Case No: JR/482/2021(V)

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

15th September 2021

Before:

UPPER TRIBUNAL JUDGE JACKSON

- -

Between:

THE QUEEN
on the application of
AA (by his litigation friend RA)

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

Ms R Chapman and Eva Doerr
(instructed by Bindmans LLP), for the Applicant

Mr S P G Murray
(instructed by the Government Legal Department) for the Respondent

Hearing date: 3rd August 2021

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J U D G M E N T

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Anonymity Direction

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Applicant or any family members. This direction applies to,

amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Judge Jackson:

1. This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by video, using Teams. There were no audio or visual difficulties during the course of the hearing. A face to face hearing was not held to take precautions against the spread of Covid-19 and as all issues could be determined by remote means. The file contained the papers in hard copy, with two supplementary documents being available electronically during the course of the hearing.

2. The Applicant challenges the decision of the Respondent dated 26 February 2021 to refuse to accept a take charge request ("TCR") made by the Republic of Greece pursuant to Article 17.2 of EU Regulation 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (the "Dublin III Regulation").

3. The Applicant claims to be a stateless Bidoon from Kuwait with a date of birth of 15 April 2003, who sought to join his elder brother (the "Sponsor") in the United Kingdom and to have his asylum claim determined here. The Sponsor lives here with status as a refugee together with his wife and another brother. The Applicant claims to have fled Kuwait in December 2019, arriving on the island of Samos in Greece on or around 12 December 2019 and his asylum claim was registered there on 15 June 2020 (although he was seen earlier by the authorities there) as an Iraqi national with a date of birth of 1 October 2000. Following his asylum interview on 30 November 2020, the Applicant's nationality has been amended to show his claim to be stateless, but the Greek authorities have not accepted the Applicant's claimed date of birth in 2003, a matter which remains in dispute.

4. The TCR request was made under Article 17 of the Dublin III Regulation, which provides as follows:

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

    2. *The Member State in which an application for international protection is made and which is carrying out the process of determining the Member State responsible, or the Member State responsible, may, at any time before a first decision regarding the substance is taken, request another Member State to take charge of an applicant in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural*

> *considerations, even where that other Member State is not responsible under the criteria laid down in Articles 8 to 11 and 16. The persons concerned must express their consent in writing.*
>
> *The request to take charge shall contain all the material in the possession of the requesting Member State to allow the requested Member State to assess the situation.*
>
> *The requested Member State shall carry out any necessary checks to examine the humanitarian grounds cited, and shall reply to the requesting Member State within two months of receipt of the request … A reply refusing the request shall state the reasons on which the refusal is based.*
>
> *Where the requested Member State accepts the request, responsibility for examining the application shall be transferred to it.*

5. The Dublin III Regulation ceased to have effect in the United Kingdom on 1 January 2021 by virtue of regulation 54 and paragraph 3(h) of schedule 1 of the Immigration, Nationality and Asylum (EU Exit) Regulations 2019; albeit paragraph 9 of the same provided for transitional provisions to allow considerations of TCR requests made prior to 1 January 2021 which were still awaiting determination at that date. It is important to note that the transitional provisions do not make any provision for a new TCR request, request for reconsideration of or actual reconsideration of a refusal of a TCR request made on or after 1 January 2021.

6. To determine this application for Judicial Review, it is necessary to consider in some detail the evidence that was before the Respondent at the time of the decision, as well as evidence which is available to the Upper Tribunal in the course of this application for Judicial Review, which includes evidence which existed at the date of decision but was not before the Respondent and evidence which post-dates the decision. I set this out below, including the detail of the decision under challenge and the Respondent's pre-action response.

Evidence before the Respondent at the date of decision

7. In the decision letter dated 26 February 2021, the Respondent states that the following evidence submitted alongside the TCR was considered and/or is expressly referred to in the decision:
   - UK Sponsor's bank statement, his tenancy agreement, his residence permit, his GBR passport.
   - Family photo.
   - The Applicant's Memorandum and Social Report dated 17 December 2020.
   - Sponsor's written consent dated 23 December 2020.
   - Extract from response from the Greek authorities dated 28 January 2021 as to the Applicant's age.
   - Completed form from the Sponsor dated 22 January 2021.

- Money transfer receipts dated 19 October 2020, 11 December 2020, 28 January 2021 and 26 August 2020.

8. The decision letter includes multiple references to a family photo, but only one has been included with the papers in this application for Judicial Review, which shows three individuals, in submissions said to be the Sponsor, the Applicant and their sister (whose face has been blacked out). There is no further identification of those in the photograph and no details as to when or where it was taken.

9. In the written statement of Mr A Tomlinson dated 26 May 2021 and made on behalf of the Respondent, paragraph 6 provides additional confirmation of the documents and evidence available to the decision maker at the time of the decision dated 26 February 2021 as follows:

> *"6. To assess the relationship between [the Applicant] and [the Sponsor], the original decision maker would have had access to all the documentation that was received with the TCR which had been e-mailed by the Greek Authorities on 30 December 2020 (email and TCR now produced as AT1). That being: [the Applicant's] written consent (dated 23 December 2020 – now produced as AT20, [the Sponsor's] written consent (dated 23/12/2020, which is at page 19 of R/B), the memorandum from the [Applicant's] Greek lawyer (page 72 of the Applicant's bundle), [the Applicant's] "Praksis" social report dated 17/12/2020 which is at page 16 of R/B), a eurodac form for [the Applicant], [the Sponsor's] bank statements, [the Sponsor's] tenancy agreement, a picture of [the Applicant], contact details for [the Sponsor], [the Sponsor's] residence permit, [the Sponsor's] ID card, a family photo, [the Sponsor's] statement of evidence form relating to his asylum application, a birth certificate for HRA, a birth certificate for AA (dated 25/04/2019), [the Sponsor's] curriculum vitae, HA's residence permit, and HA's EDF energy account information."*

10. The 'Memorandum' is a document dated 21 December 2020, written by Romanos Stivaktakis, an authorized lawyer in Greece who is the Applicant's legal representative there. This document describes the Applicant as a stateless Bidoon from Kuwait, of Arab ethnicity, Muslim and an unaccompanied minor "*registered to be born on 01/10/2000, but his real date of birth is the 15/04/2003"* and due to his statelessness he does not possess any document. The Applicant's family in Kuwait was set out, together with confirmation that two of his brothers arrived separately in the United Kingdom and have residence here as a refugee and on the basis of family reunification. The Applicant did not have any contact with the Sponsor from when he left Kuwait in 2014 until after the Applicant had arrived in Greece in 2019.

11. The memorandum refers to the Applicant being falsely registered as an adult by the Greek authorities, despite his declaration of his real age. There is reference to the Applicant having appealed the decision of his age assessment because of *"gaps and deficiencies during the procedure in hospital and he is still waiting for the response"*. The author of the

memorandum is the same author of the grounds of appeal submitted to the Greek authorities in relation to the age assessment, but no further detail in relation to this is set out within the memorandum.

12. The memorandum sets out the Applicant's experiences in Kuwait, as well as his poor living conditions in Greece, with the Applicant being identified as vulnerable as a victim of torture. It is stated that the Applicant's older brother in the United Kingdom has sufficient resources to cover the Applicant's needs and is ready to do anything to take care of the Applicant, stating that: *"Their will is to reconnect again with their brother, who really is in need of them to continue his life, as he is a minor person, that has never learnt to support himself"*. The document goes on to state: *"In this particular case, the person of concern is a minor, he has been living in a nomadic way for all of his life. He has been always supported by his brother, who he considers as a parent. … In fact, his family in the United Kingdom is capable of providing adequate care, with proven family relations. The strong supportive network that is provided in the United Kingdom, creates ideal conditions for a minor like [the Applicant] to live properly and it is to his best interest to reunite with them."* Family reunification was considered to be imperative and in the best interests of the Applicant.

13. The memorandum lists the names and dates of births of two family members who are recognised refugees (including the Sponsor) and listed nine documents submitted in support; some, but not all of which have been included with the bundle available in this application for Judicial Review. The documents include the interview of the Applicant's brother by the UK Home Office in 2016, in which he states his family status and attention is drawn to the lack of official documents available as the family are stateless Bidoons; that there may be some discrepancy in names and surnames and specifically, question 8 of the interview with the Home Office is highlighted in which it is said that the familial link is identified. This document was not available until during the course of the substantive hearing before me. As indicated in the memorandum, the Applicant's brother at question 8 identifies his family in Kuwait, as: *"Mum and dad, four brothers and one sister, and my wife still in Kuwait"*. None of the family members are identified by name nor by any other features such as age or date of birth.

14. The 'Social Report concerning A' dated 17 December 2020 is written by Theodoraki Elisavet, a care worker at Praksis, which I am told is an NGO in Greece. The report is written in such a way as to imply that the author had interviewed the Applicant, but no details are set out as to what communication there had been with him (or anyone else about him, for example, it is unknown if there had been any contact with the Sponsor) or on what basis the assessment and conclusions contained in the report are based.

15. In the Social Report, the Applicant is described as a stateless Bidoon from Kuwait who entered Greece on 12 December 2019, whose date of birth is 15 April 2003 (falsely registered with birthdate of 1 October 2000). The report refers to support from the Sponsor in Kuwait after their father's

health deteriorated and provides a general description of life in Kuwait for the Applicant and his family as well as difficulties there from authorities. The report also describes conditions in Greece for the Applicant and states that he has not been given proper support or evaluation by authorities there. In conclusion, the author states that it is in the best interests of the Applicant to be reunited with the Sponsor in an environment with safety and services for well-being, development and success. The Sponsor is the only person identified in Europe that can take this responsibility for the Applicant and there is an urgent need for reunification and support as the Applicant's stay in Samos is leading to a deterioration in his condition.

16. On 18 January 2021, the Respondent contacted the London Borough of Brent as follows:

> *"… No specific action is requested by your Local Authority at this time, however, should you hold any evidence to assist in verifying the claimed family link or possess any other information that you believe should be considered when assessing this application please do forward this within 14 days. Additionally should you possess alternative contact details or if there is another local authority who may have responsibility/an interest in the case please advise us as soon as possible. The European Intake Unit will contact you further should it be satisfied that the claimed family link has been demonstrated.*
>
> *At this point we will request completion of a Family Assessment on the UK relative which will assist with the best interests consideration and the decision on this application."*

17. On 20 January 2021, a reply confirmed that neither the Applicant nor the Sponsor were known to Brent Social Care so no evidence was held to assist in verifying the claimed family link, nor was any other information possessed that should be considered when assessing the application.

18. The documents included the written consent form completed by the Applicant for the purposes of the TCR which identified him as stateless with a date of birth of 1 October 2000.

Respondent's decision dated 26 February 2021

19. The decision letter sets out that a formal TCR has been made for the Applicant, a Kuwaiti Bidoun born on 1 October 2000, who claims to have a brother residing in the United Kingdom who he wishes to join. As above, the letter sets out the evidence that has been considered which was submitted with the TCR and the evidence subsequently available to the decision maker following further inquiries.

20. In relation to the Applicant's age, the decision letter states that an e-mail was sent the Greek authorities on 26 January 2021 to confirm his date of birth, to which a response was received on 28 January 2021 stating: *"the applicant's date of birth is 1/10/2000. The applicant mentioned in his*

registration that he was born in 15/4/2003 instead, but then an age assessment took place and the results that came out stated that he was above 18 years old. The lawyer of the applicant has made an appeal for the age assessment results but the decision is still pending until today."

21. This information was accepted by the Respondent without any further inquiry, it therefore being considered that the Applicant was born on 1 October 2000 and was an adult at the time of the decision.

22. The decision letter then details further information sought from the Sponsor in the United Kingdom on 18 January 2021, the response on 22 January 2021 and further request for evidence to be submitted on 26 January 2021 which the Sponsor complied with on 30 January 2021 by submitting money transfer receipts and a family photo. The Respondent did not accept that the undertaking letter or further evidence confirmed the claimed familial link.

23. Before concluding that the TCR has been rejected, the substantive consideration of the additional documents and application was as follows:

> *"In addition to the other information submitted above, you have also provided a Social report. It is noted in the Social report that the Applicant is vulnerable with suicidal tendencies and thoughts. However, the relations between the Applicant and the UK Sponsor has not been verified and on the evidence provided it is not clear how he is dependent on the assistance of the UK Sponsor or if indeed the UK Sponsor would be able to provide the necessary care for the applicant if he was to be transferred to the UK.*
>
> *Nonetheless it is also considered that even if the relationship had been established it is not deemed that the circumstances of the case would lead to an exercise of discretion on the part of the UK.*
>
> *When considering whether an exercise of discretion would be appropriate consideration has been given to the below, a non-exhaustive list of relevant considerations;*
> - *Whether or not the family life existed in the country of origin*
> - *Existence of other family members in country of origin/elsewhere and level of contact*
> - *Strength of ties*
> - *Level of contact between the parties since time UK Sponsor left country of origin*
>
> *The money transfer receipts submitted by the UK Sponsor have been considered. However, it is noted that the UK Sponsor arrived in the UK in December 2015. Hence, it is concluded the four money transfer receipts do not demonstrate that the UK Sponsor has been financially supporting the Applicant. It is noted one of the money transfers took place two days after the UK Sponsor was emailed to request evidence of his link to the Applicant.*

> *As no further evidence has been offered by the UK Sponsor and in line with the consideration of the claimed family link detailed above the familial connection has not been established and as such the requirements of Article 17(2) have not been met."*

Pre-action correspondence

24. On 30 March 2021, a pre-action protocol letter was sent on the Applicant's behalf seeking withdrawal of the decision dated 26 February 2021 and acceptance of the TCR from Greece. The letter set out proposed grounds of challenge against the decision, the detail of which need not be set out within this decision.

25. The Respondent replied to the pre-action correspondence on 13 April 2021, in which the relief sought was rejected. Within the letter, the Respondent confirms that following a review of all the evidence available, she was satisfied that the familial link between the Sponsor and the Applicant had been established. This is explained further in the written statement of Mr A Tomlinson dated 26 May 2021 which at paragraph 10 explains that when the file was reviewed, it was noted that the Sponsor had made a statement in relation to a family reunification request for another brother in which the Appellant (as well as other family members) were named. This information was held on the Sponsor's Home Office file and used to verify the familial link. A copy of the statement and translation was provided by the Respondent during the course of the substantive hearing before me.

26. In pre-action correspondence, the Respondent maintained the rejection of the application under Article 17.2 on the basis that the documents provided with the TCR were not sufficient to exercise discretion. On this point, the letter included the following:

> *"… (ii) Home Office Guidance, Dublin III Regulations outlines that situations in which it is appropriate to exercise discretion under Article 17(2) are rare and occurs on exceptional basis. … There must be present exceptional circumstances or compassionate factors which justify the UK authorities to exercise discretion in accepting responsibility for the claim, notwithstanding that the UK is not bound to do so under the Dublin III Regulation. The evidence provided (or received) must be coherent, verifiable and detailed. It is for the requesting Dublin State to demonstrate what the exceptional circumstances are. The SSHD maintains that the facts of this case do not lead to an exercise of discretion. Whilst it is accepted that the degree of relationship between your client and the UK sponsor would not automatically preclude them from the Dublin Regulation III it is not evidenced that there was a close relationship between the Claimant and UK Sponsor and that this relationship had existed prior to the application date. The SSHD maintains that this has not been evidenced fully in this case."*

27. In the pre-action correspondence, the Respondent gave express consideration to the fact of the Applicant's appeal against his age

assessment and stated that respect had correctly been given to the Greek Authorities' age assessment pending the appeal.

28. In relation to the Respondent's investigative duty and Article 8 of the European Convention on Human Rights, matters which were both challenged by the Applicant in pre-action correspondence, the Respondent stated:

> *"… (iv) … It is accepted that the SSHD's investigative duty does extend further than checking and verifying information which is why she conducted her own evidence gathering exercise. An undertaking letter was sent to the UK Sponsor and returned to the European Intake Unit on 22 January 2021. On 26 January 2021 an email was sent to the UK Sponsor asking for them to provide any further information and evidence to support the case. A reply to this email was received from the UK Sponsor on 30 January 2021. The SSHD has cross-checked the evidence available to her and established that the family link has been corroborated. The fact that the SSHD was unable to be satisfied Article 17.2 had been met from the evidence gathered from this exercise does not lead to the assumption that her investigations were inadequate … rather, it simply illustrates that the criteria of Article 17.2 was not met."*
>
> *"… (v) Whilst it is accepted that there is clearly an intersection of Article 8 ECHR with the application of the Dublin Regulation III, in order to engage Article 8 ECHR (or Article 7 CFR) there must be elements of dependency involving more than the 'normal emotional ties' as outlined in Kugathas. … Although it is accepted there may be some degree of emotional ties, and natural concern between your client and the UK Sponsor, it has to be taken into consideration the UK Sponsor has been residing in the United Kingdom since 2015, and although evidence of four money transfers have been provided dating back to September 2020, they only cover a very small timeframe. The evidence does not demonstrate that they have been in contact throughout the past years, or to any appreciable degree generally. Further, these money transfers alone do not demonstrate that the claimant is dependent on the UK Sponsor involving more than 'normal emotional ties'. …"*

Further evidence not before the Respondent at the time of the decision under challenge

29. In the course of this application for Judicial Review, further documents have been disclosed which existed at the time of the decision under challenge but were not submitted with the TCR or separately to it and were not before the decision maker at the time of decision; and additional documents which post-date the decision under challenge which are relied upon by the Applicant. These are, broadly set out in chronological order, as follows:

30. An information note from the Greek authorities dated 13 May 2020 which confirms the Applicant is vulnerable as a person who has been subjected to torture, rape or other forms of psychological, physical or sexual violence for the requirements of reception and identification procedures. The Applicant's nationality as declared and presumed is listed as Iraqi and his date of birth is recorded as 1 October 2000.

31. A 'Lodging Application Form' dated 15 June 2020, which records the Applicant as Iraqi/stateless, with Kuwait as the country of former habitual residence and a date of birth of 01/10/2000 (15/4/2003). The form states that the Applicant wishes to join his brother in London; that he has two brothers there and his parents, one sister and three brothers remain in Kuwait.

32. A decision by the Greek authorities to refer the Applicant for establishment of juvenile status, dated 17 June 2020. The Applicant was identified therein as an Iraqi national with a date of birth of 10 October 2000, but who stated in his registration form a date of birth of 15 April 2003; such that a reference was made to Samos General Hospital for the purpose of establishing the Applicant's real age.

33. A Deed of establishment of the age of an applicant for international protection, dated 18 November 2020, in which it is stated that the Applicant is over 18 years old and therefore an adult.

34. The transcript of the Applicant's asylum interview with the Greek authorities, dated 30 November 2020, in which the Applicant is referred to as Iraqi with a date of birth of 1 October 2020, but in which the Applicant states that he was born on 15 April 2003 and wants to join brother in UK.

35. The Applicant's age assessment appeal submitted on 11 December 2020, in which detailed reasons are given as to why it is said the age assessment is not correct. These include that there were no reasons for decision or doubt as to Applicant's age; the legal procedure for assessment was not followed, only a stage 3 dental x-ray was undertaken which is not reliable; procedural guarantees were not adhered to, for example, no guardian was appointed; and the reception and identification procedures were not completed within time limit of 25 days.

36. A Medical card created on 12 December 2020, which is referred to in other documents but no copy of the same has been included within this application for Judicial Review and it was not before the Respondent at the time of the decision under challenge.

37. A decision by the Greek authorities to change basic particulars with which the Applicant has been registered, dated 22 December 2020; which changed his nationality from Iraqi to stateless and listed Kuwait as his country of former habitual residence.

38. A psychological report in respect of the Applicant from Praksis dated 16 March 2021. This report sets out the Applicant's situation and concerns as to his presentation, which include indicators of PTSD, anxiety, possible intellectual disability and a concern that the Applicant has not been responsive to support. The report concludes with a recommendation that the Applicant be moved to a protected and stable environment to live, ideally close to persons from his family, which will give him a feeling of security to enable his mental health to recover, away from the RIC where evidently the psychological dysphoria and the accompanying symptoms worsen. It was stated that it was vital for psychological support to be provided.

39. Blood test results for the Applicant dated 4 April 2021.

40. The Applicant made a written statement in support of this application for Judicial Review on 7 April 2021 in which he describes his living conditions in Greece and encloses further documents. These included an expert medical opinion dated 10 March 2021 from the Greek authorities in which the Applicant is identified as suffering from anxiety attacks and accompanying behaviour disorders owing to physical disability (stammering) and because of which he is subjected to severe intimidations by other migrants and attacked. It is stated that the Applicant is in Samos without any relatives. The Applicant's needs are identified as (i) social services to intervene to assist in relation to living conditions; and (ii) Buspirone 10. The further exhibits include translations only of an undated A & E report for difficulty with breathing; treatment for acute bronchitis; picture of medication and what looks like an undated prescription.

41. The Sponsor also made a written statement in support of this application for Judicial Review on 7 April 2021. He stated that in Kuwait, his father stopped working when the Sponsor was around 21 years old, following which he worked to provide for the family. The Sponsor fled Kuwait in 2014 and has been in the United Kingdom since 2015. The Sponsor sends money to the Applicant and tries to speak to him every day, as well as working with the Applicant's solicitors to get him to UK. The Sponsor is worried about the Applicant and his conditions in Greece.

42. A written statement from Rachel Harger of Bindman's solicitors dated 7 May 2021 which was primarily in support of an application for interim relief in these proceedings but which contains information as to the Applicant's conditions in Greece and deterioration in his mental health and well-being.

43. A written statement from Efthymia Stathopoulou of Refugee Legal Support dated 13 July 2021 in which she sets out her role and assistance to the Applicant.

44. A written statement from May Bulman, journalist, dated 30 July 2021. Ms Bulman first had contact with the Applicant on 6 May 2021 to interview him for a story about his case, following which an article was published on 8 May 2021. The written statement details what the Applicant had

told her of conditions in Greece and what the Sponsor had told her about his concern for the Applicant's welfare.

45. A psychiatric report on the Applicant by Dr D L Bell dated 29 July 2021. In the report, Dr Bell reviews the evidence provided to him in relation to the Applicant and sets out details of his own interview with the Applicant conducted on 19 July 2021. These included the Applicant's current living conditions in Greece and his current physical and psychological presentation, as well as deterioration in his condition. The report includes a very detailed assessment and analysis of the same with a clear diagnosis and conclusion. Dr Bell considers that the Applicant suffers from severe psychiatric disorder with symptoms of PTSD which include pervasive anxiety, sleep disturbance, nightmares typical of traumatic disorder, volatility of mood including surges of unmanageable rage, panic attacks, marked noise sensitivity, typical hyper alerting and hypervigilance, intrusive memories, claustrophobia and marked social isolation. The trauma includes a number of major traumatic events over a period of at least three years and the Applicant remains in a very damaging environment which constitutes further continuous trauma. As such, Dr Bell considers that PTSD is not an appropriate diagnosis, a more appropriate one is complex-chronic traumatised state.

46. Dr Bell also finds that the Applicant shows typical features of Severe Depressive Disorder and that he has very limited emotional and cognitive resources with the possibility of a significant degree of learning disability which it is not currently possible to assess. This is in addition to the Applicant's speech impediment which causes severe difficulties not only in the Applicant being able to express himself but also a psychological impact which would have interfered with the Applicant's emotional and psychological development. Dr Bell identifies that the Applicant is at a high risk of self-harm and suicide.

47. Without quoting more extensively from the detailed report, the following passage gives a clear impression of the overall assessment by Dr Bell and the severity of the situation for the Applicant:

> *"I have assessed around 400 traumatised refugees. I would regard the severity of [the Applicant's] disorder as being in the top 5% of all those I have examined. I have described above that [the Applicant] is frequently incontinent of urine when suffering severe anxiety or panic attack – this is a measure of the degree of terror and the psychological unmanageability of his situation. Urinary incontinence is common in very young children who are stressed and therefore this symptom must be taken as a marker of the presence of severe emotional and psychological immaturity, that is in my view he functions as a young child. This very immature level of functioning results from a combination of his already limited resources combined with the impact upon him of his current context.*
>
> *Psychiatrists sometimes use a word 'catastrophic reaction'. This is a word I have hardly ever used in my assessment of cases.*

However, it would be appropriate to describe [the Applicant's] state as a catastrophic reaction to the combination of the traumatic events he has suffered and his current highly prejudicial psychological environment.

Again it needs to be borne in mind that the trauma is ongoing.

Psychological disorders such as this are exquisitely sensitive to the social and environment context. Given the very highly psychological prejudicial situation in which he finds himself, (that is the daily terror that he lives in), it is clear to me that there will be no recovery from this disorder, as long as he remains in this environment. This is the case regardless of any treatment he can be provided with, that is I do not consider that pharmacological treatment will have any impact upon this disorder. This is due to the severity, complexity and ongoing effect of the environmental context – that is fact that the major stressors responsible for preventing recovery and causing deterioration are ongoing.

A further major factor is the fact of being separated from his brother. His older brother [the Sponsor] has functioned in the past as a parent to him – and that parental function continues.

Some friendly support, perhaps from a counsellor, may be of some very limited benefit but this should not be considered 'treatment'.

If he remains in his current context his condition will continue to deteriorate."

48. Finally, there is a written statement from Mr A Tomlinson dated 26 May 2021 on behalf of the Respondent setting out the information available and decision making in this case. The detail of this statement is referred to as needed elsewhere within this decision.

Grounds of challenge

49. The grounds of challenge are, as at the hearing before me (having been recast most recently in the skeleton argument on behalf of the Respondent, narrowing the grounds from those originally claimed), in summary, as follows:

    (i) that the Respondent irrationally failed to take account of material considerations in her decision to refuse the TCR on 26 February 2021, namely (i) the Applicant's best interests and his vulnerabilities (specifically his history of trauma, arbitrary detention and torture, suicidal ideation and speech impairment) when considering the exercise of discretion, as set out in the social work report dated 17 December 2020 (despite reference to this being made in the decision letter); and (ii) the fact that the Applicant had submitted an appeal against his age assessment in Greece;

(ii) that the Respondent unlawfully fettered her discretion under Article 17 of the Dublin III Regulation when considering whether despite the familial link not being accepted, discretion would not in any event be exercised based on factors which do not correlate either to the terms of Article 17 or the Respondent's own guidance;

(iii) that the Respondent has failed to adequately comply with her investigative duties and breached her own policy in (i) failing to give the Applicant any meaningful opportunity to address any concerns prior to rejecting the TCR; (ii) failing to interview the Applicant or the Sponsor; (iii) failing to obtain an assessment from the local authority prior to rejecting the TCR which could have assisted in establishing the familial link; and (iv) failing to comply with her obligations to assess and treat the Applicant's best interests as a primary consideration;

(iv) that the Respondent's decision is in breach of Article 8 of the European Convention on Human Rights and Articles 7 and 24 of the Charter of Fundamental Rights; both in terms of the procedural safeguards in relation to family reunification and as a matter of substance as a disproportionate interference with the Applicant and Sponsor's right to respect for family life.

50. It is noted at the outset that the Charter of Fundamental Rights has ceased to have any application within the United Kingdom and will not therefore expressly be considered further in this decision. In substance, in any event, it has not been suggested that consideration of Articles 7 and 24 of the Charter of Fundamental Rights would in substance be any different to or materially add to the consideration of the Applicant's claim under Article 8 of the European Convention on Human Rights.

Ground 1

51. This ground of challenge falls in to two distinct parts, the first as to whether the Respondent has taken into account the Applicant's best interests and vulnerabilities and the second whether the Respondent has taken into account the Applicant's age and dispute in relation to that in Greece. The Applicant's best interests would of course only be relevant if he was accepted as being a minor.

52. In oral submissions it was also initially suggested that the Respondent failed to take into account evidence of the familial link between the Applicant and the Sponsor, specifically, the Sponsor's asylum interview record which was provided with the TCR request. However, once that document had been made available during the course of the hearing, it was apparent that it did not in any event identify the Applicant by name and only went so far as to state that the Sponsor had four brothers and a sister in Kuwait; such that it was of no material assistance in verifying any familial link in any event.

53. The Respondent's decision letter dated 26 February 2021 refers to the social work report, but it is submitted that the nature of the reference, immediately followed by a statement that the familial link has not been verified and reference to dependence and care, shows that the contents of the social work report have not in fact been taken into consideration in a possible exercise of discretion. There was no requirement for any level of dependency for the purposes of the exercise of discretion and the Respondent would be under a duty to investigate the Sponsor's ability to provide care (if anything beyond the evidence already provided by him was required).

54. In the circumstances where the Respondent has now accepted the familial link, Ms Chapman submitted that the exercise of discretion pursuant to Article 17.2 of the Dublin III Regulation is required. Specific reliance was placed on the evidence showing that there was clear dependency by the Applicant on the Sponsor, that the Sponsor had previously acted in loco parentis in Kuwait and it was in the best interests of the Applicant to be reunited with the Sponsor.

55. In relation to the age assessment, the skeleton argument on behalf of the Applicant set out a number of matters in paragraph 20.2.1 in relation to the substance (or otherwise) of the age assessment undertaken by the Greek authorities which it is said, together with background evidence about such assessments indicating that they are not taken lawfully in Samos in particular, should have been taken into account by the Respondent but were not. These matters included a lack of justification for the age assessment in the first place; that the prescribed procedure was not followed in that only a dental examination was undertaken (without involvement or assessment by any paediatric doctor, psychologist or social worker) which is not a reliable method of age assessment; that procedural guarantees for minors were breached (in that no guardian was appointed, the Applicant was not fully informed of his rights and the presumption of minority was breached); and there were delays in the reception and identification process such that the assessment was completed nearly a year after the Applicant's arrival in Samos.

56. As is clear from the factual history and evidence set out above, these matters relied upon in the grounds of challenge were not before the Respondent at the time of the decision. The information was much more limited to (i) the written consent form and TCR request, which both identified the Applicant's date of birth as 1 October 2000; (ii) the memorandum and social work report which both identified the Applicant's date of birth as 15 April 2003, the memorandum noting registration with a different, incorrect date, but without any further explanation; and (iii) the correspondence between the Respondent and the Greek authorities quoted in the decision letter which refers to an age assessment which has been appealed by the Applicant.

57. The Applicant's appeal against his age assessment was made on his behalf on 11 December 2020, prior to the submission of the TCR, by the same lawyer acting for him in Greece as prepared the memorandum

submitted with the TCR. The matters of substance raised in the appeal were known and had been identified by the Applicant and those acting for him in Greece at the time of drafting the memorandum and the TCR and could therefore have been included in the information prepared for that. There is no explanation as to why that was not done. Further, there was also no explanation as to how the date of birth of 1 October 2000 was initially registered for the Applicant's asylum claim. Ms Chapman indicated in her submissions that this and the initial registration of the Applicant as an Iraqi national arose from his use of a false identity document, but that is not in evidence before me and there is nothing to indicate that has ever been in evidence before the Respondent either.

58. In oral submissions, the focus of this ground of challenge shifted to matters covered predominantly in ground 3 as to the Respondent's investigative duty and compliance with the Respondent's guidance, which to the extent that those relate to the age assessment, I deal with them here for convenience.

59. Ms Chapman placed specific reliance on the Respondent's Guidance – 'Assessing Age' version 4.0 published 31 December 2020, which on page 43 under the heading 'Age assessments by European Union member states' states:

> *"Where it has been identified that a European Union (EU) member state has conducted an age assessment on a claimant whose age is doubted by the Home Office, you should request through the applicable British Embassy/High Commission that a copy of the age assessment is provided to the Home Office. There are currently no standardised processes for conducting age assessments within the EU, the weight to be assigned to age assessments conducted by EU member states is not standardised and, therefore, must be judged on its individual merits in accordance with the guidance within this instruction.*
>
> *In all cases, local authorities must be made aware of relevant information that supports or casts doubt on the claimed age in age dispute cases as soon as possible."*

60. Ms Chapman submitted that the Respondent was aware that there was a dispute as to the Applicant's age, the TCR having been submitted on the basis that he was an adult but the Applicant claiming to be a child means that this guidance applied such that the Respondent should have made a request for a copy of the age assessment. If this had been done, it would have been clear that the age assessment was conducted only on the basis of a dental examination, such that appropriate weight should have been attached to it as a flawed assessment which was not *Merton* compliant. Ms Chapman went so far as to submit that in every case where an Applicant disputed his age, the Respondent was required to make enquiries in relation to the age assessment conducted, without more.

61. It was further suggested that the Applicant's vulnerability, speech impediment and fact that he was illiterate should have also prompted the Respondent to request further details about the age assessment, although no specific basis for this submission was identified.

62. The Respondent's treatment of the Applicant as an adult led to a failure to take into account his best interests as a child and his vulnerabilities; which it was submitted should in any event have been considered in the alternative. There was evidence of vulnerability available which as above, remained relevant regardless of whether the Applicant was a minor or not. If the Applicant was, or was treated as a minor, this would trigger the requirement for a best interests assessment and also trigger the requirement for further inquiries of the local authority which would have been appropriate even before the familial link was established. The approach made to the local authority in Brent was, it was submitted, insufficient in accordance with the decision in R (on the application of Safe Passage International) v Secretary of State for the Home Department [2021] EWHC 1821 (Admin) on the facts of this case as it did not request any specific action to be taken to assist with consideration of the TCR, either as to assessment of suitability or to assess the claimed familial link. Although it was accepted on behalf of the Applicant that it was not in every case that a full assessment should be requested, on the facts of this case it was required and the delay in doing so was unlawful.

63. The Respondent's position is, in summary, that she has taken into account all relevant material in the decision under challenge; which expressly refers to the memorandum and social work report, noting the Applicant's vulnerabilities and suicidal ideation; as well as the fact that there was an appeal against the age assessment by the Greek authorities. The ground of challenge is said to amount to no more than disagreement with the consideration of this evidence by the Respondent and the fact that the circumstances were not sufficient to warrant the exercise of discretion. That was a decision which was rationally and lawfully open to the Respondent to make on the evidence available, the exercise of discretion being rare and only in exceptional circumstances.

64. Mr Murray emphasised in oral submissions the documents and evidence which were before the Respondent at the time of the decision under challenge; which included very limited evidence of the claimed family link, lack of evidence of contact and support from the Sponsor and lack of any detail as to the age assessment. The Applicant has been unable to show any failure to take into account material considerations and there could be no realistic expectation of the decision maker being aware of or seeking any of the background evidence relied upon in this application for Judicial Review.

65. In relation to the age assessment, the Respondent had made further inquiries of the Greek authorities and was entitled to rely on the assessment of another Member State in the absence of any good reason not to do so and it was not perverse or irrational to do so. The Dublin III Regulation encompasses the expectation that one Member State can rely on an assessment made in another. The Respondent's guidance on age

assessment is directed to caseworkers in the United Kingdom in relation to individuals within the United Kingdom and within this context, the passage relied upon by the Applicant is of only limited relevance.

Ground 2

66. On behalf of the Applicant it is submitted that on the facts of this case, in particular the closeness of the relationship between the Applicant and the Sponsor, supported by evidence in the memorandum and social work report which formed part of the TCR; any proper consideration required the Respondent to exercise discretion and accede to the TCR request under Article 17.2.

67. Ms Chapman submitted that the factors listed by the Respondent in the decision letter as those taken into account for the exercise of discretion are not on all fours with the terms of Article 17.2 itself which are only humanitarian grounds with reference to family or cultural considerations. There is no requirement for dependency or care, which could in any event have been satisfied on the evidence or through investigation by the local authority had they been asked to do so. Further, the factors listed in the decision letter have no basis in the Respondent's guidance on Dublin III, which on page 26 states only as follows:

> *"Where an Article 17(2) request is received from another Dublin State, caseworkers should consider whether there are any exceptional circumstances or compassionate factors which may justify the UK exercising discretion and accepting responsibility for the claim, notwithstanding that the UK is not bound to do so under the Dublin III Regulation. There may be exceptional circumstances raised by the evidence submitted with the request from the other Dublin state which would result in unjustifiably harsh consequences for the Applicant or their family relations. It is for the requesting Dublin State to demonstrate what the exceptional circumstances or compassionate factors are in their case: the evidence submitted with the request to exercise discretion must be coherent, verifiable and detailed in line with the Dublin III Regulation's general provisions on evidence.*
>
> *Each request must be decided on its individual merits. However, situations in which it would be appropriate to exercise discretion will be rare and on an exceptional basis. In considering whether or not to exercise discretion caseworkers should act consistently with the Immigration Rules and policies on family members, for example the Immigration Rules Appendix FM – Family Members."*

68. On the basis of the wording of Article 17.2 and the guidance quoted above, Ms Chapman submitted that it was difficult to tell where the factors in the decision letter come from as they do not correspond with either. The Respondent failed to consider, as required, whether there were exceptional circumstances, compassionate factors or unjustifiably harsh consequences and therefore failed to apply her own guidance and that amounts to an unlawful fettering of her discretion.

69. In relation to this ground of challenge, the Respondent reiterates the submissions already made in relation to the first ground of challenge which overlaps with this to an extent – the decision-maker considered all the relevant factors and came to a conclusion on the evidence and the exercise of discretion applying the correct test which was lawfully open to her to make.

70. Mr Murray submitted that the non-exhaustive list of factors in the decision letter as to the exercise of discretion were simply a logical extension of the consideration of the Applicant's family circumstances and not a fettering of the discretion in Article 17.2 of the Dublin III Regulation. The factors taken into account properly reflected the guidance on consideration of a TCR and the decision was taken in that context.

Ground 3

71. The skeleton argument on behalf of the Applicant identifies four areas in which the Respondent is said to have failed to comply with her investigative duties in (i) failing to give the Applicant any meaningful opportunity to address any concerns prior to rejecting the TCR; (ii) failing to interview the Applicant or the Sponsor; (iii) failing to obtain an assessment from the local authority prior to rejecting the TCR; and (iv) failing to assess and treat the Applicant's best interests as a primary consideration.

72. The written submissions in support of these four areas however only included in any detail submissions on (iii) to the extent that the Respondent failed to act in accordance with her own guidance for an initial notification to the local authority as soon as possible inviting them to provide any information they hold to allow a decision to be taken on the familial link and failing to implement in the guidance, the revision to it proposed by the President of the Upper Tribunal in paragraphs 78 to 81 of R (on the application of BAA) v Secretary of State for the Home Department (Dublin III: judicial review; SoS's duties) [2020] UKUT 00227 (IAC) for the guidance to be compatible with Article 8 of the European Convention on Human Rights and Article 7 of the Charter of Fundamental Freedoms.

73. Following disclosure of the correspondence between the Respondent and the London Borough of Brent, the Applicant claims that the Respondent has failed in her duty identified in that correspondence to request an assessment if a family link is established following that being subsequently accepted.

74. In relation to the third ground of challenge, in oral submissions, the Applicant relied specifically on the Respondent's guidance on Dublin III which at page 27 states as follows:

> *"If the person in the UK is an asylum seeker, refugee, a British citizen having previously granted asylum, or has been granted leave in any*

other capacity, the Home Office file must be obtained, and you must consider any family information it contains. This must be cross-referenced against the evidence submitted in support of the transfer request to identify and help determine whether or not you are satisfied that the relationship is genuine."

75. There is nothing to indicate in the present case that the decision-maker followed this guidance and checked the Sponsor's Home Office file for information to verify the familial link; such that the Respondent failed to follow her own guidance and her investigative duty. The fact that this was later done in the course of pre-action correspondence is not sufficient. If the information which was later used to verify the family link was available before the decision was made on 26 February 2021, then the Respondent's contact with the local authority would have been of a different nature and a full safeguarding assessment would have been requested and undertaken upon which an informed assessment of the exercise of discretion would have been taken when determining the TCR. Such an assessment is mandatory once the familial link has been accepted; although Ms Chapman accepted this was only the case if the Applicant was accepted as or treated as a minor.

76. There were also two documents, a medical card dated 12 December 2019 and an RIC note which were referred to in the TCR request but not provided to the Respondent with it; which Ms Chapman submitted the Respondent was required as part of her investigative duty to request. It was not however identified how this evidence specifically was material either to the assessment of the familial link, the Applicant's age or the overall exercise of discretion.

77. As above, the Respondent's position in relation to the age assessment is that appropriate inquiries were made to the Greek authorities and she was entitled to proceed on the basis that the TCR request was properly made under Article 17.2; taking into account the appeal against the age assessment.

78. The Respondent does not accept that she was under any duty on the facts of this case to contact the Applicant or the Sponsor to address any concerns before a decision was made on the TCR. The primary role of the Respondent is said to be to examine the evidence provided and in any event, sought further evidence from the Sponsor following receipt of the undertaking letter which specifically requested further evidence as to the link between the Applicant and the Sponsor; which indicated at that point the material required to establish the claim.

79. In relation to inquiries with the London Borough of Brent, the Respondent contacted them on 18 January 2021, with a reply received that no information was held. On the facts of this case, there was no further investigation required and there were nothing to suggest that the local authority could have undertaken any further investigation to establish the familial link in circumstances where they held no information on either the Applicant or the Sponsor. Any further request would have

likely involved unreasonable delay to the Respondent being able to make a decision on the TCR.

Ground 4

80. The Applicant seeks to rely on a corresponding breach of Article 8 of the European Convention on Human Rights and Articles 7 and 24 of the Convention on Fundamental Freedoms; duties which exist alongside the Dublin III Regulation and not subsumed or replaced by it The Applicant specifically relies on the positive obligation under Article 8 for a state to admit persons to its territory for family reunification, as acknowledged by the Court of Appeal in ZT (Syria) v Secretary of State for the Home Department [2016] EWCA Civ 810, with a particular emphasis for applications by minors and unaccompanied minors to ensure the rapid examination of any application for reunification.

81. The Applicant's claim is that he was a minor at the material time and was not therefore required to demonstrate dependency to share family life with the Sponsor, but in any event, even if he was an adult, he was a young and vulnerable person (with evidence supporting the submission that the Applicant was not functioning in accordance with his chronological age, on either date of birth) such that a fact specific approach was required to determine whether family life exists between the Applicant and the Sponsor; which is established on the facts in this case. Although Ms Chapman accepted that there was no evidence of any contact between the Applicant and the Sponsor between the latter leaving Kuwait in 2014 and the former arriving in Greece in late 2019; family life had not been broken during this time particularly when considering that the enjoyment of this had been interrupted for asylum reasons.

82. The Applicant and the Sponsor are stateless, unable to return to Kuwait and therefore family life could not be enjoyed anywhere other than in the United Kingdom. In circumstances where the Applicant is in a dangerous and insecure situation in Greece, the refusal to admit him to the United Kingdom for an indefinite period constitutes a disproportionate interference with his right to respect for private and family life. Ms Chapman placed emphasis on the most recent evidence from Dr Bell as to the Applicant's current circumstances and difficulties, risks to the Applicant and his very poor prognosis without being reunited with his brothers in the United Kingdom.

83. Ms Chapman accepted that in all but the most exceptional circumstances, Article 8 could not be relied upon in the absence of a breach of Dublin III, but the two are not equivalent and both can be argued; albeit in practice there may not be very much difference in the applicable threshold. Where Article 8 is said to add to this application for Judicial Review, is the consideration of the facts as at the date of hearing. Ms Chapman submitted that it is open to the Upper Tribunal to remake the Article 8 proportionality assessment if there is an error in the decision under challenge and family life is accepted to engage Article 8(1) of the European Convention on Human Rights.

84. The Respondent relies on the Court of Appeal's decision in R (on the application of FWF) v Secretary of State for the Home Department [2021] EWCA Civ 88 that even where a Member State acted unlawfully in discharging its obligations under the Dublin III Regulation, it did not follow that that unlawfulness was also a breach of Article 8 of the European Convention on Human Rights and absent very exceptional circumstances, Article 8 could not be relied upon to supplement, or to increase, the rights given to an individual under the Dublin III Regulation. Mr Murray submitted that the Applicant's Article 8 ground of challenge can not succeed as a separate challenge and the evidence post-dating the decision could only be relevant if the decision entailed a human rights refusal, and only if the original decision was unlawful on that basis could the Upper Tribunal reconsider the position as at the date of hearing.

85. In any event, the Respondent's position is that Article 8 of the European Convention on Human Rights is simply not engaged on the evidence available in this case. The Applicant has not been accepted as a minor and therefore, as an adult sibling, would need to show elements of dependency involving more than normal emotional ties in accordance with Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31. The only evidence of dependency in the present case was four money transfers within a short period of time, including one after the Respondent requested further evidence. Further, there was no evidence of any ongoing relationship between the Applicant and Sponsor between 2014 and 2019 (in fact, the Applicant stated in his asylum interview that there had been no contact whatsoever in this period). Even if the Applicant was a minor at the time of application, he ceased to be so two days after the familial link was accepted in the pre-action correspondence.

Discussion – grounds 1 to 3

86. The first three grounds of challenge relied upon by the Applicant overlap and/or are inter-twined, with a number of the specific grounds being predicated on positive findings on behalf of the Applicant in relation to his familial link with the Sponsor and/or his age. For example, the references to best interests assessment and local authority assessment are to a significant extent dependent on the Applicant being accepted as a minor at the date of decision, or at the very least, the Respondent erring in treating him as an adult at that time. For these reasons, I deal first with these two key issues as to family link and age before moving on to the more specific grounds of challenge.

87. In relation to the Applicant's age, I do not find any error in the Respondent's treatment of him as an adult for the purposes of deciding the TCR, it was entirely lawful, rational and reasonable for her to do so on in all of the circumstances.

88. I do not find that the Respondent's guidance on 'Age Assessment' is directly applicable to consideration of a TCR within the context of Dublin

III nor does it assist the Applicant's claim for the following three reasons. First, the guidance is expressly written principally for caseworkers to set out the policy and procedures that must be followed when an asylum seeker or migrant claims to be a child and their claimed age is doubted by the Home Office or vice versa. It is evidently directed to the situation where a person has made a claim for asylum in the United Kingdom, which the Applicant has not, unless and until his TCR is accepted. Further, the Applicant is not present in the United Kingdom for the majority, if not all of the procedures contained within the guidance to be followed in respect of him and any claim made. Although the guidance states that the general substance of it can equally be applied to other persons subject to decisions under the immigration acts and rules, there is no specific mention of Dublin III cases. The fact that there is reference within the guidance to age assessments conducted in other member states does not per se indicate any relevance or application of the guidance to consideration of a TCR.

89. Secondly, the part of the guidance specifically relied upon by the Applicant is in relation to seeking information such that a person who is undertaking an age assessment in the United Kingdom can consider the weight to be attached to an age assessment conducted in another member state given there is no standardised process for doing this within the EU. On its face, the guidance is to ensure that all relevant information supporting or casting doubt on the claimed age is available as soon as possible. This is not on all fours with the task of the Respondent when considering a TCR, which on the Applicant's case would require a decision maker to request details of the age assessment made by another member state to determine whether that assessment is accepted as valid or not, thereby requiring the Respondent to make her own decision as to the Applicant's age but without being able to follow the usual procedures for doing so and in a vacuum of other relevant evidence. Even if the Respondent did not accept the Greek authorities' age assessment, it would remain the case that the Applicant's age is disputed and it is entirely unclear as to how the Respondent could be expected to resolve that dispute in the circumstances of this case.

90. Thirdly, such an approach would be directly contrary to the Respondent's guidance 'Requests made to the UK under the Dublin III Regulation prior to the end of the Transition Period', version 1.0 dated 31 December 2020 (the "Respondent's guidance on Dublin III") which at page 24 states: *"UK practice is not to conduct age assessment on cases before they are transferred to the UK as the child is not within the UK's jurisdiction."* The guidance goes on to state that once a person is transferred to the United Kingdom, they will be allocated to be processed and age assessed if needed.

91. In the present case, the Respondent was aware of a dispute as to the Applicant's age which was apparent on the face of the documents contained within the TCR, albeit with no detail as to how the dispute arose or the substance of it; and made further inquiries with the Greek authorities in relation to it. There was no failure to take this information or the fact of the appeal into account and no requirement, in accordance

with the Respondent's guidance on age assessment or otherwise, to investigate the matter further. The Respondent could not have taken into account the substantive reasons for the Applicant's appeal against the age assessment as these were not provided to her with the TCR request (even though the Applicant's lawyer in Greece drafted the memorandum in support of the TCR and had also only very shortly before submitted the age assessment appeal on his behalf as well such that this information could have been included), nor is there any basis for suggesting that she should have been aware of or researched the background information submitted with this application for Judicial Review about age assessments in Greece and on the island of Samos in particular. Those were matters which were simply not before the Respondent at the time of the decision and even if they were, the situation would be as above that the Applicant's age is disputed with no practical or realistic way that the Respondent could be expected to resolve the dispute to decide the TCR.

92. On the evidence available to the Respondent at the date of decision, there was no rational basis to do anything other than to give respect to the age assessment undertaken by the Greek authorities. To do otherwise would have in substance required the Respondent to undertake her own age assessment in circumstances where the usual procedures for doing so could not have been complied with as the Applicant was not in the United Kingdom and would likely have delayed a decision on the TCR. The Applicant has not identified any basis for such a requirement to be placed on the Respondent generally or on the facts of this particular case. In all of the circumstances, it was open to the Respondent to assess the TCR on the basis that the Applicant was an adult with no public law error in doing so.

93. On this basis, there is no merit to any of the Applicant's grounds of challenge that rely on the Applicant being a minor, including the Respondent failed to assess or take into account his best interests as a child in accordance with the duty under section 55 of the Borders, Citizenship and Immigration Act 2009 or the 'Every Child Matters' guidance thereunder which applies the spirit of this extra-territorially and that the Respondent failed to make a request to the London Borough of Brent for a full safeguarding assessment which Ms Chapman accepted would only be relevant if the Applicant were a minor.

94. In relation to the Applicant's claimed familial link to the Sponsor, this was initially rejected by the Respondent on the basis of a lack of sufficient information and evidence to verify the same; but later in pre-action correspondence was verified and accepted. The primary challenges in relation to this as set out in the grounds of challenge and skeleton argument were that (i) the Respondent had sufficient information submitted with the TCR to establish the familial link (namely the statements from the Applicant and Sponsor, with specific reliance on the Sponsor's asylum interview record from 2016 in the United Kingdom) and (ii) the Respondent's failure to make any further inquiries with the London Borough of Brent or request a full assessment by them which may have assisted with establishing the familial link as well as

information which could inform the exercise of discretion under Article 17.2 more generally.

95. The information submitted with the TCR that was before the Respondent in relation to the familial link was very limited and extended essentially only to statements by the Applicant and the Sponsor, repeated in the memorandum and Social Report (but without any suggestion of any investigation or assessment of the familial link by the author of either). As above, the Sponsor's asylum interview record did not contain any specific family information to link him with the Applicant; stating only that he had parents and siblings in Kuwait.

96. Annex II of Implementing Regulation 118/2014 specifies the elements of proof and circumstantial evidence that the requesting member state should submit in support a TCR on the basis of family unity provisions within the Dublin III Regulation. The Respondent sets this out on page 26 of the Respondent's guidance on Dublin III, listing the documents required to confirm a familial link for a TCR as (i) written confirmation of the information by the other Dublin State; (ii) extracts from registers; (iii) residence permits issued to the family member; (iv) evidence that the persons are related, if available; (v) failing this, and if necessary, a DNA, or blood test (this is not essential but an applicant may choose to submit such evidence at their own expense). In addition, the guidance identifies circumstantial or indicative evidence that may be submitted with a TCR, including (i) verifiable information from the applicant; (ii) statements from the family members concerned; (iii) statements or information from the authorities with responsibility for the child in the requesting Dublin State; and (iv) reports or confirmation of the information by an international organisation such as UNHCR, International Committee of the Red Cross or Save the Children.

97. The evidence before the Respondent submitted with the TCR was limited, did not clearly fall within the categories or types of evidence expected and was not added to in any material way by the evidence submitted by the Sponsor when further evidence of familial link was requested from him or from the response from the London Borough of Brent, who held no information on either the Applicant or Sponsor.

98. As identified in BAA, there are likely to be circumstances in which information from the relevant local authority, deriving from direct engagement with the Sponsor in the United Kingdom, will inform the making of the Respondent's decision as to the existence of a familial link and the exercise of discretion; but it is not the case that the Respondent is required to seek a full assessment from the local authority (see paragraphs 78 to 81 in particular) in every case. In particular, the Respondent may be satisfied that the relevant local authority assessment could not possible cast any relevant light on whether the alleged family relationship exists. Although this point is not expressly referred to in the decision letter or the Respondent's evidence, it is very difficult to see what more could have been obtained from a further request to the London Borough of Brent (beyond the initial inquiry on 18 January 2021) in circumstances where they held no information about

the Applicant or the Sponsor; where further inquiries had also been made of the Sponsor in the United Kingdom and only limited documents provided in response; and where the Applicant was legally represented in Greece with the preparation of a social report there.

99. On the facts of this case, I do not find that the Respondent breached any investigative duty to request a fuller assessment by the London Borough of Brent; nor do I find that there was anything irrational or perverse in the conclusion that the familial link had not been established on the basis of evidence submitted with the TCR and subsequently by the Sponsor.

100. The secondary challenge in relation to the familial link only emerged in Ms Chapman's oral submissions during which reliance was placed on the Respondent's guidance on Dublin III requiring the Respondent to obtain the Home Office file for the Sponsor and consider any family information it contains, cross-referencing it against the evidence submitted with the TCR. This part of the guidance had not previously been referred to or relied upon at all in the grounds of challenge, amended grounds of challenge or skeleton argument submitted shortly before the substantive hearing and there is no good reason for this not having been raised before the hearing. However, given the strong merit of this point and in circumstances where there was no objection on behalf of the Respondent to this point being raised only during the hearing, I deal with it as part of the claim.

101. Mr Tomlinson's written evidence was that the familial link was verified and established at the time of the pre-action correspondence by reference to a statement made by the Sponsor on his Home Office file in connection with his sponsorship of a TCR and/or application for family reunification in respect of his other brother who now resides with him in the United Kingdom. There is nothing in the evidence to suggest that this Home Office file was sought or considered by the original decision maker in accordance with or as required by the Respondent's guidance on Dublin III. There is also nothing to suggest that if this had been done at the time, the familial link would not have been verified and accepted as it subsequently was on the basis of this information available to the Respondent.

102. In these circumstances, it can only be concluded that the Respondent failed to follow her own guidance on Dublin III set out at page 27 to obtain the Sponsor's Home Office file and cross-reference the information contained therein to the evidence submitted with the TCR. The Respondent therefore erred in rejecting the TCR on the basis that the familial link had not been established, in circumstances where she failed to verify the claim in accordance with Home Office records available to her.

103. In the decision under challenge, the Respondent considered in the alternative whether this was a case in which discretion would have been exercised if the familial link had been established and refused it also on this basis. That refusal was maintained in pre-action correspondence following acceptance of the familial link. In these circumstances and in

combination with the decision above as to the age dispute, the failure to follow the guidance to establish a familial link at the time of the TCR decision could only be material if there was also a public law error in the refusal to exercise discretion considered in the alternative. I do not accept the submission on behalf of the Applicant that the subsequent acceptance of the familial link automatically required a fresh consideration of the exercise of discretion.

104. The Applicant challenges the exercise of discretion under Article 17.2 in the alternative in the decision letter on the basis that (i) the Respondent has failed to take into account the Applicant's vulnerabilities (specifically his history of trauma, arbitrary detention and torture, suicidal ideation and speech impairment); (ii) the Respondent has fettered her discretion by making the decision by reference to a list of factors which do not correlate with the terms of Article 17 or the Respondent's own guidance on this, including requiring a level of dependency between the Applicant and Sponsor; and (iii) the Respondent has failed to undertake any investigation through the local authority as to the Sponsor's ability to provide the necessary care for the Applicant. The final point is however not relevant on the basis that the Applicant was not accepted to be a minor at the date of decision.

105. The Respondent's decision letter expressly refers to the memorandum and social report, noting the Applicant is considered to be vulnerable with suicidal tendencies and thoughts; such that it can not be said that this evidence has not been considered at all; the Applicant's case is that it has not been properly considered or given sufficient weight given that the claim had already been rejected for failure to establish the familial link (at that time) and because the decision letter immediately proceeded to refer to a lack of dependence and provision of necessary care if the Applicant were to be transferred to the United Kingdom.

106. In the Respondent's pre-action correspondence, it was maintained that the facts of this case do not lead to an exercise of discretion, with reference to the lack of evidence of any close relationship between the Applicant and the Sponsor and that this relationship existed prior to the application.

107. The evidence before the Respondent as to the relationship at the date of decision (and as at the stage of pre-action correspondence) was limited to relatively brief statements from the Applicant and Sponsor, repeated in the memorandum and social report about the Sponsor previously supporting the Applicant and other family members in Kuwait when their father became ill and current contact most days since the Applicant had been in Greece (but with no telephone records or documentary evidence of contact); the Sponsor's willingness to support the Applicant and evidence of available accommodation; four money transfer receipts between October 2020 and August 2020; and statements that the Applicant and Sponsor had had no contact at all between the Sponsor leaving Kuwait in 2014 and the Applicant arriving in Greece in December 2019.

108. On behalf of the Applicant, it has been repeatedly submitted that there was clear evidence of a close relationship and of dependence by the Applicant on the Sponsor; but this has not been made out on the evidence outlined above. Whilst there was some evidence of contact and support, it could not properly be described as clear or comprehensive. It was rationally open to the Respondent to consider this evidence in the way that she did and conclude that there was a lack of evidence of a close relationship or relationship existing prior to the TCR request.

109. Overall, contrary to the grounds of challenge, I find that the Respondent has taken into account the evidence before her as to the Applicant's vulnerabilities, conditions in Greece and relationship with the Sponsor when considering the exercise of discretion; with no failure to take any relevant material into account. The real issue in this case is whether those matters have been weighed appropriately.

110. Article 17.2 refers only to a request to take charge of an applicant *"... in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations ..."*. There are no specific criteria or particular factors listed beyond the reference to family or cultural considerations and it is accepted that Article 17.2 permits a very wide discretion challengeable on normal public law grounds.

111. The Respondent's guidance on Dublin III refers to situations in which it would be appropriate to exercise discretion being rare and on an exceptional basis. There are references to exceptional circumstances which would result in unjustifiably harsh consequences for the applicant or their family relations, or compassionate factors; supported by coherent verifiable and detailed evidence. Finally, the guidance refers to caseworkers needing to act consistently with the Immigration Rules and policies on family members, including Appendix FM.

112. The list of factors considered within the decision letter are expressly stated to be a non-exhaustive list and although they do not refer to humanitarian grounds, they are a logical and reasonable list of factors to assist in considering 'family considerations'. The evidence on humanitarian grounds had also already been referred to earlier in the decision letter with express reference to the memorandum and social report. The references to dependency and care are relevant to a potential application of Article 8 and are also in accordance with the guidance to caseworkers that the exercise of discretion under Article 17.2 should be undertaken consistently with the Immigration Rules, which on the facts of this case, would most likely be those in relation to adult dependent relatives. Whilst the factors are not squarely on all fours with the wording of Article 17.2 or the Respondent's guidance on Dublin III; they are factors which relate to matters contained within both and do not indicate any fettering of discretion.

113. Taking into account all of these factors in relation to the evidence, the requirements of Article 17.2 itself and the Respondent's guidance in relation to it; as against the substance of the decision letter under challenge; I do not find that the Respondent has failed to take into

account any relevant considerations; has taken into account irrelevant considerations; has fettered her discretion; or has reached an irrational, unreasonable or perverse decision overall in refusing to exercise discretion when considering this in the alternative to the family link being established. As such, I find no public law error on conventional grounds in the exercise of discretion contained in the decision under challenge. That is so even when taking into account the error in concluding that the familial link had not been established, given that even if this had been accepted at the date of decision, it is far from clear that this would have had any impact on the exercise of discretion. In particular I take into account that as the Applicant was lawfully treated as an adult, there would have been no further requirement for the Respondent to request the local authority to undertake a safeguarding assessment; nor would the acceptance of the familial link have otherwise changed the nature of the evidence available or investigation required.

114. The only remaining parts of the first three grounds of challenge which have not otherwise already been dealt with in the decision above are the first two parts of ground 3 as to whether the Respondent has complied with her investigative duties when assessing the claim, as to whether the Applicant should have been given a meaningful opportunity to address any concerns prior to rejecting the TCR and/or whether the Applicant or Sponsor should have been interviewed prior to the decision. The remaining parts about the level of request to the local authority and assessment of the Applicant's best interests have already been considered above. These were matters which were not developed in any detail either in the Applicant's skeleton argument or in oral submissions.

115. The Respondent's primary role in assessing a TCR is to consider the evidence submitted with it; which in the present case included evidence directly from the Applicant and the Sponsor; a memorandum and social report prepared on behalf of the Applicant and other supporting documents as listed already above. The Respondent twice sought further information from the Sponsor which clearly identified on the second occasion that further evidence was required to establish the family link as well as making further inquiries with the relevant local authority and the Greek authorities. In these circumstances, there was no further duty on the Respondent to interview the Applicant or the Sponsor or to provide any further gist of the reasons for refusal.

Discussion – ground 4 – Article 8 of the European Convention on Human Rights

116. As in BAA and for the reasons set out therein, irrespective of public law errors or otherwise identified above, it is necessary for me to consider on the totality of the evidence before the Upper Tribunal, including that not before the Respondent and that post-dating the decision under challenge, whether family life is established between the Applicant and the Sponsor for the purposes of engaging Article 8(1) of the European Convention on Human Rights and if so, whether the decision is a disproportionate interference with the Applicant and Sponsor's rights protected by Article 8. In any event, this is an exceptional case on its

facts which would, on the evidence now before the Upper Tribunal, warrant substantive consideration of Article 8 of the European Convention on Human Rights in addition to or separately to consideration of this claim within the Dublin III provisions, particularly in circumstances where the decision under challenge erred in accepting the familial link.

117. As above, whilst the evidence as to the relationship between the Applicant and the Sponsor before the Respondent at the date of decision was relatively limited and not comprehensive, the available evidence has been considerably strengthened since that date in what is available before the Upper Tribunal both in the more detailed written statements of the Applicant and the Sponsor (and others submitted on their behalf); as well as supporting evidence in Dr Bell's report about the daily telephone contact for extended periods of time between the Applicant and both of his brothers in the United Kingdom. I attach significant weight to Dr Bell's comprehensive report and his assessment of the relationship between the Applicant and the Sponsor, emphasising the emotional support provided to the Applicant and his dependency on his family in the United Kingdom.

118. Whilst it remains the case that there are gaps in the evidence and aspects of the claimed relationship remain entirely unexplained (including, for example the extended period from 2014 to 2019 when there was no contact at all between the Applicant and the Sponsor and no evidence as to how contact was re-established); there is in my view sufficient evidence before me to establish the existence of family life now for the purpose of Article 8(1) of the European Convention on Human Rights. The familial link has been accepted by the Respondent and on the basis that the Applicant is an adult, there is sufficient evidence of emotional dependency (and some much more limited evidence of financial support) to show ties which go beyond that normally expected between adult siblings.

119. The refusal of the exercise of discretion in the present case to admit the Applicant to the United Kingdom for his asylum claim to be examined here would constitute a significant interference with his right to respect for private and family life and the only remaining issue is whether that refusal is disproportionate.

120. I have no hesitation in the present case in accepting on the basis of the evidence before me that there is a disproportionate interference with the Applicant's Article 8 rights. I attach significant weight to the very detailed and thorough report of Dr Bell, which has not been challenged in substance by the Respondent at all which identifies the Applicant's current condition and living circumstances at the very high end of serious and compelling; together with his very poor prognosis for the Applicant should those circumstances persist in Greece and he is denied the support of his brother in the United Kingdom (or even the hope of being able to join him here in the future). On any rational view, Dr Bell's report sets out exceptional and compassionate circumstances which far outweigh any public interest considerations in the Respondent's favour in the proportionality balancing exercise, even taking into account that the

TCR was only for the Applicant to be admitted to the United Kingdom for the examination of his asylum claim here.

121. In so deciding, I emphasise that this decision is based on the evidence before me at the date of hearing; primarily the report from Dr Bell; which is both significantly more detailed and comprehensive than that which was before the Respondent at the date of the decision under challenge and which in substance refers repeatedly to a deterioration in the Applicant's condition over time and since the TCR was made (consistent with other evidence post-dating the decision). It is not to be inferred that the same conclusion would have been reached on the evidence before the Respondent at the date of decision (either on the engagement of Article 8(1) or whether the interference would be disproportionate), nor that there is any finding that the decision when made was in breach of Article 8 of the European Convention on Human Rights.

Remedy

122. The parties are invited to make submissions as to the form of the order as a result of the decision set out above, if the same can not be agreed; which may include submissions on the issue of damages.

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