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

JR/6069/2019

In the matter of an application for Judicial Review

The Queen on the application of AI
(a child by his litigation friend IN)

Applicant

Versus

Secretary of State for the Home Department

Respondent

ORDER

BEFORE Upper Tribunal Judge Frances

HAVING considered all documents lodged and having heard Ms C Kilroy Q.C. and Ms V Laughton of counsel, instructed by Simpsons Millar, for the applicant and Mr Pennington-Benton of counsel, instructed by GLD, for the respondent at a remote hearing on 9 November 2020 which has been consented to by the parties. The form of the remote hearing was video by Skype. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

UPON the Respondent having conceded that the delay from 14 July 2019 to 28 July 2020 comprised unlawful delay in breach of Dublin III.

AND UPON judgment being handed down on 10 May 2021.

IT IS ORDERED THAT:

(1) The application for judicial review is allowed in so far as there has been unlawful delay in transferring the applicant to the UK in breach of Dublin III.

(2) The applicant's claim that the respondent breached his Article 8 ECHR rights is dismissed for the reasons given in the attached judgment.

(3) The applicant's claim for damages for breach of Regulation (EU) No 604/2013 is dismissed.

(4) Permission to appeal is refused because there is no arguable error of law in the decision dismissing the applicant's claims for breach of Article 8 ECHR and damages for the reasons given at [104] and [105] of the judgment.

Costs

(5) The respondent conceded at the start of the hearing on 9 November 2020 that there had been an unlawful delay of over 12 months in breach of Dublin III. The applicant succeeded in that respect. The applicant's claim for breach of Article 8 ECHR and his claim for *Francovich* damages was dismissed.

(6) The respondent to pay the applicant's reasonable costs prior to and including the

hearing on 9 November 2020, subject to detailed assessment if not agreed. The cost of the hearing had already been incurred at the time of the concession and could have been reduced or avoided if the respondent had notified the applicant of the concession prior to the hearing.

(7) The applicant to pay the respondent's reasonable costs from 10 November 2020 to date, subject to the costs protection pursuant to section 26(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 and Reg. 12 of the Civil Legal Aid (Costs) Regulations 2013.

(8) There be a detailed assessment of the applicant's publicly funded costs.

Signed: **J Frances**

Upper Tribunal Judge Frances

Dated: **10 May 2021**

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): 12 May 2021

Solicitors:
Ref No.
Home Office Ref:

Notification of appeal rights

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

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

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

Case No: JR/6069/2019

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

10th May 2021

Before:

UPPER TRIBUNAL JUDGE FRANCES

- -

Between:

THE QUEEN
on the application of AI
(a child by his litigation friend IN)

Applicant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

Ms C Kilroy Q.C. and Ms V Laughton
(instructed by Simpson Millar) for the applicant

Mr R Pennington-Benton
(instructed by the Government Legal Department) for the respondent

Hearing date: 9th November 2020

- -

J U D G M E N T

- -

Judge FRANCES:

1. The applicant challenges the respondent's refusals, dated 16 January 2019 and 22 July 2019, of a take charge request [TCR] made on 14 November 2018 and the delay in transferring the applicant to the UK under Article 8.2 of EU Regulation 604/2013 [Dublin III]. The applicant was transferred to the UK on 28 July 2020.

2. It is the applicant's case that the refusals were unlawful and the respondent was in breach of her investigative duties. The delay in transferring the applicant to the UK was unlawful and in breach of the Dublin III time limits. Further, the unlawful delay breached the applicant's rights under Article 8 of the European Convention of Human Rights [ECHR] and Article 7 of the EU Charter of Fundamental Rights [CFR] informed by the Convention on the Rights of the Child [CRC]. The applicant seeks declarations and damages.

Facts

3. The applicant is a national of Burundi who arrived in Greece in June 2018 and registered a claim for asylum on 6 September 2018 when he was 16 years old. On 14 November 2018, Greece made a TCR, on the basis that the applicant's uncle [IN] lived in the UK and the applicant wished to join him. Greece sent a 'best interests assessment' [BIA] on 3 December 2018 and the respondent sent a letter and a pro-forma family undertaking form [proforma] to IN on 10 December 2018. IN responded on 19 December 2018 and the respondent received the proforma on 24 December 2018. Greece sent additional documents (an untranslated birth certificate and father's identity document) on 9 January 2019. The time limit for accepting the TCR expired on 14 January 2019.

4. The respondent refused the TCR on 16 January 2019 on the basis that there was insufficient evidence to demonstrate a family link. Greece made a re-examination request on 6 February 2019 stating that DNA tests would be taken and the results sent to the respondent. On 7 February 2019, Greece sent a family document (untranslated) confirming the family link and asked the respondent if DNA tests were still required.

5. On 3 June 2019, Greece sought an update from the respondent. By letter dated 22 July 2019 (sent on 30 July 2019), the respondent refused the TCR (re-examination request), maintaining there was insufficient evidence to establish the claimed family link and stating that a translation was required. On 14 August 2019, Greece sent a further re-examination request with translated documents. This application for judicial review was filed on 6 December 2019. On 27 December 2019, the respondent advised Greece that the family link had been established and a new TCR, under Article 17.2 of Dublin III, should be made. Greece made a second TCR on 10 January 2020.

6. On 22 January 2020, the respondent requested a family assessment from the local authority [LA]. The respondent sent two further letters to the LA chasing the family assessment on 17 February 2020 and 4 March 2020. Permission to apply for judicial review was granted on 11 March 2020. The LA expressed concerns about the welfare of other children in IN's household and requested further details of the applicant. On 23 March 2020, the respondent sent the BIA to the LA. On 26 March 2020, Greece informed the respondent that all flights were suspended due to the outbreak of Covid 19 and the Dublin unit would resume transfers as soon as restrictions were lifted. The respondent received the LA assessment on 30 March 2020 and accepted the TCR on 1 April 2020. The applicant was transferred to the UK on 28 July 2020.

7. On 22 October 2020, the respondent applied to stay the proceedings pending hand down of the judgment of the Court of Appeal in Secretary of State for the Home Department v R (FwF and FrF) (JR/1626/2019). I refused the application on the grounds that, on the information before me, the respondent had failed to demonstrate that the Court of Appeal's judgment would have a critical impact on the applicant's claim: AB (Sudan) v SSHD [2013] EWCA Civ 921 at [30],[32]. Whether there was an interference with the applicant's rights under Article 8 is a fact specific exercise.

Relevant legal provisions

8. The relevant articles of Dublin III, the Implementing Regulation 1506/2003 as amended by Regulation 118/2014 [IR] and Home Office Policy are set out in Annex A. To satisfy the Article 8.2 Dublin III criteria it must be established that:

   (a) The relative and child are related;
   (b) The relative can take care of the child; and
   (c) Reunification is in the child's best interests.

9. A decision on the TCR must be made within two months. A failure to act within the two month period is tantamount to accepting the request [deemed acceptance] giving rise to the obligation to take charge and provide for proper arrangements for arrival. The transfer should take place as soon as possible and at the latest within six months of acceptance or deemed acceptance. The failure to observe the time limits for placing a minor shall not necessarily be an obstacle to continuing the procedure for determining responsibility or carrying out a transfer.

10. The following Dublin III cases were referred to in legal argument:

    (i) FA & Others v SSHD (JR/5523/2018, JR/5405/2018, JR/5406/2018)
    (ii) KF v SSHD (JR/1642/2019)
    (iii) HN & MN v SSHD (JR/4719/2019)
    (iv) R (MK, IK and HK) v SSHD [2016] UKUT 00231 (IAC)

(v) R (MS) v SSHD (Dublin III; duty to investigate) [2019] UKUT 00009 (IAC)
(vi) BAA and TAA v SSHD [2020] UKUT 00227 (IAC)

Respondent's concession

11. By letter dated 9 November 2020, received on the morning of the hearing by email, the respondent made the following concession:

> "1. The following concession applies to this case only. The Secretary of State concedes that the overall delay between the transfer request and the Applicant's arrival in the UK was in breach of the longstop limit of 8 months (FA and KF) under Regulation (EU) No 604/2013 ('Dublin III'). The period of delay beyond 14 July 2019 comprised unlawful delay in breach of Dublin III. The Secretary of State maintains that this did not compromise a breach of the ECHR, CFR or common law process rights. Entitlement to damages is denied.
>
> 2. We do not rely on Article 29 of Dublin III or Article 10 or 12(2) of the Implementing Regulation either to extend time under Article 12(1) or to argue that the delay was lawful. We accept that the overall delay over 8 months was unlawful. We rely on article 12(2) in so far as we say that it confirms that the Secretary of State was entitled to continue to consider whether the family link was established, the care position and best interests.
>
> 3. The decisions of 16 January and 30 July 2019 were nullities in as much as they purported to reject responsibility when it had already passed. However, we rely on the contents of those communications as a valid part of the ongoing exchanges of information about the family link, care position and best interests.
>
> 4. The Secretary of State does not concede that the period of delay constituted a breach of common law process rights. Even though it is accepted that the overall delay was unlawful, it is not accepted that each and every (sic) of the failures along the way were in themselves unlawful or in themselves constituted an unlawful application of Dublin III. We will hear the argument and respond in the usual way.
>
> 5. The only point being conceded is that the overall period of delay was unlawful being beyond the 8-month long stop. As to the individual reasons for that delay and whether they themselves give rise to liability these matters remain for the Applicant to persuade the court."

12. In relation to the concession, Mr Pennington-Benton submitted the decisions of 16 January 2019 and 22 July 2019 (sent on 30 July 2019) could not do what they purported to do. He had to accept the decisions

were wrong and unlawful. However, overall, those failures did not amount to a breach of Dublin III. What was being conceded was delay caused by administrative failures. The delay was far too long, over 12 months, and amounted to an unlawful application of Dublin III. However, each failure was not enough, in itself, to breach Dublin III.

13. Mr Pennington-Benton accepted the respondent was not entitled to refuse the TCR subject to continuing to assess the question of best interests. He accepted that the UK was deemed to be responsible from 14 January 2019 and responsibility remained with the UK since that date. The respondent was not relying on Article 29. The respondent should have accepted the UK was responsible but stated that she was continuing to question the family link and the applicant's best interests. Mr Pennington-Benton accepted there was unlawful delay from 14 July 2019 to 28 July 2020.

Applicant's submissions

14. Ms Kilroy agreed that the respondent was not entitled to rely on Article 12(2) IR as a basis to refuse responsibility and submitted that the applicant's case on all those points in the grounds should be accepted. The matters in issue were breach of investigative duty and breach of Article 8 ECHR.

15. Ms Kilroy relied on her skeleton argument dated 18 October 2020 and submitted that applying KF, the refusals to accept the TCR were unlawful and the delay was in breach of Dublin III. Ms Kilroy submitted that this case was 'on all fours' with KF save that the length of interference was longer. She submitted that, in KF, the Tribunal found the respondent's failure to contact the LA, to request translations and to notify the applicant of the respondent's concerns amounted to a breach of her investigative duties under Dublin III. There was a common law duty to make reasonable enquiries and there were procedural requirements under Article 8 (R (MK, IK and HK and R (MS)). The decision maker had to comply with procedural fairness and give the applicant an opportunity to participate.

16. The Tribunal in KF applied this case law to the same failures which existed in that applicant's case. The time frame was similar. The respondent did not give the applicant an opportunity to comment and failed to contact the LA until after the family link was established. There was a pattern of conduct which impacted differently in each case. In this applicant's case, the respondent refused the TCR after the time limit because she did not accept the family link. This had a massive impact on children. Ms Kilroy submitted there was no evidence from the respondent and no explanation for the delay. The applicant's evidence and the psychiatric evidence was undisputed.

17. Ms Kilroy summarised the facts which led to the applicant travelling to Greece and submitted, on 7 February 2019, the respondent had all the information which she ultimately relied on in accepting the TCR. HN & MN could be distinguished. After the purported refusal on 16 January

2019, the Greek authorities responded with new material which ultimately proved the family link. There were lengthy delays by the respondent and no evidence that she had considered the best interests of the applicant. There was no 'best interests' argument to explain or justify the delay by the respondent.

18. The BIA from Greece strongly supported reunification and this was accepted by the respondent in her email dated 23 March 2020 (at page 533 of the trial bundle). The BIA should have been sent to the LA sooner. The respondent had all the information she needed to accept the TCR and she failed to do so until 20 January 2020. The position was clear from the untranslated document provided on 7 February 2019. Ms Kilroy relied on [40]- [45] of her skeleton argument.

19. Ms Kilroy submitted Recitals 5 and 13 to 16 of Dublin III were relevant to the assessment of Article 8. The purpose of Dublin III was to achieve family unity (Recital 17 and Article 12 IR). Ms Kilroy submitted that in R (MA (Eritrea) v SSHD (ECJ) (C-648/11)[2013] 1 WLR 2961, the court confirmed the muscularity of the 'best interests' principle and how it worked. The issue in this case was whether the delay and breaches of Dublin III amounted to a breach of Article 8. The respondent submitted there was no family life and no interference with private life because the threshold was high and the delay was not significant. Ms Kilroy submitted the justification for a decision must show that the child's substantive right to have his best interests assessed as a primary consideration had been explicitly taken into account (Mathieson v Secretary of State for Work and Pensions [2015] UKSC 47).

20. In relation to the duty to investigate and procedural fairness, Ms Kilroy referred to R (MK, IK and HK) at [20] to [27] and [38], R (Citizens UK) at [68] to [84] and R (MS) at [120] to [125], [134] to [137], [171] and [202] to [208]. She submitted this approach was confirmed by the Court of Appeal in SSHD v MS [2019] EWCA Civ 1340 at [51] to [64] and ZT (Syria) v SSHD [2016] EWCA Civ 810 did not apply.

21. Ms Kilroy submitted that BAA was the most recent authority and the Tribunal adopted the same approach as KF. The respondent should involve the LA and the applicant should be given an opportunity to address the reasons for refusal. The Tribunal should decide the matter for itself (BAA at [76] to [82], [170], [176] and [177] and KF [77] to [82] [84] [85]).

22. In relation to Article 8, Ms Kilroy submitted that Kugathas concerned family life between adults and had no application in this situation. She submitted that the potential for the development of family life was relevant to whether family live existed and this was not confined to cases involving children and natural parents. She relied on Singh v Entry Clearance Officer [2004] EWCA Civ 1075 at [1], [2], [26] to [29] in which there was an informal adoption by cousins that was not recognised in UK. Reference was made to Pini v Romania (App No. 78028/01 and 78030/01) in which the children had not met their

adoptive parents and had been picked out from photographs. The relationship arising from a lawful adoption could be considered sufficient to warrant the respect required by Article 8.

23. Ms Kilroy submitted Dublin III was a system set up by international treaty to reunify family members. The fact that the parties had not met did not mean Article 8 was not engaged. This applicant will not have a family life without reunification. Ms Kilroy submitted that family life must be extended to the potential relationship which may develop and cohabitation was likely to play a less significant role in assessing family life between uncles and nephews: Singh at [33], [34], [38], [56], [76] and [77].

24. Ms Kilroy submitted the existence of family life was fact sensitive and must include an assessment of the best interests of the child. The court in Pini concluded that orphans picked out from photographs was enough to engage Article 8. Dublin III recognised the importance of other family members to take care of children who did not live with their parents. She submitted the state should refrain from inhibiting the development of a real family life in the future: R (Ahmadi) v SSHD [2005] EWCA Civ 1721 at [18].

25. Ms Kilroy submitted the CRC should be taken into account : R (SG) v Secretary of State for Work and Pensions [2015] UKSC 16 at [116] to [121], [217] and [257]. She submitted that, in Mathieson at [39] to [44], the court recognised the relevance of General Comment No.14 on the rights of a child to have his or her best interests taken into account as a primary consideration. The right to reunification and the child's best interests ran throughout the CRC. The best interests of the child were a threefold concept and should be a primary consideration. The preservation of the family environment encompassed the preservation of the child's 'ties' in a wider sense. These 'ties' applied to extended family such as grandparents, aunts, uncles and friends.

26. Ms Kilroy submitted the Applicant was an orphan trying to reunite with his uncle. The need to preserve that family link is required by Dublin III and other international instruments. The Applicant had established family life. A decision deciding reunification had to engage Article 8.

27. Ms Kilroy referred to [71] to [77] of her skeleton argument and submitted the respondent failed to contact IN to ask him to explain the discrepancies in surnames. If the family document had been translated and the local authority had been contacted, it would have made a difference. The LA assessment was relevant to the requirement to take care of the applicant under Article 8.2 Dublin III. It was necessary for the LA to visit the family. The request should have been made when the TCR was received. DNA was not required in this case, but if the respondent thought it was necessary, she should have indicated this to the Greek authorities and she did not. The delay that followed was

worse than that in KF. There was a long delay after translations were provided and nothing was done for months.

28. In response to a question from me, Ms Kilroy submitted there was no need for a second TCR because the respondent was not relying on Article 29. The respondent accepted she unlawfully refused the TCR and to ask for another one under Article 17.2 was obviously unlawful because there was no basis for it. The delay was not as a result of any investigation into the applicant's best interests under Article 12(2) IR. The delay in this case was wholly unnecessary. The decisions were unlawful. The respondent's breach of her investigative duties and unreasonable conduct was not in compliance with Dublin III.

29. In relation to Article 8, there was evidence of the relationship in the witness statements of the applicant and IN. Since August/September 2018 they had spoken on a regular basis on the telephone and via WhatsApp. The social worker was one of the authors of the BIA and she stated that the applicant had already built a loving relationship with IN by November 2018. The applicant was feeling isolated and IN really cared about progressing matters. The psychiatric report at [16, 35, 38, 62, 63] demonstrated the delay was relevant to the interference caused. The BIA demonstrated the importance of the bond between the applicant and IN. There was ample evidence that it was in the applicant's best interests to be reunited with IN in the UK, his only family member.

30. Ms Kilroy submitted that the bonds built up while the applicant was awaiting reunification and IN's commitment to the applicant as his future carer demonstrated a strong emotional dependency. The applicant was part of IN's biological family and was an unaccompanied minor separated from his parents. On a proper application of international law, Article 8 was engaged. The applicant's private life was essential to his future development.

31. Ms Kilroy referred to R (Mambakasa) v SSHD [2003] EWHC 319 (Admin) at [65],[107], [110] [115] and [116]. Richards J found that the delay of six months in granting asylum was unreasonable. In this case there was a delay of one year in which the respondent did nothing at all. She made no attempt to move matters on in a case where there was a need for expedition. The delay in this case was more than the longstop provided for under Dublin III. It clearly met the high threshold envisaged in ZT (Syria).

32. Ms Kilroy submitted the delay was unlawful and the respondent was in breach of her investigative duties. This conduct was sufficient to engage Article 8 ECHR and Article 7 CFR. The respondent's decisions were unlawful and not in accordance with the law. There was no evidence from the respondent to justify the decisions. The interference could not be justified and was disproportionate. Ms Kilroy submitted that applying KF, BAA and R(MS) , the applicant succeeded on the two remaining issues.

Respondent's submissions

33. Mr Pennington-Benton accepted that responsibility for the applicant's asylum claim had shifted to the respondent and she was wrong to purport to decline the TCR outside the two month time limit. However, relying on FA the respondent's failure to do what needed to be done within the relevant two month period was not unlawful and did not give rise to a breach of Dublin III. Following KF, the default position was that the UK was responsible. The failure to contact the LA, in breach of Home Office Policy, did not amount to an unlawful application of Dublin III. The applicant had to show the failures gave rise to an independent and self-standing breach of Dublin III.

34. Mr Pennington-Benton submitted the failure to contact the LA, or to notify the applicant of the case against him were common law failures which did not amount to an unlawful application of Dublin III. Further, he relied on [34] to [46] of the respondent's skeleton argument and submitted that, on the facts, these individual allegations were denied.

35. The respondent sent a proforma to IN asking him to provide detailed information to demonstrate the family link and this was taken into account prior to the decision to refuse the TCR. Thereafter, the Greek authorities sent further information, but this was still insufficient to establish the family link. Mr Pennington-Benton submitted the respondent acted reasonably and in good faith even though the responses were dilatory. The delay was unacceptable because there were periods which were unexplained. The respondent had to be satisfied the Article 8.2 Dublin III criteria were met and considered the best interests of the applicant. The process was right and proper but too slow. The Tribunal should focus on the delay.

36. The applicant had a Greek lawyer, a social worker and regular contact with IN. The concerns about the family link were communicated and the applicant and IN would have been aware of the need to provide translated documents. The LA assessment was relevant to whether IN could take care of the applicant, not to establish the family link. The only breach of Dublin III was the failure to make decisions and transfer the applicant within the time limit. The reasons for the delay were not relevant because it was conceded the delay breached Dublin III. Following FA, there would be no unlawful application of Dublin III if the time limits had been complied with.

37. Mr Pennington-Benton submitted that Dublin III did not give rights to migrate on a permanent basis and did not assist in the interpretation of family life. Dublin III assigned responsibility for determining an asylum claim. It did not determine family reunification and had nothing to do with adoption or marriage. If the applicant's asylum claim was refused, he may have no basis to remain in the UK. It was unhelpful to view the engagement of Article 8 through the lens of Singh and Pini. These cases were concerned with a recognised adoption process and

were fundamentally different. In the applicant's case there was recognition of a temporary requirement to transfer him to the UK to have his asylum claim considered. Dublin III was not concerned with long term familial commitment and it was inappropriate to compare the applicant's case with cases about adoption. The applicant's position was a wholly transitory form of engagement of Article 8 and could be distinguished from Mambakasa on its facts. There was no question of IN replacing the applicant's missing parents save for a temporary period.

38. Mr Pennington-Benton submitted that, in Mambakasa, Richards J was wrong to conclude that the unlawful delay would preclude the respondent's successful reliance on Article 8(2) ECHR because any breach of the claimant's rights under Article 8(1) could not be said to have been wholly 'in accordance with the law'. Article 8 was concerned with a positive interference by the state. In cases of delay there was a failure to make a decision. It was inappropriate to assess whether the delay was not 'in accordance with the law'. The Tribunal should adopt the same approach as in a case of maladministration in assessing the delay under Dublin III. The issue was whether the maladministration under Dublin III was sufficiently egregious to amount to a disproportionate interference with the applicant's Article 8 rights.

39. Mr Pennington-Benton submitted the Tribunal had failed to adopt the correct approach in FwF. If Ms Kilroy's submission was correct then any unlawful delay would render a decision not 'in accordance with the law'. That proposition could not be correct. Mr Pennington-Benton submitted the Tribunal should adopt the same approach as in Anufrijeva v Southwark LBC [2004] EWCA Civ 1406. There was a legal obligation to transfer the applicant but it was exercised too slowly. The issue was whether the delay amounted to a disproportionate interference with Article 8. It was not appropriate to consider the question of 'in accordance with the law' when there was no appropriate measure.

40. Alternatively, the transfer decision could be treated as the interfering measure and it had been made too late. There was a legal and valid decision which was 'in accordance with the law'. The issue was whether the delay was disproportionate. In this case, however, there was no family life or it was of such a minimal and transitory nature that the delay could not lead to a breach of Article 8. The applicant had never met IN and there was no pre-existing family life or dependency. The applicant's relationship with IN was formed within two months of claiming asylum when he was housed in reasonable conditions and his basic needs provided for. The applicant had the assistance of a lawyer, a social worker and a UK legal team. He had regular contact with IN and had received psychiatric assistance for his difficulties. He had spent one year longer in Greece than he should have done. This did not amount to a breach of Article 8.

Applicant's response

41. Ms Kilroy submitted there was no distinction between positive and negative obligation cases when considering the issue of 'in accordance with the law'. The central issue was whether a fair balance had been struck between the interests of the family in maintaining family life and the public interest in immigration control: R (MM Lebanon) v SSHD [2017] UKSC 10 at [43]. Ms Kilroy submitted 'in accordance with the law' was a useful analytical tool relevant to justification and proportionality. Whether the interference was 'in accordance with the law' was a necessary part of the analysis relevant to whether a fair balance is struck: R (Quila) v SSHD [2011] UKSC 45.

42. Ms Kilroy submitted Dublin III was adopted to comply with Article 8 and was concerned with the best interests of children and family reunification. It could not be said that the respondent had struck a fair balance when she failed to comply with the requirements of Dublin III and in doing so the respondent failed to respect the applicant's Article 8 rights for that period of time: BAA at [177]. It was apparent from ZT (Syria) that Dublin III is compliant with Article 8 because only a compelling case would justify circumvention of Dublin III requirements. If Dublin III obligations are met, the member state's actions will comply with Article 8. If not, there will be a breach. That was the case here.

43. Ms Kilroy submitted that family life can be engaged even when the parties have not met because of the potential to develop family life. In this case there was evidence of a strong bond between the applicant and IN, and evidence that the applicant's best interests had not been taken into account. Family life had been found to exist in all the previous Dublin III cases save for HN & MN and none of the cases concluded that Article 8 was not engaged. There was clearly family life in the applicant's case and a failure to comply with Dublin III was likely to result in a breach of Article 8.

44. Ms Kilroy submitted there was no justification for the delay in this case. The respondent had taken double the amount of time to transfer the applicant. There was a very strict timetable aimed at protecting the rights of children. The applicant was 16 years old when he claimed asylum. In Mambakasa there was unintentional delay as a result of administrative failures. In this case there was a deliberate refusal of family reunification which was unlawful under Dublin III. The respondent unlawfully refused the TCR and failed to comply with her investigative obligations. These were not just common law failings but breaches of Dublin III and the ECHR: KF and BAA at [76] [80] and [117].

45. Ms Kilroy submitted the letters refusing the TCR's could not be viewed as requests for further information or notice of the respondent's concerns. The respondent requested a new TCR under Article 17.2 because there was no valid reconsideration request outstanding. The respondent's argument that the letters were part of a dialogue should not be entertained given the late abandonment of the argument under Article 29.

46. In response to a question from me, Ms Kilroy submitted that once responsibility had passed to the UK, on 14 January 2019, the respondent was not entitled to continue to consider the requirements of Article 8.2 Dublin III. This was contrary to the findings in HN & MN, FA and KF. Member states must collaborate. Where the respondent was responsible, only if there was a positive risk of harm to the applicant could his best interests result in a refusal of his transfer to the UK. In this case, where there was automatic acceptance of responsibility, establishing the family link was relevant to the applicant's best interests not to the application of the Article 8.2 Dublin III criteria. The respondent could only refuse to accept the transfer of the applicant if there were strong reasons that it was not in his best interests to be transferred to the UK. The fact that the applicant may not be related as claimed did not preclude transfer.

47. Ms Kilroy accepted it was appropriate for the respondent to continue to establish the family link, but she did not accept that the respondent was entitled to refuse the transfer because the applicant did not qualify under Article 8.2 Dublin III. She submitted that from 7 February 2019 there was information before the respondent to establish the family link.

48. The respondent accepted she did not comply with her obligations under Dublin III. Ms Kilroy submitted the respondent breached her investigative duties which had contributed to the delay. The refusals of the TCR were unlawful because the respondent had failed to act as soon as she received the TCR and she accepted she could not lawfully refuse the TCR after the expiry of the two-month time limit. If the respondent could not make a decision within two months, she could have refused the TCR on the basis there was not enough information. She did not do so. The respondent did not tell IN the information she already had nor did she take reasonable steps to inform IN of what information she required. The proforma sent to IN on 10 December 2018 was insufficient to comply with the respondent's investigative duties: R (MK, IK and HK). The respondent did not notify IN of her concerns about the discrepancies in names and there was no onus on the applicant to prove the relationship.

49. Ms Kilroy submitted there was no reference to the applicant's best interests in any of the respondent's evidence. The respondent's policy accepts that re- establishment of family links would normally be regarded as being in accordance with the section 55 duties, but this may not always be the case, and gives a non-exhaustive list of examples. None of those considerations applied in this case. The respondent could not refuse the transfer under Article 12(2) IR: HN & MN at [86] and [87]. The issue of damages could be resolved in further written submissions.

Conclusions and reasons

50. The following matters are not in dispute. Default acceptance of the TCR occurred on 14 January 2019 and the applicant should have been transferred to the UK by 14 July 2019. The transfer was not effected until 28 July 2020. The respondent did not rely on Article 29 Dublin III or Articles 10 or 12(2) IR to extend time or argue that the delay was lawful. The respondent accepted there had been an unlawful delay of just over one year in breach of Dublin III.

51. In his oral submissions, in relation to the concession, Mr Pennington-Benton accepted the decisions refusing the TCR were unlawful. However, if I have understood his position correctly, these unlawful decisions would not have breached Dublin III if the time limits had been complied with. Since the respondent did not seek to derogate from her responsibility and accepted an unlawful delay of just over one year, the legality of the decisions refusing the TCR was not material to the breach of Dublin III on the facts of this case.

52. In any event, I agree with the Panel's conclusions at [77] of HN & MN that Article 12 IR operates in parallel with deemed acceptance of the TCR. The respondent was not bound to accept the transfer of the applicant under any circumstances and there was scope for the disapplication of time limits, provided it was in the applicant's best interests. The respondent's duty of investigation was not extinguished once responsibility was accepted explicitly in a decision or deemed under Article 22(7). If it was established (after deemed acceptance of responsibility) that the minor was not related to the claimed relative, it was unlikely to be in the minor's best interests to be united with that claimed relative in the UK. The decisions of 14 January 2019 and 22 July 2019 were not unlawful simply by reason of deemed acceptance of responsibility (HN & MN at [86]).

53. I am not persuaded by Ms Kilroy's submission that the respondent is not entitled to consider the requirements of Article 8.2 Dublin III once there is deemed acceptance of responsibility. In any event, the distinction she makes is not material. It is hard to envisage a situation where it would be in the best interests of an unaccompanied minor to be transferred to another country where he/she has no relatives nor an asserted family and private life within Article 8 ECHR.

54. Ms Kilroy accepted that there were two matters in issue before me:

(i) Breach of investigative duty and procedural fairness obligations; and
(ii) Breach of Article 8 ECHR/Article 7 CFR. I shall treat these two Articles as equivalent.

Investigative duties and procedural fairness

55. The respondent has a duty to investigative the basis upon which the TCR is made and whether the requirements of Dublin III are met. The duty is to act reasonably and take reasonable steps. Fairness requires

that the applicant must know the gist of what is being said against him and he must have an opportunity to make representations on issues and material being relied on: R(MS) and BAA.

56. The respondent sent a letter and proforma request for information to IN on 10 December 2018. The letter made it clear to provide as much detail as possible and to provide all the evidence or information to prove the relationship. IN responded stating that he was the younger brother of the applicant's father. IN did not disclose the name of the applicant's father or the names of his parents. The applicant and IN were aware that they had to prove the family link and they were given an opportunity to do so.

57. At the time the respondent sent the letter and proforma to IN, she was not in possession of the birth certificate or identity document and therefore she was not in a position to notify IN of any discrepancies or lack of translation. These documents were sent to the respondent on 9 January 2019, five days before the two month time limit expired. The material before the respondent on 16 January 2019 was very limited. The applicant's birth certificate and father's identity document, even if translated, were insufficient to establish the claimed family link. The respondent's conclusion that the family link was not established was open to her on the evidence before her.

58. On the facts of this case, the respondent's failure to contact IN prior to the refusal of the TCR was not procedurally unfair and did not amount to a failure to take reasonable steps. The applicant and IN knew the 'gist' of the case against them and had not been denied the opportunity to meet the respondent's concerns. The respondent considered the information in the proforma before refusing the TCR on the basis the family link was not established. This case differs from KF in this respect.

59. The letter of 16 January 2019 notified the Greek authorities of the discrepancies and the lack of translation. It was accepted, in the factual and procedural summary to the applicant's skeleton argument, that the Greek authorities provided a brief summary to the applicant's Greek lawyer. The applicant submitted his Greek lawyer was not informed that translated copies of the documents were required. In my view, the letter of 16 January 2019 was sufficient to show that the respondent informed the applicant of the gist of the case against him and the need to provide translated documents. The respondent cannot be held responsible for the actions of the Greek authorities.

60. The family document establishing the family link was sent to the respondent on 7 February 2019, but the translation was not sent until 14 August 2019. I agree with Upper Tribunal Judge Blum in KF that the duty to take 'reasonable steps' did not extend to translating documents. The letter of 22 July 2019 maintaining the family link was not established was not irrational and there was no procedural unfairness in the decision making process.

61. However, the respondent failed to comply with her investigative duties under Dublin III. There were periods of unexplained delay from 7 February 2019 to 22 July 2019 and 14 August 2019 to 27 December 2019. The respondent could not be said to be taking all reasonable steps to investigate the TCR during this time. The respondent failed to liaise with the Greek authorities in relation to whether the documentation was sufficient or a DNA test was required. There was no explanation for why the family link was not accepted soon after receipt of the translated document on 14 August 2019. This unreasonable delay contributed to the respondent's failure to transfer the applicant to the UK within the Dublin III time limit.

62. In addition, the respondent failed to notify the LA when the TCR was received in November 2018 and did not do so until 22 January 2020. The failure to contact the LA was in breach of the respondent's policy and could have assisted in establishing the family link (BAA at [80]). The failure to contact the LA until January 2020 contributed to the delay in transferring the applicant to the UK. The family link was accepted on 27 December 2019, but the TCR was not accepted until 1 April 2020. By this time all transfers had been suspended due to the global pandemic.

63. Responsibility for the applicant's asylum claim passed to the UK on 14 January 2019 and remained with the UK since then. The respondent was entitled to continue to assess the family link after deemed acceptance had taken place. Once the family link was established, on the facts of this case, there were no best interests reasons for not effecting the transfer to the UK.

64. The respondent's failure to comply with her investigative duties contributed to the delay. It did not, and could not, give rise to a further breach of Dublin III because the time limits provided for the consequences of such a failure. The unlawful delay prevented the arrangements that should have been made in the transfer period from taking place within the time limit in Article 29. The respondent has rightly conceded there had been an unlawful delay of just over one year in breach of Dublin III.

Article 8

65. The existence of family life is a fact sensitive exercise and the best interests of the child are relevant to the extent to which respect should be given to family life or whether interference with family life is justified. I accept it is possible for Article 8 to be engaged where the parties have not met or do not live together. The potential for development of family life is relevant and is not confined to cases involving children and their natural parents. However, in Singh at [38] Dyson LJ acknowledged that, unless some degree of family life is already established, the claim to family life will fail and will not be saved by the fact that at some point in the future it could flower into a

full blown family life or that the applicant has a genuine wish to bring this about.

66. A BIA was conducted on 29 November 2018 and sent to the respondent on 3 December 2018. It states that the shelter [the Four Seasons Hotel, Thessaloniki] provides a hospitable and secure environment for the applicant and he feels safe there. The assessors considered that "the only thing that gives [the applicant] hope and a sense of happiness is his only relative, his uncle [IN], as he thinks that he is the only one who can understand him due to the common memories of his father and his family. He thinks of [IN] as they share a strong bond. In conclusion, it seems the only possible way to soothe the stressful symptoms of his (sic) and therefore to achieve a life of security and positive thinking for the future, is if he proceeds with the reunification with his uncle." The assessors concluded that if the applicant did not go "directly to a secure environment, his mental health and emotional health will be at high risk" and that he was "in severe need of being with a person that he trusts, loves and feels secure". The assessor emphasised the "need to act without further delay for his bests interests."

67. The applicant expressed his views in the BIA as follows: "My uncle is the only family I have. We talk very often, and I know that he has a good life in England with his family. I have never met his children, but I am looking forward to be a part of their life. I need his support and I know that, with him, I will live in a supportive and secure environment. I cannot imagine starting a new life away from him. Greece is a good country that welcomed me. Many people here helped me, but my greatest desire always was and remains to be able to reunify with my uncle."

68. In his witness statement dated 6 December 2019, the applicant stated that he thought he had met IN as a baby or as a small child, but since IN had left Burundi in 1995, he could not have met him. His parents talked about uncle IN so he thought he had met him. The applicant talked to IN over the telephone when he was 'a kid'. The applicant was able to contact IN when he got to Greece because he had his number on a piece of paper which his mother had given him. The applicant spoke to IN by telephone a few days after he arrived in Greece. He initially spoke to him on a daily basis and then on a weekly basis. The applicant also spoke with his aunt Mariam in Burundi by WhatsApp once a week at the weekends. The applicant stated, "This has been going on for so long now and I just want to start making a life in the UK with uncle [IN]."

69. In the BIA, IN expressed his views as follows: "I love my nephew and I care for him. I feel responsible for him because he is a member of my family and I knew him when he was a baby. I don't want him to suffer anymore, struggling for the basics while at the same time I can offer him a safe haven. I can offer him the necessary living conditions." In his statement, IN stated that he contacted his sister Mariam in Burundi

who sent the applicant's birth certificate, his father's identity document and the family composition document to him by WhatsApp and IN sent them to the applicant. IN has spoken to the applicant regularly over the telephone. They speak frequently about the applicant coming to live in IN's home. IN states, "as he is my blood and I have grown very close to him, I want nothing more than to look after him as my own son here in the UK."

70. In his interview with Dr Hillen on 16 December 2019, the applicant stated that the staff in the shelter in Thessaloniki were treating him well, but he still felt unhappy because there was nothing for him to do and he wanted to live with members of his family in England. The applicant reported to Dr Hillen that he was talking to them almost daily on the telephone and that he had developed a close relationship even though he had never met them in person. He was talking not only to his uncle, but to his uncle's wife and children. He felt comfortable talking to them even though his cousins only spoke English. The applicant said his uncle often gave helpful advice and encouragement and helped him to "put things into perspective and tolerate waiting." The applicant became upset and agitated when he was asked what he would do if he was not allowed to join IN.

71. Dr Hillen was of the opinion that the applicant suffered from PTSD and a moderate depressive episode. His symptoms were present before he entered Greece and there had been a marked worsening in the autumn of 2019. The applicant had no complaints about his treatment by professionals supporting him in Greece, however, the denial of his relationship with IN and the delay were further negative life events which undermined any remaining trust in the world as a safe place and the benevolence of people in any position of authority. The applicant had lost two friends at the shelter. One was involved in a fight and moved to another provision. The other friend left to be reunited with his family. This aggravated the applicant's sense of isolation and not mattering to anyone.

72. The applicant had started to form a relationship with IN in his own mind when he left Burundi and was making his dangerous and protracted journey to Europe. The applicant's hopes for finding someone who would be willing to take him in and see him as one of their own was fulfilled when the applicant established telephone contact with IN. The applicant had formed a close and supportive relationship with IN. Members of the same family can quickly form strong emotional bonds, even if they had not met before.

73. The delay and ongoing separation from IN were significant factors responsible for the maintaining and worsening of the applicant's PTSD. The worsening of the applicant's presentation included the emergence of suicidal ideation. The current moderate suicide risk would increase to severe if the applicant received further negative decisions from the Home Office. The damage caused fell into the moderate (sic) severe category of psychiatric damage.

74. Dr Hillen was of the opinion that joining IN in the UK would afford the applicant many development opportunities and allow him to make up for the lack of support which he experienced during his early adolescence. However, joining a new family at his age would be a complex and testing process which may require access to support and professional help. The risk of breakdown of this family placement could be significantly reduced if help was offered early on.

75. Ms Kilroy submitted the applicant and IN have established family life by virtue of their biological relationship, their regular contact, the care and affection that already exists and the future potential for family life. The applicant was an orphan and his only chance of family life was with IN. To suggest this did not amount to family life was inconsistent with Article 8 ECHR read in the light of the CRC.

76. I am not persuaded by Ms Kilroy's submission and conclude, on the particular facts of this case, the applicant has not established family life with IN sufficient to engage Article 8. My reasons are set out at below. In coming to this conclusion I have taken into account the following matters. The applicant's best interests are a primary consideration and it was in his best interests to join IN in the UK. Any unlawful action on the part of the respondent did not prevent the eventual transfer. The unlawful delay of just over one year resulted in the applicant having lost the opportunity to have been united with IN sooner.

77. The applicant was 17 years old at the date of default acceptance and 18 years old when he was transferred to the UK. IN is his uncle and they had never met. Their relationship started in June 2018, at the earliest, and they have had regular contact by telephone and WhatsApp since then. There was no pre-existing family life (Ahmadi and Singh). There was a genuine desire to develop family life and a potential for family life at some point in the future.

78. On the totality of the evidence, the relationship between the applicant and IN (described by Dr Hillen in his report and in the BIA) was insufficient to establish real, committed or effective support. The concern and affection associated with blood ties was not enough to establish family life under Article 8 ECHR or Article 7 CFR read in the light of the CRC.

79. In any event, there was no interference with the applicant's Article 8 rights. The delay in transferring the applicant to the UK did not interfere with the relationship he had developed with IN since June 2018. The applicant had regular contact with IN which continued until he was transferred to the UK.

80. There was no interference with the applicant's private life because the applicant had accommodation and support at the shelter, he was able to maintain contact with IN, he could function on a daily basis and he was transferred to the UK on 28 July 2020. Although the professionals

supporting the applicant were concerned for his mental well-being, the applicant did not self-harm. The delay did not result in the applicant being unable to achieve a basic quality of private life. The consequences of the delay were not sufficiently serious so as to engage Article 8.

81. The applicant's case can be distinguished from HN & MN. In that case, the applicants were not living in a safe, stable or healthy environment suitable for two vulnerable teenage boys and there was an ongoing delay in making the arrangements for transfer which was detrimental to the applicants' physical and moral integrity. In this case, the unlawful delay did not prevent transfer, the applicant had professional support in Greece and he considered himself to be well cared for by staff at the shelter. He had contact via telephone and WhatsApp with IN in the UK and his aunt Mariam in Burundi. On the facts of this case, there was no lack of respect for the applicant's family or private life (physical and moral integrity).

82. Further and alternatively, even if I accept that there has been an interference with the applicant's Article 8 rights (for the reasons given at [73] above), the unlawful delay of one year was proportionate in the circumstances. The quality and nature of the applicant's family life has remained the same notwithstanding the delay. The interference, if accepted, amounted to a delay in uniting the applicant with IN, his uncle whom he had never met. During the period of unlawful delay, the applicant was living in the Four Seasons Hotel in Thessaloniki where he was supported and well cared for. The applicant suffered significant trauma prior to his arrival in Greece and was suffering from PTSD. The delay resulted in the maintaining and worsening of his PTSD and the development of suicide ideation. Fortunately, the applicant did not harm himself. He had support from two psychologists in Greece and regular contact with IN.

83. Establishing the family link with IN was in the applicant's best interests. This was a legitimate aim. However, the process took longer than it should have done. The unlawful delay did not prevent the applicant from joining IN in the UK, but it did postpone unification. I accept the delay has impacted on the applicant's mental health. However, the applicant's relationship with IN, established while the applicant was in Greece, was able to continue until his transfer and IN has provided encouragement and support during this time. The applicant was living in a safe and stable environment with adequate support for his mental health until he was transferred to the UK. On the totality of the evidence, a fair balance had been struck. The delay in transferring the applicant to the UK did not amount to a disproportionate interference with his right to family and private life.

84. Given my findings above, I shall deal with the remaining points in Ms Kilroy's submissions very briefly. I am not persuaded by the argument that having conceded unlawful delay under Dublin III, the respondent's actions were not 'in accordance with the law' and the interference

could not be justified. This point was considered in SSHD v R(FwF) [2021] EWCA Civ 88 which was handed down on 28 January 2021. I invited written submissions from the parties and have considered those submissions in coming to the following conclusions.

85. I am not persuaded by Ms Kilroy's written submission that the judgment has no application in cases where the Secretary of State has not complied with Dublin III time limits. Laing LJ. came to reasoned conclusions relevant to the application of Dublin III and Article 8 ECHR which were of general application and not limited by compliance with the Dublin III overall time limit.

86. The principles which can be distilled from the judgment of Laing LJ. in FwF are:

(i) The obligations imposed by Dublin III are not a mirror image of the obligations imposed by Article 8 [137].
(ii) A breach of Dublin III was not *ipso facto* a breach of Article 8 [139].
(iii) The mere engagement of Article 8 was not enough to mean that any breach of the provisions of Dublin III, or any incidental unlawfulness, amounts to a breach of Article 8 [143].
(iv) If Article 8 applies, it can at most impose a positive obligation on the Secretary of State [143].
(v) The 'in accordance with the law' criterion was not applicable in positive obligation cases: MM (Lebanon) [143].
(vi) Absent Dublin III, it could not be argued that, in failing to admit an unaccompanied minor to the UK the Secretary of State was interfering with his/her Article 8 rights because he/she had no right to be in the UK [144].

87. The decisions of 16 January 2019 and 22 July 2019 refusing to accept the TCR were unlawful but had no legal effect. This 'incidental unlawfulness' did not amount to a breach of the respondent's positive obligation under Article 8 ECHR. Absent Dublin III, the applicant had no right to be in the UK. The unlawful delay of one year did not breach the respondent's positive duty to admit the applicant and a fair balance had been struck for the reasons given above.

88. In summary, the unlawful delay, in breach of Dublin III did not breach Article 8 ECHR or Article 7 CFR. I decline to make a declaration. There is no need to issue a declaration that the respondent has breached Dublin III because the respondent conceded the point.

Damages

89. Having concluded there was no breach of Article 8 ECHR, the claim for damages is only in respect of the respondent's failure to comply with the time limits in breach of Dublin III. I have considered the written submissions of the applicant dated 25 April 2021. It is the respondent's position that no question of damages arises because the claim failed.

90. Ms Kilroy submitted that *Francovich* damages are clearly appropriate because Articles 3.1, 6, 8, 18.1(a) and 22 Dublin III and Article 3(2) IR give rise to individual rights and those rights were breached. Moreover, the breach of EU law adversely affected the individual enforceable rights of family reunification of unaccompanied minors which are given the highest priority by Dublin III. The breach was 'sufficiently serious' and caused delay in reunification and access to asylum procedures, impacting on the applicant's mental health and well-being, for which he was entitled to compensation. Ms Kilroy submitted that exemplary damages were appropriate given the respondent's ongoing failure to accept responsibility for the applicant's claim.

91. Ms Kilroy submitted the three conditions in *Francovich* were satisfied:

(1) The rule of EU law that has been infringed was intended to confer rights on individuals;
(2) The breach of EU law was sufficiently serious; and
(3) There was a direct causal link between the breach and the damage sustained.

92. Ms Kilroy submitted the damages judgment in KF (18 September 2020) could be distinguished and was not binding. She submitted the respondent's unlawful decisions breached Article 8.2 Dublin III because the applicant was not transferred pursuant to Article 8.2 Dublin III but following a further TCR under Article 17.2 Dublin III and the breach of the longstop provisions was much longer in this case. Alternatively, KF was wrongly decided and should not be followed because an applicant could only claim damages if the breach was not corrected by legal proceedings. Further, the existence of prescribed consequences for failing to make a decision within the relevant time period did not mean the applicant could not claim damages because those prescribed consequences were not complied with in this case. The respondent issued decisions refusing to accept the TCR after deemed acceptance had taken place which prevented the transfer of the applicant. A remedy was only obtained through a legal challenge under Article 27 Dublin III which led to the respondent conceding these issues.

93. Further and/or alternatively, Ms Kilroy submitted the breach of investigatory duty contained in Articles 6, 8 and 22 Dublin III amounted to breaches of rights conferred on individuals. These duties were neither imprecise nor unclear and the Tribunal in KF was wrong to conclude otherwise, and to distinguish between substantive and procedural rights. The procedural safeguards that ensure the rights are effective were also intended to confer rights on individuals. Checks had to be conducted properly and within the timescales or the rights, arising from Article 8 Dublin III, would not be effective or compatible with the speedy allocation of claims or the protection of the child's best interests.

94. Condition 2 was satisfied because Dublin III was directly applicable and the provisions relevant to this case were mandatory. The applicant was entitled to have his reunification claim investigated with basic standards of procedural fairness and to have his asylum claim determined in the UK. The respondent's unlawful actions led to an unlawful delay of over 12 months amounting to a clear and admitted breach of Dublin III. The infringement was a sufficiently serious breach of EU law. The *Factotame* test was also met.

95. Condition 3 was met because the delay deprived the applicant of the swift determination of responsibility and access to asylum procedures to which he was entitled under Dublin III, delay in family reunification of over 12 months and associated instability which caused psychiatric harm and distress. The applicant was entitled to compensatory damages.

96. Ms Kilroy submitted that exemplary damages were also appropriate because of the respondent's sustained failure to give effect to the applicant's EU rights over an extended period. The respondent's unlawful conduct frustrated the objective of rapid allocation of asylum claims and the reunification of an unaccompanied minor. A punitive response was appropriate given the respondent's breach of her investigative duties in defiance of a series of binding judgments. The respondent failed to acknowledge responsibility for the applicant's asylum claim until after legal proceedings were brought and the applicant's transfer was further delayed by the respondent's unlawful actions in defence of the refusal of the TCR.

Conclusions on damages

97. There is no dispute that responsibility for the applicant's asylum claim passed to the UK on 14 January 2019 and remained with the UK since then. I found at [64] that the respondent's failure to comply with her investigative duties contributed to the delay, but did not give rise to a further breach of Dublin III. The respondent's unlawful delay of just over one year breached the long stop time limits in Articles 22 and 29 Dublin III.

98. I am not persuaded that Dublin III confers a right to actually be transferred within the long stop time limit and therefore condition 1 of *Francovich* is not satisfied. I agree with Judge Blum's conclusion at [46] of KF. My reasons are as follows.

99. I am not persuaded that the decision in KF was wrong and should not be followed. The applicant's claim for damages was not contingent upon the applicant issuing proceedings but upon whether the conditions in *Francovich* are satisfied. The submission that a remedy was only obtained through a legal challenge had no foundation in fact and did not demonstrate an error in the application of *Francovich*. The respondent's breach of her investigative duty did not give rise to a

further breach of Dublin III. In any event, those rights are too imprecise to be capable of conferring rights on individuals sufficient to give rise to a claim for *Francovich* damages. The points made by Ms Kilroy do not establish an error in the decision of KF.

100. I am not persuaded by Ms Kilroy's submission that KF can be distinguished. The applicant was transferred to the UK on 28 July 2020. On the facts of this case, it was accepted responsibility passed to the UK on 14 January 2019 and remained with the UK thereafter. The respondent did not argue that responsibility had reverted to Greece. In any event, it was irrelevant whether the transfer was made in response to a TCR under Article 8.2 or Article 17.2 Dublin III. There was no breach of Article 8.2 or 17.2 Dublin III in this case. The transfer was made in breach of the time limits as in KF. The length of the unlawful delay was not a basis upon which to distinguish the case.

101. The time limits in Dublin III reflect the aim of ensuring rapid processing of asylum applications and the consequences for the failure to comply with time limits is provided for within Dublin III. The failure to comply with those time limits was not intended to confer rights on individuals. Dublin III is concerned with the actions of member states. The applicant had a right under Article 8.2 to have his asylum claim determined in the UK. That right has been delayed but not denied.

102. Accordingly, I conclude that condition 1 of *Francovich* is not satisfied and the applicant has failed to establish he is entitled to damages. Exemplary damages are not appropriate in the circumstances.

Permission to appeal

103. The applicant applies for permission to appeal on five grounds. The Upper Tribunal erred in finding that:

a. The decision of 22 July 2019 was not procedurally flawed;
b. There was no family life sufficient to engage Article 8;
c. There was no interference/breach of positive obligation under Article 8 given the accepted unlawful delay and the damage to the applicant's mental health which significantly inhibited the applicant's relationship with his uncle and his ability to develop and enjoy family life;
d. The respondent's admitted unlawful actions were proportionate and struck a fair balance; and
e. The UT's findings were inconsistent with HN.

2. I refuse permission to appeal for the following reasons. The respondent's decision of 22 July 2019 was not procedurally flawed. The applicant was aware of the need to provide translations and failed to do so until 14 August 2019. In any event, this finding was not material because any procedural unfairness did not give rise to a separate breach of Article 8 ECHR. The unlawful delay was conceded.

3. There was no arguable error of law my assessment of Article 8. On the facts, there was no family life, but in any event, there was no interference with the Applicant's family and private life because the status quo was maintained notwithstanding the unlawful delay. Given the nature and quality of the applicant's family and private life, if accepted, and taking into account all relevant circumstances, the delay was proportionate. HN could be distinguished on its facts and was not binding.

Costs

4. The applicant has succeeded in establishing unlawful delay. The respondent conceded this issue on the day of the hearing. Thereafter the applicant's claims were dismissed. The respondent's breach of her investigative duties contributed to the delay and did not give rise to a separate breach of Dublin III. Accordingly, the applicant is entitled to his reasonable costs up to and including the day of hearing on 9 November 2020. The cost of the hearing having already been incurred by the time of the concession. The applicant to pay the respondent's reasonable costs from 10 November 2020 to date.

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

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

J Frances

Signed: _____

Upper Tribunal Judge Frances

ANNEX A

Dublin III

Article 2 (h) – A relative for the purposes of Article 8.2 includes an uncle

Article 8 - Minors

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. Where the applicant is a married minor whose spouse is not legally present on the territory of the Member States, the Member State responsible shall be the Member State where the father, mother or other adult responsible for the minor, whether by law or by the practice of that Member State, or sibling is legally present.
2. Where the applicant is an unaccompanied minor who has a relative who is legally present in another Member State and where it is established, based on an individual examination, that the relative can take care of him or her, that Member State shall unite the minor with his or her relative and shall be the Member State responsible, provided that it is in the best interests of the minor.

Article 21 - Submitting a take-charge request

1. Where a Member State with which an application for international protection has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible and in any event within three months of the date on which the application was lodged within the meaning of Article 20(2), request that other Member State to take charge of the Applicant

   Notwithstanding the first sub-paragraph, in the case of a Eurodac hit with data recorded pursuant to Article 14 of Regulation (EU) No 603/2013, the request shall be sent within two months of receiving that hit pursuant to Article 15(2) of that Regulation.

   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.

2. The requesting Member State may ask for an urgent reply in cases where the application for international protection was lodged after leave to enter or remain was refused, after an arrest for an unlawful stay or after the service or execution of a removal order. The request shall state the reasons warranting an urgent reply and the period within which a reply is expected. That period shall be at least one week.

Article 22 - Replying to a take charge request

1. The requested Member State shall make the necessary checks, and shall give a decision on the request to take charge of an applicant within two months of receipt of the request.

   …

4. The requirement of proof should not exceed what is necessary for the proper application of this Regulation.

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

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

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

Article 29 - Modalities and time limits

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

2. Where the transfer does not take place within the six months' time limit, the Member State responsible shall be relieved of its obligations to take charge or to take back the person concerned, and responsibility shall then be transferred to the requesting Member State. This time limit may be extended up to a maximum of one year if the transfer could not be carried out due to

imprisonment of the person concerned or up to a maximum of eighteen months if the person concerned absconds.

The relevant provisions of the Implementing Regulation 1560/2003 (as amended by Regulation 118/2014)

Article 8(1) – Co-operation on transfers

It is the obligation of the Member State responsible to allow the asylum seeker's transfer to take place and to ensure that no obstacles are put in his way.

Article 10 – Transfer following default acceptance

(1) Where… the requested Member State is deemed to have accepted a request to take charge … the requesting Member State shall initiate consultations needed to organise transfer.

(2) If asked to do so by the Member State, the Member State must confirm in writing, without delay, that it acknowledges its responsibility as a result of its failure to reply within the time limit. The Member State responsible shall take the necessary steps to determine the asylum seeker's place of arrival as quickly as possible and, where applicable, agree with the requesting Member State the time of arrival and the practical details of the handover to the competent authorities.

Article 12 – Unaccompanied minors

(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 22(1) and (6) and 29(2) of [Dublin III] shall not necessarily be an obstacle to continuing the procedure for determining the Member State responsible for carrying out a transfer.

(6) The requested Member State shall endeavour to reply within four weeks from the receipt of the request [to exchange information]. 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 shall be carried out ensuring full compliance with the deadlines in Article 21(1), 22(1) etc of Dublin III.

Home Office Policy on Dublin III (November 2017)

Unaccompanied children: notifying local authorities and or social services

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

You must engage the local authorities’ children’s social services throughout the process, seeking their advice in every case.