UTIJR6

JR/1265/2020

# Upper Tribunal
# Immigration and Asylum Chamber

# Judicial Review Decision Notice

**The Queen on the application of MA**
**(a child by his litigation friend ASM)**
**[Anonymity Direction Made]**

**Applicant**

**v**

**Secretary of State for the Home Department**

**Respondent**

**Upper Tribunal Judge Blum**

**Application for judicial review: substantive decision**

This decision follows a remote hearing in respect of which there has been no objection by the parties. The form of remote hearing was by video (V), the platform was Skype for Business. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

Having considered all documents lodged and having heard the parties' respective representatives, Ms M Knorr of Counsel, instructed by Wilson Solicitors LLP, on behalf of the applicant and Ms H Masood, of Counsel, instructed by the Government Legal Department, on behalf of the respondent, at a remote hearing at Field House, London on 1 and 2 October 2020.

**Decision: the application for judicial review is granted**

**Background**

1. The applicant challenges four decisions of the respondent made under the provisions of the Council Regulation (EU) No 604/2013 ("the Dublin III Regulation" or "Dublin III" or "DIII"):

(1) The decision on 27 January 2020 to refuse a request by Greece that the United Kingdom (UK) should take charge of his asylum claim;

(2) The decision on 13 March 2020 to refuse the request again, having been asked by Greece to reconsider her earlier refusal;

(3) The decision on 27 April 2020 to refuse the request a third time, having been asked by Greece to reconsider the previous refusal;

(4) The decision on 2 June 2020 to refuse the request a fourth time, in response to a third reconsideration request from Greece.

2. I summarise the applicant's account based on the information and evidence that was available to the respondent when her decisions under challenge were made. The applicant is a male national of Somalia born in 2006. He is the second cousin of ASM, a British citizen of Somali origin who arrived in the UK in 2006 and was granted refugee status. ASM works as an Uber driver and lives in a property with one bedroom and a separate living room.

3. The applicant's mother left him when he was approximately one year old. His father remarried and fathered children with his new wife. Although he lived with his father and his father's new family for a short time the applicant mostly lived with H, his father's cousin. H has several children, all of whom are older than the applicant.

4. From a young age the applicant has suffered from a medical condition that eventually required him to undergo an end colostomy in 2014. The edge of his colon was brought through his abdominal wall to form an opening through which his faeces drain. The applicant requires the use of colostomy bags but these were difficult to obtain in Somalia and he often made do using a cloth which was unhygienic and smelled foul. As a result of his medical condition he suffered neglect, social exclusion, bullying and physical and mental abuse, and did not attend school. As H's children did not want the applicant to sleep in their rooms because of his physical condition, he slept outside most of the time.

5. The applicant and ASM maintain that their respective mothers were first cousins. ASM's own mother informed him of the applicant's circumstances in 2008. ASM began to send money to his mother in Somalia intending that it be given to the applicant's father to help support the applicant. After the applicant's end colostomy operation in 2014 ASM started to send him colostomy bags or money to buy the bags. The applicant and ASM used to speak to each other regularly.

6. ASM first met the applicant in 2014 in Somalia. ASM wanted to help the applicant because the applicant was a member of his family and because he was a sick child who wasn't being properly cared for by adults. The applicant stayed with ASM in his hotel for a week. ASM arranged for the applicant to have a wash and have his hair cut and bought him clothes and shoes and food and gave him money. ASM and the applicant "became close" during that week. ASM told the applicant that he loved him and wanted to change his life. They were both

very sad when ASM returned to the UK. They would speak to each other once a week or fortnight and would message each other.

7. ASM became aware that doctors in India may be able to perform an operation on the applicant that was not available in Somalia. ASM raised funds and saved money to enable the applicant to travel to India for the operation. In May 2018 ASM travelled to Somalia and then travelled with the applicant to India. The applicant and ASM stayed in a hotel and ASM took care of the applicant. ASM collected and administered medication to the applicant, dealt with the applicant's dressings, bought him food, washed his clothes, played with him, and accompanied him to hospital. The applicant and ASM returned to Somalia in July 2018 and the applicant returned to the UK on 19 July 2018. The operation did not make much difference to the applicant's daily life and he required further treatment following an infection.

8. ASM raised further funds and saved more of his own money to take the applicant to Turkey for a further operation in 2019. Although it was originally intended for the applicant's father and AF, H's oldest son to accompany the applicant to Turkey, the applicant's father died in May 2019. In June 2019 ASM returned to Somalia and, together with AF, they all travelled to Turkey on 9 July 2019. Doctors in Turkey advised that the applicant needed to strengthen the relevant muscles in his body before any further operation and that the applicant's infection also needed to first be treated. ASM paid for the doctors, the accommodation and food. ASM had to return to the UK after spending around a month in Turkey. ASM returned to continue working to support himself and the applicant and AF. ASM paid their rent and left them money for expenses. The applicant and ASM maintained frequent contact.

9. Unbeknown to ASM the applicant and AF entered Greece on 7 September 2019. The applicant did not want to return to Somalia because of the way he was treated and because H was no longer willing to care for him. ASM continued to send money to the applicant and AF. AF remained in a refugee camp in Chios but the applicant was accommodated by the Greek authorities in a hostel for children in Athens. ASM purchased a mobile phone for the applicant and they speak to each other frequently. ASM continues to financially support the applicant. ASM is in communication with the staff at the hostel and discusses the applicant's behaviour and progress. ASM has been unable to visit the applicant because of the coronavirus.

10. According to ASM's statements the applicant can't communicate with other children or his carers in the hostel because of language difficulties, and he is depressed because he is lonely and feeling anxious because of his situation. The applicant requires a private space to change his colostomy bag which he does not have. The applicant also needs to insert a metal device every night to make sure that his bottom does not close up and has little privacy to do that. ASM provides the applicant with financial and practical support, advice, love and attention, and wants to be responsible for the applicant and take care of him. ASM loves the applicant and wants to change his life, and if the applicant came to the UK ASM would look after him like his own child. The applicant maintains that ASM

is the only family member with whom he has a positive loving relationship and who is willing to accommodate and take care of him. The applicant regards ASM as a father figure.

11. The applicant currently resides in a hostel in Athens accommodating unaccompanied asylum-seeking children. He has no family members in Greece. He maintains that he has no family members in Somalia who would be prepared to support him.

12. ASM states that the Home Office have never written to him or telephoned him concerning the applicant.

13. According to a psychiatric report obtained after the date of the last challenged decision the applicant is suffering from PTSD and Major Depressive Disorder as a consequence of his history of abuse and neglect. In her written submissions provided after the hearing the respondent expressed her concerns with the psychiatric report, particularly the diagnosis of PTSD and major Depressive Disorder. A report by an Independent Social Worker (ISW), also obtained after the date of the last challenged decision, supports the applicant's account of his relationship with ASM.

**The Take Charge Request**

14. On 3 October 2019 the applicant registered his asylum claim in Greece. On 26 November 2019 he started residing at the Athens hostel. On 24 December 2019 Greece made a Take Charge Request (TCR) to the UK pursuant to Article 17(2) ("Article 17(2)") of Dublin III. The TCR was accompanied by, inter alia, a psychosocial report dated 23 December 2019 prepared by Othon Christofilis, a psychologist, medical notes relating to the applicant's treatment in India and photographs of the applicant and ASM together.

14. On 3 January 2020 the respondent emailed the local authority in which ASM resides. The letter stated,

> "**The Home Office is <u>NOT</u> requesting completion of a Family Assessment at this time.**
>
> However should you hold any evidence to assist in verifying the claimed family link or possess any other information that you believe should be considered when assessing this application, please do forward this within 14 days. …
>
> The European Intake Unit will contact you further should it be satisfied that the claimed family link has been demonstrated. At this point we will request completion of a Family Assessment on the UK relative which will assist with the best interests consideration and the decision on this application."

15. On the same date the respondent maintains that she wrote to ASM asking him to complete a pro forma providing more information about the claimed family relationship and his ability and willingness to care for the applicant.

16. The respondent now concedes that her decision refusing the TCR and her refusal of the 1st request to re-examine the TCR were unlawful. I do not therefore need

to dwell on these decisions, but their framing is relevant to the issues that remain in contention.

**The refusal of the TCR, 27 January 2020**

17. The decision listed the documents that accompanied the TCR, referred to Article 8 DIII, and then stated,

> You have maintained that the above is eligible for transfer to the UK under article 17(2). And it is stated within the Take charge request [sic], that the best interests of the minor would be to join his claimed cousin in the UK, as he is the only close family he has. However no evidence has been provided which would support the assertion that their relationship would have the strength to compare to that of a sibling relationship.
>
> When considering all of the information available it is not accepted that this amounts to exceptional circumstances which would require the SSHD to show discretion in overlooking the failure to meet the eligibility criteria in articles 8-11.

18. This decision is flawed because the requirement to show that the family relationship for the purposes of Article 17(2) would have to have the strength to compare with that of siblings is not supported in Dublin III or any published Guidance (**R(on the application of BAA and Another) v Secretary of State for the Home Department (Dublin III: judicial review; SoS's duties)** [2020] UKUT 00227 (IAC) ("**BAA**"), at [113]).

**The refusal of the first reconsideration request, 13 March 2020**

20. On 12 February 2020 Greece requested that the UK re-examine the TCR pursuant to Article 5(2) of the Implementing Regulation (EC No 1560/2003) ("IR") and provided further evidence in the form of a short statement from ASM dated 7 February 2020 and a letter from Tzortzi Eleni, 'Scientific Supervisor'.

21. The respondent refused the reconsideration request. She noted her failure to comply with the two-week deadline outlined in Article 5(2)IR but cited the judgment of the CJEU in **X and X v Staatssecretaris van Veiligheid en Justitie (Regulation (EU) No 604/2013)** (Joined Cases C-47/17 and C-48/17, [2019] 2 CMLR 100) ("**X and X**") and maintained that the expiry of the time limit meant that Greece was responsible for the applicant's asylum claim "unless it still has the possibility to make a further take charge or takeback request."

22. The respondent does not defend this decision. She accepts that she ought to have taken the opportunity to cure the defective 1st decision and did not do so.

**The refusal of the second reconsideration request, 27 April 2020**

23. On 2 April 2020 Greece sent a 2nd re-examination request enclosing a detailed 'Best Interests Assessment' ("BIA") dated 28 February 2020 and a legal submission from an NGO, 'Safe Passage', responding to the respondent's previous reliance on the **X and X** judgement.

24. Following a Pre-Action-Protocol Letter issued by the applicant's solicitors on 9 April 2020 and challenging the first two decisions, a claim for judicial review was sent to the Upper Tribunal and the respondent on 23 April 2020. This was accompanied by, *inter alia*, a witness statement from ASM dated 23 April 2020, a witness statement from Othon Christofilis (psychologist) dated 22 April 2020, and a witness statement from Anastasia Solopova, an Assistant Solicitor at Wilson Solicitors LLP, dated 23 April 2020. This claim was issued by the Upper Tribunal on 24 April 2020.

25. On 27 April 2020 the respondent refused Greece's 2nd re-examination request. This is the principal decision that is under challenge in these proceedings. The respondent maintained that the secondary examination request was invalid but she nonetheless considered the evidence provided to her and reassessed her earlier decisions. The respondent stated,

> It is noted that the applicant claims that [ASM] is his cousin, and [ASM] does not mention either the applicant's mother or father as being his relative. Unfortunately, having considered all the evidence available, he is not considered to fall under the category of 'relative' as defined by article 8.

26. The respondent referred to the 'best interests of the child' being a primary consideration in any decision, but that it was not the only consideration and that it would not automatically lead to an individual being transferred.

> As such whilst the accompanying documentation which support the reunification has been considered it is noted that it is based on the assumption that the two parties were related as claimed and involved no scrutiny or evidence of the relationship between the two parties. As such it is not considered that, in relation to the investigations into the familial link between the two parties that these reports add any substantial evidential value. As the receiving member state, it is the duty of the UK to ensure that the parties are related as claimed and for the reasons listed above unfortunately it has not been possible to verify the family link with the evidence provided to date.

27. The respondent additionally stated,

> When considering the evidence submitted in relation to the applicant's medical conditions it is important to note that the starting point must be that this evidence suggests that the cause of these conditions are historic. The evidence has not established a clear causal link between the applicant's conditions and his separation from the UK sponsor.
>
> It is not clear from the reports how his conditions are not being adequately treated or why the UK health system and specifically the UK sponsor would be in a better position to provide the care needs of the applicant.

28. Even if it was accepted that they were "first cousins", the respondent was not willing to exercise her discretion based on family considerations as she was not satisfied, citing **Kugathas** [2003] EWCA Civ 31 ("**Kugathas**"), that the applicant and ASM had established a family life together in the sense of a relationship involving more than the normal emotional ties between relatives.

> It is noted that the reports and the best interests assessment also allude to the close relationship between the applicant and the UK sponsor. However it is not accepted that the applicant and the UK sponsor share family life within the meaning of Article 8 ECHR/Article 7 of the CFR (even if they are related is claimed), or that their relationship in the circumstances of the case are otherwise such as to justify an exercise of discretion in the applicant's favour under Article 17(2).

29. Having cited from paragraph 24 of **Kugathas**, the respondent stated,

> Whilst it is accepted there may be some degree of emotional ties, and natural concern and affection between a minor in his adult cousin, it is not accepted that there is evidence in this case of elements of dependency involving more than the normal emotional ties.

30. The respondent noted that ASM had lived in the UK since 2006 and that the BIA indicated that ASM and the applicant met for the 1st time in 2014, when the applicant was 8 years old, and that "the ties built in this period are not likely to have been significant given the age of the applicant." Having referred to the assertions in the BIA that ASM and the applicant spoke on the phone and via Skype, the respondent maintained that there was no evidence of dependency on ASM during this period involving more than the normal emotional ties between family members. Whilst it noted that ASM collected donations and took the applicant for an operation in India in 2018, and the claim that ASM travelled to Somalia in May 2019 and then with the applicant to Turkey to have another operation was acknowledged, there was said to be no evidence in relation to this operation. The respondent again rejected the existence of any dependency involving more than normal emotional ties, "even when considered in the context of the issues described in the medical report."

31. The respondent finally stated,

> Given it is not accepted that there is family life between the two parties the rejection of the take charge request does not result in a breach of the applicant's Article 7 CFR and Article 8 ECHR rights.

**The refusal of the third reconsideration request, 2 June 2020**

32. On 18 May 2020 Greece issued a third reconsideration request. The request did not contain any new evidence but took issue with the respondent's claim that the earlier request was invalid and the respondent's use of the term "relative" with reference to Article 8 DIII. Greece stated that the decision of 27 April 2020 was the first time the respondent disputed the establishment of the family link. This was said to be contrary to the Implementing Regulation which requires full and detailed reasons for a refusal. Greece maintained that although the family link had not been proven by documentation enough evidence had been provided to enable the UK to make any further investigations for the purposes of establishing the family link. The reconsideration request stated,

> We do not claim that the boy's survival is at risk in Greece or that the Greek health system is unable to provide medical treatment. What we do claim is that the medical issues of the boy are serious and affect his everyday life in many

> ways. In this respect having an adult person looking after him is indeed in his best interest. Everyday social and psychological support cannot be provided by the Greek Health Services and this is what the 14-year-old boy desperately needs.

33. Greece outlined ASM's involvement in the trip to India in 2018 and the trip to Turkey in 2019 and maintained that this evidenced far more than normal emotional ties. Greece continued to believe there were strong humanitarian reasons for accepting the reconsideration request.

34. On 2 June 2020 the respondent reiterated her view that the Dublin III Regulation made no provision for multiple re-examination requests and stated that she now considered Greece to be responsible for examining the applicant's asylum claim.

**The grant of permission to proceed with the judicial review challenge**

35. On 22 June 2020 the applicant's solicitors applied to amend their grounds to include challenges to the decisions of 27 April 2020 and 2 June 2020.

36. In a decision dated 14 July 2020, although sent to the parties on 23 July 2020, Mr Justice Lane, President of the Upper Tribunal (IAC), granted permission to proceed with the JR in respect of all four decisions. He observed,

> "The challenges to the impugned decisions are arguable; in particular, as regards the asserted duties of investigation and advance notification of concerns, and as regards the respondent's engagement with the evidence from Greece and with the relevant local authority in the United Kingdom."

**The applicant's submissions**

37. I summarise the applicant's submissions, as set out in Ms Knorr's detailed skeleton argument and her oral submissions. The submissions can be split into two parts. The first part contends that the respondent's decisions (but with almost exclusive focus on the decision of 27 April 2020) disclose traditional public law errors and breach the Dublin III Regulation in respect of its requirements as to the best interests of children and its investigative obligations.

38. Firstly, the respondent misdirected herself and failed to give lawful reasons when considering and rejecting the familial link between the applicant and ASM as she asked herself whether they were "relatives" which has a specific definition in Dublin III relevant to the Article 8(2) DIII criteria. The respondent therefore asked herself the wrong question.

39. Secondly, the respondent failed to adopt the correct approach to evidence and proof pursuant to Article 22 DIII and the respondent's own policy confirming that the relevant standard was that of the "balance of probabilities". Whilst acknowledging that 'List B' (concerning 'circumstantial evidence' in Annex II of the Implementing Regulation No 118/2014 necessary for proving a relationship) strictly related to the Chapter III criteria in the Dublin III Regulation, there was no logical reason why the same approach should not be applied when assessing the family link in Article 17(2). The respondent failed to grapple with the

evidence of the family link and acted unreasonably and unlawfully in attaching little or no weight to the views of the Greek professionals who accepted the relationship and who were in regular communication with the applicant and ASM. There was said to be no basis for rejecting the evidence of the claimed relationship.

40. Thirdly, if the respondent had concerns with the familial link, she was obliged to put this to the applicant and/or ASM as a matter of fairness prior to rejecting that family link (**Balajigari** [2019] EWCA Civ 673 ("**Balajigari**")).

41. Fourthly, the respondent was obliged to request a local authority assessment prior to taking a decision on the TCR as this could have provided further evidence supporting the family link and which was, in any event, relevant to the assessment of the existence of humanitarian grounds. That the respondent wrote to the relevant local authority specifically telling it not to do an assessment was no answer to the complaint. Nor was there any force in the respondent's contention that an assessment could not possibly cast any light on the relationship or upon the existence of humanitarian grounds. Neither the challenged decisions nor the General Case Information Database ("GCID") Case Record Sheets, nor any other disclosure, revealed that there had been any consideration that a local authority assessment was unnecessary based on materiality. The local authority would conduct its own checks, including the proposed residence, and these would be relevant to the general best interests assessment and in determining the existence of humanitarian grounds. The respondent additionally failed to contact ASM and send him an undertaking form as required by her own guidance, and failed to telephone him, contrary to her own guidance.

42. Fifthly, the respondent failed to properly assess the applicant's best interests or to conduct a lawful best interests investigation of her own, failed to comply with the obligation to treat his best interests as a primary consideration (Article 6 DIII), breached his "*right to such protection and care as is necessary for their wellbeing*" (Article 24(1) CFR), and failed to properly engage with the evidence provided by the Greek authorities and the applicant and ASM concerning these matters. There was a failure to identify where the applicant's best interests lay, and no actual reasons were given as to why his best interests were outweighed on the particular facts of this case. To the extent that the respondent was only willing to accept the TCR on humanitarian grounds if she was satisfied as to the existence of 'family life' for the purposes of Article 8 ECHR, this approach was unlawful. There was no requirement that the discretion under Article 17(2) could only be exercised if 'family life', in the Article 8 ECHR sense, was established. 'Humanitarian grounds' were not confined to situations where the right to family life was engaged and the respondent was required to exercise her discretion rationally and lawfully even where the right to family life was not engaged. The respondent's approach constituted an unlawful fetter on her discretion.

43. Sixthly, the respondent took into account irrelevant considerations such as the cause of the applicant's medical condition being "historic" whilst failing to

engage with the points made by Greek professionals that the applicant's need for love and care from a family member was enhanced by his condition and the discrimination, isolation and abuse he suffered. The decision unreasonably stated that the evidence failed to explain how the applicant's conditions were not being adequately treated or why ASM would be in a position to provide for the care needs of the applicant, despite these matters being clearly addressed by the evidence.

44. Seventhly, the respondent's Article 8 ECHR and Article 7 CFR assessment was unlawful as she entirely failed to consider the applicant's private life relationship with ASM.

45. The second part of the grounds contend that the respondent's decisions are incompatible with fundamental rights, specifically, (i) the applicant's rights as a child (Article 6 DIII and Article 24 CFR); (ii) his right to family life and the principle of family unity (recital 39 DIII, Article 6(3) DIII, Article 7 CFR and Article 8 ECHR; and/or (iii) his right and that of ASM to their private life relationship (Article 7 CFR and Article 8 ECHR)). Ms Knorr contends that the Tribunal must assess for itself whether the applicant's rights under the Dublin III Regulation or the ECHR have been infringed, if necessary, taking account of evidence that was not before the decision-maker.

46. Ms Knorr invites the Tribunal to find, applying the balance of probabilities threshold, that the relationship between the applicant and ASM is as claimed.

47. She invited the Tribunal to find that there was "exceptionally strong" evidence of the applicant's best interests and that it was "very strongly" in his best interests for the TCR to be accepted. The post-decisions evidence from the ISW and the Consultant Psychiatrist rendered the evidence relating to the applicant's best interests "overwhelming", having regard both to his physical health needs and his mental health problems. The respondent offered no justification for the interference in the relationship, which was disproportionate. Having regard to the aims of the Dublin III Regulation and the serious harm being caused by separation, the factors in favour of unification would require a weighty justification to be outweighed.

48. Family life exists between the applicant and ASM even though their relationship is that of extended family members. In support Ms Knorr relies on several decisions including **Re A** [2018] EWHC 3625 (Fam), **R(Ahmadi) v SSHD** [2005] EWCA Civ 1721, **R(X) v SSHD** [2006] EWHC 1208 (Admin), and **Kugathas**. Taking account of the applicant's best interests, his traumatic history, his young age, his pre-existing ties with ASM and ASM's declared intentions of caring support, the evidence demonstrates dependency involving more than normal emotional ties. The applicant needs a safe and secure family environment where he is emotionally supported in order to have any prospect of recovering from the trauma he experienced as a child. When assessing the relationship between the applicant and ASM the respondent's singular focus was on the amount of time they spent together in the past and the lack of extensive cohabitation. There was no evaluation of the strength of the relationship or levels of dependency. If I was not persuaded that family life existed I was invited to find that the applicant and

ASM share private life (applying **R(HN & MN) v SSHD** (JR/4719/2018) ("**HN & MN**")) and that, in view of the quality of the relationship and the very serious impact on the applicant's life if he is not reunited, the interference in the private life relationship would be disproportionate.

49. Ms Knorr submitted that there is no 'exceptionality' threshold when applying Article 8 ECHR in the context of the Dublin III Regulation and that the Courts and Tribunals had already rejected arguments that this threshold applies to Article 8 ECHR claims within the framework of the Dublin III system (**BAA** and **R(MS) v SSHD** [2019] EWCA Civ 1340 ("**MS/CA**").

**The respondent's submissions**

50. Ms Masood adopted and expanded upon the skeleton argument prepared by Mr G Lewis. The respondent's exercise of discretion under Article 17(2) on "humanitarian grounds" was a quintessential matter for her and she lawfully explained why she was unwilling to exercise her discretion in the applicant's favour as she did not consider that the applicant had a history of family life with ASM and there was not a strong enough case to reunite them on humanitarian grounds. The lack of a history of family life between the applicant and ASM meant that the case did not engage the right to respect for family life under Article 8 ECHR.

51. As the obligation to examine an asylum claim under Article 17(2) only arose if the UK decided to exercise its discretion and become responsible, the other provisions of the Dublin III Regulation and the Implementing Regulations relating to 'responsibility' were only relevant to the extent that those provisions did not concern the mechanisms for establishing pre-existing responsibility. Given that Articles 3 and 5 of the Implementing Regulations ("IR") were concerned with a claim concerning pre-existing 'responsibility', they had no bearing on the discretion conferred by Article 17(2).

52. There was no requirement, either by reference to principles of fairness or the respondent's investigative duties, to contact ASM. In any event, because his account of his relationship with the applicant was set out in the BIA and in ASM's statement, it was difficult to see how contact with ASM could have made any material difference. The respondent nevertheless did send ASM an undertaking form on 3 January 2020 and on the same day wrote to ASM's local authority. Neither ASM nor the local authority responded. A signed statement from Isabella Goddard of the European Intake Unit ("EIU"), dated 5 October 2020, indicated that she had attempted to telephone ASM on or around 17 January 2020, but the call rang through. Due to an oversight on her part Ms Goddard failed to make a record of the telephone call in the GCID. The respondent's letter to the local authority followed her policy requirement to "notify" it of the TCR "as soon as possible" after it was made and it was then a matter of judgement for the respondent when, if at all, to request a safeguarding assessment. Insofar as the Tribunal in **BAA** interpreted this policy to mean that the respondent was required immediately to request a safeguarding assessment, it was incorrect. The respondent reserved her position on this point. **BAA** nevertheless indicated that there may be circumstances in which a lawful

decision could be reached without obtaining a local authority assessment, including if the respondent was satisfied that the assessment could not possibly cast any relevant light on whether the alleged family relationship existed or upon the alleged humanitarian grounds. Any failure to follow the relevant policy could not have made any material difference as all the relevant information was already before the respondent.

53. Fairness did not require a 'minded-to' letter, such as that considered in **Balajigari**, to be issued in response to a TCR. The respondent did not have a "specific concern" that was capable of being addressed through further evidence as the evidence of the very limited time that the applicant and ASM spent together had already been provided with the TCR and could not be improved. No purpose would be served determining whether the respondent was lawfully entitled to reject the family link because the respondent proceeded, in the alternative, on the assumption that they were related. Nor, for the same reasons, did the Tribunal need to adjudicate on whether the respondent should have given the applicant, ASM and/or the local authority a further opportunity to provide more evidence of the claimed family link.

54. On a fair reading of the decision, the respondent considered all the evidence concerning the applicant's best interests and accepted that his best interests were a primary consideration. She acknowledged the evidence from medical and social care professionals who concluded that the applicant's transfer would be in his best interests but, as part of her assessment of whether to accept the TCR "through the lens of Article 7 CFR and/or Article 8 ECHR, taking account of the best interests of the child" (**BAA** at [27]), it was permissible and necessary to assess the strength of the claimed family life between the applicant and ASM. The statements that accompanied the judicial review application were not listed in the decision of 27 April 2020 and were not served on the EIU, although Ms Masood understood that entries in the GCID were sequential and that anyone inputting information in respect of an individual would be aware of the other entries in the GCID. The respondent was entitled to conclude that there was no history of family life between the applicant and ASM in the sense of a family relationship going beyond normal emotional ties (**Kugathas**). Whilst the "best interests" considerations were an important aspect they were not determinative of the broader assessment of "family considerations" required by Article 17(2).

55. The respondent did not reject the evidence from the Greek professionals but she did not consider that evidence determinative of whether the TCR should be accepted given the absence of family life between the applicant and ASM. The challenge to her assessment did not raise issues of law but were concerned instead with the merits of the respondent's decision. As part of that assessment it was not irrelevant or otherwise irrational to observe that the applicant's separation from ASM was not a cause of his medical condition. Nor was it irrational to observe that it was "not clear" from the professional evidence why Greece was not in a position to manage the applicant's use of colostomy bags, or why it was necessary for the applicant to be reunited with ASM for this to be achieved. Although the psychosocial report dated 23 December 2019 indicated that the applicant was shy and introverted, no other issue was raised about his

psychological state and there was nothing in the report to indicate that the applicant had serious psychological issues.

56. In respect of the fundamental rights challenge, the respondent's pleaded case was to put the applicant to proof in respect of the relationship. The relationship between the applicant and ASM did not engage Article 8 ECHR. The respondent acknowledged the evidence suggesting there was a close relationship between the applicant and ASM but she was entitled to conclude, given that they were only second cousins and given their relationship history, that there was no Article 8 ECHR family life. Whilst ASM's acts of kindness and support to the applicant, taken at the highest, were "plainly laudable", they were insufficient in a legal sense to establish family life which generally involved cohabiting dependants (citing **S v United Kingdom** (1984) 40 DR 196, as referred to by Sedley LJ in **Kugathas**). The importance of cohabitation, as a normal ingredient of family life, was reinforced by the European Court of Human Rights in **Paradiso and Campanelli v Italy** (2017) 65 EHRR 2 ("**Paradiso**"). The evidence before the respondent, and now the Tribunal, did not show that the applicant and ASM had established a "family life" together capable of making out humanitarian grounds for their reunion. Nor did the evidence point to any arguable interference with the private lives of the applicant and ASM within the meaning of Article 8 ECHR. The applicant's reliance on **HN & MN**, which found that the rights of two minors to respect for their private lives was engaged by the Secretary of State's refusal to accept Take Charge requests to enable them to be reunited with their maternal uncle, was clearly distinguishable given that the Tribunal in that case was dealing with significantly closer family relationships and a mandatory responsibility criterion under the Dublin III Regulation. The right to respect for private life could not possibly extend to the right to enter a foreign state to establish a social relationship with any relative, no matter how distant (**SSHD v Abbas** [2017] EWCA Civ 1393 ("**Abbas**")), and the applicant could not point to any case where a court found a positive obligation on a state to admit someone to its territory of the purposes of establishing or continuing private life relationships.

57. With reliance on **R (FTH) v SSHD** [2020] EWCA Civ 494 ("**FTH**"), applied in **R (AM (a child)) v SSHD** [2018] EWCA Civ 1815 ("**R (AM)**"), the respondent's obligations under Article 8 ECHR to an unaccompanied child were limited to the kind of "very exceptional circumstances" described in **ZT (Syria) v SSHD** [2016] 1 WLR 4894 ("**ZT (Syria)**"). Although **FTH** concerned a challenge to a refusal to reunify a minor and his family relation outside the Dublin III system, the Court of Appeal was clear that "where the Dublin III procedure (including the enforcement procedures available through the French judicial system) was available" to an unaccompanied asylum-seeking child, the Secretary of State's independent obligations under Article 8 ECHR would only have arisen if "for some reason, it could be shown that there was a deficiency in the [Dublin] system". A "very exceptional circumstances" test was appropriate where the respondent was being asked to exercise her discretion to do something she was not normally required to do.

58. The respondent accepts that the 4th decision of 2 June 2020 is largely parasitic on his challenge to the 3rd decision and that, pursuant to **X and X**, the respondent was lawfully entitled to conclude that Greece was not entitled to make more than one reconsideration application. It was however agreed by both representatives that, if I found that the 3rd decision was unlawful, it would not be necessary for me to consider the respondent's reliance on **X and X**, which I understand is to be considered in another case. Ms Masood accepted that if the April 2020 decision was unlawful, then the June 2020 decision fell away.

**Relevant legislative framework**

The Dublin III Regulation

59. Council Regulation (EU) No 604/2013 sets out the criteria and mechanisms for determining which EU Member State is responsible for examining a third country national's asylum application. The criteria establish a hierarchy for determining responsibility. If a Member State where an asylum application is lodged considers that another Member State is responsible for determining the claim, the first State (the "requesting State") must ask the second State (the "requested State") to take charge of the applicant.

60. Recital (13) identifies the relevance of the best interests of children:

> 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.

61. Recital (14) reads:

> In accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with the Charter of Fundamental Rights of the European Union, respect for family life should be a primary consideration of Member States when applying this Regulation.

62. Recital (39) indicates that the Dublin III Regulation respects and observes the "fundamental rights" and "principles" of, *inter alia*, the Charter of Fundamental Rights of the European Union (CFR):

> 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.

63. Chapter II of the Dublin III Regulation deals with 'General Principles and Safeguards'. Article 2(h) defines 'relative' as the applicant's adult aunt or uncle or grandparent. Article 3 states, so far as is relevant:

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

64. Article 6 provides guarantees for minors:

> 1. The best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation.
>
> ….
>
> 3. In assessing the best interests of the child, Member States shall closely cooperate with each other and shall, in particular, take due account of the following factors:
>
> (a) family reunification possibilities;
> (b) the minor's well-being and social development;
> (c) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking;
> (d) the views of the minor, in accordance with his or her age and maturity.
>
> 4. For the purpose of applying Article 8, the Member State where the unaccompanied minor lodged an application for international protection shall, as soon as possible, take appropriate action to identify the family members, siblings or relatives of the unaccompanied minor on the territory of Member States, whilst protecting the best interests of the child.
>
> 5. With a view to facilitating the appropriate action to identify the family members, siblings or relatives of the unaccompanied minor living in the territory of another Member State pursuant to paragraph 4 of this Article, the Commission shall adopt implementing acts including a standard form for the exchange of relevant information between Member States. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 44(2).

65. Article 8(4) reads,

> In the absence of a family member, a sibling or a relative as referred to in paragraphs 1 and 2, the Member State responsible shall be that where the unaccompanied minor has lodged his or her application for international protection, provided that it is in the best interests of the minor.

66. Article 17 is located within Chapter IV, which is headed 'dependent persons and discretionary clauses'. Article 17 enables a Member State to accept responsibility for an asylum claim even where it is not responsible under the criteria of the Regulation. Article 17 (2) reads, so far as material,

> 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.

67. Article 27 deals with remedies. It reads, so far as material:

> 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.

The Charter of Fundamental Rights

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

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

69. Article 24 CFR is headed 'the rights of the child'.

> 1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
>
> 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
>
> 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

70. Article 47 of the CFR relates to the right to an effective remedy and a fair trial.

> Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
>
> Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.

The Human Rights Act 1998 and Article 8 ECHR

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

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

Relevant decisions

72. A large number of cases were cited by the parties. I have considered all the cases relied on by the parties and refer to them as appropriate in this decision. It is however appropriate, at this stage, to mention a few of the most relevant cases. **R (on the application of HA & Others) v Secretary of State for the Home Department (Dublin III; Articles 9 and 17.2)** [2018] UKUT 00297 (IAC) ("**HA**") concerned a refusal to accept a TCR made by Greece pursuant to Article 17(2). Its facts were "highly unusual, if not unique" (at [2]) and concerned a stateless Bidoon from Kuwait married to a British citizen and who was seeking asylum in Greece with her child, who also appeared to be a British citizen. Headnote (2) of the decision, which reflects [27] and [32] of the decision, reads,

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

73. **R (on the application of BAA and Another) v Secretary of State for the Home Department (Dublin III: judicial review; SoS's duties)** [2020] UKUT 00227 (IAC) ("**BAA**"), a recent decision authored by the President of the Upper Tribunal, deals with issues similar to those that arise in the present challenge. The applicant ("A1") was a 17 years old Syrian unaccompanied minor child residing in the same hostel in Greece as the current applicant. A1 claimed

asylum in Greece and a TCR was issued by the Greek authorities pursuant to Article 17(2) because he had a cousin, A2, in the UK. The SSHD refused the application and refused to subsequent re-examination requests. The headnote, which reflects [66] of the decision, reads,

> *(1) Article 17(2) of Regulation 604/2013 of the European Parliament and of the Council ("Dublin III") confers a discretion on a Member State to examine an application for international protection "in order to bring together any family relations, on humanitarian grounds, based on family or cultural considerations". Although the discretion is wide, it is not untrammelled: R (HA & others) (Dublin III; Articles 9 and 17.2) [2018] UKUT 297 (IAC). As in the case of any other discretionary power of the Secretary of State 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.*
>
> *(2) The Secretary of State's Article 17(2) decisions are susceptible to "ordinary" or "conventional" judicial review principles, of the kind described by Beatson LJ in ZT (Syria) v SSHD [2016] 1 WLR 4894 as "propriety of purpose, relevancy of considerations and the longstop Wednesbury unreasonableness category" (para 85).*
>
> *(3) Where a 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. If, in order to make that assessment, the court or tribunal needs to make findings of fact, it must do so.*
>
> *(4) Nothing in paragraphs (1) to (3) above is dependent upon Article 27 (remedies) of Dublin III applying to the facts of the case. Nevertheless, what the Upper Tribunal held in R (MS) (Dublin III; duty to investigate) [2019] UKUT 9 (IAC) regarding the scope of Article 27 is correct and nothing in the Court of Appeal judgments in MS [2019] EWCA Civ 1340 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).*
>
> *(5) It would be remarkable if the Secretary of State's investigatory responsibilities were materially narrower in an Article 17(2) case which concerns an unaccompanied minor and his or her best interests, than they would be in respect of any other take-charge request under Dublin III. Where the request under Article 17(2) raises issues that involve an asserted family life within Article 8 ECHR/Article 7 of the Charter of Fundamental Rights, then, in the normal course of events, the Secretary of State's degree of engagement with the relevant United Kingdom local authority should be no less than in the case of any other unaccompanied minor, where the take-charge request is made under Article 8 of Dublin III on the basis that the relation in the United Kingdom is a sibling or a "family member" or "relative" as defined.*
>
> *(6) Even in Article 17(2) cases, the principles of procedural fairness may mean that the Secretary of State may be required to provide an indication or gist to an applicant or his alleged United Kingdom relation, of matters of concern that may lead to a refusal to take charge of the applicant: R v SSHD ex parte Fayed [1998] 1 WLR 763; R (Balajigari) v SSHD [2019] 1 WLR 4647. This is, however, an area where one cannot lay down hard and fast rules. Even where Article 8 ECHR is in play, there may be exceptions. Furthermore, the process must not become so elaborate as to defeat the aim of expeditious decision-making, particularly where the best interests of minors are concerned.*

*(7) The references to "exceptional circumstances" in the Secretary of State's Dublin III Guidance (18 April 2019) do not render the Guidance unlawful. Those working in the immigration field know that the use of "exceptional" in the context of Article 8 ECHR is not to be used as setting a particular (high) threshold but, rather, as predictive of the outcome of the application of the principles of proportionality to the facts of a particular case. Nothing in the Guidance suggests its author is telling caseworkers to do anything other than follow the settled law on this topic.*

74. The nature of the investigative duty in the context of a TCR has been considered in **R (on the application of MK, IK (a child by his litigation friend MK) and HK (a child by her litigation friend MK) v Secretary of State for the Home Department (Calais; Dublin Regulation – investigative duty) IJR** [2016] UKUT 00231 (IAC) ("**MK, IK**") and in **R (on the application of MS) (a child by his litigation friend MAS) v SSHD (Dublin III; duty to investigate)** [2019] UKUT 00009 (IAC) ("**MS/UT**"). The Tribunal in **MK, IK** concluded that the investigative and evidence gathering duties are "unavoidably factually and contextually sensitive", that the "content and scope of such duties will vary from one context to another", and that the principle that the duties required was that "reasonable steps" were taken by the Member State (at [40]). In **MS/UT** the Tribunal confirmed that the Member State was required to "act reasonably" and take "reasonable steps" in carrying out the investigative duty (headnote 2; and at [112] – [114] and [120] – [128]). Whilst accepting that Dublin III imposed a duty of investigation, the Tribunal quashed the SSHD's decisions by reference to domestic law principles (see [63] to [66] in **MS/CA**).

**The admissibility and consideration of post-decision evidence**

75. The applicant sought to admit, pursuant to a consent order sealed by the Tribunal on 27 August 2020 (granting the applicant an extension until 18 September 2020 to make any application to rely on additional evidence), further evidence consisting of a report from Dr Susan Walker, Consultant Child and Adolescent Psychiatrist, dated 23 July 2020, a report from Peter Horrocks, an Independent Social Worker ("ISW") dated 4 August 2020, a witness statement from the applicant dated 16 September 2020, a second witness statement from Othon Christofilis dated 16 September 2020, a 2nd statement from Anastasia Solopova dated 18 September 2020, Royal Mail track and trace document, and a second witness statement from ASM signed 17 September 2020. The reports from Dr Walker and Mr Horrocks were provided to the respondent on 5 August 2020, although not pursuant to any application to admit further evidence.

76. To the extent that the applicant seeks to adduce the new evidence (primarily the report from Mr Horrocks, Dr Walker, the 2nd witness statement of Mr Christofilis, the statement of the applicant and the 2nd witness statement of ASM) to support his grounds relating to the infringement of fundamental rights (Article 8 ECHR; Article 7 CFR), the respondent relies on **R(A) v Chief Constable of Kent** [2013] EWCA Civ 1706 ("**R(A)**") to support her contention that the Tribunal cannot not consider post-decision material when determining whether there has been a breach of the family and/or private life rights of the applicant and/or ASM.

77. **R (A)** concerned unsubstantiated allegations of mistreatment by **A** in a care home context which were disclosed in an Advanced Criminal Record Certificate ("ECRS"), and whether such disclosure breached **A's** Article 8 ECHR private life rights. The Administrative Court found that the disclosure amounted to a disproportionate interference with **A's** private life rights and prevented her from obtaining full-time employment in her profession. The Chief Constable appealed to the Court of Appeal on the basis, *inter alia*, that the Administrative Court judge erred in relying on material which could not have been available to the Chief Constable at the time the disclosure decision was made or on the date of disclosure ([6], [20], [35(3)]). At [36] & [37] The Court of Appeal considered the intensity of review that was to be applied when dealing with human rights issues and referred to, *inter alia*, **Belfast City Council v Miss Behavin' Ltd** [2007] UKHL 19, **R (SB) v Governors of Denbigh High School** [2006] UKHL 15 and **Huang** [2007] UKHL 11. The Court considered the issue of post-decision material at [67] to [92]. It was common ground between the parties that the need, in a judicial review context involving human rights, of an intense scrutiny including, in some cases, live evidence and cross-examination, did not change the process to a "merits review" in which the courts will always substitute their views for those of the relevant public authority [79]. At [80] Beatson LJ considered that this:

> … poses a serious difficulty of principle for the contention that the court must also scrutinise material which could not have been available to the decisionmaker at the time of the decision. This because, if the court is required to scrutinise such material, it is difficult to see how the process can characterised as one of the review of a decision made by the public authority which has been given primary responsibility for a subject-matter, often because of its special knowledge and expertise. Considering post-decision material would, in truth, turn the process into one of a determination on all the material available to the court at the date of the adjudication. It would be very similar to what Lord Neuberger in Re B (A Child) (FC) UKSC 33 at 89. [2013] 3 All ER 929, [2013] 1 WLR 1911, in the context of the role of an appellate court, described as "a sort of half-way house role between review and reconsideration", and which he deprecated.

78. Once new evidence relevant to **A's** conduct had been published it was open to **A** to seek a further ECRS which would take account of that evidence [81]. At [82] and [83] Beatson LJ expressed his concern that if a court becomes too entangled with post-decision evidence this would be detrimental for the process of litigation and would mean the court sidestepping its primary role causing it to "become part of a rolling administrative decision-making process." At [84] Beatson LJ expressed his view that the appropriate course in many cases was not to review the SSHD's decision on the basis of new material and that the matter should either be remitted or the claimant should make a further application deploying the new material. Having quoted from Lord Neuberger in **Re B (A Child) (FC)** [2013] UKSC 33, Beatson LJ concluded, at [90] and [91],

> [90] The law as stated thus means that, in the present case, unless this court concludes that the judge erred in principle in her approach to the assessment of proportionality, it is not required to reconsider the issue for itself. The decision in *Re B* is, however, also instructive in determining whether a reviewing first

> instance court should consider post-decision material. This is because requiring it, as the art 6 compliant court or tribunal which considers the matter, to consider post-decision material gives it the sort of "half-way house role between review and reconsideration" which Lord Neuberger deprecated.
>
> [91]For these reasons I consider that, 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 at 77 – 78, 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.

79. **R (A)** had not been cited in **BAA**, and it does not appear to have been considered by the Supreme Court in **Kiarie and Byndloss v SSHD** [2017] UKSC 42. If **R(A)** has not been expressly overturned or overturned by necessary implication it is binding on the Upper Tribunal. I accept that a similar ISW report from Mr Horrocks was admitted on an agreed basis in **BAA** just 8 days before the substantive hearing in that case, and that a requirement to act in a consistent manner is a fundamental element of the rule of law, but no argument based on **R (A)** was advanced by the respondent in **BAA** and the fact that a post-decision ISW report was admitted in another case is not, of itself, a reason to admit a similar report in this challenge in a manner that would be contrary to the ratio of **R (A)**. Ms Knorr also relies on the fact that in other Dublin III Regulation cases new evidence was considered (such as **MS/UT**, **FwF v SSHD** (JR/1626/20019), **HN & MN v SSHD** (JR/4719/2019) and **KF v SSHD** (JR/1642/2019), but it does not appear that any argument based on **R (A)** was raised in these decisions.

80. **R (A)** is however distinguishable from the present judicial review challenge. Firstly, unlike **R (A)**, the respondent's decisions concern 'transfer decisions' under Dublin III (**BAA**, at [28] & [29]) and the applicant therefore has a right to an effective remedy, in the form of an appeal or a review, "in fact and in law", in respect of the transfer decisions (Article 27 DIII, read in conjunction with Article 47 CFR). In **MS/UT** the Tribunal held, albeit in the context of a TCR issued under the Chapter III criteria, that it could determine for itself whether the relevant criteria applied, including whether the required relationship was established. In the Court of Appeal the SSHD effectively conceded that, if Article 27 applied, the domestic court conducting the Article 27 review of the transfer decision should determine for itself whether there is a "sufficiently solid factual basis" for it (at [13] of **MS/CA**). Although the instant case concerns an exercise of discretion under Article 17(2) and not the determination of the criteria for responsibility under Chapter III of the Dublin III Regulation, common to both is the need to establish a family link in order for a TCR to be accepted in the context of the family reunion of an unaccompanied minor. In **MS/UT** the Tribunal held that there was no insurmountable procedural obstacle to a factual inquiry being undertaken that included post-decision evidence (at [195] to [201]) when determining the 'hard edged' fact of the claimed relationship. Given that the respondent's discretion can only be exercised if a family relationship exists, I find that this question does involve a 'hard edged' question of fact that must be resolved by the Tribunal by reference to all available evidence, including that post-dating the challenged decisions.

81. I additionally note that, unlike **R (A)**, the present case involves an obligation under Article 6 DIII to approach the best interests of children as a primary consideration, as well as the rights in Article 24 CFR to ensure that children have the right to such protection and care as is necessary for their well-being, and that these obligations, considered in the context of Article 27 DIII, are relevant when determining whether the Tribunal can consider post-decision evidence relating to the best interests of children (see, for example, **X v Latvia** (GC) (2014) 59 EHRR 3, at 112 – 117).

82. I am further persuaded, on the particular facts of this case, that in the absence of any lawful decisions by the respondent (which will be considered later), there is a continuing duty on the respondent to make a lawful decision in response to the TCR (and in response to the requests for reconsideration of the refusal of a TCR). The respondent relies on **MS/UT** in support of her submission that there is no continuing duty to investigate or consider new material once a 2nd rejection of a TCR has been made, but that finding was subject to an exception where a domestic court in the requested Member State quashes one of more of the decisions rejecting the TCR (**MS/UT**, at [134]). Given that the respondent has accepted that her first two decisions relating to the TCR were unlawful, there has not yet been any lawful decision and the first two decisions are liable to be quashed. In any event, **MS/UT** held that a duty of investigation did not continue beyond the second rejection of a TCR "subject to the requirements of fairness". At [137] the Tribunal stated,

> "We do not consider that the duty of investigation continues beyond the second rejection, subject to the requirements of fairness. We say that because in reaching that second adverse decision the requested State must act fairly: the applicant must know the 'gist' of what is being said against him in respect of the application of the criteria relevant to the TCR and must have an opportunity to make representations on the issues and material being relied on if that has not previously been the case. In those circumstances, fairness requires that the respondent consider any representations and material raised (perhaps for the first time) to deal with a matter of which the individual was 'taken by surprise' in the second rejection decision. To that extent, the duty continues and may require the respondent as the requested State to reconsider the rejection of the TCR. It may well be that it is the implications of the duty to act fairly which, in many instances, explains why new (and post-second) rejection decisions are made. To the extent we are departing from MK on this issue, it is because we consider on the basis of the regime in the Dublin III Regulation the UT in MK was wrong and there is good reason to depart from it."

83. Neither the first nor the second decisions made by the respondent identified the respondent's rejection of the family relationship, and the 4th decision did not engage with this issue. In these circumstances, where the respondent had not previously provided the applicant with the 'gist' of her decision rejecting the family link, there continued to be a duty of investigation.

84. Furthermore, in **Spahiu, R (on the application of) v SSHD** [2018] EWCA Civ 2604 the Court of Appeal held, when considering at the issue of 'rolling review' at [63],

> "In short, there is no hard and fast rule. It will usually be better for all parties if judicial review proceedings are not treated as "rolling" or "evolving", and it is generally simpler and more cost-effective for the reviewing court to avoid scrutinising post-decision material. But there will also be a need to maintain a certain procedural flexibility so as to do justice as between the parties."

85. The need to maintain "a certain procedural flexibility so as to do justice as between the parties" was also referred to in **R (A)** at [83]. Procedural flexibility is relevant in the instant case because any decision to make a further TCR request cannot be made by the applicant but is entirely dependent on a third party (the requesting Member State, in this case, Greece). This is a further factor relevant when determining whether the Tribunal should consider post-decision evidence relating to the breach of fundamental rights.

86. I am mindful of the concern that Courts and Tribunals may become too entangled in the consideration of post-decision evidence, and the danger that to allow consideration of post-decision evidence generally may led to a persistent avalanche of further evidence. However, as pointed out in **MS/UT** (at [195]) whilst fact-finding in a judicial review, including by reference to post-decision evidence, is rarely undertaken, it is not unknown, and there is "no insurmountable procedure or obstacle to a factual enquiry being undertaken in judicial review proceedings". Given that this case is governed by Article 27 DIII, and for the reasons given above, I consider it appropriate to admit the postdecision evidence identified at paragraph 76 above. In the event however that my assessment of the admissibility of the post-decision evidence is wrong, I do not consider it necessary for me to have regard to that evidence in order to justly determine this judicial review challenge. I therefore proceed <u>without</u> consideration of the evidence identified at paragraph 76 above.

87. In respect of the 2nd statement from Anastasia Solopova and the Royal Mail track and trace document (the document could not confirm the status of the respondent's delivery of the Request for Information Form to ASM), which the applicant seeks to introduce to support his contention that the respondent failed to comply with her Dublin III Regulation Policy Guidance (v2, 18 April 2019; extant at the date of the challenged decisions) and Article 8 ECHR procedural safeguards, the respondent contends that this issue has been overtaken by events because the focus was now on the decision of 27 April 2020 and, by that stage, there was a significant amount of evidence of the nature and strength of the relationship between the applicant and ASM and the applicant and ASM had sufficient opportunity to provide evidence of their relationship. The respondent, in any event, contends that there was no breach of the procedural duty because Isabella Goddard, a decision-maker in the EIU, did telephone ASM but received no answer. The respondent herself seeks to introduce a post-decision statement from Ms Goddard dated 5 October 2020 (indeed, a post-hearing statement, there being no mention during the hearing of the possibility of a statement being obtained and served) in which Ms Goddard maintains not only that a Request for Information Form was sent to ASM by recorded delivery on 3 January 2020, but that on or around 17 January 2020 she telephoned the number provided in the TCR but there was no answer and the call rang through. She maintains that,

due to an oversight on her part, she failed to record the telephone call in the GCID database.

88. I have decided to admit the new evidence from both parties relating to the respondent's communication with ASM. The 2nd statement from Anastasia Solopova and the Royal Mail track and trace document are clearly relevant when determining whether the respondent complied with her own policy to contact the family relation in the UK and such evidence, by its nature, will sometimes post-date a challenged decision. I do not accept Ms Masood's submission that matters have been overtaken by the primary focus shifting to the decision of 27 April 2020. Any failure to comply with the procedural requirements of the respondent's Dublin III Regulation Policy Guidance continued to feed into and thereby inform the respondent's decision in respect of the decision of 27 April 2020. There has been no opportunity for the applicant to probe the evidence of Ms Goddard by way of oral cross-examination and it is surprising that this evidence was only obtained after the conclusion of the hearing given that the issue was raised as long ago as the Pre-Action-Protocol Letter sent on 9 April 2020. But these factors, and Ms Goddard's ability to recall a telephone call made 9 months previously that was not recorded in the GCID database, go the issue of what weight is attached to the evidence, not their admissibility.

**Discussion of the substantive issues**

89. I approach the challenged decisions on the basis that Article 17(2) contains a wide discretion, but that the exercise of discretion must be considered through the lens of Article 7 CFR and/or Article 8 ECHR, taking account of the best interests of a child (see **BAA**, at [25] to [27], [66(1)] and **R(HA)**). I adopt the approach taken in **BAA** that Article 27 DIII (remedies) applies to Article 17(2). It was not in dispute between the parties that the respondent's decisions were susceptible to challenge on ordinary public law grounds (see **BAA**, at [30]).

**Whether the applicant and ASM are second cousins**

90. I will first consider the respondent's approach, in her decision of 27 April 2020, to the claimed family relationship. During the hearing Ms Masood accepted that it was necessary to determine the lawfulness of the respondent's assessment of the claimed family relationship because the discretion under Article 17(2) can only be exercised if the applicant was the family relation of ASM (see also **BAA**, at [19]).

91. With reference to the extract at paragraph 25, the respondent noted that ASM did not mention either the applicant's mother or father as being his relative and that, "having considered all the evidence available" the applicant was not considered to fall under the category of 'relative' as defined in Article 8 DIII.

92. It is unclear why there was any need to refer to Article 8 DIII. The term 'relative' has a specific meaning within the Dublin III Regulation (under the heading "Definitions", Article 2(h)) and the applicant never suggested that his relationship with ASM met the definition of 'relative'. The respondent's reference to 'relative' as define by Article 8 DIII risks tainting the entirety of her

assessment of the familial relationship. On a holistic reading of the decision however, particularly the earlier reference to "cousins passport" and "cousins written consent" when setting out the evidence that was considered on the first page of the decision, and the respondent's subsequent (inaccurate) description to the applicant and ASM as "first cousins", I am satisfied that the respondent did appreciate that the assessment was to be undertaken by reference to Article 17.2 and not Article 8 DIII and that she did not limit her consideration of the familial relationship by reference to Article 8 DIII.

93. The respondent's inaccurate reference to the applicant and ASM being "first cousins" does however raise a concern that she failed to adequately scrutinise the evidence before her. Moreover, to the extent that the respondent concluded that the relationship between the applicant and ASM was not as claimed because ASM did not mention either the applicant's mother or father as being his relative, she took into account an irrelevant consideration or attached weight to an irrelevant matter. This is because in his statement dated 7 February 2020 ASM clearly indicated that he and the applicant were related in blood "… as we cousin through mother's side. His mother name: [HAI] and my [AHI]." Moreover, the BIA provided by the Greek Authorities contained a letter from ASM in which he stated, "[the applicant] and I are close in terms of family as we are second degree cousins through his mother."

94. In his statement dated 23 April 2020 ASM again describes in detail his relationship with the applicant, naming the applicant's mother and his mother and asserting that they (the mothers) were first cousins (at paragraph 5). No reference is made in the decision dated 27 April 2020 to this statement. An issue arose during the hearing as to whether this statement was properly before the respondent when her decision was made. This statement (and those by Mr Christofilis and Ms Solopova) accompanied the judicial review lodged on 24 April 2020 and which was served on the respondent on the same date. It would therefore have been before the department dealing with litigation ('Litigation Operations (West London)', according to the GCID records). It was not specifically served on the EIU. The GCID notes are however structured chronologically and anyone inputting information relating to a particular individual will have sight of the earlier information. It should therefore have been apparent to the decision maker in the EIU reading the GCID notes and inputting information that a judicial review had been lodged (the GCID records clearly refer to the lodging of the judicial review) and that this may have contained documents or material or evidence relevant to the reconsideration of the TCR request. This is particularly so given that at the bottom of the GCID sheet it is stated "I confirm that in making this decision I have considered all evidence submitted and all evidence held by the Home Office: YES". It should have been apparent to the respondent, in both departments, that further evidence had been provided but she failed to consider this further evidence (a similar finding was made in **HA**, at [44]). At the hearing Ms Masood indicated that even now the E-Folders (which contain correspondence relevant to an application) did not appear to contain the statements accompanying the judicial review. This indicates a failure by the respondent to transfer clearly material evidence to the relevant team. Even if the litigation team were somehow

unaware that a fresh decision was being taken, the statements should have been forwarded to the EIU team as soon as possible to give them an opportunity to consider withdrawing the April 2020 decision and remaking it in light of the new statements. Instead this evidence was not considered. The respondent erred in law by failing to consider the statements that were available to her when assessing the existence of the familial link.

95. I am additionally persuaded that, in concluding that the familial relationship was not made out, the respondent failed to take account of relevant considerations, namely, the detailed information provided by ASM and the applicant concerning their relationship, the conduct of ASM towards the applicant, which suggests a familial relationship, and the views of the Greek professionals caring for the applicant.

96. The respondent's Dublin III Regulation guidance (version 2.0, 18 April 2019) requires a decision-maker to consider whether, on the "balance of probabilities", there is sufficient information to accept that the parties are related as claimed, "… in other words, you must decide whether, after looking at all the evidence, it is more likely than not that the applicant and the person in the UK are related as claimed" (at page 44 of 46). It is not apparent from the decision that the respondent has looked at "all of the evidence" when reaching her decision. The respondent is not of course obliged to refer to every item of evidence produced by an individual, and I remind myself that I am undertaking a review of the lawfulness of the respondent's decision and not a merits assessment. The respondent must however demonstrate that she has taken into account material evidence bearing on the core issue in contention and show that she has applied the balance of probabilities standard. Although there was no independent documentary evidence confirming the relationship, the BIA, which constituted a detailed assessment of the applicant's account and circumstances and which was conducted by a professional psychologist at the hostel, presented a plausible description of the familial relationship, and this was supported by ASM's statement of 7 February 2020. The familial relationship was, moreover, accepted by the professionals with responsibility for the applicant's welfare in Greece (as evidenced in the psychosocial report dated 23 December 2019). The evidence from the psychologist was relevant when determining the family link as he saw the applicant every day since his arrival in the Athens hostel and observed the applicant's interaction with ASM (as detailed in his statement). Moreover, the evidence of ASM's journey to Somalia and then India with the applicant and his payment of the applicant's medical procedures provided further support for their claimed relationship. The very fact that ASM was supportive of the applicant to such a high degree was relevant when assessing the claimed relationship. Nor was there any contrary evidence that the relationship was other than as claimed. It is not apparent that the totality of this evidence has been considered by the respondent, and if it was considered, given the nature of the BIA and the psychosocial report, there was no basis for the respondent's conclusion that the evidence was incapable of adding "any substantial evidential value".

97. Quite apart however from the reasons given above, I am additionally but independently satisfied that, in her assessment of the familial relationship, the respondent acted in a procedurally unfair manner. In neither of her first two decisions had the respondent disputed the claimed familial relationship. It was not therefore apparent that the relationship was being disputed. This is clear from the third reconsideration request dated 18 May 2020 in which Greece underlined the fact that the decision of 27 April 2020 was the first time the respondent mentioned that the family link had not been demonstrated as a reason for rejecting the request, despite the two earlier decisions.

98. In **MS/UT** the Upper Tribunal held (at [123] to [124]) that the SSHD may be obliged to inform an individual of the "gist" of what is being said against them so as to be able to make representations and/or adduce evidence, before the actual decision is taken. The content of the duty to inform an individual of the "gist" of the case against them was considered in the context of Article 17(2) in **BAA**. Having considered relevant authorities including **R (Doody) v SSHD** [1994] 1 AC 531, **Balajigari**, **R (Citizens UK) v SSHD** [2018] 4 WLR 123, and **R v SSHD ex parte Fayed** [1998] 1 WLR 763, Mr Justice Lane rejected (at [91] to [93]) the respondent's submission that, in Article 17(2) applications, domestic common law fairness principles mean the respondent is never required to provide an indication or gist, to an applicant or his claimed United Kingdom relation, of matters of concern that may lead to a refusal to take charge of the applicant, particularly when Article 8 ECHR rights were potentially in issue. At [92] Mr Justice Lane stated,

> "Whilst 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 in respect of the initial decision, as a general matter there is likely to be an actual obligation to give the necessary indication, prior to a second refusal, where the concerns harboured by the requested State are not ones that have been ventilated by it."

99. At [93] Mr Justice Lane recognised that this was an area where one could not lay down hard and fast rules and that the process must not become so elaborate as to defeat the aim of expeditious decision-making, but found it difficult to see what legitimate purpose was served where the respondent had a specific concern that the requesting State or relevant individual may be able to address. In the instant case no issue with the family link had previously been raised by the respondent. Neither the applicant nor ASM were informed of 'the gist' of the respondent's belief, expressed for the first time in the decision dated 27 April 2020, that the familial relationship was not made out before the refusal to reconsider the TCR. It would not have imposed an onerous burden on the respondent to have informed ASM and the applicant. It would have given both an opportunity to further explain the details of their relationship. Had the respondent made her concerns apparent to the applicant and/or ASM, more details and further evidence of the claimed relationship could have been provided. I find that procedural fairness required the respondent to alert the applicant, ASM and/or Greece of her concerns before proceeding to make a decision.

100. For the reasons given above at paragraphs 93 to 99 I find that the respondent acted unlawfully in reaching her conclusion that the familial relationship was not made out. In her oral submissions Ms Masood indicated that the applicant was being 'put to proof' in respect of the claimed familial relationship. With reference to Article 27(1) DIII, and by analogy with **MS/UT**, I consider it appropriate to determine for myself whether the familial relationship is made out. In doing so I adopt the approach to the elements of proof and circumstantial evidence set out in Article 22 DIII, particularly with regard to circumstantial evidence (although Article 22 DIII does not strictly apply there is no reason in principle why the approach should differ in respect of an assessment of a family relationship under Article 17(2)) and I apply the balance of probabilities standard. I note that both the applicant and ASM have consistently maintained that they are second cousins, and that this account is inherently plausible having regard to ASM's description of how he came to meet the applicant and his interaction with him. I note that the professionals who are concerned for the applicant's wellbeing and welfare, including the observations of Othon Christofilis, the psychologist who prepared both the BIA and the psychosocial report and who has observed the (remote) interaction between the applicant and ASM, did not have any concern with the genuineness of the claimed relationship. I take into account the evidence that ASM has visited Somalia and travelled to India and Turkey in pursuit of medical treatment for the applicant and that ASM paid for such medical treatment, and the evidence that ASM continues to communicate with and support the applicant in Greece. Although I cannot entirely discount the possibility that ASM did so out of purely altruistic reasons, I find it more likely than not that his actions are the result of a relationship of consanguinity between him and the applicant.

**The exercise of discretion: the applicant's medical condition**

101. I now consider the lawfulness of the respondent's conclusion that, even if the applicant and ASM were related as claimed, it was not appropriate to exercise her discretion under Article 17(2). With reference to the extract from the respondent's decision set out at paragraph 27 above, the respondent considered it "important to note" that the causes of the applicant's medical conditions were historic and that there was no causal link between those medical conditions and the applicant's separation from ASM.

102. Neither the TCR nor the reconsideration requests maintained that the applicant's condition was causally linked to the respondent's decisions. The TCR and the reconsideration requests asserted that the applicant had a particularly high level of need that could not be catered for in Greece and that ASM could provide him with the necessary space and privacy and the emotional support needed by a young child living with his condition who was otherwise without any other family support. These reasons were carefully set out in the TCR, the reconsideration requests, the psychosocial report, the BIA and the evidence from Mr Christofilis.

103. In **BAA** one of the reasons upon which the SSHD relied in refusing to reconsider her refusal of the TCR was that A1's medical condition was 'historic'

and that the evidence had "… not established a clear causal link between the applicant's conditions and his separation from the UK sponsor" (at [148]). The decision of 27 April 2020 in the present case is in very similar terms. At [129] of **BAA** Mr Justice Lane stated that "The focus of attention should have been on A1's best interests, taking account of his documented difficulties, whether they were "pre-existing" or not." The fact that the applicant's medical condition was historic was therefore irrelevant to the exercise of the respondent's discretion.

104. Another reason relied on by the SSHD in **BAA** in refusing to reconsider her refusal of the TCR was that there was no explanation as to how the sponsor would be in a better position than professionals in Greece to provide for A1's care needs (at [150]). In the instant case it was not clear to the respondent from the reports how the applicant's conditions were not being adequately treated or why the UK health system, and specifically ASM, would be in a better position to provide the care needs of the applicant. In **BAA** Mr Justice Lane held,

> "The question is not whether or how A2 would clinically address the psychiatric and cognitive conditions, from which A1 suffers. Rather, given those conditions, the question is whether it would be in A1's best interests to be living with a person, A2, whom he trusts and regards as a father figure, alongside the other cousins, who regard him as members of their family. Although the evidence in that regard has further developed since the date of the decision, even on the evidence available to the decision-maker in April 2020, the treatment of the reports is so deficient as to be legally flawed."

105. I find that similar reasoning applies in the instant case. I adopt the reasoning of Mr Justice Lane and find that the respondent's treatment of the evidence failed to consider whether it would be in the applicant's best interests, given his medical condition and his circumstances in the Greek hostel, to live with the only family relation who have consistently cared and provided for him and who he trusts and regards as a father figure.

**The exercise of discretion: 'best interests' and 'humanitarian grounds'**

106. I am further persuaded that the respondent acted unlawfully in the way she approached the applicant's 'best interests.' The best interests of a minor are of significant relevance within the framework of the Dublin III Regulation (see, for example, Recital 13, Article 6, and Article 8(4), which states that, in the absence of a family member, a sibling or a relative, the Member State responsible will be that where the minor lodged his protection application "provided that it is in the best interests of the minor"). It is incumbent on the respondent to apply the relevant provisions of the CFR, including Article 24 CFR which gives children the right to "such protection and care as is necessary for their wellbeing." It is also incumbent on the respondent, when considering whether to exercise her discretion under Article 17(2), to treat the applicant's best interests as a primary consideration and to undertake for herself a best interests assessment (e.g. **HA** at [30] & [32]). This is also apparent from the respondent's 'Dublin III Regulation' guidance, version 2.0, published on 18 April 2019, which states (page 8 of 46)

> "however, acting in a way that takes account of these interests is a shared responsibility at this point and you must carefully consider all of the information and evidence provided as to how a child will be affected by a decision and this must be addressed when assessing whether an applicant meets the criteria in the Dublin 3 Regulation. In addition, you must demonstrate that all relevant information and evidence provided about the best interests of a child, such as a sibling or other relative, in the UK have been considered."

107. And at page 39 and 40 of 46 the guidance states,

> "when considering a request to transfer an unaccompanied child to the UK under the Dublin III Regulation, you must adhere to the spirit of the section 55 duty and careful consideration must be given to their safeguarding and welfare needs in assessing their best interests.… It is important that you demonstrate and record how you have considered a child's best interests in line with the section 55 duty."

108. The 'best interests' assessment is therefore a relevant factor for the respondent to take into account when determining whether it is appropriate to exercise her discretion under Article 17(2), and this includes an assessment as to the existence and nature of any 'humanitarian grounds'.

109. Once it is established that the applicant is the 'family relation' of ASM, it is possible for the discretion under Article 17(2) to be exercised in the applicant's favour even if Article 8 ECHR/Article 7 CFR is not engaged. In **BAA** Mr Justice Lane stated, at [69],

> "It is also necessary to make the following point. Although Article 17(2) relates to the bringing together of "family relations", the fact that this may be "on humanitarian grounds based … on … cultural considerations" makes it clear that the ambit of Article 17(2) encompasses cases that may elicit a favourable response, even where Article 8 ECHR/Article 7 CFR is not engaged. Just as Ms Masood correctly points out that the Guidance covers applicants who may not be children (whether or not accompanied), the fact that it extends beyond the classic Article 8 scenarios must be borne in mind, when reading it."

110. Although such instances may be rare, the obligation to treat the best interests of a child as a primary consideration contained in Article 6 DIII, and the right of a child to such protection and 'care as is necessary for their well-being' contained in Article 24 CFR, read in conjunction with Recital 39 to Dublin III, requires the respondent to consider whether to exercise her discretion even if the relationship between the applicant and ASM does not engage Article 8 ECHR. This was not done. The respondent considered herself tethered to the prior establishment of Article 8 ECHR/Article 7 CFR family life between the applicant and ASM before her discretion could be exercised. The respondent was only willing to consider exercising her discretion in the applicant's favour if she was satisfied that family life, as understood by reference to Article 8 ECHR, existed. Her exercise of discretion was therefore pinned to the existence of Article 8 ECHR family life. There was no consideration of whether the discretion should be exercised based on 'family or cultural considerations' that did not engage Article 8 ECHR/Article 7 CFR, having regard to his best interests, his right to protection and care as is necessary for his well-being, and his particular medical

condition and circumstances. This constitutes an unlawful fettering of the respondent' discretion.

111. Nor am I satisfied that there has been a lawful 'best interests' assessment. The respondent does not purport herself to undertake a 'best interests' assessment (she only refers to Greece's BIA of 28 February 2020) and she does not identify what the applicant's best interests are. Whilst the best interests of a child are not a paramount consideration and cannot determine the manner in which the Article 17(2) discretion is exercised, the respondent does not explain why she concluded that the applicant's best interests were outweighed by other considerations in the exercise of her discretion.

112. I additionally find there has been no lawful consideration or application of Article 24 CFR in relation to the applicant's right to have the care that is necessary for his well-being in the respondent's assessment of the humanitarian grounds. The decision focuses on whether there is dependency between the applicant and ASM such as to constitute family life under Article 8 ECHR and Article 7 CFR. There is little if any assessment of the elements underpinning the asserted humanitarian grounds (including the applicant's history of neglect, social exclusion, stigmatisation and abuse, his young age, the absence of any other significant family member willing to offer support, the BIA and psychologist's assessment of his particular care needs, his difficulties in communicating in the Athens hostel and the lack of privacy, and the strong bonds that exist between the applicant and ASM, including his claim that ASM is the only family member who could love and care for him). Even if the respondent was entitled to find there was no Article 8 ECHR family life between the applicant and ASM, the humanitarian grounds were particularly compelling.

**Procedural unlawfulness and the duty to investigate**

113. The respondent's Dublin III Regulation guidance, extant at the dates of the decisions under challenge, indicates (at page 38 of 46) that relevant local authorities will be requested to undertake an assessment with an applicant's family in the UK which will inform a recommendation to EIU as to whether the request should be accepted or rejected.

> "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; however, these decisions will be informed by the assessment and recommendation provided by local authorities."

114. In the part of **BAA** dealing with the duty of investigation under Dublin III so far as it relates to the involvement of a relevant local authority, Mr Justice Lane stated, at [77] and [78]:

> 77. Although Article 17(2) lacks some of the formal requirements as to verification etc, which derive from the Implementing Regulations, it would be remarkable if the respondent's investigatory responsibilities were materially narrower in an Article 17(2) case which concerns an unaccompanied minor and his or her best interests, than they would be in respect of any other take-charge request.

> 78. But this is not to say that the precise nature of the investigatory obligation bears no relationship with the nature of the request to take charge made under Article 17(2), and the information supplied in connection with it. 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. Where, however, the request in respect of an unaccompanied minor raises issues that involve an asserted family life within Article 8/Article 7, then, in the normal course of events, the respondent's degree of engagement with the relevant local authority should be no less than in the case of any other unaccompanied minor where the take-charge request is made under Article 8 of Dublin III on the basis that the relation in the United Kingdom is a sibling or a "family member" or "relative", as defined. Unless the respondent is satisfied that the relevant local authority's assessment could not possibly cast any relevant light on whether the alleged family relationship exists, or upon the alleged humanitarian grounds, I consider that, in an Article 8/Article 7 case of this kind, the respondent should seek an assessment from the relevant local authority.

115. At [79] Mr Justice Lane considered statements from Ms Julia Farman, Head of the European Intake Unit (EIU), who indicated that a family assessment will only be requested from a local authority once the claimed family relationship had been established and once it had been decided to exercise discretion under Article 17(2). Mr Justice Lane did not consider the statements of the respondent's practice to be compatible with the requirements of Dublin III. At [80] he stated,

> "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."

116. Mr Justice Lane considered that the case before him was not one in which a lawful decision might be reached without calling for a local authority assessment. At [117] he stated,

> "… the materials from Greece that accompanied the initial take-charge request, although somewhat sparse, nevertheless raised the issue of there being an Article 8 family life between A1 and A2, as cousins, by reference to the emotional and material dependency of A1 upon A2. Given that there is no question but that A1 is an unaccompanied minor, there was no reason for the respondent to depart from her normal policy, as set out in the Guidance, of requesting an assessment. As I have already held, I consider that the practice of the respondent in Article 17(2) cases, as disclosed in Ms Farman's statements, is incompatible with the respondent's obligations under Dublin III, the ECHR and the CFR. Such an assessment could have shed light on the relevant issues in this case."

117. It is not in dispute that there was no request from the local authority for an assessment. Such an assessment may have yielded relevant information both in respect of establishing the family link, and in the assessment of the applicant's best interests and the manner in which the Article 17(2) discretion should be exercised. The local authority's assessment would have been particularly

relevant when determining the applicant's best interests as it is only possible to determine whether his best interests lie in coming to the UK if his circumstances in this country are known and considered. The local authority would have considered, *inter alia*, the suitability of the proposed accommodation and ASM's suitability as the applicant's carer, including his ability to provide for his physical and emotional needs. The respondent contends that an assessment from the local authority could not possibly have cast any relevant light capable of assisting in her, but this view is speculative in the absence of any such assessment and it cannot be rationally said that the absence of a local authority assessment could have made no material difference. I observe that there was no indication at the date of any of the relevant decisions that the respondent considered that a local authority assessment was unnecessary as all relevant information had already been obtained.

118. The extant Dublin III Regulation guidance stated, at page 40 of 46:

> A sponsorship undertaking form must be sent to [an applicant's] family member or relative in the UK and representative (where notification is given) as soon as a transfer request is received. five working days must be given to complete and return the form. If it is not returned within this time limit you must pursue by telephone, if a number is available, or by sending a further letter requesting a response.

119. ASM contends that he did not receive any undertaking form or any telephone call from the respondent. The Royal Mail, by way of the Track and Trace document, was unable to confirm whether the undertaking form was delivered to ASM's address, and Ms Goddard's statement, in which she confirmed that she did telephone ASM on or around 17 January 2020, was provided very late in the day and failed to explain, other than by reference to an "oversight" why there was no reference to the attempted telephone call in the GCID notes. There is however no reason for me to doubt the credibility of Ms Goddard's assertion and the GCID notes do suggest that an undertaking form was dispatched to ASM on 3 January 2020. I am not therefore persuaded that there was any unlawfulness in the respondent's attempts to obtain the undertaking form from ASM.

**Article 8 ECHR/Article 7 CFR**

120. I will consider the lawfulness of respondent's conclusion that there was no Article 8 ECHR or Article 7 CFR family life relationship between the applicant and ASM, in respect of both the challenge on traditional judicial review principles and in respect of the challenge based on a breach of fundamental rights, in the context of the factual framework based on the information and evidence that was available to the respondent when her decisions were made, including that summarised at paragraphs 2 to 11 above.

**Must the applicant meet a "very exceptional circumstances" test for the applicability of Article 8 ECHR?**

121. The respondent contends that her obligations under Article 8 ECHR to an unaccompanied minor are limited to the kind of "very exceptional

circumstances" described in **ZT (Syria)**, as considered in **FTH** and **R (AM)**. Although all three authorities concerned challenges to decisions taken outside the Dublin III system, the respondent argues that the Court of Appeal was clear that "where the Dublin III procedure (including the enforcement procedures available through the French judicial system) was available" to an unaccompanied asylum-seeking child, the SSHD's independent obligations under Article 8 ECHR would only arise if "for some reason, it could be shown that there was a deficiency in the [Dublin] system". Ms Masood submitted that the Tribunal in **BAA** did not deal with the respondent's submission that the "very exceptional circumstances" test applied given that the respondent was being asked to exercise discretion to do something she was not normally required to do.

122. The applicants in **ZT (Syria)**, concerned with aspects of the asylum determining procedures in France, entirely bypassed the procedures and requirements of the Dublin III Regulation by directly requesting asylum in the UK and challenging the SSHD's refusal to admit them and consider their requests. It was in this specific context, where the Court of Appeal was considering the strength of a human rights case needed to override the processes and procedures of the Dublin system, that it concluded that only "very exceptional circumstances" would entitle the applicants to rely on Article 8 ECHR considerations without having to utilise the Dublin III system (see [65] and [95]).

123. **R (AM)** was concerned with the 'expedited process' which was established by the SSHD in conjunction with the French authorities in October 2016 in response to the impending demolition of the makeshift encampment in Calais and through which the SSHD sought to assess the eligibility of unaccompanied asylum-seeking children to be transferred to the UK. The Upper Tribunal found, *inter alia*, that the expedited process breached the procedural protections afforded by Article 8 ECHR. The Court of Appeal accepted the SSHD's submission that the expedited process operated outside and without prejudice to Dublin III [85]. The SSHD submitted [66], in reliance on **ZT(Syria)**, that Article 8 ECHR did not require a different approach to the admission of the applicants to the UK outside the framework of the expedited process and the Dublin III Regulation. Singh LJ explained, at [88] and [89]:

> 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 Article 8 and its procedural requirements as essentially interchangeable with the procedural requirements of Dublin III and/or the common law. However, as this Court made clear in *ZT (Syria)*, Article 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.

124. **R (AM)** was therefore also concerned with the applicability of Article 8 ECHR outside of the Dublin III system, and the reference to "very exceptional circumstances" must be considered in this specific context.

125. **R (FTH)** was also concerned with the 'expedited process'. The applicant in that case chose not to make an asylum claim in France and therefore the Dublin III procedures were not triggered. The SSHD appealed against the Upper Tribunal's declaration that Article 8 ECHR was breached on the basis that this was inconsistent with **R (AM)**. The SSHD argued that the Dublin III system sufficiently respected Article 8 ECHR rights and effectively ensured that Article 8 ECHR rights were properly respected, save in very exceptional circumstances (see the summary of the SSHD's submissions at [41] to [47]). Allowing the appeal, the Court of Appeal held, at [55]:

> 55. It seems clear to us, however, from [88] of Singh LJ's judgment read in the context of the arguments he earlier set out, that, even though the expedited process operated outside Dublin III, AM held that the Secretary of State's obligations under article 8 to a UASC in France were limited to the very exceptional circumstances as described in ZT (Syria), even where that child had been the subject of the expedited process. That is because, where the Dublin III procedure (including the enforcement procedures available through the French judicial system) was available to such a UASC, that would usually have provided sufficient protection for his or her article 8 rights by (amongst other things) providing an effective remedy. The Secretary of State's independent obligations under article 8 would only have arisen if, for some reason, it could be shown that there was a deficiency in the system which meant that the UASC was denied such a remedy by that route.

126. In my judgment this paragraph indicates that the Court of Appeal was principally concerned with Article 8 ECHR claims brought outside of the Dublin III system. None of the authorities relied on by the respondent in support of her submission that reliance on Article 8 ECHR is only triggered if the applicant can demonstrate the existence of "very exceptional circumstances" are concerned with the assessment of Article 8 ECHR relationships within the framework of the Dublin III Regulation or breaches of Article 8 ECHR rights that are identified through the application of the Dublin III process and procedures. The assessment of the existence of a family or private life relationship and the impact of separation on that relationship are factors that ordinarily fall to be considered by Member States applying the Dublin III procedures, including the exercise of discretion in Article 17(2), by reference to and application of recitals 13, 14 and 39. In this way the Dublin III procedures will sufficiently respect family life rights. I find there is no support in the authorities indicating that the test for determining a breach of Article 8 ECHR undertaken within the Dublin III procedures requires the existence of "very exceptional circumstances."

**Is there an Article 8/Article 7 CFR family life relationship between the applicant and ASM?**

127. As the present challenges contend that the respondent's decisions are contrary to section 6 of the Human Rights Act 1998, and having regard to the authorities of **R (Nasseri) v SSHD** [2009] UKHL 23, **Bank Mellat v HM Treasury**

**(no 2)** [2013] UKSC 38 and 39, **R (Lord Carlile of Berriew) v SSHD** [2014] UKSC 60, **Caroopen & Myrie** [2016] EWCA Civ 1307, and the Dublin III related decisions including **MS/UT** and, more recently, **BAA** (at [61]), this Tribunal must determine for itself whether the respondent's decision (principally, the decision of 27 April 2020) breaches Article 8 ECHR rights. In reaching my decision on whether Article 8 ECHR is engaged, with respect to both family life (and private life) relationships, and on the issue of proportionality, I give weight to the view of the respondent, who is the primary decision-maker and the person with the authority to make a decision under Article 17(2).

128. When assessing whether a protected family life relationship exists between the applicant and ASM I note the observations of the House of Lords in **Huang** [2007] UKHL 11, at [18]

> "Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant."

129. In her decision the respondent relies on the authority of **Kugathas** [2003] EWCA Civ 31. Although the case itself concerned the relationship between adult children and their parents, the principles it established equally apply to consideration of other relationships concerning the existence of family life. At [14], Sedley LJ cited with approval the report of the Commission in **S v United Kingdom** (1984) 40 DR 196 at [198]:

> "Generally, the protection of family life under Article 8 involves cohabiting dependents, such as parents and their dependent, minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults … would not necessarily acquire the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal emotional ties."

130. Sedley LJ considered the issue of dependency at [17]:

> "But if dependency is read down as meaning "support", in the personal sense, and if one adds, echoing the Strasbourg jurisprudence, "real" or "committed" or "effective" to the word "support", then it represents in my view the irreducible minimum of what family life implies."

131. When considering the material factors that comprise the "irreducible minimum" of what constitutes family life Arden LJ stated, at [24]:

> "There is no presumption that a person has a family life, even with the members of a person's immediate family. The court has to scrutinise the relevant factors. Such factors include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant,

> where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life."

132. And at [25] Arden LJ stated:

> "Because there is no presumption of family life, in my judgment a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties … Such ties might exist if the appellant were dependent on his family or vice versa."

133. In **Uddin v SSHD** [2020] EWCA Civ 338, having considered **Kugathas**, the Senior President of Tribunals stated, at [31]:

> "Dependency, in the *Kugathas* sense, is accordingly not a term of art. It is a question of fact, a matter of substance not form. The irreducible minimum of what family life implies remains that which Sedley LJ described as being whether support is real or effective or committed."

134. Careful consideration must be given to the particular circumstances of each case, and the situations in which an Article 8 family life relationship exists may be highly fact-sensitive (**Uddin**, at [32]).

135. In her written and oral submissions, the respondent places particular reliance on **Paradiso and Campanelli**. The Grand Chamber of the European Court of Human Rights considered whether the forced removal of an infant from his surrogate parents constituted an interference with the right to respect for family or private life under Article 8 ECHR. The applicant parents, Italian nationals, entered into a surrogacy agreement with a Russian clinic as such an agreement was not legally available in Italy. Mr Campanelli's sperm was supposed to have been used for the in vitro fertilisation but, after tests were carried out in Italy, it was discovered that he had no genetic connection to the child. The Italian authorities refused to register the child's Russian issued birth certificate and sought an order to put the child, who had lived with the applicants for 8 months, up for adoption. The child was placed in a children's home for approximately 15 months and then placed with a family with a view to adoption.

136. In a majority decision the Grand Chamber concluded there was no family life between the applicants and the child, but that there was a private life relationship. At [140] the Grand Chamber stated:

> "The existence or non-existence of "family life" is essentially a question of fact depending upon the existence of close personal ties. The notion of "family" in art.8 concerns marriage-based relationships, and also other de facto "family ties" where the parties are living together outside marriage or where other factors demonstrated that the relationship had sufficient constancy."

137. At [149] the Grand Chamber held:

> "The Court must ascertain whether, in the circumstances of the case, the relationship between the applicants and the child came within the sphere of

family life within the meaning of art.8. The Court accepts, in certain situations, the existence of de facto family life between an adult or adults and a child in the absence of biological ties or a recognised legal tie, provided that there are genuine personal ties."

138. Having then considered other cases in which 'de facto' family life had been established in the context of fostering relationships and adoption, the Grand Chamber stated, at [151] to [153]:

> "151 It is therefore necessary, in the instant case, to consider the quality of the ties, the role played by the applicants vis-à-vis the child and the duration of the cohabitation between them and the child. The Court considers that the applicants had developed a parental project and had assumed their role as parents vis-à-vis the child. They had forged close emotional bonds with him in the first stages of his life, the strength of which was, moreover, clear from the report drawn up by the team of social workers following a request by the Minors Court.
>
> 152 With regard to the duration of the cohabitation between the applicants and the child in this case, the Court notes that the applicants and the child lived together for six months in Italy, preceded by a period of about two months' shared life between the first applicant and the child in Russia.
>
> 153 It would admittedly be inappropriate to define a minimal duration of shared life which would be necessary to constitute de facto family life, given that the assessment of any situation must take account of the "quality" of the bond and the circumstances of each case. However, the duration of the relationship with the child is a key factor in the Court's recognition of the existence of a family life. In the above-cited case of Wagner and JMWL, the cohabitation had lasted for more than 10 years. Equally, in the Nazarenko case, in which a married man had assumed the parental role before discovering that he was not the child's biological father, the period spent together had lasted more than five years."

139. And at [157] the Grand Chamber concluded:

> "Having regard to the above factors, namely the absence of any biological tie between the child and the intended parents, the short duration of the relationship with the child and the uncertainty of the ties from a legal perspective, and in spite of the existence of a parental project and the quality of the emotional bonds, the Court considers that the conditions enabling it to conclude that there existed a de facto family life have not been met."

140. In determining whether there was family life between the child and the applicants the Grand Chamber's focused on the existence of close (and genuine) personal ties that had sufficient constancy or duration. The duration or constancy of a relationship is not however the same as cohabitation, and the Grand Chamber does not conflate the constancy or duration of a relationship with whether there has been cohabitation as part of the relationship. I additionally note that the child in **Paradiso** was only 8 months old when separated from the applicants and that the nature of the emotional bonds in the first stages of a child's life are different to those established when the child is older (such as a 14

year old) when the quality of any attachment or dependency is likely to be more sophisticated and more focused.

141. I bring to bear on the evidence available to the respondent when her decisions were made the principles and guidance established by **Huang**, **Kugathas**, and **Paradiso**.

142. There is no dispute as to the applicant's age. He was at all material times, and remains, 14 years old. I have determined, for the reasons given above at paragraph 100 that the applicant and ASM are second cousins. There is therefore a relationship of consanguinity between them, albeit one located, in terms of blood relationships, at the outer edges for the purposes of establishing an Article 8 ECHR protected family life relationship. The evidence before the respondent indicated that the applicant and ASM had been regularly communicating with each other since 2008, although they first met in 2014 (BIA; ASM's statement 23 April 2020). The applicant and ASM spent approximately 2 months together in 2018 in Somalia and India, and then approximately 2 months together in Somalia and Turkey in 2019 (psychosocial report dated 23 December 2019; ASM statement dated 7 February 2020; ASM statement 23 April 2020). I have taken into account the more remote relationship of consanguinity between the applicant and ASM, and the limited time that they have lived together.

143. The respondent was aware from the TCR issued in December 2019 of the applicant's claim that he had no other family relations who were able to care for him. He had been abandoned by his mother in infancy and his father, with whom he never had any parental relationship, died in May 2019 (BIA, dated 28 February 2020). The evidence before the respondent indicated that ASM wished to take on responsibility for the applicant in the capacity of a parent (ASM statement dated 7 February 2020). There was no indication in the respondent's decisions that she had taken into account the absence of any other close family relations, including parents and siblings. The absence of any other close family member is a relevant factor when assessing the existence of family life between the applicant and ASM (**Kugathas**).

144. In addition to the financial support provided by ASM to the applicant since 2008, and his financing of the applicant's medical treatment in India and Turkey and the purchase of a mobile phone for the applicant in Greece, the evidence before the respondent indicated that the applicant did not believe there was anyone else who could or wished to take care of him other than ASM (psychosocial report dated 23 December 2019). In the BIA the applicant described ASM as "being in the place of the parents I have never had" and said that ASM "is the only person who is there for me and who cares about me and helps me." In the same document ASM described offering the applicant "all of the emotional support he needed" and stated that he was the only person with whom the applicant shared his thoughts and problems. In his statement of 23 April 2020 ASM described how the applicant told him no one had ever said they loved him prior to ASM. ASM said that he loved the applicant and wanted to change his life and that "if [the applicant] came to the UK I will look after him like my child." ASM said, with respect to the applicant, "I listen to him, give advice and

give him love and attention, which is what a child needs, particularly one who has had such a difficult life." ASM continued to provide financial support for the applicant and discussed the applicant's behaviour and progress with the professionals at the Athens hostel.

145. The quality of emotional attachment between the applicant and ASM must also be considered in the context of the applicant's circumstances in the Athens hostel. He was said to be shy and introverted, matters exacerbated by the absence of a regular Somali interpreter (which meant that he was not followed up by the psychosocial team as frequently as necessary and which caused him difficulty in communicating with the other children and staff in the hostel) and the consequences of his particular medical condition (the applicant had no privacy in respect of his personal hygiene needs and was concerned that if the other children in the shelter learnt of his condition he would be further ostracised (psychosocial report dated 23 December 2019; report by scientific supervisor dated 11 February 2020; BIA)). In his statement dated 22 April 2020 Othon Christofilis said that the applicant needed the type of emotional support that could only be provided by a caregiver, that the applicant was lonely and very closed, and that he had never learned social skills relating to interaction with people his own age. Nor did the applicant have a private space to change his colostomy bag. Othon Christofilis believed that ASM was the only person with whom the applicant could talk when he was sad, happy or angry, the only person who properly supported him directly, and the only person who could play the role of parent to him. It was the view of the Greek professionals that the applicant was very close to ASM, that they spent a lot of time in contact with each other, and that the applicant needed a loving and caring environment which could only be provided by ASM (report by scientific supervisor dated 11 February 2020; BIA).

146. The relationship between the applicant and ASM should also be considered in the context of his upbringing which involved neglect, bullying, social exclusion, rejection and ostracisation from other family members and those with whom he resided and from the communities in which he lived (as detailed in the psychosocial report dated 23 December 2019; ASM's statement dated 7 February 2020; the BIA dated 28 February 2020; and ASM's statement of 23 April 2020). This was materially relevant when assessing the nature of the bonds that had been established between the applicant and ASM as ASM was the first person who provided the applicant with love and care and was the only person to whom the applicant referred to as 'family' (the BIA dated 28 February 2020). There is no adequate indication from the decision that the evidence relating to the applicant's upbringing was factored in when the respondent concluded that there was no dependency. Contrary to the conclusion of the respondent, and in light of the evidence available to her which I have considered above, I find there was considerable evidence of emotional dependency between the applicant and ASM.

147. Although the blood relationship between the applicant and ASM is distant, and although they have only cohabited for short periods of time, I have found that their relationship had sufficient constancy, that there are close and

genuine personal ties and that ASM provides support to the applicant that is "real" or "committed" or "effective".

148. I find, for the reasons given above, that the respondent acted unlawfully in her assessment of whether there was Article 8 ECHR family life between the applicant and ASM on traditional judicial review principles. I find, also for the reasons given above, that there is family life between the applicant and ASM sufficient to trigger the protection of Article 8 ECHR.

**Whether the respondent's decisions disproportionately interfere with the Article 8 ECHR family life relationship**

149. I understood Ms Masood's position to be that, if I found that Article 8 family life existed between the applicant and ASM, there was no suggestion that the challenged decisions did not interfere with that relationship. It then falls to determine whether the decisions were disproportionate.

150. There is no general obligation on Member States to allow non-nationals into their country to reunite with their family (**Sen v Netherlands** (2001) 36 EHRR 7). A state may however owe a positive Article 8 obligation to admit individuals to its territory for family reunification, although the extent of that obligation will vary according to the particular circumstances of the persons involved and the general interest (**Secretary of State for the Home Department v ZAT & Ors** [2016] EWCA Civ 810).

151. At [175] of his decision in **BAA** Mr Justice Lane stated,

> "As I have earlier explained, although the existence of family life is conceptually separate from whether there has been a disproportionate interference with the right to respect for it, on the facts of the present case the two are closely intertwined. The extreme emotional dependency that A1 has on A2 is not only a factor that helps establish the existence of family life between them. It also goes to the question of whether the respondent's decisions, refusing to exercise discretion under Article 17(2), represent a disproportionate interference with that family life."

152. At [66(2)] of **BAA** Mr Justice Lane held that, as is the case with any other discretionary power of the SSHD 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.

153. I find, on the facts of the instant case, having particular regard to the applicant's young age, his serious medical condition, the circumstances in which he is living in the Greek hostel, the absence of any other close family members and his strong emotional dependency on ASM, that the factual matrix supporting the existence of a family life relationship also goes to the question of whether the respondent's refusal to exercise her discretion under Article 17(2) constitutes a disproportionate interference under Article 8 ECHR. I note that the principal decision under challenge (27 April 2020) failed to address the issue of proportionality as it rejected the existence of an Article 8 ECHR family life

relationship. I take into account the factors identified in section 117B of the Nationality, Immigration and Asylum Act 2002 as being relevant to the public interest considerations, including the public interest in the maintenance of effective immigration controls. I note that the applicant would not be transferred to the UK for the purposes of settlement but to enable his asylum claim to be determined. I find however that the applicant's need for affection and support from the only family relation willing to provide it during the processing of his asylum claim, which is a challenging time, in light of his age and his history of neglect and abuse and his medical condition, and his dependency on ASM, is sufficient, even having regard to the width of the discretion, to render the refusal to exercise discretion under Article 17(2) a disproportionate interference with the right to respect for family life under Article 8 ECHR.

**Article 8 ECHR Private life**

154. If I am wrong in my assessment that there exists an Article 8 ECHR family life relationship between the applicant and ASM, I am satisfied, for the reasons enumerated at paragraphs 142 to 146 above, that their relationship is protected by the private life aspect of Article 8 ECHR.

155. The respondent relies on **Abbas** in support of her submission that there is no positive obligation on a state to admit someone into its territory for the purposes of establishing or continuing private life relationships. Mr Abbas was an adult who lived with his own family Pakistan and who was refused entry clearance to visit his uncle and grandmother in the UK. His human rights appeal to the First-tier Tribunal was allowed on the basis that private life, as understood by Article 8 ECHR, included the maintenance of relationships outside those which count as family life, that the development of private life included being able to visit the UK for that purpose (so long as the immigration rules were met), that there was a positive obligation under Article 8 ECHR to allow a foreign national to enter the UK to develop his private life if he satisfied the immigration rules, and that, as the First-tier Tribunal found that Mr Abbas did satisfy the immigration rules, the refusal of entry clearance was disproportionate. The point of principle considered by the Court of Appeal in Abbas was set out at [2].

> "To what extent does the state have a positive obligation on grounds of private life (where no relevant family life exists) to grant entry clearance for an adult to visit an elderly relative located in the United Kingdom?"

156. Lord Justice Burnett answered the above question at [3]:

> "In my judgment the answer to that question is that no such positive obligation exists. There is no sign of it having been recognised in the jurisprudence of the Strasbourg Court. It is inconsistent with the jurisprudence on the positive obligation under article 8 as regards family life which that court has recognised and would sit uneasily with its approach to the extra-territorial reach of the ECHR."

157. The Court accepted that the SSHD had been unable to identify any case or settled line of authority in which the Strasbourg Court held that the private life aspect of Article 8 ECHR has been engaged in respect of a person outside a

Contracting State seeking to enter to develop that private life [18]. The Court commented on the broad reach of private life, as opposed to family life, and the prospect of a large number of individuals relying on the private life aspect to support their entry clearance applications, and that it would be wrong, as a matter of principle, to accept that the private life aspect of Article 8 ECHR could require a state to allow an alien into its territory [supra]. At [19] and [20] the Court held:

> 19. It would be wrong as a matter of principle because there is no equivalence for these purposes between private life and family life. The passage from *Khan* set out above recognises the unitary nature of a family for article 8 purposes with the consequence that the interference with the family life of one is an interference with the rights of all those within the ambit of the family whose rights are engaged. That is a feature of family life recognised, for example, in *Beoku-Betts v Secretary of State for the Home Department* [2009] AC 115 which held that the rights of all family members, and not only the person immediately affected by a removal decision, must be considered in the article 8 balance. As Lord Brown of Eaton-under-Heywood observed:
>
> > "Together these members enjoy a single family life and whether or not the removal would interfere disproportionately with it has to be looked at by reference to the family unit as a whole and the impact of the removal upon each member. If overall the removal would be disproportionate, all affected family members are to be regarded as victims." (paragraph [20]).
>
> Lady Hale put it this way:
>
> > " … the central point about family life … is that the whole is greater than the sum of its individual parts. The right to respect for family life of one necessarily encompasses the right to respect for family life of others, normally a spouse or minor children, with whom the family life in enjoyed." (paragraph 4)
>
> 20. No such reasoning could apply to the multifarious aspects of an individual's private life.

158. The Court found that the Tribunal had "out-paced the Strasbourg Court by expanding the reach of article 8 in a way which is entirely novel" which it was precluded from doing by the principles in **Ullah v Special Adjudicator** [2004] 2 AC 323.

159. As I am bound by the decision in **Abbas**, it is important to consider the point of principle that was being considered in its full context. It is clear from the question considered by the Court, and from the factual matrix, that the situation in **Abbas** was materially different from the present. **Abbas** involved an application for entry clearance by an adult for a short visit, not the exercise of (albeit a wide) discretion that requires consideration of humanitarian grounds in respect of a vulnerable child who is emotionally dependent on his family relation, set in the context of legal obligations to respect the best interests of unaccompanied minors.

160. The Court's decision was based on the "multifarious aspects of an individual's private life" and the absence of "equivalence" between private life and family life. In the instant case the applicant does not rely on multifarious aspects of his private life but only on his relationship with ASM, and the aspects of his private life relationship with ASM reflect, to a significant degree, that between close family members. The quality of the emotional relationship between the applicant and ASM, the support ASM provides to the applicant, and the manner in which the applicant regards ASM, share the elements of a close family relationship and is 'equivalent' to that between close family members.

161. Support for this approach can be found in Paradiso, at [161] and [162]:

> 161 The Court considers that there is no valid reason to understand the concept of "private life" as excluding the emotional bonds created and developed between an adult and a child in situations other than the classic situations of kinship. This type of bond also pertains to individuals' life and social identity. In certain cases involving a relationship between adults and a child where there are no biological or legal ties the facts may nonetheless fall within the scope of "private life".
>
> 162 In particular, in the above-cited case of X v Switzerland, the Commission examined the situation of an individual who had been entrusted by friends with the care of their child, a task which she fulfilled. When, several years later, the authorities decided that the child could no longer remain with the individual in question, since the parents had asked to resume caring for him, the applicant lodged an appeal in order to be able to keep the child, relying on art.8 of the Convention. The Commission held that the applicant's private life was involved, in that she was deeply attached to the child.

162. The applicability of the private life aspect of Article 8 ECHR was considered in the context of the Dublin III Regulation in **HN & MN**. The applicants, who were brothers, met their maternal uncle (a recognised refugee settled in the UK) on two occasions when he visited Afghanistan and they maintained regular contact with him whilst in Turkey for 3 to 3½ years and following their arrival in Greece. Greece made a TCR pursuant to Article 8(2) DIII. Although the Presidential Tribunal did not accept there was family life between the applicants and their uncle, it did find that the relationships that developed formed part of their private lives protected by Article 8 ECHR based on the on-going communication between the applicants and their uncle and the support provided by him ([122] to [125]). The Tribunal found that a delay in transferring the applicants to the UK pursuant to Article 8(2) DIII interfered with the applicants' private life rights [128]. Paragraph 135 of the Tribunal's decision contains a postscript.

> "In responding to the embargoed version of this judgment, the respondent sought to raise the case of Abbas v SSHD [2017] EWCA Civ [sic], in connection with the Tribunal's findings on Article 8 of the ECHR. The respondent wished to rely upon this case as authority for the proposition that entry clearance cases that turn on private life do not engage Article 8. Abbas, however, did not concern a situation where the United Kingdom's international obligations required the government to take charge of individuals outside the United Kingdom, and

where the failure to comply with those obligations threatened their moral and physical integrity."

163. I accept that, unlike **HN & MN**, which concerned a TCR issued pursuant to Article 8 DIII, the respondent is not subject to an international obligation to accept the TCR given the discretionary nature of Article 17(2). Given however the equivalence of the particular elements that constitute the private life relationship between the applicant and ASM with that of a family life relationship, I find that the present case is distinguishable from **Abbas** and that the respondent's refusal to exercise her discretion in the applicant's favour does constitute a disproportionate interference with the private life relationship between the applicant and ASM. Moreover, an unlawful exercise of that discretion is also very likely to result in a breach of the applicant's moral and physical integrity, having holistic regard to the evidence considered above, including, but not limited to, the evidence relating to the applicant's emotional dependency on ASM.

164. Even if I am wrong in my above assessment of the private life relationship, and the particular private life relationship established by the applicant and ASM cannot give rise to a positive obligation to admit the applicant to the UK, the existence of a strong private life involving elements of dependency between an unaccompanied vulnerable child and his family relation in the UK is a material factor that should have been considered in the exercise of the respondent's discretion, but was not. It was incumbent on the respondent, when assessing the relationship between the applicant and ASM, to consider whether a private life relationship has been established, even in the absence of a positive obligation to allow the applicant to enter the UK on the basis of his private life relationship, because this informed the nature of the humanitarian grounds and therefore had a bearing on whether the discretion should be exercised. If there is no obligation on the respondent to admit the applicant to the UK as a consequence of his Article 8 ECHR private life relationship with ASM, the fact that an Article 8 relationship existed was therefore a relevant factor that should have been considered in the exercise of the discretion.

**Conclusion**

165. Following the above assessment, and in light of my findings, I will quash the challenged decisions in a separate order.

166. I additionally consider it appropriate to issue a declaration, to be contained in a separate order, that each of the respondent's decisions was unlawful as it breached the applicant's Article 8 ECHR/Article 7 CFR rights.

167. I decline to make a declaration that the UK is the responsible Member State for the applicant's asylum claim under Dublin III, or a mandatory order that the respondent exercise her discretion in the applicant's favour. I note that the local authority has not yet had the opportunity of confirming ASM's ability to take charge of and care for the applicant, and it would not be appropriate to deprive the respondent of the ability the determine whether there are now any

matters that may affect the exercise of discretion in the applicant's favour. The respondent will be aware of the need to exercise all due expedition in this matter.

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

**Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the applicant in this judicial review is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the applicant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

*D.Blum*

Signed: _____

**Upper Tribunal Judge Blum**

Dated: **15 December 2020**

---

**Applicant's solicitors:**
**Respondent's solicitors:**
**Home Office Ref:**
**Decision(s) sent to above parties on: 15/12/20**

---

**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.



# Upper Tribunal
# Immigration and Asylum Chamber

# Judicial Review Decision Notice

**The Queen on the application of MA**
**(a child by his litigation friend ASM)**

**Applicant**

**v**

**Secretary of State for the Home Department**

**Respondent**

**Upper Tribunal Judge Blum**

## ORDER

This order follows a remote hearing in respect of which there has been no objection by the parties. The form of remote hearing was by video (V), the platform was Skype for Business.

UPON considering all documents lodged and having heard the parties' respective representatives, Ms M Knorr of Counsel, instructed by Wilson Solicitors LLP, on behalf of the applicant and Ms H Masood, of Counsel, instructed by the Government Legal Department, on behalf of the respondent, at a remote hearing at Field House, London on 1 and 2 October 2020, and at the handing down of this decision on 15 December 2020;

AND UPON the respondent confirming that she intends to ask the relevant local authority to complete an assessment;

**IT IS ORDERED THAT:**

1. **The application for judicial review is granted for the reasons set out in the Judgment dated 15 December 2020.**

2. **The respondent's decisions dated 27 January 2020, 13 March 2020, 27 April 2020 and 2 June 2020 refusing the Take Charge Request (TCR) made by the Greek authorities on 24 December 2019 are quashed.**

**3. There be a declaration that the respondent's decisions refusing to accept the TCR breached the applicant's rights under EU Regulation 604/2013 (Dublin III), Article 7 and 24 of the Charter of Fundamental Rights of the European Union and Article 8 ECHR.**

**4. The respondent shall:**

**(i) take a new lawful decision on the TCR in accordance with the Judgment and paragraph 3 of this Order.**

**(ii) make a request to the local authority within 2 working days of this Order to conduct an urgent assessment, and must communicate her decision on the TCR to the Greek Authorities and the applicant's solicitor within two working days of receipt of the local authority assessment.**

**(iii) in the event she accepts the TCR, make a request to the Greek authorities to expedite the applicant's transfer to the UK insofar as they are able to do so, and shall provide a copy of that request to the applicant's solicitor.**

**5. The parties have 8 weeks to try to reach an agreement on damages. If damages are agreed the applicant is to notify the Tribunal within 7 days of agreement. If damages are not agreed:**

**(i) The applicant is to file and serve written submissions on damages within 10 weeks;**

**(ii) The respondent is to file and serve written submissions on damages within 14 days of receipt of the applicant's submissions;**

**(iii) The applicant is to file and serve any Reply to the respondent's submissions, if so advised, within 7 days of receipt of the respondent's submissions.**

**6. The respondent will pay the applicant's reasonable costs, to be assessed if not agreed.**

**7. The applicant's legally aided costs to be subject to a detailed assessment.**

**8. Permission to appeal is refused.**

**(i) Ground 1 is academic as the Tribunal did not consider any of the postdecision evidence. The issue of the admissibility of post-decision evidence is most appropriately left to a case where the admission of the evidence had a material impact.**

**(ii) There is no merit in Ground 2 for the reasons set out in the substantive judgment at paragraphs 121 to 126. I note that the Court of Appeal in MS v SSHD [2019] EWCA Civ 1340 endorsed the distinction, in the context of the application Article 8 ECHR, between cases in which**

**applicants seek to bypass the Dublin III procedures and those in which the procedures are utilised.**

**(iii) Ground 3 is no more than a disagreement with the Judge's Article 8 ECHR findings, which did accord appropriate weight to the issue of cohabitation (paragraphs 142 & 147), and does not disclose a legal error.**

**(iv) Ground 4 is academic as Article 8 ECHR private life was considered in the alternative.**

**(v) Liberty to apply.**

**9. Any renewed application for permission to appeal to the Court of Appeal is to be made within 28 days.**

Signed: D.Blum

**Upper Tribunal Judge Blum**

Dated: **15 December 2020**

**The date on which this order was sent is given below**

---

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): 15/12/20

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

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

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

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