Neutral Citation Number: [2021] EWCA Civ 1428

Case No: C2/2020/1474

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
MR JUSTICE LANE
JR/467/2020

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 October 2021

Before:

LORD JUSTICE BEAN
LORD JUSTICE PHILLIPS
and
SIR STEPHEN IRWIN

- -

Between:

THE QUEEN ON THE APPLICATION OF BAA & ANOR	**Claimants/ Respondents**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant/ Appellant**

- -

Rory Dunlop QC and Hafsah Masood (instructed by the **Government Legal Department**)
for the **Appellant**
Charlotte Kilroy QC and Michelle Knorr (instructed by **Bhatt Murphy Solicitors**)
for the **Respondents**

Hearing dates: 23 and 24 June 2021

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Approved Judgment

Sir Stephen Irwin:

Background and facts

1. This is an appeal by the Secretary of State ["SSHD"] from a decision of Mr Justice Lane, sitting as the President of the Upper Tribunal (Immigration and Asylum Chamber). The decision was promulgated on 29 June 2020.

2. The first respondent ["BAA"] was at all material times an unaccompanied asylum-seeking minor ["UAM"], who was 17 years of age at the time of the decision appealed. He was born on 1 September 2002. The second respondent ["TAA"] is his cousin. Both are Syrian. TAA is a refugee, residing in the United Kingdom. BAA left Syria, travelled to Greece and there claimed international protection.

3. On 7 October 2019, Greece requested the United Kingdom to take charge of BAA's international protection claim, pursuant to Article 17(2) of regulation 604/2013 of the European Parliament and Council ["Dublin III"], as BAA wished to join his cousin, with whom he wished to resume a family life. The Greek authorities appended a form setting out information as to the history and circumstances of BAA, the basis of the claim, the death and disruption which had arisen within the family, BAA's vulnerabilities, and the fact that TAA had established and maintained close contact with BAA since the latter arrived on his own in Greece [Best Interests Information]. In the course of giving this information (erroneously, as it later transpired) it was stated that TAA had left Syria when BAA was about 2 years old.

4. The SSHD requested information and evidence concerning that take-charge request ["TCR"] on 28 October 2019. The SSHD also notified the relevant local authority of the TCR, asking for any information they might hold, but indicating they were not then asking for a family assessment.

5. The SSHD refused the TCR on 5 November 2019. Lane J found that refusal to be unlawful on public law grounds, a conclusion which is conceded by the SSHD.

6. Greece requested re-examination on 25 November 2019. By then the SSHD had received a response from TAA to the earlier request for information. This was a completed form concerning the availability of accommodation and confirming support for BAA, offering to take him into his home. TAA did not refer to BAA's age at the time when TAA left Syria. He did not give the date of his own departure from Syria.

7. On 25 November 2019, Greece made a formal request that the SSHD should re-examine the TCR. The re-examination request was refused on 16 January 2020. Again, Lane J found that refusal to be unlawful on public law grounds. Once again, that is conceded by the SSHD.

8. In neither of these refusals did the SSHD raise the matter of the age of BAA when TAA left Syria. In substance, the position taken was a general point that a cousin was an insufficiently close relationship to fall within Article 17(2) of Dublin III. In addition, the SSHD was subsequently found to have breached his own declared policy by failing to refer the case for a local authority assessment.

9. On 5 February 2020, Greece made a second request that the SSHD should re-examine the TCR.

10. By this time, on 4 February 2020, BAA filed a judicial review claim challenging the initial refusal of the TCR and the first refusal of re-examination. The claim was accompanied by witness statements from TAA, a further brother [IAA] and from BAA's solicitor. BAA was described as an 'extremely vulnerable' child. None of this evidence addressed the age of BAA when TAA left Syria.

11. On 14 February 2020 the SSHD sent a response to the letter of claim. On 18 March the Upper Tribunal granted BAA permission to apply for judicial review, and granted expedition. On 21 April 2020 the SSHD sent the response to the second re-examination request to Greece, refusing the TCR, and on the same day filed detailed Grounds of Defence. Amongst a number of other factual and legal points, the issue of the age of BAA when TAA left Syria was for the first time raised by the SSHD in this response. Once again, Lane J found that refusal was unlawful, again conceded by the SSHD to be correct.

12. On 4 May 2020, the Upper Tribunal gave permission to BAA to serve additional evidence in the judicial review. The application had been made on 28 April 2020. The relevant statements were dated 23 or 28 April. They do not address the 'age at TAA's departure' issue. The application sought permission to introduce evidence from an independent social work expert, Mr Peter Horrocks. His report was dated 9 May 2020, and was served on 12 May. Mr Horrocks considered the family history in detail, and set it out fully, concluding that BAA would have been 9 or 10 years of age when TAA left Syria. The age given in the Best Interests Information prepared by Greece was 'clearly incorrect'.

13. The hearing before Lane J took place remotely on 21 and 22 May 2020.

14. In the course of the hearing before us, following helpful assistance from junior counsel for the SSHD, our attention was drawn to an Agreed Note drawn up following argument below. The UT's conclusion was that, had a local authority family assessment been conducted, then the error as to BAA's age on TAA's departure would probably have been discovered (as it was by Mr Horrocks).

15. Following the hearing, the Upper Tribunal handed down judgment on 29 June 2020, and granted the following relief: (1) a declaration that the SSHD's decisions breached the Respondents' rights' under Dublin III, Article 8 of the ECHR and Article 7 of the CFR (2) an order quashing the SSHD's decisions and (3) an order requiring the SSHD to take a new decision on the TCR.

16. On 7 July 2020 the SSHD applied for leave to appeal. However, on 14 July 2020, the SSHD accepted the TCR which had been made by Greece on 7 October 2019. As a consequence, BAA entered the United Kingdom on 6 August 2020 and joined TAA.

17. On 28 August 2020, BAA informed the SSHD that he no longer sought any damages.

18. On 4 February 2020, Popplewell LJ granted leave to appeal on three grounds, subject to the provision by the SSHD of an indemnity as to the Respondents' costs. Provision of such an indemnity was confirmed on 3 March 2020.

The relevant provisions of Dublin III

19. Extensive reference was made by counsel in the course of argument to the provisions of Dublin III. The relevant provisions are set out in Annex 1 to this judgment. It should be noted that on 1 January 2021, Dublin III ceased to apply to the United Kingdom, subject to saving and transitional provisions, but that does not affect the present appeal.

20. It appears to be common ground that the best interests of a child are a primary consideration: see paragraphs 13, 16, 17 and 19 of the Preamble, and Article 6 of the Regulation. The Regulation "seeks to ensure full observance of the right to asylum….as well as the rights recognised under Articles….7… [of the CFR]": see paragraph 39 of the Preamble.

21. Article 2 defines "family members" and "relative": see sub-paragraphs (g) and (h). Neither definition would encompass a cousin.

22. Article 6 sets out a number of guarantees for minors. Article 8 makes specific provision in relation to minors. In each case there is express reference to "family members" and "relatives". Under these Articles there is no reference to "family relations", a phrase which appears in Article 17. It appears to be accepted by both sides that this term is broader than "family members" or "relatives".

23. Article 17 contains two discrete discretionary clauses. Article 17 (1) relates to a case where a member state, in which an application for international protection is lodged decides to examine an application for international protection even where that state would not be thought responsible for the individual concerned under the criteria laid down in the Regulation. That is clearly not our case, but featured as a matter of contrast in the course of argument.

24. Article 17(2) is the central provision in this case. Under this provision, a state examining a claim for international protection "… may… 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 "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…."

25. Section II of Chapter VI of the regulation sets out the procedure for TCRs, including a timetable culminating in a default provision (article 22(7)), with the effect that failure by the requested state to act within the timetable "shall be tantamount to accepting the request, and entail the obligation to take charge of the person…." Article 29 has a similar effect in relation to the transfer itself.

26. Article 27(1) provides that any applicant under the regulation shall have the right "to an effective remedy, in the form of an appeal or review, in fact and in law, against a transfer decision, before a court or tribunal."

The Grounds of Appeal

27. As will already be clear, a number of matters which were in issue before Lane J do not arise directly in the appeal, although the public law breaches are, in my view, of significance to the issues we must address. It is helpful to begin with the grounds, and to consider the relevant findings below in the context of the grounds advanced.

28. Three grounds are advanced. They are that:

> "The Upper Tribunal erred in:
>
> (1) finding that the SSHD's decisions breached BAA's right to respect for his family life (under Article 8 of the European Convention on Human Rights ["ECHR"] and Article 7 of the Charter of Fundamental Rights of the European Union ["CFR"] in reliance on evidence that was not before the SSHD at the time of those decisions
>
> (2) failing to apply an appropriately high threshold in determining whether errors in decisions about whether to permit someone entry into the UK to live with a family member amount to a breach of Article 8 of the ECHR and Article 7 of the CFR
>
> (3) finding that the SSHD was obliged by EU Regulation 604/2013 to commission a family assessment from the local authority in response to Greece's take charge request."

29. Grounds 1 and 3 are clearly related on the facts of this case. If there should have been a family assessment from the local authority, then Mr Dunlop QC conceded that this court would not go behind the conclusion of the Upper Tribunal that such an assessment would have revealed the error as to BAA's age when TAA left Syria. Thus, although that piece of evidence was not before the SSHD at the time of those decisions, it would have been, had the assessment been conducted. On that basis of fact, Ground 1 might be thought to be academic so far as this case is concerned. Even if that was our conclusion, Mr Dunlop QC for the SSHD urged us to give an indication on the point. However, Mr Dunlop also made it clear that Ground 2 now represented the heart of this appeal. That Ground is based on a discrete point of law. Given that the SSHD accepts the UK is responsible for determining BAA's asylum claim, this point too might be thought academic, but despite that concern being raised, Popplewell LJ gave permission to appeal and we will address it.

30. I will first address Ground 3, then Ground 1 and finally Ground 2.

Ground 3

31. The appellant accepts that it was proper on the part of the Upper Tribunal to admit fresh evidence when conducting a judicial review where human rights are in question. The respondents submit that it was necessary to do so, in the light of the need to establish the best interests of the child. As I have indicated, Lane J did permit the introduction of fresh evidence on behalf of both parties. In particular he admitted two witness statements of Ms Julia Farman, head of the European Intake Unit, UK Visas and

Immigration ["EIU"], a position she had held since 2016. In her first statement, Ms Farman stated that a family assessment is requested from a local authority only "once the family link has been established". In her second witness statement, she stated that in an article 17(2) case, a family assessment would be requested "only once we are satisfied that the claimed family relationship has been established and the requirements of Article 17(2) have been met." The judge concluded [80] that "these statements of the respondent's practice" were not "compatible with the requirements of Dublin III, as they bear on the issue of Article 7 CFR/Article 8 ECHR, where the best interests of an unaccompanied minor are at issue. There are likely to be circumstances in which information from the relevant local authority, deriving from direct engagement with the asserted United Kingdom relation, will inform the making of the Respondent's decision, both as to the existence of the claimed relationship and as to the way in which the Article 17 (2) discretion should be exercised."

32. In a preceding passage, [78] Lane J had made it clear that in his view the nature of the investigatory obligation does vary with the facts. He stated that: "Given the breadth of Article 17(2), there may well be some cases in which what the respondent and, by extension, the relevant local authority, are expected to do would be less than in other cases."

33. However, there was in addition a second basis upon which the judge found that the SSHD should have referred the matter for assessment to the local authority [113/118]. Part of the additional evidence produced by Ms Farman consisted of the published Guidance from the SSHD to staff, in force at the time of the decision to refuse the TCR in November 2019. It is accepted that this guidance represented developed policy with which those acting on behalf of the SSHD had an obligation to conform. The relevant passage in the Guidance reads:

> "You must ensure that both local authority children's social care services at the child's point of entry and where the child's family member, sibling or relative reside, are notified of the transfer request under the Dublin III Regulation. This must be done as soon as possible after the formal request to take charge is received from the requesting State. <u>You must engage local authorities' children's social care teams throughout the process, seeking their advice in every case</u>." (emphasis added in judgment below).

34. This policy was subsequently amended in April 2020, however Mr Dunlop concedes that the practice on the part of the EIU not to seek a local authority assessment in Article 17(2) cases until "the family link has been established" was inconsistent with the policy laid down in the Guidance. In his Replacement Skeleton Argument [83] Mr Dunlop concedes that if the Upper Tribunal "had limited itself to finding that the practice in 2019 was inconsistent with published policy, there would have been no need for this third ground of appeal."

35. In my view it follows that Ground 3 is indeed academic in this case. It is in fact common ground, on the second basis given by the judge, that there should have been a referral to the local authority for an assessment.

36. I would add by way of further observation, although not essential for my decision, that in my view the broader approach expressed by Lane J as to the obligation to seek a local authority assessment in the case of an unaccompanied minor where the facts were as in this case, or indeed comparable to this case, was entirely proper. It is important to understand that he founded that part of his judgment on the "requirements of Dublin III", not on any presumption that the United Kingdom was already subject to a positive obligation to the Respondent in respect of Article 8/Article 7.

37. For those reasons, I would reject the appeal under Ground 3.

Ground 1

38. It follows that there should have been a local authority assessment in late 2019 or early 2020, and it is conceded that the Upper Tribunal concluded that such an assessment would probably have revealed the factual error I have described. The implication of the factual error or "missing fact" in the BIA, was that if TAA had left Syria when BAA was 2 years old, it was unlikely the two could have developed an active family life to an extent that breach of Article 7 CFR/Article 8 ECHR could be in question.

39. It is worth emphasising that, to the extent that this "missing fact" was or might be considered significant by the SSHD, affecting the negative decisions reached in this case, then to that extent fairness might be thought to require that BAA (and Greece) should be alerted to the point. The judge clearly took this view. He considered the remarks of this court in *Balajigari v SSHD* [2019] 1 WLR 4647, [2019] EWCA Civ 673, and concluded that the situation in the instant case could not be distinguished. The judge also remarked:

> "….. It is difficult to see what legitimate purpose is served where the respondent has a specific concern that the requesting state or relevant individual may be able to address but which – because no forewarning is given – has to be addressed in judicial review proceedings, with all the expense and effort these entail." [93]

40. I have sympathy with that view.

41. In his Replacement Skeleton Argument, in addressing the use of "fresh evidence", Mr Dunlop placed considerable reliance on the decision of this court in *R(A)v Chief Constable of Kent* [2013] EWCA Civ 1706, and in particular on the judgment of Beatson LJ. In that case, in the course of his review of principle, Beatson LJ considered cases involving a "continuing duty" on the part of the Home Secretary, in relation to a decision whether to expel individuals currently in the United Kingdom, where their rights under Article 3 were in question. Even in cases where a "continuing duty" existed on the part of the Secretary of State, but where fresh evidence emerged in the course of the judicial review proceedings, Beatson LJ observed at paragraph 78 that: "the proper way of proceeding was [for the Claimant] to make a 'fresh claim' application to the Secretary of State, which would be subject to further review by the court…"

42. Later in his judgment, at paragraph 91, Beatson LJ observed:

> "[In] a case such as this, where the primary decision-maker is not under a continuing duty in relation to the matter in the way

> that the Home Secretary is in the cases to which I referred [above] the reviewing court should not consider post-decision material when conducting its assessment of whether a prima facie infringement of an ECHR right has been justified as proportionate."

43. I pause to note that, in the course of his careful judgment, Lane J made no reference to *R(A) v Chief Constable of Kent*. Given the breadth of the references he did make, it may be that the case was never cited to him.

44. In the course of his closing submissions, Mr Dunlop conceded that his written submissions went too far in reliance on *R(A) v Chief Constable of Kent.* He accepted that the "no hindsight" principle should be limited to cases where the decision-maker "could not have known the evidence". He relied on the way the matter was put by Lord Kerr in his judgment in *DB v Chief Constable of the Police Service of Northern Ireland* [2017] UKSC 7. That case concerned difficult policing decisions in relation to politically contentious parades in Northern Ireland, decisions in respect of which proportionality was critical. Lord Kerr put the matter simply in paragraph 76, by saying: "… a judgment on what is proportionate should not be informed by hindsight."

45. I would wish to emulate the clarity of Lord Kerr's approach. As sometimes occurs in cases of public law, it seems to me the principles are straightforward and we should not over-elaborate them. Where a fact was known, no question of hindsight arises. Whether a fact was known is itself a question of fact. Whether a fact should have been known, is a mixed question of law and fact, depending on all the circumstances. I suggest that behind the observations of Beatson LJ in relation to "continuing duty" cases there lies the recognition that, even in relation to such cases, ministers and those who assist them cannot be expected to keep each case under perpetual and unsleeping review.

46. Where a salient fact emerges before a court or tribunal in the course of its own review in a human rights case, then unless that fact was known, or should have been known, it must be wrong in principle to condemn an earlier decision in relation to the rights in question, whether a matter of a decision as to proportionality or otherwise. That does not prevent the court relying upon the newly emerged fact or facts in reaching its own conclusions: indeed it is under an obligation to do so. The view of Beatson LJ that the appropriate procedure in such circumstances is to request a fresh decision may well be right in many cases. No doubt the court or tribunal will be astute to ensure that no step is taken which will infringe the rights of the individual before the matter is conclusively resolved.

47. In this case, the relevant facts should have been known, and would have been known had the SSHD complied with its own stated policy. For that reason, in my view the appeal under Ground 1 must also fail.

Ground 2

48. Under this Ground the SSHD's complaint is that in a Dublin III case a particularly high threshold applies in relation to any alleged breach of Article 8 ECHR/Article 7 CFR. That proposition is grounded on a range of authorities, in particular *R(ZT (Syria)) v SSHD* [2016] EWCA Civ 810; [2016] 1 WLR 4894, and most importantly *R(FwF) v SSHD* [2021] EWCA Civ 88. Mr Dunlop also relies on a series of cases following on

from *R(ZT(Syria*)), which were reviewed by Elisabeth Laing LJ in the course of her leading judgment in *R(FwF)*: *RSM v SSHD* [2018] Civ 18; *R(AM) v SSHD* [2018] EWCA Civ 1815 (which should be read together with *R(Citizens UK) v SSHD* [2018] EWCA Civ 1812, although that case was not cited to us), and *SSHD v FTH* [2020] EWCA Civ 494. There are also relevant and important remarks to be found in *SSHD v MS* [2019] EWCA Civ 1340.

49. Reduced to the essentials, Mr Dunlop's arguments can fairly be expressed as follows. Dublin III is a process for ascertaining which member state has responsibility for the individual asylum claimant. The starting point is that the obligations lie with the member state where the claimant is present. In the case of a TCR addressed to the SSHD, by definition the UAM is not present in the United Kingdom, and so, although the claimant's Article 8/Article 7 rights are engaged in such a case, there is no current positive obligation in respect of that claimant on the part of the United Kingdom. No such obligation arises simply because a TCR has been made. The line of authority cited, culminating in *R(FwF),* (which Mr Dunlop acknowledges had not been decided by the time of the decision below) establishes that the Dublin III process can be relied upon to protect the Article 8/Article 7 rights, whether the claim represents an attempt to circumvent the Dublin III process, or arises within the process. For that reason, an exceptionally high standard for a breach of Article 8/Article 7 was established in *R(ZT (Syria))* in a Dublin III case, and that standard applies even in cases where the applicants have invoked the Dublin III procedures, as opposed to seeking to circumvent them. The governing principle enunciated by Laing LJ in *R(FwF)* is that:

> "when a UM makes a claim for family reunion to which Dublin III applies, he cannot rely on article 8 to supplement, or to increase, the rights which Dublin III gives him as against member state 2, unless his circumstances are very exceptional…" [140]

50. Again reduced to the essentials, Ms Kilroy QC for BAA argues that the authorities on which the SSHD relies are distinguishable from the instant case and provide no basis for such an exceptional threshold here. In the case of a UAM, the relevant rights are engaged, and Dublin III is a vehicle for ensuring those rights are implemented. The language of the Regulation makes that clear. Where it has not done so, the court must intervene. The process did not do so here. Ms Kilroy submits the SSHD's position is circular: but for the judicial review claim, the rejection of the TCR in this case would have remained in place. On these facts, it was right that the Upper Tribunal proceeded to consider the substantive position and reach a conclusion on BAA's Article 8/ Article 7 rights.

The decision below

51. In the course of his decision, Lane J considered *R(ZT (Syria))*and noted that the decisions in the instant case were "infected by public law errors of the kind described by Beatson LJ" in that case, and, as a separate issue, were "incompatible with [BAA's] and [TAA's] protected family rights…" [32]. Where such rights are in question, the tribunal must consider fresh evidence, if properly available, and reach a conclusion on the substantive rights in question. Lane J made a careful analysis of *MS* and noted that such an approach was there said to be "compatible with domestic public law" [40]. Where Article 8/Article 7 were "in issue" the nature of the review is altered to a merits

review, and the court must decide whether the decisions represent "a proportionate interference with the individual's Article 8 rights" [43]. He then focussed on the fourth issue identified by the Upper Tribunal in *MS* which was:

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

52. Following that, Lane J addressed the decision of the Court of Appeal in *MS*, including the judgment of the Master of the Rolls (see [67] below). From this analysis, he drew the following conclusions, which founded his approach:

> "61. It is, therefore, established that in a judicial review which challenges a decision on the ground that it actually or potentially violates a person's protected human right, the court or tribunal must determine that issue for itself (albeit ascribing weight to the decision-maker's expertise and statutory or other relevant functions). Where there is a dispute as to the primary facts that must be ascertained before that issue can be determined, the court or tribunal must resolve that dispute.
>
> 62. The legal principle I have just stated is part of our domestic law of judicial review. It has been reached by the domestic courts applying section 6 of the Human Rights Act 1998, which prohibits a public authority from acting incompatibly with an ECHR right. Where an ECHR right is in play, this legal principle is not dependent on Article 27 of Dublin III or, indeed, any other piece of EU legislation regarding the availability of an effective remedy, even where the challenged decision is made under EU law. Nor is the principle dependent upon there being some other public law error in the impugned decision.
>
> 63. The fact that a decision of the respondent, which is otherwise free from public law error, may fall to be quashed, as a result of a fact-finding exercise of the kind undertaken in MS and the present case, needs to be seen in context. In most instances, there is unlikely to be any dispute as to the primary facts. The issue in contention will, rather, be about what weight should be ascribed to particular factual elements in order to strike the proportionality balance. A decision which is free from public law error, where the evidence available to the respondent does not disclose a reason why the decision might be in breach of section 6 of the Human Rights Act 1998, will not get past the permission stage on judicial review. Although there is no legal requirement for there to be an independent public law error, a genuine dispute as to primary facts is likely to arise only where

there has, in practice, been some such error, such as a breach of procedural fairness (as in *Balajigari*).

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

53. In paragraph 66, Lane J drew together the threads of his analysis, as follows:

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

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

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

(4) Where the judicial review challenge involves an allegation of violation of an ECHR right, such as Article 8, it is now an established principle of domestic United Kingdom law that the court or tribunal must make its own assessment of the lawfulness of the decision, in human rights terms. 16 88 Case Number: JR/467 /2020

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

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

(7) Nevertheless, what the Upper Tribunal held in MS regarding the scope of Article 27 is correct and nothing in the

> Court of Appeal judgments in that case suggests otherwise. The reference to a "transfer decision" in Article 27 encompasses a refusal to take charge of a Dublin III applicant. That includes a refusal to take charge under Article 17(2)."

The authorities

54. I turn to consider the cases cited.

55. In *R(ZT(Syria))* the four claimants were either unaccompanied minors or a mentally impaired adult. They lived in a makeshift refugee camp in France and had refused to claim asylum in France or to invoke the Dublin III procedures, since they regarded the French system of processing such applications as ineffective and extremely slow. The lead judgment was given by Beatson LJ. He defined the issue in the case in paragraph 4:

> "In what circumstances can the processes and procedures of the Dublin III regulation for determining the member state responsible for processing and application for asylum be bypassed because of rights under the European Convention, in particular the right to family life under article 8? When, if at all, can an individual who is not in the United Kingdom decided not to apply for asylum in the first member state he or she enters and ask another member state directly that it "take charge" of his asylum application, and, either directly or through a family member, require that other member state to consider an application, or to admit him or her?"

56. Throughout his judgment, Beatson LJ made plain the primacy of the Dublin III regulation to the decision, and the need to maintain the integrity of the process. In paragraph 8, he focused on the circumstances in which the Dublin procedures might properly be "bypassed because of the right to family life under Article 8". He made it clear that an application for entry by an unaccompanied minor "without first invoking the appropriate Dublin III procedures in the relevant member state, can only be justified in an especially compelling case." In paragraphs 59 and 60, Beatson LJ summarised what he subsequently described as the "absolutist strand" of the SSHD's submissions. The reason, it was said, why it was only in an exceptionally compelling case that Article 8 can prevail relied on a "contrast between… the substantive aspect of Article 8 and the role of Article 8 at what might be described as the anterior procedural stage….[which] involves the process of determining which member state is responsible." The government's submission was that in the anterior procedural stage an even stricter approach should be taken.

57. Beatson LJ explicitly rejected that last submission, in paragraph 83 of his judgment. After a review of the authorities, he concluded that there was no "absolute rule that the determination of the responsible member state must be by the operation of the Dublin process and procedures in the member state in which the individual is present." Beatson LJ gave two reasons for rejecting that argument: the need for expedition in cases involving "particularly vulnerable persons such as unaccompanied children" [84] and the procedure under Article 17 of Dublin III by which a "second member state has

power to assume responsibility in a case in which the Regulation assigns it to another member state." [85]

58. In paragraph 87, Beatson LJ balanced the need for expedition in cases involving unaccompanied minors with the requirement for an orderly process, even in such cases. It was in that context, and as a result of that balancing exercise, that he accepted that the "especially compelling case" hurdle was appropriate for the "initial procedural stages" of the Dublin III process. In paragraphs 90 and 95, Beatson LJ emphasised that such cases were "intensely fact-sensitive" and that applications such as those before the court should only be made "in very exceptional circumstances where they can show that the system of the member state that they do not wish to use….is not capable of responding adequately to their needs."

59. In my view, *R (ZT (Syria)),* read on its own, is of limited assistance to the SSHD. The Court's primary concern was to limit the circumstances in which claimants could seek to circumvent or bypass the procedures under Dublin III. The *ratio* of this decision, it seems to me, is not confined to the need to support the primacy of the Dublin III procedures, but is based upon the proposition that the Dublin III arrangements, save in exceptional circumstances, will provide an adequate safeguard for the Article 8 rights of those claiming asylum. In my view this case provides no support for the proposition that an unlawful approach by a member state within the operation of a Dublin III application, in the face of a TCR, is not capable of amounting to a breach of Article 8/Article 7, or is only so capable in exceptional circumstances.

60. In *RSM* the appellant was an unaccompanied minor who claimed asylum in Italy. His aunt had refugee status in the United Kingdom, and she asked the SSHD to take responsibility for the minor. There was at that stage no TCR from Italy. The SSHD did nothing, and judicial review proceedings were issued: hence this claim was an attempt to enforce Article 8/Article 7 rights outside the Dublin III process. The UT indicated that it had found in favour of the appellant with reasons to follow, but before those reasons could be handed down, Italy issued a TCR to the United Kingdom, which was accepted. The UT nevertheless issued a mandatory order against the SSHD that the Appellant should be admitted to the United Kingdom. The Court of Appeal allowed an appeal, on the basis that Article 17(1) gave a discretion to the relevant member state to consider taking responsibility for a person present in that member state (in accordance with domestic law) but did not give the SSHD the power to override a TCR by another member state. English domestic law required a foreign national or stateless person to be present in the country in order to claim asylum, something which the Court accepted set important limits on the application of Art 17(1).

61. In relation to the application of Article 8 of the ECHR, Arden LJ accepted the submission from the SSHD that it was "correct to focus on the Italian processes" [142]. The purpose of Dublin III was to "establish criteria and mechanisms for determining the member state for examining an application for international protection" [1] and conferred "the right to an effective remedy in respect of any transfer decision that may be taken against them" [44, 116]. For that reason, save in exceptional circumstances, "There is no need for [the asylum seeker] to have any remedy against the other state" [116]. Arden LJ went on to evaluate the facts in the case as not being 'especially compelling'.

62. In my view, this is readily distinguishable from a case such as ours, where the Dublin III procedure has been invoked, a TCR made in proper form, the operation of the system in the 'requesting' state has been effective, with the consequence that there can be no effective remedy against the requesting state or in the jurisdiction of the requesting state, but the problem arises from an unlawful act or omission in the state to which the TCR has been made.

63. In *R(AM)* the claim arose from a special arrangement for an "expedited process" between the SSHD and the French authorities to deal with those asylum seekers living in a large camp near Calais, and through that process to assess their eligibility for transfer to the United Kingdom. This agreement sat beside, and was entirely separate from, the Dublin III regulation. There was no TCR by France and indeed no Dublin III process in train. The SSHD submitted that transfers under the expedited process were not transfers under Dublin III [58/59], and in that context the obligations of the SSHD " … are limited to the exceptional circumstances in which art 8 of the ECHR applies independently of [the Dublin III process]." [60].

64. The leading judgment was given by Singh LJ, with whom Asplin and Hickinbottom LJJ agreed. The Court found that the "expedited process was unfair at common law in the present cases" [86], and rejected the appeal of the SSHD on that ground. Singh LJ went on to say:

> "[88] First, the Upper Tribunal reached a view which, in my judgement, is inconsistent with the decision of this Court in *ZT (Syria)*. It seems to have regarded art 8 and its procedural requirements as essentially inter-changeable with the procedural requirements of Dublin III and/or the common law. However, as this Court made clear in *ZT (Syria)*, art 8 will only have a role to play in very exceptional circumstances. In particular it must be shown that the French legal system had systemic deficiencies in it, which rendered it incapable of providing an effective remedy to the Respondent children: see *ZT (Syria)*, at para [95] (Beatson LJ); and also the judgments of this Court in RSM, at paras [132]–[144] (Arden LJ) and [173]–[175] (Singh LJ). [89] Secondly, I agree with the Secretary of State that the Upper Tribunal gave insufficient recognition to the importance of the fact that the children concerned were under the jurisdiction of the French care system."

65. Once again, as BAA asserts, this situation is distinguishable from the present case. The expedited process stood aside from Dublin III. As Singh LJ observed, the minors involved had the potential to ask for TCRs from France to England. They were in France and had the right of an effective remedy against France. There was no evidence, and no necessary premise, that France would fail in its obligations under Dublin III. In short summary, the rights and obligations attendant on their claims for international protection fell to be met by France. The common law breaches established had not inhibited or prevented the operation of the Dublin III process, which had not been invoked.

66. Turning to *MS*, in that case the respondent was a UAM who had claimed asylum in France. His claim was that he had a brother [MAS] who lived lawfully in the United

Kingdom. In understanding the case, the sequence of events is important. France made successive TCRs in 2017 and early 2018, which were all refused on a factual basis, namely that MS and MAS were not brothers. MS sought judicial review, and on 19 July 2018 the Upper Tribunal quashed the refusal decisions, and went on to find that MS and MAS were indeed brothers. The SSHD appealed, principally on the ground that the Upper Tribunal had misinterpreted Article 27 of Dublin III (the point identified by Lane J in his judgment below). However, subsequent to the decision of the Upper Tribunal, the SSHD solicited a fresh TCR from France, and then accepted the fresh TCR on 27 July 2018. Thus, by the time the matter came before this court, the appeal was academic, and in his leading judgment Hickinbottom LJ declined to rule on the legal issue appealed.

67. I have already indicated that the judgment given by the Master of the Rolls, with which Hickinbottom and Simon LJJ agreed, was important in the thinking of Lane J in his decision in this case. For that reason, and because this judgment of the Master of the Rolls was criticised by Laing LJ in her judgment in *R(FwF)*, I will quote the salient passages:

> "**Sir Terence Etherton MR**:
>
> 59. I agree, and wish to add only a short amplification of the place of article 8 of the ECHR and ordinary domestic law principles of judicial review in the proceedings below and on this appeal…..
>
> 62. Ms Giovannetti stated in her oral submissions before us that, in the proceedings before the tribunal below, the Secretary of State accepted that there could be judicial review under ordinary domestic law principles even if the alleged unlawfulness arose under Dublin III itself.
>
> 63. It is apparent from the judgment of the tribunal that its decision to quash the Secretary of State's refusal to accept France's take charge requests was made on that basis (see the way the tribunal summarises MS's case in paragraphs 44 and 45). The issue of article 27 arose only in the context of the subsequent question whether, having concluded that the decisions of the Secretary of State should be quashed, the tribunal should decide for itself whether the criteria for determining responsibility under article 8 of Dublin III were met on the facts.
>
> 64. Hickinbottom LJ has set out in paragraph 5 above the two grounds of appeal. In her arguments for dismissing the appeal on the footing that it is academic Ms Kilroy relied upon, among other things, the right to challenge refusals by the Secretary of State of take charge requests as infringements of article 8 of the ECHR, irrespective of rights and obligations under Dublin III, applying ordinary domestic law judicial review principles and also bearing in mind the Secretary of State's acceptance on the appeal that (1) there is residual power in

> judicial review proceedings to make findings of fact, and (2) when called upon to determine whether there is a breach of article 8 of the ECHR, the court has to decide proportionality for itself, and it may be required to resolve issues of disputed fact.
>
> 65. ZT (Syria) and RSM (Eritrea), cited in the Grounds of Defence and in the arguments before us on the appeal, are not relevant to that line of argument and are plainly distinguishable on their facts as cases in which the applicants were seeking to bypass or override express procedures under the Dublin process which would otherwise have applied.
>
> 66. Ms Giovannetti, perhaps rather surprisingly in view of the way matters proceeded in the tribunal below and the concession by the Secretary of State on Ground 2 of the appeal, urged us to express no view about the application of ordinary domestic law principles of judicial review in a case such as the present one as, she emphasised, that is not the subject of the notice of appeal. It is sufficient, therefore, to conclude this description of the way the issue arose in this case and on the appeal by recording that nothing was said to us to indicate that the tribunal was wrong to approach the case as it did, by reviewing the Secretary of State's decision on the basis of ordinary judicial review principles."

68. I return to this passage later in this judgment.

69. The next decision in time is that of *FTH*. This case too concerned the expedited process, and concerned 'unaccompanied asylum-seeking children' who had not made applications for asylum in France, which would have triggered the Dublin III mechanism [5]. This case was therefore another in which the application sought to circumvent the Dublin III process. The Court (Sir Terence Etherton MR, Flaux and Hickinbottom LJJ) considered the judgment of Singh LJ in *R(AM)*, in addition to *R(ZT(Syria))*. As part of their *ratio,* the Court made several remarks which are important:

> "40. Mr Kellar, for the Secretary of State, accepted that the factual circumstances of this case – a minor in France who wished to be reunited with a close relative in the UK – engaged article 8 of the ECHR. In our view, that concession was properly made. He submitted, however, that the circumstances did not give rise to any breach of article 8.
>
> 41. He submitted that the Upper Tribunal erred in failing to draw the analytical distinction, made by Singh LJ in AM at [88] (quoted at paragraph 23 above), between a breach of the common law duty of fairness (which focuses on the right to fair procedure) and a breach of article 8 (which focuses the substantive rights in the ECHR, although a breach of those rights can be effected by a failure to adopt a fair procedure: see, e.g., TP and KM v United Kingdom (ECtHR Application No

> 28945/95) (2002) 34 EHRR 2 at [83]; and P, C and S v United Kingdom (ECtHR Application No 56547/00) (2002) 35 EHRR 31 at [136]-[137]).
>
> 42. In respect of the article 8 rights of UASCs in France with close relatives in the UK, the principle derived from ZT (Syria) is that the availability of the Dublin III process (taken with the supportive judicial process) in France sufficiently respects that child's right to family life, so long as the process is effective. (emphasis added) Whilst the application of article 8 is quintessentially fact-sensitive, generally, the Dublin III process and procedures strike a proper and proportionate balance between the public interest in having a coherent international immigration system and the private rights and interests of asylum seekers including their rights under article 8. It is in only very exceptional (i.e. very rare) circumstances that that process will not be effective; but it may be shown, for example, that the process in France does not work quickly enough to ensure that the article 8 rights of the child are sufficiently respected and protected. It is only when the Dublin III process is inadequate in such a way that the UASC in France can properly have recourse to the UK authorities or courts."

70. The final authority in the sequence is *FwF*. It is this case on which Mr Dunlop places the heaviest reliance. The case was an appeal to this court by the Secretary of State. The respondents were brothers from Afghanistan, who made asylum claims in France when both were under the age of 18. They wished to join an elder brother NF in the United Kingdom. On about 15 November 2018 the French authorities issued a TCR to the United Kingdom in relation to the respondents. In December 2018 the Secretary of State sent forms to NF asking for information, but it appears that little more was done. The Upper Tribunal inferred that the Secretary of State did not respond to the TCRs within the two month time limit provided for by Article 22.1 of Dublin III, and as a consequence responsibility for considering the respondents asylum claims automatically transferred to the Secretary of State pursuant to Article 22.7.

71. In late January or early February 2019, the Secretary of State refused the TCRs on the ground that the respondents had not established their relationship with NF, purporting to throw the responsibility for the respondents back to France, in spite of the fact that it had by then passed by default to the United Kingdom. In March 2019 the respondents issued judicial review proceedings in the Upper Tribunal claiming that the actions of the Secretary of State were in breach of the respondents' rights under Article 7 CFR/Article 8 ECHR and "in breach of Dublin III".

72. A series of failings were alleged against the Secretary of State in handling the TCRs. It is not necessary to rehearse them all here. In large measure the criticisms amounted to unwarranted delay and a failure properly to investigate the circumstances of the respondents. However, it is worth quoting two paragraphs from the judgment of Elizabeth Laing LJ, who gave the leading judgment in this court, summarising aspects of the findings in the Upper Tribunal:

> "67. The Secretary of State failed to engage with the local authority in this case, in breach of his own policy. Referral to a local authority was central to the Secretary of State's duty to investigate when he received the TCRs, yet no reference to a local authority was made. In a letter dated 26 April 2019, the Government Legal Department said that the Secretary of State was taking his usual position and only referring the case to a local authority once he had accepted a family link. The result of this approach was that the Secretary of State made a negative decision without hearing from any local authority. If the Secretary of State had engaged with the local authority from the start, as the policy requires, 'the assessment was likely to have been available within the two-month deadline and it is further highly likely that the TCRs would have been accepted' (paragraph 99).
>
> 68. The Secretary of State's breach of policy was not inadvertent. It is unlawful on normal public law principles. The policy was expressly approved by the Minister. The justification for the breach in the detailed grounds was plainly wrong. It would be nonsensical for the Secretary of State to do no more than to tell the local authority about the TCR and not to follow that with a request for an assessment of the family link and of the best interests of the children."

73. These failings on the part of the Secretary of State were essentially the same as those arising in the current case, constituting there, as here, illegality on normal public law principles and a breach of established policy.

74. In *FwF,* the Secretary of State asked the French authorities in March 2019 to send new TCRs, and they were received on 25 March 2019. The Secretary of State then informed the French authorities on 3 June 2019 that the fresh TCRs would be accepted. At the time of the hearing before the Upper Tribunal it was expected that the respondents would be transferred to the United Kingdom by 24 June 2019.

75. The Secretary of State in *FwF* then submitted (as here) that there was no breach of Dublin III, since the transfer to the United Kingdom was expected to take place within the overall 11 month outside time limit derived from the sequential time limits specified by Dublin III.

76. The Upper Tribunal in *FwF* found that "the multiple breaches of Dublin III led to a more prolonged delay to family reunion than was necessary", which was of significance, given the unchallenged evidence of significant psychological consequences for the respondents. The judge rejected the Secretary of State's argument as to the effect of the overall timeframe of 11 months, on the ground that there was "no provision for a member state to use the entire timeframe for its own purposes". The judge then made two declarations, firstly that the Secretary of State's delay and failure to properly investigate was unlawful, and secondly that the Secretary of State had breached his obligations under Dublin III and the CFR, and under Article 8 ECHR.

77. The Secretary of State advanced four principal grounds before this court in *FwF*. First, that the case did not involve an interference with Article 8 rights since it was a "positive obligation" case; second, that the requirement in ECHR Article 8 (2) that a relevant party should "act in accordance with law" does not arise in a positive obligation case; third, that the Upper Tribunal should not have treated each of the Secretary of State's failings as breaches of Article 8 ECHR/Article 7 CFR since the authorities on Dublin III hold that such breaches arose only in exceptional cases and fourth, that the Upper Tribunal should not have held there was any remedy for such failings or delays beyond those laid down within the scheme of Dublin III.

78. In her judgment, Elizabeth Laing LJ reviewed the precursor authority to which I have made reference. For the most part, I need not recapitulate her analysis. However, as I have indicated she did make reference to the judgment of the Master of the Rolls in *MS* as follows:

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

79. She went on to summarise the main strands of the submissions made on both sides. Those from the Secretary of State essentially presented the grounds of appeal as I have summarised them. The respondents submitted that the Secretary of State had "mischaracterised" their case, which was not a case about delay but a case about unlawful refusal of the initial TCRs. The failings of the Secretary of State, in particular breaching his investigative duty and breaching his expressed policy as to referral for local authority assessment, represented a breach of Article 8 as well as a breach of the Dublin III procedure. The sequence of judgments in which the Court of Appeal had considered breach of Dublin III and breach of Article 8, with the exception of *MS v SSHD [2019]* EWCA Civ 1340 which was clearly distinguishable, had all concerned decisions outside the Dublin III process. The argument of the Secretary of State characterising the case as one of positive obligations was incorrect since the Strasbourg Court did not distinguish between removal and admission.

80. In an exchange during argument, Ms Kilroy QC, appearing for the respondents in *FwF,* agreed that a domestic court would have been entitled to conclude that the Secretary of State had acted unlawfully in that case in the various ways complained of without invoking Article 8, and "that the only difference which Article 8 could make was that it might give rise to damages, rather than simply a declaration or quashing order."[128].

81. Elizabeth Laing LJ first considered whether the actions of the Secretary of State in *FwF* breached Dublin III. She said:

> "133. Dublin III, the IR and the UIR impose general obligations on member states. I do not consider that it is possible to spell out of their express provisions sufficiently clear sub-rules which would enable a court to decide that a member state which had complied with the overall time limits had nevertheless breached Dublin III by delay within those overall limits. This is particularly the case as respects delays in the period between deemed acceptance and the transfer, as member state 1 and member state 2 both have responsibilities during that period. It may, of course, be possible, in a particular case, to say that one of the two member states was responsible for all the delay, but that will not be possible in every case. One evident purpose of the scheme, which is that clear and uniform rules should apply to all member states, would be defeated if it is necessary to investigate, and attribute responsibility for, delays in that period in order to see whether one or other state had breached Dublin III. Such an approach is inimical to legal certainty. I therefore consider that, provided that a transfer has taken place within the overall time limit provided for by Dublin III, member state 1 and member state 2 have complied with Dublin III, whether or not there was incidental unlawfulness, 'failings' or other errors. The Secretary of State's purported refusal of the TCR outside the two-month period was unlawful, but it had no legal effect. If my approach to the obligations imposed by Dublin III is correct, then the Secretary of State did not breach Dublin III."

82. Elizabeth Laing LJ then considered whether a breach of Dublin III, or what she characterised as "incidental unlawfulness" by a member state in addressing its responsibilities under Dublin III, represented *ipso facto* a breach of Article 8. That argument has not been developed before us, and I simply record that her conclusion was it did not. The provisions of Dublin III "do not individually mirror the obligations imposed by Article 8" [137].

83. In a critical passage, Elizabeth Laing LJ went on to consider the question whether, despite her conclusion that a breach of Dublin III did not automatically amount to a breach of Article 8/Article 7, an unaccompanied minor could nevertheless rely upon Article 8/Article 7 in this context? She said this:

> "140. …….. The ZT (Syria) line of cases concerns applicants who either tried to avoid Dublin III, or who relied on a different scheme which occupied similar ground (the expedited scheme). The question, however, is not whether that distinction is factually accurate. It is. The question, rather, is whether that factual distinction affects the principle which underlies the ZT (Syria) line of cases. That principle is that when a UM makes a claim for family reunion to which Dublin III applies, he cannot rely on article 8 to supplement, or to increase, the rights which Dublin III gives him as against member state 2, unless his

> circumstances are very exceptional (for example, he is in the territory of a member state which systematically fails to comply with the obligations imposed by Dublin III). The reason why he cannot do so is that if a member state complies with Dublin III, which goes significantly further than article 8 requires, that member state will, in all but the most exceptional circumstances, also comply with article 8, and that that can be assumed at a high level of generality, without the need to examine the circumstances of an individual case. I therefore reject Ms Kilroy's argument that the distinction between the facts of this case and the facts of the ZT (Syria) line of cases has any legal significance.
>
> 141. Whether or not this Court is strictly bound by the ZT (Syria) line of cases, I consider that the principle on which they rest, which in turn derives from the characteristics of Dublin III which I have described above, should be applied to this case, unless there are very exceptional circumstances. I reject Ms Kilroy's submission that there are such circumstances here. The question whether there are very exceptional circumstances must be asked in the context of a UM who has made an asylum claim in France, as Miss Giovannetti QC submitted in RSM. Most, if not all of those children, have, by definition, a history in which trauma, separation from their close families, an arduous and dangerous journey, and mental health difficulties all feature.
>
> 142. That reasoning is decisive of this appeal."

The arguments before us

84. I have summarised very briefly above [49-50] the competing positions of the parties.

85. Mr Dunlop submitted that the Upper Tribunal should have applied an exceptionally high threshold, following *FwF*. He acknowledges of course that that case had not been heard at the time of the decision below. He submits that the requirement for such an exceptional threshold is not diminished by the decision of this court in *MS,* which he submits is distinguishable for the reasons given by Elizabeth Laing LJ in paragraph 142 of *FwF*. He then argued that this case is a case of positive obligation, if obligation arises, and as such, at least in the context of Dublin III, compliance depends on the outcome: see paragraph 144 of *FwF*. On the facts of this case, the TCR from Greece came some seven months before the hearing below, leaving four months before the overall timescale for compliance under Dublin III would expire. Even if the Upper Tribunal considered that there was a positive obligation to admit, the proper outcome would have been a declaration as to the remaining period during which the necessary outcome had to be achieved.

86. Further, Mr Dunlop argued that there is no body of ECtHR case law supporting the proposition that there is a positive obligation to admit a minor to live with a cousin residing in the relevant member state within eight months of his request for entry. The decision below was based on an assumption that where there were sufficient emotional ties to create family life, refusal of entry would amount to an unjustified and

disproportionate interference with family life in breach of Article 8. The Upper Tribunal had left out of the equation the other side of the "fair balance". If a positive obligation arose in this case then the effect would be to "impose an equivalent positive obligation to admit all the unaccompanied minors around the world in similar need of affection and support who can find an adult relative in an ECHR signatory state that is willing and able to look after them". This would significantly undermine the state's ability to control immigration.

87. In her oral submissions, Ms Kilroy QC helpfully grouped her arguments in the form of eight propositions, some of which had a degree of internal complexity. Her first point was that the reasoning of the SSHD was circular: the only reason that the TCR was accepted in July 2020 and BAA admitted in August 2020 was the judicial review claim and the judgment. Secondly, she suggested that the SSHD's position included an attempt to rewrite history. In the course of the refusals of the TCR before May 2020, there had in fact been no reliance by the Secretary of State on the issue of BAA's age when TAA left Syria. Those earlier decisions were based entirely on the unlawful practice of the SSHD, as found by the Upper Tribunal and subsequently conceded by the Secretary of State. Next, she submitted that there is no reported case, in England and Wales or Europe, which decides that, where Dublin III is in question and Article 8 ECHR/Article 7 CFR require admission to a member state, but the decision of that state was negative, the obligation to admit arises only in the future. *FwF* was not such a case. That case was to be distinguished from the instant case on a straightforward basis. In *FwF,* the SSHD had failed to address the TCR within the required time limit and thus by the automatic operation of the provisions of Dublin III, had acquired responsibility for the applicants claim for international protection. Subsequent decisions by the SSHD in that case were seen by the court to be decisions within the Dublin III scheme. The underlying assumption in the judgment in that case was that the operation of the Dublin III procedures, provided they were complied with, would produce an outcome consistent with Article 8 ECHR/Article 7 CFR. In that case the fact that the United Kingdom had the responsibility by default, meant that that underlying assumption could be relied upon.

88. This case was different. The TCR request had been refused for reasons which were agreed to be unlawful. The default remedies provided within the scheme of Dublin III did not arise.

89. Further propositions advanced by Ms Kilroy began with the submission that the criticism of the Upper Tribunal that the high threshold was not applied was inappropriate. The SSHD had not made that submission below. The submission below had been that the case was one where the traditional "exceptional circumstances" test applied, which was based on an expectation of outcome and not a threshold, as the judgment below had set out. The Secretary of State had not advanced a coherent case as to how the *FwF* threshold could sensibly have operated in such cases as this. Moreover, any decision-maker entrusted with a discretionary decision turning upon Article 8/Article 7 rights, who reached a decision which assumed a lawful outcome and refused to examine the circumstances of the individual case, would clearly be acting unlawfully in a number of ways, for which proposition Ms Kilroy cited *ZT (Syria)* at paragraphs 85 and 90.

90. Ms Kilroy went on to make submissions based on the facts, suggesting that the evidence in this case was sufficient so that a positive obligation pursuant to Article 7/Article 8

properly arose here, consistent with Strasbourg authority. Indeed, in her submission there was sufficient evidence to make out that case on the facts even before the report from Mr Horrocks. Family life having been established, the Upper Tribunal proceeded to address proportionality or fair balance and following submission by the SSHD, applied the Secretary of State published policy on "exceptional circumstances" as requested in submissions before the Upper Tribunal by the SSHD herself.

My Conclusions

91. This ground of appeal, as perhaps is rather too common in public law cases, is one which can only properly be addressed after a considerable recital of authority and submissions. I will aim to be as succinct as possible in conclusion.

92. The sequence of reported cases coming before *FwF* upon which I have touched above, were all, or almost all, concerned with claimants who were seeking to avoid or circumvent the Dublin III scheme. In my judgment they are readily distinguishable from *FwF* and indeed from this case. As Elisabeth Laing LJ recognised in paragraph 141 of her judgment quoted above, it may well be that the court in *FwF* was not strictly bound by that line of authority.

93. As Laing LJ outlined in paragraph 140 of her judgment, the critical principle is that an unaccompanied minor "cannot rely on Article 8 to supplement, or to increase, the rights which Dublin III gives him as against member state 2, unless his circumstances are very exceptional." I fully accept the principle. If it were otherwise, then registering a claim under Dublin III might arbitrarily add weight to such a claim.

94. *FwF* is of course binding authority on this court unless the case is properly distinguishable. However, in my view, the case is properly distinguishable for one important reason. In *FwF* the unaccompanied minors were still within the Dublin process. Because of the failure of the SSHD to respond in time, the Secretary of State had by default acquired responsibility for the claims for international protection. Under the Dublin III process, the responsibility remained with the United Kingdom for at least the six months provided, under Article 29.2 of Dublin III, to effect transfer. At the time of the hearing before the Upper Tribunal in *FwF*, the Dublin process was incomplete. Further, the timeframe for completion of the process was unexpired, and as Elisabeth Laing LJ rightly emphasised, a decision about performance in pursuance of a positive obligation under ECHR Article 8 falls to be judged by the outcome.

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

With great respect to Elisabeth Laing LJ, it seems to me that this approach is also consistent with the judgment of the Master of the Rolls in *R(MS)*.

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

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

98. In such a situation what is the proper course to be taken on behalf of an unaccompanied minor? This may be a generally academic point, given the end of the Dublin III process in January 2021. However, in principle, where a proper case can be made that public law errors brought the process wrongly to a conclusion, a public law challenge can be made. If a public law error is established, other than an 'incidental' error which did not alter the outcome, then the court will consider evidence as to the underlying Article 8/Article 7 rights. If, on the facts, the transitional provisions enfranchise a resumed Dublin III process, then it would be consistent with the approach of this court in *FwF* to identify the public law errors, give declaratory relief and set a timetable for a fresh decision pursuant to Dublin III. The court will have to consider whether, on the facts, the delay involved in that process would breach those rights. That delay would itself be a consequence of the illegality.

99. What if there are no public law errors, or they were mere "incidental illegalities"? It seems to me then that the principle formulated by Elisabeth Laing LJ must be applied, and the approach to any claim based on rights said to arise pursuant to Article 8/Article 7 will be unaffected by Dublin III: the rights of the unaccompanied minor cannot be supplemented or increased by the fact that he or she has gone through that process, by that point unsuccessfully.

100. In any such case it will be open to the Upper Tribunal to admit fresh evidence bearing on the Article 8/Article 7 issue.

101. For those reasons, I would dismiss the appeal on Ground 2.

Phillips LJ

102. I agree.

Bean LJ

103. For the reasons given by Sir Stephen Irwin I too would dismiss the appeal on all three grounds.

ANNEX 1

REGULATION (EU) No 604/2013 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 June 2013 establishing 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 or a stateless person (recast)

Preamble

…….

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

…….

(16) In order to ensure full respect for the principle of family unity and for the best interests of the child, the existence of a relationship of dependency between an applicant and his or her child, sibling or parent on account of the applicant's pregnancy or maternity, state of health or old age, should become a binding responsibility criterion. When the applicant is an unaccompanied minor, the presence of a family member or relative on the territory of another Member State who can take care of him or her should also become a binding responsibility criterion.

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

…….

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

……

(32) With respect to the treatment of persons falling within the scope of this Regulation, Member States are bound by their obligations under instruments of international law, including the relevant case-law of the European Court of Human Rights.

…….

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

……

CHAPTER 1

……..

Article 2

Definitions For the purposes of this Regulation:

……

(g) 'family members' means, insofar as the family already existed in the country of origin, the following members of the applicant's family who are present on the territory of the Member States: — the spouse of the applicant or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals, — the minor children of couples referred to in the first indent or of the applicant, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law, — when the applicant is a minor and unmarried, the father, mother or another adult responsible for the applicant, whether by law or by the practice of the Member State where the adult is present, — when the beneficiary of international protection is a minor and unmarried, the father, mother or another adult responsible for him or her whether by law or by the practice of the Member State where the beneficiary is present;

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

……..

CHAPTER II

GENERAL PRINCIPLES AND SAFEGUARDS

Article 3

Access to the procedure for examining an application for international protection

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

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

……

Article 6 Guarantees for minors

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

2. Member States shall ensure that a representative represents and/or assists an unaccompanied minor with respect to all procedures provided for in this Regulation. The representative shall have the qualifications and expertise to ensure that the best interests of the minor are taken into consideration during the procedures carried out under this Regulation. Such representative shall have access to the content of the relevant documents in the applicant's file including the specific leaflet for unaccompanied minors. This paragraph shall be without prejudice to the relevant provisions in Article 25 of Directive 2013/32/EU.

3. In assessing the best interests of the child, Member States shall closely cooperate with each other and shall, in particular, take due account of the following factors: (a) family reunification possibilities; (b) the minor's well-being and social development; (c) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking; (d) the views of the minor, in accordance with his or her age and maturity.

4. For the purpose of applying Article 8, the Member State where the unaccompanied minor lodged an application for international protection shall, as soon as possible, take appropriate action to identify the family members, siblings or relatives of the unaccompanied minor on the territory of Member States, whilst protecting the best interests of the child. To that end, that Member State may call for the assistance of international or other relevant organisations, and may facilitate the minor's access to the tracing services of such organisations. The staff of the competent authorities referred to in Article 35 who deal with requests concerning unaccompanied minors shall have received, and shall continue to receive, appropriate training concerning the specific needs of minors. L 180/38 Official Journal of the European Union 29.6.2013 EN 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).

CHAPTER III

CRITERIA FOR DETERMINING THE MEMBER STATE RESPONSIBLE

Article 7

Hierarchy of criteria

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

…….

3. 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.

Article 8

Minors

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

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

…….

6. The Commission shall, by means of implementing acts, establish uniform conditions for the consultation and the exchange of information between Member States. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 44(2).

……..

Article 17

Discretionary clauses

1. By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation. The Member State which decides to examine an application for international protection pursuant to this paragraph shall become the Member State responsible and shall assume the obligations associated with that responsibility. Where applicable, it shall inform, using the 'DubliNet' electronic communication network set up under Article 18 of Regulation (EC) No 1560/2003, the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of, or to take back, the applicant. The Member State which becomes responsible pursuant to this paragraph shall forthwith indicate it in Eurodac in accordance with Regulation (EU) No 603/2013 by adding the date when the decision to examine the application was taken.

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

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

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

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

CHAPTER V

OBLIGATIONS OF THE MEMBER STATE RESPONSIBLE

Article 18 Obligations of the Member State responsible

1. The Member State responsible under this Regulation shall be obliged to: (a) take charge, under the conditions laid down in Articles 21, 22 and 29, of an applicant who has lodged an application in a different Member State;

……

SECTION II

Procedures for take charge requests

Article 21

Submitting a take charge request

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.

……..

Article 22

Replying to a take charge request

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

…….

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.

……..

SECTION IV

Procedural safeguards

…….

Article 27

Remedies 1.

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

……..

SECTION VI

Transfers

Article 29 Modalities and time limits

1. 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). If transfers to the Member State responsible are carried out by supervised departure or under escort, Member States shall ensure that they are carried out in a humane manner and with full respect for fundamental rights and human dignity. If necessary, the applicant shall be supplied by the requesting Member State with a laissez passer. The Commission shall, by means of implementing acts, establish the design of the laissez passer. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 44(2). The Member State responsible shall inform the requesting Member State, as appropriate, of the safe arrival of the person concerned or of the fact that he or she did not appear within the set time limit.

2. Where the transfer does not take place within the six months' time limit, the Member State responsible shall be relieved of its obligations to take charge or to take back the person concerned and responsibility shall then be transferred to the requesting Member State.
…….