JR-2020-LON-001176

Case No: JR/1696/2020

In the Upper Tribunal
(Immigration and Asylum Chamber)

Field House
Breams Buildings
London, EC4A 1WR

3 December 2021

Before
UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

REGINA

On the application of
MR
(ANONYMITY ORDER MADE)

Applicant

-and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Michelle Knorr (instructed by Bhatt Murphy Solicitors) for the Applicant
Gwion Lewis QC (instructed by the Government Legal Department) for the Respondent

Hearing dates: 9 and 10 November 2020 and 19 January 2021
Further Written Submissions: (Applicant) 8 February 2021, 15 March 2021, 21 May 2021 and 15 October 2021; (Respondent) 8 February 2021, 15 March 2021, 27 May 2021 and 14 October 2021

JUDGMENT

The Tribunal confirms the anonymity order made by UTJ Finch in the following terms:

> **Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the applicant. This order applies to, amongst others, the applicant and the respondent. Any failure to comply with this order could give rise to contempt of court proceedings.**

By the same Order UTJ Finch directed that the applicant's uncle, "HR", was to conduct proceedings on the applicant's behalf as a Litigation Friend. No reasons were provided in respect of the appointment. As the applicant is not a protected party, the appointment of HR as litigation friend ceased on 1 January 2021, the applicant's 18th birthday: CPR 21.9(1).

Judge O'Callaghan:

This judgment is in six main parts, as follows:

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I. Overview

1. An anonymity order was made by UTJ Finch on 13 August 2020 when granting the applicant permission to apply for judicial review. Neither party requested that the order be set aside. I note that the applicant was a minor at the date of the order. He is now an adult. I observe that he seeks international protection. Having carefully considered the circumstances arising in this matter I conclude that the applicant's rights protected under article 8 of the European Convention on Human Rights ('ECHR') outweigh the public interest in open justice, as protected by article 10 ECHR. I am satisfied that it is presently in the interests of justice that the applicant is not publicly recognised as someone seeking international protection: *Cokaj (anonymity orders, jurisdiction and ambit)* [2021] UKUT 202, at [17]-[28]. I confirm the anonymity order above

2. At the time the claim was filed with the Tribunal the applicant, an Afghan national, was an unaccompanied child seeking asylum ('UASC') residing in a shelter in Athens, Greece.

3. The applicant has a paternal uncle residing in this country, HR, who is a British national.

4. On 16 July 2019 the applicant registered an asylum claim with the Greek authorities. During examination of his claim, he stated that he wished to be reunited with HR. On 24 September 2019 the Greek authorities made a take charge request ('TCR') to the United Kingdom under EU Regulation 604/2013, the Dublin III Regulation ('the Regulation'). The United Kingdom authorities rejected the TCR by a decision dated 29 October 2019, on the ground that the required familial link had not been established. The Greek authorities requested on three subsequent occasions that the United Kingdom re-examine its decision. The requests were rejected.

5. By means of a claim filed with the Tribunal on 7 July 2020 the applicant challenged on public law grounds the TCR decision of 29 October 2019 and the respondent's rejection of the first and second re-examination requests by decisions dated 24 February 2020 and 5 May 2020. Noting that the applicant's challenges to the first two decisions fell outside of the 3-month time period established by rule 28(2) of the Tribunal Procedure (Upper Tribunal) Rules 2008 UTJ Finch granted the applicant an extension of time in which to bring both challenges.

6. When granting permission to apply for judicial review UTJ Finch observed, *inter alia*, that in light of the documentary evidence available to the respondent from 18 November 2019, which included a copy of the applicant's Tazkira – national identity card - as well as evidence from the applicant and his uncle as to their personal contact, it was arguable that the decisions reached by the respondent were irrational and unlawful.

7. The substantive hearing was conducted as a Skype for Business video conference hearing held during the Covid-19 pandemic. Such hearing eliminated any risk to any person, whether associated with the parties or a member of the press or public, from having to travel to a hearing room or be present in one. I was present in the hearing room at Field House. The hearing room and the building were open to the public. The hearing and its start time were listed in the daily list. The representatives accessed the hearing remotely. I was addressed by counsel in the same manner as if we were together in the hearing room. I am satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.

8. The hearing was expected to be conducted over the course of the first day and the second morning. Counsel did not demur from this timeframe when listing was discussed at an earlier hearing. I am satisfied that this was a reasonable time estimate considering the issues raised in this matter. Unfortunately, the hearing was concluded at the end of the third day. A consequence of the failure to engage with adequate time management was the applicant losing the benefit he had sought and secured in these proceedings being expedited, with it not being possible to resume on the third day for a period of two months.

II. Legislative Framework

i. Dublin III Regulation - Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013

9. The Regulation is a component of the Common European Asylum System, which encompasses several measures that aim swiftly to determine the Member State ('State') responsible for examining an individual's application for asylum. Where a third country national has a connection with more than one State it is necessary to determine which State is responsible for examining their claim for asylum. The criteria for determining the State responsible are set out in a strict hierarchy in the Regulation. If the State where an asylum application is lodged considers, based on those criteria, that another State is responsible for determining the claim, the first State must ask the second State to take back (or to take charge of) the applicant.

10. In very broad terms the Regulation provides that UASCs should be reunited with any family members or relatives legally present in another State, and that the application for international protection should be made in the State where the family members or relatives reside.

11. Recital (13) of the Regulation states that in accordance with the 1989 United Nations Convention on the Rights of the Child and the Charter of Fundamental Rights of the European Union ('the CFR'), the best interests of the child should be a primary consideration. In assessing the best interests of the child, States should 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 their age and maturity, including their background.

12. Recital (14) declares that, in accordance with the ECHR and the CFR, "respect for family life should be a primary consideration for Member States when applying this Regulation."

13. Recital (16) states that when an applicant is an unaccompanied minor "the presence of a family member or relative on the territory of another Member State who can take care of him or her should become a binding responsibility criterion."

14. Recital (32) details that with respect to the treatment of persons falling within the scope of the Regulation, "Member States are bound by their obligations under instruments of international law, including the relevant case-law of the European Court of Human Rights."

15. Article 2 of the Regulation is headed 'Definitions'.

16. Article 2(g) lays down the basic definition of "family member" applicable throughout Articles 8 to 11. It is a restrictive definition, embracing only the relationship between members of the nuclear family, including:

> 'iii. when the applicant is an unmarried minor, the father, mother or another adult responsible for the applicant, whether by law or by the practice of the member state where the adult is present'

17. Article 2(h) defines "relative" as meaning the applicant's "adult aunt or uncle or grandparent who is present in the territory of the Member State, regardless of whether the applicant was born in or out of wedlock or legally adopted." Article 2(h) is not subject to the limitation in Article 2(g) that family ties existed in the country of origin.

18. Chapter II of the Regulation sets out "General Principles and Safeguards" (at Articles 3 to 6).

19. Article 3 states, so far as relevant:

> '1. Member States shall examine any 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.'

20. Article 6 is headed "Guarantees for minors". By Article 6(1), "The best interests of the children shall be a primary consideration for Member States with respect to all procedures provided for by this Regulation." Article 6(3) makes detailed provisions about the factors States must consider when assessing the best interests of children. They include "safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking."

21. Article 6(4) establishes for the purposes of applying Article 8, detailed below, that the State where an unaccompanied minor lodges an application for international protection "shall, as soon as possible, take the 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."

22. Chapter III of the Regulation sets out the hierarchy of criteria (at Articles 7 to 15).

23. Article 8 makes provision for unaccompanied minors. The responsibility for determining their applications for asylum falls on the State where, *inter alia,* the unaccompanied minor 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" provided that this is "in the best interests of the minor": Article 8(2). As confirmed by Article 2(h) a "relative" for this purpose includes an uncle.

24. Chapter VI of the Regulation sets out the procedures for taking charge of asylum applications lodged in another State (at Articles 20 to 33).

25. Article 21 governs the making of a TCR and provides, materially, as follows:

> '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.'

26. Article 22 governs the reply to a TCR, and provides, materially, that:

> '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.
>
> [...]

> 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.'

27. Once the receiving state has accepted the TCR, there is a maximum period of six months set for the transfer to be effected, as established by 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).'

28. Article 29(2) directs that if the transfer is not effected within six months of the acceptance, then (subject to certain exceptions) responsibility for the asylum claim is transferred back to the requesting State:

> '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.'

ii. The Implementing Regulation - Regulation (EC) No 1560/2003 of 2 September 2003, amended by Commission Implementing Regulation (EU) No. 118/2014 of 30 January 2014, laying down detailed rules for the application of Council Regulation (EC) No 343/2003

29. The Implementing Regulation makes further provision generally for how the Dublin III Regulation framework is to work in practice.

30. Article 3 of the Implementing Regulation requires the requested State to "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."

31. Article 5(1) of the Implementing Regulation provides for the refusal of a TCR ("negative reply"). The emphasis is on verification of "the evidence submitted" by the requesting State:

> '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 refusal.'

32. Article 5(2) provides for a process of re-examination at the inter-State level:

> '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. […]'

33. If the requesting State considers that it has further evidence that it wants the requested State to consider, it has three weeks to provide that evidence and ask the

requested State to examine it. The requested State is expected to respond within two weeks.

iii. European Convention on Human Rights

34. Article 8 of the ECHR confirms in respect of private and family life rights:

> '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.'

iv. Charter of Fundamental Rights of the European Union

35. The Explanations to the Charter (2007/C 303/02) confirm that the right in article 7 CFR has the same meaning and scope as the right in article 8 ECHR. The right to a private and family life was recognised as a general principle of EU law prior to the coming into force of the Charter: *National Panasonic (UK) Ltd v. Commission of the European Communities* (Case C136/79) [1981] 2 All E.R. 1.

III. <u>The Facts</u>

36. The applicant is a national of Afghanistan and is presently aged 18. His uncle, HR, resides in the United Kingdom having left Afghanistan before the applicant's birth. Following his arrival in the United Kingdom HR visited Afghanistan and saw the applicant in 2009, 2011, 2013, 2015 and 2017.

37. The applicant states that his parents were killed in Afghanistan in 2018. He subsequently left that country and travelled to the European Union as a UASC via Iran and Turkey. In June 2019 he was fingerprinted by the Greek authorities and in July 2019 an asylum claim was subsequently registered in Greece.

38. On 24 September 2019 the Greek authorities made a TCR under Article 8(2) of the Regulation for the United Kingdom authorities to bring together the applicant and HR on humanitarian grounds. On 8 October 2019 the respondent's casework team, the European Intake Unit, sent an undertakings letter to HR and in addition wrote to HR's local authority to notify it of the TCR. On 15 October 2019 HR wrote to the respondent confirming that he was in contact with the applicant and wished to be reunited with him.

39. On 29 October 2019 the respondent wrote to the Greek authorities refusing the TCR on the ground that there was no evidence, either submitted or available from the respondent's records, substantiating the claimed family relationship between the applicant and HR.

40. The Greek authorities requested on 18 November 2019 that the United Kingdom authorities re-examine the decision to refuse the TCR. Additional documents accompanied the request, including a copy of the applicant's Tazkira with translation and a witness statement from HR.

41. On 24 February 2020, the respondent maintained the decision to refuse the TCR observing, *inter alia,* that HR did not name the applicant as his "sibling" at his asylum screening interview conducted in 2002.

42. On 13 March 2020 the Greek authorities made a second re-examination request. By a decision dated 5 May 2020 the respondent maintained the decision to refuse the

TCR observing that though the United Kingdom endeavoured in the spirit of sincere co-operation to respond within the two-week deadline outlined in article 5(2) of the Implementing Regulation the expiry of the two-week deadline in this matter definitively brought to an end the additional re-examination period.

43. The Greek authorities sent a third re-examination request to the United Kingdom authorities on 25 May 2020. The respondent responded on 4 June 2020 confirming the United Kingdom's position that Greece was the State responsible for the applicant's international protection claim but noted that if a further submission was accompanied by DNA evidence it would be considered. This decision is not subject to challenge in these proceedings.

44. On 20 August 2020, after the filing of this claim, the applicant's legal representatives wrote to the respondent confirming that the results of a DNA test dated 12 August 2020 "extremely strongly supports" the familial relationship between the applicant and HR as being that of nephew and uncle.

45. The respondent wrote to the Greek authorities on 15 September 2020 confirming a conclusion had been reached that it would be prudent to make a fresh decision in respect of the applicant in light of the DNA evidence provided. It was observed that if the Greek authorities had not yet proceeded to determine the asylum claim itself, the best way to progress the case was for a new TCR to be sent to the United Kingdom authorities.

46. The Greek authorities initially declined to issue a new TCR but ultimately sent a new request on 22 October 2020. A decision on the application was outstanding on the first day of the substantive hearing of this matter.

47. HR's local authority confirmed no safeguarding concerns by an assessment dated 25 November 2020.

48. On behalf of the United Kingdom the respondent accepted the TCR by a decision dated 27 November 2020. This decision pre-dates the third day of the hearing.

49. The applicant arrived in the United Kingdom on 10 May 2021, joining HR and his family.

IV. Remedies Sought

50. As is identifiable from the facts stated above, events proceeded apace in this matter not only following the filing of the applicant's claim but up to and after the close of the parties' cases on the third day of the hearing. It is therefore appropriate to detail remedial orders agreed by the parties and certain orders sought that have fallen away so as to clearly identify the outstanding orders sought.

51. The closely typed grounds of claim filed in this matter run to thirty-two pages. The concern of the Court of Appeal is noted as to the unwarranted development of a culture of excessive prolixity and complexity in the grounds for judicial review. They make the task of the courts and the Tribunal more difficult rather than easier: *R (Dolan) v. Secretary of State for Health and Social Care* [2020] EWCA Civ 1605, [2021] 1 W.L.R. 2326, at [119]-[120]. The Tribunal can properly expect "a clear and concise statement of the grounds for bringing the claim": Administrative Court Judicial Review Guide 2021, at para 7.3.1.2 (see also para. 6.3.4.1 of the 2019 Guidance in circulation at the date this claim was filed in July 2020). This is particularly so when an applicant requests the Tribunal to utilise its valuable resources at the expense of others by expediting the consideration of their claim. It is unfortunate that such expectations were not met in this matter.

52. The grounds identify various remedies sought on behalf of the applicant: four declarations, three quashing orders, alternative mandatory orders, damages and "further or other relief deemed appropriate by the Tribunal, which may include transfer to the High Court so that the applicant can plead misfeasance in public office."

53. Consequent to the filing of a draft order agreed by the parties, the Tribunal quashed the respondent's decisions in respect of the TCR dated 29 October 2019, and the re-examination decisions dated 24 February 2020 and 5 May 2020 by an Order dated 19 October 2020, the respondent having accepted they were unlawful for the following reasons:

    i) There was a failure to comply with the duty of reasonable investigation under the Regulation in the first decision dated 29 October 2019. The decision stated that the respondent's records concerning HR did not enable his status as the applicant's uncle to be corroborated. This was incorrect as HR's asylum screening interview (as later relied upon in the second decision dated 24 February 2020) did corroborate the family link: HR had given the name of his brother, which matched the name of the applicant's father as stated in the original TCR.

    ii) It was accepted there was a material error of fact in the second decision dated 24 February 2020. The decision wrongly described HR as the applicant's claimed "brother" and then rejected the TCR on the basis that HR had not identified the applicant as his "brother" during his asylum screening interview. The TCR was made on the basis that HR was the applicant's uncle.

iii) It was accepted that the decision of 5 May 2020 was an opportunity to correct the errors in the previous two decisions and that this opportunity was not taken.

54. In addition, the respondent accepted that the third re-examination decision of 2 June 2020 was unlawful.

55. By the same order the Tribunal declared that the Respondent had failed to comply with her duty of reasonable investigation under the Regulation in processing the TCR dated 24 September 2019.

56. The applicant's skeleton argument runs to eighty-seven paragraphs over twenty-seven pages. There is a significant, and unhelpful, overlap with detail provided in the grounds of claim, particularly as to the identified legal framework and the extensive reciting of authority, both domestic and originating from the European Courts in Luxembourg and Strasbourg. Advocates are to be mindful as to the expertise of the Upper Tribunal. The excessive citing of authority both in writing and at oral hearing is deprecated.

57. By the third day of the substantive hearing in January 2021 the applicant sought the following orders:

i) A declaration that the United Kingdom is responsible for the applicant's asylum claim under the Regulation.

ii) A declaration that the respondent's refusal to accept the TCR breached the applicant's fundamental rights under the Regulation, article 7 CFR and article 8 ECHR.

iii) A mandatory order as to expedited transfer of the applicant to the United Kingdom.

58. The applicant continues to seek damages.

59. The respondent accepted responsibility for the applicant's asylum claim by her decision dated 27 November 2020 and the applicant entered this country on 10 May 2021. The applicant has been successful in respect of establishing that the United Kingdom is the State responsible for his asylum claim and accordingly he should be transferred to this country, contentions that underpin the remedies sought at para. 57(i) and (iii) above. Accordingly, I am satisfied that the granting of the declaration and mandatory order sought would be a pointless exercise of discretion as there would be no practical purpose served by the grant of remedy. The application for the orders identified at para. 55(i) and (iii) above is refused.

60. The sole remaining issue before the Tribunal is the declaration identified at para. 57(ii) above.

V. Conclusions

61. The scope and substance of protected rights under article 8 ECHR and article 7 CFR within the Regulation regime has been considered on several occasions in recent months by the Upper Tribunal and the Court of Appeal: *R (FWF and Another) v. Secretary of State for the Home Department* [2021] EWCA Civ 88, [2021] 1 WLR 3781;[1] *R (BAA) v. Secretary of State for the Home Department* [2021] EWCA Civ 1428; *R (SM) v. Secretary of State for the Home Department* (JR/1592/2020) (5 March 2021);[2] and *R (AI)*

[1] The Supreme Court refused the claimant (FWF) permission to appeal on 6 August 2021: [2021] 1 WLR 4859

[2] At the request of the appellant (SM) the Court of Appeal dismissed the Appellant's Notice by an Order dated 24 August 2021.

v. Secretary of State for the Home Department (JR/6069/2019) (10 May 2021). The parties were permitted to file written submissions addressing these judgments, which post-date oral argument in this matter.

62. In *FWF* the Court of Appeal held that the obligations imposed by the Regulation are not a mirror image of the obligations imposed by article 8 ECHR. Elisabeth Laing LJ stated, at para.137:

> '137. … The references in the recitals to article 8 and to article 7 CFR show, not that Dublin III mirrors article 8, but, rather, that in framing Dublin III, the legislator has had the importance of family links well in mind, no doubt because it was thought that if an application for international protection succeeds, it will help the successful applicant to settle in his new country if any member of his wider family is lawfully present there. Recital (32) recognises the significance of the Strasbourg caselaw, but does not oblige member states to go further than that caselaw indicates (for example, no member state other than the United Kingdom is bound by the Supreme Court's decision in *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 AC 621 to overrule *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471). For those reasons, I consider that the provisions of Dublin III do not individually mirror the obligations imposed by article 8.'

63. The Court of Appeal recently returned to the scope of article 8 ECHR in respect of the Regulation in *BAA*, at para. 93, observing the critical principle to be that a UASC cannot rely on article 8 ECHR to supplement or increase the rights which the Regulation gives them as against a State receiving a TCR unless their circumstances are very exceptional. If it were otherwise, then registering a claim under the Regulation might arbitrarily add weight to such a claim.

Dublin III process completed

64. The respondent accepts that the Regulation's process had been completed by the time the applicant issued his claim for judicial review on 7 July 2020. By this date,

the respondent had rejected the TCR within the requisite two-month period and had proceeded to reject subsequent re-examination requests. No issue of default acceptance arises.

Applicant entitled to assert article 8 rights in these proceedings

65. The respondent concedes that the applicant is entitled to assert his article 8(1) ECHR rights in these proceedings following her concession, detailed at para. 53 above, that the decisions challenged in this claim contained public law errors that caused the ostensible end of the Regulation's process: *BAA*, at para. 95.

Article 8 – Interference with family life rights?

66. Under article 8(1) ECHR everyone has the right to respect for their private and family life. Public authorities may only interfere with that right in the circumstances laid down in article 8(2). As to family life, the European Court of Human Rights confirmed in *Nazarenko v. Russia* (2019) 69 EHRR 6, at para. 56:

> '56. The court reiterates that the notion of 'family life' under article 8 of the Convention is not confined to marriage-based relationships and may encompass other de facto 'family' ties. The existence or non-existence of 'family life' for the purposes of article 8 is essentially a question of fact depending upon the real existence in practice of close personal ties [referring to *K v. Finland* (2001) 36 EHRR 18, at [150]] ...'

67. Contrary to the submission advanced on behalf of the applicant, it is not the case that where the Regulation criteria is met in respect of family relationship a UASC enjoys family life with a relative for the purpose of article 8(1) ECHR (and article 7 CFR). This conflates the criteria for "family life" established by article 8(1) ECHR (and article 7 CFR) with the wider aim of the Regulation to permit such UASC, in identified circumstances, to secure the support of wider family members. The

provision of familial support seeks, *inter alia*, to prevent a UASC being reliant upon national care systems and to provide stability as they integrate into life in a new country.

68. The notion of family life is an autonomous concept, independent of the legal position of an applicant vis-à-vis national law: *Marckx v. Belgium* (1979-80) 2 E.H.R.R. 330, at para. 31.

69. The protection of family life presupposes the existence of "family". A child born of a marital relationship is *ipso jure* part of that "family" unit from the moment of their birth: *Berrehab v. the Netherlands* (1989) 11 E.H.R.R. 322, at para. 21. A single woman and her child are also a family unit from the moment of birth: *Marckx v. Belgium*, at para. 31. Such tie can only be broken in exceptional circumstances: *Ahmut v. The Netherlands* (1997) 24 EHRR 62, at para. 60.

70. The relationship arising in this matter as between the applicant and HR is that of nephew and paternal uncle. This is not a relationship that established, *ipso jure*, family life upon the applicant's birth.

71. In *Marckx* the European Court of Human Rights confirmed at para. 45 that family life, within the meaning of article 8(1) ECHR, includes at least the ties between near relatives, for instance, those between grandparents and grandchildren, since such relatives may play a considerable part in family life. Therefore, though the notion of "family" concerns marriage-based relationships, it also concerns other *de facto* family ties where the parties are living together or where other factors demonstrate that the relationship has sufficient constancy: *Kroon v The Netherlands* (1994) 19 EHRR 263, at para. 30.

72. Family life is a question of fact depending upon the real existence in practice of close personal ties: *Paradiso and Campanelli v. Italy* (2017) 65 E.H.R.R. 2, at para 140. The core importance is the factual substance of the relationship, with a focus on the protection of an existing relationship with a *de facto* family member.

73. Family life may exist between an uncle and a nephew: *Boyle v United Kingdom* (1995) 19 E.H.R.R. 179. In that application, the uncle lived very close to the home of his sister and nephew, and formed a close bond with the child, such as to be identified as a "father figure". The child was placed in care consequent to serious allegations made against his mother. The uncle made repeated requests for access to his nephew throughout the child's placement in care but was allowed only one supervised visit. He was not invited to attend any of the meetings or case conferences at which access to the child was discussed. In the then pre-Children Act 1989 landscape the uncle complained that the refusal of the local authority to allow him access to his nephew whilst the child was in care infringed his right to respect for family life under article 8(1) ECHR. The Commission confirmed at paras 44 and 45 of its opinion, as recorded in the Court's judgment at para. 15:

> '44. The Commission recalls in this case that the applicant had frequent contact with C from the time of C's birth and spent considerable time with him. While it appears the two families did not share the same household, they lived in close proximity and C often made "weekend stays" at the applicant's home. The Commission further notes that the guardian *ad litem* in the care proceedings described the applicant as a "good father figure" to C.
>
> 45. In these circumstances, and having regard to the absence of C's father, the Commission finds there was a significant bond between the applicant and C, and that this relationship fell within the scope of the concept of "family life".'

74. In this matter the applicant relied upon several judgments, both domestic and from the European Court of Human Rights, in respect of the establishment of family life.

As article 8(1) ECHR is a fact sensitive assessment, the assessment of facts in judicial decisions may assist but are not dispositive.

75. Whilst cohabitation is not a prerequisite for the establishment and maintenance of family ties under article 8(1) ECHR, it is an important factor to be considered when assessing the existence or otherwise of such ties. As to whether the relationship enjoyed sufficient constancy during the applicant's residence in Afghanistan, weight can properly be given to the frequency, or otherwise, of contact between uncle and nephew. HR left Afghanistan before the applicant's birth, and prior to the applicant's arrival in this country in May 2021 had only seen him whilst visiting Afghanistan every two years from when the applicant was aged six until he was fourteen or fifteen. Such visits lasted between five to six weeks, with HR staying with his in-laws and not at the applicant's family home. The visits to the applicant and his family were therefore limited and of unspecified length and duration. At the time, HR had limited interest in the applicant or his development beyond him being his brother's son. The applicant's primary contact with HR's family during these visits was playing with HR's children, his cousins, though their communication was limited by the cousins having limited command of Dari. Such facts do not come close to establishing a significant bond between the applicant and HR that would establish a family life for the purpose of article 8(1) ECHR.

76. I turn to consider whether family life was established between uncle and nephew after the applicant left Afghanistan. The applicant contended that at the date the Greek authorities made the TCR, family life did exist with his uncle, permitting him to rely upon the protection of article 8 ECHR (and article 7 CFR).

77. The applicant relied upon a letter from a lawyer at HAIS Legal Office, Greece, dated 13 November 2019 confirming telephone communication with HR in respect of the applicant.

78. Documentary evidence corroborating money transfers from HR to the applicant were filed with the Tribunal. The transfers were dated 24 July 2019 (£100), 18 October 2019 (£140.47), 9 January 2020 (Euros 140) and 20 May 2020 (£193.97). The applicant was present in Greece on all four occasions.

79. HR detailed in his witness statement dated 2 July 2020 that he transferred money to the applicant on three occasions whilst the latter was in Turkey. The sums amounted to $1270.

80. In their witness statements, HR and his wife, SR, confirmed that HR kept in contact with the applicant on his journey from Afghanistan to Greece by Facebook Messenger and telephone calls. HR stated that he continued to speak to the applicant at least two to three times a week, sometimes several times a day. In addition, documents were filed with the Tribunal confirming phone calls and messages between HR and the applicant. They cover a period of approximately twelve weeks from March to May 2020. Four missed calls from HR to the applicant in the space of three minutes are recorded on 18 March 2020. A call from HR lasting almost four minutes is then recorded as taking place five minutes after the last of the missed calls. A further missed call from HR is detailed as occurring on 21 March 2020. Six audio calls are then noted as having been made and received by the applicant, individually lasting between seven seconds and eight minutes, though no detail is provided as to the other party/parties to the calls. A missed call from HR is recorded on 5 April 2020. The applicant requested money by text message on 6 April 2020 as he wished to repair his phone handset. The next identified contact is on 19 May 2020 when several short text messages are exchanged. The following day further short text messages are sent, with the applicant asking for some money so that he can go into an unidentified city, presumably Athens. Later text communication confirms that HR attended a bank and sent money to the applicant.

This corresponds with the transfer addressed at para 78 above in the sum of £193.97. The applicant confirmed receipt of the money in writing on 21 May 2020. The applicant and HR exchange Eid Mubarak greetings on 25 May 2020.

81. The documentary evidence relating to phone calls and messages is limited in nature and does not establish on its own a significant bond between uncle and nephew. The messages are brief, with gaps of several days and weeks between several of them. Few phone calls are recorded as having been made. I observe the evidence of HR and SR as to regular contact by HR with the applicant through Facebook Messenger, but no evidence of such contact has been placed before the Tribunal.

82. HR did not visit the applicant in either Turkey or Greece. Consequently, there was no face-to-face meeting from the time the applicant left Afghanistan and his arrival in this country in May 2021.

83. I am satisfied that HR sent the applicant $1270 whilst he was in Turkey. I conclude that this money was sent primarily to enable the applicant to travel onto Greece, a country situated in the European Union. I further accept that HR sent £434.44 and Euros 140 to the applicant in Greece between July 2019 and May 2020, a period of 10 months. These are matters that I place into my factual assessment as to the substance of the relationship. As to the weight properly to be applied to such events, I observe that the provision of some money on occasion to a nephew does not determinatively establish family life for the purposes of article 8 ECHR.

84. Considering the limited evidence advanced on behalf of the applicant, I am satisfied that whilst he was present in Turkey and Greece there was no existing close personal ties with HR. The provision of money on occasions by HR was genuine, and I accept that there was some contact between uncle and nephew by modern means of communication. However, the personal circumstances existing were insufficient to

establish a family life between them, there being no significant bond between uncle and nephew and their relationship lacking the required enduring, or constant, substance.

85. The applicant placed reliance upon *Pawandeep Singh v. Entry Clearance Officer, New Delhi* [2004] EWCA Civ 1075, [2005] QB 608, particularly Dyson LJ's consideration of the judgment in *Pini v. Romania* (App. Nos. 78028/01 and 78030/01) (2005) 40 E.H.R.R. 13, in seeking to establish that when care by a child's parents is unavailable, the offer of future care and support by a relative confirmed the existence of a family life in respect of article 8(1) ECHR (and article 7 CFR). Ms. Knorr submitted in respect of the existence of family life that the applicant was an orphan, living in a foreign country and that HR was his only surviving family member able to care for him. Ms. Knorr further submitted that in view of the applicant's highly traumatic recent history, vulnerability and poor mental health, he was in real need of the love, support and care offered by HR.

86. I observe UTJ Stephen Smith's consideration of a similar submission advanced in *SM*, in which Ms. Knorr was junior counsel for the applicant, at [146]-[147]:

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

> 147. The facts of *Pawandeep Singh* were unique; the entry clearance applicant was a child who had been adopted in India, according to the laws and practices of the Sikh faith, by a British couple residing in this country. The adoption was recognised under the law of India. The arrangement was unique because the child remained in the home of his birth parents in India, along with his siblings, but was brought up to regard his adoptive parents as his real parents, and to address his birth parents as 'aunt' and 'uncle'. The adoptive parents visited at least twice annually. They took all major decisions for him, including concerning his schooling, providing funding and maintenance. The required irreducible minimum of family life with his adoptive parents plainly already existed, yet, if he were granted entry clearance to reside with them in this country, that kernel of family life would have expanded and developed exponentially, especially when compared to the long-distance arrangements which the family were forced to tolerate in the meantime. The extract from Dyson LJ's judgment at [38] relied upon by Ms Kilroy must be read in that context, and in the context of the remaining reasoning in the same paragraph, which included this important caveat:
>
> > 'I acknowledge, however, that unless some degree of family life is already established, the claim to family life will fail and will not be saved by the fact that at some time in the future it could flower into a full-blown family life, or that the applicants have a genuine wish to bring this about.' (emphasis original)
>
> For those reasons, the adjudicator had been entitled to find on the facts that family life did exist, the court held.'

87. I agree with UTJ Stephen Smith. In this matter, there existed no family life between the applicant and HR at the date of the hearing, both in November 2020 and January 2021. The offer of future care and support, though genuine and well-meant, was simply incapable of creating a family life engaging article 8(1) ECHR.

88. In the circumstances, the applicant cannot succeed in respect of his challenge that the respondent's initial refusal of the TCR, and subsequent refusals to re-examine this decision, breached family life rights as protected by article 8(1) ECHR and article 7 CFR. This element of the applicant's claim is dismissed.

Article 8 ECHR (article 7 CFR) - Interference with private life rights?

89. The applicant's case as to his private life rights enjoyed junior status in argument before me: Ms. Knorr spending considerable time addressing family life rights, which ran into the third day of the hearing, and Mr. Lewis QC having to marshal his resources with care in the limited time permitted to him on the final day.

90. The European Court of Human Rights has confirmed that close relationships short of "family life" will generally fall within the scope of "private life": *Znamenskaya v. Russia* (2007) 44 E.H.R.R. 15, at para. 27.

91. As to the obligations resting upon the United Kingdom authorities in respect of article 8 ECHR, Elisabeth Laing LJ observed in *FWF*, at paras. 114-115:

> '114. As Baroness Hale explained, giving the judgment of the Supreme Court in *MM (Lebanon) v Secretary of State for the Home Department* [2017] UKSC 10; [2017] 1 WLR 771, the European Court of Human Rights ('the ECtHR') has always distinguished between cases in which a state expels a settled migrant, and those in which it either expels, or refuses to admit, a person with no such rights. The former involves an interference with rights protected by article 8, and must be justified under article 8.2. The latter does not. The legal question in the second type of case is whether the state has a positive obligation, imposed by article 8. Some of the approach which applies in a negative obligation case can be transposed to positive obligation cases, such as the question whether a fair balance has been struck between the state's interests and those of the migrant, and a margin of appreciation for the state (judgment, paragraphs 38 and 40-43).
>
> 115. Domestic courts have used article 8.2 as a useful analytical tool in such cases. The issue is 'always whether the authorities have struck a fair balance between the individual and public interests, and the factors identified by the Strasbourg have to be taken into account, among them the "significant weight" which has to be given to the interests of the children' (judgment, paragraph 44). Her analysis of positive and negative obligations in *R (Bibi) v Secretary of State for the Home Department* [2015] UKSC 58; [2015] 1 WLR 5055 is similar (see, in particular, paragraphs 25-29 of her judgment). In both cases, Baroness Hale's reasoning is expressly

> based on the decision of the Grand Chamber in *Jeunesse v Netherlands* (2014) 60 EHRR 789.'

92. A positive obligation may therefore fall upon a State under article 8 ECHR to admit a person to its territory for family reunion. Beatson LJ stated in *R (ZT (Syria) and others) v. Secretary of State for the Home Department* [2016] EWCA Civ 810, [2016] 1 W.L.R. 4894, at para. 64:

> '64. I start with *Sen v The Netherlands* (2001) 36 EHRR 7, *Tuquabo Tekle v The Netherlands* [2006] 1 FLR 798, and *Mayeka v Belgium* (2006) 46 EHRR 23. Those decisions show that a state can owe a positive duty under article 8 of the European Convention to admit persons to its territory for family reunification. They also show that the extent of that obligation varies according to the particular circumstances of the persons involved and the general interest, and that in cases involving children the best interests of the child are a primary consideration in the proportionality exercise …'

93. The Greek authorities issued their TCR on 24 September 2019. The United Kingdom accepted the request on 27 November 2020, some 14 months later, and the applicant arrived in this country on 10 May 2021. This was some 19 months after the initial TCR was made. The respondent has accepted public law failings in her consideration of the initial TCR and subsequent re-examination requests: para. 53 above.

94. I am satisfied on the evidence presented that the applicant sought to join HR in the United Kingdom to enjoy the benefit of the care and security that HR wished to provide to him. A 'Best Interests Assessment Form' authored by the Greek Ministry of Migration Policy, dated 15 September 2019, records the applicant indicating his desire to live with HR and to enjoy a secure future. HR informed the respondent by a letter dated 6 November 2019 that he was willing to provide the loving and stable environment he believed the applicant needed to be able to recover from the loss of his parents. I find that such intentions evidence a protected private life within the meaning of article 8(1) ECHR (and article 7 CFR).

95. I further find that the delay in completing the transfer of the applicant to the United Kingdom has consequences of such gravity as to engage the operation of article 8(1) ECHR in respect of private life. The initial TCR clearly identified HR to be the applicant's uncle and provided details as to HR's date of birth and British citizenship. Several documents accompanied the TCR including evidence of HR's nationality, home address and employment. In addition, the Greek authorities provided to the respondent its 'Best Interests Assessment Form' which records the observation, "... the minor is severely traumatised and in need of psychosocial support. The minor can't talk about his past without crying and it is impossible for him to speak a lot about his parents … According to his statements, he feels sad, unprotected and anxious. He also stated that he finds it very hard to sleep and that he has intense headaches. The symptoms have severely deteriorated during the past few months, something that is probably related to the current context and lack of stable environment. The minor doesn't feel safe [living] unattended with so many people in the camp and he is afraid all the time."

96. An individual's physical and moral integrity is an important aspect of their private life. Article 8(1) ECHR requires States to desist from steps that adversely impact on an individual's mental health. I note the postscript to the decision of the Upper Tribunal (Lane J and UTJ Mandalia) in *R (HN and MN) v. Secretary of State for the Home Department* (JR/4719/2018) confirming that a positive obligation may arise in a situation where the United Kingdom's international obligations require the government to take charge of individuals outside of the United Kingdom where the failure to comply with those obligations threaten their moral and physical integrity. There is evidence before me that the applicant's poor mental health continued to afflict him whilst he awaited a positive decision as to his transfer to the United Kingdom. Elli Avramidou, psychologist, details in her short note, referred to as a mental health certificate, dated 2 June 2020, that the applicant reported symptoms

of PTSD, including severe and frequent flashbacks, recurrent nightmares and isolation. He was identified as being upset easily, crying without reason and being unable to cope with loud voices and noises. He reported problems with sleeping.

97. The obligation to take charge under the Regulation did not arise until the respondent was satisfied that HR was the applicant's uncle. Once the applicant established the familial relationship and the respondent was satisfied that this fundamental requirement was met, in the absence of evidence establishing that it was not in the best interests of the applicant to be united with HR, an obligation rested upon the respondent to agree to the transfer.

98. The initial TCR was refused by a decision dated 19 October 2019 observing, *inter alia*, that having "consulted the minor's claimed uncle's previous Home Office submissions .... from the information provided within the claimed uncle's Home Office records, regrettably we have been unable to corroborate the claimed family link." The respondent now accepts this decision was made in error, as she was in possession of HR's asylum screening interview dated 2002 that corroborates the family link. The Greek authorities' request for re-examination, dated 18 November 2019, was accompanied by the applicant's Tazkira, with translation, detailing both his father and his grandfather. There is no dispute by the respondent as to HR having provided these names during his own application for refugee protection in 2002. Unfortunately, the request for re-examination was rejected by a letter dated 24 February 2020 on the mistaken basis that the applicant and HR asserted that they were 'siblings'.

99. Upon considering the evidence in the round and observing the respondent's acceptance detailed at para. 53 above that at the date the TCR was refused on 29 October 2019 she was in possession of information, namely HR's asylum screening interview, corroborating the family link, I am satisfied that a positive obligation

arose requiring the respondent to take charge of the applicant because the failure to comply with international obligations threatened the applicant's moral and physical integrity. Consequently, the failure by the respondent to accept the transfer of the applicant to the United Kingdom on this date was in breach of the applicant's private life rights as protected by article 8(1) ECHR and article 7 CFR. The delay between the decision of 29 October 2019 and the respondent's eventual acceptance of the second TCR on 27 November 2020 amounts to almost 13 months.

Article 5(2) of the Implementing Regulation - timescale

100. I was addressed by the parties as to whether the respondent's policy of refusing to reconsider TCRs outside of the timescales identified by Article 5(2) of the Implementing Regulation in reliance on *X and X v. Staatssecretaris van Veiligheid en Justitie* (C-47/17 and C-48/17) EU:C:2018:900, [2019] 1 WLR 4924 is unlawful. The issue arose in respect of the remedy sought at para. 57(iii) above, the application for which has been dismissed.

101. I agree with Mr. Lewis QC that my consideration of this issue is now academic; the respondent having accepted the second TCR by the time of the resumed hearing in January 2021 and the applicant having subsequently entered this country. I further note the United Kingdom formally left the European Union at 11pm on 31 December 2020 and so exited the Dublin III framework, save in respect of relevant saving provisions. The outstanding applications to which this issue may be relevant are diminishing by the month. I conclude that exceptional circumstances do not arise in this matter, and it would not be in the public interest for an *obiter* judgment on this issue. I therefore decline the applicant's request to consider the lawfulness, or otherwise, of the respondent's policy.

VI. Further Steps

102. I invite the parties to agree an order reflecting my decision, with attendant consequential orders if deemed necessary.

Signed: D O'Callaghan
Upper Tribunal Judge O'Callaghan

Date: 3 December 2021

By The Tribunal