R (on the application of MS) (a child by his litigation friend MAS) v Secretary of State for the Home Department (Dublin III; duty to investigate) [2019] UKUT 9 (IAC)

Upper Tribunal
Immigration and Asylum Chamber

Heard at Field House
On 17 and 18 May 2018

Before

Upper Tribunal Judge Grubb
Upper Tribunal Judge Blum

Between

The Queen (on the application of MS)
(a child by his litigation friend MAS)
(Anonymity Direction Made)

Applicant

v

Secretary of State for the Home Department

Respondent

Appearances:

For the Applicant: Ms C Kilroy and Ms M Knorr instructed by Bhatt Murphy Solicitors
For the Respondent: Mr G Lewis instructed by Government Legal Department

(1) A Member State considering a Take Charge Request ("TCR") made by another Member State under the Dublin III Regulation has a duty to investigate the basis upon which that TCR request is made and whether the requirements of the Dublin III Regulation are met. (R (on the application of MK, IK (a child by his litigation friend MK) and HK (a child by her litigation friend MK) v Secretary of State for the Home Department (Calais; Dublin III Regulation – investigative duty) IJR [2016] UKUT 00231 (IAC) followed).

© CROWN COPYRIGHT 2019

(2) The Member State's duty is to "act reasonably" and take "reasonable steps" in carrying out the investigative duty, including determining (where appropriate) the options of DNA testing in the requesting State and, if not, in the UK (MK, IK explained).

(3) The duty of investigation is not a 'rolling one'. The duty does not continue beyond the second rejection, subject to the requirements of fairness (MK, IK not followed).

(4) Fairness requires that the applicant, even after a second rejection, must know the 'gist' of what is being said against him in respect of the application of the criteria relevant to the TCR and must have an opportunity to make representations on the issues and material being relied on if that has not previously been the case. In those circumstances, fairness requires that the respondent consider any representations and material raised (perhaps for the first time) to deal with a matter of which the individual was 'taken by surprise' in the second rejection decision. To that extent only, the duty continues and may require the requested State to reconsider the rejection of the TCR.

(5) In judicial review proceedings challenging a Member State's refusal to accept a TCR, it is for the court or tribunal to decide for itself whether the criteria for determining responsibility under the Dublin III Regulation have been correctly applied. This may require the court or tribunal to reach factual findings on the evidence and it is not restricted to public law principles of challenge.

(6) The tribunal or court's role should not be taken as an open invitation to parties to urge the court or tribunal to review and determine the facts in a Dublin case and, as a concomitant, to admit oral evidence subject to cross-examination. Often there will be no factual dispute: the issue will be a legal one on the proper application of the Dublin III Regulation. Even if there is a factual issue, the need to assess the evidence may not always mean also admitting "oral" evidence subject to cross-examination. It will only be so if it is "necessary in order to resolve the matter fairly and accurately".

Judgment

UT Judge Grubb:

1. This is the judgment of the Tribunal to which both members of the Panel have substantially contributed.

2. The Tribunal has made an anonymity direction and the applicant will be referred to throughout as "MS". The applicant's claimed brother will be referred to as "MAS" and other relevant witnesses are similarly anonymised.

INTRODUCTION

3. The underlying issue in this challenge is whether MAS, who is lawfully present in the UK, is the brother of MS, an unaccompanied minor who has made an asylum application in France. If MS is the sibling of MAS then, under Council Regulation (EU) No 604/2013 (the "Dublin III Regulation"), the UK has responsibility for determining MS's asylum claim, as long as this is in his best interests.

4. Arising from this underlying issue are other issues concerning the proper interpretation of the Dublin III Regulation, and in particular, whether the UK has a duty of investigation once it receives a request from the French authorities to take charge of MS's asylum application, and the scope of any such duty. This in turn raises issues concerning the scope and power of the Tribunal to order the respondent to use his best endeavours to obtain DNA evidence, and the scope of the Tribunal's reviewing power.

5. Some of these issues were considered by the Upper Tribunal (the "UT") in R (on the application of MK, IK (a child by his litigation friend MK) and HK (a child by her litigation friend MK) v Secretary of State for the Home Department (Calais; Dublin III Regulation – investigative duty) IJR [2016] UKUT 00231 (IAC) (McCloskey J and UTJ Peter Lane, as he then was) (hereinafter "MK"). The respondent contends that this decision was wrongly decided and should not be followed.

BACKGROUND AND PROCEDURAL HISTORY

6. We can set out the background and procedural history to this claim relatively briefly.

7. The applicant is a national of Afghanistan. His given date of birth is 1 January 2001. He is, therefore, now 17 years old. The applicant left Afghanistan in 2016 and arrived in France in late 2016. He initially lived in a makeshift camp in Dunkirk. The camp burnt down in April 2017. Thereafter, the applicant was transferred to a children's centre in Roubaix, and is now residing in an accommodation centre in Armentières.

8. MAS, who it is accepted is an Afghan national, entered the United Kingdom on 24 May 2006. He was granted indefinite leave to remain on 21 August 2013. His partner ("MOS") is a Polish national. They have two children, twins aged two years old, who are British citizens. In addition, MOS has two other children, aged 12 years and 8 years, who live with them. MAS and MOS married on 12 March 2018.

9. The applicant contends that MAS is his older brother. Since January 2017

he has been seeking to join MAS in the UK in accordance with the Dublin III Regulation.

10. MS made an asylum claim in France on 13 June 2017. Accepting that MS had an older brother in the UK, on 19 June 2017 France made a 'take charge request' ("TCR") to the UK under Art 8(1) of the Dublin III Regulation.

11. On 27 July 2017 the respondent refused the TCR. The respondent was not satisfied that MAS was the applicant's brother as he claimed.

12. On 9 August 2017 France made a second TCR. On 21 August 2017, the respondent again refused the TCR on the basis that the applicant had not established he was MAS' brother.

13. The applicant's solicitors send a pre-action protocol ("PAP") letter on 3 November 2017 challenging the respondent's decisions of 27 July 2017 and 21 August 2017. Additional supporting evidence and material was included.

14. On 10 November 2017, the respondent responded to the PAP letter maintaining her decisions to refuse the TCRs. At that time no consideration was given to the further evidence and material that had been submitted on the applicant's behalf.

15. On 13 November 2017, the applicant's solicitors wrote requesting that the respondent consider the material and reconsider his decision not to accept the TCR.

16. On 20 November 2017, the applicant lodged these judicial review proceedings challenging the respondent's decisions not to accept the TCR requests. The applicant sought various orders including orders quashing the decisions of 27 July 2017 and 21 August 2017, a declaration that the respondent's refusal to admit MS was unlawful and a mandatory order requiring the respondent to admit MS to the UK, to facilitate DNA testing and to remake the decision whether to accept the TCR.

17. On 20 November 2017, UT Judge King ordered that the permission application be considered at an oral hearing.

18. On 7 December 2017, UT Judge Canavan refused an application made by the applicant to list the application as a rolled-up hearing.

19. On 14 December 2017, the respondent filed an Acknowledgment of Service and Summary Grounds of Defence.

20. Following an oral hearing on 21 December 2017, UT Judge Freeman

granted the application permission to bring these proceedings. He did so in the following terms relying upon MK:

> "arguably…the respondent's investigative duties under the Dublin Convention required her to pursue with the French authorities the possibility of DNA testing being carried out by this applicant solicitor's, if necessary facilitating obtaining any necessary order by a French judge."

21. UT Judge Freeman also made a number of specific case management directions relating to disclosure (which the applicant's representatives had expressed concerns over) and, again following MK, specifically that

> "The Secretary of State shall (a) take all reasonable steps and use her best endeavours to facilitate and secure the DNA testing of this applicant and shall liaise and communicate as appropriate with the relevant French authorities in this exercise, which must be completed by 2 February 2018, and (b) make a further decision by 16 February."

22. The latter date was varied to 23 February 2018 by a consent order sealed on 31 January 2018.

23. There then followed correspondence exchanges between parties' legal representatives. An application was made by the respondent to vary UT Judge Freeman's order specifically in relation to the obtaining of DNA testing of the applicant in France. There was also an application relating to the linkage of this case with another, about which we need to say no more, other than that the cases were not linked at the time of the hearing before us.

24. On 12 March 2018 the respondent made a further decision, as contemplated by UT Judge Freeman's order of 21 December 2017 as subsequent varied, again refusing France's TCR in respect of the applicant on the basis that he was still not satisfied that MS and MAS are brothers.

25. On 23 March 2018, the respondent filed Detailed Grounds of Defence.

26. On 6 April 2018, the applicant applied for permission to amend his claim to include a challenge to the decision of 12 March 2018.

27. Following a case management hearing on 16 April 2018, UT Judge Lindsley granted permission for the claim to be amended additionally to challenge the decision of 12 March 2018. The judge also gave permission to the applicant to rely on further evidence including an additional expert report.

THE CHALLENGED DECISIONS

28. In these proceedings, the applicant challenges three decisions rejecting the TCRs made by France dated: (1) 27 July 2017; (2) 21 August 2017; and (3) 12 March 2018. We will take each of these decisions in turn.

Decision letter of 27 July 2017

29. The Respondent's decision of 27 July 2017 was reached following France's TCR dated 19 June 2017. The decision first sets out the material which has been considered and which was, as we understand it, forwarded pursuant to the Dublin III Regulation regime by France to the respondent. The evidence was:

- Take charge request 19 June 2017
- Copy of minor's fingerprint
- Copy of consent letter from minor
- Copy of UK Residence permit
- Copy of Afghan passport
- Copy of utility bill
- Copy of family tree [diagram]

30. The decision then continues:

> "No evidence has been provided to demonstrate the link between the above and his brother. Therefore, it is not accepted as a familial link has been shown. In an effort to initiate the family link the UK has consulted the above's claimed relation's previous Home Office submissions. Regrettably, there is no mention of siblings and the names of the parents of the above's claimed brother are different. Consequently, I regret to inform you that your take charge request is respectfully denied."

31. The reference to MAS' previous Home Office submissions include his screening interview when he claimed asylum on 24 May 2006. In the record of that interview at para 3.2 under the heading "siblings details" there is entered: "NO SIBLINGS". In addition, in a supporting statement dated 22 September 2006 provided by MAS's asylum claim he said:

> "I do not have any siblings."

32. In his asylum statement dated 22 September 2006, MAS also said: "I do not have any siblings".

Decision letter of 21 August 2017

33. In response to this decision, further material was provided on behalf of the applicant including a statement from MAS dated 31 July 2017, photographs and two untranslated Afghan documents. France then

made a further TCR which was again rejected by the respondent in his decision dated 21 August 2017.

34. Again, the respondent set out the material he had considered: first, the material previously considered in response to the first TCR; and then secondly, the new material as follows:

- Copy of un-translated Afghan document
- Copy of UK Driver's licence
- Copies of photographs
- Copy of a Written letter from brother
- Copy of family tree [diagram]
- Copy of Residence permit
- Copy of un translated AFG document
- Copy of AFG passport

35. The decision letter then goes on to state the respondent's conclusion and decision as follows:

> "Please note that in order for these documents to be considered, English translations must be provided along with the original copies. The documents provided do not establish a family link. Whilst it is recognised that official Afghan documents have been provided which may demonstrate a family link, these have not been translated into English or French. No English copies have been provided. Therefore, it is not considered that the evidence provided sufficiently demonstrates the link between the above and his claimed brother.
>
> Also as previously stated, the claimed brother claimed he did not have any siblings in his previous submissions the Home Office.
>
> Consequently I once again regret to inform you that your Take Charge request is respectfully denied under article 8.1."

36. As can be seen, central to the respondent's conclusion that MS has not established that he is the brother of MAS was the recorded evidence of MAS in his screening interview in 2006 that he had "NO SIBLINGS" and its confirmation in his witness statement submitted in support of his asylum claim. This was despite what was said by MAS in his letter of 31 July 2017 which the respondent had, namely that:

> "I informed the officer that I had 1 brother aged 5 at the time (he is 16 now), and 2 sisters aged approximately 8 and 25 at that time (who are 19 and 36 now).
>
> However it was not requested from me to provide additional information including their names."

37. As we have already alluded to, following the decision of 21 August 2017, in the lead up to, and during the course of this claim, a considerable number of documents and witness statements have been submitted to the respondent on behalf of the applicant to seek to make good his claim to be the brother of MAS. In addition to witness statements from MAS and MOS, was a written statement from, it was claimed, their cousin (referred to in the respondent's decision as "SS"). A certified translation of what was claimed to be the applicant's Taskira or Afghan ID document was submitted. The latter was subject to verification with the Afghan authorities. In response to this material, and the order of UT Judge Freeman, the respondent reconsidered his rejection of the TCR in his detailed decision of 12 March 2018. The earlier conclusions and decision were re-affirmed in the following terms:

> "3. …The SSHD has considered the evidence contained within the Tribunal bundle, as well as the additional evidence you provided on 16/02/2018. This evidence has been considered in its totality in conjunction with the previous information submitted by the French authorities in their formal requests.
>
> **Credibility**
>
> 4. The SSHD remains of the view that MAS is not your client's brother. The further material you have recently filed on your client's behalf is not sufficient to persuade the SSHD as to the claimed family link.
>
> 5. When MAS was interviewed by the SSHD, he made no mention of having any siblings in Afghanistan or elsewhere. Rather, he confirmed in his asylum interview that he had no siblings. He further submitted a witness statement in support of his claim positively stating that he had no siblings.
>
> 6. You have submitted three witness statements from MAS which seek to address the fact that he did not mention having siblings in his previous contact with the immigration authorities in the UK. However, the explanation given for this omission in these witness statements is inconsistent:
>
> (i) In the first witness statement, MAS sought to rely on the fact that his interviews with the immigration authorities took place over 11 years ago. He claims that, to the best of his recollection, he did refer to his siblings in his interview, but not by name.

(ii) In his second witness statement (submitted at the pre-action protocol stage), MAS did not offer an explanation as to why he had not previously mentioned his siblings, but said that he did not know why it was not recorded that he had siblings, the implication being that he must have referred to them.

(iii) In his third and final statement, MAS has offered an explanation as to why he might not have mentioned having any siblings. He now claims that it was possible an agent advised him not to mention any siblings to the UK immigration authorities. This latest explanation contradicts MAS' claimed initial recollection that he mentioned his siblings but did not refer to them by name. Moreover, if, as MAS suggests, he was advised not to refer to any siblings he had in Afghanistan, he surely would have mentioned this in his first witness statement. It is important to note that, when MAS provided this first witness statement in support of his asylum application, MAS was represented. If it was genuinely the case that an agent had advised MAS not to mention his siblings in Afghanistan, this would surely have been identified and scrutinised by the solicitor at the time as part of the overall assessment of family circumstances. For these reasons, the various explanations offered by MAS for not previously referring to his claimed siblings are not accepted.

7. Other information submitted in support of MAS' asylum application gives rise to further credibility issues. In a statement MAS submitted in response to his reasons for refusal letter at page 74 of Tab B of the bundle, he sought to address one particular argument in the refusal letter whereby the decision maker referred to the death of his mother. MAS stated that he was not sure if his mother had died but that he had been informed by his neighbours that his house had been attacked. It is notable that in his attempt to clarify his answer, MAS made no mention of any concern for any other family members. Given that the attack on the family home was alleged to have taken place in 2004, your client's claimed brother, MS, would have been 3 years old at the time, MAS has not offered any explanation for not referring to any family member other than his mother in these submissions.

8. In support of your client's case you have also submitted a Taskira with certified translations which you claim

corroborates the claimed family link between your client and MAS. These documents have been considered. However, after conducting investigations with the FCO in Kabul, it has been found that these documents do not assist your client. The Afghanistan Central Civil Registration Authority was asked to verify the Taskira. The Authority produced a report concluding that the document was 'non genuine' (see attached). The rationale for this rejection was that the serial number listed on the document could not be matched with any internal records in either the Kabul or Laghman province archives.

9. In addition to the written statements, you have also provided evidence in the form of bank transfers, allegedly showing transactions made between MAS and an individual who was resident in Calais at the same time as your client. You state that this individual then withdrew this money to give to your client. Whilst it is accepted that you have evidence that these transfers are genuine, it is not accepted that you have sufficient evidence that your client was the intended recipient of these transfers. Aside from a screenshot of the Facebook profile of the individual in question, you have not provided any evidence to show that this individual was resident in France at the same time as your client, or indeed that he is known to your client. There is nothing to substantiate any link between this individual and MS at all.

10. Along with the above transaction details you have also provided alleged evidence of contact between your client and MAS. This is presented in the form of translated text conversations between MAS and your client. It is not possible to verify if these messages were in fact between the two individuals in question. In any event, it is not accepted that these corroborate a sibling relationship; at best, they show that the two individuals are known to each other in some capacity.

11. You have also provided a written statement by the claimed cousin of your client and MAS, who for the purposes of anonymity shall be referred to as SS. SS asserted that both your client and MAS grew up in the same household in Afghanistan before they all subsequently fled. In support of the written statement you have provided a copy of the asylum interview SS underwent in 2004. In this interview, SS referred to his father and his uncle. The name given for the uncle is not the same as the name given for the claimed father of your client and MAS. SS was also questioned on the children of his uncle, to which he responded that he had one son and two daughters. In his witness statement, SS seeks to address the fact that he did not mention both individuals in his interview, claiming that as your client

was very young at the time he did not think it would be relevant to list him. It is not accepted that this adequately explains this omission particularly when taking into consideration that SS claims that all three grew up in the same family household. Rather than support the claimed sibling relationship between your client and MAS the submissions provided on behalf of SS have considered to undermine these claims.

12. You have also provided two witness statements from the partner of MAS. You claim that these statements also help to corroborate the relationship between your client and MAS. However, neither of these statements seeks to address the inconsistencies in MAS' account. It is considered that these statements are self-serving and do not come close to substantiating the claimed family link between your client and MAS, when the evidence is assessed in the round.

13. It is noted that neither MAS nor his partner have visited MS in France despite referring to their concern for his wellbeing. In her first statement, MAS' partner stated at paragraph 5 that she and MAS tried to visit MS but they were stopped at Dover because MAS did not have a visa (having not realised that he needed one). In her second witness statement MAS' partner states that they have not applied for a visa for MAS to go to France as it "takes time and is costly". This is not an adequate explanation for why neither MAS nor his partner have taken steps to visit MS, if the family relationship is genuine as claimed, especially given the concerns they express about his wellbeing. In particular, MAS' partner does not need a visa to visit France as a Polish national and so there would be no difficulty in her making arrangements to visit MS who she describes as family. MAS appears to have taken no steps to investigate whether he could obtain a visa and how much the cost is: a quick search on the internet indicates that a visa can be obtained for £51 (https://www.schengenvisainfo.com/france-visa/uk). This is not a prohibitively expensive sum. MAS and his partner's failure to take any steps to visit MS further undermines the claimed family relationship between MAS and MS.

14. Assessing all the evidence in the round, it is not accepted that MS and MAS are brothers, as claimed. The claimed basis for the take charge request is therefore rejected.

Vulnerability

15. You have claimed that the case of your client is especially compelling given his current vulnerabilities. In

submissions sent to the Upper Tribunal requesting an expedited hearing, you attached an email from Dr Helen O'Keefe which outlined a telephone assessment which had been undertaken on 01/12/2017. Dr O'Keefe gave a preliminary opinion that there were grounds for concern about your client's physical and mental health, including that he may be experiencing suicidal ideation. You subsequently submitted a mental health assessment dated 05/12/2017 which came to the conclusion that your client is suffering from [sic]. Within the report Dr O'Keefe referred to gaining assurances from those responsible for your client's care that his referral to the relevant medical authorities would be prioritised. You have not since provided an update as to the referral or what treatment your client has received since. In her formal diagnosis of your client Dr O'Keefe stated that your client "currently meets the diagnostic criteria for Post Traumatic Stress Disorder" but that his symptoms may also be symptoms of "a co-morbid psychotic illness such as schizophrenia". Since your client is under the care of the French authorities, it is France who owes him a duty of care. Any concerns regarding your client's wellbeing should be referred to those caring for him in France. Should your client present himself to the relevant authorities as requiring support, including for any mental health condition, he will be treated in accordance with internationally agreed standards. You have not provided any evidence to suggest that the French authorities have failed to comply with these standards.

Section 55 consideration

16. Section 55 of the **Border, Citizenship and Immigration Act 2009** (the 2009 Act) places a duty on the Secretary of State to ensure that functions in relation to immigration, asylum or nationality are discharged having regard to the need to safeguard and promote the welfare of children "who are in the United Kingdom". As the section 55 duty applies only where a child is physically present in the UK, it does not provide a separate basis, in law, for accepting the take charge request in this case."

THE HEARING

38. The hearing before us took place over two days. The applicant was represented by Ms Charlotte Kilroy and Ms Michelle Knorr. The respondent was represented by Mr Gwion Lewis. We were provided with a large file of documents and three files of relevant authorities. During the course of the hearing a number of witnesses gave evidence,

in some cases simply adopting their witness statements as Mr Lewis did not wish to cross-examine them. In the case of MAS, MOS and a third witness ("SS"), who claimed to be the applicant's cousin, they were cross-examined. We heard this evidence on a *de bene esse* basis subject to the legal argument we later heard on whether the Tribunal was required to make its own decision in the current proceedings on the issue of whether MS and MAS were related as they claimed.

39. Counsel for both parties provided us with detailed skeleton arguments and, following the conclusion of the hearing, additional submissions on the oral evidence and, in the case of the applicant, counsel's written reply to Mr Lewis' oral submissions. We are grateful to all counsel for their assistance and helpful submissions on the issues.

THE APPLICANT'S CASE

40. The basis of the applicant's legal challenge is set out in the Grounds of Claim and in counsels' written and oral submissions. It is fair to observe that the specificity of the challenge has evolved over time.

41. As we understand the final resting place of the claim as advanced by Ms Kilroy before us in her oral submissions, the core of the claim, in summary, is as follows.

42. First, in reaching all three decisions, the respondent failed to comply with his obligation to take steps to investigate and/or facilitate with the French authorities the carrying out of DNA testing on MS in France or failed to consider whether to admit him (and then to admit him) into the UK in order to undergo DNA testing.

43. In support of that obligation, Ms Kilroy relies upon the terms of the Dublin III Regulation itself and the high importance given to a child's 'best interests' in the Dublin III Regulation and elsewhere in the law, the procedural obligations imposed by Art 7 of the Charter of Fundamental Rights of the European Union and Art 8 of the ECHR, and the common law duty to act fairly, all of which, Ms Kilroy submits, came together in the UT's decision in MK. That decision, although not binding on us, she submits, should as a matter of 'comity' be followed unless wrong or clearly wrong – which it is not.

44. Ms Kilroy submits that the respondent failed adequately to investigate whether a DNA test could be carried out in France, particularly – she emphasised in her oral submissions – in one of the juxtaposed areas of Calais and Sangatte under the control of the UK authorities. Further, the respondent has not properly considered whether the applicant should be admitted to the UK for a DNA test as happened, in fact, to MK following the UT's decision in respect of him. The Tribunal should make a

mandatory order requiring the Secretary of State to admit the applicant to the UK in order to undergo DNA testing.

45. Secondly, Ms Kilroy contends that the evidence before the respondent prior to each decision was such that, in any event, it was irrational to conclude MS and MAS were not related as they claimed.

46. Thirdly, and as an alternative approach to our role, Ms Kilroy submits that the UT should reach its own decision on whether MS and MAS were related, applying a balance of probabilities standard of proof, on the basis of all the evidence including the oral and other evidence submitted as part of these proceedings. Ms Kilroy submits that such an approach is warranted in order to provide the applicant with an 'effective remedy' in challenging a "transfer decision" as required by Art 27 of the Dublin III Regulation. She relies, in particular, upon the Grand Chamber decisions of the CJEU in Ghezelbash v Staatssecretaris van Veiligheid en Justice (Case C-63/15) [2016] 1 WLR 3969 and Mengesteab v Bundersrepublik Deutschland (Case C-670/16) (26 July 2017). Further, she submits that the issue of whether they are brothers is a 'precedent fact' (relying principally on R(A) v Croydon LBC [2009] UKSC 8) or because the applicant's human rights are at stake and it is for the Tribunal to determine whether they are breached by the respondent's decision (relying on cases such as Belfast City Council v Miss Behavin' Ltd [2007] UKHL 19).

THE RESPONDENT'S CASE

47. The respondent's case is set out in the Detailed Grounds of Defence and in Mr Lewis' skeleton argument and oral submissions. We may summarise the core of it as follows.

48. First, Mr Lewis submits that the decision of the Tribunal in MK was 'clearly wrong' and should not be followed. There was no duty upon the UK on receipt of a TCR to investigate, in particular to take any or any reasonable steps to facilitate and secure a DNA test on an asylum applicant in the requesting State. The only obligation on the requested state was to "check" the evidence submitted by the requesting state. There was no obligation to procure evidence relating to the individual.

49. Secondly, Mr Lewis submits that there was no such obligation during the course of the 'take charge' process but, even if there were, that did not impose an obligation on the requested state to consider on a "rolling and piecemeal basis" evidence submitted on behalf of the applicant after the 'take charge' process was completed, namely after the rejection the second request to take charge. In effect, Mr Lewis submits that the Dublin III Regulation process was a finite one. To that extent, at least, the decision in MK was clearly wrong.

50. Thirdly, Mr Lewis submits that the role of the Tribunal was restricted to reviewing the legality of the decision to reject the TCR. Whether or not the applicant was the brother of MAS was not a 'precedent fact' or a matter upon which the Tribunal should properly reach its own decision on the evidence. He submits that, as a consequence, the evidence which we heard *de bene esse* at the hearing was irrelevant and inadmissible in determining the legality of the respondent's decisions.

51. Fourthly, Mr Lewis submits that if there was an investigative obligation imposed upon the respondent, he had taken all reasonable steps and used his best endeavours to secure and facilitate the DNA testing of MS. He submits that the evidence demonstrated that testing could not properly be undertaken in France under French law and that there was no power to do so in the juxtaposed areas.

52. Fifthly, Mr Lewis submits that there was nothing irrational in the respondent's assessment of the evidence such as to justify a conclusion that any of the decisions were unlawful.

53. Sixthly, Mr Lewis submits that if the Tribunal did consider the evidence given at the hearing the proper conclusion, assessing all the evidence in the round, was that the applicant has failed to establish on a balance of probabilities that MAS is his brother.

54. Finally, in respect of remedy, Mr Lewis submits that it would be wrong for the Tribunal to make a mandatory order requiring the Secretary of State to grant the applicant entry clearance in order to seek DNA testing in the UK. That, he submits, would run counter to the approach of the Court of Appeal in R(RSM) and another v SSHD [2018] EWCA Civ 18 which disapproved of the Upper Tribunal issuing a mandatory order in that case requiring the Secretary of State to admit that applicant to the UK.

RELEVANT LEGAL FRAMEWORK

The Dublin III Regulation

55. Council Regulation (EU) No 604/2013 (the "Dublin III Regulation") is one of the component parts of the Common European Asylum System (the "CEAS"). It establishes the criteria and mechanisms for determining which EU Member State is responsible for examining a third country national's asylum application (see respectively, Arts 7 to 15, Chapter III and Arts 20 to 26, Chapter VI). One of its aims is to ensure that there will only be one EU Member State responsible for dealing with an individual's asylum claim. The criteria set out a hierarchy for determining that responsibility. This prevents as asylum applicant

effectively 'forum shopping' in making such a claim. The responsible Member State is usually the one in which the individual is physically present but not always. This obviates the individual being transferred repeatedly between Member States. If a Member State where an asylum application is lodged considers, on the basis of strict criteria, that another Member State is responsible for determining the claim, the first State (the "requesting State") must ask the second State (the "requested State") to take charge of the applicant (a 'Take Charge Request' or "TCR").

56. As the challenge before us concerns the proper interpretation of the provisions of the Dublin III Regulation, it is necessary to consider the recitals to that Regulation. According to recital (5) the Dublin III Regulation aims to:

> "…. make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for granting international protection and not to compromise the objective of the rapid processing of applications for international protection."

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

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

58. Recital (14) reads:

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

59. Recital (19) relating to 'transfers to Member State responsible" states:

> "In order to guarantee effective protection of the rights of the persons concerned, legal safeguards and the right to an effective remedy in respect of decisions regarding transfers to the Member State responsible should be established, in accordance, in

> particular, with Article 47 of the Charter of Fundamental Rights of the European Union. In order to ensure that international law is respected, an effective remedy against such decisions should cover both the examination of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred."

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

> "In particular, this Regulation seeks to ensure full observance of the right to asylum guaranteed by Article 18 of the Charter as well as the rights recognised under Articles 1, 4, 7, 24 and 47 thereof. This Regulation should therefore be applied accordingly."

61. It is clear that the purpose of the Dublin III Regulation is to enable the rapid determination of which Member State is responsible for considering an asylum claim, and that, in so determining, the best interests of a child and respect for family life should be a primary consideration.

62. Chapter II of the Dublin III Regulation deals with 'General Principles and Safeguards'. Article 3 states so far as is relevant:

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

63. Article 4 establishes that, as soon as an asylum claim is lodged in a Member State, its authorities will inform the applicant of the application of the Dublin III Regulation including, *inter alia,* the consequences of making an asylum claim in another member state, the hierarchy of criteria for determining which Member State is responsible, the possibility of submitting information regarding the presence of family members in other Member States, and the possibility to challenge a transfer decision. This information must be contained in a specific leaflet for unaccompanied minors.

64. Article 6 provides guarantees for minors:

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

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

65. Chapter III of the Dublin III Regulation establishes the criteria for determining the Member State responsible.

66. Article 7, relating to the hierarchy of criteria, explains that the criteria for determining the State responsible shall be applied in the order in which they are set out in the Chapter. Article 7 (3) states:

> "In view of the application of the criteria referred to in Articles 8, 10 and 16, Member States shall take into consideration any available evidence regarding the presence, on the territory of a Member State, of family members, relatives or any other family relations of the applicant, on condition that such evidence is produced before another Member State accepts the request to take charge or take back the person concerned, pursuant to Articles 22 and 25 respectively, and that the previous applications for international protection of the applicant have not yet been the subject of a first decision regarding the substance."

67. Article 8(1), which is headed 'Minors', reads, in material part:

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

in the best interests of the minor."

68. Provided therefore that it is in the best interests of the unaccompanied minor, if he has a sibling legally present in another Member State, by virtue of Article 8(1) that Member State becomes responsible.

69. The procedures for 'take charge requests' (TCR) are contained in Articles 21 and 22. Article 21(1) states:

> "1. Where a Member State with which an application for international protection has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible and in any event within three months of the date on which the application was lodged within the meaning of Article 20(2), request that other Member State to take charge of the applicant.
>
> …
>
> Where the request to take charge of an applicant is not made within the periods laid down in the first and second subparagraphs, responsibility for examining the application for international protection shall lie with the Member State in which the application was lodged.
>
> …
>
> 3. In the cases referred to in paragraph[s] 1 …, the request that charge be taken by another Member State shall be made using a standard form and including proof or circumstantial evidence as described in the two lists mentioned in Article 22(3) and/or relevant elements from the applicant's statement, enabling the authorities of the requested Member State to check whether it is responsible on the basis of the criteria laid down in this Regulation."

70. Article 22, which deals with the reply to a TCR, reads, in material part:

> "1. The requested Member State shall make the necessary checks, and shall give a decision on the request to take charge of an applicant within two months of receipt of the request.
>
> 2. In the procedure for determining the Member State responsible elements of proof and circumstantial evidence shall be used."

Article 22(3) requires the Commission to establish two lists, indicating the relevant elements of proof and circumstantial evidence in determining which Member State is responsible:

> "(a) Proof
>
> (i) This refers to formal proof which determines responsibility pursuant to this Regulation, as long as it is not refuted by proof to the contrary;
>
> (ii) …..

(b) Circumstantial evidence:

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

(ii) their evidentiary value, in relation to the responsibility for examining the application for international protection shall be assessed on a case-by-case basis."

Article 22(4) indicates that

"… the requirement of proof should not exceed what is necessary for the proper application" of the Dublin III Regulation."

Article 22(5)-(7) states:

"5. If there is no formal proof, the requested Member State shall acknowledge its responsibility if the circumstantial evidence is coherent, verifiable and sufficiently detailed to establish responsibility.

6. Where the requesting Member State has pleaded urgency in accordance with the provisions of Article 21(2), the requested Member State shall make every effort to comply with the time limit requested. In exceptional cases, where it can be demonstrated that the examination of a request for taking charge of an applicant is particularly complex, the requested Member State may give its reply after the time limit requested, but in any event within one month. In such situations the requested Member State must communicate its decision to postpone a reply to the requesting Member State within the time limit originally requested.

7. Failure to act within the two-month period mentioned in paragraph 1 and the one-month period mentioned in paragraph 6 shall be tantamount to accepting the request, and entail the obligation to take charge of the person, including the obligation to provide for proper arrangements for arrival."

71. Also of relevance is Article 27, dealing with remedies. Article 27(1) reads:

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

72. One of the issues in this case concerns the application of Article 27 and

the role of the court or tribunal when considering a challenge to a rejection of a TCR. The applicant's case is that the court or tribunal is not limited to considering the legality of the decision on public law principles but is required to determine for itself whether the 'criteria' for determining which Member State is responsible for determining the individual's asylum claim have been correctly applied.

The Implementing Regulations

73. The Implementing Regulations, which put into effect the provisions considered above, are contained in Regulation (EC) No 1560/2003 (the "2003 Regulation"), which is amended by Regulation (EU) No 118/2014 (the "2014 Regulation").

74. Article 1 of the 2003 Regulation deals with the preparation of requests for taking charge. This reads,

> "1. Requests for taking charge shall be made on a standard form in accordance with the model in Annex I. The form shall include mandatory fields which must be duly filled in and other fields to be filled in if the information is available. Additional information may be entered in the field set aside for the purpose.
>
> The request shall also include:
>
> (a) a copy of all the proof and circumstantial evidence showing that the requested Member State is responsible for examining the application for asylum, accompanied, where appropriate, by comments on the circumstances in which it was obtained and the probative value attached to it by the requesting Member State, with reference to the lists of proof and circumstantial evidence referred to in Article 18(3) of Regulation (EC) No 343/2003, which are set out in Annex II to the present Regulation;
>
> (b) where necessary, a copy of any written declarations made by or statements taken from the applicant."

[The reference to Art 18(3) should now refer to the equivalent article of the Dublin III Regulation, i.e. Art 22(3).]

75. Article 3 of the 2003 Regulation, under the heading "Processing Requests for Taking Charge", provides:

> "1. The arguments in law and in fact set out in the request shall be examined in the light of the provisions of Regulation (EC) No 343/2003 and the lists of proof and circumstantial evidence which are set out in Annex II to the present Regulation.
>
> 2. Whatever the criteria and provisions of Regulation (EC) No 343/2003 that are relied on, the requested Member State shall, within the time allowed by Article 18(1) and (6) of that

> Regulation, check exhaustively and objectively, on the basis of all information directly or indirectly available to it, whether its responsibility for examining the application for asylum is established. If the checks by the requested Member State reveal that it is responsible under at least one of the criteria of that Regulation, it shall acknowledge its responsibility."

76. Article 5 provides for a negative reply to a TCR and the possibility of the Requesting State requesting that the TCR be re-examined.

> "1. Where, after checks are carried out, the requested Member State considers that the evidence submitted does not establish its responsibility, the negative reply it sends to the requesting Member State shall state full and detailed reasons for its refusal.
>
> 2. Where the requesting Member State feels that such a refusal is based on a misappraisal, or where it has additional evidence to put forward, it may ask for its request to be re-examined. This option must be exercised within three weeks following receipt of the negative reply. The requested Member State shall endeavour to reply within two weeks. In any event, this additional procedure shall not extend the time limits laid down in Article 18(1) and (6) and Article 20(1)(b) of Regulation (EC) No 343/2003."

[The reference to Art 18(1) and (6) and Art 20(1)(b) should now be taken to refer to the equivalent articles of the Dublin III Regulation, i.e. Arts 22(1) and (6) and Art 23(2).]

77. Article 12 of the 2003 Regulation, as amended by the 2014 Regulation, applies to unaccompanied minors.

> "1. Where the decision to entrust the care of an unaccompanied minor to a relative other than the mother, father or legal guardian is likely to cause particular difficulties, particularly where the adult concerned resides outside the jurisdiction of the Member State in which the minor has applied for asylum, cooperation between the competent authorities in the Member States, in particular the authorities or courts responsible for the protection of minors, shall be facilitated and the necessary steps taken to ensure that those authorities can decide, with full knowledge of the facts, on the ability of the adult or adults concerned to take charge of the minor in a way which serves his best interests.
>
> Options now available in the field of cooperation on judicial and civil matters shall be taken account of in this connection.
>
> 2. The fact that the duration of procedures for placing a minor may lead to a failure to observe the time limits set in Article 18(1) and (6) and Article 19(4) of Regulation (EC) No 343/2003

shall not necessarily be an obstacle to continuing the procedure for determining the Member State responsible or carrying out a transfer.

3. With a view to facilitating the appropriate action to identify the family members, siblings or relatives of an unaccompanied minor, the Member State with which an application for international protection was lodged by an unaccompanied minor shall, after holding the personal interview pursuant to Article 5 of Regulation (EU) No 604/2013 in the presence of the representative referred to in Article 6(2) of that Regulation, search for and/or take into account any information provided by the minor or coming from any other credible source familiar with the personal situation or the route followed by the minor or a member of his or her family, sibling or relative.

The authorities carrying out the process of establishing the Member State responsible for examining the application of an unaccompanied minor shall involve the representative referred to in Article 6(2) of Regulation (EU) No 604/2013 in this process to the greatest extent possible.

4. Where in the application of the obligations resulting from Article 8 of Regulation (EU) No 604/2013, the Member State carrying out the process of establishing the Member State responsible for examining the application of an unaccompanied minor is in possession of information that makes it possible to start identifying and/or locating a member of the family, sibling or relative, that Member State shall consult other Member States, as appropriate, and exchange information, in order to:

(a) identify family members, siblings or relatives of the unaccompanied minor, present on the territory of the Member States;

(b) establish the existence of proven family links;

(c) assess the capacity of a relative to take care of the unaccompanied minor, including where family members, siblings or relatives of the unaccompanied minor stay in more than one Member State.

5. Where the exchange of information referred to in paragraph 4 indicates that more family members, siblings or relatives are present in another Member State or States, the Member State where the unaccompanied minor is present shall cooperate with the relevant Member State or States, to determine the most appropriate person to whom the minor is to be entrusted, and in particular to establish:

(a) the strength of the family links between the minor and the different persons identified on the territories of the Member States;

(b) the capacity and availability of the persons concerned to take care of the minor;

(c) the best interests of the minor in each case.

6. In order to carry out the exchange of information referred to in paragraph 4, the standard form set out in Annex VIII to this Regulation shall be used.

The requested Member State shall endeavour to reply within four weeks from the receipt of the request. Where compelling evidence indicates that further investigations would lead to more relevant information, the requested Member State will inform the requesting Member State that two additional weeks are needed.

The request for information pursuant to this Article shall be carried out ensuring full compliance with the deadlines presented in Articles 21(1), 22(1), 23(2), 24(2) and 25(1) of Regulation (EU) No 604/2013. This obligation is without prejudice to Article 34(5) of Regulation (EU) No 604/2013."

78. Annex II, List A of the 2014 Regulation is entitled 'Means of Proof'. This provides:

"I. Process of determining the State responsible for examining an application for international protection

1. Presence of a family member, relative or relation (father, mother, child, sibling, aunt, uncle, grandparent, adult responsible for a child, guardian) of an applicant who is an unaccompanied minor (Article 8)

Probative evidence

— written confirmation of the information by the other Member State;

— extracts from registers;

— residence permits issued to the family member;

— evidence that the persons are related, if available;

failing this, and if necessary, a DNA or blood test."

79. List B in Annex II is headed "Circumstantial Evidence". This provides:

"I. Process of determining the State responsible for examining an application or international protection

1. Presence of a family member (father, mother, guardian) of an applicant who is an unaccompanied minor (Article 8)

Indicative evidence

– verifiable information from the applicant;

– statements by the family members concerned;

– reports/confirmation of the information by an international organisation, such as the UNHCR."

80. Annex VIII contains a standard form to be used by Member States in fulfilling their obligation under the Dublin III Regulation to "exchange information" headed "Standard Form For The Exchange of Information On The family, Siblings Or relatives Of An Unaccompanied Child In A Dublin Procedure Pursuant To Article 6(5) of Regulation (EU) No 604/2013".

81. Part A deals with information from the requesting State and Part B information from the requested Member State. Included in Part B is the following:

> "*In situations where the person/persons mentioned above is/are present on the territory of the requested Member State:*
>
> Relationship of the person with the child:
>
> – Please specify, following inquiry, the presumed nature of the relationship of the person identified with the child:
> – Please provide information on the type of data used to establish the relation (e.g. administrative certificates or other types of official documents found in the possession of the person)".

The Charter of Fundamental Rights of the European Union

82. Article 7 of the CFR relates to respect for private and family life.

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

83. Article 24 of the CFR is concerned with the rights of the child.

> "1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
>
> 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.

> 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."

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

> "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.
>
> Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.
>
> Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."

The Human Rights Act 1998 and Article 8 ECHR

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

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

THE ISSUES

86. We can summarise the principal legal issues raised in this case as follows:

I. Is the Secretary of State under a duty to investigate the relevant circumstances when considering a TCR under the Dublin III Regulation?

II. If there is such a duty, what is the proper scope of that duty? Does any duty include a duty to facilitate and/or secure the

obtaining of a DNA sample from an individual in the requesting state?

III. If there is such a duty, does that duty continue once the Dublin III Regulation process is concluded?

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

87. In addition, and depending upon the particular resolution of some or all of those issues, a number of issues arise in relation to the challenge to the specific decisions in this case:

V. In reaching each of the three decisions challenged, has the respondent breached any duty to investigate?

VI. Are any or all of the three decisions unlawful on any other basis?

VII. If the UT must decide, for itself, whether the criteria have been correctly applied, what findings do we make?

VIII. In the light of the above, what is the appropriate, if any, remedy to grant?

DISCUSSION: (1) THE LEGAL ISSUES

88. The legal issues raised before, and decided by, the UT in MK were substantially similar to those raised before us (issues I, II and III). Issue IV was also raised but it was left undecided by the UT. It is convenient, therefore, that we begin with the UT's decision in MK.

MK

89. IK and HK were unaccompanied minors who made asylum applications in France. They maintained that they were the children of MK. MK was recognised as a refugee by the Secretary of State in March 2010 and had been granted ILR. In her asylum interview she made no mention of IK or HK. In February 2016, in response to a TCR, the Secretary of State rejected the claimed relationship based on MK's answers during her asylum application. Although the French authorities asked for the TCR to be re-examined, the Secretary of State maintained her decision in a subsequent decision in March 2016 and for substantially the same reasons. Further evidence provided to the Secretary of State, not

originating from the French authorities, resulted in a third decision being made in April 2016, again rejecting the TCR.

90. It was argued on behalf of the applicants that the Secretary of State was under a positive legal duty to admit IK and HK to the United Kingdom for the purpose of reunification with MK and that the Secretary of State acted unlawfully by failing to discharge his investigatory and evidence gathering obligations, and, in particular, properly to investigate the viability and availability of DNA testing for IK and HK in France. This, it was submitted, led to a breach of Article 8 ECHR and Article 7 of the CFR. It was additionally submitted, in reliance on R (Al-Sweady) v SSHD [2010] HRLR 2, that the UT was obliged to examine all the evidence and was entitled to differ from the Secretary of State's assessment as to the existence of the family relationship.

91. The UT set out the relevant provisions of the Dublin III Regulation and the Implementing Regulations, the ECHR (including the obligations on a state to admit persons to its territory in order to achieve family reunification and the procedural dimension of article 8) and the CFR, the United Nation's Convention on the Rights of the Child (UNCRC) and the General Comment Number 14 (2013) on the Right of the Child to have his or her best interests taken as a primary consideration" (the "General Comment"). The UT then referred to the "best interests" obligations imposed upon the Secretary of State under domestic law detailed in s.55 of the Borders, Citizenship and Immigration Act 2009 (restricted by its own terms to children in the UK: s.55(1)(a)) and the authorities of ZH (Tanzania) v SSHD [2011] 2 AC 166 and Zoumbas v SSHD [2013] 1 WLR 3690, and the Upper Tribunal's assessment of the "best interests" duty in JO and Others (Section 55 Duty) Nigeria [2014] UKUT 00517 (IAC). The UT also considered the principles expounded in Secretary of State for Education and Science v Metropolitan Borough Council of Tameside [1977] AC 1014 by which the Secretary of State in reaching decisions, as a matter of public law obligation, is required to take reasonable steps to acquaint himself with and take into account relevant information and exclude irrelevant matters.

92. At [34] the UT noted the concession by the Secretary of State's counsel, that a duty to investigate existed, at least up to the point that the first TCR was rejected:

> "… Mr Keith accepted that the Secretary of State, upon receipt of the "take charge" request, had a duty under the Dublin Regulation to investigate. His associated submission was that since the initial refusal decision was made there has been no continuing duty of this nature."

93. Even though this concession was made, the UT, nevertheless, made clear that it was correct on an analysis of the Dublin III Regulation and the

legal obligations otherwise imposed upon the Secretary of State that a duty to investigate was imposed upon the Secretary of State. At [36]–[39], the UT said this:

> "(36) The available evidence points readily to the threefold conclusion that the Secretary of State has at no time (a) investigated, in conjunction with the French authorities or otherwise, the viability or availability of DNA testing for IK and HK in France, (b) investigated what the relevant French domestic laws are in this respect or (c) considered the possibility of admitting IK and HK to the United Kingdom for the purpose of carrying out DNA testing. We consider that these are all material considerations, none of which has been taken into account. This analysis is reinforced when one superimposes the "Tameside" duty of enquiry. It follows that, viewed through a pure public law prism, the Secretary of State's initial and subsequent decisions are unlawful.
>
> (37) This is not, however, the only dimension from which the legality of the Secretary of State's rejection of the "take charge" request is to be evaluated. As the outline in [14] - [27] shows, the governing legal framework has multiple constituent elements, many of them interlocking. The analysis that the dominant instrument in this legal matrix is the Dublin Regulation seems to us uncontroversial. In contrast with the situation prevailing in ZAT, the processes and procedures of the Dublin Regulation had been fully observed in the present case. In summary, IK and HK made their respective claims for asylum in France, these claims were examined by the French authorities, a "take charge" request ensued and the Secretary of State made her refusal decision accordingly and reaffirmed it subsequently. The contrast with ZAT, where no Dublin Regulation steps had been taken, is striking."
>
> (38) We consider that duties of enquiry, investigation and evidence gathering course through the veins of the Dublin Regulation and its sister instrument, the 2003 Regulation as amended. In some of the provisions of the Dublin Regulation, these duties are explicit: see for example Article 6(4) and Article 8(2). These duties are also explicit in Article 22(1), which requires a requested Member State to "*make the necessary checks*" upon receipt of a "take charge" request prior to reaching its decision. In other provisions of the Dublin Regulation, these duties are clearly implicit. The scheme of the Dublin Regulation is that the more detailed outworkings of these duties are not specified in the measure itself but are, rather, to be found in the ancillary, implementing legislation adopted by the Commission, namely the 2003 Regulation as amended. These two measures must be considered together and as a whole.
>
> (39) It follows that we reject the Secretary of State's contention (as pleaded) that she had no duty of investigation upon receipt of the

> "take charge" requests and the associated contention that the onus to provide all necessary evidence rested on the Applicants. These contentions are, in our judgment, confounded by the provisions of the Dublin Regulation and its sister instrument considered as a whole. We further reject the Secretary of State's selective reliance on one of the various components of Article 22, namely Article 22(5), of the Dublin Regulation, for the same reason."

94. The UT saw the duty as being derived from a confluence of a number of legal bases, principally the terms and context of the Dublin III Regulation itself which envisages the requested state carrying out "checks" before reaching a decision in respect of a TCR. The UT also relied upon the public law duty stated succinctly by Lord Diplock in the well-known Tameside case, at 1065b*:*

> "It is for a court of law to determine whether it has been established that in reaching his decision….[the Secretary of State] had directed himself properly in law and had in consequence taken into consideration the matters which upon the true construction of the Act he ought to have considered and excluded from his consideration matters that were irrelevant to what he had to consider ....
>
> Or, put more compendiously, the question for the court is did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly? "

95. Further, the UT was undoubtedly influenced, as that case (like the present) involved children, by the obligation to further a child's best interest set out in the Dublin III Regulation and which undoubtedly exists in our domestic law even if s.55 of the BCI Act 2009 could not apply to a child overseas.

96. The scope of the investigative duty was considered by the UT at [40] and required him to take "reasonable steps":

> "We must now consider the Secretary of State's modified position at this stage of the hearing. This entailed an acknowledgement that there was a duty of investigation under the Dublin Regulation when the initial "take charge" request was received. What did this duty require of the Secretary of State? We consider that the investigative and evidence gathering duties imposed on Member States by the Dublin Regulation are unavoidably factually and contextually sensitive. The content and scope of such duties will vary from one context to another. While we did not receive detailed argument on this discrete issue, we are inclined to the view that these duties are not absolute, in the

> sense that they apply irrespective of considerations such as excessive or disproportionate burden. It seems to us that implicit in the Dublin Regulation is the principle that these duties require the Member State concerned to take reasonable steps. The court or tribunal concerned will, having regard to its duty under Article 6 TEU, be the arbiter of whether this duty has been acquitted in any given case."

97. The UT then considered, at [41], the extent of the investigative duty and rejected the Secretary of State's contention that it was limited to the period up to the initial decision to not accept a TCR:

> "We find nothing in either the Dublin Regulation or its sister instrument to support the argument that the Secretary of State's acknowledged duty of investigation was extinguished once the initial refusal decision had been made. There is nothing in this regime to suggest that a decision on a "take charge" request is in all cases final and conclusive, subject only to legal challenge under (*inter alia*) Article 27. Furthermore, this would be entirely inconsistent with the concept of practical and effective protection and the broader context of the real world of asylum claims. The phenomenon of renewed "take charge" requests and successive "take charge" decisions by the requested State is, in our view, implicitly recognised in the Dublin Regulation. Furthermore, it was not argued that the Secretary of State's reconsidered decision, made pursuant to a renewed "take charge" request, was in some way a voluntary act of grace, as opposed to the discharge of a decision making duty. Nor was it argued that the Secretary of State's later decisions, made in the course of these proceedings, were in some way divorced from the Dublin Regulation context."

98. In [44], having noted that DNA evidence was likely to be determinative of the TCR, the Tribunal concluded that the Secretary of State was obliged, as a minimum, to properly consider the relevant French domestic laws in respect of DNA testing, to investigate, in conjunction with the French authorities or otherwise, the viability or availability of DNA testing in France, and to consider the possibility of admitting IK and HK to the United Kingdom for the purpose of carrying out DNA testing. The Tribunal concluded that:

> "… the investigative and evidence gathering duties, both explicit and implicit, in Articles 6 and 8 of the Dublin III Regulation, considered in tandem with the 2003 Regulation as amended, were not discharged."

99. And at [45] the UT stated:

> "The key to breaking the logjam was DNA evidence: but none was available. The Applicants were unable to provide such evidence for a variety of reasons, including in particular lack of resources

> and uncertainties relating to French law. The Secretary of State was at all material times in a position to proactively take steps to at least attempt to overcome this *impasse*. However, the evidence establishes beyond peradventure that nothing was done. … Relying upon a mistaken assessment that she was entitled, in law, to be purely passive and a further erroneous view of onus of proof the Secretary of State proceeded to make a decision adverse to the Applicants of fundamental significance to their lives. We consider these failures to be incompatible with the progressively strengthening mechanisms and provisions contained in the current incarnation of the Dublin Regulation, reflected particularly in the investigative and evidence gathering duties identified above and the new (and welcome) emphasis on protecting children and families."

100. Having found, at [46], that the Secretary of State's decisions also breached the procedural dimension of Article 8 ECHR, the UT concluded, at [47] that, in the fact sensitive context of this case, that the Secretary of State's investigative and evidence gathering duties were continuing. This followed from the UT's analysis that the Secretary of State's duties were not properly discharged in any of the 3 decision-making processes that had occurred, coupled with the Tribunal's conclusion that the Dublin III Regulation "… Continued to govern the relationship between the parties since the initial decision was made." The UT noted, in passing, that it seemed unlikely that French law enshrined an absolute prohibition against the DNA testing of IK and HK.

101. The UT declined to engage in a detailed examination and make findings that IK and HK were MK's biological children, and noted that the Secretary of State was the primary decision-maker and that there had not yet been a lawful decision. The Tribunal considered it could fashion an appropriate remedy by quashing the Secretary of State's three decisions and making a mandatory order requiring the Secretary of State (a) to take all reasonable steps and use her best endeavours to facilitate and secure DNA testing of IK and HK and to communicate and liaise with the appropriate French authorities in this exercise, and (b) to make a further decision thereafter.

102. We were informed that the Secretary of State had sought to appeal in MK but that appeal was not ultimately pursued. We were not told the reason.

103. MK was subsequently followed by the UT in R(on the application of HA, AA and NA) v SSHD (JR/10195/2017) (19 April 2017) (UTJs Rintoul and Rimington) (hereafter "HA").

104. If MK is correct, the legal issues identified under issues I, II and III (above para 86) would fall to be decided in the present applicant's

favour.

Our Conclusions

105. We were invited by Ms Kilroy to follow MK as a matter of comity as a decision of co-ordinate jurisdiction in this Tribunal. Mr Lewis invited us to depart from it, in large measure at least, on the basis that it was 'clearly wrong'. We were referred to a number of authorities on what might be called the 'comity' principle, in particular R v Greater Manchester Coroner, ex parte Tal [1985] QB 67 and R(Jollah) v SSHD [2017] EWHC 330 (Admin) (on appeal but not raising this point: [2018] EWCA Civ 1260).

106. We apprehend we can deal with the authorities briefly as there was no issue between the parties as to the position, although of course there was as to their application in this case. It is clear that the doctrine of precedent applies in a like way to decisions of the UT when exercising its judicial review jurisdiction as it does to decisions of the High Court (see Secretary of State for Justice v RB [2010] UKUT 454 (AAC) at [39]-[47]). The one exception will be those decisions of the UT identified as "authoritative" by designation (in practice as CG cases) (see para 12 of Senior President's "*Practice Direction: Immigration and Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal*" (10 February 2010 amended 13 November 2014).

107. It is also clear that the High Court, and by extrapolation, the Upper Tribunal (see RB at [40]), is not, as a matter of *stare decisis* bound by a decision of the High Court or Upper Tribunal but should as a matter of 'comity' follow the earlier decision unless persuaded it is wrong. In ex parte Tal, Robert Goff LJ (as he then was) said this (at p.81A-C):

> "If a judge of the High Court sits exercising the supervisory jurisdiction of the High Court then it is, in our judgment, plain that the relevant principle of stare decisis is the principle applicable in the case of a judge of first instance exercising the jurisdiction of the High Court, viz., that he will follow a decision of another judge of first instance, unless he is convinced that that judgement is wrong, as a matter of judicial comity; but he is not bound to follow the decision of a judge of equal jurisdiction (see *Huddersfield Police Authority v. Watson* [1947] K.B. 842, 848, *per* Lord Goddard C.J.), for either the judge exercising such supervisory jurisdiction is (as we think) sitting as a judge of first instance, or his position is so closely analogous that the principle of stare decisis applicable in the case of a judge of first instance is applicable to him."

108. In Jollah, Lewis J returned to this issue at [46] of his judgment where, citing ex parteTal, he said this:

> "A judgment of a judge of the High Court is not binding on another judge of the High Court but that judge will follow the earlier decision unless he or she is convinced that it is wrong: see *R v Manchester Coroner ex p. Tal* [1985] 1 Q.B. 67 at 81A-C and *Police Authority for Huddersfield v Watson* [1947] 1 K.B. 842 at 848. The Privy Council has observed that High Court judges are not technically bound by decisions of other High Court judges "but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so" (see paragraph 9 of the judgment of the Privy Council (*sic*) in *Willers v Joyce (No. 2)* [2016] 3 WLR 534). Such principles contribute to coherence and certainty within the legal system. They are likely to contribute to efficient and more cost-effective use of resources as the same point will not normally be re-argued at length and cost before different High Court judges."

109. We were not referred to the report of Willers but, given it is a decision of the Supreme Court in which nine members of that Court sat, it is undoubtedly determinative of the correct approach. At [9] Lord Neuberger P (with whom the other eight Justices agreed) said this:

> "So far as the High Court is concerned, puisne judges are not technically bound by decisions of their peers, but they should generally follow a decision of a court of co-ordinate jurisdiction unless there is a powerful reason for not doing so. And, where a first instance judge is faced with a point on which there are two previous inconsistent decisions from judges of co-ordinate jurisdiction, then the second of those decisions should be followed in the absence of cogent reasons to the contrary: see *Patel v Secretary of State for the Home Department* [2013] 1 WLR 63, para 59. I would have thought that Circuit Judges should adopt much the same approach to decisions of other Circuit Judges."

110. Consequently, we should follow MK unless we are persuaded it is "wrong" (we apprehend the epithet "clearly" – not actually used by Robert Goff LJ in ex parte Tal adds nothing in practice) or there are "powerful reasons" for doing so.

111. For the reasons that we now give we are neither satisfied that MK is "wrong" or "clearly wrong", nor that there are any "powerful reasons" for not following it. In essence, therefore, we agree with the UT's conclusion in respect of the legal issues identified above as I and II. We do, however, take a slightly modified view in respect of issue III.

Issue I

112. First, a duty to investigate is, in our judgment, not only consistent with the terms of the Dublin III Regulation but is explicitly recognised in Article 12(6) of the 2003 Regulation as amended by the 2014 Regulation. That is concerned with the situation where the requesting State is

considering making a TCR pursuant to Art 8 of the Dublin III Regulation because it considers that the unaccompanied minor has a relevant family member (such as a sibling) in the requested State. There is, as we have seen, an obligation on the Member States to "exchange" information (see Art 12(4)). Under the Dublin III Regulation the requested State is required, usually, to respond to the TCR within two months and will usually have 4 weeks to reply to a request for information under Article 12(4) of the 2003 Regulation. Article 12 (6) provides some flexibility in the following circumstances:

> "The requested Member State shall endeavour to reply within four weeks from the receipt of the request. Where compelling evidence indicates that <u>further investigations</u> would lead to more relevant information, the requested Member State will inform the requesting Member State that two additional weeks are need." (our emphasis)

113. This provision, in our judgment, recognises that at least in these circumstances "investigation" may be required by the requested State in order to fulfil its obligations under the Dublin III Regulation before responding to a TCR.

114. We see nothing inconsistent between the imposition of a duty to investigate - at least to do so to a reasonable extent - and adherence to the strict time limits for dealing with TCRs in the Dublin III Regulation.

115. Secondly, we do not accept Mr Lewis' submission that the Dublin III Regulation draws a distinction between the requested State "checking" or "verifying" the evidence and material provided by the requesting State and carrying out an "investigation". Aside from the terms of article 12 (6) we referred to above, the terminology and structure of the Dublin III Regulation does not clearly point to a mere 'verification' duty. In any event, 'verification' may involve investigation. For example, a Document Verification Report often involves a detailed investigation. A similar observation can be made in respect of Art 3 of the 2003 Regulation, the heading of which reads, "Processing requests for taking charge." The 'processing' of a TCR could, on a reasonable understanding of the word, includes an investigation – it is the 'process' by which a decision is reached. It is not apparent that the terminology of the Dublin III Regulation was employed with the precision advanced by the respondent.

116. Specifically, it is not clear that "check", as used in Articles 21 and 22, does not involve a duty of investigation, at least to some degree. A reply to an urgent TCR (under Art 21(2)) may be given after the time limit requested if the "…examination of a request for taking charge of an applicant is particularly complex." If the process requires the requested State to undertake an 'examination', and it anticipates instances where

the requests "is particularly complex", this suggests it is more than a simply 'verification' of documents. Nor, in our view, does the language of Art 22 suggest that the requested State can only consider evidence provided by the requesting State.

117. Although Art 1(1)(a) of the 2003 Regulation notes that the request shall include "… a copy of all the proof and circumstantial evidence …" this does not need to be read as if the information to be considered is hermetically sealed. The Article imposes an obligation on the requesting State to include a copy of all the proof and evidence available to it, but this does not mean that the requested State must exclusively consider only that evidence. Such an argument runs counter to the respondent's own policy document entitled "Dublin III Regulation (Version 1.0, 2 November 2017) which contemplates the Secretary of State considering, in response to a TCR, not only the evidence submitted by the requesting State (whether proof or circumstantial) but also:

> "information contained in Home Office records and evidence submitted by the person in the UK…"

118. This was precisely the avenue taken by the respondent in this case when he consulted MAS' asylum application and related documents and also considered evidence submitted on behalf of the applicant. It would be wrong, in our view, to see this process in a narrow sense as not engaging in an "investigation" prior to reaching a decision on the TCR.

119. Further, and linked to the previous point, we do not accept Mr Lewis' submission that the "information" which must be considered which is "directly or indirectly" available is limited to that retained by the Home Office itself. It would, in our judgment, reflect a position of unerring narrowness and, we apprehend, not be consistent with the respondent's own practice which would disentitle the respondent from obtaining information from third parties, for example local social services which would, in all probability, be important where a child is involved in the potential transfer to the UK.

120. Finally, we are wholly persuaded by the arguments accepted in MK, that a confluence of legal principles is a proper basis for a duty to investigate.

121. First, there are the child's best interests and the obligation to act consistently with them.

122. Second, the Dublin III Regulation must be applied consistently with Articles 7, 24 and 47 of CFR. As a result, the determination of a TCR must be reached in accordance with the best interests of children and respect for family life. There is a procedural obligation inherent in article 7 of the CFR (and Art 8 of the ECHR) which supports a duty to investigate imposed upon the respondent in considering a TCR (see e.g.,

McMichael v UK (1995) 20 EHRR 205 at [87]; Mugenzi v France (Application No 52701/09) (10 July 2014) at [46] and [60] and Longue and France (Application No 19113/09) (10 July 2014) at [63]. The procedural fairness aspect of Article 8 ECHR was considered by the Court of Appeal in R(Gudanaviciene & Ors) v Director of Legal Aid Casework & Another [2014] EWCA Civ 1622. We do not accept Mr Lewis' submission that Art 7 of the CFR (or Art 8 of the ECHR) is not engaged – at least procedurally – because the applicant has not established his relationship with MAS and, therefore, his 'family life'. In our judgment, the procedural obligation arises where it is claimed that the family life of the individual is engaged. It would be contrary to common sense to eschew that obligation in the very process by which the individual claims his family life is engaged.

123. Third, it was not suggested before us that in reaching a decision in respect of TCR, the Secretary of State was not required to act lawfully according to public law principles (see R(RSM and ZAM) v SSHD [2018] EWCA Civ 18, especially *per* Singh LJ at [171]). The Tameside duty on a decision-maker "to acquaint himself with the relevant information" to enable him to reach an informed decision self-evidently provides a basis for the duty. Finally, the respondent's obligation to act fairly may require investigation and permit an individual to know the 'gist' of what is being said against him or her and to make representations and/or evidence on issues central to the decision to be taken (see, e.g. R v SSHD, ex parte Doody [1994] 1 AC 531 *per* Lord Mustill at p.560). The obligation is succinctly stated by Lord Phillips MR (as he then was) in R(Q and others) v SSHD [2004] QB 36 at [99]:

> "The second defect is not unconnected with the first and was identified by the Judge in [2003] EWHC 195 (Admin) at [20]. He stressed that it was important that the applicant should be given a reasonable opportunity to deal with and to explain any matter which was to be relied on against him. We agree. Before the decision maker concludes that the applicant is not telling the truth he must be given the opportunity of meeting any concerns or, as Lord Mustill put it in *R v Secretary of State for the Home Department, Ex p Doody*, [1994] 1 AC 531,560, he should be informed of the gist of the case against him. We should add that we also agree with the Judge that at the very least the applicant must be given the chance to rebut a suggestion of incredibility and to explain himself if he can. As the Judge put it [2003] EWHC 195 (Admin) at [20]: "All that may be needed is a warning that the account is too vague or is incredible having regard to known practices at ports or it was not reasonable to rely on advice or to obey instructions." The fact that the burden rests on the applicant makes such a warning more, not less, necessary."

124. None of this is, in our judgment, inconsistent with the Dublin III Regulation and the regime for reaching decisions based upon the criteria for determining responsibility. Rather than adversely affecting the

integrity of that system, in our judgment, it is patently focussed on enhancing or maintaining the integrity of the system in reaching lawful and correct decisions.

125. For these reasons, we agree with the decision in MK on our **issue I**.

Issue II

126. Turning then to issue II, and whether the duty can include a duty to investigate the possibility of DNA evidence being obtained either in the requesting State or the UK. We agree with the conclusion and reasons of the UT in MK at [44]-[45] (set out above). We agree that the emphasis in the Dublin III Regulation (see in particular Art 6(1)-(3)) and, indeed elsewhere in the law, on the child's best interests is a powerful pull in favour of the duty to investigate including in an appropriate case investigating the potential for DNA testing in the requesting state or, if not possible or practicable, admitting the child to the UK to do so. We do not consider this would impose an unreasonable burden of insufficient certainty upon the respondent. The duty to investigate (in this particular regard and otherwise) would be one to act reasonably in the light of all the circumstances. It would, as the UT pointed out in MK, be "factually and contextually sensitive" (at [40]).

127. We were referred to case law, in particular to Rhodia International Holdings Ltd v Huntsman International LLC [2007] EWHC 292 (Comm), (Julian Flaux QC sitting as a Deputy High Court Judge) that drew a distinction between an obligation to use "best endeavours" and to use "reasonable endeavours"; the former being more onerous than the latter (see [33]-[35]). The UT in MK expressed a hybrid test that the respondent was to "take all reasonable steps and use her best endeavours" to facilitate and secure DNA testing. We do not know the origin of this language – whether it emanated from the parties or one of them or from the UT itself. We would eschew the language of "best endeavours", derived we apprehend from the commercial or consumer rather than public context. In our judgment, clarity leads us to formulate the content of the duty as one to "act reasonably" and take "reasonable steps" in carrying out the investigative duty, including in determining the options of DNA testing in the requesting State and, if not, in the UK. The test of 'reasonableness' and of acting 'reasonably' in all the circumstances is a familiar one in public law and is a sufficiently certain, but malleable, duty properly to impose upon a public body in reaching a lawful decision.

128. For these reasons we answer **issue II** in the applicant's favour as set out in the immediately above paragraph.

Issue III

129. In MK, the UT saw the duty of investigation as a 'continuing' one. It was not extinguished following the rejection of the initial TCR and was not even extinguished following a further request and rejection. We set out the relevant passage above but it will be helpful to set it again here. It is [41]-[42] of the UT's judgment:

> "(41) We find nothing in either the Dublin Regulation or its sister instrument to support the argument that the Secretary of State's acknowledged duty of investigation was extinguished once the initial refusal decision had been made. There is nothing in this regime to suggest that a decision on a "take charge" request is in all cases final and conclusive, subject only to legal challenge under (*inter alia*) Article 27. Furthermore, this would be entirely inconsistent with the concept of practical and effective protection and the broader context of the real world of asylum claims. The phenomenon of renewed "take charge" requests and successive "take charge" decisions by the requested State is, in our view, implicitly recognised in the Dublin Regulation. Furthermore, it was not argued that the Secretary of State's reconsidered decision, made pursuant to a renewed "take charge" request, was in some way a voluntary act of grace, as opposed to the discharge of a decision making duty. Nor was it argued that the Secretary of State's later decisions, made in the course of these proceedings, were in some way divorced from the Dublin Regulation context.
>
> (42) The present cases are a paradigm illustration of the truism that, in certain contexts, there may be a series of formal requests by one Member State and a series of formal decisions by the requested Member State. We are in no doubt that all such decisions and associated decision making processes are governed by the Dublin Regulation and its sister instrument, the 2003 Regulation as amended."

130. Mr Lewis invited us to depart from this reasoning and approach. He submitted that there was no basis for the 'rolling process' envisaged by the UT in MK at [41]. He submitted that it was inconsistent with the tight time-scales envisaged by the Dublin III Regulation. It ignored, he submitted, that after the rejection of the second request by the requested State that that state was *functus officio* under the Dublin III Regulation unless and until a further TCR was made (although this is not envisaged after the second TCR is rejected) or the relevant TCR decision was quashed. He submitted that the third decision made by the respondent in this case on 12 March 2018 was not made under the Dublin III Regulation but in response to UT Judge Freeman's order following the grant of permission to bring these proceedings. Mr Lewis submitted that the process envisaged was administratively unworkable for the

respondent.

131. Ms Kilroy submitted that the evidence now relied upon since the second decision was submitted as part of these proceedings. The point did not arise on the facts of this case as it was submitted in order to allow the respondent to make the further decision envisaged by UT Judge Freeman's order, requiring the respondent to make a third decision. Making further decisions – beyond the two envisaged in the Dublin III Regulation - was, Ms Kilroy submitted, common place. The respondent was unable to explain the legal basis of these decisions other than to assert they were not made under the Dublin III Regulation. Indeed, it was the respondent's case that the applicant should seek to ask France to make a further TCR if he wished the new evidence to be considered.

132. The Dublin III Regulation regime does impose a tight timescale for reaching decisions. Under Art 21(1), a TCR must be made "as quickly as possible" and, in any event, within 3 months of asylum application being made. Further, by virtue of Art 22(1) the requested Member State must give a decision on TCR within 2 months of receipt. Article 22(6) requires, when the requesting State requests an urgent reply, that any reply must be within 1 month.

133. Article 5 of the 2003 Regulation does not appear to have been considered by the Upper Tribunal in MK. This contains tight time limits for a requesting State to exercise its option to have its TCR re-examined by the requested State. That said, there is some flexibility. Art 12(2) of the 2003 Regulation states that:

> "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."

134. The reference to Art 18(1) and (6) in the Dublin II provisions are to the 2 month and 1 month time limit imposed upon the requested State to make a decision: the equivalent of Art 22(1) & (6) of the Dublin III Regulation. However, once the requested State has made a decision, it may well be that the respondent is *functus officio* as a final decision has been reached under the Dublin III Regulation. That would, of course, be subject to a domestic court in the requested State quashing one or more of the TCR rejections.

135. We were not provided with any supporting material on administrative difficulties that the respondent would face if subject to the 'continuing' duty recognised in MK and we do not take that into account. However, we do recognise the finite nature of the TCR regime under the Dublin III

Regulation. While we have no difficulty in contemplating a 'continuing' duty to investigate (and thereby take into account new material provided by an applicant) following an initial rejection of a TCR, we do see legal difficulties in the scheme of the Dublin III Regulation in imposing such a duty after the second rejection. Of course, public law is familiar with a decision-maker's continuing duty to consider any fresh matter relevant to a previously reached decision and, if appropriate, to reconsider and make a new decision. That, however, pertains in a situation where such a process would not offend a statutory scheme or run counter to its purpose and objectives. A continuing duty in the present context has the potential to extend the obligations of the requested State beyond that envisaged by the time-scale and scheme of the Dublin III Regulation for dealing with TCRs. It may be that the best method for dealing with new material is to submit it to the requesting State who may then make a fresh TCR. But, even that is not easy to fit within the 'two request' only scheme of the Dublin III Regulation – no doubt thought desirable to achieve certainty within a relatively brief time-scale.

136. We are content, for present purposes, to accept that the respondent could reconsider a second rejection of a TCR if he wished but that is not mandated by the Dublin III Regulation itself. The position may be otherwise, and we put it no higher than that, if a further TCR (beyond the two envisaged in the Dublin III Regulation) is made by the requesting State.

137. To the following extent, we consider that the UT in MK went too far in recognising a 'continuing' duty of investigation in [41]-[43] of its judgment. We do not consider that the duty of investigation continues beyond the second rejection, subject to the requirements of fairness. We say that because in reaching that second adverse decision the requested State must act fairly: the applicant must know the 'gist' of what is being said against him in respect of the application of the criteria relevant to the TCR and must have an opportunity to make representations on the issues and material being relied on if that has not previously been the case. In those circumstances, fairness requires that the respondent consider any representations and material raised (perhaps for the first time) to deal with a matter of which the individual was 'taken by surprise' in the second rejection decision. To that extent, the duty continues and may require the respondent as the requested State to reconsider the rejection of the TCR. It may well be that it is the implications of the duty to act fairly which, in many instances, explains why new (and post-second) rejection decisions are made. To the extent we are departing from MK on this issue, it is because we consider on the basis of the regime in the Dublin III Regulation the UT in MK was wrong and there is good reason to depart from it.

138. For these reasons we decide **issue III** accordingly.

Issue IV

139. Issue IV concerns the permissible scope of the applicant's challenge to the rejection of the TCR by the respondent: is the challenge limited to public law grounds? Or, is the tribunal required to decide for itself on the evidence whether the 'criteria' for determining which Member State is responsible for deciding the applicant's asylum claim have been correctly applied? We will defer consideration of issue IV until after we had considered issues V and VI.

DISCUSSION: (2) APPLICATION TO THE FACTS

140. Having concluded that there is a duty incumbent on the respondent to undertake reasonable investigations on receipt of a TCR, and having established the general scope of that duty, including the need to undertake reasonable efforts to ascertain the viability of DNA testing, we turn our attention to the decisions under challenge (Issues V and VI).

141. The respondent's understanding of the position of DNA testing in France and his ability to facilitate such testing are contained in a witness statement from Jessica Maria Da Costa, a GLD lawyer, dated 14 December 2017. Details of the endeavours undertaken by the respondent in compliance with Judge Freeman's Order dated 21 December 2017 are contained in Ms Da Costa's 2nd witness statement, dated 9 February 2018. In her 1st statement she describes a meeting on 12 July 2016 between the then head of the Asylum and Family Policy Unit in the UK with, amongst others, the Director General of the Ministry of the Interior responsible for immigration and asylum and the Director of Asylum Services in France. The French officials at the meeting made it clear that there was extremely limited scope for DNA testing due to its controversial nature in France. The British officials understood that, "while not strictly unlawful", the French officials would not generally recommend that legal representatives take samples from individuals in France and bring them back to the United Kingdom for testing.

142. In her 2nd statement Ms Da Costa explains that MK, IK and HK was the first case requiring the respondent's officials to deal with Dublin III Regulation cases that engaged with French law on DNA testing and that, for cultural reasons, French law imposes particular controls on obtaining DNA evidence. During the proceedings in MK, IK and HK the respondent believed that, while the French authorities would not themselves carry out DNA tests on individuals, they would not object to individuals doing this themselves if they wished. This reflected the contents of her 1st statement. Since then the respondent has learnt that the availability of DNA testing in France is much more constrained then he previously understood. As there were various other claims raising the

same issue in or around the summer of 2016 the respondent continued to make enquiries with the French authorities about the legal position in France.

143. On 11 July 2016 UK officials were provided with a note written by a French lawyer, Mr Guillaume Toutias, the legal adviser to the Director General of Foreigners in France (State Councillor). The translated note indicated that there was no provision within the French Civil Code for the establishment of family ties relating to entry and residence of foreigners and the right to asylum, or during proceedings relating to entry, stay or asylum in France. While a provision was introduced in November 2007 to enable genetic testing in respect of family reunification applications, which could only be used after authorisation by a judge and with the consent of the person, the provision aroused controversy and was never implemented, its constitutionality being admitted to the Constitutional Council in November 2007. The authorisation relating to the provision, in any event, expired on 31 December 2009. The French Civil Code only allows for the identification of a person by DNA testing by reference to an exhaustive list, which appear to have no application to the present circumstances. The note stated:

> "The use of genetic tests to establish the parentage of a foreigner who, by virtue of this family link, is entitled to entry, stay or asylum in France or in a foreign country is therefore not authorised by French law. On a summary application for a request that the conduct of a genetic test to be ordered for the purposes of establishing the affiliation of a visa applicant who has links with a person residing in France, the Conseil d'Etat has judged that it is not for the administrative judge to decide, in case of serious doubt, the state of the persons, consequently, order measures of expertise or instruction to establish, where applicable, a relationship of affiliation such as those provided for [in the relevant Civil Code]."

144. The note indicated that using genetic tests outside of the cases provided for in the Civil Code render a person liable to criminal prosecution with a punishment of up to one year's imprisonment and a fine of €15,000, and that the mere fact of requesting the genetic identification of a 3rd party is punishable by a fine of €3,750.

145. According to Ms Da Costa's 2nd statement, in order to obtain 'absolute clarity' on the legal regulation of DNA testing France, the respondent made further detailed enquiries of the French authorities following the order of Judge Freeman on 20 December 2017. The Head of the European Intake Unit within UK Visas and Immigration, Ms Julia Farman, discussed this matter with Mr Pierre Chareyron of the Dublin Unit within the French Government who in turn raised it with Mr Raphael Sodini, the Head of Direction of Asylum (who, according to Ms Da Costa's statement, also has the legal authority of an Administrative

Judge in France both at first-tier and appeal). Ms Farman also met Mr Chareyron and his line manager, Mr Pascal Baudouin, to discuss this issue in the context of the present litigation on 29 January 2018. Ms Da Costa believes the position is now clear, that DNA testing in France is contrary to the law (except for very specific exception which do not apply to the applicant), and that the French authorities have clarified that the taking of samples is unlawful rather than simply not being recommended.

146. Ms Da Costa was authorised by the respondent to make her witness statements, and her statements were based on her own knowledge and documents she had seen, and from legally privileged discussions that lawyers from the Foreign Office and Home Office conducted with their mutual clients. There is no reason for us to doubt that she has accurately described the information provided to her. Although there is no separate statement from Ms Farman, we reject the applicant's contention that the statements from Ms Da Costa are somehow unworthy of appropriate weight. As Mr Lewis submitted, given that several people were involved in obtaining the relevant information, the use of a single statement is a concise and cost-effective way of giving an overview of the endeavours undertaken and information gleamed. In particular, there is no reason for us to reject the accuracy of the assertions contained within Ms Da Costa's 2nd statement relating to the information imparted to her by Ms Farman, which in turn relate to her discussions with Mr Chareyron and the information he provided, despite the absence of any notes of the meeting. It does however appear that, at the time of Ms Da Costa's 1st statement, the respondent understood that it was "not strictly unlawful" for a DNA to be taken in France by a person's legal representatives. We note that no consideration at all appears to have been given to this possibility in the 1st and 2nd decisions under challenge. By the time Ms Da Costa wrote her 2nd statement, the position, at least according to the respondent, had sufficiently crystallised such that the taking of DNA samples was now considered unlawful rather than simply not being recommended.

147. In a further disclosed email from Mr Chareyron to Ms Farman, sent on 29 January 2018, Mr Chareyron confirmed the contents of the note prepared by Mr Toutias, and stated that, since the juxtaposed control areas are on French territory, the rules summarised by him apply. The applicant relies on another email which purports to contain advice from Mr Chareyron at some undisclosed time in the past suggesting that the French authorities could not refuse a lawyer recovering a DNA sample from a client as long as it was voluntarily. Given the considerable uncertainties relating to the age of the advice, and the inconsistency with the more detailed analysis provided by Mr Toutias, we find we cannot attach any significant weight to this email.

148. In her 2nd statement Ms Da Costa then considered other routes by which

the applicant might be able to be DNA tested in France; (1) at the UK Embassy in Paris; (2) at the juxtaposed control zones, whether by French or UK border officials; (3) by having a DNA sample taken by the applicant's representatives in France which could then be brought back to the UK for testing; and (4) and by enquiring whether there was any other way in which the applicant's DNA could be lawfully tested in France.

149. In respect of DNA testing at the UK Embassy, the respondent was advised by Foreign and Commonwealth Office (FCO) officials that the British Embassy is on French territory and therefore within French jurisdiction, and that French law applies to the site and its staff. Although diplomatic staff have some diplomatic immunities, and that in theory an official at the UK Embassy could take a sample from the applicant and then liaise with Home Office officials in the UK to get this tested, Article 41 of the Vienna Convention on Diplomatic Relations (which makes it the duty of all Embassy staff to respect the law and regulations of the receiving state) is taken very seriously and any attempt by UK officials to use the cover of diplomatic privileges and immunities in this way would raise very real concerns that it may lead to foreign diplomats in the UK having less regard to UK law, possibly resulting in damage to the UK's reputation in the international community. Ms Da Costa stated:

> "It is the understanding of Home Office officials from having spoken to the French authorities that they would be unhappy with any attempt by the UK authorities to do this and that they would see this as an abuse of the diplomatic immunity principle."

150. We pause to note that Ms Kilroy did not pursue the suggestion that DNA evidence could be obtained through the British Embassy in Paris either in her skeleton argument or in her oral submissions.

151. In respect of the juxtaposed control areas, Ms Da Costa states that the Control Zones, which are designated for the exercise of functions by UK officials, do not constitute UK territory and the UK does not enjoy exclusive jurisdiction within them. The UK's jurisdiction is limited to the exercise of the functions specified in the relevant international treaties. She records Article 2 of the Le Touquet Treaty (relating to Calais and Dunkirk) which defines "Frontier Control" as "the application in the Control Zone of all of the laws and regulations of the Contracting Parties concerning immigration controls and the investigation of offences relating to immigration", and that, according to Article 4, the purpose of the immigration controls carried out by the UK is to verify whether persons leaving France fulfil the Frontier Control conditions and requirements laid down by the UK. Ms Da Costa maintains that, with respect to the Le Touquet Treaty (which was given effect in domestic law by the Nationality, Immigration and Asylum Act 2002 (Juxtaposed

Controls) Order 2003) and the Sangatte Protocol (relating to the Eurotunnel terminal at Coquelles), there is no power for immigration officers to take DNA samples.

152. We appreciate that Ms Da Costa is essentially giving a legal opinion as to whether the juxtaposed control treaties allow immigration officers to take DNA samples. Ms Kilroy was nevertheless unable to satisfactorily identify any specific provision of the Immigration Act 1971 that could bestow upon immigration offices, as opposed to medical inspectors, the power to take DNA samples. Her general assertion that this was covered by Schedule 2 of the 1971 Act in respect of the respondent's powers to examine was not adequately particularised. Ms Kilroy relied on a pilot scheme, 'Nationality Swapping – isotope Analysis and DNA Testing', under which Asylum Screening Unit officers (immigration officers) took DNA samples. However, having sought instructions, Mr Lewis informed us that the lawful basis of the pilot was "dubious" and that the respondent was unable to identify the particular legal power that enabled immigration officers to take DNA samples under the scheme. An Immigration Directorate Instruction of November 2009 (Annex N, Chapter 8, section 5A, relating to 'DNA testing of Children'), also relied on by Ms Kilroy, primarily related to DNA testing undertaken by Entry Clearance Officers in entry clearance cases and, presumably, would also suffer from the absence of legal basis so far as it related to immigration officers. Mr Lewis made it plain that the respondent did not consider that immigration officers had any power to take DNA samples, and, given the emerging laws on data protection, we accept that such a power cannot be reasonably implied. The fact that the applicant has indicated that he would give his consent to DNA testing cannot establish a legal basis for taking DNA samples where none exists.

153. Article 2 of the Le Touquet Treaty defines "Responsible Officers" as the "… Officers given responsibility by each Government for the exercise of Frontier Controls." Immigration officers are responsible for the exercise of frontier Controls. Article 3 of the Treaty enables British immigration officers (Responsible Officers) to carry out their functions relating to Frontier Controls within the Control Zone, and states that the laws and regulations relating to Frontier Controls of the UK shall be applicable in the Control Zone in the same way as they are applicable within the UK. Article 14(3) states that criminal acts undertaken in the Controlled Zone in the exercise of their functions may not be prosecuted by the authorities of the State of Departure (in this case, France). Given the absence of any clearly identifiable legal basis that would enable immigration officers to take a DNA sample, we find that Article 14 cannot form a legitimate legal mechanism through which a DNA sample could be taken as this would not be in the exercise of an immigration officers functions. We also accept Mr Lewis's observation that the treaties to which our attention was drawn (the Sangatte Treaty of 1991 (the Protocol entering into force on 2 August 1993) and the Le Touquet

Treaty, contain very detailed provisions relating to the powers that can be exercised in the Control Zones and yet omit any reference to DNA testing, suggesting that no such power was anticipated, especially given the cultural sensitivity in France relating to DNA testing.

154. With respect to securing a DNA sample in accordance with French law, Ms Da Costa confirms in her 2nd statement that the note from Mr Toutias was still accurate and that the French Civil Code only allows DNA testing in (1) investigative measures in the context of domestic legal proceedings; (2) for medical or scientific purposes for the purpose of establishing, where unknown, the identity of deceased persons; (3) for the purposes of national defence; and (4) to establish the identity and prior involvement in hostilities of persons who died in combat or were captured by armed forces. As none of these cover the current situation, Ms Da Costa concludes the applicant would not be able to make any kind of application for a court order that he be DNA tested, even if he consented. On the basis of the inquiries said to have been made by the respondent, and having regard to the evidence stemming from those inquiries, and in particular, the Note from Mr Toutias, we accept that there would be no realistic prospect of being able to negotiate immunity from prosecution for legal representatives who wished to take a sample of the applicant's DNA.

155. In her 2nd statement Ms Da Costa indicates that the respondent would not agree to admit the applicant to the UK for DNA testing and that a refusal would not be unlawful. The only reason the Secretary of State for the Home Department admitted IK and HK to the UK was because the Tribunal had quashed the take charge decisions and the position as set out in French law was, at that stage, still unclear. She considers the most appropriate course of action would be for the applicant to provide the French authorities with additional material setting out the family link and explaining, in particular, why MAS said he had no other siblings during his asylum application. Ms Da Costa does not identify the source of the decision not to admit the applicant into the UK, and does not indicate when this decision was taken.

156. The applicant, being of the view that he is not under any duty to investigate the possibility of DNA evidence being taken in France, has not produced any evidence relating to DNA testing in France himself. We are satisfied, having regard to the evidence produced by the respondent and the for reasons give above, that the respondent had, by the date of the 3rd decision, undertaken all reasonable steps in carrying out his investigative duty to determine the viability of DNA testing in France.

157. Having assessed the evidence produced by the respondent relating to DNA testing, and in light of our conclusion relating to the general scope of the respondent's duty to investigate, we consider the challenged

decisions.

The decision of 27 July 2017

158. There is nothing to indicate in this decision that the respondent undertook reasonable steps to investigate the viability of obtaining DNA evidence in France, including the possibility of obtaining DNA samples in the juxtaposed control zones, in order to determine the relationship between the applicant and MAS, or that he considered the possibility of admitting the applicant to the UK for the purpose of carrying out DNA testing. Despite the respondent having been provided with the note from Mr Toutias on 12 July 2016, there is no indication that the content of that note was considered by the decision-maker. In any event, the further detailed inquiries made of the French authorities following the Tribunal's order of 20 December 2017 could not have been available to the respondent when this decision (or indeed his second decision) was made. Given the respondent's concerns regarding the relationship, the absence of extracts from official registers or other probative evidence detailed in Annex II of Implementing Regulation 118/2014, and the fact that the applicant is a child and is likely to have limited resources or ability to investigate the possibility of DNA testing himself, and in light of the cogent nature of DNA evidence to the single reason advanced by the respondent for refusing the TCR, it was incumbent on the respondent, as a material element of his duty to investigate, to take reasonable steps to determine the options of DNA testing in France or to consider the option of admitting the applicant to the UK to undertake DNA testing. No such reasonable steps were taken. Such failure additionally points to a failure by the respondent to consider MS' best interests as required pursuant to Art 6(1) of the Dublin III Regulation.

159. We are additionally satisfied that the respondent acted unlawfully by failing to inform the applicant of his concerns regarding the applicant's relationship with MAS before refusing the TCR. The requirement, as a material element of his investigative duty, for the respondent to acquaint himself with the relevant information to enable him to reach an informed decision and to act in a procedurally fair manner (at common law, and by reference to the procedural aspects inherent in Art 7 CFR and Art 8 ECHR, and by reference to the need to ensure the applicant's best interests as a primary consideration in accordance with Article 6(1) of the Dublin III Regulation) obliged the respondent to inform the applicant of his concerns arising from the assertions contained in MAS' asylum application and to give him a reasonable opportunity, albeit within the confines of the applicable time limits, to respond to those concerns. The applicant did not know and was not made aware of the gist of the case against him and was denied an opportunity to meet those concerns.

160. We consequently quash the 1st decision.

The decision of 21 August 2017

161. For the reasons given above, we again find that the respondent failed to undertake reasonable steps to investigate the viability of obtaining DNA evidence in France, or that the possibility of admitting the applicant to the UK for DNA testing was considered. The letter dated 31 July 2017 sent on behalf of MAS specifically indicated that he was willing to undertake DNA testing to prove his relationship with the applicant. The respondent failed to engage with this evidence. Having found that the respondent unlawfully failed to carry out his duty to take reasonable steps, we quash the 2nd decision under challenge.

The decision of 12 March 2018

162. The respondent's 3rd decision is a much more detailed assessment of the evidence presented to her. It is therefore surprising that it does not make any reference to the contentious issue of DNA testing, even though this was again specifically raised by MAS in his statement dated 16 November 2017. It may be that the decision-maker expected the decision to be read in conjunction with Ms Da Costa's statement dated 9 February 2018. If so, this should have been expressly stated. We have nevertheless found, with reference to our conclusion in paragraph 156 above, that the respondent has undertaken all reasonable steps in considering the viability of obtaining DNA evidence in France, in accordance with the Order of Judge Freeman.

163. We are not however satisfied that the respondent has lawfully considered the option of admitting the applicant into the UK for the purpose of obtaining a DNA test. Ms Da Costa's 2nd statement was vague in respect of this option. While stating that the respondent would not agree to admit the applicant into the UK, no details were given in relation to this decision, either in respect of when it was made or who made it. Ms Da Costa supports the respondent's stated position by reference to the fact that this Tribunal had not yet determined her decisions as unlawful, and because the position in French law was clearer. With respect, the fact that the position in French law is clearer, and that there is no realistic prospect of DNA testing being undertaken in France, arguably provides an ever more compelling reason for admitting the applicant into the UK in order to undertake a test that is likely to be conclusive of the issue in contention. We do not find the reasoning advanced on behalf of the respondent, and which does not even appear in the 3rd decision itself, to be satisfactory. The failure to adequately consider that option constitutes, in our judgment, a breach of the respondent's investigative duty.

164. In his 3rd decision the respondent has, on the whole, engaged with the evidence presented to him and has given generally rational reasons for rejecting that evidence. The respondent was unarguably entitled to hold

against the applicant his brother's assertions during his asylum application that he had no siblings and the inconsistencies in MAS' three statements concerning this omission. We note that there was no engagement with MAS' evidence, contained in his statement dated 17 November 2017, that the letter written on 31 July 2017 was not written by him but by a French lawyer to whom he spoke in English and that he did not see the letter before it was submitted. This failure does not however, on its own, render the respondent's assessment of the evidence unlawful. It was open to the respondent to draw an adverse inference based on the failure by MAS to mention his brother in respect of an attack on the family home in Afghanistan in 2004. The respondent was entitled to find the failure by SS, the claimed cousin of MAS and the applicant, to mention that SS' uncle had two sons (SS claimed his uncle had one son and two daughters). The respondent's assessment of the bank transfers showing transactions through which MAS allegedly provided funds to the applicant accurately noted the absence of clear evidence that the applicant was the intended recipient, or indeed that the recipient of the funds was actually in France at the same time as the applicant. The respondent placed no reliance on a Taskira (an identification document) produced by the applicant following an investigation conducted by the FCO and the Afghanistan Central Civil Registration Authority which concluded that the document was 'not genuine' as the serial number could not be matched with any internal records maintained in Kabul and Laghman Provinces. The drawing of an adverse inference based on the failure by MAS or his partner, MOS, to visit the applicant was within the range of reasonable responses open to the respondent.

165. We are however satisfied that the respondent acted unlawfully in his consideration of the two statements from MOS, the partner of MAS. The respondent did not engage with the content of the statements other than to note that they did not address the inconsistencies in MAS' account and that they were self-serving, and, as such, did not "… come anywhere close to substantiating the claimed family link." In her first witness statement, dated 11 December 2017, MOS indicated that she and MAS had been together for about 6 years and had lived together for over 5 years. They had two children together (as well as MOS' two children from a previous relationship) and were engaged to be married. MOS stated that she heard her partner talk about his family, including the applicant, over a period of years. MAS and the applicant spoke to each other daily and an attempt to visit the applicant in August 2017 was aborted because MAS did not realise that, although he had ILR, he also needed a Schengen visa. In her second witness statement, dated 26 January 2018, MOS stated she was 'absolutely sure' the applicant was MAS' brother and there was no way MAS could have pretended to have a brother throughout the years. She had witnessed MAS speaking to his mother and the applicant about 2 or 3 times a week. MOS' own children said 'Salaam-Alaikum' when she saw the applicant during a video call

and called him 'Kaka', which means uncle. It was clear to her that MAS felt responsible for the applicant and was anxious and frustrated by the delay in his case. MOS confirmed that a transfer of money to the applicant occurred in a friend's name. MOS witnessed an emotional bond between the applicant and MAS and they also looked like each other. She loved and the applicant and was very concerned for him.

166. In R (SS) v SSHD ("self-serving" statements) [2017] UKUT 00164 (IAC), Upper Tribunal Judge Lane (as he then was), stated, at [30] and [31]:

> "The decision letter criticised the letter from the applicant's father as being "self-serving". The expression "self-serving" is, to a large extent, a protean one. The expression itself tells us little or nothing. What is needed is a reason, however brief, for that designation. For example, a letter from a third party may be "self-serving" because it bears the hallmarks of being written to order, in circumstances where the applicant's case is that the letter was a spontaneous warning.
>
> In the present case, the reasons given in the decision letter for the father's letter being regarded as self-serving are because "it is from your father and does not demonstrate how you as an individual will face fear or persecution upon your return to Sri Lanka". The first reason falls foul of the point made at paragraph 28 of AK, where the Court of Appeal criticised the respondent for stating that "an affidavit from a family member cannot add probative or corroborative weight to your client's claim". A statement from a family member is, of course, capable of bearing weight. The issue is whether, looked at in the round, it does so in the particular case in question. For instance, a statement from a family member may be incapable of saving a claim which, in all other respects, lacks credibility. Whilst the pressure on the respondent's caseworkers can be great and their decision letters are not in any sense to be construed as if they were carefully-crafted pieces of legislation, I consider that this reason for the rejection of the father's letter displays a lack of anxious scrutiny."

167. We are satisfied that similar criticism can be levelled at the respondent's assessment of MOS' statements. No lawfully sustainable reasons have been given for rejecting the statements as 'self-serving'. The statements from MOS were capable of bearing weight but no consideration was given to this, indicating a lack of anxious scrutiny. Had the respondent approached the statements in a lawful manner his overall conclusion may have been different.

168. We are additionally satisfied that the respondent failed to take account of relevant evidence, namely the report dated 5 December 2017 from Helen O'Keeffe, an Independent Psychiatric Social Worker with Approved Mental Health Professional status, with supervision from Dr Susannah Fairweather, a Consultant Child and Adolescent Psychiatrist,

when considering whether MAS and the applicant were related. While the respondent did consider the report from Ms O'Keeffe at paragraph 15 of her decision, this was only in respect of the applicant's vulnerability. In paragraph 14 the respondent had already concluded that the applicant and MAS were not brothers and the TCR was therefore rejected. It is readily apparent that the report from Ms O'Keeffe did not form part of the respondent's assessment of the relationship.

169. While clearly not determinative, the report from Helen O'Keeffe nevertheless gave some relevant insight in determining the nature of the applicant's relationship with MAS. Her professional opinion partly attributed the applicant's emotional state and distress to being separated from his claimed family member (e.g. 6.7.3 – he "appeared particularly distressed, when discussing his wish to join his brother and the distress he suffers at night times", 6.7.5 – "He is focused on joining his brother in the UK", 6.7.8 – "Compounding his frustration is the sense of injustice at not being believed by the British Home Office in regard to being the brother of [MAS], along with the apparent impossibility of completing any DNA or blood test in France due to the unhelpful legislative provisions. He appears most distraught when describing these last aspects of his situation", and 7.4.5 – "He is particularly frustrated by his inability to do a DNA test in France so that he can prove his disputed relationship with his brother"). Had the respondent taken account of this evidence, he may have reached a different conclusion. We are therefore satisfied that the respondent acted unlawfully in her 3rd decision letter by failing to take account of relevant considerations.

170. We consequently quash the 3rd decision.

DISCUSSION: (3) FURTHER LEGAL ISSUES

171. Although our conclusions above lead us to quash all three decisions under challenge, Ms Kilroy urged upon us a more expansive role: namely, that the Tribunal should, for itself, decide whether the 'criteria' for determining responsibility in Article 8 of the Dublin III Regulation are met on the facts. That is issue IV we identified above.

172. Under the regime pertaining in the EU prior to the Dublin III Regulation (i.e. under the "Dublin II" arrangements), the determination of the 'criteria' for responsibility was seen as one between the 'requesting' and 'requested' State alone. While an individual could challenge removal on human rights' grounds based upon a 'systematic failure' or 'systematic flaws' in the system in the receiving state, no challenge could be made *per se* to the decision to transfer under the Dublin II arrangements on the basis that the criteria determining the Member State responsible for examining the individual's asylum application had been misapplied (see, e.g. Abdullahi v Bundesasylamt (Case C-394/12) [2014] 1 WLR 1984

(CJEU) and R(NS) v SSHD (Cases C-411/10 and C-493/10) [2013] 1 WLR 102 (CJEU)).

173. Article 27 of the Dublin III Regulation has changed the position. Article 27, so far as relevant, provides as follows:

> "1. The applicant … shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.
>
> 2. Member States shall provide for a reasonable period of time within which the person concerned may exercise his or her right to an effective remedy pursuant to paragraph 1."

174. Ms Kilroy submits that article 27, read with article 47 of the CFR, provides for an "effective remedy" against a "transfer decision". That applies to the respondent's decisions to reject TCRs. Further, the scope of that challenge is not restricted to traditional public law grounds, but requires the tribunal to decide for itself whether the applicant meets the relevant 'criteria under 'the Dublin III Regulation, namely that he is the brother of MAS. Ms Kilroy relies upon a number of decisions of the Grand Chamber of the CJEU which, she submits, have acknowledged that a 'transfer decision' under the Dublin III Regulation may be challenged by an individual on the ground that the 'criteria' in the Regulation for determining which Member State is responsible for deciding the individual's asylum claim have been incorrectly applied: Ghezelbash v Staatssecretaris van Veiligheid en Justice (Case C-63/15) [2016] 1 WLR 3969 and Mengesteab v Bundersrepublik Deutschland (Case C-670/16) (26 July 2017) and AS (Case C-490/16) (26 July 2017). She submits that, as a consequence, the tribunal should reach its own factual conclusion, based upon all the evidence that submitted statements and oral evidence at the hearing, on the issue of whether MS and MAS are brothers.

175. We begin with the Grand Chamber decision in Ghezelbash. In that case, the CJEU was concerned with a challenge to a decision to transfer the applicant from the Netherlands to France on the basis that under the 'criteria 'in article 12 of the Dublin III Regulation, France was responsible for examining his asylum application as he had been granted a visa residence document in France. Having been requested by the Dutch authorities to "take charge" of the applicant's asylum claim, the French authorities accepted responsibility under the Dublin III Regulation. The Grand Chamber accepted that article 27, read in the context of the Dublin III Regulation as a whole, meant that the applicant was entitled to challenge the application on the 'criteria' upon which the transfer decision was based. The applicant was not restricted, as had been the case under Dublin II, to a challenge to the conditions he would face in the EU country to which he would be returned relying upon article 3 of

the ECHR. The Grand Chamber recognised that such a challenge is not inconsistent with the overall scheme, including the timescales for reaching decisions on responsibility under the Dublin II Regulations. The Grand Chamber drew support for a more extensive right of challenge which extended to cover both "fact and law" from Recital (19) which is in the following terms:

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

176. At [35]-[41], the Grand Chamber said this:

> "35 The scope of the appeal provided for in Article 27(1) of Regulation No 604/2013 must therefore be determined in the light of the wording of the provisions of that regulation, its general scheme, its objectives and its context, in particular its evolution in connection with the system of which it forms part (see, to that effect, judgment of 10 December 2013 in *Abdullahi*, (C-394/12, EU:C:2013:813, paragraph 51).
>
> 36 It is apparent from the wording of Article 27(1) of Regulation No 604/2013 that the legal remedy provided for in that article must be effective and cover questions of both fact and law. Moreover, the drafting of that provision makes no reference to any limitation of the arguments that may be raised by the asylum seeker when availing himself of that remedy. The same applies to the drafting of Article 4(1)(d) of that regulation, concerning the information that must be provided to the applicant by the competent authorities as to the possibility of challenging a transfer decision.
>
> 37 In particular, it is clear that the EU legislature did not provide for any specific link or, a fortiori, any exclusive link between the legal remedies established in Article 27 of Regulation No 604/2013 and the rule, now set out in Article 3(2) of that regulation, which limits the possibilities for transferring an applicant to the Member State initially designated as responsible where there are systemic flaws in the asylum procedure and in the reception conditions for asylum seekers in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights.
>
> 38 Furthermore, the scope of the remedy available to an asylum seeker against a decision to transfer him is made clear in recital 19

of Regulation No 604/2013, the content of which did not appear in Regulation No 343/2003.

39 That recital states that, in order to ensure compliance with international law, the effective remedy introduced by Regulation No 604/2013 in respect of transfer decisions should cover (i) the examination of the application of that regulation and (ii) the examination of the legal and factual situation in the Member State to which the asylum seeker is to be transferred.

40 While the second examination mentioned in that recital refers only to the review of the situation prevailing in the Member State to which the applicant is to be transferred and is designed to check that it is not impossible to proceed with the transfer of the applicant for the reasons set out in Article 3(2) of the regulation, the first examination mentioned in that recital is designed to ensure, more generally, review of the proper application of the regulation.

41 It is apparent from the general scheme of Regulation No 604/2013 that its application is based essentially on the conduct of a process for determining the Member State responsible as designated by the criteria listed in Chapter III of the regulation."

177. Then at [44]-[53], the Grand Chamber continued:

"44 Accordingly, the reference in recital 19 of Regulation No 604/2013 to the examination of the application of the regulation in an appeal against a transfer decision for which provision is made in Article 27(1) of the regulation must be understood as being intended to ensure, in particular, that the criteria for determining the Member State responsible laid down in Chapter III of the regulation are correctly applied, including the criterion for determining responsibility set out in Article 12 of the regulation.

45 That conclusion is supported by the general thrust of the developments that have taken place in the system for determining the Member State responsible for examining an asylum application made in one of the Member States ('the Dublin system') as a result of the adoption of Regulation No 604/2013 and by the objectives of the regulation.

46 Thus, with regard, first, to those developments, it should be noted that, as the EU legislature has introduced or enhanced various rights and mechanisms guaranteeing the involvement of asylum seekers in the process for determining the Member State responsible, Regulation No 604/2013 differs, to a significant degree, from Regulation No 343/2003, which was applicable in the case which gave rise to the judgment of 10 December 2013 in *Abdullahi* (C-394/12, EU:C:2013:813).

47 In the first place, Article 4 of Regulation No 604/2013 confers a right on the applicant to be informed of, inter alia, the criteria for determining the Member State responsible and the relative importance of those criteria, including the fact that an application for international protection lodged in one Member State may result in that Member State becoming the Member State responsible, even if that designation of responsibility is not based on those criteria.

48 In the second place, Article 5(1), (3) and (6) of Regulation No 604/2013 provides that the Member State carrying out the determination of the Member State responsible must, in a timely manner and, in any event, before a transfer decision has been taken, conduct a personal interview with the asylum seeker and ensure that the applicant or the counsellor representing him has access to a written summary of the interview. Pursuant to Article 5(2) of the regulation, the interview does not have to take place if the applicant has already provided the information relevant to the determination of the Member State responsible and, in that case, the Member State in question must give the applicant the opportunity to present any further information which may be relevant for the correct determination of the Member State responsible before a decision is taken to transfer the applicant.

49 In the third place, Section IV of Chapter VI of Regulation No 604/2013, entitled 'Procedural safeguards', sets out at considerable length the arrangements for the notification of transfer decisions and the rules governing the remedies available in respect of such decisions, matters which were not covered with the same degree of detail in Regulation No 343/2003.

50 It is apparent from Article 27(3) to (6) of Regulation No 604/2013 that, in order to ensure that those remedies are effective, the asylum seeker must, inter alia, be given the opportunity to request within a reasonable period of time a court or tribunal to suspend the implementation of the transfer decision pending the outcome of his or her appeal and have legal assistance.

51 It follows from the foregoing that the EU legislature did not confine itself, in Regulation No 604/2013, to introducing organisational rules simply governing relations between Member States for the purpose of determining the Member State responsible, but decided to involve asylum seekers in that process by obliging Member States to inform them of the criteria for determining responsibility and to provide them with an opportunity to submit information relevant to the correct interpretation of those criteria, and by conferring on asylum seekers the right to an effective remedy in respect of any transfer decision that may be taken at the conclusion of that process.

52 As regards, second, the objectives of Regulation No 604/2013, it is apparent from recital 9 thereof that, while it

> confirms the principles underlying Regulation No 343/2003, Regulation No 604/2013 is intended to make the necessary improvements, in the light of experience, not only to the effectiveness of the Dublin system but also to the protection afforded applicants under that system, to be achieved, inter alia, by the judicial protection enjoyed by asylum seekers.
>
> 53 A restrictive interpretation of the scope of the remedy provided in Article 27(1) of Regulation No 604/2013 might, inter alia, thwart the attainment of that objective by depriving the other rights conferred on asylum seekers by that regulation of any practical effect. Thus, the requirements laid down in Article 5 of the regulation to give asylum seekers the opportunity to provide information to facilitate the correct application of the criteria for determining responsibility laid down by the regulation and to ensure that such persons are given access to written summaries of interviews prepared for that purpose would be in danger of being deprived of any practical effect if it were not possible for an incorrect application of those criteria — failing, for example, to take account of the information provided by the asylum seeker — to be subject to judicial scrutiny."

178. At [61] the Grand Chamber stated its conclusion as follows:

> " In the light of all the foregoing considerations, the answer to the first question is that Article 27(1) of Regulation No 604/2013, read in the light of recital 19 of the regulation, must be interpreted as meaning that, in a situation such as that in the main proceedings, an asylum seeker is entitled to plead, in an appeal against a decision to transfer him, the incorrect application of one of the criteria for determining responsibility laid down in Chapter III of the regulation, in particular the criterion relating to the grant of a visa set out in Article 12 of the regulation."

179. It is readily apparent to us that the Grand Chamber accepted that a 'transfer decision' could be challenged by an individual on the basis that the 'criteria' determining responsibility for examining an asylum application had been wrongly or incorrectly applied. The challenge is not limited to the legality of such a decision. Further, it is clear to us that the Grand Chamber envisaged such a challenge to "cover questions of both fact and law" (at [36]).

180. The decision in Ghezelbash was subsequently applied by Grand Chamber in Mengesteab. The Grand Chamber accepted that the remedy envisaged by article 27 applied to allow for a challenge to a 'transfer decision' even where the requested Member State is willing to take charge even after the time for making a TCR under Art 21 of the Dublin III Regulation has expired and the requesting state is deemed to have taken responsibility.

181. Having made extensive reference to the decision in Ghezelbash, at [55], the Grand Chamber said this:

> "…in order to satisfy itself that the contested transfer decision was adopted following a proper application of the take charge procedure laid down in that regulation, the court dealing with an action challenging a transfer decision must be able to examine the claims made by an asylum applicant who invokes an infringement of the provisions set out in Article 21(1) of that regulation (see, by analogy, judgment of 7 June 2016, *Karim*, C-155/15, EU:C:2016:410, paragraph 26)."

182. Then at [57], the CJEU said:

> "…it must be stated that Article 27 of the Dublin III Regulation makes no distinction between the rules which can be relied on in the context of the remedy for which it provides, and that recital 19 of that regulation refers, in general terms, to review the application of that regulation."

183. Recognising the breadth of Art 27 in mandating a judicial remedy in which the 'criteria' for responsibility can be challenged, the CJEU added (at [58]-[62]):

> "58 Moreover, the restriction of the scope of the judicial protection afforded by the Dublin III Regulation relied on in this respect would not be consistent with the objective, set out in recital 9 of that regulation, of strengthening the protection for applicants for international protection, since that strengthened protection is manifested principally by the grant, in essence, of procedural safeguards for those applicants (see, to that effect, judgment of 7 June 2016, *Ghezelbash*, C-63/15, EU:C:2016:409, paragraphs 47 to 51).
>
> 59 The fact, mentioned by the referring court in its second question, that the requested Member State would be willing to take charge of the person concerned despite the expiry of the periods laid down in Article 21(1) of that regulation, cannot be decisive.
>
> 60 Indeed, as the remedy provided for in Article 27(1) of the Dublin III Regulation can be applied, as a matter of principle, only in a situation where the requested Member State has accepted, either explicitly, in accordance with Article 22(1) of that regulation, or implicitly, under Article 22(7) thereof, that fact cannot, in general, lead to a limitation of the scope of judicial review provided for in Article 27(1) (see, to that effect, judgment delivered today, *A.S.*, C-490/16, paragraphs 33 and 34).
>
> 61 Moreover, as regards more specifically Article 21(1) of that regulation, it is necessary to point out that its third subparagraph provides, in the case of the expiry of the periods laid down in the

> two preceding subparagraphs, for a full transfer of responsibility to the Member State in which the application for international protection was lodged, without making that transfer subject to any reaction by the requested Member State.
>
> 62 In the light of all the foregoing considerations, the answer to the first and second questions is that Article 27(1) of the Dublin III Regulation, read in the light of recital 19 thereof, must be interpreted as meaning that an applicant for international protection may rely, in the context of an action brought against a decision to transfer him, on the expiry of a period laid down in Article 21(1) of that regulation, even if the requested Member State is willing to take charge of that applicant."

184. The decisions in AS and also Shiri v Bundesamt fur Fremdenwesen und Asyl (Case C-2-1/16) [2018] 2 CMLR 3 (Grand Chamber, CJEU) apply and adopt the same approach and it is not necessary to deal with them further.

185. Mr Lewis submitted that the remedy envisaged by article 27 did not apply in this case because there was no 'transfer decision'. A refusal of a TCR did not result in such a decision. Whilst Mr Lewis's submission is not without some force, we do not consider it is correct.

186. We accept that, on a narrow reading, a 'transfer decision' will result from an application of the 'criteria' for responsibility, whether as a result of accepting a 'take back' request or a TCR or, indeed, as in Mengesteab as a 'deemed' acceptance following the expiry of a time-scale set out in the Dublin III Regulation (see Mengesteab at [60]). Here, as a result, on this reading, at least, there is no 'transfer decision'. But, that narrow reading is not, in our judgment, the correct one.

187. First, Recital (19) is, on its face, of broader import. It recognises the need for an "effective remedy in respect of decisions regarding transfers…" (our emphasis). In interpreting article 27, it is proper to have regard to the terms of any relevant recital. In our judgment, a rejected TCR is itself a decision "regarding" a transfer. The fact that it does not lead to a transfer decision does not make it any the less, as a matter of common sense, one "regarding" such a decision.

188. Secondly, the decisions of the Grand Chamber in Ghezelbash and Mengesteab acknowledge both the breadth of recital (19) and the judicial (effective) remedy envisaged in article 27. If Mr Lewis's submission were correct, an individual would only be able to challenge the application of the 'criteria' for determining responsibility in circumstances where that will lead to transfer. We are in no doubt that the Grand Chamber contemplated an individual being entitled to challenge the correctness in application of the 'criteria' to determine which Member State is responsible under the Dublin III Regulation whether the effect of the

decision led to the individual's transfer to another Member State or, as in this case, left him or her in the Member State in which he or she currently was present. The substance of what the Court considers should be subject to an "effective remedy" is the application of the 'criteria'. Were it otherwise, as Ms Kilroy submitted, is it likely that those at the "top of the hierarchy', seeking family reunification such as the applicant would be the individuals most likely to be deprived of any "effective remedy". We do not consider that can have been intended by the CJEU. The distinction between the two situations leading to a difference in an individual's ability to challenge the decision taken under the Dublin III Regulations would, in our judgment, be arbitrary and is unwarranted.

189. We reach that conclusion the basis of Art 27 and the approach of the Grand Chamber to it and having regard to Art 47, CFR (requiring an "effective remedy") given the significant of 'family reunion' in the Dublin III Regulation involving a child.

190. What, then, is the role of the Tribunal in these proceedings? In Ghezelbash, the Grand Chamber affirmed that the effective remedy "cover[s] questions of both fact and law" (at [36]). There is no suggestion that the court or tribunal in determining whether the criteria in the Dublin III Regulation have been "correctly" applied is limited to determining the legality of decision based upon public law principles. We were not referred by either party to any passages in the relevant CJEU decisions to suggest otherwise.

191. We note, however, that the Advocate General (Sharpston) in Ghezelbash did consider this issue in her opinion at [90]-[91]:

> "90. Article 27(1) does not specify how that examination is to be conducted. That is therefore a matter for the national court to oversee pursuant to domestic procedural rules. Those rules would also govern the intensity of the review process and the outcome — that is, whether a successful challenge would result in the application being remitted to the competent national authorities for reconsideration, or whether the decision is taken by the courts themselves, subject always to the principle of effectiveness.
>
> 91. I therefore conclude that the Dublin III Regulation should be interpreted as meaning that an applicant (in circumstances such as those in the main proceedings) is able to challenge, on appeal or by review, a transfer decision under Article 27(1) and to request the national court to verify whether the criteria in Chapter III have been correctly applied in his case. The effectiveness of judicial review guaranteed by Article 47 of the Charter requires an assessment of the lawfulness of the grounds which were the basis of the transfer decision and whether it was taken on a sufficiently solid factual basis. The manner in which the examination is conducted as to whether the Chapter III criteria have been applied objectively and fairly in any particular case is governed by

> national procedural rules. Subject to the principle of effectiveness, those rules also govern the intensity and outcome of the appeal or review process."

192. We would make a number of observations. First, the Advocate General does not state that Art 27 requires a full inquiry into the facts in relation to the application of the Dublin III Regulation criteria. Rather, she recognises that it involved the assessment of the "lawfulness" of the decision and whether it was taken on a "sufficiently solid factual basis". This is not whole-heartedly the language of a full merits appeal for which Ms Kilroy, in effect, contends in this case. Secondly, rather the Advocate General recognises the scope of the review is a matter for the domestic courts subject to their procedures. Thirdly, however, the "review process" must have the appropriate "intensity" given the principle of effectiveness. Fourthly, the Advocate General specifically contemplated it being for the domestic courts to determine whether a successful challenge would result in the decision-maker (i.e. the Secretary of State) to reconsider or result in the court taking the "decision" itself.

193. The Advocate General's opinion is far from an unambiguous statement of the approach that Ms Kilroy invites us to take. It does, however, provide some support for the view that the challenge is not restricted to legality alone in the requirement for any decision to have a "sufficiently solid factual basis". It is, perhaps, illuminating that the CJEU made no comment on this aspect of the Advocate General's opinion, confining itself to stating, as we have pointed out, that the review covers "questions of fact and law". That may, in its simplicity be, in effect, an unambiguous acknowledgment that the individual must have the ability to challenge the application of the criteria not only as legally wrong, but also as factually wrong. We have concluded that it is.

194. It is, of course, relatively rare for a court or tribunal to engage in a factual assessment relevant to a claim in judicial review proceedings. This is because historically, and still in the generality of cases, judicial review is a challenge to the legality of a decision. Only if the fact-finding is irrational (e.g., Edwards v Bairstow [1956] AC 14) or there is a mistake of fact amounting to an error of law (e.g. E & R v SSHD [2004] EWCA Civ 49) will the facts be, so to speak, in issue. The former basis of challenge is sometimes said to arise where there is "no evidence to support" the findings (see Edwards v Bairstow at p.36 *per* Lord Radcliffe); language which is reminiscent of the Advocate General in Ghezelbash when she spoke of the transfer decision being "taken on a sufficiently solid factual basis". Consequently, post-decision evidence is rarely relevant and, therefore, admissible in judicial review proceedings. The evidence is that which was before the decision-maker and the facts, if in dispute, are generally taken to be in the respondent's favour (see, e.g. R v Board of Visitors of Hull Prison, ex parte St Germain (No 2) [1979] 1 WLR 1401 at p.1410). An enquiry as to the legality of a decision rarely requires such

evidence and the decision-maker is the primary fact-finder (see e.g. Anisminic v Foreign Compensation Commission [1969] 2 AC 147 *per* Lord Reid at p.182). An example where this may not be the case is where some procedural impropriety is alleged upon which evidence is required (see, e.g. Jones v Secretary of State for Wales [1995] 2 PLR 26 *per* Balcombe LJ at pp.30-32). Oral evidence and cross-examination has, however, been potentially available in judicial review proceedings since 1977 (see RSC Ord 53 rule 8 and O'Reilly v Mackman [1983] 2 AC 237 *per* Lord Diplock at pp.282-3). It is available in principle in judicial review claims in the High Court (and the Upper Tribunal) (CPR 54.16 and CPR 8.6(2)(3)) and may be ordered where it is just and fair to do so (see, e.g. R(Al-Sweady and others) v Secretary of State for Defence [2009] EWHC 2387(Admin) at [20] and [29]).

195. Consequently, there is no insurmountable procedural obstacle to a factual enquiry being undertaken in judicial review proceedings. There are, indeed, cases where the tribunal or court in judicial review proceedings is drawn into deciding the facts. Historically, the best illustration is that of the 'precedent fact' cases upon which Ms Kilroy placed reliance in this case. Auburn, Moffet and Sharland, *Judicial Review: Principles and Procedure* (2013) (at para 20.23) summarise such cases as follows:

> "Parliament has provided that a public body's power or duty to act in a particular way depends upon the existence of a particular factual situation and the public body's assessment of that factual situation is challenged, in certain cases the court will determine whether the relevant factual situation actually exists. In such cases, the court will not permit the public body to confirm itself power to act (or to deny itself power to act) by an erroneous conclusion as to the relevant fact."

196. Hence, where there is a power to remove an individual who is an "illegal entrant" that power can only be exercised if the individual is in fact an "illegal entrant" and the latter is a 'precedent' or 'jurisdictional' fact which the court must for itself decide (see R v SSHD, ex parte Khawaja [1984] AC 74).

197. A more recent illustration, relied upon by Ms Kilroy, may be said to arise in 'age assessment' cases where the legislation imposes statutory powers upon a local authority when an individual is a "child" in need. The issue of whether the individual is a child is a factual matter which the court or tribunal must decide for itself. That was decided by the Supreme Court in R(A) v Croydon LBC [2009] UKSC 8. Having set out the traditional approach to issues of fact in judicial review cases, Lady Hale (with whom Lords Scott, Walker and Neuberger expressly agreed) went on to distinguish the issue of whether an individual was a child at [27]-[32]:

> "27. But the question whether a person is a "child" is a different

kind of question. There is a right or a wrong answer. It may be difficult to determine what that answer is. The decision-makers may have to do their best on the basis of less than perfect or conclusive evidence. But that is true of many questions of fact which regularly come before the courts. That does not prevent them from being questions for the courts rather than for other kinds of decision makers.

28. The arguments advanced by Mr Béar might have to provide an answer in cases where Parliament has not made its intentions plain. But in this case it appears to me that Parliament has done just that. In section 20(1) a clear distinction is drawn between the question whether there is a "child in need within their area" and the question whether it appears to the local authority that the child requires accommodation for one of the listed reasons. In section 17(10) a clear distinction is drawn between whether the person is a "child" and whether that child is to be "taken to be" in need within the meaning of the Act. "Taken to be" imports an element of judgment, even an element of deeming in the case of a disabled child, which Parliament may well have intended to be left to the local authority rather than the courts.

29. I reach those conclusions on the wording of the 1989 Act and without recourse to the additional argument, advanced by Mr Timothy Straker QC for M, that "child" is a question of jurisdictional or precedent fact of which the ultimate arbiters are the courts rather than the public authorities involved. This doctrine does, as Ward LJ pointed out in the Court of Appeal [2008] EWCA Civ 1445, [2009] PTSR 1011, para 19, have "an ancient and respectable pedigree". Historically, like the remedy of certiorari itself, it was applied to inferior courts and other judicial or quasi-judicial bodies with limited jurisdiction. Thus a tithe commissioner could not give himself jurisdiction over land which had previously been discharged from tithe (*Bunbury v Fuller* (1853) 9 Ex 111), [1853] EngR 768; and a rent tribunal could not give itself jurisdiction over an unfurnished letting (*R v Fulham, Hammersmith and Kensington Rent Tribunal, Ex p Zerek* [1951] 2 KB 1). Although of course such a body would have to inquire into the facts in order to decide whether or not to take the case, if it got the decision wrong, it could not give itself a jurisdiction which it did not have.

30. In *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74, the same principle was applied to the power of the Home Office to remove an "illegal entrant". The existence of the power of removal depended upon that fact. It was not enough that an immigration officer had reasonable grounds for believing the person to be an illegal entrant. As Lord Scarman put it, ". . . where the exercise of executive power depends upon the precedent establishment

of an objective fact, the courts will decide whether the requirement has been satisfied" (p 110).

31. This doctrine is not of recent origin or limited to powers relating to the liberty of the subject. But of course it still requires us to decide which questions are to be regarded as setting the limits to the jurisdiction of the public authority and which questions simply relate to the exercise of that jurisdiction. This too must be a question of statutory construction, although Wade and Forsyth on *Administrative Law* suggest that "As a general rule, limiting conditions stated in objective terms will be treated as jurisdictional" (9th ed (2004), p 257). It was for this reason that Ward LJ rejected the argument, for he regarded the threshold question in section 20 as the composite one of whether the person was a "child in need". This was not a limiting condition stated in wholly objective terms so as to satisfy the Wade and Forsyth test (para 25).

32. However, as already explained, the Act does draw a distinction between a "child" and a "child in need" and even does so in terms which suggest that they are two different kinds of question. The word "child" is undoubtedly defined in wholly objective terms (however hard it may be to decide upon the facts of the particular case). With a few limited extensions, it defines the outer boundaries of the jurisdiction of both courts and local authorities under the 1989 Act. This is an Act for and about children. If ever there were a jurisdictional fact, it might be thought, this is it."

198. We set this out for two reasons. First, it illustrates the point that a merits/factual review is not unknown in the public law sphere. Secondly, Ms Kilroy directly relies on this case and its adherence to the 'precedent fact' approach and submits the present case is, itself, a 'precedent fact' case. The analogy being that (1) the issue of whether MS and MAS are brothers is a 'hard-edged' fact, capable of a "right or wrong answer"; and (2) the question of the 'criteria' (following the Grand Chamber decisions) has not been left to the public body to decide.

199. As will be clear from Lady Hale's judgment at [29], she preferred to decide the case, not on the 'jurisdictional' or 'precedent fact' basis, but rather as a matter of construction of the legislation and on the basis of her conclusion that Parliament had intended the courts to be the final arbiters of the 'hard-edged' fact of whether a particular individual was a child. Although, of course, as Lady Hale commented at [32], the issue of whether an individual was a child under the legislative scheme was quintessentially a 'precedent fact' to the exercise of the local authority's power.

200. In our judgment, the approach in the Croydon case provides a strong,

and indeed compelling, basis for the approach taken by the CJEU in respect of Art 27 of the Dublin III Regulation and which we analysed above. The application of the hierarchy criteria in the Dublin III Regulation, in particular in this case whether MAS and MS are brothers, is a 'hard-edged' fact. As the CJEU jurisprudence signals, whether those criteria have been correctly applied is intended ultimately to be a factual issue for a court or tribunal to be determine.

201. Although we were invited to treat the application of the hierarchy criteria as being a 'precedent' or 'jurisdictional fact', it is unnecessary for us to decide that issue given our view, based upon the CJEU's jurisprudence of the scope of Art 27. Suffice it to say, that there may not be an altogether easy analogy between cases where the "fact" arises prior to, and in order to give jurisdiction to, a decision-maker to exercise the power or duty vested in that decision-maker and cases involving the hierarchy criteria under the Dublin III Regulation where the criteria, in effect, are likely to occupy the whole of the decision-making required of the relevant State, here the requested State in accepting a TCR. But, as we say, it is unnecessary for us to decide this issue and we do not.

202. Ms Kilroy also prayed in aid of her argument that we should decide the factual issue of the relationship between MS and MAS, the case law concerning a court or tribunal's role in determining whether a decision has breached an individual's human rights. She, of course, placed reliance upon Art 8 of the ECHR and Art 7 of the CFR, in particular (but not exclusively) the procedural/fairness dimension of those provisions. She reminded us that Art 47 of the CFR also creates an obligation to provide "an effective remedy" for breaches of the CFR.

203. It is now well-recognised that an "intense" review or, arguably, merits assessment arises in cases where the judicial review claim is that the decision in determining whether the challenged decisions are contrary to section 6 of the Human Rights Act 1998 (see, e.g., R (Nasseri v SSHD [2009] UKHL 23, Bank Mellat v HM Treasury (no. 2) [2013] UKSC 38 and 39, and R (Lord Carlile of Berriew) v SSHD [2014] UKSC 60). The court or tribunal must, for itself, determine whether a breach of the relevant Convention right has occurred.

204. The principle was encapsulated by Underhill LJ in R(Caroopen & Myrie) v SSHD [2016] EWCA Civ 1307, where he stated at [73] that:

> "… where the issue raised by a judicial review challenge is whether there has been a breach of Convention rights, the Court cannot confine itself to asking whether the decision-making process was defective but must decide whether the decision was right."

205. That language – whether the decision was "right" – echoes the approach of the CJEU to scope of the 'effective remedy' required by Art 27 of the Dublin III Regulation.

206. In Belfast City Council v Miss Behavin' Ltd [2007] UKHL 19 Lady Hale said, at [31]:

> "The role of the court in human rights adjudication is quite different from the role of the court in an ordinary judicial review of administrative action. In human rights adjudication, the court is concerned with whether the human rights of the claimant have in fact been infringed, not with whether the administrative decision-maker properly took them into account."

207. Consequently, where a breach of Art 8 is alleged, the court must for itself determine whether the challenged decision is a proportionate interference with the individual's art 8 rights. It is not constrained only to determine whether it has been lawfully applied (see, e.g, Miss Behavin' Ltd and R (SB) v Governors of Denbigh High School [2006] UKHL 15). It was this approach which was adopted by the UT in the HA case (at [53]-[56]).

208. We do not consider that this approach is limited to the issue of proportionality under Art 8.2. It must also apply to establishing that the right, upon which reliance is placed, is actually engaged. We accept this approach must be applied to Art 8, whether relied upon for its procedural/fairness' dimension or substantively. It was not suggested before us that any different approach should be applied in respect of Art 7 of the CFR. Whether, therefore, family life exists between MAS and MS based upon their claimed relationship as brothers is also a matter which a court or tribunal must determine for itself. We reject Mr Lewis' submission that this, in effect, puts the 'cart before the horse'. Only if the right is engaged can the court indulge in a merits review. To say otherwise would effectively remove from the court or tribunal in cases where 'engagement' was the, or an, issue, determination of a vital part of the individual's claim that his Art 8 right was breached. We see no basis in the case law for it. Indeed, in the Al-Sweady case, a strongly constituted Divisional Court (Scott Baker LJ and Silber and Sweeney JJ) made plain that the factual enquiry extended in that case to the underlying facts of one individual's claim under Arts 2 and 3, namely whether he had been killed on the battle-field or, as he alleged, in a camp under the control of British forces in Iraq (see [16]). The Court accepted that cross-examination of witnesses was necessary in order for the Court to resolve that 'hard-edged' factual issue. *Mutatis mutandis*, we conclude, so it was in this case for us to resolve the 'hard-edged' issue of fact of whether MAS and MS are related as claimed as an aspect of their reliance upon Art 8 of the ECHR (and Art 7, CFR).

209. What we say, however, should not be taken as an open invitation to

parties to urge the Tribunal (or a court) to review and determine the facts in a Dublin case and, as a concomitant, to admit oral evidence subject to cross-examination (see the useful discussion in Auburn, Moffett and Sharland, *op cit* at paras 27-96 to 27.102). First, often there will be no factual dispute: the issue will be a legal one on the proper application of the Dublin III Regulation. Secondly, even if there is a factual issue, the need to assess the evidence may not always mean also admitting "oral" evidence subject to cross-examination. It will only be so if it is "necessary in order to resolve the matter fairly and accurately" (see Al-Sweady at [2], quoting Tweed v Parades Commission for Northern Ireland [2007] 1 AC 650 at [3] *per* Lord Bingham).

210. Consequently, we determine **issue IV** in the applicant's favour.

DISCUSSION: (4) FURTHER FACTUAL ISSUES

211. In the light of our conclusion on the scope of review in these proceedings, we turn to consider the written and oral evidence and state our findings and conclusions on that evidence (Issue VII)

212. At the hearing Ms Helen O'Keeffe and Dr Susannah Fairweather adopted their Mental Health Assessment report dated 5 December 2017, and their second medical report dated 6 April 2018. There was no cross-examination by Mr Lewis of either Ms O'Keeffe or Dr Fairweather. Laura Diskin, a Field Co-ordinator for Safe Passage, a charity working with unaccompanied child refugees and vulnerable adults, adopted her statement and was not cross-examined. We shall refer to the evidence from Ms O'Keeffe, Dr Fairweather and Ms Diskin so far as is necessary for our assessment of the relationship between MAS and the applicant.

213. MAS, MOS and SS adopted their statements and gave their oral evidence in the form of detailed cross-examination and brief re-examination under oath. We shall also refer to their evidence so far as is necessary to determine the nature of the relationship between the applicant and MAS.

214. The starting point for our factual assessment is the omission in MAS' asylum application of any reference to the applicant. At 3.2 of his Screening Interview, which required details of siblings, there is a reference to 'No Siblings'. At 3.5 the interviewing officer wrote 'Not applicable' in relation to a question concerning siblings. Other sections of the Screening Interview included confirmation, supported by his signature, that MAS understood the interpreter and that the details he provided were understood and were correct. MAS' asylum statement, prepared by his previous solicitors and signed and dated 22 September 2006, asserted that he did not have any siblings, and no reference was made to any siblings when troops entered the family home in Afghanistan, when the applicant would have been a young child. We

appreciate that these documents were completed some 12 years ago, and that memory may fade over time. MAS maintains that he has no recollection of the answers and assertions as recorded. He was nevertheless assisted by a Pashtu interpreter and had the benefit of legal assistance during his asylum application. Moreover, there appears little reason why, if he did have siblings, he failed to disclose the fact. We find this evidence goes some way to undermine the claimed relationship. We note however that the asylum statement was not signed by an interpreter confirming that it was read back to MAS, and, as he did not speak English at the time, it remains unclear how he was able to approve its contents. This gives some support for the applicant's submission that the previous solicitors may have lifted the information contained in the asylum statement from the screening interview.

215. The letter MAS claims was written by a French lawyer and issued on his behalf on 31 July 2017 states that he did inform an interviewing officer that he had a 5-year-old brother, but was not asked to provide further details such as his brother's name. In his first statement, dated 2 November 2017, MAS claimed he could not remember exactly what he was asked by the Home Office or how he responded. This is inconsistent with the letter dated 31 July 2017, although we take into account MAS' claim that he did not write the letter himself and did not check it before it was issued, as detailed in his second statement dated 17 November 2017, and his claim that his first statement was obtained by previous solicitors without the benefit of a Pashtu interpreter. In his third statement, dated 8 February 2018, MAS says it was possible he was told by someone not to mention his family to the Home Office during his asylum application, but that he simply has no recollection. While we cannot discount the possibility that MAS may have been told not to mention his siblings, given the importance of such advice, we find it more likely than not that he would have recalled such advice.

216. We nevertheless found MAS' oral evidence to be convincing. He gave his evidence under oath in a direct and clear manner. There was no hesitation in his answers and no perceptible attempt at embellishment. Indeed, he readily pointed out errors in translation of the WhatsApp messages that initially suggested the word 'Bro' has been used as term of sibling endearment. We consider that MAS gave a credible explanation for the delay in visiting the applicant. His account of being turned away at the ferry port in Dover in August 2017 because he did not have a Schengen visa is detailed, plausible and corroborated by MOS. In oral evidence he explained his belief that it would take time to obtain a Schengen visa and his belief that the applicant would be allowed to enter the UK and that he did not, as a result, seek a visa. On being married to MOS he was able to enter France without a visa. Given that MOS has twin two-year olds (in addition to two older children), we do not find it incredible that she would not visit the applicant on her own, especially given the language barrier. The account given by MAS of his reunion

with the applicant at the accommodation centre in France was both detailed and inherently plausible.

217. We have carefully considered the evidence of contact and communication between the applicant and MAS. We accept that the money transfer receipts and phone top-ups sent by MAS do not identify the applicant as the recipient, but this is hardly surprising given the applicant's lack of ID documents. We do not find it implausible that MAS would send funds to the applicant via third persons identified by the applicant and based on trust. Several of the references in the WhatsApp messages refer to transfers of money, which is consistent with the applicant financially relying on MAS. The transfer receipts cover a wide period of time and the transfer of funds suggests some responsibility on the part of MAS for the applicant's welfare, suggesting there is a relationship between the applicant and MAS, although, as Mr Lewis points out, it could be a more distant family relationship or even a relationship based on friendship. The WhatsApp text messages are poorly translated but once again indicate a relationship, as do the media messages and photographs sent by the applicant and MAS to each other, although, once again they do not disclose the exact nature of the relationship.

218. We note that the applicant and MAS have consistently asserted their relationship as siblings, and that MAS has consistently written of his knowledge of, and affection for, the applicant, and his concerns relating to the applicant's welfare. While the mere consistency of assertions does not render those assertions true, they are nevertheless factors we find we are entitled to take into account 'in the round' when assessing the nature of the disputed relationship. We additionally note that both MAS and the applicant have consistently indicated their willingness to undertake DNA testing, and that the applicant has, according to the medical reports, become somewhat fixated on obtaining DNA evidence to prove his relationship. Their willingness to undertake DNA testing, in circumstances where the inability to do so is not a result of their actions, is a further factor we take into account.

219. The applicant relies on a photograph said to show him and MAS in Pakistan in 2009 when MAS visited the country to see his family. We caution ourselves of the inherent danger in comparing an individual said to appear in photographs taken some 8 to 9 years apart, especially if the individual is a child. We are nevertheless satisfied that the person appearing in the photograph said to date from 2009 is the applicant. We base this conclusion on the similarity in features between the person appearing in the 2009 photograph and the photographs taken when MAS and the applicant met in France in March 2018. While we remind ourselves that the photograph does not demonstrate that the applicant and MAS are siblings, it is capable of supporting the claimed relationship as it indicates that the relationship has been maintained for

some years. We are not confident that we can discern a family resemblance between the applicant and MAS, although we cannot entirely discount the possibility.

220. We found MOS to be an honest and persuasive witness. She gave her evidence, on oath, in an open and direct manner and without any perceptible attempt at embellishment. Her oral evidence was consistent with her two statements and consistent with the evidence of MAS. Her evidence was detailed and plausible, although we bear in mind that she is unable to speak Pashtu and would not be privy to the conversations between the applicant and MAS. In considering MOS' evidence we remind ourselves of the relationship between her and MAS and the possibility of bias. MOS confirmed in her written and oral evidence that MAS has spoken about the applicant many times over the years. She has also regularly heard MAS speaking to his family about the applicant, and witnessed MAS speaking to both his mother and the applicant on the telephone during the same call. She is aware that MAS and the applicant speak frequently and that MAS sends him money. She confirms the abortive attempt to visit him in August 2017 and that MAS is worried about the applicant and feels responsibility for him. She makes the valid point that it would be difficult for MAS to have pretended to have a brother over the years of her relationship with MAS. In her view, it is "obvious" that the applicant and MAS are related. MOS gave a detailed and plausible description of the adverse emotional impact of the respondent's decision on both MAS and the applicant, based on her own knowledge, and cited, as an example, the manner in which MAS was affected during Ramadan when the applicant would not answer his telephone. We have noted that MOS is willing to have the applicant live with her children, and the photographic evidence showing MOS and three of her children with the applicant and MAS in Disneyland Paris. Having found MOS to be an entirely credible witness, we are satisfied that she genuinely believes that the applicant and MAS are brothers, and that she has described a solid basis for this conclusion.

221. SS also gave oral evidence on oath. In his asylum interview in 2004 he twice mentioned that his uncle (the father of MAS) had a son and two daughters. This tends to undermine the claimed relationship, although he did mention that MAS had two sisters which, although inconsistent with MAS' account during his asylum application, is consistent with his subsequent claim to have two sisters. SS' asylum interview occurred in 2004, some 13 years before the respondent's first decision. He claims to not remember why he mentioned his uncle having one son, but that he was under a lot of stress at the time and it may have been because the applicant was so young. This explanation is not outside the realms of possibility and we cannot discount it as being untrue. It is apparent from the photographs taken in 2015 in Pakistan, clearly showing the applicant and SS together, that there is likely to be some type of relationship between them, and there was no challenge to SS' evidence that he

continues to speak to the applicant once or twice a week, or his evidence that the applicant has cried and become angry and frustrated during their conversations. We also note that SS is willing to undertake a DNA test. Other than the omission to mention the applicant in his asylum interview, we found SSs evidence to be generally consistent with that the MAS and MOS.

222. Laura Diskin has worked with the applicant since August 2017 and has visited him at his accommodation on a number of occasions. She records the applicant's frustration and distress at being reunited with MAS and observed MAS and the applicant tougher, describing that they interacted in a familiar way and had a family resemblance. The applicant was clearly pleased to see MAS and was emotional. We have no doubt that Ms Diskin believes the applicant and MAS are brothers, but we remind ourselves that her evidence may reflect a relationship between the applicant and MAS that is one other than that of siblings, although her evidence does provide some support for the claimed relationship.

223. We have already considered the evidence contained in Ms O'Keeffe's Mental Health Assessment dated 5 December 2017 above at paragraphs 168 and 169 which partly attributed the applicant's emotional state and distress to being separated from MAS. In her updated report, dated 6 April 2018, which was again supervised by Dr Fairweather, Ms O'Keeffe describes there being an "immediate and high risk" of the applicant self-harming due to the severe stress of his situation (he had previously cut himself). There was said to be a deterioration in his mental state. She described how the applicant immediately asked her to conduct a DNA test, that he was preoccupied with this, and that he constantly asked Ms Diskin to arrange a DNA test. Ms O'Keeffe was able to observe the applicant and MAS and his family together on 14 March 2018. The applicant described himself as being very happy to see MAS and Ms O'Keeffe described how he appeared happier and more relaxed with MAS and MOS. She observed the applicant and MAS behaving in a "natural, close and trusting manner towards each other." MAS appeared genuinely worried for the applicant's well-being and there was nothing in his interaction with the applicant that caused Ms O'Keeffe to doubt they had a close and supportive relationship. The applicant described feeling a sense of injustice as to not being believed about his relationship with MAS and met the criteria for PTSD. There was no challenge to Ms O'Keeffe's evidence. We remind ourselves that she only observed the applicant and MAS on one occasion, and that the description of their interaction could equally apply to cousins or more distant relatives. We nevertheless find the Mental Health Assessment Update to provide some support for the claimed relationship.

224. The applicant relies on a Taskira that the respondent maintains has a Form Number '884363'. This was the Form Number checked by the Afghanistan Central Civil Registration Authority at the National Identity

Verification Centre and which found there was no match with any records. In email correspondence the applicant's representatives maintain that the relevant reference number is in fact '88/363'. We were shown the most legible copy of the Taskira but we could not easily discern whether the figure in contention was a '4' or a '/'. Regrettably, no specimen or standard form evidence was provided. We find we cannot place any reliance on the Taskira produced by the applicant, but nor are we satisfied that it is a false document.

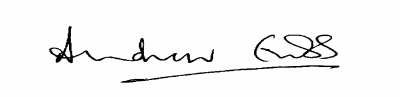
225. We have approached the evidence described above in a holistic manner. We accord due weight to the significant omission in MAS' asylum application of any mention of a sibling, and the other factors relied on by the respondent in her decision dated 12 March 2018. We are nevertheless persuaded, having particular regard to the evidence from MOS, the willingness of the applicant and MAS to undergo DNA testing, taken in conjunction with the evidence of continued communication and support provided by MAS, that they are brothers and not more distantly related.

REMEDY

226. For the reasons given in paragraphs 158 to 169 above, we quash the respondent's decisions dated 27 July 2017, 21 August 2017, and 12 March 2018. The respondent has not yet made a lawful decision in response to the TCRs issued by France.

227. We have found that the applicant and MAS are brothers. Under Art 8 of the Dublin III Regulation, read in conjunction with Art 3 of the 2003 Regulation, it remains for the respondent to consider whether it is in the applicant's best interests, as a minor, for his asylum application to be examined by the UK.

228. Given that the TCRs remain outstanding awaiting a lawful assessment in accordance with our judgment, it is not appropriate to make a mandatory order requiring the respondent to accept the TCRs and grant the applicant entry clearance.



Signed: _____

Upper Tribunal Judge Grubb

Dated: **19 July 2018**