In the Upper Tribunal
(Immigration and Asylum Chamber)
Judicial Review

JR/1592/2020

In the matter of an application for Judicial Review

The Queen on the application of
SM

Applicant

versus

Secretary of State for the Home Department

Respondent

ORDER

BEFORE Upper Tribunal Judge Stephen Smith

HAVING considered all documents lodged and having heard hearing Charlotte Kilroy QC and Michelle Knorr, instructed by Wilson Solicitors LLP, for the applicant and Mr G. Lewis, of counsel, instructed by the Government Legal Department, for the respondent at a hearing on 25 January 2021

AND UPON considering further submissions in writing from both parties, received on 8 February 2021

IT IS ORDERED THAT:

(1) For the reasons set out in the judgment dated 5 March 2021, the application for judicial review is granted to the extent that the Respondent's processing of the take-charge request made by Greece and refusal to accept responsibility for the Applicant's asylum claim until 11 February 2021 was (i) a breach of the Dublin III Regulation; and (ii) a breach of the Applicant's right to respect for his private life under Article 7 of the EU Charter of Fundamental Rights, and there shall be a declaration accordingly.
(2) The claim is otherwise dismissed.
(3) The Respondent's decisions dated 18 February 2020, 17 March 2020, 27 April 2020 and 1 June 2020 refusing to accept the take-charge request are quashed.
(4) By 4pm on 16 March 2021, the Applicant is to file and serve written submissions, no longer than 10 pages in length, on (i) whether any further relief is required; and (ii) costs.
(5) By 4pm on 30 March 2021, the Respondent is file and serve written submissions, no longer than 10 pages in length, on the same matters (i) and (ii) identified in paragraph (4) above, with those matters then to be determined by Upper Tribunal Judge Stephen Smith, on the papers if appropriate.
(6) Costs are, therefore, reserved at this stage.
(7) The applicant's application for permission to appeal against the tribunal's Article 8 findings is refused. None of the proposed grounds of appeal have a realistic prospect of success and there is no other compelling reason why permission to appeal should be granted.
(8) Time to file the Applicant's Notice and Grounds of Appeal in the Court of Appeal is not extended and the applicant's application to stay these proceedings pending final

determination of any appeal is refused. The tribunal considers that whether to extend the time to file a notice and grounds of appeal in the Court of Appeal is a matter for the Court of Appeal. Staying the proceedings pending resolution of any final appeal would could lead to a lengthy delay. It is plainly not in the best interests of this child applicant that the question of relief arising from his success in these proceedings should be postponed for a potentially lengthy period, nor would it be compatible with the overriding objective of this tribunal, which is to avoid delay, so far as is compatible with proper consideration of the issues (see rule 2(2)(e) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

Signed: *Stephen H Smith*

Upper Tribunal Judge Stephen Smith

Dated: **5 March 2021**

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): 05/03/2021

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

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

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

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

Case No: JR/1592/2020

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

5 March 2021

Before:

UPPER TRIBUNAL JUDGE STEPHEN SMITH

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Between:

THE QUEEN
(on the application of SM)
(ANONYMITY DIRECTION IN FORCE)

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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

Ms C. Kilroy, QC, and Ms M. Knorr
(instructed by Wilson Solicitors LLP), for the applicant

Mr G. Lewis
(instructed by the Government Legal Department) for the respondent

Hearing date: 25 January 2021
Further submissions received: 8 February 2021

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J U D G M E N T

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This has been a remote hearing which has been consented to / not objected to by the parties. The form of remote hearing was V: partly remote.

A face to face hearing was not held because it was not practicable, and all issues could be determined in a remote hearing.

The documents that I was referred to were primarily contained in a bundle of 397 pages, the contents of which I have recorded. The order made is described at the end of these reasons.

The parties said this about the process: they were content that it had been conducted fairly in its remote form.

Covid-19: this judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on https://tribunalsdecisions.service.gov.uk/utiac. The date and time for hand-down is deemed to be 2.30PM on 5 March 2021

JUDGMENT (V)

Upper Tribunal Judge Stephen Smith:

Introduction

1. This application for judicial review concerns a series of decisions taken by the Secretary of State to refuse requests made by the Greek authorities to 'take charge' of an unaccompanied asylum-seeking child under Regulation (EU) 604/2013 of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), known as 'Dublin III'.

2. In this decision, 'TCR' means a 'take charge request' under Dublin III.

3. I maintain the anonymity direction already in force.

Impact of EU exit: saving provision

4. Although the United Kingdom has now left the European Union, the take charge requests in these proceedings were made before 11pm on 31 December 2020. Pursuant to Part 3 of Schedule 2 to the Immigration, Nationality and Asylum (EU Exit) Regulations 2019/745, paragraph 9, the Dublin III Regulation continues to have effect for the purposes of such requests. Paragraph 9(8) of Schedule 2 provides that the relevant provisions of Dublin III are to be construed as though the United Kingdom continued to be a Member State of the European Union.

Factual background

5. The applicant, SM, is a citizen of Bangladesh, born on 22 March 2003. He arrived in Greece in May 2019. On 8 October 2019, he claimed asylum there. He lives with a group of adult men, in substandard conditions, outside the Greek child protection system. He has an uncle and sister residing legally in this country. On 7 January 2020, the Greek Dublin Unit ('the GDU') requested that the United Kingdom 'take charge' of the applicant under Article 22(1) of Dublin III, on the basis that, pursuant to Article 8 of the Regulation, the United Kingdom was the Member State responsible. The request was expressly made in relation to the applicant's uncle,

but under 'other useful information' featured details of his sister, including her date of birth and telephone number.

6. The Secretary of State refused the request on 18 February 2020, on the basis that the documentary information supporting the application left the respondent 'unable to confirm' that the applicant was related to his claimed uncle, SU. Additionally, the English translation of his Bangladeshi birth certificate was not accompanied by the original version. A so-called 'undertaking letter' sent to SU had not been returned.

7. The Secretary of State's guidance states the following concerning 'undertaking letters':

> 'Whilst not a legal requirement of the Dublin III Regulation or Implementing Regulation, the sponsorship undertaking form will require the family to state clearly whether they are willing and able to receive the child. It will bring to the attention of the UK family member or relative, their obligations and responsibilities, and it will provide them the opportunity to raise any issues or questions about their obligations or responsibilities prior to a child's arrival.'

8. The 18 February 2020 refusal decision is the first decision challenged by the applicant.

The first reconsideration request

9. On 6 March 2020, the GDU requested the Secretary of State to reconsider the refusal, under Article 5(2) of Commission Regulation (EC) 1560/2003 ('the Implementing Regulation'). The reconsideration request included the Bengali original documents, and informed the Secretary of State that, in any event, the Bangladeshi authorities issued original documents in English. The English documents initially provided had been issued in that form, and there was no need for a certified translation from the original. SU had, said the request, not received the undertaking letter. He had telephoned the Secretary of State's intake unit to ask about the case. Contact details for SU and LB were re-provided.

10. On 17 March 2020, the Secretary of State refused the first reconsideration request. No further evidence had been provided to demonstrate the claimed familial link, the refusal said. Although the undertaking letters sent to SU had been 'signed for', they had not been returned:

> 'Therefore we also have no evidence that the UK sponsor remains willing and able to accommodate the above named.'

11. The 17 March 2020 refusal decision is the second decision challenged by the applicant.

The second reconsideration request

12. On 2 April 2020, the GDU submitted a further reconsideration request. It maintained that sufficient evidence had been provided to establish the claimed familial link. In relation to the sponsor's willingness and ability to accommodate the applicant, the GDU stated:

> 'Article 6 of the Dublin III regulation provides that both requesting and requested member states are responsible for assessing the best interests of the child. In this respect we kindly ask you to reach a conclusion as to whether the uncle is willing and able to take care of his nephew.
>
> If the UK reaches the conclusion that the uncle is unwilling or unable to take care of the child then the UK should investigate whether the child's sister (article 8.1 DR) is willing to take care of the boy! We are waiting for your assessment of the uncle AND of the sister…' (emphasis original)

13. On 27 April 2020, the Secretary of State declined to reconsider the refusal request further. She stated:

> 'It is important to note that the case was rejected on 18 February 2020 and as such the required deadline for a request for re-consideration as outlined in Article 5(2) of the Implementing Regulation has now passed. As made clear in the CJEU case of C-47/17 and C-48/17 *X and X* the timeframes set out in the Implementing Regulation should be read as 'strictly circumscribed' in order to respect the objective of rapid processing (paragraph 74).
>
> You have also provided new information, you have requested 'if the uncle is unwilling or unable to take care of the child than the UK should investigate whether the child's sister (article 8.1 DR) is willing to take care of the boy. We are waiting for your assessment of the uncle AND of the sister'.
>
> However, for the reasons given above regarding the ruling in C-47/17 and C-48/17 *X and X* the UK is not in a position to consider this information in the form of a request for re-examination with reference to Article 5(2) of the Implementing Regulation. In accordance with the aforementioned case law, the UK now considers Greece to be the responsible member state for examining the claim,

> unless you have the possibility to make a further take charge or take back request.'

14. The 27 April 2020 is the third decision challenged by the applicant.

The third reconsideration request

15. On 18 May 2020, the GDU invited the respondent to reconsider her refusal a further time:

> 'In your third rejection letter sent on 27/04/2020… You simply invoke [the] CJEU case of C-47/17 and C-48/17 *X and X* in order to close the case.
>
> We must be clear that the CJEU judgement [sic] in question is neither an excuse of unaccountability nor a justification for arbitrariness. It ensures and protects the rights of applicants; it does not uphold the right of state administrations to evade responsibility by presenting merely formal or plainly false argumentation.
>
> This request should be accepted from the beginning. You rejected it because supposedly the family link has not been proven in the uncle does not consent. We provided enough supporting proof/evidence in our two re-examination requests for the request to be accepted. The family link is proven by the submitted documentation and the will of the uncle and the sister to welcome the child in the UK is known to the Greek Authorities. We remind you that article 8. 1 of the Dublin III Regulation does not provide for the sibling to be able to ‹‹take care›› of the unaccompanied minor.
>
> We therefore ask you one more time to reconsider your negative decision.
>
> In any case we will keep the case open since we have been informed that the NGO Safe Passage will pursue the case further in the UK.
>
> In light of the above we kindly ask you to re-examine the case according to article 8 of the Dublin III Regulation in the principle of the best interests of the child.' (emphasis original)

16. On 1 June 2020, the Secretary of State responded, setting out key events in the chronology from her perspective, again relying on Cases C-47/17 and C-48/17 *X*

and X and the fact that the time limits were 'strictly circumscribed'. Written consent from the applicant and his sister had not been received, and it was not in the best interests of the applicant to be transferred to the UK to join his 'claimed relatives'. The letter concluded in these terms:

> 'In accordance with the aforementioned case law, the UK now considers Greece to be the responsible member state for examining the claim. If appropriate, it remains open to you to make a further take charge request, as indicated in the *X and X* judgment.'

17. The 1 June 2020 decision is the fourth decision challenged by the applicant.

The fourth reconsideration request from the GDU

18. The GDU submitted a fourth and final request on 31 December 2020, before 11PM. By this stage, the applicant had issued proceedings for judicial review, and, through his solicitors, had engaged directly with the GDU about the progress of the take charge request, and the approach of the Secretary of State. By definition, this judicial review application does not encompass the Secretary of State's response to the fourth request and, as set out below, Mr Lewis contends that the Secretary of State's forthcoming response to it renders this application for judicial review academic.

19. The 31 December 2020 request was in these terms:

> 'We have been informed that the responsible member state about this case will be decided by the British courts.
>
> We would like to confirm that the Greek authorities have kept the Dublin case of the child open, as is our standard practice for family reunification cases, that no decision on the asylum claim of the boy has been issued and that we are willing to receive an acceptance letter under article 8, if the court so decides.
>
> Regarding your informal request for a new take charge request under article 17.2 in order for you to be able to make a fresh decision, we believe that a new TCR in the present case would amount to procedural hoops that will cause further delay [to] the allocation of responsibility and thus it is contrary to the best interests of the child.
>
> You have also informally submitted some documents to our authorities in order for us to be able to justify a new article 17.2 TCR (since new evidence would have been provided). Sending the Greek authorities documents at your disposal and then asking the Greek authorities to

> send them back to you does not make much sense according to my opinion – but perhaps I am not able to understand the hidden logic behind it.
>
> More importantly though, adding the documents you have submitted to this boy's file is against Greek law. Only the authorised legal guardian/legal representative of the child is allowed to submit documents to the child's official file and this only when it serves the best interests of the child. The British authorities are in no way allowed to send documents and asked to be included in an unaccompanied minor's file.
>
> Furthermore, we would appreciate if the British authorities instead of asking for new TCRs in order to make discretionary 'fresh decisions' would communicate to the Greek authorities what they communicate to the British courts. Specifically, SSHD admits to the court that the previous negative decisions were unlawful, the Greek authorities should be informed about this fact and we assure you that we would cooperate closely in organising the transfer.
>
> If a newly received TCR is indeed really necessary for you in order to make new decisions we are resubmitting the original TCR, as proof that the Dublin case is still open for Greece.'

20. The reference to the Secretary of State admitting to the court that 'previous negative decisions were unlawful' must have been a reference to the Secretary of State's position as set out in her Detailed Grounds of Defence ('the DGRs') submitted in these proceedings, dated 13 November 2020. At paragraphs 21-22 and 25 of the DGRs, the Secretary of State accepted that the 18 February and 17 March decisions were unlawful and did not seek to defend them.

21. By the date of the substantive hearing before me, the Secretary of State accepted the family link between the applicant and SU and LB, with the only remaining issue outstanding being whether it was in the best interests of the applicant to be reunited with them. In that respect, on 11 January 2021, the applicant applied for an interim order compelling the Secretary of State to request the relevant local authorities to conduct urgent assessments in relation to the suitability of SU and LB to receive the applicant.

22. At the hearing before me, Mr Lewis did not resist the proposed order, and committed the Secretary of State to using all reasonable endeavours to secure family assessments from the local authorities on an expedited basis. The order also required the respondent to communicate a decision on the TCR to the Greek

authorities within two working days of receiving a positive local authority assessment in relation to either SU or LB.

23. I made the order, a copy of which may be found in the **Annex** to this judgment.

Issue of proceedings

24. The applicant lodged this application for judicial review on 15 June 2020, challenging the lawfulness of all four refusal decisions, on the following grounds:

    a. Ground 1: the Secretary of State's processing of the TCR and refusal to accept responsibility is unlawful and in breach of EU law, common law and Article 8 ECHR.

    b. Ground 2: the UK is the responsible Member State for the applicant's asylum claim, and the applicant's fundamental rights have been breached.

25. The above two grounds are officially pleaded as the two grounds for judicial review. The applicant's statement of facts and grounds, and Ms Kilroy's skeleton argument, feature additional criticisms of the respondent's general approach, as well as more specific criticisms of different facets of the decisions under consideration, and what is said to have been a reversal of the Secretary of State's standard practice concerning the withdrawal of incorrect reconsideration refusal decisions. Not all such criticisms are articulated under specific submissions advanced pursuant to each ground for judicial review. They are buried throughout the statement of facts and grounds, and the skeleton argument. The applicant's statement of facts and grounds and his main skeleton argument run to 49 pages in total. The respondent's detailed grounds of resistance and main skeleton argument, to 46 pages. I have sought to respond to salient arguments advanced in this way where necessary to do so in order to consider the primary grounds for judicial review. Mindful of the need for procedural rigour in this jurisdiction, the now well-established need for permission to amend the grounds for judicial review, and the deprecation with which attempts to engage in any form of 'rolling review' should be met, I have sought to confine the focus of this judgment to the two grounds for judicial review. That necessarily means that there are some submissions which it has not been necessary to engage with in depth.

26. In her Acknowledgement of Service dated 8 July 2020, the Secretary of State agreed to reconsider the applicant's case 'subject to receiving a fresh Take Charge Request' from the Greek authorities, agreeing to contact them within five days, presumably to catalyse a further request. A decision on the TCR would then be taken within two months. The Tribunal was invited to refuse permission on the papers.

27. Upper Tribunal Judge Gill initially refused permission on the papers. She declined to admit the application in relation to the 18 February 2020 decision, on the basis the challenge was out of time. In relation to the remaining decisions, Judge Gill considered the respondent's concerns about the absence of an undertaking from SU

to be dispositive of refusing permission, and said that the grounds for judicial review failed to engage with the respondent's arguments concerning the import of *X and X*.

28. Following a renewal hearing on 23 October 2020, Upper Tribunal Judge Norton-Taylor granted permission on both grounds. He accepted submissions advanced on behalf of the applicant that the decision was not out of time and considered that it was appropriate to extend time in any event. In his decision granting permission, Judge Norton-Taylor said:

> '…there is a matter of some importance in this case, namely the respondent's current practice of requiring the requesting state (here, Greece) to make a new take charge request in order for any reconsideration to occur.'

29. The substantive hearing on 25 January 2021 was conducted remotely, in order to take precautions against the spread of Covid-19. The parties were content that the hearing had been conducted fairly in its remote form. I received further submissions from both parties on 8 February 2021, as set out below.

LEGAL FRAMEWORK

30. Article 8 of the European Convention on Human Rights ('the ECHR') provides:

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

31. Article 7 of the Charter of Fundamental Rights of the European Union provides:

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

32. The 'broad purpose' of the Dublin III regime was described by Laing LJ in *Secretary of State for the Home Department v R (oao FWF & Anr)* [2021] EWCA Civ 88 at [13] as:

> '…to continue the EU's system for regulating the allocation of responsibility between member states for deciding claims for international protection made in different

> member states, particularly where one person makes such a claim in more than one member state.'

33. The Recitals to the instrument outline its objectives in further depth. Recital (4) highlights the importance of a 'clear and workable method' for determining the responsible member state, which should be based on 'objective and fair criteria' for both the member state, and the person concerned.

34. Recital (13) provides that, in accordance with the UN Convention on the Rights of the Child, and the Charter of Fundamental Rights, the best interests of the child should be a primary consideration. Unaccompanied minors are to enjoy specific procedural guarantees 'on account of their particular vulnerability.' Recital (14) provides that, in accordance with the ECHR, and the Charter, respect for family life should be a 'primary consideration' in the application of the regulation.

35. Pursuant to Recital (16), a relationship of dependency between a child applicant and their sibling is to be regarded as 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.

36. Turning to the substantive provisions of the regulation, Article 1 outlines the purpose of the regulation as being to prescribe the criteria and mechanisms for examining international protection claims.

37. Article 2 defines certain terms. Under paragraph (g), certain 'family members' are defined. Paragraph (h) defines 'relative' as meaning '…the applicant's adult aunt or uncle or grandparent who is present in the territory of a Member State…' The term 'sibling' is not defined, suggesting its ordinary meaning applies.

38. Article 6(1), headed Guarantees for minors, provides:

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

39. Turning to the operative criteria for determining responsibility for the examination of a protection claim, Article 8 is relevant in the case of an unaccompanied minor. Under paragraph (1), where a family member or sibling of the unaccompanied minor is legally present in a member state, that member state is responsible, provided it is in the best interests of the applicant. Paragraph (2) makes similar provision for a 'relative' provided, based on an individual examination, the relative can take care of him or her.

40. Article 17 features a discretionary procedure, whereby a member state may choose to examine (paragraph (1)) or be invited to take charge of (paragraph (2)) the examination of an asylum claim for which it would not otherwise be responsible. In the case of a request under Article 17(2), the paragraph suggests a member state may wish to do so, 'in order to bring together any family relations, on humanitarian

grounds based in particular on family or cultural considerations.' The persons concerned must express their consent in writing.

41. Article 21 makes provision for the requesting member state to submit a take charge request, which must be within three months of the application for international protection being lodged.

42. Article 22(1) provides:

> '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.'

The consequences of failing to respond within the two month period are addressed in Article 22(7):

> 'Failure to act within the two-month period mentioned in paragraph 1… 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.'

43. Article 27 provides for an effective remedy by which a take charge request may be challenged.

44. The European Commission has adopted two implementing regulations making practical provision for the implementation of the Dublin regime. The first, Commission Regulation (EC) 1560/2003, concerned the Dublin II regime. It has been updated by the second implementing regulation, Commission Regulation (EC) 118/2014. In this judgment, I use the term 'Implementing Regulation' to refer to Regulation 1560/2003, as amended by Regulation 118/2014.

45. Article 5(2) of the Implementing Regulation provides:

> '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.'

Pursuant to the correlation table at Annex II to Dublin III, the references to Article 18(1) and (6) are to be read as references to Articles 22(1) and (6), and 29(2) of

Dublin III, and the reference to Article 20(1)(b) has effect as though it concerned Article 25(1) (replying to take back requests).

46. Article 12(2) of the Implementing Regulation is also relevant; see paragraph 94, below.

Secretary of State for the Home Department v R (oao FWF & Anr) [2021] EWCA Civ 88

47. On 28 January 2021, three days after the hearing in these proceedings, the Court of Appeal handed down judgment in *Secretary of State for the Home Department v R (oao FWF & Anr)* [2021] EWCA Civ 88, addressing matters including the interaction between the Dublin III regime and Article 8 ECHR. I permitted the parties to make written submissions in response to the judgment, and I am grateful to both parties for doing so, as directed, by 8 February 2021.

48. *FWF* concerned the relationship between obligations imposed by Dublin III, the Charter of Fundamental Rights, and Article 8 ECHR. The central issue was whether, if a member state acts unlawfully in any way in the course of discharging its Dublin III obligations, that is *ipso facto* a breach of Article 8 of the ECHR, and Article 7 of the Charter: see [4]. The Secretary of State purported to refuse a TCR after the two month limit for responding had passed, with the effect that, by the time of the purported refusal, the UK was the responsible member state by default, pursuant to Article 22(7). A fresh TCR was made, and subsequently accepted by the Secretary of State. The children were transferred to the UK within eight months of the original TCR, that being the 'longstop' for lawful transfer under the regulation.

49. The court held that a refusal post-dating default acceptance had no legal effect [133]. Any breaches of Dublin III along the way were incidental and not operative, provided there was compliance with the overall timescales. Article 8 ECHR did not impose additional obligations on the requested member state where there had been overall Dublin III compliance, for the Dublin III regime goes further than is required by Article 8 ECHR. For there to be a breach of Article 8 ECHR in those circumstances, it would be necessary to demonstrate 'very exceptional circumstances' [140]. On the facts of the case, because the Secretary of State complied with the longstop Dublin III timings, there had been no breach of Dublin III, or Article 8 ECHR. The Secretary of State's appeal was successful, and the decision of the Upper Tribunal to the contrary was set aside.

SUBMISSIONS

Ground 1 - the Secretary of State's processing of the TCR and refusal to accept responsibility is unlawful and in breach of EU law, common law and Article 8 ECHR

Decisions of 18 February and 17 March 2020

50. First, Ms Kilroy submits that the evidence provided with each TCR was extensive, and clearly proved the relationships between the applicant, SU and LB. The requests could not reasonably be refused, and the Secretary of State has not sought to contend otherwise. The TCR should have been accepted.

51. Secondly, the Secretary of State breached her investigative duty by:

    a. Failing to give the applicant, SU or LB any opportunity to address her concerns about the claimed relationship before rejecting the TCR.

    b. Failing, contrary to Dublin III, the applicant's best interests, and her own policy, to obtain an assessment from the relevant local authority, before rejecting the TCR.

    c. Failing to investigate, assess and treat the applicant's best interests and his right to family unity under Article 6 of Dublin III, Article 24 of the Charter of Fundamental Rights, and Article 8 of the European Convention on Human Rights ('the ECHR') as a primary consideration in any of the decisions.

    d. Failing to liaise with Greece to secure DNA testing prior to issuing a refusal, as was incumbent upon the Secretary of State in the event she legitimately harboured doubts about the claimed family relationship which could not be resolved in any other way.

52. Thirdly, the Secretary of State should not have relied on the non-return of the undertaking forms as a basis for refusing the request, even if they were successfully delivered. Completing the forms was not a legal requirement, as recognised by the Secretary of State's policy. Even if the undertaking form could, in principle, serve a useful purpose in helping to determine an applicant's best interests, it could never be in an applicant's best interests to adopt a blanket refusal policy in the event of the non-return of an optional form. Only if the non-return of the form revealed safeguarding or other concerns could that be relevant to refusing a TCR, and only then if it were not in the child's best interests for family unification to take place.

53. Fourthly, the Secretary of State failed to comply with the investigative duty imposed by Article 3(2) of the Implementing Regulation. Given the GDU provided information relating to SU *and* LB, the Secretary of State was required to investigate the TCR request in relation to each. LB's information was clearly provided. The Article 3(2) duty required the Secretary of State to investigate both possibilities for reunification, *prior* to refusing the TCR. To the extent the Secretary of State relied on the absence of consent from LB (as she later suggested in the third reconsideration refusal on 1 June 2020), there was no requirement for consent of the family member, sibling or relative under Article 8 of Dublin III. If the Secretary of State considered that LB's consent was desirable, her investigative duties required her to seek her consent through either the Greek authorities, or to approach LB directly, using the contact details in the TCR.

54. Ms Kilroy submits that, irrespective of whether the 27 April and 1 June 2020 decisions were unlawful, the applicant is entitled to an effective remedy in relation to the accepted unlawfulness contaminating the first two decisions.

Decisions of 27 April and 1 June 2020

55. The applicant accepts that the approach taken by the Secretary of State in the 27 April and 1 June 2020 decisions was consistent with her policy then in force, *Dublin*

III Regulation, version 3, 30 April 2020, at pp37-38. He contends that both the decisions *and* the policy are unlawful.

56. It will be recalled that in the 27 April and 1 June decisions, the Secretary of State contended that Article 5(2) of the Implementing Regulation, as interpreted by the CJEU in *X and X*, entailed the conclusive rejection of the TCR. The policy puts the position in these terms, at page 38:

> 'A rejected request can only trigger one re-examination procedure, it is not possible to call for repeated re-examinations in the same procedure. Only a new request to take charge or take back, if rejected, would attract the possibility of a new re-examination request (of that new rejection).'

57. The Secretary of State should have used the second and third reconsideration requests as an opportunity to reverse the plain unlawfulness of her first two decisions. The strict timeframes of Article 5(2) of the Implementing Regulation, as amplified by *X and X,* do not apply to cases involving unaccompanied minors. The primacy of the best interests of the child is a primary consideration under all Dublin III procedures, pursuant to Article 6. As held in *MA (Eritrea) v Secretary of State for the Home Department* Case C-648/11 [2013] 1 WLR 2961 at [59] to [61], such primacy is an interpretative principle guiding the overall interpretation of the Regulation. *X and X* concerned the quite different situation of calculating the time within which the Member State responsible for examining an adult's asylum claim must do so.

58. In the case of an unaccompanied asylum-seeking child, there are such compelling reasons militating in favour of family unification, recognised by Dublin III itself and the leading authorities and international materials, that the strict time limits of the Regulation must be applied flexibly, Ms Kilroy submits. The CJEU could not have intended to enable Member States to abrogate the responsibility for an asylum claim of an unaccompanied child they would otherwise have to bear, simply because the Article 5(2) timescales were not met. That is especially so where, as here, the Secretary of State has acted unlawfully by rejecting the TCR. *X and X* was designed to protect applicants, not to clothe Member States with a shroud of impunity for unlawfully rejecting TCRs. If *X and X* is authority for anything, it underlines the proposition that Dublin III must be interpreted in accordance with its aims and purpose, which resolutely cannot entail leaving unaccompanied minors in the dangerous limbo suffered by the applicant in these proceedings.

Ground 2 - the UK is the responsible Member State for the applicant's asylum claim, and the applicant's fundamental rights have been breached

59. Ms Kilroy submits that all four decisions of the Secretary of State should be quashed, and that I should decide for myself whether the applicant's rights under EU law, or the ECHR, have been breached.

60. 'For the purposes of reunification with LB under Article 8(1) [of Dublin III], there is no requirement to show her ability to care for the [a]pplicant': see the applicant's skeleton argument at [47]. The best interests assessment is primarily the responsibility of the requesting state, as recognised by the Secretary of State's policy at page 8. There is a presumption that reunification with family members is in the best interests of unaccompanied minors. The Secretary of State was required to undertake safeguarding checks upon receipt of the TCR; no safeguarding concerns have been raised.

61. Given the Dublin III criteria for the applicant's reunification with his uncle and sister are met, 'that alone is a strong indication' that the applicant's rights under Article 7 of the Charter of Fundamental Rights and Article 8 of the ECHR are engaged, Ms Kilroy submits. The rationale behind the Article 8 of Dublin III includes the need to ensure respect for family unity and the best interests of the child; see Recitals (16) and (39). Article 7 of the Charter, Article 8 ECHR and Dublin III must be interpreted harmoniously. Article 8 ECHR, interpreted in light of the Convention on the Rights of the Child, as expressed by the UN Committee on the Rights of the Children's *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para 1)* (CRC/C/GC/14), places a significant, and primary, emphasis on the importance of family unification and the prevention of disruption. The criteria in *Mathieson v Secretary of State for Work and Pensions* [2015] UKSC 47 at [39] concerning the three-fold concept of the best interests of the child underlines the centrality of the best interests of the applicant in the Secretary of State's decisions, and in these proceedings.

62. As an unaccompanied minor with no alternative care arrangements in Greece, a decision by the Secretary of State concerning his potential reunification with SU and LB plainly engages his right to family or private life. The jurisprudence on Article 8 ECHR supports a finding of the existence of family life based on the *potential* for family life to be strengthened: see *Pawandeep Singh v Entry Clearance Officer, New Delhi* [2005] QB 608, [2004] EWCA Civ 1075.

63. In *Pawandeep Singh*, Dyson LJ drew heavily on *Pini v Romania (Application Nos 78028/01, 78030/01*) (unreported) 22 June 2004, and Ms Kilroy placed significant reliance on the case accordingly. The matter concerned two Italian citizens seeking to adopt two nine year old Romanian girls living in a private orphanage in Romania. The children had been selected by their adoptive parents on the basis of photographs alone. Adoption orders were in place but were not carried into effect. The applicants contended that the Romanian authorities' refusal to allow the children to join them in Italy violated their Article 8 rights. The Strasbourg Court held that Article 8 ECHR 'family life' existed between the children and the parents, but that there was no violation of Article 8, as the positive obligations under Article 8 did not oblige the Romanian authorities to ensure the children went to Italy against their will. The orphanage had opposed the adoption arrangements, as did a number of third parties. Significantly, it said this, at [143]:

> 'Admittedly, by guaranteeing the right to respect for family life, Article 8 presupposes the existence of a family (see *Marckx*, cited above, pp. 14-15, § 31, and *Abdulaziz*,

> *Cabales* and *Balkandali*, cited above, p. 32, §62), a requirement which does not seem to have been met in the instant case as the applicants did not live with their respective adopted daughters or have sufficiently close de facto ties with them, either before or after the adoption orders were made. However, this does not mean, in the Court's opinion, that all intended family life falls entirely outside the ambit of Article 8. In this connection, the Court has previously held that Article 8 may also extend to the potential relationship between a child born out of wedlock and his or her natural father (see *Nylund v. Finland* (dec.), no. 27110/95, ECHR 1999-VI), or apply to the relationship that arises from a lawful and genuine marriage, even if family life has not yet been fully established (see *Abdulaziz*, *Cabales* and *Balkandali*, cited above, p. 32, § 62).'

64. The above extract paved the way for Dyson LJ, as he then was, to say the following at [38], upon which Ms Kilroy places considerable reliance:

> 'the potential for development of family life is relevant in determining whether family life already exists…'

65. Ms Kilroy also relies on *R (Ahmadi) v Secretary of State for the Home Department* [2005] EWCA Civ 1721, per Moses LJ, at [17], and *Boyle v United Kingdom* 19 EHRR 179 at [40] to [46], concerning the potential for family life to develop. She also relies on a series of judicial review cases in this tribunal to make good the same point, plus further authorities listed at [53] of her skeleton argument.

66. Family life having been established, submits Ms Kilroy, the repeated TCR refusals amounted to an unlawful interference in the applicant's Article 8 ECHR rights. As the Secretary of State is in breach of Dublin III, the interference is not 'in accordance with the law'. The refusals have forced the applicant to remain in dire and unacceptable conditions in Greece, prolonging his separation from his family. The delay caused by the Secretary of State's unlawful refusals exacerbated her breaches of Article 8 ECHR, and the multiple instances of procedural unfairness and procedural irregularities breached the procedural limb of Article 8 ECHR. The Secretary of State's practice of requiring a further TCR was unlawful, and contrary to established authority*: R (oao of MS) (a child by his litigation friend MAS) v Secretary of State for the Home Department (Dublin III; duty to investigate)* [2019] UKUT 00009 (IAC); *R (oao IAD) v Secretary of State for the Home Department* JR/1333/2020; *R (oao MA (a child by his litigation friend ASM)) v Secretary of State for the Home Department* JR/1265/2020, and the Outer House of the Court of Session's reasoned order on interim relief in *Nasser Al Fadhli*.

67. Ms Kilroy submits that, even though further TCRs were neither necessary nor appropriate following the initial request, the Secretary of State failed to provide the tribunal and the Greek authorities with accurate information concerning her position, further compounding the unlawfulness of her conduct.

68. For example, in parallel to maintaining before the tribunal that she was willing to reconsider the applicant's case, subject to receiving a fresh TCR (see paragraph 2 of the Acknowledgement of Service dated 8 July 2020), the Secretary of State's officials contacted the Greek authorities to inform them that it would be necessary for the applicant's lawyers to convey further evidence to the Greek authorities in order for a further TCR to be considered. See the email of Julia Farman, Head of the European Intake in the UK Dublin Unit, dated 10 July 2020, at page 252 of the trial bundle.

69. In the DGD dated 13 November 2020, the Secretary of State accepted that her first two decisions were unlawful (see paragraphs 21 and 25), having underlined her position that she was willing to reconsider the request, subject to a further TCR from Greece. By contrast, on the same day as filing her DGD, Ms Farman emailed an official in the GDU stating that further evidence would be required in order for the UK to consider a further TCR: see page 244 of the trial bundle.

70. At no stage, submits Ms Kilroy, did Ms Farman reveal to the GDU that the Secretary of State now accepts that the first two refusal decisions were unlawful. Instead, the impression given to the GDU was that a further TCR request would only be considered in a different light if new evidence were provided in support. Ms Farman has not provided a witness statement explaining her decisions in the process, nor has she sought to respond to the concerns raised by Ms Kilroy in relation to her handling of the matter.

71. In relation to *FWF* in the Court of Appeal, Ms Kilroy's post-hearing submissions contend that the authority is distinguishable. Its focus was default acceptance cases where transfer had taken place within the overall time limits prescribed by Dublin III. It was in that limited context that the court held that Article 8 added little to the rights guaranteed by the Dublin III regime, for the process it established went considerably further than Article 8 ECHR would require within the same timeframe. The purported TCR refusal in *FWF* was held to have no legal effect. That was in stark contrast to the unlawful refusals in the present matter which had 'full legal effect', resulting in responsibility for the applicant unlawfully failing to pass to the UK upon the conclusion of the two month Article 22(1) period. The unlawfulness in these proceedings is fully operative, and not in any sense incidental. The applicant does not seek to supplement his rights under Dublin III in a situation where the Secretary of State has complied with the regulation. Rather he relies on Article 8 ECHR in circumstances where the Secretary of State has manifestly failed to comply with Dublin III, with the effect that the 'exceptional circumstances' test underlined in *FWF* does not apply.

72. Ms Kilroy invites me to declare that the Article 8 Dublin III criteria are met, and to order the Secretary of State to liaise with the Greek authorities to arrange the applicant's prompt transfer to the UK, consistent with the approach of Lord Boyd in *Nasser Al Fadhli*, or to take a fresh decision within an appropriately tight timeframe. I should also declare that the Secretary of State breached her EU law obligations.

73. I turn now to Mr Lewis' submissions. The Secretary of State's primary position has always been that this challenge is academic. Mr Lewis emphasised that it is now

accepted that the applicant is related to SU and LB. The only outstanding matters to be resolved ahead of a transfer tacking place were responses to the undertaking forms, and the local authorities' assessments (SU and LB living in different local authority areas), which will inform the assessment of the applicant's best interests. The Secretary of State had also sought clarity from the GDU as to whether the proposed transfer was in relation to SU or LB, as legal certainty in that respect was essential, and the original requests have been unclear. The Secretary of State accepted that a final decision on the transfer should be taken within two working days of receipt of the local authority assessment.

74. Mr Lewis submits that I need not engage with the substance of the applicant's submissions, and there is no good reason to exercise my discretion to consider argument on an academic matter. There is not, for example, a discrete point of statutory construction of significance to a large number of similar or anticipated cases as a reason to engage with an otherwise academic claim. No such considerations arise in the present matter, he submits, and I should decline to examine the claim any further. While Mr Lewis accepted that the legal effect of further reconsideration refusals, such as the third and fourth decisions of the Secretary of State in these proceedings, was a point which ordinarily would have the potential to impact other cases, the United Kingdom was no longer part of the Dublin III regime. With the exception of certain transitional cases, the point was of no broader significance.

75. In the event I was not with Mr Lewis on the academic nature of this challenge, he advanced the following submissions in response.

76. First, it could not be said that the Secretary of State was obliged to address the potential significance of LB as well as SU. On a proper construction of the TCR, it related only to SU, not LB. LB's details featured on the form simply 'as a matter of interest'. There was no indication that LB consented to the transfer.

77. Secondly, there was no basis under Dublin III for the GDU to have made multiple reconsideration requests. Recital (5) to Dublin III emphasises the importance of the rapid determination of which Member State is responsible for examining an asylum claim. The Secretary of State was right to rely on Article 5(2) of the Implementing Regulation, in the light of *X and X*, to conclude that the refusal had been final. To the extent that the Greek authorities sought or were required to make further take charge requests, the discretionary process under Article 17(2) of Dublin III provided the necessary vehicle. Adopting that approach provides legal certainty. While the Secretary of State has been prepared in these proceedings to entertain the purported re-submission of the original TCR by the GDU, she did so exceptionally, as emphasised at [4] of her skeleton argument.

78. Thirdly, the issue of whether it was appropriate for the Secretary of State to 'solicit' further TCR requests had recently been the subject of full argument before Upper Tribunal Judge O'Callaghan in JR/1696/2020, in relation to which judgment was awaited. It would not be consistent with the overriding objective for these proceedings to re-examine the same question.

79. Put simply, the Secretary of State's position on the 'soliciting' issue was that, where a prior unlawful refusal was conceded or otherwise accepted, a further TCR was necessary, in order to provide the Secretary of State with the necessary legal certainty that the transfer was still sought. In some cases, the requesting Member State may no longer wish to pursue transfer, for example where there were extant criminal proceedings concerning the transferee. The Secretary of State was entitled to require an additional formal request, rather than simply clarification from the caseworker at an informal level.

80. In post-hearing submissions on *FWF*, Mr Lewis maintained that the application was academic. In *FWF*, the Court of Appeal held that an actionable breach of Dublin III only occurred where the eleven month 'longstop' period for a transfer to the requested member state was breached. Even on that standard, where there had been a breach of Dublin III, that would not amount *ipso facto* to a breach of Article 8 ECHR. Dublin III goes further than Article 8 ECHR, setting its own 'procedural code' for enabling some applicants for asylum and humanitarian protection to be reunited with certain family members in another Member State. For there to be a breach of Article 8 ECHR, there had to either be a negative interference with the rights protected by ECHR, or a breach of a positive obligation to admit a person for the purposes of family reunion. Unless there are very exceptional circumstances, which are plainly not present here, submits Mr Lewis, a person cannot rely on Article 8 ECHR to supplement or augment the rights conferred by Dublin III. This applicant is on the cusp of adulthood, and nothing about his case is 'very exceptional' when viewed in the context of the cohort of unaccompanied minors in continental Europe seeking family reunion pursuant to Dublin III.

81. In relation to Article 8 ECHR, and in light of the Court of Appeal's judgment in *FWF*, Mr Lewis submitted that, to the extent that there is a positive Article 8 obligation to facilitate the applicant's transfer to this country, the Secretary of State is meeting that obligation by the steps she is now taking to finalise the Dublin III transfer process. There can be no question of the Secretary of State breaching the United Kingdom's negative Article 8 obligations towards the applicant, SU and LB, as 'family life' plainly does not exist between them. SU has only met the applicant twice. The first time was in 2008, when the applicant was five years old, and then it was not until 2016 that they met again. There is no evidence as to what the applicant and SU did together in these two brief meetings. Their only contact has been by telephone. LB is the applicant's 28 year old sister. She left the family home in Bangladesh to marry in 2012, which was the last time she saw him. The suggestion that Article 8 'family life' exists between the applicant, a young man on the cusp of adulthood, SU and LB is, Mr Lewis submits, 'hopeless'. There has simply been no breach of Article 8 on the facts of this case.

DISCUSSION

18 February and 17 March decisions

82. This application for judicial review is founded upon the procedural implications of two initial decisions by the Secretary of State which she now accepts to have been unlawful: see paragraphs 24 and 28 of Mr Lewis' skeleton argument dated 18 January 2021.

83. Specifically, the Secretary of State accepts that she made a mistake of fact in her 18 January decision, in part because she relied on the absence of the applicant's 'original' birth certificate and declined to accept an inferior translation into English. In fact, as the Secretary of State now accepts, the authorities in Bangladesh issue such documents in Bengali and English. The English version provided had been the original version, and the reasons given by the Secretary of State for refusing to accept the document do not withstand scrutiny.

84. In relation to the 17 March decision, the Secretary of State accepts that she could and should have used the first reconsideration request as an opportunity to cure the defects in her earlier decision yet did not. She wrongly stated that 'no further evidence' had been provided with the reconsideration request, whereas additional, Bangla versions of the birth and family certificates had been provided to her.

85. As outlined above, Ms Kilroy advanced a multi-faceted challenge to these decisions, on a number of detailed bases. I accept Mr Lewis' submissions that, at this stage, and for the purpose of the present binary assessment of the lawfulness of the two initial decisions, it is not necessary for me to engage in further analysis of those criticisms. The Secretary of State accepts that the two decisions were unlawful, and the decisions are not defended.

86. As Ms Kilroy accepts at [7] of her post-hearing submissions on *FWF*, the first two refusals had legal effect. This is not a case where the unlawful refusals were void and had no legal effect (in contrast, for example, to the Secretary of State's purported refusals outside the two month limit in *FWF*, which had no legal effect: see [133]). The decisions of 18 February and 17 March were unlawful and provided the unlawful foundation for the Secretary of State's subsequent reconsideration refusals, as set out below. While ordinarily I may have had some reservations about quashing a decision which has had legal effect in another member state in the context of a member state-to-member state regime for the allocation of responsibility for the examination of claims for international protection, I consider that it is appropriate to do so in this case. The Greek authorities are live to these proceedings and are actively awaiting my decision. In the circumstances, quashing the decisions would be appropriate.

27 April and 1 June decisions

87. The first two unlawful decisions laid the foundations for the Secretary of State's subsequent unlawful processing of the TCR, in the form of the 27 April and 1 June decisions. Mr Lewis contends that, in light of the 'resubmitted' TCR on 31 December 2020, and the Secretary of State's acceptance of the family link, it is academic for me to engage in further and detailed consideration of the merits of the third and fourth decisions of the Secretary of State.

88. I am not persuaded that consideration of the third and fourth decisions of the Secretary of State is wholly academic. Pursuant to *FWF*, so-called 'incidental' breaches of Dublin III are of peripheral relevance to the overall question of whether there has been a 'breach' of Dublin III where transfer takes place within the overall 11 month longstop: see [133]. By the same token, it must follow that, where (as here) transfer has *not* taken place within the 11 month longstop, the question of

whether there has been a breach of Dublin III remains a live issue, and must be determined, as it may be relevant to the question of damages for breach of EU law (subject to submissions on the question of EU exit).

89. Taken in isolation, the 27 April and 1 June decisions were based on a literal application of Article 5(2) of the Implementing Regulation and *X and X v Staatssecretaris van Veiligheid en Justitie* (Cases C-47/17 and C-48/18). At [86], the Court of Justice held that Article 5(2) of the Implementing Regulation:

> '…must be interpreted as meaning that the expiry of the two-week time limit for a reply laid down by that provision definitively brings to an end the additional re-examination procedure, whether the requested Member State has, or has not, replied within that period to the re-examination request made by the requesting Member State.'

90. To that end, submits Mr Lewis, the decisions of 27 April and 1 June were in response to 'impermissible reconsideration requests', and should be treated as final.

91. Ms Kilroy contends that *X and X* is, upon a purposive interpretation in light of the best interests of the child, not the binding authority for which the Secretary of State contends. I agree. In my judgment, while the Secretary of State's reliance on *X and X* was superficially consistent with the approach of the Court of Justice, Mr Lewis' submission is flawed.

92. *X and X* did not concern unaccompanied minors, and its teleological and purposive interpretation of the Dublin III regulation was not conducted with the best interests of a child applicant in mind, pursuant, for example, to Article 6(1), which gives expression to the principles at the heart of Recital (13). There is nothing in the court's judgment which suggests that a reconsideration refusal under Article 5(2) of the Implementing Regulation is irrevocable where the underlying reconsideration refusal concerns the best interests of an unaccompanied minor.

93. Moreover, the Dublin regime admits of the possibility of TCR requests involving unaccompanied minors taking longer to process by the requested member state than the mandatory time limits prescribed by Article 22(1) of Dublin III.

94. Article 12(2) of the Implementing Regulation provides:

> '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.'

Pursuant to the correlation table at Annex II to Dublin III, the references to Article 18(1) and (6) are to read as references to Articles 22(1) and (6), and 29(2) of Dublin

III. Neither this provision, nor the concept of the best interests of the child, were addressed in *X and X*.

95. In *R (oao HN and MN (by their litigation friend SH)) v Secretary of State for the Home Department* JR/4719/2018, Mr Justice Lane, President, and Upper Tribunal Judge Mandalia considered the import of Article 12(2) of the Implementing Regulation in the context of a default acceptance case (see [54]). Having found the UK to be the responsible member state by default, at [57], the tribunal identified the potential impact of Article 29(2) of Dublin III, in light of the fact the applicants had not been transferred by Greece within the mandatory six month time limit. Pursuant to Article 29(2), the consequences of the Greek failure to transfer the applicants to the UK within six months meant that responsibility for the examination of the asylum claims defaulted to Greece. The tribunal considered the judgment of Upper Tribunal Judge Frances in *R (oao FA & Others) v Secretary of State for the Home Department*, another default acceptance case. At [66], Judge Frances held:

> 'Article 12(2) of the [Implementing Regulation] applies in extreme cases where there are 'best interest reasons' for not complying with the time limit.'

96. In *HN and MN*, the tribunal concluded that the allocation of responsibility for an unaccompanied minor by default was not capable of overriding the child's best interests. Article 12(2) of the Implementing Regulation operated in parallel with the deemed acceptance of the TCR. If transfer were not in the child's best interests, the regulation did not require it to proceed. At [77], the tribunal held:

> 'There is therefore scope for the disapplication of the time limits, if warranted.'

And at [78]:

> 'Article 12(2) [of the Implementing Regulation] is not in our judgment, concerned with a 'reversal of the obligation' to take charge, or the '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.'

97. Those were considerations which, by definition, the Court of Justice did not have cause to consider in *X and X,* but which are central to the issue of whether the strict application of the time limits enunciated by the Court of Justice reads across to cases involving unaccompanied minors.

98. The potential import of Article 12(2) of the Implementing Regulation in the present matter is that, had the Secretary of State withdrawn her earlier unlawful refusals, the provision would potentially have permitted an extension to the Article 22(1)

two month limit for responding to a TCR on the grounds of the applicant's best interests.

99. Drawing this analysis together, the Secretary of State's approach in the 27 April and 1 June decisions was to rely on her earlier unlawful refusals to accept the family link between the applicant and SU and LB, and in doing so, compound her earlier unlawfulness, purportedly justified by reliance on a judgment of the Court of Justice which had nothing to do with unaccompanied minors. The decisions of 27 April and 1 June provided opportunities for the Secretary of State to cure those defects. She did not avail herself of those opportunities.

100. I therefore quash the decisions of 27 April and 1 June.

101. Had the Secretary of State used the 27 April or 1 June decisions as vehicles to withdraw her earlier, unlawful refusals, there are at least two constructions of the Dublin regime which would have followed, each with the same result. The withdrawal of the earlier unlawful refusals would have resulted in the UK being the responsible member state by default, pursuant to Article 22(7). Alternatively, pursuant to Article 12(2) of the Implementing Regulation, the Article 22(1) two month time limit for responding to the TCR could have been extended to enable the Secretary of State's proper consideration of the applicant's best interests, following the withdrawal of her earlier unlawful refusals. On either formulation, whether the UK became the responsible member state depends on the applicant's best interests, and on either formulation, the result would be the same; the UK is the responsible member state, provided transfer would be in the applicant's best interests. It is not necessary to reach a final view on which of the two procedural alternatives would lead to this result.

102. The 27 April and 1 June decisions therefore provided the Secretary of State with the opportunity to withdraw the earlier, unlawful refusal decisions, with the effect that the UK would have been the responsible member state, provided transfer was in the applicant's best interests. By the time of the final reconsideration refusal, on 1 June, the applicant's transfer would still have been within the six month transfer window permitted by Article 29(1) of the regulation. Provided the best interests requirement were met, the applicant's transfer could have been effected within the overall Dublin III time limit, with no overall breach of the regulation.

103. By the date of the hearing on 25 January 2021, the Secretary of State was yet to commission formal assessments of the applicant's best interests by the relevant local authorities. The order I made at the end of the hearing required her to do so forthwith. Such assessments should have been commissioned well within the initial two month period for responding to the TCR.

104. At this stage, in the absence of the local authorities' assessments of the applicant's best interests, I am not in a position to assess whether the Secretary of State has breached her overall obligations towards the applicant under the Dublin III regulation. It is only if transfer is in the applicant's best interests that the UK is the responsible member state by default. Having made an order to require the Secretary of State to commission local authority assessments to that end, it would be inappropriate for me to seek to usurp that process by pre-empting it, and

unilaterally declaring that transfer would be in the applicant's best interests. I have doubts about Ms Kilroy's submission, outlined in paragraph 60, above, that there is no requirement to demonstrate the ability of the proposed family member in this country to care for a Dublin III unaccompanied minor. It is true that there is no *express* requirement, as there is with Article 8(2) concerning a 'relative'. However, the placement of an unaccompanied child with a family member or sibling who was *not* able to care for the child would be anathema to the primacy of the best interests of a child. The ability of the family member or sibling to take care of the child is certainly a relevant factor that must be considered.

105. While I note that Lord Boyd was content to conclude in *Nasser Al-Fadhli* that transfer would be in the petitioner's best interests, that was plainly a case-specific decision, on the basis of the materials before the Outer House. See paragraph 2: 'having regard to the material before the court in terms of the petitioner's best interests.' I am not privy to the materials that were before Lord Boyd, but I do know that in these proceedings no formal local authority assessments had been conducted by the time of the hearing on 25 January.

106. It is sufficient to state that, if it is in the applicant's best interests that he be united with either his uncle or his sister, the UK will be the responsible member state, and transfer will have breached the eleven month long stop.

The respondent's practice of soliciting further TCRs

107. There was no application to amend the grounds for judicial review in light of Judge Norton-Taylor's observations when granting permission concerning what is said to be the respondent's practice of 'soliciting' fresh TCRs. The grounds for judicial review target only the four decisions set out above. See Section 3 on form T480 sealed on 15 June 2020. While there is a generic reference to the Secretary of State's 'ongoing' decisions being the target of the judicial review, the 'ongoing' conduct of the Secretary of State was plainly a reference to the alleged, thereby 'ongoing', failure to respond positively to the TCR and the reconsideration requests. Quite apart from the difficulties inherent to considering post-decision material in judicial review proceedings which I consider below, the generic reference to the 'ongoing' conduct of the Secretary of State is imprecise and vague, and certainly cannot provide cover for the applicant to target any post-decision conduct of the Secretary of State at will. The two grounds for judicial review remain as those set above, with no specific ground targeting any specific post-decision steps taken by the Secretary of State in relation to soliciting a 'fresh' TCR request. I note that Ms Kilroy's skeleton argument raises the issue at [3] to [6], but that is as part of a general discourse of the sort referred to at paragraph 25, above, distinct from the submissions advanced in relation to the grounds upon which the applicant enjoys permission which start at [36] and following.

108. In Secretary of State for the Home Department v R (oao Spaihu) [2018] EWCA Civ 2604 at [63], the Court of Appeal held:

> 'It will usually be better for all parties if judicial review proceedings are not treated as "rolling" or "evolving", and it is generally simpler and more cost-effective for the

> reviewing court to avoid scrutinising post-decision material. But there will also be a need to maintain a certain procedural flexibility so as to do justice as between the parties.'

109. It follows that this application for judicial review is not expressly concerned with the question of whether the Secretary of State has a practice of soliciting new TCRs, and if so whether the practice is unlawful. The Secretary of State's subsequent engagement with the GDU which led to the correspondence received on 31 December 2020 is a post-decision matter. In the absence of express grounds concerning this issue, and having heard only peripheral argument on, in the exercise of my discretion pursuant to the overriding objective, I decline to consider it.

ARTICLE 8 ECHR AND THE CHARTER

110. I will approach the Article 8 ECHR submissions as follows:

    a. By reference to first principles, what are a contracting party's Article 8 ECHR obligations?

    b. What is the relationship between Article 8 ECHR, the Dublin III regime and the Charter?

    c. What, therefore, are the UK's Article 8 obligations towards the applicant?

a) Article 8: first principles

111. I reject Ms Kilroy's submission that the potential responsibility of the UK for examining the applicant's asylum claim necessarily provides a 'strong indication' of the engagement of his Article 8 ECHR family life rights in relation to his uncle and sister (see Ms Kilroy's skeleton argument at [52]). While there are areas of overlap between the Dublin III regime and the rights guaranteed by Article 8 ECHR, the two regimes are not identical. The Dublin III regime goes considerably further than Article 8 ECHR in some respects. In others, the two regimes 'may sometimes tug in different directions', and in especially compelling cases, the requirements of Article 8 may militate in favour of bypassing the Dublin III procedures (see *R. (oao ZT (Syria)) v Secretary of State for the Home Department* [2016] EWCA Civ 810 at [65]).

112. In order to address the Article 8 submissions, I shall return to first principles.

113. As Baroness Hale explained in *R (oao Bibi) v Secretary of State for the Home Department* [2015] UKSC 68 at [25] to [29], and in *R (oao MM (Lebanon)) v Secretary of State for the Home Department* [2017] UKSC 10 at [38] and [40] to [44], the Strasbourg Court has for long distinguished between the negative and positive obligations imposed by Article 8 of the ECHR. Contracting parties to the Convention have negative obligations not to interfere with the private and family lives of settled migrants, other than as may be justified under the derogation contained in Article

8(2). By contrast, in cases concerning the removal, or admission, of migrants with no such rights, the essential question is whether the host state is subject to a positive obligation to facilitate their entry or continued residence. In positive obligation cases, the question is whether the host country has an obligation towards the migrant, rather than whether it can justify the interference under Article 8(2). But the principles concerning negative and positive obligations are similar. As the Strasbourg Court held in *Gül v Switzerland* (1996) 22 EHRR 93:

> 'In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the state enjoys a certain margin of appreciation…' (paragraph 106)

b) The relationship between Article 8 ECHR, Dublin III and the Charter

114. In *FWF* the Court of Appeal conducted an extensive review of the authorities on the interaction between the Dublin III regime and Article 8 ECHR. While Ms Kilroy sought to confine *FWF* to the default acceptance context, I do not consider that attempted distinction to be of merit, for the following reasons.

115. First, I have quashed the refusal and initial reconsideration decisions dated 18 February and 17 March respectively. As set out in paragraph 101, above, the result is that either the UK is the responsible member state by default, or that the time for accepting the TCR may be extended, provided it is in the applicant's best interests. Each formulation would lead to the same result, provided that were consistent with the applicant's best interests. It is not necessary to determine the precise inner workings of the Dublin III regime, given the end result would be identical. Ms Kilroy's submissions that *FWF* concerned a so-called 'default acceptance' scenario does not place the case in significantly different territory from the present matter.

116. Secondly, the Court of Appeal's analysis of the interaction between Article 8 ECHR and Dublin III was not confined to 'default acceptance' Dublin III cases. It concerned a broad range of Dublin III authorities, including proceedings where the applicants specifically sought to *bypass* Dublin III on Article 8 grounds, having chosen not to claim asylum in the host member state. See, for example, *ZT (Syria)*, *R (oao Citizens UK) v Secretary of State for the Home Department* [2018] EWCA Civ 1812, *R (oao AM) v Secretary of State for the Home Department* [2018] EWCA (Civ) 1815.

117. At [134] to [136] of *FWF*, Laing LJ contrasted the aims and purpose of the Dublin III regime and the Strasbourg authorities concerning a state's positive obligation to admit the family member of a person settled in a contracting state. She noted that some Strasbourg authorities, for example *Tanda-Muzinga v France* (Application No

2260/10, 10 July 2014), recognised that family reunion may, compatibly with Article 8 ECHR, take some time. At [136], she stated:

> 'There is no Strasbourg case, however, which has recognised a positive obligation to admit them within the relatively short time limits prescribed by Dublin III. Moreover, no Strasbourg case has derived an obligation from article 8 to admit a person to a contracting state in order to enable that state to consider his claim for international protection.'

Ms Kilroy's *FWF*-based submissions did not highlight any Strasbourg authorities which cast a shadow of doubt over the above summary by Laing LJ of that court's jurisprudence.

118. It follows that nothing in the Court of Appeal's analysis in *FWF* concerning the interaction between Article 8 ECHR and the Dublin III regime was confined to the facts of the proceedings in *FWF*. To the extent that the principles enunciated by *FWF* concerned the facts of the proceedings before the Court of Appeal, for example where there were only 'incidental' breaches of Dublin III, that is of course relevant, and will be considered as set out below.

119. I turn therefore to the court's substantive analysis of the relationship between the two regimes.

120. At [137] of *FWF*, Laing LJ held:

> 'It is therefore obvious that the obligations imposed by Dublin III are not a mirror image of the obligations imposed by article 8. The references in the recitals to article 8 and to article 7 CFR [the Charter of Fundamental Rights] show, not that Dublin III mirrors article 8, but, rather, that in framing Dublin III, the legislator has had the importance of family links well in mind, no doubt because it was thought that if an application for international protection succeeds, it will help the successful applicant to settle in his new country if any member of his wider family is lawfully present there. Recital (32) recognises the significance of the Strasbourg caselaw, but does not oblige member states to go further than that caselaw indicates…'

121. Laing LJ then addressed the question to be addressed by a court seized of a possible breach of Article 8 ECHR or the Dublin III regime, which she had identified, at [134], in these terms:

> 'The second issue is whether the court should ask, not whether a public authority has interfered with the rights protected by article 8, or whether a public authority has

> failed to discharge a positive obligation imposed by article 8, but whether article 8 is engaged in the overall operation of the Dublin scheme, and then to ask whether the Secretary of State has acted unlawfully in the discharge of the obligations imposed by that scheme.'

122. The answer to that question, held the court at [138], was that:

> 'The Strasbourg cases do not decide that if a contracting state establishes an administrative scheme (such as Dublin III) which is designed, in part, to recognise or to respect the rights protected by article 8, any incidental unlawfulness in the operation of such a scheme is a breach of article 8. Such an approach is similar to the approach which a court takes when considering an allegation of discrimination contrary to article 14. That approach is to ask, if a state is acting 'within the ambit' of a Convention right, whether an applicant has been treated differently on the grounds of his status. Article 14 does not require an interference with Convention rights. There is no warrant for such an approach to article 8. A breach of article 8 depends, in the case of a negative obligation, on an interference with rights protected by article 8, and, in the case of a positive obligation owed to that person, a breach of that positive obligation.'

123. I accept that the Dublin III unlawfulness in the present matter is more than incidental. If transfer is in the applicant's best interests, it will not be able to take place until some time after the eleven month longstop has passed.

124. While below I give reasons for finding that the applicant's Article 8 ECHR private and family life rights are not breached by the decisions of the Secretary of State, the question of the applicant's private life under Article 7 of the Charter is a different matter. While the Charter draws much of its inspiration from the ECHR, and the provision made by each overlaps to a considerable extent, the scope of their engagement can be different, as the Charter can provide more extensive protection than the ECHR. Article 52(3) of the Charter provides:

> 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. **This provision shall not prevent Union law providing more extensive protection.**' (emphasis added).

125. The Charter is engaged when the Secretary of State is acting within the scope of EU law, or, more accurately, 'implementing' EU law (see *R. (oao NS) v Secretary of State*

for the Home Department (C-411/10) [2013] QB 102, operative paragraph 1). The Charter can be engaged even where corresponding rights in the ECHR would not be. See, for example, *ZZ v Secretary of State for the Home Department* (C-300/11) [2013] QB 1136, concerning the engagement and import of Article 47 of the Charter in circumstances where Article 6 of the ECHR would have no role to play, namely in immigration proceedings. That is an example of the more extensive provision which can be made under the Charter. Similarly, while the ECHR has territorial constraints which limit its effective scope of application in relation to individual contracting parties (see Article 1 of the Convention: 'the High Contracting Parties shall secure to *everyone within their jurisdiction* the rights and freedoms defined…'), the Charter is engaged on the 'implementing' EU law basis set out above. In practical terms applied to the present matter, that means that there may be circumstances when an individual's Article 8 ECHR private life rights are not engaged towards the UK, even though the equivalent rights in the Charter do not operate under the same territorial constraints.

126. It is difficult to see how the Charter could *not* be engaged in relation to the applicant's Article 7 private life. The circumstances of his life in Greece (which is, of course, outside the territorial scope of the UK's ECHR obligations, with the effect that he does not enjoy Article 8 private life *vis a vis* the UK's ECHR obligations) are closely intertwined with the processing of his application under the Dublin III regime. The UK's responses to the GDU's requests amount to the UK 'implementing' EU law for these purposes. The applicant's Article 7 Charter private life rights are therefore engaged.

127. By contrast, the applicant's private life Article 8 ECHR rights are, given his location in Greece, within the jurisdiction of the Hellenic Republic, and not the UK, and are not justiciable in these proceedings.

128. The applicant's Article 7 Charter 'family life' rights are not engaged. He does not enjoy 'family life' with his uncle or sister, as set out below. While the UK's obligations under the Charter are not subject to the same territorial constraints as its obligations under the ECHR, nothing in the Charter requires a broader view of what amounts to the substance of family life than is required under the ECHR.

129. It follows that the Secretary of State's unlawful responses to the TCR and reconsideration requests breached the Dublin III regulation, and the applicant's Article 7 private life rights under the Charter. In practice, the engagement of the Charter on a private life basis is unlikely to add significantly, if at all, to the overall magnitude of the Secretary of State's breaches of EU law. The private life role of the Charter in this context is simply one facet of the Secretary of State's overall breach of the Dublin III regulation.

130. I address the question of relief, and associated next steps, at paragraph 171, below.

c) What, therefore, are the UK's Article 8 ECHR obligations towards the applicant?

131. The essential question for me to address under Article 8 ECHR is whether Article 8 imposes a positive obligation on the UK to admit the applicant for the purposes of unification with his family members already resident in the territory.

132. I make two preliminary observations. First, an overall breach of the Dublin III regime will not automatically be a breach of Article 8 ECHR, given the distinctions between the two regimes. I have been taken to no sub-species of Strasbourg authority concerning the impact on the positive and negative obligations of a contracting party by a parallel administrative regime for family unification, even where there is a breach of that regime. See [138] of *FWF*, quoted at paragraph 122, above.

133. Nor have I been taken to any authority which demonstrates that the 'in accordance with the law' criterion of Article 8(2) applies to a positive obligation case. While the proportionality assessment inherent to Article 8(2) has been described domestically as a 'useful tool' for assessing whether a fair balance has been struck between the individual and public interests at play in such a decision (see *MM (Lebanon)* at [44]), nothing I have been taken to demonstrates that the other criteria in Article 8(2) map across to the fair balance assessment. In practical terms, therefore, a breach of the Dublin III regulation in a putative positive obligation case does not result in an additional breach of Article 8 ECHR on 'not in accordance with the law' grounds under Article 8(2).

134. Secondly, while the applicant's best interests as a child are a primary consideration, they cannot, in principle, affect an analysis of whether 'family life' exists between him and his uncle and sister. Family life either exists, or it does not. Of course, the assessment that follows must be conducted in a manner benevolent to the applicant, reflective generally of the primacy of his best interests. However, while it would no doubt be in the applicant's best interests for family life to be found to exist, the question of whether it does exist is an objective question, which must be assessed according to the evidence.

Does the applicant enjoy 'family life' with SU or LB?

135. It is necessary first to establish whether the applicant enjoys 'family life' for the purposes of Article 8 ECHR with his uncle or sister. If 'family life' does not exist, there can be no question of a positive obligation to facilitate the admission of the applicant exists, still less whether such an obligation has been breached.

136. I take the following facts from the uncontested witness statements of SU and LB.

Family life: factual matrix

137. SU was born in 1962 in Bangladesh. His elder sister is the applicant's mother. SU left Bangladesh in 1989 for Italy. He married his wife, whom he met in Bangladesh, in 1999, and she joined him in Italy. He acquired Italian citizenship in 2010 and now lives in this country, having acquired the right to permanent residence on 9 October 2017.

138. SU first met the applicant in 2008 during a return visit to Bangladesh. The applicant would have been five or six years old. Their second, and only subsequent, meeting was in 2016, when the applicant would have been 13 or 14 years old. SU does not suggest that he ever spoke directly to the applicant when he was in Bangladesh; SU's contact was with the applicant's mother, his sister. They

would speak three to four times weekly, and SU would enquire after the applicant. Now that the applicant is in Greece, he maintains 'close contact' with him and calls 'more often' (statement at [10]). The purpose of the calls is to check on the applicant and find how he is doing. SU is aware of the basic and unsatisfactory living arrangements of the applicant in Greece. SU liaised with the applicant's brother in Bangladesh to obtain some of the family documents that have been provided to the GDU as part of the asylum process. He has sought to cooperate with the Home Office as part of the Dublin process, but claims he didn't receive some of the correspondence that the Secretary of State maintains was sent to him. He made some calls to the Secretary of State's European Intake Unit when the applicant's Dublin application was refused. He has had contact with a charity called *Safe Passage* to help with the applicant's transfer here. He is very worried about his nephew.

139. LB's statement begins by outlining the family situation. She was born in 1991 in Bangladesh. She lived with the appellant and their brother and two sisters until leaving the country in 2012 with her Italian husband. In 2016 she moved with her husband to the UK, with whom she has three children. She would speak to her brother in Bangladesh every week to two weeks after leaving. Now she speaks with him almost daily. She is worried about him and so is in more frequent contact. His living conditions are concerning. She was very upset when his application was refused. In May 2020, she used the internet to find the charity Safe Passage which helped the applicant find a solicitor.

Family life: legal framework

140. In relation to Ms Kilroy's submissions concerning the *General comment No.* 14, I accept that the Strasbourg Court and the authorities draw on the UN Convention on the Rights of the Child when determining the engagement and scope of Article 8 family life in cases involving children. That the *General comment No. 14* emphasises the preservation of family, the maintenance of relations and the prevention of disruption is an uncontroversial proposition, and such considerations are woven throughout many domestic and international authorities concerning the best interests of children.

141. However, I consider the *General comment* to be of limited assistance in relation to the issue of determining whether family life exists in the first place between this applicant and his uncle and sister. The *General comment,* and the generally accepted emphasis on the importance of maintaining family relations and preventing family disruption in cases involving children, assist with identifying what the best interests of a child should be and how those interests should be incorporated into decision making, particularly in the context (in the extracts relied on by Ms Kilroy) of family reunification. In my judgment, the *General comment's* primary relevance in the context of these proceedings would be in relation to striking a fair balance between the rights of the individual child (and his or her family members) and the public interests of the state militating in the opposite direction, once family life is established, rather than determining whether family life for the purposes of Article 8 ECHR exists in the first place.

142. To the extent that the *General comment* endorses the proposition that the best interests of children may encompass many shapes and forms, it confirms established jurisprudence in this jurisdiction. I accept that cohabitation is not necessarily the hallmark of family life and that family life may exist even where those who are a party to it are separated by international boundaries. Internationally accepted standards for the best interests of children also assist in confirming it would be in the applicant's best interests for family life to be created with his uncle and sister, in the event it does not exist already.

143. The leading domestic authority on the existence of 'family life' for the purposes of Article 8 ECHR is *Kugathas v Secretary of State for the Home Department* [2003] EWCA Civ 31. At [14], Lord Justice Sedley drew on the decision of the European Commission for Human Rights in *S v United Kingdom* (1984) 40 DR 196, accepting that it sets out the 'proper approach.' Addressing the facts before it in those proceedings, the Commission held, at page 198:

> 'Generally, the protection of family life under Article 8 involves cohabiting dependents, such as parents and their dependent, minor children. Whether it extends to other relationships depends on the circumstances of the particular case. Relationships between adults, a mother and her 33 year old son in the present case, would not necessarily acquire the protection of Article 8 of the Convention **without evidence of further elements of dependency, involving more than the normal emotional ties**.' (emphasis added)

144. As to what was meant by 'dependency', Sedley LJ held at [17]:

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

145. Although in submissions Ms Kilroy contended that *Kugathas* was not the leading authority on this issue, that it had never been reported, and that it was not cited in *Pawandeep Singh*, it is clear that the Court of Appeal has consistently ascribed to it the significance for which Mr Lewis contends. See, for example, *AU v Secretary of State for the Home Department* [2020] EWCA Civ 338 at [32] ('Subsequent case law has built upon but not detracted from *Kugathas*…'); *R (oao Britcits) v Secretary of State for the Home Department* [2017] EWCA Civ 368 at [61], [74], and [86]; *Entry Clearance Officer, Sierra Leone v Edna Kopoi* [2017] EWCA Civ 1511 ('The leading domestic authority on the ambit of 'family life' for the purposes of Article 8 is the well-known decision of this court in *Kugathas*…' [17], [19], per Sales LJ, as he then was). *Kugathas* is plainly the leading authority. There must, therefore, be something more than normal emotional ties. There must be dependency characterised by real, committed or effective support.

146. I do not consider that Dyson LJ was attempting to adopt a different approach or establish a general principle of 'anticipatory' family life in *Pawandeep Singh* at [38] (see paragraph 62, above). Concerning *Pini v Romania*, which formed a central plank of the reasoning of Dyson LJ, Ms Kilroy initially sought to emphasise the fact the adoptive parents had not even met the children as being supportive of the applicant's case as to the existence of family life with SU and LB. However, as I pointed out during argument, there had been physical meetings between the persons concerned; one set of adoptive parents had met 'their' child five times, the other set, three times: see [26]. The court was not endorsing the proposition that family life can exist where physical contact had *never* taken place. In fairness to Ms Kilroy, she accepted as much when I drew the facts of *Pini* to her attention. But the factual matrix of *Pini* provides essential context for its influential role in *Pawandeep Singh*.

147. The facts of *Pawandeep Singh* were unique; the entry clearance applicant was a child who had been adopted in India, according to the laws and practices of the Sikh faith, by a British couple residing in this country. The adoption was recognised under the law of India. The arrangement was unique because the child remained in the home of his birth parents in India, along with his siblings, but was brought up to regard his adoptive parents as his real parents, and to address his birth parents as 'aunt' and 'uncle'. The adoptive parents visited at least twice annually. They took all major decisions for him, including concerning his schooling, providing funding and maintenance. The required irreducible minimum of family life with his adoptive parents plainly already existed, yet, if he were granted entry clearance to reside with them in this country, that kernel of family life would have expanded and developed exponentially, especially when compared to the long-distance arrangements which the family were forced to tolerate in the meantime. The extract from Dyson LJ's judgment at [38] relied upon by Ms Kilroy must be read in that context, and in the context of the remaining reasoning in the same paragraph, which included this important caveat:

> 'I acknowledge, however, that unless *some* degree of family life is already established, the claim to family life will fail and will not be saved by the fact that at some time in the future it could flower into a full-blown family life, or that the applicants have a genuine wish to bring this about.' (emphasis original)

For those reasons, the adjudicator had been entitled to find on the facts that family life did exist, the court held.

148. I consider that Dyson LJ's emphasis on the need for 'some degree of family life' already to be established must mean some degree of family life *for the purposes of Article 8 ECHR*. 'Family life' in this context cannot mean mere emotional ties. Were that not so, it would render nugatory any requirement for there to be more than normal emotional ties in an entry clearance (or any other Article 8) context. By definition, barring some intervening or disruptive act such as family breakdown, all 'usual emotional ties' would have the potential to develop into 'full-blown family life', given the opportunity to do so. Dyson LJ could not have meant that merely

demonstrating normal emotional ties would suffice for engaging Article 8 ECHR, given the potential for future development of family life. He was plainly referring to a quality of relationship which had already passed the minimum threshold to amount to 'family life' for the purposes of Article 8 ECHR. In *Pawandeep Singh*, as in *Pini's* case, formal adoption arrangements were in place, pursuant to the legal framework of the jurisdiction in which the putative adopted children resided. The parents and children had met, albeit to differing degrees. There were plainly more than mere emotional ties between the parents and children.

149. Ms Kilroy's reliance upon *R (oao Ahmadi) v Secretary of State for the Home Department* does not assist her submission either. Those proceedings concerned family life between two Afghan brothers in this country. The Secretary of State proposed to remove one of the brothers to Germany under the Dublin II regime, having certified a human rights claim he made in an attempt to resist removal as 'clearly unfounded' under section 92(2) of the Nationality, Immigration and Asylum Act 2002. Ms Kilroy relies on [17], where Moses LJ observed that:

> 'The question [of whether the human rights claim was '*bound to fail*'] must be considered in the light of the potential of the brothers' family life together, not just that which has existed for a short time in the past. It must also be remembered that by the time of any appeal before an immigration judge, the relationship, if it was a genuinely supportive relationship, will have developed, and a greater opportunity will have emerged for those qualified medically to speak about the effect of that relationship.'

150. In *Ahmadi*, Moses LJ was concerned not with the *engagement* of Article 8 on a family life basis, but rather the *proportionality of removal*, once Article 8 was engaged. So much is clear from the discussion of the fifth question posed by Lord Bingham of Cornhill in *Razgar* [2004] UKHL 27 at [15] of Moses LJ's judgment. By definition, *Razgar* question (5), concerning the proportionality of an interference with rights under Article 8(2) ECHR, only arises once Article 8 is engaged. If Mr Ahmadi were able to enjoy an in-country appeal, the adjudicator would have assessed the human rights claim at the date of the hearing, which would have been some time away. By then, the family life which – as was common ground – already existed would necessarily have augmented. There were health considerations and additional levels of dependency. The first instance judge simply failed to have regard to the likely facts as they would obtain before the adjudicator at the eventual appeal, and, as such, failed to have regard to a material consideration.

151. If any further clarity be required, it is provided by Moses LJ at [18], addressing this precise issue:

> 'That is not to say that, where there has been no pre-existing family life and there exists only a future intention, that will be sufficient to engage Article 8.'

152. *Boyle v United Kingdom*, also relied upon by Ms Kilroy, does not assist the applicant, other than to endorse the proposition that family life is capable of existing between an uncle and nephew, which is uncontroversial. The applicant uncle established that Article 8 ECHR family life existed with his nephew, with whom he was very close. The context was care proceedings, the uncle having been denied contact with the nephew upon the latter being taken into care as a result of abuse from his mother, the uncle's sister. The uncle and nephew lived close to each other, and the nephew made weekend stays at the uncle's home. The uncle had been a father figure to the nephew from birth. The care process cut the uncle out of the nephew's life altogether, with no provision for his involvement in the process to determine contact. Family life existed, but the absence of a proper process to respect the uncle's Article 8(1) rights meant that the interference could not be regarded as 'necessary' under Article 8(2): see [58].

153. While *Boyle* establishes that an uncle and nephew may enjoy Article 8(1) family life, I do not understand that simple proposition to be controversial. The issue in these proceedings is whether this applicant enjoys family life either with *his* uncle, or with LB. *Boyle* is instructive in one respect, as it assists with the calibration of the strength and depth of relationship required between non-immediate family members in order to establish 'family life' for Article 8(1) purposes. The relationship was very close, as outlined above.

Family life with SU: discussion

154. I find that the applicant and SU do not enjoy family life for the purposes of Article 8 ECHR. They have met only twice, once when the applicant was very young, and the last time in 2016. There are no details of what took place during those meetings. Prior to the applicant's arrival in Greece, the high watermark of his relationship with the applicant was to enquire after him when speaking to his mother. He does not claim to have spoken directly with the applicant, or written, or had any other form of long-distance relationship which goes beyond the normal emotional ties of uncle and nephew prior to his arrival in Greece. While there may have been an increase in the contact with the applicant following his arrival there, what is striking from the evidence presented in these proceedings is its general paucity. There are no copies of text message or telephone logs of the sort that would readily be available, and which are usually relied upon in cases where the parties seek to establish long-distance family life. SU's evidence is that he speaks regularly with the applicant by telephone. Such evidence would be easy to provide.

155. There is no evidence of any financial support, or any visits to meet with the applicant. While international travel has been difficult since late March 2020, the applicant arrived in Greece in May 2019 (see [20] of Emma Terenius' witness statement dated 12 June 2020). There is no suggestion of any visits by the uncle (or sister) in the ten month period before the pandemic struck, which is significant. Were it the case that 'family life' existed between the applicant and SU, I would have expected SU's statement to have at least engaged with the possibility of travelling to meet him, even if there were practical problems which later intervened, or which prevented travel in the first place. SU wrote that he could not

afford lawyers to assist the applicant in his asylum and Dublin claim. He does not say there was no possibility of travelling to meet him.

156. SU has indicated a willingness to accommodate the applicant in future and supports his Dublin transfer request. That is a degree of support. However, the mere fact of his willingness to support the applicant in the future, assessed in the context of the general paucity of evidence as to the current status of family life between the two, is insufficient. Many human rights claims where the central issue is whether 'family life' exists in the entry clearance context involve the prospect of the parties cohabiting upon arrival in this country; something more than mere willingness to accommodate is required to demonstrate the engagement of Article 8 on a family life basis prior to their arrival.

157. I accept that SU, and LB (see below), have provided some assistance to the applicant with his Dublin III application. As detailed by Ms Terenius at [7] of her statement, SU assisted the applicant to liaise with SA, the applicant's cousin in Bangladesh, to obtain his birth certificate and other documentation. I accept that those isolated tasks do involve the provision of a degree of support, but when viewed in the context of the overall paucity of evidence, that is insufficient to reach the minimum threshold for the existence of family life.

158. The fact that family life would inevitably develop in the future is not sufficient to merit a finding that it *already exists*, as set out above. The case-specific examples relied upon by Ms Kilroy concerning other decisions of this tribunal finding that family life does exist are just that: case-specific examples. They do not establish a proposition. They are merely examples of already-established principles applying to the facts of individual cases.

Family life with LB: discussion

159. I reject Ms Kilroy's submission (see [53] of her skeleton argument) that family life should be 'presumed' to exist in this sibling context. The assessment of family life is inherently case-specific, and there is no presumption that it exists in any context: see Arden LJ at [24] of *Kugathas*:

> 'There is no presumption that a person has a family life, even with the members of a person's immediate family. The court has to scrutinise the relevant factors.'

160. Similarly, Ms Kilroy's reliance on *R (oao FA & Ors) v Secretary of State for the Home Department* JR/5523/2018 does not take matters further. It was common ground on the facts of those cases that Article 8 was engaged on a family life basis: see [79]. The fact that in other, factually distinct, proceedings the parties agreed that Article 8 was engaged does not lead to the conclusion that it must be engaged in the present matter. A case specific assessment is required.

161. LB left the family home when the applicant was nine years old. They have not seen each other since. He is now nearly 18. LB paid no return visits to Bangladesh prior to his departure and does not appear to have sought to visit the applicant in Greece, nor contemplated the possibility of travelling to meet the applicant in the ten

months before the pandemic struck. There are no details of telephone, messaging or social media contact of the sort which would readily be expected when family life exists between an adult and minor sibling living in different countries.

162. I accept that LB appears to have been instrumental in securing the services of Safe Passage on behalf of the applicant: see [6] of her statement. This accords with SU's statement at [17] where he writes that it was LB who contacted Safe Passage, thereby taking the initial steps to catalyse the applicant obtaining legal representation. That led to him instructing Wilson solicitors, and bringing this application. I take that into account.

163. I find that LB has provided the applicant with a degree of support, but the support is limited, and I do not consider it to demonstrate the required 'dependency' on the part of the applicant. There is no evidence of financial or other physical provision, such as sending, posting or arranging delivery of items of support, such as clothing or other basic items. While I accept that LB has emotional concern for her brother and is worried for him, such concern does not evidence more than normal emotional ties. If family life existed, there would be a wealth of evidence of more contact and greater support, even taking into account the difficulties of making such provision while the applicant remains in Greece. LB does not mention barriers to such support, other than financial barriers in seeking legal representation for the applicant. She does not mention that she experienced financial or other barriers in seeking to provide the applicant with other forms of support.

164. Plainly, there is the potential for 'family life' to develop in due course in relation to both SU and LB, in the event that the applicant's transfer to the UK under Dublin III is in his best interests and therefore takes place. However, I find that 'family life' does not exist between the applicant and SU and LB at the present time. Whatever the potential may be in the future, 'family life' does not exist at the moment.

165. In relation to the applicant's private life under Article 8 ECHR, he is outside the territorial jurisdiction of the UK's ECHR obligations, as he is in Greece.

166. It follows, therefore, that the respondent's failure properly to consider the TCR request made by the GDU did not entail a breach of the UK's obligations under Article 8 of the European Convention on Human Rights.

SUMMARY OF DECISION

167. This application for judicial review is granted in relation to Ground 1, to the extent that the Secretary of State's processing of the TCR and refusal to accept responsibility for the examination of the applicant's asylum claim was a breach of the Dublin III regulation.

168. The application is dismissed in relation to Ground 2. In the absence of an assessment of the applicant's best interests, it is not possible for me to conclude that the UK is responsible for the examination of the applicant's asylum claim.

169. To the extent both grounds contend that the Secretary of State's processing of the TCR breached the applicant's rights under Article 8 ECHR, this application is dismissed.

170. In the exercise of my discretion, I decline to conduct a full assessment of the applicant's best interests, for the reasons given at paragraph 104, above.

OTHER RELIEF

171. Both parties are directed to make written submissions on the question of whether any further relief is required, as follows:

    a. Within 14 days of being sent this judgment in draft, the applicant may make written submissions on those issues;

    b. Within 28 days of being sent this judgment in draft, the respondent may make written submissions on those issues.

172. Written submissions from each party must be no longer than ten pages. If relevant, the submissions should address paragraph 4 of Schedule 1 to the EU (Withdrawal) Act 2018, which provides:

> 'There is no right in domestic law on or after IP completion day to damages in accordance with the rule in *Francovich*.'

173. If further written submissions, or an oral hearing is required, I will give further directions accordingly.

POSTSCRIPT

174. This judgment was circulated in draft to the parties on 2 March 2021. On 3 March, by a letter from the applicant's solicitors I was informed that the respondent had accepted the TCR on 9 February. I sought submissions from the parties as to (i) why I had not been informed of the development, and (ii) the impact of the TCR having been accepted on the applicant's application for judicial review.

175. As to (i) there appears to have been an oversight on the part of both parties. The Secretary of State, having accepted the TCR, should have informed me immediately. The failure to do so is said to be attributable to an oversight by the case lawyer in the Government Legal Department. The applicant was on notice from the GDU that the request had been accepted on 12 February 2021, but decided to seek further confirmation from the Secretary of State before informing the tribunal. Strikingly, despite having copied other inter-parties correspondence to the tribunal, those representing the applicant decided not to do so on that occasion. If ever there was a time to copy correspondence to the tribunal, or alert it to potentially significant developments, it was then.

176. As to (ii), the applicant proposed amendments to the judgment to reflect the fact the TCR had been accepted. The respondent submitted that the 'administrative oversight' had no bearing on the draft judgment, suggesting that the factual

development could be regarded as a postscript. I agree with the respondent. The judgment reflects my decision and reasons on the application for judicial review as it was presented to me. There will always be post-hearing developments in judicial review cases, especially in this jurisdiction, where the Secretary of State engages with an applicant through a series of decisions and actions over a course of time. Just as 'rolling review' is generally to be avoided, so too should judgments seek to avoid trying to adapt to a continually changing factual matrix. Insofar as the date of the TCR being accepted has any bearing on further relief sought by the applicant, that is an issue which may be dealt with pursuant to the directions set out in paragraph 171 and following, above.

Stephen H Smith

Upper Tribunal Judge Stephen Smith

5 March 2021

Annex – Order dated 26 January 2021

IN THE UPPER TRIBUNAL CASE NO: JR/1592/2020

B E T W E E N : –

The Queen (on the application of ShM) Applicant

– and –

Secretary of State for the Home Department Respondent

INTERIM ORDER

UPON hearing from the Applicant's counsel, Ms Charlotte Kilroy QC and Ms Michelle Knorr, and the Respondent's counsel, Mr Gwion Lewis at a hearing on 25 January 2021;

AND UPON the Respondent accepting that her substantive decisions dated 18 February 2020 and 17 March 2020 refusing the request made on 7 January 2020 by the Greek authorities for her to take responsibility for the Applicant's asylum claim under Article 8 EU Regulation 604/2013 were unlawful and fall to be reconsidered;

AND UPON the Respondent committing to all reasonable endeavours to secure family assessments from the relevant local authorities on an expedited basis;

IT IS ORDERED that:

1) The Respondent shall make a request to the relevant local authorities for SU and LB by 4.30 pm on 27 January 2020 to conduct urgent assessments and must inform the Applicant of the outcome of those assessments, through his solicitor, within 1 working day of receipt.
2) The Respondent shall communicate a decision on the Article 8 TCR to the Greek authorities within 2 working days of receiving any positive local authority assessment for either SU or LB (it not being necessary to await a positive local authority assessment in relation to both SU and LB), and shall provide a copy of that decision to the Applicant's solicitor.
3) At the time of communicating the decision on the TCR to the Greek authorities, and in the event that the TCR is accepted, the SSHD shall request that the Greek authorities expedite the Applicant's transfer insofar as they are able to do so. The Respondent must provide a copy of the request to the Applicant's solicitor together with the decision on the TCR.
4) Liberty to apply.
5) The Respondent do pay the Applicant's reasonable costs of the application sealed 11 January 2021, to be assessed if not agreed.

Stephen H Smith
Upper Tribunal Judge Stephen Smith,
26 January 2021