". While the assessment document has redactions, it appears (for reasons set out below) that at least some of the relevant redacted contents are set out in the email of Bury Social Services to SSHD of 14 October 2020 (to which I refer below).
37. On 24 September 2020, SSHD's senior caseworker received advice from SSHD's policy team that the TCR should be rejected citing safeguarding concerns.
38. On 29 September 2020, SSHD's senior caseworker emailed the social worker at Bury Social Services and asked her to contact her. (A copy of this email has not been provided to A or the Tribunal).
39. On 14 October 2020, SSHD's senior caseworker spoke to the social worker "about the measures that were being taken by the Local Authority to ensure the safety of the persons said to be at risk" including "Social Services' ongoing involvement with the family as a result the behaviour/development of one of [Uncle Z's] children". She sent a follow up email on the same day which "emphasised that our intention to refuse the take charge request on safeguarding grounds should be backed up with evidence and reiterated the request for information the Local Authority had on record of previous domestic abuse issues and Social Services involvement." (Again, a copy of this email has not been provided).
40. On 16 October 2020, Bury Social Services sent an email to SSHD's senior caseworker. The only measure/ongoing involvement stated in this email was

"Child is now under the mental health team for further assessment." The email did not state that social services had any ongoing involvement. Its material terms were as follows:

> "I have spoken to my managers and they have confirmed that I can share the following information with yourselves to help the case and protect [REDACTED].
>
> 2013 – Police called twice in one week as reports of mother wanting to leave with the children. Issues raised around cultural differences father is from Afghanistan and Muslim and mother is from Palestine and Christian. Concerns around verbal arguments and children witnessing abuse.
>
> 2014 – There was a domestic dispute where by mother was kicked several times in front of the children by father, child contacted Police. Mother attended hospital and father arrested. Mother did not want to resume the relationship. Concerns raised around the impact the arguments are having on the children. Strategy meeting held and information states that mother's ribs were broken in the incident but this is unclear as hospital report states no injury. Concerns for the children witnessing domestic abuse is raised by professionals. Concerns that there has been no change since the last contact in 2013, children have voiced "not being brilliantly happy at home".
>
> 24th August 2020 – Police referral, mother has locked one of the children outside the house due to his verbal aggression. Mother reports struggling with youngest child's behaviour.
>
> 26th August 2020 – Hospital referral – I am referring this child as the GP referred him to ED due to violent and aggressive outbursts and he often says he wants to kill himself. Mum feels she is no longer able to manage his behaviour. Often the 17 year old brother has to help mum restrain him when he is having an outburst, as he often says things like he is going to run into traffic. Child is now under the mental health team for further assessment".

41. On 20 October 2020, SSHD notified Greece of the refusal to accept the TCR (which is the Decision under challenge). Neither Bury Social Services nor SSHD had warned A or the family that Bury Social Services had recommended to SSHD that she reject the TCR or that SSHD had decided on 24 September 2020 to do so.

42. The material parts of the Decision were as follows:

> "From the evidence available the UK is satisfied that the family link between the applicant and the UK sponsor and the UK sponsor has been established.
>
> However, the UK has concluded that the best interests of the child cannot be met, and therefore Article 8.2/17.2 is not satisfied. This is due to safeguarding grounds that came to light during our best interest checks.
>
> Between 2013 and 2014, the police were called to the UK Sponsors address 3 times due to domestic incidents. During one incident the UK Sponsor was arrested as he kicked his partner, leading to her requiring hospital treatment. In all incidents, concerns were raised about the children witnessing arguments and abuse.
>
> A further referral was made to the police in August 2020 after the UK sponsors partner locked one of her children outside the house, due to his aggression. She reported struggling with the child's behaviour. The child is reported to have violent and aggressive outbursts. The UK sponsors partner has stated she is no longer able to manage his behaviour.
>
> As outlined above, the home is not a suitable environment for [A]. Therefore, we do not accept that the proposed transfer is in the child's best interest as our local authority safeguarding checks have revealed that there had been issues with the family of [Uncle Z], which have resulted in further action being taken, particular the wellbeing of one of his children.
>
> Due regard has been given to the 'guarantees for minors' outlined in Article 6 of the Dublin Regulations. Whilst it is clear from the wording set out in both the regulation and the implementing regulation that the best interests of the child shall be a primary consideration in any decision it is not accepted that this is the only consideration in deciding. As outlined above the UK has not found that an exercise of discretion is appropriate on the specific facts of the case.
>
> The evidence does not demonstrate that there is an exceptional set of circumstances to accept on Article 17(2) in particular when the best interests of the child cannot be met.
>
> I regret to inform you that your request to take charge of the above named is respectfully denied."

43. On 9 November 2020, A was notified of the Decision.

44. On 10 November 2020, the three-week period under Implementing Regulation 1560/2003, Article 5(2) for Greece to request re-examination of the Decision

expired. Greece showed no intention then (or now) of seeking to ask the UK to review the matter.

45. In the meantime, A's application for permission to proceed with JR had been refused on the papers and, on 9 November 2020 the JR proceedings were adjourned, in light of the 20 October 2020 Decision, for A to apply to amend his claim and for SSHD to respond. Permission was in due course granted by UTJ Blundell as I have described above.

46. Counsel for A said that in relation to the redactions from the material, SSHD has not asserted that she has been unable to comply with her duty of candour. Nor has she applied to the Tribunal under r. 14(2) for a direction that she be permitted to provide a document to the Tribunal but not to A on the grounds that disclosure "would be likely to cause that person or some other person serious harm."

47. I accept Counsel for A's submission that the proper inference is that SSHD has placed before the Tribunal in open evidence all of the material relevant to this JR and that therefore the redactions are irrelevant. This was also the position of Counsel for SSHD.

IV. Procedural Fairness

48. The essential argument made by Counsel for A was attractively made and simple. He submits that common law fairness standards required, on the particular facts of this case, that A and his family be given an opportunity to respond to the safeguarding concerns before the TCR was not granted. He relies upon various cases in support. I will consider those cases below.

49. Against this, Counsel for SSHD forcefully submitted that there was no obligation on the SSHD to inform and give Greece/A, still less Uncle Z an opportunity to address her concerns *before* she refused the TCR. She advanced two main points. First, what she described as the nature of the "concerns and sensitivity" of the contents of the email sent by the local authority on 16 October 2020 (and the source of the information: social services); and second, the fact that Greece had the option of requesting reconsideration of the decision pursuant to Article 5(2) of the Implementing Regulation. As I understood this submission, it was put forward (in my words) as an argument that any procedural fairness concerns would be catered for by this mechanism.

50. SSHD relied in particular upon R (BAA and Another) v SSHD (Dublin III: judicial review; SoS's duties) [2020] UKUT 00227 (IAC). BAA was also a challenge to the SSHD's refusal of a TCR made under Article 17(2), where The President recognised that [92]:

> "…the ability of the requesting State to seek reconsideration from the requested State of an initial adverse decision may diminish or even remove the potential obligation [to provide the requesting State and the applicant with an indication of the SSHD's concerns] in respect of the initial decision [hough] as a general matter there is likely to be an actual obligation to give the necessary indication, prior to the second refusal [following the reconsideration request], where the concerns harboured by the requested State are not ones which have been ventilated by it."

I will return to BAA below.

51. Counsel for SSHD submitted that the Decision was what she termed "an initial decision". It was said that Greece had the option of requesting reconsideration of the decision if it felt that that the refusal was based on a misappraisal, and/or there was additional evidence Greece wished to put forward. Counsel prayed in aid the

fact Greece had previously exercised that option and requested reconsideration, following the refusal of both the first and second TCRs, and had provided additional evidence from the Applicant/his family (in relation to DNA). She persuasively argued that the reconsideration process had worked before so it could work now. It was against this background that she submitted there was no obligation on the SSHD to give A or his family an opportunity to address her concerns before refusing the TCR on 20 October 2020.

Analysis: legal principles and conclusion

52. In my judgment, applying well-established principles of public law and on the facts of the present case, some form of "gisting" process where there was a chance to respond to the safeguarding concerns was necessary. It could be called a "minded to" process. I emphasise that my conclusion is confined to the facts before me and is not intended to apply to other factual situations which may arise in the context of TCRs and their rejection.

53. I start from the agreed proposition that public law principles apply when a court assesses the legality of SSHD's decisions in relation to an Article 17(2) request. Indeed, it was accepted (correctly in my view) by SSHD in R (BAA and Another) v Secretary of State for the Home Department (Dublin III: judicial review; SoS's duties) [2020] UKUT 00227 (IAC) that "a decision of the respondent to refuse an Article 17(2) request is susceptible to challenge on ordinary United Kingdom public law grounds." [30].

54. Those principles however must always be applied in a manner which respects and does not undermine or contradict the Dublin III legislative regime. Principles of

fairness are fact and context specific: Pathan v Secretary of State for the Home Department [2020] UKSC 41; [2020] 1 WLR 4506 at [55].

55. As to the relevant principles. I do not need to refer to the extensive case law in the authorities provided to me because a number of recent decisions of the Court of Appeal have collected the jurisprudence.

56. I refer to Singh LJ's judgment in R (Citizens UK) v Secretary of State for the Home Department [2018] EWCA Civ 1812, [2018] 4 W.L.R. 123, for a comprehensive summary of the requirements of procedural fairness in modern public law at [68]-[71]. Also relevant is R (Balajigari) v Secretary of State for the Home Department [2019] EWCA Civ 673; [2019] 1 W.L.R. 4647 (CA).

57. Both parties also made submissions on my decision in Karagul and others v Secretary of State for the Home Department [2019] EWHC 3208 (Admin) at [95]-[103]. Having considered the case law referred to above and some additional cases, I said at [103]:

> "I summarise [the] general principle as follows but with the caveat that its application will of necessity be modified depending on the terms of the statutory regime:
>
> (1) Where a public authority exercising an administrative power to grant or refuse an application proposes to make a decision that the applicant for some right, benefit or status may have been dishonest in their application or has otherwise acted in bad faith (or disreputably) in relation to the application, common law fairness will generally require at least the following safeguards to be observed. Either the applicant is given a chance in a form of interview to address the claimed wrongdoing, or a form of written "minded to" process, should be followed which allows representations on the specific matter to be made prior to a final decision.
>
> (2) Further, a process of internal administrative review of an original negative decision which bars the applicant from submitting new evidence to rebut the finding of wrongdoing is highly likely to be unfair.

> (3) The need for these common law protections is particularly acute where there has been a decision by the legislature to remove an appeal on the merits to an independent and impartial tribunal".

58. Counsel both focussed on sub-paragraph (1) above: does this case fit the categories there identified? They accepted however that I was not laying down any universal principle as to when a "minded to" or "gisting" process would need to be followed. Counsel for SSHD argued the present was not a case of any form of dishonesty being alleged by SSHD, so no such process was required to be followed. She accepted however that there are cases outside that category where fairness requires such a process.

59. In my judgment, this is a clear case where the facts demanded a gisting process. Aside from the obvious seriousness of the allegation, the family of A would be the only parties able to correct an error in the Bury assessment (if there was such error). The rejection of the TCR would have fundamental and long-term effects on A's life. This may not be a case of denial of "right, benefit or status", but modern public law would require a decision with such life changing consequences for A to be attended by basic procedural safeguards such as notice of why he was being denied the ability to join his family. A significant feature of the present case is that at no stage in the process would A and the family have had an opportunity to address a safeguarding concern prior to rejection.

60. The question of whether there has been procedural fairness or not is an objective question for the court to decide for itself. The question is not whether the decision maker has acted reasonably, still less whether there was some fault on the part of the public authority concerned.

61. As to SSHD's case that she had no duty to do so because Greece had the opportunity to ask for a review under Implementing Regulation art. 5(2), this struck me as an odd submission on the facts given that: (1) SSHD accepts that A was not advised of the Decision until 1 day before Greece's deadline for seeking a review; and (2) SSHD had rejected Greece's request to review her first TCR refusal without considering the merits because SSHD had not dealt with it within 2 weeks.

62. The opportunity that Greece had to ask for a review does not excuse the failure of SSHD to give A and his family any warning that she had decided on 29 September 2020 to refuse the TCR. Counsel for A is right to submit that SSHD's argument is not confined to the facts of this case, but is very far reaching, since it rests on the *possibility* that the requesting state may ask for a review.

63. I consider SSHD's position to be wrong in principle. The duty of fairness is owed to the asylum-seeker and their family, and they cannot decide to ask for a review, only the requesting state can. Indeed, the time for seeking a review runs from when the state is notified, not from when the asylum-seeker and their family are notified. They are merely third-party observers in the inter-state dialogue but those (particularly A) with the most to lose. On SSHD's case the remedy is in Greece's hands, but A has no locus to require Greece to exercise it.

64. If SSHD were right, fairness to the asylum-seeker and their family would not require that they be warned before the decision, no matter how novel or serious the allegation, yet they would have no right to even know of this in time to ask the state to seek a review, and even then the state would be free to decline.

65. In submissions the SSHD claimed support for her position from para. 92 of BAA. I do not consider that case assists SSHD. On balance, the substance of the

President's observations at [91]-[93] are more supportive of the position that common law fairness may in fact require a gisting/minded-to process on the facts which are before me.

66. For these reasons, the correct approach in law is that the mere possibility that the state may seek review (which in fact did not happen in this case) does not affect SSHD's duties of fairness to not take A and his family by surprise by the basis for the decision she makes on a TCR. I underline the fact that the safeguarding issue was not a matter which A or the family would know had to be addressed (such as proving family relationships).
67. I also respectfully adopt UTJ Blundell's analysis of the position when he granted permission. He considered the point arguable. I consider it is made out.
68. As to SSHD's second line of argument that there was some sensitivity concern which precluded her from giving any prior information to A or the family, I reject that on the facts. No submission was made that the contents of the Decision (which referred to safeguarding concerns) or the email of 16 October 2020 contained material which was not disclosable to A or his family. It has been disclosed to the family in these proceedings and no reasoned argument has been made as to why a gist could not have been disclosed earlier.
69. There was also no dispute that on the timetable of events leading to the Decision, there was time to make disclosure to A/the family and receive representations before a final response to the TCR. Indeed, Counsel for SSHD accepted in fact there was no absolute time deadline which required SSHD to respond to the specific type of discretionary TCR request in issue in this claim. There was no urgency in the Dublin III regime which required the SSHD to respond by 20 October 2020.

70. I accordingly conclude on the facts of the present case, common law standards required a process where A and his family had an opportunity to respond to the decision not to grant a TCR before it was made final. This was a classic case on the facts for a form of "gisting" in the terms described by Lord Mustill in R v Secretary of State for the Home Department, Ex p Doody [1994] 1 AC 531, 560.
71. I emphasise again, however, that what I have decided as to a lawful process is what was required on the facts before me, as opposed to any matter of general application in Dublin III cases.

V. Conclusion

72. A succeeds on his procedural fairness complaint. Counsel for SSHD rightly and realistically accepted that if, contrary to her submission on the first ground, I found there was procedural unfairness, SSHD would not pursue the original pleaded argument in her Detailed Grounds of Defence that the outcome would, nonetheless, inevitably have been the same. This was a sensible concession.
73. The courts have urged caution in refusing relief on the basis of materiality, particularly where the allegation is one of procedural unfairness, and the high test that would therefore have to be met: Balajigari at [135]-[136].
74. I quash the Decision and direct that a fresh decision be taken. That decision must be taken in accordance with the fairness safeguards identified in this judgment including provision of proper and informed opportunity to A and his family to address the claimed safeguarding concern.