IN THE UPPER TRIBUNAL

JR/4719/2019

Field House,
Breams Buildings
London
EC4A 1WR

Heard at Field House on 6 December 2019
Further submissions 11 and 18 December 2019

BEFORE

THE PRESIDENT, MR. JUSTICE LANE
and
UPPER TRIBUNAL JUDGE MANDALIA

Between

THE QUEEN ON THE APPLICATION OF
HN (1)
MN (2)
(by their litigation friend SH)

Applicants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Ms Catherine Meredith, instructed by Simpson Millar Solicitors appeared behalf of the Applicant

Ms Hafsah Masood, instructed by the Government Legal Department appeared on behalf of the Respondent.

JUDGMENT

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1. The applicants challenge the respondent's refusal to accept responsibility for their asylum claim and the on-going delay in making arrangements for their transfer from Greece to the UK, so that they can be reunited with their maternal uncle (SH).

2. The claim concerns the application of Regulation No 604/2013 of the European Parliament and of the Council of 26th June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person ("Dublin III"), and The Commission Implementing Regulation (EC) No 1560/2003, as amended ("IR")

3. Although Ms Meredith formulates the issues before the Tribunal differently, in our judgment, the issues to be decided by the Tribunal distilled to their essence, are:

    i) Whether the respondent's refusal to 'take charge' of the applicants is in breach of the Dublin III Regulation and/or in breach of Article 8 ECHR; and if so;

    ii) Whether there is an entitlement to damages for a breach of European Law and/or Article 8 ECHR

4. This decision is concerned only with the first issue we have set out. The matter will be listed for further hearing so that we can address the second issue, in light of the decision that we have reached. For the reasons we have set out in this decision, we find the respondent's failure to accept transfer of the applicants to the UK as of 13th September 2019 was in breach of Dublin III, Article 8 ECHR and Article 7 of the EU Charter of Fundamental Rights.

5. It is convenient at this point to set out the relevant legal and policy framework that forms the backdrop to the respondent's decisions to refuse the take charge request and to maintain that decision.

The Legislative and Policy Framework

The Dublin III Regulation and the Implementing Regulation

6. Since the European Council of Tampere in 1999 the European Union has sought to develop a common European asylum system. At present, the legal framework establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one Member State, by a third country national, is set out in the Dublin III Regulation.

7. The recitals in the preamble to the Dublin III Regulation include:

> "(4) The Tampere conclusions also stated that the CEAS should include, in the short-term, a clear and workable method for determining the Member State responsible for the examination of an asylum application.
>
> (5) Such a method should be based on objective, fair criteria both for the Member States and for the persons concerned. It should, in particular, make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for granting international protection and not to compromise the objective of the rapid processing of applications for international protection.
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> …
>
> (13) In accordance with the 1989 United Nations Convention on the Rights of the Child and with the Charter of Fundamental Rights of the European Union, the best interests of the child should be a primary consideration of Member States when applying this Regulation. In assessing the best interests of the child, Member States should, in particular, take due account of the minor's well-being and social development, safety and security considerations and the views of the minor in accordance with his or her age and maturity, including his or her background. In addition, specific procedural guarantees for unaccompanied minors should be laid down on account of their particular vulnerability.
>
> (14) In accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with the Charter of Fundamental Rights of the European Union, respect for family life should be a primary consideration of Member States when applying this Regulation.
>
> …

> (16) In order to ensure full respect for the principle of family unity and for the best interests of the child, the existence of a relationship of dependency between an applicant and his or her child, sibling or parent on account of the applicant's pregnancy or maternity, state of health or old age, should become a binding responsibility criterion. When the applicant is an unaccompanied minor, the presence of a family member or relative on the territory of another Member State who can take care of him or her should also become a binding responsibility criterion.
>
> (17) Any Member State should be able to derogate from the responsibility criteria, in particular on humanitarian and compassionate grounds, in order to bring together family members, relatives or any other family relations and examine an application for international protection lodged with it or with another Member State, even if such examination is not its responsibility under the binding criteria laid down in this Regulation.
>
> …
>
> (19) In order to guarantee effective protection of the rights of the persons concerned, legal safeguards and the right to an effective remedy in respect of decisions regarding transfers to the Member State responsible should be established, in accordance, in particular, with Article 47 of the Charter of Fundamental Rights of the European Union. In order to ensure that international law is respected, an effective remedy against such decisions should cover both the examination of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred."

8. Insofar as children are concerned, Article 6 emphasises that the best interests of the child will be a primary consideration with respect to all of the procedures provided for in the Regulation (Article 6(1)), and, in assessing such best interests, Member States shall closely cooperate and take into account family reunion possibilities (Article 6(3)). Article 6(4) provides:

> "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 interest of the child".

9. The determination of the Member State responsible is undertaken in the order in which they are set out in Chapter III (Article 7(1)), and a Member State is obliged to examine any asylum application for which, by the application of the hierarchy, it is responsible (Article 3(1)).

10. Article 8 is at the top of the hierarchy of criteria and provides;

"1. Where the applicant is an unaccompanied minor, the Member State responsible shall be that where a family member or a sibling of the unaccompanied minor is legally present, provided that it is in the best interests of the minor….

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

…

5. The Commission shall be empowered to adopt delegated acts in accordance with Article 45 concerning the identification of family members, siblings or relatives of the unaccompanied minor; the criteria for establishing the existence of proven family links; the criteria for assessing the capacity of a relative to take care of the unaccompanied minor, including where family members, siblings or relatives of the unaccompanied minor stay in more than one Member State. In exercising its powers to adopt delegated acts, the Commission shall not exceed the scope of the best interests of the child as provided for under Article 6(3).

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

11. Article 17 of the Regulation also includes provision for discretionary derogation as follows:

"Discretionary clauses

By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation."

12. The obligations of the Member State responsible are set out in Chapter V. By operation of Article 18(1)(a), the Member State responsible is obliged to take charge, under the conditions laid down in Articles 21, 22 and 29, of an applicant who has lodged an application in a different Member State. The procedures for take charge requests are set out in Section II of Chapter VI.

"Article 21

Submitting a take charge request

1. Where a Member State with which an application for international protection has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible and in any event within three months of

the date on which the application was lodged within the meaning of Article 20(2), request that other Member State to take charge of the applicant.

…

3. In the cases referred to in paragraphs 1 and 2, the request that charge be taken by another Member State shall be made using a standard form and including proof or circumstantial evidence as described in the two lists mentioned in Article 22(3) and/or relevant elements from the applicant's statement, enabling the authorities of the requested Member State to check whether it is responsible on the basis of the criteria laid down in this Regulation.

The Commission shall, by means of implementing acts, adopt uniform conditions on the preparation and submission of take charge requests. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 44(2).

Article 22

Replying to a take charge request

1. The requested Member State shall make the necessary checks and shall give a decision on the request to take charge of an applicant within two months of receipt of the request.
2. In the procedure for determining the Member State responsible elements of proof and circumstantial evidence shall be used.
3. The Commission shall, by means of implementing acts, establish, and review periodically, two lists, indicating the relevant elements of proof and circumstantial evidence in accordance with the criteria set out in points (a) and (b) of this paragraph. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 44(2).

   (a) Proof:

   (i) this refers to formal proof which determines responsibility pursuant to this Regulation, as long as it is not refuted by proof to the contrary;

   (ii) the Member States shall provide the Committee provided for in Article 44 with models of the different types of administrative documents, in accordance with the typology established in the list of formal proofs;

   (b) Circumstantial evidence:

   (i) this refers to indicative elements which while being refutable may be sufficient, in certain cases, according to the evidentiary value attributed to them;

   (ii) their evidentiary value, in relation to the responsibility for examining the application for international protection shall be assessed on a case-by-case basis.
4. The requirement of proof should not exceed what is necessary for the proper application of this Regulation.

5. If there is no formal proof, the requested Member State shall acknowledge its responsibility if the circumstantial evidence is coherent, verifiable and sufficiently detailed to establish responsibility.
6. Where the requesting Member State has pleaded urgency in accordance with the provisions of Article 21(2), the requested Member State shall make every effort to comply with the time limit requested. In exceptional cases, where it can be demonstrated that the examination of a request for taking charge of an applicant is particularly complex, the requested Member State may give its reply after the time limit requested, but in any event within one month. In such situations the requested Member State must communicate its decision to postpone a reply to the requesting Member State within the time limit originally requested.
7. Failure to act within the two-month period mentioned in paragraph 1 and the one-month period mentioned in paragraph 6 shall be tantamount to accepting the request, and entail the obligation to take charge of the person, including the obligation to provide for proper arrangements for arrival.

Article 29

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

…

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

13. Procedural safeguards for the notification of a transfer decision are set out in Section IV of Chapter VI. Those procedural safeguards place an obligation upon the requesting Member State to notify the person concerned of the decision to transfer him or her to the Member State responsible and, where applicable, of not examining his or her application for international protection.

14. The Commission Implementing Regulation (EC) No 1560/2003, as amended ("the IR") sets down detailed rules for the application of the Dublin III Regulation.

15. As this Tribunal held in MK, IK -v- SSHD [2016] UKUT 00231 (at para 38)

"…The scheme of the Dublin Regulation is that the more detailed outworking of these duties are not specified in the measure itself but are, rather, to be found in the ancillary, implementing legislation adopted by the Commission, namely the 2003 Regulation as amended. These two measures must be considered together and as a whole."

16. Article 5 of the implementing Regulation deals with a negative reply where the requested Member State considers that the evidence submitted does not establish its responsibility and for re-examination of requests.

"Negative reply

1. Where, after checks are carried out, the requested Member State considers that the evidence submitted does not establish its responsibility, the negative reply it sends to the requesting Member State shall state full and detailed reasons for its refusal.
2. Where the requesting Member State feels that such a refusal is based on a misappraisal, or where it has additional evidence to put forward, it may ask for its request to be re-examined. This option must be exercised within three weeks following receipt of the negative reply. The requested Member State shall endeavour to reply within two weeks.

   In any event, this additional procedure shall not extend the time limits laid down in Article 18(1) and (6) and Article 20(1)(b) of Regulation (EC) No 343/2003."

17. Article 8 of the Implementing Regulation makes provision for the transfer and imposes a requirement of cooperation between the Member States regarding the transfer:

"**Cooperation on transfers**

1. It is the obligation of the Member State responsible to allow the asylum seeker's transfer to take place as quickly as possible and to ensure that no obstacles are put in his way. That Member State shall determine, where appropriate, the location on its territory to which the asylum seeker will be transferred or handed over to the competent authorities, taking account of geographical constraints and modes of transport available to the Member State making the transfer. In no case may a requirement be imposed that the escort accompany the asylum seeker beyond the point of arrival of the international means of transport used or that the Member State making the transfer meet the costs of transport beyond that point.

2. The Member State organising the transfer shall arrange the transport for the asylum seeker and his escort and decide, in consultation with the Member State responsible, on the time of arrival and, where necessary, on the details of the

handover to the competent authorities. The Member State responsible may require that three working days' notice be given."

18. Article 10 of the Implementing Regulation expressly makes provision for the procedure for 'Transfer following an acceptance by default'. It provides:

"**Transfer following an acceptance by default**

1. Where, pursuant to Article 18(7) or Article 20(1)(c) of Regulation (EC) No 343/2003 as appropriate, the requested Member State is deemed to have accepted a request to take charge or to take back, the requesting Member State shall initiate the consultations needed to organise the transfer.
2. If asked to do so by the requesting Member State, the Member State responsible must confirm in writing, without delay, that it acknowledges its responsibility as a result of its failure to reply within the time limit. The Member State responsible shall take the necessary steps to determine the asylum seeker's place of arrival as quickly as possible and, where applicable, agree with the requesting Member State the time of arrival and the practical details of the handover to the competent authorities."

19. Article 12 of the Implementing Regulation states:

"**Unaccompanied minors**

1. Where the decision to entrust the care of an unaccompanied minor to a relative other than the mother, father or legal guardian is likely to cause particular difficulties, particularly where the adult concerned resides outside the jurisdiction of the Member State in which the minor has applied for asylum, cooperation between the competent authorities in the Member States, in particular the authorities or courts responsible for the protection of minors, shall be facilitated and the necessary steps taken to ensure that those authorities can decide, with full knowledge of the facts, on the ability of the adult or adults concerned to take charge of the minor in a way which serves his best interests.

   Options now available in the field of cooperation on judicial and civil matters shall be taken account of in this connection.
2. The fact that the duration of procedures for placing a minor may lead to a failure to observe the time limits set in Article 18(1) and (6) and Article 19(4) of Regulation (EC) No 343/2003 shall not necessarily be an obstacle to continuing the procedure for determining the Member State responsible or carrying out a transfer."

Charter of Fundamental Rights of the European Union

20. The recitals to the Dublin III Regulation expressly provide that 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 the Regulation. Article 24 of the Charter of Fundamental Rights of the European Union recognises 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."

Home Office Guidance Dublin III Regulation 'Version 1' published 02 November 2017

21. The respondent has issued guidance about the processes involved when a request is made by another State for the UK to accept responsibility for considering an asylum claim under the Dublin III Regulation. The guidance in force when the TCR was received in August 2018 was version 1, published on 2nd November 2017. Version 2 was published on 18th April 2019. There is, as far as we are aware, no difference in the two versions of the guidance insofar as the issues that we are to consider are concerned.

22. The guidance explains to caseworkers, the process to be adopted when an asylum claim has been lodged in another Member State and there is evidence to suggest that the UK may be responsible for taking charge of the applicant and to examine the claim for international protection. Insofar as is relevant to the issues before us, the guidance states:

"**Criteria and evidence when considering a request from another Dublin State**

Cases must meet at least one of the criteria and at least one piece of evidence for a request to be accepted. The request should include a copy of all available evidence (including circumstantial evidence) to show the UK is the State responsible for examining an asylum claim. Article 22 of the Regulation provides that 2 lists shall be established to set out the relevant elements of proof and circumstantial evidence (including detailed statements) to be used by Dublin States when considering whether to make requests to take responsibility. The 2 lists can be found in Annex II of the Implementing Regulation 118/2014. Caseworkers must be familiar with the lists on the relevant elements of proof and circumstantial evidence. Formal requests for the UK to take ownership of an asylum claim can be made on the basis of a number of Articles contained in the Dublin III Regulation. An asylum claim must have been formally lodged in the requesting Member State before the UK can consider the request under Dublin. Articles 8, 9, 10, 11 and 16 of the Dublin III Regulation contain specific provisions on family unity and dependency, including cases that concern unaccompanied children with family members in another Dublin State.

Mandatory checks

Security checks must be conducted on the applicant and the family member(s) or relative(s) in the UK on receipt of all formal requests.

…

Requests involving children

As per Article 8(1), if the applicant is an unaccompanied child, the responsible Dublin State shall be that where a qualifying family member (insofar as the family existed in the country of origin, the mother, father or another adult responsible by the law or practice of the Dublin State where the adult is present –as per Article 2(g)) or sibling is legally present provided that is in the best interests of the child. For Article 8(1) cases, where the family member or sibling cannot accommodate the child, the UK has an obligation to accept the take charge request, provided it is in the best interests of the child and all other criteria and requirements are met. As stated under Article 8(2), where another relative (adult aunt, uncle or grandparent –as per Article 2(h)) is legally present and where it can be established that the relative can take care of the child and it is in the best interests of the child, then the Dublin State where the relative is present shall be responsible. Article 8(2) presents an additional requirement (compared to 8(1)) on being able to demonstrate they can 'take care' of the child. In order to accept the take charge request, there must be evidence the UK based qualifying family member(s) are able to accommodate and support the child.

Both Articles 8(1) and 8(2) require the transfer to be in the best interests of the child. The best interests of the child must always be a primary consideration when applying the Regulation in family unity cases. When assessing a child's best interests, Dublin States should cooperate with each other taking due account of factors such as family reunification possibilities, the child's well-being and social development, safety and security considerations and the views of the child in accordance with their age and maturity, and background. The European Intake Unit (EIU) will work with the local authority in which the family member, sibling or relative of the child is residing. Local authorities will be requested to undertake an assessment with the family or relative(s) in addition to the checks undertaken by EIU, which will inform a recommendation to EIU as to whether the request should be accepted or rejected. The checks and assessment to be undertaken by the local authority will be outlined in the Department

for Education's forthcoming Friends and Family Guidance. 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.

Article 6 and 8 of the Dublin III Regulation provides further information on guarantees for minors (children) in the Dublin procedure: caseworkers must be familiar with these articles.

In addition, Article 12 of Implementing Regulation 1560/2003 as amended by Implementing Regulation 118/2014 provides further guidance on the application of the provisions on unaccompanied children, including that if the duration of procedures for placing a child leads to a failure to observe the time limits set in Article 22(1) and 22(6) (on replying to a request to take charge) and Article 29(2) (on modalities and time limits for transfer) of the Dublin III Regulation, this shall not necessarily be an obstacle to continuing the procedure for determining the responsible State or carrying out a transfer.

Unaccompanied children: notifying local authorities and or social services

You must ensure that both local authority children's social care services at the child's point of entry and where the child's family member, sibling or relative reside are notified of the transfer request under the Dublin III Regulation. This must be done as soon as possible after the formal request to take charge is received from the requesting State.

You must engage local authorities' children's social care teams throughout the process, seeking their advice in every case. You must keep accurate records of what information is relayed, who is spoken to, when and by whom. Article 12 of the Implementing Regulation 1560/2003, as amended by Implementing Regulation 118/2014 refers to the role of authorities responsible for the protection of children having full knowledge of the facts to consider the ability of the adult or adults concerned to take charge of the child in a way which serves their best interests.

…

Once the request from another Dublin State to take charge of an asylum seeking child has been accepted by the UK, on the basis that the UK is responsible for examining the child's asylum claim under the Dublin III Regulation, the process of arranging transfer to the UK and to the 'sponsoring' family is a shared responsibility between UKVI and the local authority where the child will be living.

The UKVI role is to facilitate the arrival of the child into the UK with the sending Dublin State. Local authorities will provide additional information and advice on the wellbeing of the child if they are transferred to the UK.

Best interests of the child and section 55 consideration

Section 55 of the Borders, Citizenship and Immigration Act 2009 places a statutory safeguarding duty on the Home Office. It requires the Home Secretary to make arrangements:

> 'To ensure that immigration, asylum, nationality and customs functions are discharged having regard to the need to safeguard and promote the welfare of children in the UK'

In respect of the Dublin III Regulation, the section 55 obligation applies only where a child is physically present in the UK. It is for the requesting State to be satisfied that the request they are making is in keeping with the child's best interests.

Full guidance on the UK legislation can be found in part 1, paragraph 1.4 of Every Child Matters: Change for Children. This provides further guidance on the extent to which the spirit of the duty should be applied to children who are overseas.

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. You must work with local statutory child safeguarding agencies in the UK in order to develop arrangements that protect children and reduce the risk of trafficking and exploitation.

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

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

It is important that you demonstrate and record how you have considered a child's best interests in line with the section 55 duty. All aspects of this consideration must always be clearly recorded both on the casefile and on CID."

The factual background

23. The applicants are both nationals of Afghanistan. They are brothers and are 17 and 16 years of age respectively. They claim to have fled Afghanistan several years ago and travelled through Pakistan, Iran and Turkey before arriving in Greece in April 2018. Their journey from Afghanistan to Greece is set out in a witness statement made, on instructions, by their solicitor. They describe a difficult journey to Turkey that took around 23 days and they claim to have spent 3 to 3 ½ years in Turkey before travelling to Greece. They arrived in Greece on 7th April 2018 and made a

protection claim on 1st June 2018. As matters stand, the applicants remain in Greece.

24. On 31st August 2018, a 'take charge request' ("TCR") was communicated by the Greek National Dublin Unit to the respondent in respect of each applicant. The requests provided the address of the applicants' maternal uncle who lives in the UK. The following further information was set out:

> "... During his examination he stated that his maternal uncle [SH] resides in the United Kingdom as a recognised refugee. For this reason he wishes to be transferred to the United Kingdom and his application for asylum to be examined by your authorities so that the family members be reunited.
>
> The above-mentioned unaccompanied minor alien also stated that his parents along with his three siblings are in Afghanistan.
>
> On the same day the applicant's minor brother also applied for asylum. A separate request concerning him will be sent with reference number …
>
> We are sending you attached all the relevant documents concerning this case and his written consent."

25. On 12th October 2018 a letter was sent by the respondent's European Intake Unit ("EIU") to the Immigration Directorate in Greece. The letter stated:

> "… To assist in demonstrating the claimed family link between the claimed relative and minor, may we request you provide the contact details to the British Red Cross of the minor/guardian or representatives so that they can provide consent and further information.
>
> The British Red Cross can be contacted by using the following details: …
>
> Please inform the minor that failure to contact the British Red Cross within 15 days will result in the take charge request being considered using only the information that is currently available…."

26. There was no response to that letter from the Greek authorities until 8th March 2019. On that day, an email was sent by the Department of the National Dublin Unit in Greece, to the respondent, enclosing a number of documents to support the claim made by the applicants that they are related to SH as claimed.

27. On 12th June 2019, the respondent refused the TCR's. The letters sent by the respondent to the Immigration Directorate in Greece were in identical terms and stated:

> "... The evidence submitted in the original application did not demonstrate the family link. [The applicant's] case was referred to the British Red Cross to assist with family tracing process and to submit further information that could support the family link as claimed between him and the claimed uncle in the UK. On 08 March 2019, further evidence was submitted to assist the United Kingdom make a decision.
>
> In responding to your request all evidence in the original Take Charge Request lodged on 31 August 2018 were considered, as well as the following additional information submitted following the assistance from the British Red Cross:
>
> [Evidence listed]
>
> The United Kingdom has further examined all documentary evidence submitted, and the HO record of the UK-based relative. It is noted the parents details given by the UK-based relative does not match the parents details shown in the applicant's mother *(sic)* Tazkira and Family Tree. Therefore familial link has not been demonstrated that applicant's mother and the claimed UK-based relative are related. It is therefore not demonstrated that (SH) UK-based relative and [the applicant] are related as claimed
>
> Consequently, I regret to inform you that the take charge request is refused.
>
> Should you wish to pursue Dublin III action in this case, it is open for those supporting [the applicant] to contact the British Red Cross through the established channels to assist with gathering information to support a reconsideration within 21 days of receipt of the letter."

28. It is the respondent's decision of 12th June 2019 that was the subject of the claim for judicial review when it was issued. Matters did not, however, end there. By letter dated 1st July 2019, the Greek Department of the National Dublin Unit wrote to the respondent stating:

> "Following your rejection letters sent on 12/06/2019 with reference numbers …., we kindly ask you to keep this case open since the uncle and his nephews have agreed to undergo a DNA Test in order to prove their relationship. Please find attached the uncle's statement.
>
> We would appreciate if you confirmed the UK.'s agreement to this prospect. We will forward you the results as soon as we receive them."

29. DNA test were commissioned by the applicants' representatives and DNA reports dated 9th September 2019 were sent by the applicants' representatives to the

respondent and to their representative in Greece, on 10th September 2019. The following day, the respondent sent an email to the applicants representative stating:

> "Just to advise you that we have now received the re-examination request from our Greek colleagues and will proceed to having a family assessment request sent to the local authority for [the applicants'] UK relative's home. Please note this is part of our process and until that has been undertaken by the local authority we cannot have the young persons transferred to the UK…"

30. On 12th September 2019 the respondent wrote to the Immigration Directorate – Greece in the following terms:

> "… On the basis of the evidence submitted with your request to take charge and our own checks we are satisfied that the relationship between him and his family member is as claimed.
>
> A UK local government authority care assessment is now underway with the UK family to aid in the consideration of the child's best interests as per the requirements of the Dublin III Regulation in respect of unaccompanied minors.
>
> We will endeavour to inform you of our decision on the request upon receipt of the action undertaken by the UK local government authority…"

31. On the same day, the respondent requested a family assessment be completed by Derby City Council. In the absence of a response from the local authority, the respondent sent an email on 26th September 2019 to the local authority requesting an update. On 27th September 2019, the social worker confirmed that the assessment was to be completed and an update will be provided after a visit has been completed. On 11th October 2019 the respondent was informed that the assessment has been completed and the outcome was negative.

32. On 14th October 2019, the respondent wrote to the Immigration Directorate – Greece in the following terms:

> "… Following a Family Assessment concerning the applicant, the applicant's uncle shows concerns with the following:
>
> - Significant safeguarding risk
> - There are concerns about his capacity to care
>
> It is our understanding that the applicant's claimed uncle would not be able to accommodate the applicant. Instead the applicant would, be placed in our social care

> system. The UK believes that it is not in the best interests of the applicant to simply move from their current arrangements, education and healthcare to simply be placed in another. Unfortunately, on the grounds of the applicant's claimed uncle's inability to care for the applicant the United Kingdom cannot advise the transfer of [the applicant]
>
> … The applicant's uncle would have to be able to care for and accommodate the above in order for a transfer to be arranged, as he poses a significant safeguarding risk it is not in the best interests of [the applicant]. Therefore I regret to inform you that your re-examination has been rejected and maintained…."

33. The amended grounds for judicial review include a challenge to the respondent's decision of 14th October 2019. In support of the claim for judicial review the applicants have secured an independent social work summary report completed by Maria Mooney, an Independent Social Worker. In her report she sets out her opinion as to whether it would be in the applicants' best interests to be placed with their uncle or in local authority care in the UK, as against the applicants remaining in Greece. The applicants have also been subjected to a psychiatric assessment and the outcome of the assessments is set out in the reports of Dr Batsheva Habel, a Consultant Child and Adolescent Psychiatrist.

34. When the hearing before us commenced, we were informed by Ms Meredith that the respondent has made yet a further decision, dated 5th December 2019, that purports to deal with the independent social work report and psychiatric assessments. We were provided with a copy of that decision, and we have also been provided with a copy of a draft statement that was prepared by the social worker at Derby City Council, but which had not been filed and served, or relied upon by the respondent. There was no application for an adjournment and Ms Meredith confirmed that she was content to proceed with the hearing and would address the most recent decision, in her submissions before us.

The applicants' case

35. There are four strands to the applicants' claim that the respondent's refusal to 'take charge' of the applicants is in breach of Dublin III. First, the applicants rely upon Article 22(1) of the Dublin III Regulation that provides for a 2-month maximum time-limit to the requested State for investigating and providing a fully reasoned

response to a 'take charge request'. The applicants claim the failure to make a decision within that 2-month time limit – i.e. by 31 October 2018 - resulted in automatic allocation of responsibility for the applicants' asylum claims to the UK.

36. The applicants rely upon the concession made by the respondent that there was "deemed acceptance" of responsibility for the examination of the applicants' asylum claims, and that entails the obligation to provide for proper arrangements for arrival pursuant to Article 22(7). The applicants claim, once automatic acceptance has occurred under Article 22(7), as in this case, any assessment of whether a relative is able to take care of a child, or, whether it is in their best interests to join them, no longer affects the allocation of responsibility, because the UK is already the responsible Member State. The applicants claim that upon a proper application of Dublin III, once responsibility has passed, the best interests of the applicants are relevant to the arrangements for transfer and accommodation on arrival; including the decision as to whether to place the applicants with their uncle or alternatively in local authority care.

37. Second, the applicants claim the respondent's reliance upon the implementing Regulations is erroneous. They claim Article 12(2) of the IR does not provide for the allocation of responsibility to be reversed, and in any event, even if it did, it could do so only in extreme circumstances where the best interests of the children necessitate the applicants remaining in a different jurisdiction to the one which is responsible for them under Dublin III. They claim that to come even close to demonstrating that high threshold is met, the respondent is required to demonstrate the applicants would be placed at a positive and "serious risk" from the family member in this jurisdiction, as accepted in the context of assessing the best interests test for responsibility under Article 8 (or in relation to Article 6) in the respondent's own published policy guidance.

38. Third, the applicants submit the respondent's assertion that it is not in the applicants' best interests to be transferred to the UK is without any evidential foundation. They say, to the contrary, the only evidence before the Tribunal is that

it is in the applicants' best interests to be transferred to the UK as quickly as possible; and that they are being placed at significant risk of harm in Greece. They point to the reports of Dr Habel, and Maria Rooney, although Ms Meredith accepts that evidence relied upon by the applicants post-dates the decisions challenged.

39. Finally, the applicants claim the respondent's decisions of 12th June and 14th October 2019 were also unlawful due to a series of breaches of the respondent's investigative duty and procedural fairness obligations. They claim the respondent failed to take reasonable steps to investigate the take charge requests and unlawfully confined her investigation to checking the evidence provided by the Greek authorities against the Home Office records of SH and failed to consider DNA testing. They claim the respondent unlawfully failed to engage with the local authority prior to rejecting the requests, contrary to her own published policy and failed to give the applicants or SH the opportunity to respond to her doubts about the relationship prior to the refusal.

The respondent's pleaded case as set out in the Detailed Grounds of Defence

40. The respondent concedes, at paragraph [30] of the Detailed Grounds of Defence, that she did not give a decision on the 'Take Charge Requests' within two months of receipt. The respondent acknowledges that there was deemed acceptance on 31st October 2018. However, the respondent maintains that it is not in the applicants' best interests to be transferred to the UK and for their applications for international protection to be examined by the UK.

41. The respondent claims that having received the take charge requests, it was open to her to conclude that the information and evidence submitted with the requests, taken together with the records held by the respondent in respect of SH, was insufficient to demonstrate the claimed family link and to seek further information from the Greek authorities. It was open to the respondent to write to the Greek authorities on 12th October 2018, and the respondent made that request for further information within the two months permitted for a decision.

42. The respondent claims that notwithstanding the deemed acceptance it was entirely appropriate and proper for the respondent to continue to make enquiries about the claimed familial link and best interests of the applicants. The respondent claims that by operation of Article 12(2) of the IR, the respondent is permitted to continue her enquiries even after she was deemed to have accepted the take charge request and claims that on any view, it would not have been appropriate and in the best interests of the applicants to transfer them to the UK without making the relevant enquiries.

43. The respondent claims the information subsequently provided by the Greek authorities on 8th March 2019 was considered with all the other information available and it was open to the respondent to conclude that the family link had not been established. It is said that the applicants and Greek authorities were on notice from 12th October 2018 that the respondent required further information in respect of the claimed family link. It was open to the applicants throughout, to provide DNA evidence of that relationship earlier but they failed to do so.

44. The respondent claims that in October 2019, by which time the claimed family link had been accepted, the relevant local authority had raised concerns about the ability of SH to care for the applicants and reunification was not recommended. It is said that it was open to the respondent in her decision of 14th October 2019 to maintain the decision to refuse the take charge request because of SH's inability to care for the applicants.

45. The respondent claims that the criteria set out in Article 8(2) of Dublin III are not met, because it has not been established following an individual examination, that SH can take care of the applicants. Further, or alternatively, it was open to the respondent to conclude that it is not in the best interests of the applicants to reunite them with SH in the United Kingdom.

46. The respondent claims that there has been no breach of the applicants' Article 8 ECHR rights and no breach of the Charter of Fundamental Rights of the European Union.

Preliminary

47. At the outset of the hearing before us, we noted that surprisingly although both parties refer obliquely to Article 29 of Dublin III in their skeleton arguments, neither party has addressed the impact of Article 29(2). We informed the parties that our preliminary view is that Article 29(2) is relevant on the facts here. It is uncontroversial that the respondent was deemed to accept responsibility on 31st August 2018. As the applicants appear to accept at paragraph [42] of their skeleton argument, Article 29 requires the requesting member state to carry out the transfer as soon as practically possible, and at the latest within six months. The transfer of the applicants from Greece to the UK should therefore have taken place before 30th April 2019. According to Article 29(2), where the transfer does not take place within the six months' time limit, the Member State responsible shall be relieved of its obligations to take charge or to take back the person concerned, and responsibility shall then be transferred to the requesting Member State. The parties were given an opportunity to address the question whether responsibility had reverted to Greece by operation of Article 29(2) on 30th April 2019, in their submissions before the Tribunal and were given a further opportunity to provide the Tribunal with written submissions following the hearing before us.

The respondent's further submissions

48. In the further submissions filed by the respondent following the hearing before us on 6th December 2019, the respondent states that in light of the unreported decision of Upper Tribunal Judge Blum in KF -v- SSHD JR/1642/2019, the respondent does not claim that the deemed acceptance following a failure to respond within the permitted time is otiose, where the requesting Member State makes a

reconsideration request rather than to initiate the consultations needed to organise the transfer.

49. The respondent claims that following deemed acceptance under Article 22(7) of Dublin III, it is for the requesting Member State to initiate consultations with a view to organising the transfer, and it is only if asked to do so by the requesting Member State, that the requested State must (in writing and without delay) acknowledge its responsibility as a result of the failure to comply with the time limit. The respondent acknowledges that there continues to be deemed acceptance (and an obligation to take charge), and that responsibility can only pass to the requesting Member State via the mechanisms in Dublin III, including, for example, the operation of Article 29(2). The respondent claims the requested Member State need not take any steps following deemed acceptance, particularly regarding transfer, unless and until the requesting Member State takes the required steps in Article 10 of the IR.

50. Further or alternatively, the respondent claims that following deemed acceptance on 31st October 2018, the six-month time limit for the transfer of the applicants to the UK commenced. The applicants' transfer did not take place within six-months of that date and it follows that on the expiry of the six-month time limit, the UK was relieved of its obligations to take charge.

51. The respondent acknowledges that she did make decisions in respect of the requests following the expiry of the six-month time limit but claims that that does not mean that transfer of responsibility did not revert to Greece under Article 29(2) of Dublin III.

<u>The applicants' further submissions in reply</u>

52. The applicants oppose the fundamental change in the respondent's case as set out in the further submissions filed following the hearing of the claim before us. The applicants submit the Tribunal should not entertain the new unpleaded case being

advanced by the respondent relying upon Article 29(2) of Dublin and Article 10 of the Implementing Regulation. The applicants' objection is twofold. First, the respondent did not rely upon Article 29(2) and Article 10 previously and has taken no steps whatsoever to amend her pleaded case. Notwithstanding what is said in the further submissions now relied upon by the respondent, there has been no application to amend the Grounds of Defence and it is wholly inappropriate for the Tribunal to accede to any formal application for relief from sanctions and to amend the Detailed Grounds of Defence following the hearing of the claim for judicial review. The applicants submit that entertaining the claim the respondent now wishes to advance, would inevitably result in further delay and would be contrary to the overriding objective. Second, in reaching the two decisions that are the subject of the claim for judicial review, the respondent did not at any point claim that she was relieved of any obligation to take charge of the applicants by operation of Article 29(2) of the Dublin III Regulation and Article 10 of the Implementing Regulation. The respondent proceeded upon an erroneous interpretation of Article 12(2) of the Implementing Regulation and the claim the respondent now seeks to advance is inconsistent with the reasons for the decisions the Tribunal is concerned with.

53. We accept the submissions made by Ms Meredith that we should not entertain the new unpleaded case being advanced by the respondent relying upon Article 29(2) of Dublin III and Article 10 of the IR. This claim for judicial review was listed for hearing with an expedited timetable in view of the particular difficulties that the applicants find themselves in, and the need for a swift resolution of the claim. The filing of Detailed Grounds of Defence required the respondent to assist the Tribunal by producing documents and giving such reasons as are needed to enable the Tribunal to fulfil its judicial function and determine whether the respondent was in error in reaching her decisions. Here, as Ms Meredith submits, in reaching the two decisions that are the subject of the claim for judicial review, the respondent did not at any point claim that she was relieved of any obligation to take charge of the applicants by operation of Article 29(2) of the Dublin III Regulation and Article 10

of the Implementing Regulation. In fact the two decisions that are the subject of the claim for judicial review were both made after responsibility appears to have reverted to the Greek authorities, but in neither decision does the respondent claim that she is relieved of her obligation to take charge. The matters now relied upon by the respondent in the further submissions do not explain how and why the respondent reached her decisions but amount to a process of 'after-the-event rationalisation'. Although it is appropriate for the Tribunal to make its own observations as to the proper application of the legal framework, we make it clear that we have decided these claims for judicial review, solely upon the respondent's pleaded case as set out in the Detailed Grounds of Defence and the submissions that were made at the hearing before us.

DISCUSSION

Overview of the Dublin III Regulation and Implementing Regulation

54. Before we turn to the respondent's decisions of 12th June 2019, 14th October 2019 and 5th December 2019, in our judgment, drawing together the threads of the Dublin III Regulation and the Implementing Regulation, upon a proper application of the Dublin III Regulation, the respondent's failure to communicate a decision upon the TCR within the permitted two months was, as the respondent now accepts, tantamount to accepting the request, and entailed the obligation to take charge of the applicants. Once responsibility had passed to the UK:

i. The obligation to take charge, included the obligation to provide for proper arrangements for arrival; (Article 22(7) Dublin III)

ii. The transfer from the requesting Member State (Greece) to the Member State responsible (the UK) was required to be carried out in accordance with the national law of the requesting Member State (Greece), as soon as practically possible and at the latest within six months of acceptance of the request to take charge; (Article 29(1) Dublin III)

iii. Article 10 of the Implementing Regulation required that the requesting Member State (Greece) shall (*our emphasis)* initiate the consultations needed to organise the transfer. If asked to do so by the Greek authorities, the respondent was required to:

a) confirm in writing, without delay, that it acknowledged its responsibility as a result of its failure to reply within the time limit; and

b) take the necessary steps to determine the applicants' place of arrival as quickly as possible and, if required, agree with the Greek authorities the time of arrival and the practical details of the handover.

iv. Article 8(1) of the Implementing Regulation imposed an obligation on the Member State responsible (the UK) to allow the transfer to take place as quickly as possible and to ensure that no obstacles are put in the way.

55. As we have not permitted the respondent to rely upon the matters referred to in the further submissions filed after the hearing, we have not heard full argument regarding the application of Article 29(2). In the written submissions made by Ms Meredith, she refers to the decision of the CJEU in Petrosian Case C-19/08 [2009] 2 CMLR 33, and the conclusions which were relied on by Advocate General Sharpston in Shiri [2018] 2 CMLR 3 that the period for carrying out the transfer may begin to run only as from the time the future implementation of the transfer is, in principle, agreed upon and certain, and only the practical details remain to be determined. However, the circumstances being considered there were quite different. It was said in Petrosian that the Regulations are to be interpreted as meaning that, where the legislation of the requesting Member State provides for suspensive effect of an appeal, the period for implementation of the transfer begins to run, not as from the time of the provisional judicial decision suspending the implementation of the transfer procedure, but only as from the time of the judicial decision which rules on the merits of the procedure and which is no longer such as to prevent its implementation. The implementation could not be regarded as being

certain, if a court of the requesting Member State which is hearing an appeal had not yet ruled on the merits of the appeal but had merely ruled on an application for suspension of the operation of the contested decision. Plainly, if the transfer decision is contested, it is easy to see that the six-month time limit cannot properly begin to run until the court has determined where responsibility rests.

56. Where the transfer decision is not the subject of any challenge, in our judgment, upon a proper application of Dublin III, Article 29(2) makes it clear that where the transfer does not take place within the six months' time limit, the Member State responsible shall be relieved of its obligations to take charge and responsibility shall then be transferred to the requesting Member State.

57. That however is subject to one important caveat. Insofar as children are concerned, Dublin III repeatedly emphasises the principle of family unity and the best interests of children. There are two relevant provisions within the framework that ensure that notwithstanding responsibility under the Regulation, Member States can, where appropriate, derogate from the determination of responsibility under a strict application of the Regulations. First, Article 17 of Dublin III includes a discretion by way of derogation, for a Member State to decide to examine an application for international protection, even if such examination is not its responsibility under the criteria laid down in the Regulation. Second, Article 12 of the IR expressly provides that the fact that the duration of procedures for placing a minor may lead to a failure to observe the time limit (including the time limit set in Article 29(1) – formerly Article 19(4)) shall not necessarily be an obstacle to continuing the procedure for carrying out a transfer. The provisions read in that way are consistent with the objective to ensure full respect for the principle of family unity and to bring together family members, in particular on humanitarian and compassionate grounds.

The Take Charge Requests and the respondent's response

58. Having considered the relevant legal framework, we now turn to the respondent's decision-making in this claim. Article 21(1) imposes an obligation upon the Member State in which an application for international protection has been lodged to make a take charge request where it considers that another Member State is responsible for examining the application and provides the time limits within which such a request must be made. Here, the Greek authorities considered the UK to be responsible for examining the applications and it was open to the Greek authorities to request that the UK take charge of the applicants. It is uncontroversial that the Greek authorities did so, albeit on the last possible day. It is what happened thereafter, that goes to the heart of this claim for judicial review.

59. Article 22(1) placed an obligation upon the requested Member State to make the necessary checks and give a decision on the request within two months of receipt of the request. Here, a decision was therefore required from the respondent by 31st October 2018. In the absence of a decision, the UK had become the Member State responsible, by default on 31st October 2018.

60. We reject the claim that the respondent's failure to formally accept responsibility for the applicant's asylum claims or to communicate a decision in itself amounts to a breach of Dublin III. It is undoubtedly preferable for a response to a TCR to be provided within the two months permitted because the Regulation is after all, concerned with determining rapidly the Member State responsible and the rapid processing of applications for international protection. We accept, as Ms Meredith submits, that the need for expedition in cases involving particularly vulnerable persons such as unaccompanied children is recognised in the Regulation and authorities; (ZT (Syria) -v- SSHD [2016] EWCA Civ 810). However, Beatson LJ stated:

> "87. There will be a need for expedition in many cases involving unaccompanied minors. The circumstances of the first four respondents' cases, especially the psychiatric evidence, suggested in their cases there was a particular need for urgency.

> But an orderly process is also important in cases of unaccompanied minors. The need to examine their identity, age, and claimed relationships remains, and there is a particular need to guard against people trafficking."

61. If a decision had been communicated whether positive or negative, the respondent would not be deemed responsible by default by operation of Article 22(7) of Dublin III. The failure to communicate a decision was not in itself unlawful. The consequence of the failure to make a decision is provided for in Dublin III itself and, as the respondent accepts, by operation of Article 22(7) there was deemed acceptance of the TCR's.

62. The applicants submit following deemed acceptance of the TCR's, the respondent was dutybound to "provide for proper arrangements for arrival"; (Article 22(7) Dublin III), to facilitate the applicants' transfer "as soon as practically possible" (Article 29 Dublin III); and to allow the transfer to take place as quickly as possible and to ensure that no obstacles were put in the way; (Article 8(1) IR). The applicants submit that rather than comply with these obligations, the respondent proceeded to breach them by making unlawful decisions on 12th June 2019, 14th October 2019 and 5th December 2019.

63. The obligations to provide for proper arrangements for arrival, to carry out the transfer as soon as practically possible, to allow the transfer to take place as quickly as possible and to ensure that no obstacles are put in the way, flow in our judgment, from a request by the requesting member state which is under an obligation to initiate the consultations needed to organise the transfer; (Article 10 IR). That it is for the requesting member state to initiate the consultation so that the transfer can take place, is supported by Article 29 of Dublin III. Article 29 requires the transfer to be carried out in accordance with the national law of the requesting Member State. It was for Greece to initiate the consultation so that the transfer could take place in accordance with the national laws of Greece before 31st April 2019.

64. We accept, as Ms Meredith submits, once responsibility passes by default under Article 22(7), the affected individual has a right to enforce that passage of

responsibility. Article 26 of Dublin III sets out procedural safeguards. Article 26(1) imposed an obligation upon the Greek authorities (as the requesting Member State) to notify the applicants of the decision to transfer them to the UK (as the Member State responsible), and, of not examining their application for international protection. The applicants have remained in Greece and they have made their application for protection in Greece. It is clear the Greek authorities did not initiate any consultations to organise the transfer. It would have been open to the applicants to mount a challenge in the Greek Courts if the Greek authorities refused to initiate the consultations to organise the transfer, but they did not do so.

Article 12 of the Implementing Regulation

65. The respondent claims that notwithstanding the deemed acceptance it was entirely appropriate and proper for her to continue to make enquiries about the claimed family link, and the applicants' best interests. She relies upon Article 12(2) IR and claims Article 12(2) enables enquiries and an assessment to continue, even after the deeming provision takes effect.

66. On behalf of the applicants Ms Meredith submits the respondent's reliance upon the Implementing Regulation is erroneous. The applicants claim Article 12(2) does not provide for the allocation of responsibility to be reversed, and, even if it did, it could do so only in extreme circumstances where the best interests of the children necessitate the applicants remaining in a different jurisdiction to the one which is responsible for them under Dublin III. Ms Meredith submits that to come even close to demonstrating that high threshold is met, the respondent is required to demonstrate the applicants would be placed at a positive and "serious risk" from the family member in this jurisdiction, as accepted in the context of assessing the best interests test for responsibility referred to in the respondent's own published guidance.

67. The respondent's reliance upon Article 12 of the IR has been considered by this Tribunal in three unreported decisions. Permission is granted for these cases to be

cited before us and we are satisfied that the requirements of Practice Direction 11 are met in respect of them. In FA & others JR/5523/2018, Upper Tribunal Judge Frances considered three linked claims concerning the respondent's delay and failure to accept Take Charge Requests made by the French authorities under Dublin III. Each of the applicants was a child with a sibling in the United Kingdom. In each case, the French authorities had made a TCR to the respondent and in each case, the respondent had failed to reach a decision within two months so that in each case, the United Kingdom was deemed responsible by operation of Article 22(7) of Dublin III. In each case the respondent had purported to accept responsibility some time later and each of the applicants was transferred to the UK. The respondent advanced two interpretations of Article 12(2). It either prevented the deeming provision from operating or it operated in parallel and the parties would not proceed with a transfer whilst negotiations were continuing. It was submitted on behalf of the respondent that Article 12 either extended the period or enabled the withdrawal of any acceptance. Upper Tribunal Judge Frances stated, at [66]:

> "Article 12(2) of the IR does not assist the respondent because, on the facts of these cases, there was no 'best interests reasons' preventing the UK from accepting the TCR's. Acceptance is beneficial to the Dublin III process because the UAM is more likely to remain engaged with the transfer process. The deeming provision in Article 22(7) means that there is no need to extend the acceptance period. It cannot be done under Dublin III. In that respect I am of the view that Article 12(2) of the IR applies in extreme cases where there are 'best interest reasons' for not complying with the time limit. That was not the case here."

68. In FwF & FrR -v- SSHD JR/1626, a decision handed down shortly after the decision in FA -v- SSHD, Upper Tribunal Judge Kamara considered similar claims made by two Afghan nationals concerning the respondent's delay and failure to accept a Take Charge Request made by the French authorities. France had made a TCR in respect of the two applicants on 15th November 2018. On 28th January 2019, the SSHD, after the two months permitted for a reply had passed, rejected the TCR in relation to FwF. A similar decision was made to reject the TCR in respect of FrF's claim, but that decision was not communicated. After the claim for judicial review

had been issued, on 22nd May 2019, the SSHD confirmed she accepted the relationship between the applicants and their brother. Insofar as the respondent relied upon Article 12 of the Implementing Regulation in her defence to the claim, Upper Tribunal Judge Kamara stated:

> "92. The respondent relies on Article 12(2) of the Implementing Regulation as well as Article 2(5)(a) of the Sandhurst Treaty, stating that the latter requires a departure from the time-limit in Article 22(7) of Dublin III and consequently the UK is not deemed responsible for minors until at least ten working days after "the conclusion of engagement with the relevant UK local authority." This is not an attractive argument. The Sandhurst Treaty enables a more rapid, simplified, process for the purpose of protecting the best interests of unaccompanied minors as opposed to enabling the UK to evade the strict timescales of Dublin III. Furthermore, Article 2.4 of the Sandhurst Treaty states that Dublin III timescales apply and, in any event, has no relevance to the applicants' case because no referral to the LA was ever made.
>
> 93. While Article 12(2) applies to the duration of procedures, in that a failure to observe the time limits shall not necessarily be an obstacle to determining the member state responsible, this does not assist the Secretary of State given the series of failings by the EIU which led to the delays in this case or the resulting damage to the mental health of the applicants. The purpose of Article 12(2) is to protect the best interests of the child and it is for the respondent to demonstrate why it was in the best interests of the applicants to exceed the timescales. That argument has not been made."

69. In KF -v- SHHD JR/1642/2019, an Afghan National registered a claim for asylum in Greece and on 11th October 2018 a TCR was communicated to the UK. When the claim was heard in September 2019, the respondent accepted she had become responsible for determining the applicant's asylum claim on 11th December 2018. Upper Tribunal Judge Blum noted, at [74], that until promulgation of the decision of Upper Tribunal Judge Frances in FA & Others, the respondent believed she was not bound by the two-month time limit in Article 22(1) of the Dublin III Regulation. Upper Tribunal Judge Blum did not disagree with the decision of Upper Tribunal Judge Frances in FA & Others that Article 12(2) IR applies in extreme cases where there are 'best interest reasons for not complying with the time limits', but found the respondent had erroneously believed that Article 12(2) of the Implementing Regulation modified Article 22 of Dublin III in the context of unaccompanied children.

70. The respondent does not maintain before us, the claim that was advanced in FA & Others that Article 12(2) of the Implementing Regulation prevented the deeming provision from operating. The respondent has refined her position and before us, does not even go so far as to say the parties would not proceed with a transfer whilst negotiations were continuing. In her skeleton argument, at paragraph [16], the respondent simply maintains that Article 12(2) IR operates in parallel to Article 22(7) of the Dublin III Regulation.

71. Here, there was deemed acceptance on 31st October 2018, and in our judgment it was open to the respondent to await further communication from the Greek authorities, not least because it was for the Greek authorities to initiate the consultations for the transfer. There can be a myriad of reasons why the Member State in which the applicants are present may not wish to pursue the transfer notwithstanding deemed acceptance. For example, the Member State may have decided to examine the application even though such examination is not its responsibility as it is permitted to do under Article 17, because of information that has become available to it but would not be known to the receiving Member State.

72. Notwithstanding a significant period of inactivity on the part of both Member States, on 8th March 2019, the Greek authorities responded to the respondent's letter of 12th October 2018. By that time, responsibility had already transferred to the respondent and the focus should have been upon the arrangements for the transfer of the applicants to the UK. That is, a determination of the reception arrangements for the applicant's including the time and date of arrival and the practical details for the handover.

73. However, the email received from the Greek authorities on 8th March 2019 is silent as to the deemed transfer of responsibility. The Greek authorities provided further information to establish the familial link between the applicants and SH. The evidence provided, formed the backdrop to the respondent's decision of 12th June 2019. The respondent was not satisfied that a familial link had been demonstrated to establish that the applicant's mother is related to SH as claimed. The Greek

authorities responded on 1st July 2019, treating the respondent's letter of 12th June 2019 as a "rejection letter", and inviting the respondent to keep the case open since the applicants and their uncle had agreed to undergo a DNA test to prove their relationship. A DNA test report was provided to the respondent on 10th September 2019 and by a letter dated 12th September 2019, the respondent confirmed that on the evidence now available, the respondent is satisfied that the relationship between the applicants and SH, is, as claimed. The respondent made arrangements for a family assessment to be completed by Derby City Council, and following that negative assessment, informed the Greek authorities that the respondent believes that it is not in the best interests of the applicants to simply move from their current care arrangements, education and healthcare, to be placed in the care system in the UK.

74. The applicants claim that once automatic acceptance has occurred under Article 22(7), any assessment of whether a relative is able to take care of a child, or, whether it is in their best interests to join them, no longer affects the allocation of responsibility, because the UK is already the responsible Member State. The applicants claim that once responsibility has already passed, the best interests of the applicants are relevant only to the arrangements for transfer and accommodation on arrival, including a decision here, as to whether to place the applicants with their uncle or alternatively in care. Ms Meredith submits Article 12(2) does not permit the respondent to "continue" to make enquiries after deemed acceptance or continue to determine responsibility under Article 8(2).

75. We note that under Article 8(1) of Dublin III the presumption is that the unaccompanied minor will be reunited with the family member or sibling provided it is in the best interests of the minor. The test is modified where the unaccompanied minor has a relative (defined in Article 2(h) to include an adult uncle) who is legally present in another member state. In our judgment, under Article 8(2), it must be established, based on an individual examination, that (a) the minor has a relative who is legally present in the requested member state; and (b)

that relative can take care of him or her. Where those two pre-conditions are met, the receiving Member State shall unite the minor with that relative, and shall be the Member State responsible, provided also that it is in the best interests of the minor.

76. We accept that once a Member State is deemed to accept responsibility for examining a claim, there is an obligation for the transfer from the requesting Member State to the Member State responsible to be carried out in accordance with the national law of the requesting Member State, as soon as practically possible. That is not to say that that is the end of the matter and there is a binary choice between transfer taking place within 6 months in accordance with Article 29(1), or responsibility reverting to the requesting Member State.

77. In our judgment, Article 12 IR must, as the respondent submits, operate in parallel with the deemed acceptance of the TCR. Once responsibility has passed under Article 22(7), the focus should primarily be upon the arrangements for the transfer of the unaccompanied minor to the requested Member State but that is not to say that having failed to respond to the TCR and having accepted responsibility by default, the requested Member State is bound to accept the transfer no matter what, and under any circumstances. Article 12 of the Implementing Regulation is concerned with 'Unaccompanied minors' and expressly provides that the fact that the duration of procedures for placing a minor may lead to a failure to observe the time limits set out in what are now Articles 22 and 29(1) of Dublin III, shall not necessarily be an obstacle to continuing the procedure for determining the Member State responsible or carrying out a transfer. There is therefore scope for the disapplication of the time limits, if warranted.

78. Article 12(2) IR is not in our judgement, concerned with a 'reversal of the obligation' to take charge, or 'the withdrawal of responsibility', but is concerned with reaching a decision that promotes the best interests of the child as a primary consideration and ensures full respect for the principle of family unity. It is simply concerned with reaching a decision that in the end, is reached in full knowledge of the facts, and serves the best interest of the child.

79. Where children are concerned, we are fortified by referring back to the recitals set out in Dublin III that make clear that the best interests of children lie at the heart of Dublin III; "the best interests of the child should be a primary consideration of Member States when applying this Regulation" – recital [13]; "In order to ensure full respect for the principle of family unity and for the best interests of the child…When the applicant is an unaccompanied minor, the presence of a family member or relative on the territory of another Member State who can take care of him or her should also become a binding responsibility criterion" – recital [16], and, "Any Member State should be able to derogate from the responsibility criteria, in particular on humanitarian and compassionate grounds, in order to bring together family members, relatives or any other family relations" – recital [17]

80. In MK & IK -v- SSHD the Upper Tribunal stated:

> "42. We find nothing in either the Dublin Regulation or its sister instrument to support the argument that the Secretary of State's acknowledged duty of investigation was extinguished once the initial refusal decision had been made. There is nothing in this regime to suggest that a decision on a "take charge" request is in all cases final and conclusive, subject only to legal challenge under (inter alia) Article 27. Furthermore, this would be entirely inconsistent with the concept of practical and effective protection and the broader context of the real world of asylum claims. The phenomenon of renewed "take charge" requests and successive "take charge" decisions by the requested State is, in our view, implicitly recognised in the Dublin Regulation. Furthermore, it was not argued that the Secretary of State's reconsidered decision, made pursuant to a renewed "take charge" request, was in some way a voluntary act of grace, as opposed to the discharge of a decision making duty. Nor was it argued that the Secretary of State's later decisions, made in the course of these proceedings, were in some way divorced from the Dublin Regulation context.
>
> 43. The present cases are a paradigm illustration of the truism that, in certain contexts, there may be a series of formal requests by one Member State and a series of formal decisions by the requested Member State. We are in no doubt that all such decisions and associated decision making processes are governed by the Dublin Regulation and its sister instrument…"

81. There is a consistent thread within Dublin III and the Implementing Regulation that the best interests of a child should be a primary consideration. One only has to read Article 8 of Dublin III to see that the allocation of responsibility under Article 8(1)

and (2) is subject to the proviso "… provided that it is in the best interests of the minor ...".

82. Article 12(2) of the Implementing Regulation acknowledges that where the decision to entrust the care of an unaccompanied minor to a relative other than the mother, father or legal guardian is likely to cause particular difficulties, particularly where the adult concerned resides outside the jurisdiction of the Member State in which the minor has applied for asylum, there should be cooperation between the competent authorities in the Member States, to ensure that those authorities can decide, with full knowledge of the facts, on the ability of the adult(s) concerned to take charge of the minor in a way which serves his best interests. The Implementing Regulation expressly anticipates that the duration of procedures for placing a minor may lead to a failure to observe the time limits set in Dublin III and there will therefore be cases in which notwithstanding the time limit referred to, the failure to observe the time limits should not necessarily be an obstacle to continuing the procedure for determining the member state responsible or carrying out a transfer.

83. There is nothing in either the Dublin Regulation or the Implementing Regulation to support a claim that the duty of investigation was extinguished once a decision has been made, whether expressly or deemed. It would in our judgment be extraordinary in circumstances where the best interests of a child are a primary consideration, for there to be a strict application of responsibility under Dublin III without any opportunity to revisit the obligations imposed in light of any information that subsequently comes to light. Here, as matters stand, upon a strict application of Articles 22 and 29(1) of the Dublin III Regulation, responsibility for examining the claim for international protection appears to have reverted to the Greek authorities. It would be extraordinary if there was no opportunity for the dialogue between the Member States to continue, so that as required by the legal framework, a decision is reached that acknowledges the best interests of a child as a primary consideration. Article 12(2) of the IR confirms that the fact that the duration

of procedures for placing a minor may lead to a failure to observe the time limits set out, shall not necessarily be an obstacle to continuing the procedure for carrying out the transfer, thereby enabling a transfer to be completed notwithstanding the requirement under Article 29(1) for the transfer to be carried out within six months.

84. If there is, as the applicants appear to claim, no opportunity for any further consideration by the respondent, there was little to be gained by the applicants when their representatives served the DNA reports, in their endeavour to persuade the respondent of their relationship with SH in September 2019. It would be contrary to the best interests of the children and contrary to Article 8(1) and (2) of Dublin III, if, once the UK was deemed to have taken responsibility it was never open to the respondent to contend that transfer to the United Kingdom would not in fact, be in the best interests of the unaccompanied minors. On-going enquiry might reveal that the transfer could be positively harmful to them. The respondent's published guidance provides a non-exhaustive list of useful examples of circumstances in which transfer to the UK would not be in the best interest of children. In ZT (Syria) -v- SSHD, Beatson LJ identified the need to guard against people trafficking as an example of circumstances in which the need for expedition may be outweighed by the need for an orderly process of enquiry.

85. To further illustrate the difficulty with the submission made on behalf of the applicants, the identified family member/relative may, following enquiry that has taken more than two months, be identified as a person who has sexually abused the minor in their home country and poses a significant risk to them, if they were to be in the same country. In such a case, Article 8(1) and (2) would compel the conclusion that the minors should not come to the United Kingdom, regardless of the fact that the United Kingdom is deemed to have accepted the take charge request. Similarly, if after the two-month time limit has passed, it is established that the child is not related to the adult in the UK as claimed, it is unlikely to be in the best interest of the child to be united with that adult in the UK. In our judgment, if as part of the ongoing dialogue, enquiries establish that it is not in the best interests

of the child to be transferred to the UK, it is open to the respondent to reach a decision to that effect. That is entirely consistent with the closing words of Article 8(1) and (2) of Dublin III which establish that the Member State responsible will be that where there is a family member, sibling or relative, "provided that it is in the best interests of the minor".

86. We reject the submission made by Ms Meredith that the respondent's refusals of the TCR on 12th June 2019 and 14th October 2019 were unlawful simply by reason of the deemed acceptance of responsibility. It is apparent the best interests of a child should be a primary consideration of Member States when applying the Regulations. It would be contrary to the best interests of an unaccompanied minor if the simple failure to observe the time limit set out, resulted in no further enquiries, or an end to any on-going enquiry that could, in the end, further the objective of promoting family unity, or conversely reveal information that establishes that the transfer is not in the best interests of the child. In FA & others -v- SSHD Upper Tribunal Judge Frances expressed the view that Article 12(2) of the IR applies in extreme cases where there are best interest reasons for not complying with the time limit. The question is not in our judgement whether there are best interests reasons for not complying with the time limit, but whether there are best interests reasons for not carrying out the transfer. We agree that in this context, where the decision maker is concerned with the best interests of the child, Article 12(2) of the Implementing Regulation does not permit derogation from responsibility save where there is some particularly good reason to do so. In the respondent's published guidance it is said that:

> "... the re-establishment of family links would not be in accordance with section 55, for example, if it is identified that:
>
> • the safety of the child or their family will be jeopardised
>
> • the child has a well founded fear of relevant family members
>
> • the relevant family members are the alleged actors of persecution within the claim for asylum which has not yet been finally determined
>
> • the child is a recognised or potential victim of trafficking in which the family were knowingly complicit

> • the child has shown to have been previously exploited or abused or neglected by their family, or claims to have been previously exploited or abused or neglected by their family and this has not been conclusively discounted"

87. Whilst that is a non-exhaustive list, it does in our judgment illustrate the threshold of severity that must be established before it can be said that the transfer would not be in the best interests of the child. In our judgment, the respondent would need to establish that there is some significant risk to the safety or welfare of the child, such that it cannot be in the best interests of the child to be united with the family member.

The decision of 12th June 2019

88. The respondent's decision of 12th June 2019 was made after consideration of the evidence provided by the Greek Authorities with the email on 8th March 2019. In reaching that decision, the respondent considered the original TCR as well as the additional information submitted. The respondent maintained she was not satisfied the applicants have a relative who is in the UK.

89. The applicants claimed to be the nephews of SH. They are said to be the sons of SH's elder sister. Our attention has been drawn to the relevant material. The respondent has now disclosed the relevant unredacted extracts from the Home Office records held in respect of SH. SH had disclosed the names of his parents and two siblings. In the hearing bundle before us, the applicants have provided their mother's identity documents with an English translation. The identity documents give the names of her father and grandfather. Her father's name as set out in the identity documents, is not the same as the name of SH's father as provided by him and set out in the respondent's records. It was in the circumstances open to the respondent to conclude on 12th June 2019 that the applicants had not established that the applicant's mother and SH are related as claimed and by extension, that SH and the applicants are not related as clamed.

90. Article 8(2) of Dublin III, requires, based on an individual examination, that the minor has a relative who is legally present in the requested Member State. Based upon the material relied upon by the applicants, the respondent was entitled to conclude on 12th June 2019 that the applicants did not have a relative, as defined in Dublin III in the UK. In the absence of an accepted familial relationship, the question of family unity did not arise. In any event, in our judgment a case in which the unaccompanied minor is unable to satisfy the respondent of the claimed relationship is an obvious example in which, notwithstanding deemed acceptance of responsibility, it could not be in the best interests of the unaccompanied minor to be transferred to the requested Member State, such that here, on 12th June 2019 it was open to the respondent to derogate from responsibility.

The respondent's decision of 14th October 2019

91. Following the respondent's decision of 12th June 2019, the applicants provided DNA evidence and on 12th September 2019 the respondent accepted the applicants are related to SH as claimed. On the same day, the respondent notified the Greek authorities that she was satisfied that the relationship between the applicants and SH is as claimed and that "a UK local government authority care assessment is now underway" to aid in the consideration of the child's best interests. In fact, a care assessment was not underway, but had been requested that day. The respondent arranged for a family assessment to be completed by Derby City Council. In her decision of 14th October 2019 refusing the TCR's, the respondent relied upon a significant safeguarding risk and concerns about SH's capacity to care.

92. We have been provided with a copy of the 'Family Assessment' completed by the social worker employed by Derby City Council on 11th October 2019. It appears that a visit was completed by the social worker on 7th October 2019. The checklist completed by the social worker states that SH had informed the social worker that he resides alone, however there was evidence of someone residing in a third bedroom. It is recorded that SH denied this and claimed someone had just left their items of clothing there. The social work noted that SH had informed the Probation

Service that he resides with another person so the rent can be shared. The social worker noted that *"the home conditions were well maintained and of a good standard. Whilst [SH] resides in a large property that could accommodate his nephews, it is not felt that he is being truthful about individuals who also reside with him whom social care would need to complete relevant safeguarding checks on."* SH confirmed he is in regular contact with the applicants in Greece and that he intends to care for them alone. He informed the social worker that he is engaged to a woman currently in Afghanistan, although there was no set date for marriage and he *"generally seemed uncertain about any plans."*. The social worker recorded that SH expressed a wish to care for his nephews but recorded that there are concerns about his capacity to care. The social worker noted SH does not have any prior experience of caring for children or young people and he struggled to identify how he would meet the applicants needs and did not appear to have considered their day-to-day needs and how he would tend to them. The safeguarding/welfare issues are identified as follows:

> "[SH] is known to probation services and he was convicted of grievous bodily harm and possession of a blade in a public place in June 2019. He currently has a suspended sentence order.
>
> He also advises that he resides alone but there was evidence of another person's belongings in the property. Given the nature of his conviction, associates of his could also present risks to young people.
>
> Probation services also advise that his employment history has been unstable questioning his capacity to financially support the young people. He states that he is currently self-employed as a chef and is not in permanent or stable employment."

93. The social worker concluded:

> "There are concerns regarding [SH's] capacity to care for to young people given his violence-related conviction, unstable employment and current living circumstances. At this time, this reunification is not recommended by Derby City Social Care."

94. Having carefully considered the material that was before the respondent when she reached her decision of 14th October 2019 and 5th December 2019, although we acknowledge that there were some concerns regarding the ability of SH to care for the applicants, the matters relied upon by the respondent are not in our judgment

sufficient to outweigh the best interests of the applicants and the overall principle set out in Dublin III of family unity as a binding responsibility criteria. Neither the local authority nor the respondent considered whether it may be appropriate to arrange for short-term local authority care, whilst further enquiries were completed, and arrangements were made for the applicants to live with SH or near to him. It follows that in our judgement, the respondent's decision of 14th October 2019, is a decision that is in breach of Dublin III.

The investigative duty

95. The applicants also submit the respondent's failure to accept responsibility for the applicant's asylum claims in her decisions of 12th June 2019 and 14th October 2019 is in any event unlawful because the respondent failed to comply with her investigative duties. It is said that following receipt of the TCR, the respondent unlawfully confined her investigation to checking the evidence provided with the requests against the Home Office records and failed to consider DNA testing to establish whether the applicants are related to SH as claimed. The applicants also claim the respondent failed to engage with the local authority prior to rejecting the requests contrary to her own published policy.

96. As the Tribunal held in MK, IK -v- SSHD (para 40) the investigative and evidence gathering duties imposed on Member States by the Dublin Regulation are unavoidably factually and contextually sensitive. There, the key to breaking the impasse was DNA evidence to establish the familial relationship between a mother and her daughters: but none was available. The applicants were unable to provide such evidence for a variety of reasons, including, in particular, lack of resources and uncertainties relating to French law. The Tribunal found the SSHD was at all material times in a position to proactively take steps to at least attempt to overcome this impasse. However, the evidence before the Upper Tribunal established that nothing was done by the SSHD.

97. Unlike in MK, IK -v- SSHD, we have been provided with no evidence or reason why the applicants here, could not have secured DNA evidence to establish the relationship between them and SH much earlier. We note the applicants had arrived in Greece in April 2018 and there was a delay of almost 2 months before they registered their claim for asylum there. In his witness statement, SH confirms that he was contacted by HN after they had arrived in Turkey, and from that point on, he has been in regular contact with them. He confirms that he maintained regular contact with the applicants following their arrival in mainland Greece.

98. The GCID records show that after a period of inactivity following the request received from Greece on 31st August 2018, the respondent recalled her records regarding SH on 4th October 2018. On the same day, the GCID records record "undertaking letter sent to UK relative: Yes …". The records show that on 10th October 2018, the Home Office records for SH were examined and there was nothing within those records that established a family link between SH and the applicants. A negative response letter was drafted for approval by a senior caseworker. The negative response was approved on 11th October 2018, but the GCID records also record; "... As a UASC refusal based on insufficient evidence, this case has now entered the British red Cross (BRC) Family Tracing Program. Case forwarded to … to send hold letter to Greece ...". The respondent sent a letter to the Greek authorities on 12th October 2018. In that letter, the respondent requested further information to establish the familial relationship between the applicants and their maternal uncle. By that letter, the applicants were on notice that the respondent required further evidence to demonstrate the claimed family link. We reject the submission by Ms Meredith that the respondent failed to give the applicants an opportunity to address the concerns held regarding the relationship before a decision was made. It was open to them to obtain and submit DNA evidence to establish their relationship with SH, but they did not do so.

99. Ms Meredith referred to the GCID records that have been disclosed by the respondent. She referred us to the entry dated 12th October 2018, in which the

letter of 12th October 2018 sent to the Greek authorities is referred to as a 'Hold letter'. She submits it is now well established that the use of a 'holding letter' in this context is unlawful. Although described as a 'hold letter' in the respondent's GCID records, having considered the GCID records that are referred to in the paragraph above, and the content of that letter for ourselves, we are quite satisfied that it was a letter the respondent was entitled to send to the Greek authorities to establish whether the UK is the member state responsible. Article 8(2) of Dublin III requires an individual examination, that the minor has a relative who is legally present in the requested member state, and that the relative can take care of him or her.

100. In the letter of 12th October 2018, the respondent requested further information to establish the familial relationship between the applicants and their maternal uncle before a final decision was made. Such an enquiry could not be objectional. The respondent had said in that letter that *".. failure to contact the British Red Cross within 15 days will result in the take charge request being considered using only the information that is currently available."*. Although a negative reply had been drafted, it appears the respondent was prepared to delay reaching a decision until 27th October 2018. The respondent was required to reach a decision within two months of receiving the take charge request. Had a decision been reached before 31st October 2018, whether based upon any further information that had been forthcoming or in the absence of further information, there can be no doubt the respondent would have been acting in accordance with Dublin III. The respondent concedes there was no decision upon the request and as we have said, the failure to communicate a decision was not in itself unlawful.

101. There is a further element to the investigative duty that is relied upon by the applicants. That is, the respondent's failure to engage with the local authority until the respondent was satisfied that the appellants are related to SH as claimed. Article 12(1) IR requires cooperation between the competent authorities in the Member States, including cooperation with the authorities or courts responsible for the protection of minors, and for the necessary steps to be taken to ensure that those

authorities can decide, with full knowledge of the facts, on the ability of the adult or adults concerned to take charge of the minor in a way which serves his best interests. That, in our judgment, is part of the investigative duty imposed on member states and applies throughout the consideration of any take charge request. It applies as much to the investigations carried out during the initial two months permitted to reach a decision, as it does to any steps that may be taken by Member States following acceptance of responsibility by default. The respondent's published guidance states:

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

102. The GCID records that we have been referred to, establish the DNA evidence relied upon by the applicants was received by the respondent on 11th September 2019 and it was not until the respondent had accepted the family link, that on 12th September 2019 Derby City Council was approached to complete a family assessment.

103. The failure to engage with the local authority much earlier was in breach of Dublin III and the respondent's published guidance. However, the obligation to take charge did not arise until the respondent was satisfied the applicants had a relative who is legally present in the UK. It was not until 12th September 2019 that the respondent was satisfied that that fundamental requirement was met. Any failure to act in accordance with Dublin III and in accordance with the respondent's published guidance is of no assistance to the applicants until 12th September 2019.

104. Ms Meredith submits that, had the TCR's been accepted when they should have been, the applicants should have been transferred within 6 months of the date of deemed acceptance; by 31st April 2019. The difficulty with that submission is

threefold. First, the respondent was not obliged to accept the Take Charge Requests. There was a duty to make the necessary checks, and the consequence for the respondent of any failure in that duty and the failure to make a decision within two months is that the respondent is deemed to accept the request. Second, as we have already set out, once the respondent was deemed to have accepted the request, it was for the Greek authorities to initiate the consultations needed to organise the transfer. They did not do so, and the applicants did not challenge the failure of the Greek authorities to take steps to transfer the applicants to the UK. Third, it was not until 10th September 2019 that the applicants sent the DNA evidence to the respondent to establish the claimed familial link. The respondent accepted, on 12th September 2019, that SH and the applicants are related as claimed.

105. We are however quite satisfied that if the respondent had acted in accordance with Dublin III and her published guidance, the family assessment would have been completed earlier than 11th October 2019. Absent some particularly good reason to establish that the transfer to the UK is not in the applicants best interests (akin to the examples referred to in the respondent's published guidance) there could not be any reasonable or rational justification for refusing the TCR once the respondent had accepted on 12th September 2019, that SH and the applicants are related as claimed. In our judgement, the respondent has therefore been in breach of the Dublin III Regulation since 13th September 2019.

106. It follows from our finding that the respondent has been in breach of Dublin III since 13th September 2019 and there has been a delay in uniting the applicants with SH since that date. The respondent has throughout relied upon Article 12 of the IR as justification for her decisions. Having acknowledged the relationship between SH and the applicants, and having decided to consider whether the UK remains the Member State responsible, it was not rationally open to the respondent to conclude that transfer is not in the best interests of the applicants and delay the transfer of the applicants to the UK after 13th September 2019.

Article 8 ECHR and Article 7 of the EU Charter of Fundamental Rights

107. The parties have provided the Tribunal with written submissions addressing the applicants' claims under Article 8 ECHR. The applicants submit the respondent's decisions are unlawful and in breach of their right to a family and private life. The applicants submit the evidence before the Tribunal demonstrates that there is family life between the applicants and SH, and the nature and quality of that family life is demonstrated by SH offering significant emotional encouragement and support to the applicants who remain in Greece without family support. They claim the right to private life is in any event engaged between the applicants and SH, and private life is engaged on the individual aspects of each of the applicants physical and moral integrity. They submit the respondent's decisions amount to a disproportionate interference with their family and private life.

108. In ZT (Syria) -v- SSHD Beatson LJ said it is clear that the Dublin regime does not operate to the exclusion of the human rights regime but exists side by side with it. Article 8 of the ECHR provides:

> "Article 8 – Right to respect for private and family life
>
> 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."

109. Article 7 of the EU Charter of Fundamental Rights ("the EU Charter") also provides for the right to respect for private and family life.

110. In addressing the Article 8 claim on both private and family life grounds, we have carefully considered the evidence before us. The applicants are brothers. HN is shown on a Taskira as having been born on 11th June 2002 and is now 17. MN's

Taskira shows that he was born on 18th August 2003 and he is now 16. They were both born in Afghanistan. In her witness statement, Sarah Collier states:

> "The applicants have met their uncle, SH on two occasions when he was visiting Afghanistan from the UK in 2012 and 2014. The applicants were young at the time, but they remember spending time with their uncle and the wider family. SH also told us that he recalls both trips very well. He remembers taking his nephews on various trips to local lakes and rivers, and taking picnics or eating out in restaurants together. He told me that in 2012 he took HN, HN's father, and SH's brother to visit Mazar for a few days. He told me that MN did not come with them as he was too young at the time.

111. Ms Collier states the applicants fled Afghanistan several years ago and travelled through Pakistan and Iran to Turkey, where they remained for over three years. She states they had a very difficult journey to Turkey, which they believe to have taken around 23 days. She states the applicants remained in Turkey for around 3 to 3 ½ years until they were 14 and 15 years old. Ms Collier states that after the applicants' arrival in Turkey, the applicants contacted SH and told him they were in Turkey having fled Afghanistan. After this, they were in regular contact with him. The applicants then managed to arrange their transport through an agent to Greece. That journey was relatively short, only taking a few days but it was extremely traumatic. The applicant arrived on mainland Greece in April 2018.

112. We have also been provided with a witness statement signed by SH on 10th September 2019. He confirms that he is the applicant's maternal uncle and the younger brother of their mother. He confirms that he has been living in the UK since arriving from Afghanistan in March 2002. He confirms that he visited Afghanistan in around 2012 and 2014 and states he "spent a lot of time with the applicants during both visits.". He confirms that he was contacted by HN after the applicants had arrived in Turkey and confirms that he has been in regular contact with them since. He explains:

> "I have kept in regular contact with the applicants since their arrival in mainland Greece and speak to them using WhatsApp and Facebook Messenger on a regular basis. I have provided screenshots of our contact for use in their case. Unfortunately I have not been able to visit them in Greece as my work is extremely busy and I have very little time off for holidays…."

113. Although not before the respondent when she reached her decisions of 12th June 2019 and 14th October 2019, we have been provided with the independent social work summary report prepared by Maria Rooney dated 27th November 2019. She was instructed by the applicants representatives to give an opinion as to the adequacy of the family assessment completed by Derby City Council and whether it would be in the applicants best interests to be placed with SH or in local authority care in the UK, as opposed to their remaining in Greece. She spoke to the applicants by telephone on 26th November 2019. In the summary report, she states:

> "My assessment is that due to [HN] and [MN]'s ages, vulnerabilities and lack of protective factors there are significant safeguarding concerns in regards to their safety, well-being and welfare in their current placement. They are constantly being exposed to inappropriate behaviour in the environment – self-harm, substance misuse and violence, which is placing them both at significant risk of victimisation, child trafficking and Child Criminal Exploitation (CCE) from organised criminal gangs and also Child Sexual Exploitation (CSE). Due to their background/lived experience, ages and vulnerabilities, [HN] and [MN] require a high level of care, support and supervision to ensure their safety and well-being at all times.
>
> It is clearly evident that [HN] and [MN]'s current placement is not suitable or able to promote their safety and welfare and meet their needs. I have significant safeguarding concerns in regards to their safety, well-being and welfare in this placement. They have been resident in this inappropriate accommodation in Greece for almost 2 years and both are suffering from mental health and physical health problems as a result."

114. Maria Rooney concludes:

> "[HN] and [MN] are two highly vulnerable young people with *(sic)* have suffered significant trauma, neglect and abuse. As a result of this they are now suffering from emotional and mental health difficulties where they are not receiving the appropriate care, treatment and emotional support which they require. They are currently placed in extremely unsuitable, unsafe and volatile conditions. They would benefit greatly from the love, care and attention of their uncle who is trying his hardest to enable his nephews to return to his care. I am sure that with a safe, consistent and stable home environment accompanied with a high level of emotional support from their uncle, that [HN] and [MN]'s transition back home to their uncle will be a successful and positive move for all involved."

115. We also have before us the Psychiatric assessments of the applicants carried out by Dr Batsheva Habel. The reports of Dr Habel refer to the applicants' family and early history and their experiences following their departure from Afghanistan.

They are said to have witnessed distressing scenes, including seeing dead bodies by the side of the road and being forced to work very long hours for very little money in poor conditions. The aspect of the history which caused much distress to both applicants was their recounting of MN's experience of being separated from HN in Turkey. HN is described as being heartbroken by the state of his brother when they were reunited. HN witnessed his brother fall off the back of a moving vehicle and MN has experienced a significant assault at his accommodation in Greece.

116. Although there is no formal diagnosis of PTSD, Dr Habel expresses the opinion that HN presents with symptoms of trauma and having experienced the trauma and virtually fulfilling a diagnosis of PTSD, has placed him at increased risk of developing other emotional disorders. HN is diagnosed as suffering from prolonged depressive reaction, which describes a mild depressive state occurring in response to a prolonged exposure to a stressful situation but of a duration not exceeding two years. The severity of the depressive illness is said by Dr Habel to be mild to moderate.

117. MN is said to fulfil the criteria for a diagnosis of PTSD which will have placed him at an increased risk of developing other emotional disorders and experiencing serious mood symptoms associated with PTSD. Dr Habel expresses the opinion that there is evidence that MN has experienced a deterioration in his mood linked to the delays in his reunification with his uncle. Dr Habel considers the reaction to the delay in decision-making can be characterised as one of the adjustment disorders and due to the number and severity of symptoms they would be best understood under the diagnostic category of 'Major Depressive Disorder'.

118. Dr Habel notes that both applicants have experienced a large number of potential stressors from early on in their life that would be considered as traumatising for a child of their age. The multiple and chronic nature of the traumas make it difficult to clearly apportion causation.

119. We also have before us a witness statement made by Sarah Danby, the manager of the Sindos Community Centre, in Greece, setting out her concerns about the mental and physical well-being of the applicants. She believes the education provision for the applicants, as it is, is inadequate and the ongoing delay is impacting upon their physical and mental health. She believes the applicants are not living in a safe, stable or healthy environment that is suitable for two vulnerable teenage boys.

120. In considering the Article 8 claim we have considered the decision of the House of Lords in Razgar, v SSHD [2004] UKHL 27. The first issue for us to consider is whether the applicants enjoy family life within the meaning of Article 8(1) with SH. Ultimately, the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case. The question is highly fact sensitive. In Kugathas -v- SSHD [2003] EWCA Civ 31, at [14], Sedley LJ cited with approval, the Commission's observation in S v United Kingdom (1984) 40 DR 196: "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.". There is no presumption that a person has a family life, and the Tribunal must consider a range of factors that are relevant. Such factors include a consideration of matters such as the family members with whom the individual has lived, identifying who the direct relatives and extended family of the appellant are, the nature of the links between them, the age of the applicants, where and with whom they have resided in the past, and the forms of contact they have maintained with the other members of the family with whom they claim to have a family life.

121. The notion of 'family life' extends to other relationships including relationships, as here, between the applicant and their uncle, provided that sufficiently close links in the form of demonstrable interest, commitment and dependency is established. In Kugathas, the Court of Appeal held that there must be real, committed or effective support between the family members, and 'neither blood ties nor the concern and

affection that ordinarily go with them are, by themselves or together', sufficient to be called 'family life' in the Article 8 sense.

122. The respondent now accepts the applicants are related to SH as claimed. On the evidence before us we do not accept that the evidence is sufficient to establish 'family life' in the Article 8 sense, but we do accept, as Ms Meredith submits, the relationship that has developed between the applicants and SH forms part of their private life. In AA -v- UK [2011] ECHR 1345, the ECtHR said:

> "49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having "family life". However, it is not necessary to decide the question given that, as Article 8 also protects the right to establish and develop relationships with other human beings and the outside world and can sometimes embrace aspects of an individual's social identity, it must be accepted that the totality of social ties between settled migrants and the community in which they are living constitutes part of the concept of "private life" within the meaning of Article 8….Thus, regardless of the existence or otherwise of a "family life", the expulsion of a settled migrant constitutes an interference with his right to respect for private life. While the Court has previously referred to the need to decide in the circumstances of the particular case before it whether it is appropriate to focus on "family life" rather than "private life", it observes that in practice the factors to be examined in order to assess the proportionality of the deportation measure are the same regardless of whether family or private life is engaged (Üner, cited above, §§ 57-60)."

123. SH has lived in the UK since March 2002. That is before either of the applicants were born. We have no evidence of any communication between SH and the applicants at all between 2002 and 2012. At its highest, the evidence before us is that SH visited Afghanistan in 2012 and again in 2014. There is no evidence before us as to the length of time that SH spent in Afghanistan on each of those occasions, and where he lived. The evidence of SH is that he recalls taking various trips with the applicants on both visits, to go and see lakes and rivers nearby, to go on picnics, and to visit other cities. He also recalls taking the applicants out for meals in local restaurants. He recalls that during the visit in 2012, he took HN, his father and SH's brother on a trip to the city of Mazar for a few days. HN would have been 10 in 2012 and 12 in 2014 when his uncle visited Afghanistan. MN would have been 9 in 2012 and 11 in 2014. As Ms Collier states in her statement, the applicants were

young at the time, and SH will undoubtedly have spent time with the applicants during those two visits, when SH visited his elder sister.

124. From the account set out in the witness statement of Ms Collier and SH, it is reasonable to conclude that the applicants left Afghanistan in or about 2015. They were about 12 and 13 years of age at that time. They had spent their lives living with their parents and immediate family in Afghanistan, with some very limited contact with SH. The applicants appear to have arrived in Turkey in or about early 2015, and they appear to have maintained contact with SH via social media but there has been no direct face to face contact between them.

125. That in our judgement is insufficient to establish a family life between the applicants and SH. However, the evidence before us regarding the on-going communication between the applicants and SH and the support that he provides to them in the hope that they will be united in the UK so that he can care for the applicants is such that we are satisfied that there is evidence of a protected private life within the meaning of Article 8. The delay in completing the transfer of the applicants to the UK has consequences of such gravity as to engage the operation of Article 8.

126. Here, we are concerned with entry to the United Kingdom and the ability to take up private and family life here. The ultimate question is whether there has been an unjustified lack of respect for private and family life and the focus should be on whether, in the light of the positive obligations on the UK, there has been a failure to act in the particular circumstances of the case. An interference with right to respect for private life will be in breach of Article 8 of the Convention unless it can be justified under paragraph 2 of Article 8 as being "in accordance with the law", as pursuing one or more of the legitimate aims listed and as being "necessary in a democratic society" in order to achieve the aim or aims concerned.

127. Once the existence of family or private life in the UK is established its character and intensity affects the proportionality of the proposed interference with it. In ZT

(Syria) Beatson LJ, referred, at [65], to the decisions in Sen v The Netherlands (2003) 36 EHRR 7, Tuquabo-Tekle v The Netherlands application 60665/00 [2006] 1 FLR 798 , and Mayeka v Belgium (2008) 46 EHRR 23, that show that a state can owe a positive duty under Article 8 of the ECHR to admit persons to its territory for family reunification. He went on:

> "… They also show that the extent of that obligation varies according to the particular circumstances of the persons involved and the general interest, and that in cases involving children the best interests of the child are a primary consideration in the proportionality exercise."

128. We are satisfied the delay in transferring the applicants to the UK amounts to an interference with the right to a private life. We have carefully considered the evidence before us regarding the quality and nature of the relationship between the applicants and SH as set out in the witness statements and reports before us. An individual's physical and moral integrity are important aspects of their private life and we have carefully considered the impact that the delay in the transfer is having upon the physical and moral integrity of the applicants, as set out in the report of the independent social worker and the psychiatric assessments. Article 8 requires States to desist from steps which would have an adverse impact upon the individual's mental health and there is at least some evidence that the ongoing delay is impacting upon the applicants' mental health.

129. We have already found that the respondent's failure to agree the transfer of the applicants to the UK was in accordance with Dublin III until 12th September 2019, but it was not rationally open to the respondent to delay the transfer of the applicants to the UK after 12th September 2019. It is uncontroversial that the interference is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country.

130. We must therefore consider whether the interference is proportionate to the legitimate public end sought to be achieved. The strength of the relationship and the private life is a relevant consideration in any assessment of proportionality. For

the reasons we have already set out earlier in this decision, the obligation to take charge did not arise until the respondent was satisfied the applicants have a relative who is legally present in the UK. That was not until 12th September 2019. The assessment of proportionality is entirely fact specific. There are a number of factors that lead us to the conclusion that the failure to transfer the applicants to the United Kingdom before 12th September 2019 was not disproportionate to the legitimate aim, but was disproportionate thereafter.

131. First, the respondent's failure to formally accept responsibility for the applicants' asylum claims or to communicate a decision within 2 months of receiving a request was not of itself a breach of Dublin III. The consequence was that the respondent was 'deemed' to accept responsibility. Second, having accepted responsibility by default, it was for the Greek authorities to initiate the consultation needed to organise the transfer, but they did not do so. Instead, both Member States continued to communicate with a view to establishing the familial relationship. Third, the obligation to take charge did not arise until the applicants had established a familial link with SH and until that relationship had been established it was open to the respondent to maintain that transfer to the United Kingdom is not in the best interests of the children. However, once the applicants had established the familial relationship and the respondent was satisfied that that fundamental requirement was met, in the absence of evidence establishing that it is not in the best interests of the applicants to be united with SH, the failure to agree the transfer of the applicants to the United Kingdom amounted to a disproportionate interference with the Article 8 rights of the applicants.

132. It follows that in our judgement, the respondent's failure to accept transfer of the applicants to the UK as of 13th September 2019 was in breach of Article 8 ECHR and Article 7 of the EU Charter of Fundamental Rights.

133. In light of our findings and conclusions set out in this decision, the matter will now be listed for a resumed hearing for the Tribunal to determine the issue of damages.

134. We invite the parties to agree an order reflecting our decision. We are minded to make a declaration that the respondent's decision to refuse the transfer of the applicants to the UK since 13th September 2019 has been in breach of Dublin III and Article 8 ECHR, and, is unlawful. The parties should seek to agree any consequential orders. In the absence of an agreed order within 7 days, the Tribunal will determine the appropriate order when this decision is handed down. In default of an agreed order, the parties are directed to provide the Tribunal with a draft of the order they invite the Tribunal to make, no less than 48 hours before the hearing, together with their written submissions in support.

Postscript

135. In responding to the embargoed version of this judgment, the respondent sought to raise the case of Abbas v SSHD [2017] EWCA Civ, 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.