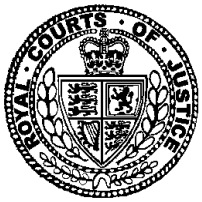

Neutral Citation Number: [2021] EWHC 1821 (Admin)

Case No: CO/2663/2020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/07/2021

Before :

LORD JUSTICE DINGEMANS,
VICE-PRESIDENT OF THE QUEEN'S BENCH DIVISION
and
MR JUSTICE DOVE

- -

Between :

The Queen on the Application of Safe Passage International	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**

- -

Charlotte Kilroy QC, Victoria Laughton and Michelle Knorr (instructed by **Islington Law Centre**) for the **Claimant**
Alan Payne QC and Gwion Lewis QC (instructed by **The Government Legal Department**) for the **Defendant**

Hearing dates: 25 and 26 May 2021

- -

Approved Judgment

Lord Justice Dingemans:

Introduction

1. This is the hearing of a challenge to parts of guidance published by the Respondent, the Secretary of State for the Home Department ("the Secretary of State") to Home Office caseworkers, about the application of EU Regulation 604/2013 ("Dublin III") to unaccompanied minors seeking asylum ("UAM's"). The challenge is brought by Safe Passage International ("Safe Passage").

2. Safe Passage is a registered charity which provides assistance to UAM's in the UK and Europe. It was common ground and the evidence showed that UAM's, who are also referred to as unaccompanied children seeking asylum ("UASC's"), are among the most vulnerable persons in society.

3. Dublin III provides a system for allocating responsibility for determining applications for international protection from asylum seekers to member states of the European Union ("EU"). In very broad terms Dublin III provides that UAM's should be reunited with any family members or relatives legally present in another member state, and that the application for international protection should be made in the member state where the family members or relatives reside.

4. Parts of Dublin III continued to apply pursuant to the Immigration, Nationality and Asylum (EU Exit) Regulations 2019, ("the 2019 Regulations"), made pursuant to powers set out in the European Union (Withdrawal) Act 2018, so that outstanding requests under Dublin III could be processed. There was some (immaterial, as it turned out) confusion in the oral submissions before the court about what parts of Dublin III had been retained, but the position is set out in paragraphs 28 to 42 of the detailed grounds of defence. Part III of Schedule 2 of the 2019 Regulations provided for the processing of 'Take Charge Requests' ("TCR's") which were outstanding before the day on which the UK withdrew from the European Union.

The respective cases

5. The challenge is to three policy guidance documents published by the Secretary of State. The first, entitled 'Dublin III Regulation Policy Guidance, version 3.0' (referred to by the parties and in this judgment as "Policy v.3") was published for Home Office staff on 30 April 2020. The second, entitled 'Dublin III Regulation Policy Guidance, version 4.0' ("Policy v.4") was published for Home Office staff on 14 August 2020. It replaced Policy v.3. The third document challenged is entitled 'Requests made to the UK under the Dublin III Regulation prior to the end of the Transition Period, version 1.0' ("Policy v.5"). This was published for Home Office staff on 31 December 2020. It replaced Policy v.4 and set out how the Dublin III Regulation would apply in the UK following the end of the transition period for leaving the European Union.

6. The claim was brought in July 2020 and therefore originally related only to Policy v.3. As the policy guidance has been updated between that time and the hearing of the claim, Safe Passage amended its statement of facts and grounds with permission and now challenges Policy v.3, Policy v.4 and Policy v.5.

7. Safe Passage submits that the guidance set out in each successive policy document is unlawful on three main grounds. First, it is submitted that the guidance inaccurately states the investigatory duties imposed by the Dublin III Regulation on the UK following receipt of a TCR from another Member State. It was submitted that the relevant guidance provides only for information to be obtained from the local authority once the family link had been established, which came too late in the process to allow for relevant information to be obtained to inform the assessment. It was said that there was no process for case workers to give UAM's notice of concerns before refusing TCR's, which had led to errors in a number of cases. Further it was said that the use of the word "onus" in the guidance was inaccurate.

8. Secondly, it is said that the guidance wrongly states that TCRs can be summarily refused if the SSHD's investigation has not been completed within the two month time limit imposed by the Dublin III Regulation.

9. Thirdly, it is said that the guidance sets out a practice in relation to re-examination requests which is unlawful because it misapplies the decision of the Court of Justice of the European Union ("CJEU") in *X and X v Staatssecretaris van Veilgheid en Justitie* [2019] 2 CMLR 4.

10. The Secretary of State denies that the guidance in any of the policy documents misstates the law. The Secretary of State claims that the challenges to Policy v.3 and Policy v.4 should not now be entertained because those policy versions have been superseded and are now academic.

11. As to the three main grounds the Secretary of State submits first that the guidance concerning investigatory duties is not wrong in law and the complaint merely relates to drafting suggestions. It is said that when read as a whole it is apparent that appropriate inquiries are required to be made by the case workers with all relevant bodies, including local authorities. It is said that there is no need to set out in the guidance principles of public law required to give effect to overarching principles of fairness. The use of the word "onus" was both correct and could not be read as requiring case workers to exclude evidence which had been located.

12. Secondly the Secretary of State submitted that the guidance concerning refusal of TCRs is correct and has been mischaracterised by Safe Passage. Thirdly it is submitted that the guidance concerning re-examination requests is correct and is consistent with the CJEU jurisprudence which is still relevant under the 2019 Regulations.

Some procedural matters

13. Two procedural issues arose in the course of the hearing. First the Secretary of State asked for permission to rely on a late witness statement from Julia Farman, head of the European Intake Unit ("EIU") at the Home Office. When the application was made at the start of the hearing on 25 May, the statement was not available. This was not a promising basis on which to make the application, and the court adjourned the application until the statement was available and Safe Passage had had a fair opportunity to consider it. A written application dated 25 May 2021 was then made on behalf of the Secretary of State to adduce the witness statement, which was provided. It was common ground that the court should look at the statement for the purposes of deciding whether to admit the statement.

14. Secondly, it became clear in the course of oral submissions that Safe Passage intended to deal with issues of remedies only once judgment had been handed down. There was no order providing for a separate hearing on remedies, and the court required issues of remedies to be addressed at the hearing. This was because issues of legality and remedy should be dealt with together unless the court has ordered otherwise; and because the Secretary of State's submissions raised the issue of whether the court should entertain the challenges, for which permission to apply had been granted, to Policy v.3 and Policy v.4 on the basis that they were no longer in force. It would not be sensible to resolve this issue without considering overlapping issues of remedy. Further Ms Kilroy QC made it clear that if the claim succeeded and if asked to address remedies, Safe Passage would submit that the court should require the Secretary of State to write and notify member states of the EU of the terms of the judgment. There had been no written claim for that relief in the statement of facts or grounds, other than the broadest pleaded claim to "further or other relief", and the issue was not addressed in the written Skeleton Arguments. It was apparent that such a proposed order would be strongly contested. It would not, in my judgment, be appropriate to deal with issues of that nature only in written submissions after the judgment had been delivered. This is because both parties should have a fair opportunity to address and respond to points made about such relief. In the event Safe Passage and the Secretary of State produced short written notes on the issue of remedies and the matter was addressed in oral submissions.

The issues

15. We are very grateful to both Ms Kilroy QC and Mr Payne QC, and their respective legal teams, for the helpful written and oral submissions. By the conclusion of the hearing it was apparent that the matters for decision in this judgment are: (1) whether the witness statement of Ms Farman should be admitted; (2) whether the court should consider the challenges to Policy v.3 and Policy v.4, in addition to the challenge to Policy v.5; (3) whether any of the Policy versions being considered by the court provides guidance which is erroneous in law; and if so (4) what, if any, relief ought to be granted.

The evidence

16. It was common ground that, given the particular challenge in these proceedings to the guidance, the evidence would not determine the issues before the court. On the other hand it was also clear that the evidence would assist in illustrating the issues which had arisen with the processing of TCR's relating to UAM's.

17. There was evidence of the difficulties UAM's had in obtaining legal advice and legal representation throughout Europe as set out in the statement of Jennine Walker, a solicitor at Safe Passage. There was evidence that UAM's were at particular risk of being trafficked and might resort to using people smugglers in attempts to join family members.

18. There was evidence setting out the numbers of applicants where the Secretary of State had made decisions under Dublin III in the witness statement of Nick Wale of the Asylum Policy Unit in the Home Office. There had been 679 rejections of TCR's in 2020.

19. There was evidence from Sonal Ghelani, a solicitor at the Migrants' Law Project, Islington Law Centre, which set out details of a number of cases in which the Secretary

of State had applied the relevant law incorrectly, as confirmed by proceedings in the Upper Tribunal (Immigration and Asylum Chamber) ("UTIAC"). These included cases where applicants had not been given an opportunity to comment on erroneous conclusions drawn by caseworkers at the Home Office, for example that a Bangladeshi birth certificate would not be in English, when contact with the family of the applicant would have shown that to be false. Some of these examples pre-dated the relevant versions of the policy guidance being considered in this case.

20. Ms Ghelani had referred to the previous practice adopted by the Secretary of State of sending a holding letter towards the end of the two month period set out in Dublin III as explained in a statement made by Ms Farman, head of the EIU. This practice had been adopted by a number of member states which had struggled to process applications relating to children within the two month period. The practice was declared to be unlawful by the CJEU in *X and X v Staatssecretaris van Veilgheid en Justitie* (C-471/7 and C-48/17); [2019] 2 CMLR 4.

21. Ms Ghelani also commented in a second witness statement dated 12 May 2021 on disclosure given by the Secretary of State in the course of these proceedings. This identified, among other matters, concerns within the Home Office about the resource implications of contacting local authorities before a family link had been established and the fact that although Policy Guidance version 2 had required such contact, it had not been the practice of the Home Office to make such contact. The statement linked practices which had been declared to be unlawful in individual challenges in UTIAC cases to changes, or the absence of changes, in the practice of the EIU and the contents of the Policy Guidance.

22. In the Skeleton Argument on behalf of Safe Passage and at the end of the oral submissions Ms Kilroy on behalf of Safe Passage questioned whether the Secretary of State had complied with her duties of candour. The duty of candour is owed by both parties to the Court and requires parties to assist the court by ensuring that information relevant to the issues in the claim is drawn to the court's attention, regardless of whether it supports or undermines their case. Mr Payne on behalf of the Secretary of State confirmed that the Secretary of State had complied with the duty of candour, and after the hearing both parties put in further short written submissions.

The Dublin III Regulation

23. The Dublin III Regulation provides the mechanism by which responsibility for determining asylum claims is allocated across the Member States of the European Union. It achieves this by providing a hierarchy of criteria to be applied. A key feature of Dublin III is the emphasis on speedy investigations and responses when requests are made by one state to another. This need for rapid decision making is not particularly surprising in circumstances where Dublin III is only dealing with deciding which member state is responsible for determining the application for international protection, before the actual process of determining the application begins.

24. Dublin III continued the development from earlier EU Regulations (Dublin I and Dublin II) by providing a role for asylum seekers whose transfers were being considered. It is apparent from decisions of the CJEU that member states have had difficulties in complying with the time limits set out in Dublin III.

25. The recitals to Dublin III explain the importance of a common policy on asylum for achieving the EU's objective of establishing an area of freedom, security and justice (recital 2). That common policy should include 'a clear and workable method for determining the Member State responsible for the asylum application' (recital 4). The method should be based on 'objective, fair criteria both for Member States and for the persons concerned. It should, in particular, make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for granting international protection' (recital 5). The recitals provide that '… the best interests of the child should be a primary consideration of Member States when applying this Regulation' (recital 13). Recital 14 makes the same point in relation to Article 8 of the ECHR. Recital 19 referred to the effective protection of rights. Recital 39 confirms that the Regulation respected fundamental rights.

26. Article 2 of the Regulation defined "family members" in 2(g) and "relatives" in 2(h). Article 3 states that an application 'shall be examined by a single Member State, which shall be the one which the criteria in Chapter III indicate is responsible'. Article 6 set out guarantees for minors providing that "the best interests of the child shall be a primary consideration for member states with respect to all procedures provided for" in the Regulation.

27. The vulnerabilities of UAM's is recognised by article 6.2 which provides that:

> "Member States shall ensure that a representative represents and/or assists an unaccompanied minor with respect to all procedures provided for in this Regulation. The representative shall have the qualifications and expertise to ensure that the best interests of the minor are taken into consideration during the procedures carried out under this Regulation".

28. Chapter III then sets out a hierarchy of criteria for determining the responsible Member State in a claim. Article 7 provided for a hierarchy of criteria to be applied as set out in Chapter III.

29. Article 8 made provision for UAMs. In so far as relevant, it provides:

> "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."

30. Article 8 continues by making provision for family members in more than one member state (article 8(3)) and providing that the member state responsible shall be decided on the basis of what is in the best interests of the UAM.

31. Chapter IV of Dublin III provides 'discretionary clauses' which enable Member States to accept responsibility for an asylum claim even where they are not otherwise responsible under the Chapter III criteria. As explained in Recital 17, 'Any Member State should be able to derogate from the responsibility criteria, in particular on humanitarian and compassionate grounds, in order to bring together family members, relatives or any other family relations'. In this respect, Article 17 states:

> "1. By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation.
>
> The Member State which decides to examine an application for international protection pursuant to this paragraph shall become the Member State responsible and shall assume the obligations associated with that responsibility. […]
>
> 2. The Member State in which an application for international protection is made and which is carrying out the process of determining the Member State responsible, or the Member State responsible, may, at any time before a first decision regarding the substance is taken, request another Member State to take charge of an applicant in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations, even where that other Member State is not responsible under the criteria laid down in Articles 8 to 11 and 16. The persons concerned must express their consent in writing.
>
> The request to take charge shall contain all the material in the possession of the requesting Member State to allow the requested Member State to assess the situation.
>
> The requested Member State shall carry out any necessary checks to examine the humanitarian grounds cited, and shall reply to the requesting Member State within two months of receipt of the request […] A reply refusing the request shall state the reasons on which the refusal is based.
>
> Where the requested Member State accepts the request, responsibility for examining the application shall be transferred to it."

32. Chapter VI of Dublin III sets out 'procedures for taking charge and taking back'. TCR's allow a Member State with which an application for asylum has been lodged to request that another Member State should take charge of the applicant on the basis that it considers the other Member State to be responsible under Dublin III. Article 21(1) explains that a TCR must be made 'as quickly as possible and in any event within three months of the date on which the application for international protection was lodged.

33. Article 22 governs the response of a Member State upon receipt of a TCR. It provides:

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

34. Article 27 deals with the issue of remedies available to individuals or their families. Article 29.1 provides for transfers to take place within 6 months.

The Implementing Regulations

35. The practical operation of the Dublin III Regulation is governed by Commission Regulation (EC) No 1560/2003 ("the Implementing Regulation"), which was amended by Commission Regulation (EU) No 118/2014.

36. Recital 3 of the Implementing Regulation states that the rules set out therein seek to 'increase the efficiency of the system and improve the cooperation between national authorities' in relation to asylum applications and family reunion cases. The Implementing Regulation makes particular provision in relation to procedures governing TCRs.

37. Article 1(1)(a) states that it is the obligation of the requesting State to provide, with its TCR, "all the proof and circumstantial evidence showing that the requested Member State is responsible for examining the application for asylum". Article 3.2 requires the requested member state to "check exhaustively and objectively on the basis of all information directly or indirectly available".

38. Article 5 of the Implementing Regulation provides for the refusal of a TCR by a requested State. It provides:

> "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.
>
> 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. […]"

39. Article 12 deals with UAM's and provides for flexibility in cases involving UAM's. This enables, among other matters, the best interests of children to be fully considered. In this respect the EU Charter of Fundamental Rights emphasises the rights of children to maintain personal relationships (in article 24 of the EU Charter) and the right to an effective remedy (in article 47 of the EU Charter).

40. There are standard forms annexed to the Implementing Regulation which provide for data to be supplied by the requesting and requested state.

The Policy Versions v.3, v.4 and v.5

41. The SSHD first published guidance concerning the application of the Dublin III Regulation on 2 November 2017. This policy was revised on 18 April 2019 in light of developments in the case law governing the Dublin III Regulation. It was this policy which was superseded by Policy v.3.

42. Policy v.3 was published on 30 April 2020. It set out what the guidance was intended to do:

> "This guidance tells you about the operation of the Dublin Regulation when determining the State responsible for examining an asylum claim and then either transferring an asylum claimant from the UK to another European State (for the purpose of the guidance, referred hereafter as a Dublin State or Dublin States) or accepting that the claimant should have his or her claim examined in the UK.
>
> The instruction provides you with guidance on the Dublin III Regulation's rules for referral, consideration of responsibility and the transfer process to the responsible State. It also tells you about our policy when making a request to another Dublin State or when another Dublin State makes a formal request to the UK to take responsibility for an asylum claimant who is in that State under the terms of the Dublin III Regulation."

43. Policy v.3 set out the background to the Dublin III Regulation. It emphasised family unity and the primary consideration of acting in the best interests of children. At page 6 it stated:

> "The Dublin III Regulation is consistent with the principle of family unity in accordance with the European Convention for the Protection of Human Rights, the Charter of Fundamental Rights and the best interests of the child. The provisions on family unity and the best interests of the child are primary considerations which may result in the State responsible for examining the asylum claim being the State where an asylum claimant's family members or relatives, as defined in the Dublin III Regulation, are

> legally present or resident (depending on the circumstances of the case)."

44. The guidance set out the policy intention for the application of the Dublin III Regulation. The policy was to ensure "respect for family life and the best interest of a child are a primary consideration when applying the Dublin III Regulation", together with the aim of "ensuring cases are dealt with as expeditiously as possible, particularly in cases involving unaccompanied children", at pages 7-8. The guidance also notes that "A Dublin state may ask another Dublin State to accept responsibility for an asylum claim … in cases where the strict application of the Regulation would keep them apart." The guidance specifically referred to section 55 of the Borders, Citizenship and Immigration Act 2009. Case workers were told to be alert to any indications that the child may be in need of assistance. There were a number of references to the best interests of children in the guidance.

45. At page 12 the guidance explained the legal framework governing the Dublin III Regulation, including the broader human rights obligations which must be taken into account when applying it. These obligations were identified as coming from: the UN Convention on the Rights of the Child; article 24 of the EU Charter of Fundamental Rights; and from the European Convention on Human Rights and Fundamental Freedoms ("ECHR").

46. At page 16 reference was made to article 6 and the best interests of the child. The guidance stated that "the Dublin state shall as soon as possible take appropriate steps to identify family members and may call for the assistance of international or other relevant organisations …".

47. The guidance explained elements of the Dublin III process. In a section entitled 'Making a request to another Dublin State' beginning at page 33 guidance was given about further steps which could be taken following the rejection of a TCR. This guidance stated at pages 37-38:

> "In the event of a negative reply to a take charge or take back request, it is open to the requesting State to challenge the refusal by asking that its formal request be re-examined. The CJEU in X and X C-47/17, C-48/17 confirmed that this must be done within 3 weeks of the receipt of the negative reply. The requested Dublin State shall strive to reply to a re-examination request within 2 weeks.
>
> However, in X and X the CJEU also ruled that if a reply to the request for re- examination is not received within 2 weeks that process ends and the requesting Dublin State retains responsibility, unless it is possible to make a new request to take back or take charge within the time limits in Dublin III. A rejected request can only trigger one re-examination procedure, it is not possible to call for repeated re- examinations in the same procedure."

48. Part of Policy v.3 is headed: 'Dublin process: requests for transfer into the UK'. In a passage headed 'Requests involving children' the guidance describes Local Authority participation in an article 8 assessment. It stated:

> "The European Intake Unit (EIU) will work with the local authority in which the family member, sibling or relative of the child is residing. Local authorities will be requested to undertake an assessment with the family or relative(s) once the family link has been established, in addition to the checks undertaken by EIU, which will inform a recommendation to EIU as to whether the request should be accepted or rejected."

49. Policy v.3 relates what steps are to be taken where a TCR has been made and the time period for assessment is drawing to a close. It states at pages 44-45:

> "In cases involving a take charge request based on Article 8(1) where the 2- month period from receipt of the TCR is drawing to an end and it has not been possible to establish, with sufficient confidence: (a) whether or not the family link exists and/or (b) whether it would be in the child's best interests to have the asylum claim considered in the UK then it is appropriate to reject TCR, whilst (if appropriate) continuing to undertake enquiries pursuant to 12.2 IR in anticipation of the requesting state making a request for reconsideration. This is to prevent default acceptances of TCRs where it has not been possible to establish that it is in the best interests of the child to transfer to the UK. However, a TCR should not be rejected in order to complete arrangements with the local authority for accommodation. In these circumstances the TCR should be accepted and arrangements concluded as soon as possible thereafter.
>
> All reasonable endeavours must be made to conclude necessary enquiries prior to the expiration of the two-month deadline. Accurate records should be kept detailing progress on consideration of the TCR throughout the process for audit purposes."

50. The guidance describes at pages 49-50 the elements of proof and evidence that must be provided in order to confirm a family relationship pursuant to article 8 of the Dublin III Regulation:

> "As above, it is not essential for DNA evidence to be provided (DNA Policy Guidance 16 March 2020), as within the list annexed to the Implementing Regulation the issue of DNA evidence is mentioned in the context of it being necessary only in the absence of other satisfactory evidence to establish the existence of proven family links that are referred to elsewhere in Articles 11 and 12 of Implementing Regulation (EC) No 1560/2003 as amended by (EU) No.118/2014

> The onus is on the applicant and their qualifying family member, sibling, relative or relations in line with the relevant provisions in the Dublin III Regulation (Articles 8-11, 16 and 17(2) Dublin Regulation (EU) No.604/2013) in the UK to prove their relationship and satisfy you that they are related as claimed. Although not expected to provide DNA evidence, an applicant and their UK family may wish to submit a DNA test at their own expense from an organisation that is International Organization for Standardisation (ISO) accredited in order for it to be accepted as having evidential weight. Please refer to the "DNA Collection Standards" section of the DNA Policy Guidance (DNA Policy Guidance 16 March 2020).
>
> In addition to elements of proof, circumstantial evidence or indicative evidence may also be submitted with a transfer request, such as:
>
> - verifiable information from the applicant:
>
> - any documents an applicant wishes to rely upon should be provided in English, or accompanied by English translations
>
> - the onus is on the requesting Dublin State to provide the translation, […]
>
> If the person in the UK is an asylum seeker, refugee, a British citizen having previously been granted asylum, or has been granted leave in any other capacity, the Home Office file must be obtained and you must consider any family information it contains. This must be cross-referenced against the evidence submitted in support of the transfer request to identify and help determine whether or not you are satisfied that the relationship is as claimed.
>
> You must, having considered the evidence submitted by the requesting State (proof or circumstantial evidence, as above, including information provided on standard forms which aim to establish the proven family link and the dependency link between the applicant and his or her child, sibling or parent, as well as to establish the capacity of the person concerned to take care of the dependent person), information contained in Home Office records and evidence submitted by the person in the UK, be satisfied that the parties are related as claimed."

51. Policy v.3 refers to refusing a TCR. The guidance explains at page 52 that:

> "If the requesting State believes the refusal is based on a misappraisal, or has additional evidence to put forward, it may ask for the request to be re-examined under Article 5 of Implementing Regulation 1560/2003. A request must be made within 3 weeks of receipt of the refusal to accept transfer. Upon

> receipt of a reconsideration request, best endeavours should be made to respond within 2 weeks. If it is not possible to respond within two weeks despite best endeavours then responsibility for considering the asylum claim reverts to the requesting state."

52. Policy v.4 replaced Policy v.3. As might be expected many of the statements of principle governing the Dublin III Regulation were the same. The passage about rejected TCRs was also the same. However the passage about local authority assessments was amended in material respects. The following passages were added:

> "An initial notification to the local authority should be sent as soon as possible following the receipt of the TCR. It should specify whether the application has been made under Article 8(1) or Article 8(2) and should invite the local authority to provide any information that they hold that will allow a decision to be taken on the family link. The initial notification should also relay any information held by EIU which may be relevant to any safeguarding considerations.
>
> If the family link is established, the EIU will then ask the relevant authority to undertake a full safeguarding assessment of the family member which will inform a recommendation to the EIU as to whether the request should be accepted or rejected. The local authority should be provided with information held by the EIU which may be relevant to any safeguarding considerations."

53. There were also amendments in policy v.4 about refusing TCRs towards the end of the relevant time limit. It stated at pages 42-43:

> "In cases involving a take charge request based on Article 8 of Dublin III where the 2- month period from the receipt of the TCR is drawing to an end and despite having made reasonable and timely enquiries it has not been possible to establish with sufficient confidence: (a) whether or not the family link exists and/or (b) whether it would be in the child's best interests to have the asylum claim considered in the UK, the formal rejection of TCRs before the end of the 2-month period is necessary to prevent default acceptances of TCRs.
>
> At the end of the two-month period where enquiries have not produced sufficient evidence in relation to the family link and/or best interests, and if enquiries remain ongoing at the point of rejection of the TCR, then this should be stated alongside the reasons given for rejecting the TCR. The requesting State should also be reminded of its ability to make a re-examination request within the next 3 weeks
>
> A TCR should not be rejected solely to enable arrangements with the local authority for accommodation to be completed. In these circumstances the TCR should be accepted and these arrangements concluded as soon as possible thereafter.

> All reasonable endeavours must be made to conclude necessary enquiries prior to the expiration of the two-month deadline. Accurate records should be kept detailing progress on consideration of the TCR throughout the process for audit purposes."

54. The passage relating to proof and circumstantial evidence was the same in Policy v.4. The passage about reconsideration requests was repeated in the same terms at page 50, with the qualification that if it was not possible to respond within 2 weeks then "the requesting State is responsible for considering the asylum claim, subject to the requesting State making a subsequent fresh request for example under Article 17(2) of the Dublin III Regulation to bring together family relations." That new addition was preceded by a new statement about "minded to refuse" notifications. The relevant passage explains:

> "The Dublin III Regulation is intended to enable responsibility for an asylum claim to be determined swiftly within set timeframes. In some cases, where a caseworker forms a preliminary view that the TCR should be refused they may, depending on the nature of the proposed reasons for refusal and the time remaining within the Dublin timeframes, consider it appropriate to notify the claimed family member(s) of the proposed reasons for refusal so as to give them an opportunity to respond. Caseworkers are encouraged to provide this opportunity, if time allows and it is reasonable to do so. In deciding whether to afford such an opportunity, it may be relevant to consider the extent to which family member(s) have already been given the opportunity to be involved in the process and the cause for any delay in the decision making process. Due to the strict Dublin III timeframes, caseworkers should require a response within a maximum of 7 days. It should also be made clear that only new evidence not already submitted should be provided. Case workers should also keep a record of any consideration given to notifying the claimed family member(s) in this way."

55. Policy v.5 replaced Policy v.4. Policy v.5 repeated large sections of the guidance set out in Policy v.4, including passages of relevance to the challenges in this case, being the guidance concerning the SSHD's duty to investigate, the 'onus' on the applicant; the significance of translations and DNA evidence; and the local authority's role in undertaking an assessment. The passage on minded to refuse notifications was expanded but the material parts remained as set out in Policy v.4. The discussion of refusing take charge requests in Policy v.5 is largely identical to Policy v.4, with the addition of the following passage:

> "At the end of the two-month period where enquiries have not produced sufficient evidence in relation to the family link and/or best interests, and if enquiries remain ongoing at the point of rejection of the TCR, then this should be stated alongside the reasons given for rejecting the TCR."

56. Policy v.5 did make material changes to the discussion of reconsideration requests, at p.29. The guidance was:

> "If the requesting State believes the refusal is based on a misappraisal, or has additional evidence to put forward, it may ask for the request to be re-examined under Article 5 of Implementing Regulation 1560/2003.
>
> Where a TCR (or take back request) to which this guidance applies has been rejected before the end of the Transition Period and where a reconsideration request has been received before the end of the Transition Period caseworkers should consider that request in a manner consistent with the rules and case law in X and X (see below) that applied before the end of the Transition Period.
>
> The reconsideration must be made within three weeks of receipt of the refusal to accept the request to transfer. A request to reconsider the earlier refusal must be responded to within two weeks of receipt. As above caseworkers should be familiar with the terms of the ruling from the Court of Justice of the European Union in X and X C-47/17, C-48/17. The expiry of the two-week period (above) will close the reconsideration procedure. It is not possible for repeated requests for reconsideration to follow a decision to refuse a formal request to take charge of (or take back) an applicant.
>
> A new take charge request or reconsideration request under the Dublin Regulation cannot be made to the UK by a Dublin State after the end of the Transition Period. All new cases must apply for family reunion under the Immigration Rules."

Relevant case law on challenges to policy guidance

57. It was common ground that the guidance had to be interpreted not with all the strictness applicable to the construction of a statute, but sensibly according to the natural and ordinary meaning of the words used and as they would be understood by the reasonable case worker.

58. There was no material dispute about the legal test to be applied to determine whether the court had jurisdiction to correct an error of law in the guidance. The Court's jurisdiction to grant relief in cases where guidance documents published by the Secretary of State are said to contain inaccurate statements of the law was recognised in *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 at pages 193-194. It is established that "if a government department, in a field of administration in which it exercises responsibility, promulgates in a public document, albeit non-statutory in form, advice which is erroneous in law, then the court, in proceedings in appropriate form commenced by an applicant or plaintiff who possesses the necessary locus standi, has jurisdiction to correct the error of law by an appropriate declaration". It was expressly noted that the occasions of a departmental non-statutory publication

raising a clearly defined issue of law, unclouded by political, social or moral overtones, would be rare.

59. Different considerations may apply depending on the purposes for which and the bodies to whom the guidance was issued, see *R (Bayer plc) v NHS Darlington CCG* [2020] EWCA Civ 449 at paragraph 214. The test has been expressed in slightly different ways in later cases, see *R (Tabbakh) v Staffordshire and West Midlands Probation Trust* [2013] EWHC 2492 (Admin) at first instance as approved on appeal, [2014] 1 WLR 4620 at paragraph 46, and *R(Letts) v Lord Chancellor* [2015] 1 WLR 4497 which referred to guidance which would lead to, permit or encourage unlawful acts. A revised formulation of the test was applied by the Court of Appeal in *BF (Eritrea) v SSHD* [2019] EWCA Civ 872. The test applied by the Court of Appeal in that case is being considered by the Supreme Court in an appeal which was heard on 16 March 2021, but where judgment is awaited. Neither party submitted that the refinements of the test were material to this case.

Relevant case law on Dublin III TCR's

60. There was common ground between the parties that some relevant principles of law had been set out in various decisions of the CJEU, High Court and UTIAC on Dublin III. Ms Kilroy relied on this common ground about the legal principles to submit that it meant that the claim was bound to succeed. Mr Payne submitted that the common ground about legal principles did not lead to the claim succeeding, because policy guidance did not need to set out every relevant principle of public law. The relevant decisions on the case law showed that where justiciable errors had been made in decisions made by case workers the courts and tribunals had put them right in the cases before them, but the evidence showed that resources available to UAM's and family members to investigate such challenges were limited.

61. I will set out only those propositions of law relevant to the parts of the policy guidance which are in issue.

62. First there is a duty on the relevant member state to carry out relevant investigations into the claimed family relationship. This arises from the express wording of the articles of Dublin III and the Implementing Regulation, including articles 6(4), 8(2) and 22 of Dublin III and article 5 of the Implementing Regulation, which is supported by requirements relating to the best interests of the children and the procedural obligations inherent in article 8 of the ECHR, as interpreted in various decisions. The investigative duties are "unavoidably factually and contextually sensitive" and are not absolute, but there is a duty to take reasonable steps, see *R(MK and IK) v Secretary of State for the Home Department* [2016] UKUT 231 (IAC) at paragraphs 38 to 40. The duty is to investigate to a reasonable extent within the strict time limits set out in Dublin III, see *R(MS) v Secretary of State for the Home Department* [2019] UKUT 9 (IAC) at paragraph 114 (there was an appeal to the Court of Appeal in this case [2019] EWCA Civ 1340 but this point was not the subject of the appeal).

63. More detail about the scope of the investigatory duty was considered in *R(FWF) v Secretary of State for the Home Department* (JR/1626/2019) (unreported 12 June 2019) where the Upper Tribunal found that the Secretary of State had, in that case, failed to engage with the local authority when carrying out investigations, in breach of the terms of the policy then applying. At paragraph 99 of the judgment the Upper Tribunal noted

that the local authority's "assessment of a family link and the best interests of a child ought to have been central to the respondent's duty to investigate upon receipt of the TCR's, yet there was no referral to the relevant [local authority] at any stage". In that case the Upper Tribunal recorded that "the LA's assessment of a family link and the best interests of a child ought to have been central to the respondent's duty to investigate upon receipt of the TCR's, yet there was no referral to the relevant LA in this case at any stage". The Upper Tribunal recorded that it would be nonsensical for the Secretary of State to notify the LA of the TCR and then not to follow this up with a request for an assessment of the family link and best interests of the children. The Court of Appeal allowed an appeal by the Secretary of State against part of the findings made in that case, see [2021] EWCA Civ 88, but again it was not material to paragraph 99 of the judgment of the Upper Tribunal.

64. In *R(BAA) v Secretary of State for the Home Department* [2020] UKUT 227 (IAC) at paragraph 78 the Upper Tribunal stated, at paragraph 78, that "unless the [Secretary of State] is satisfied that the relevant local authority's assessment could not possibly cast any relevant light … the respondent should seek an assessment from the relevant local authority". At paragraph 100 the Upper Tribunal commented on the current practice of the Secretary of State, recording that it was not compatible with the requirements of Dublin III. It was said "there are likely to be circumstances in which information from the relevant local authority … will inform the respondent's decision" both in respect of the claimed relationship, and the exercise of the article 17 discretion.

65. It might be noted that there is an appeal outstanding in *R(BAA)* to the Court of Appeal but it was not suggested to this Court by the parties that the appeal engaged these points of practice.

66. Secondly the member state has a duty to provide "full and detailed reasons for the refusal" of any TCR, see, *X and X* at paragraph 67.

67. Thirdly if the decision maker is minded to refuse a TCR fairness required that the decision maker give the family member an opportunity to deal with the proposed reason for rejection, but "it must be emphasised that this is an area where one cannot lay down hard and fast rules", see *BAA* at paragraph 93.

68. Fourthly, the CJEU in *X and X* undertook an interpretation of the provisions of the Implementing Regulation, and in particular article 5.2, and concluded in paragraph 74 of its judgment that this provision should be interpreted so that the additional optional re-examination procedure is "strictly and foreseeably circumscribed, both in the interests of legal certainty for all the parties concerned and to ensure its compatibility with the detailed time frames established by the Dublin III Regulation". At paragraph 80 of the judgment the CJEU concluded that "provided that the requested Member State has, after carrying out the necessary checks, given a negative reply to a take charge or take back request within the time limits prescribed for that purpose by the Dublin III Regulation, the additional re-examination procedure cannot trigger the effects laid down in art 22(7) and art 25(2) of that regulation."

69. The CJEU also considered the legal significance of the time limit of two weeks provided in article 5.2 of the Implementing Regulation, and the effect of it expiring. The court concluded that the provision would not be correctly interpreted if it were to be treated as purely indicative, and therefore unrestricted or only restricted to a reasonable period

of time. This would be inconsistent with the underlying principles of the Dublin III Regulation. The CJEU concluded that article 5.2 "must be interpreted as meaning that the expiry of the two week limit for a reply laid down by that provision definitively brings to an end the additional re-examination procedure, whether the requested Member State has, or has not, replied within that period to the re-examination request" (see paragraph 86). Thus unless the requesting Member State has available the time needed to lodge a further take charge or take back request as provided within article 21.1 and 23.2 of the Dublin III Regulation it must be considered to be responsible for examining the relevant application for international protection.

70. Fifthly, in addition to the conclusions identified by the CJEU in *X and X* it is also important to appreciate that the provisions of article 17.2 of the Dublin III Regulation (see above) continue to be of application to a requested state at all times prior to the making of a first decision on the substance of an application for international protection. This provision would potentially provide a mechanism for transfer if, after the end of the re-examination process and prior to the requesting state determining any application for international protection by the child, it was considered that based on continuing enquiries it was in the best interests of the child for the transfer to occur. In this event a further request under article 17.2 would enable this to be achieved.

Admission of the statement of Ms Farman – issue one

71. The late witness statement from Ms Farman sets out details of the numbers of applications which have been processed since 31 December 2020, together with numbers of the successful applications. The statement also sets out the practices which were employed by case workers which were different from the Policy v.5 which applied at the time. Mr Payne said that this statement was responding to the second witness statement dated 12 May 2021 made by Ms Ghelani on behalf of Safe Passage about disclosure provided by the Secretary of State, and was discharging the Secretary of State's duty of candour because it demonstrated that there had been a variation in practice from Policy v.5 after 1 March 2021 in that applications were not being refused "simply on the basis that the two-month consideration period had expired". The evidence related to the position after 31 December 2020 and so was all new. Ms Kilroy did not accept that the witness statement responded to the disclosure because it gave evidence about different practices being employed by the case workers from 1 March which was not dependent on points made by Safe Passage about the Secretary of State's disclosure. As noted above Ms Kilroy asked whether the Secretary of State had complied with her duty of candour, and Mr Payne confirmed that she had.

72. The witness statement of Ms Farman should have been served on 31 March 2021, which was the date on which the statement of Mr Wale was served on behalf of the Secretary of State under the directions timetable with agreed extensions. It is clear that procedural rigour applies to public law cases, and to both parties in public law cases, as in any other case. There was no good reason not to have served the statement on Ms Farman on 31 March. This was because the relevant change of practice reported to have occurred after 1 March 2021 had already occurred, and details of the processing of applications relating to UAM's decided after 31 December 2020 could have been provided to that date. However, in considering all the circumstances of the case it is, in my judgment, appropriate to admit the statement. This is because the statement does provide updating information about the practices operated by the case workers after 1 March 2021, and the evidence (together with the earlier evidence) serves to illustrate

the issues raised by the challenge to the Policy Versions. It was apparent that both parties were able to deal fairly with the material. The Secretary of State must bear the costs consequences of making this application late.

Court should consider challenges to Policy v.3 and v.4 – issue two

73. As noted above Mr Payne submitted that the court should not entertain the challenges to Policy v.3 and v.4 because they had been overtaken by Policy v.5 and the challenge was academic. Ms Kilroy submitted that the claim had been brought promptly, Safe Passage had asked for expedition of the hearing, the challenge was to Policy v.3 and then amended to add in the later versions, permission to apply for judicial review to challenge all the Policy Versions had been granted, and Safe Passage was entitled to an adjudication of the claim.

74. In my judgment this court should consider the challenges to Policy v.3 and v.4, in addition to the challenge to Policy v.5. This is because permission to apply for judicial review had been granted to bring the challenge to all the Policy Versions, the claims have not been compromised, and Safe Passage was entitled to a determination of the challenge in circumstances where the challenge to Policy v.5 was a development of the challenges to Policy v.3 and v.4, so that the time taken to consider the separate challenges would not be increased.

Some advice in the policy guidance which is erroneous in law – issue three

75. In my judgment there are two specific parts of the policy guidance in Policy v.3, v.4 and v.5 which contains advice which is erroneous in law for the detailed reasons which follow. I will deal first with these two specific parts before addressing other complaints about the policy guidance where I do not consider that there was advice given which was erroneous in law, or would lead to, permit or encourage unlawful acts.

76. In my judgment that part of the Policy v.3 which directed that information should be obtained from a local authority only once the family link had been established was erroneous in law. It is apparent from the evidence before the Court that concerns about creating extra work for local authorities had been a point of concern for the Home Office, although there was also some evidence that local authorities welcomed early involvement in investigating TCR's. The Upper Tribunal had stated in the case of *R(FWF)* that the local authority should be involved on receipt of the TCR, but there were other dicta from the Upper Tribunal in other cases that the investigatory duty on the Secretary of State on receipt of a TCR was a duty to carry out a reasonable investigation, not an absolute one.

77. It is common ground that there was an investigative duty on the Secretary of State, and that the duty required the Secretary of State, acting through the case workers, to act reasonably in carrying out that duty. I agree that it would not be in every case that a local authority would need to be involved before a family relationship had been established, but in my judgment the guidance misstated the law when it said (at page 44) that "The European Intake Unit (EIU) will work with the local authority in which the family member, sibling or relative of the child is residing. Local authorities will be requested to undertake an assessment with the family or relative(s) **once the family link has been established** …" (emphasis added). This advice established a bright line that the local authority should not undertake an assessment with the family or relative

until the family link had been established. As the evidence before the court, and some of the decided cases show, the local authority's assessment assisted the Secretary of State in making an informed decision about whether there was a family link, and whether the request should be accepted. The creation of the bright line was therefore an erroneous statement of the law. In my judgment it was not saved by other references to the investigative duty, for example, at page 16 that "the Dublin state shall as soon as possible take appropriate steps to identify family members and may call for the assistance of international or other relevant organisations …". This is because that general guidance did not alter the specific bright line established by the guidance that local authorities should not be involved unless and until a family link had been established.

78. As noted above some amendments were made to that part of Policy v.3 which related to local authorities in Policy v.4, which were continued into Policy v.5. The following passages were added: "**An initial notification to the local authority should be sent as soon as possible following the receipt of the TCR**. It should specify whether the application has been made under Article 8(1) or Article 8(2) **and should invite the local authority to provide any information that they hold** that will allow a decision to be taken on the family link. The initial notification should also relay any information held by EIU which may be relevant to any safeguarding considerations. **If the family link is established, the EIU will then ask the relevant authority to undertake a full safeguarding assessment of the family member** which will inform a recommendation to the EIU as to whether the request should be accepted or rejected. The local authority should be provided with information held by the EIU which may be relevant to any safeguarding considerations." (emphasis added).

79. Mr Payne submitted that the amendments in Policy v.4, continued in Policy v.5, put right any guidance which was erroneous in law. Ms Kilroy submitted that in both *R(FWF)* and *R(BAA)* the Upper Tribunal had made it clear, particularly in the passages referred to in paragraphs 63 and 64 above, that the local authority must be involved as soon as possible, and that the local authority's information and assessment of the best interests of the children might inform the Secretary of State's decision on the TCR.

80. In my judgment in order to discharge duties under Dublin III the Secretary of State was required to involve the local authorities as soon as possible. I also agree that in some cases an assessment of the best interests of the children by the local authority would inform the decision to be made by the Secretary of State. It is, however, reading too much into *R(FWF)* and *R(BAA)* to conclude that guidance in Policy v.4 requiring the involvement of the local authority from the start, with a full safeguarding assessment to follow only if the family link was established, was erroneous in law. This is because the local authority was being invited to provide any information that they held about the family link, and local authorities were entitled to obtain and disclose information in any way that they chose. It is also because the Upper Tribunal in *R(FWF)* and *R(BAA)* was not purporting to establish as a principle of law how the investigative duty was to be discharged in all cases, and any such attempt would have been inconsistent with the dicta in various cases to the effect that the duty was "unavoidably factually and contextually sensitive", see *R(MK and IK)*. In this respect I note that in *R(BAA)* the Upper Tribunal found that the Secretary of State had acted unlawfully in a particular case, but rejected challenges (on different grounds) contending that a past version of the policy guidance dated 18 April 2019 had given advice which was erroneous in law.

Finally I note that a full safeguarding assessment could only be meaningful if it was clear that the family link was established. For these reasons this passage in Policy v.4 did not give guidance which was erroneous in law. Policy v.4 removed the bright line guidance which was erroneous in law or which would lead to, permit or encourage unlawful acts. Policy v.5 followed Policy v.4 in this respect. Therefore, in my judgment, the guidance which was erroneous in law was limited to Policy v.3.

81. I agree with Ms Kilroy that if there were delays in establishing the family link it might mean that time to carry out the full safeguarding assessment would necessarily be shortened which might have implications for the discharge of the Secretary of State's investigatory duties within the two month period. This brings me to the challenge concerning the guidance in relation to the expiry of the two month period. In my judgment the second part of the policy guidance which contained an erroneous statement of law was that part which related to the coming to an end of the two month period, in circumstances where it had not yet been possible to establish whether a family link was established or whether it would be in the UAM's best interests for the claim for international protection to be determined in the UK. The scheme of Dublin III required member states to carry out their investigations on a TCR rapidly so that the actual process of making the claim for international protection could commence. Member states were required to provide sufficient resources to discharge their obligations on receipt of TCR's.

82. As noted above Policy v.3 states at pages 44-45: "In cases involving a take charge request … where the 2- month period from receipt of the TCR is drawing to an end and it has not been possible to establish, with sufficient confidence: (a) whether or not the family link exists and/or (b) whether it would be in the child's best interests to have the asylum claim considered in the UK then it is appropriate to reject TCR … **This is to prevent default acceptances of TCRs**." (emphasis added).

83. Mr Payne, on behalf of the Secretary of State, submitted that, properly interpreted, this advice was not erroneous in law because it meant that TCR's should only be rejected at the end of the 2 month period if the links had not been established and reasonable inquiries had been made. He relied on the requirements on caseworkers to use all reasonable endeavours to complete the inquiries within 2 months, as set out in paragraph 49 above. Ms Kilroy pointed out that there was no qualification in the policy guidance requiring reasonable steps to have been taken before the TCR was rejected.

84. The policy guidance did not provide for a TCR to be rejected only if all reasonable endeavours to complete the inquiries had been used. There was nothing said about rejecting the request at the end of the 2 month period only if reasonable inquiries had been made. In my judgment the advice set out in this part of Policy v.3 was erroneous in law because it provided for TCR's to be rejected where inquiries had not yet established whether the family link existed or whether it was in the best interests of the child to have the asylum claim considered in the UK. As the CJEU had made clear TCR's had to be addressed within the timescales and it was not appropriate to send holding replies, and a member state had a duty to provide full and detailed reasons for any refusal, see *X and X* at paragraph 67. It was therefore not appropriate to reject TCR's because the family link had not been established with sufficient confidence. This is because the Secretary of State should have carried out sufficient investigations so that it could be said whether the family link existed or did not exist.

85. Similarly it was not appropriate to reject a request where the family link had been established but inquiries about whether it was in the best interests of the UAM to determine the claim in the UK were ongoing. Again this is because the Secretary of State should have carried out sufficient investigations to enable that question to be answered. It might also be noted that if a TCR was accepted, the issue of transfer still needed to be addressed, where the best interests of the child would again be considered.

86. Although there were some amendments to the wording of this guidance in Policy v.4 and Policy v.5 they were not material amendments which had the effect of removing the advice which was erroneous in law. Policy v.4 stated: "In cases involving a take charge request based on Article 8 of Dublin III where the 2- month period from the receipt of the TCR is drawing to an end **and despite having made reasonable and timely enquiries** it has not been possible to establish with sufficient confidence … **the formal rejection of TCRs before the end of the 2-month period is necessary** to prevent default acceptances of TCRs." Policy v.4 continued: "At the end of the two-month period where enquiries have not produced sufficient evidence in relation to the family link and/or best interests, and if enquiries remain ongoing at the point of rejection of the TCR**, then this should be stated alongside the reasons given for rejecting the TCR. The requesting State should also be reminded of its ability to make a re-examination request within the next 3 weeks** … All reasonable endeavours must be made to conclude necessary enquiries prior to the expiration of the two-month deadline. Accurate records should be kept detailing progress on consideration of the TCR throughout the process for audit purposes." (emphasis added).

87. It is apparent that the policy guidance was therefore amended from Policy v.3 to provide for all reasonable and timely enquiries to be made and to ensure that the Dublin III process continued where no good reason had been given for the rejection of the TCR. The amendments, however, specifically provided for a practice of sending a "formal rejection of the TCR" at a time when it was not yet possible to give full and detailed reasons (as required by *X and X*) for the rejection, because the inquiries were ongoing. This meant that the guidance was erroneous in law.

88. I should record that it is apparent from the witness statement of Ms Farman that the practice on the ground did change from 1 March 2021 and did not reflect some of the policy guidance set out in Policy v.5. This does not alter the fact that the policy guidance set out in Policy v.5 was erroneous in law. Therefore the guidance which was erroneous in law in this respect was in Policy v.3, v.4 and v.5.

89. I turn now to deal with complaints made about the policy guidance which I do not accept gave advice which was erroneous in law or would lead to, permit or encourage unlawful acts. I do not accept that the advice about the "onus" was erroneous in law although the wording might have been more clearly expressed. Policy v.3 set out the elements of proof and evidence that must be provided in order to confirm a family relationship. The guidance made it clear that it was not essential that DNA evidence be provided. However the guidance did say that the '**onus is on the applicant and their qualifying family member, sibling, or relative to prove** their relationship and satisfy you that they are related as claimed' (emphasis added). The policy guidance did go on to refer to considering evidence submitted by the requesting state, including circumstantial evidence, evidence from the standard forms, as well as "**information contained in Home Office records**" (emphasis added) and evidence submitted by the person in the UK, to be satisfied that the parties are related as claimed."

90. In my judgment, on a fair reading of the policy guidance as a whole, it was apparent that the policy guidance was directing the caseworker to consider all the evidence which had been obtained, from whatever source, to determine whether the family link had been satisfied. The policy guidance did not say that the Home Office should not discharge its investigatory duties, and the reference to evidence in the Home Office records shows that caseworkers were going to carry out investigations into the claimed link on the TCR. Although it might have been sensible to avoid referring to onus in circumstances where there was an investigatory duty on the Secretary of State, it is not possible to say that the reference to it made the advice given in the guidance erroneous in law.

91. Complaint is made that there was not in Policy v.3 advice to caseworkers to go back to family members to raise any concerns that they might have about facts on which the TCR was based. It was noted that in *BAA* the Upper Tribunal had suggested that consideration should be given to the policy guidance to include provision for the caseworkers to raise issues with family members. In Policy v.4 a new passage was added, as appears above. The relevant passage explains: "… In some cases, where a caseworker forms a preliminary view that the TCR should be refused they may … consider it appropriate to notify the claimed family member(s) of the proposed reasons for refusal so as to give them an opportunity to respond. Caseworkers are encouraged to provide this opportunity, if time allows and it is reasonable to do so … **Due to the strict Dublin III timeframes, caseworkers should require a response within a maximum of 7 days.**" (emphasis added). Ms Kilroy submitted that even though the point had been addressed this period of time was too restrictive and caseworkers were given a discretion when in fact it was an obligation if fairness required it. Mr Payne submitted that there was no requirement to include any guidance about reconsideration in Policy v.3, and that the guidance in Policy v.4 and v.5 was not erroneous in law.

92. In my judgment the absence of guidance about the desirability of notifying claimed family members about concerns in Policy v.3 did not make the policy guidance erroneous in law. This is because there was nothing in the policy guidance which prevented such an inquiry being made where it was appropriate. When it became apparent that caseworkers were not acting fairly and seeking further comments when fairness required that to be done, it was suggested in *BAA* that the guidance be amended, but it was not said (or apparently submitted in *BAA)* that the absence of such a passage made the policy guidance unlawful. Policy guidance does not become unlawful because it fails to state all the principles of fairness required of decision makers on matters of public law.

93. As to the specific criticism of the wording inserted in the Policy v.4 (and continued into Policy v.5) on this matter, I do not find that the guidance was erroneous in law. It is right that the 7 day limit was very short, but this was in the context of the strict time limits in Dublin III. In this respect the requirement of fairness will vary from case to case, and if more than 7 days was required, the guidance did not require any relevant response received outside that period to be ignored. Further it was appropriate for caseworkers to have a discretion to take account of time requirements and reasonableness, because what fairness requires will be fact specific.

94. In relation to that part of the complaint which related to the advice on re-examination requests, it was said to misapply the decision of the CJEU in *X and X*. It is apparent from judgments of the Upper Tribunal that a practice grew up in member states of

considering and re-considering TCR's. This was held to be lawful under Dublin III, although this would lead to consideration after the formal time limits in Dublin III had expired. It appears that this practice derived from the need to ensure that the best interests of the UAM's were vindicated. The policy guidance set out in Policy v.3 included "In the event of a negative reply to a take charge or take back request, it is open to the requesting State to challenge the refusal by asking that its formal request be re-examined … However in *X v X* the CJEU also ruled that if a reply to the request for re- examination is not received within 2 weeks that process ends and the requesting Dublin State retains responsibility, unless it is possible to make a new request to take back or take charge within the time limits in Dublin III. **A rejected request can only trigger one re-examination procedure, it is not possible to call for repeated re-examinations in the same procedure.**" (emphasis added). This was consistent with the later passage at page 52 of Policy v.3 which referred to article 5 of the Implementing Regulations. It is said that the particular passage misstated the effect of Dublin III and the decision of the CJEU in *X v X*.

95. The relevant passage at page 37 went on, however, to provide that "In cases involving the humanitarian provisions in article 17(2) of Dublin III **a request can be made at any time before a first decision is made on the substance of the asylum claim**" (emphasis added). This made it clear that further requests could be made and would need to be considered. I accept Ms Kilroy's submissions that it was possible for more than one reconsideration request to be made under Dublin III, and for reconsideration requests to be entertained even if made after the 3 week period, but I do not consider that, read as a whole by the reasonable caseworker to whom this policy guidance was directed, the advice was erroneous in law or would lead to, permit or encourage unlawful acts. This is because the policy guidance expressly contemplated that further requests might be made which would need to be considered. A similar provision, contemplating further requests being made, was contained within Policy v.4 to which the same considerations apply. The text of Policy v.5 properly reflects the amended position which now exists following 31 December 2020. In submissions Ms Kilroy placed reliance upon the recent decision of UTIAC in *R(SM) v SSHD* (JR/1592/2020), but this case was a fact-specific challenge related to that case. I am not satisfied that the policy conflicted with the conclusions of the CJEU in *X and X*, or that as drafted in each of the versions under consideration was likely to lead to unlawful decisions in relation to the optional process relating to requests for re-examination.

96. There were some other complaints made about specific passages in the policy guidance, for example relating to DNA and translations. One of the passages relating to translations was criticised for being opaque. In my judgment, apart from the two specific parts of the guidance identified above, none of the other passages provided advice which was erroneous in law or would lead to, permit or encourage unlawful acts.

97. There is no doubt that others, such as Safe Passage, would have drafted the guidance set out in Policy v.3, v.4 and v.5 differently, and emphasised different aspects of Dublin III and the Implementing Regulation. However the responsibility for producing the policy guidance was with the executive, and specifically the Secretary of State. The Court's function is limited to finding whether the guidance provided advice which was erroneous in law or would lead to, permit or encourage unlawful acts. I have found two parts of the policy guidance to have given advice which was erroneous in law. As to the other passages, the fact that passages might have been differently worded or the

wording might have been improved, does not make the advice erroneous in law or lead to, permit or encourage unlawful acts.

Remedies – issue four

98. The fact that guidance directed to caseworkers gives advice which is erroneous in law may lead to unlawful decisions. This does not assist UAM's, who may have been wrongly denied the right to re-join family members while the claim for asylum was being processed. It does not assist the Secretary of State, who may have acted in breach of obligations and may have made decisions which were unlawful and which are liable to be set aside, as appears from some of the decisions in the Upper Tribunal referred to above. It does not assist the Court or Upper Tribunal, which may have to deal with the resulting claims. There is therefore a principled reason to make the position clear.

99. In its note on remedies Safe Passage identified that it was seeking: declarations that Policy v.3, Policy v.4 and Policy v.5 were unlawful; a quashing order in respect of Policy v.5; and a direction that the Secretary of State notify and send the judgment and order to member states and relatives of UAMs who received refusals of TCRs when the unlawful guidance was in place. The Secretary of State submitted that all the relief sought should be refused.

100. I deal first with the issue of a declaration. It is right to note that Policy v.3 and Policy v.4 are no longer in force, but they were in force at times during the challenge and, for the reasons set out in paragraphs 69 and 70 above, I consider that it is appropriate to consider the challenge to these Policy versions. I also accept that, at the time of the hearing, there were only 14 applications outstanding and that there was evidence that the Secretary of State's practice had changed, but I do not accept that the challenge had become hypothetical and academic, see *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450 at page 457. This is because there are parts of the policy guidance which will continue to apply. Further, as was made clear in *R (Hunt) v North Somerset Council* [2015] UKSC 51; [2015] 1 WLR 3375 at [12] that "in circumstances where a public body has acted unlawfully but where it is not appropriate to make a mandatory, prohibitory or quashing order, it will usually be appropriate to make some form of declaratory order to reflect the court's finding … simply to dismiss the claim when there has been a finding of illegality is likely to convey a misleading impression and to leave the claimant with an understandable sense of injustice." The declaration is not that Policy v.3, v.4 and v.5 are unlawful, because there were substantial parts of the policy guidance which did not give advice which was erroneous in law. In this case the declaration should identify the specific parts of the policy guidance which was erroneous in law, according to the terms of this judgment.

101. In my judgment it is not appropriate to make a quashing order in relation to Policy v.5 (it was common ground that there should be no quashing order in relation to Policy v.3 and v.4 because they had been superseded by Policy v.5). This is because there are substantial parts of the policy guidance which are not erroneous in law. Further it is because the appropriate order is, in my judgment, a declaration.

102. In my judgment it is not appropriate to make an order requiring that the Secretary of State notify the terms of this judgment to Member States and to family members resident in the UK with whom a UAM sought to join. This is because the principled function of the court on an application for judicial review is to audit the legality of the

relevant decision-making, and on occasions as in this case, to decide whether the Policy guidance gave advice which was erroneous in law. The court has attempted to discharge that function, and the executive must comply with the law as it has been declared (unless the declaration is set aside or varied on an appeal), see generally *R (National Council for Civil Liberties) v Secretary of State for the Home Department* [2018] EWHC 975 (Admin); [2019] QB 481 at paragraph 52.

103. It is, however, for the executive to make the decisions in accordance with the law, and it is not (exceptional cases apart) for the court to become the decision maker. This reflects the separation of powers, and also takes account of the fact that the court lacks time and expertise to attempt to manage decision making on the part of the executive. Ms Kilroy placed much reliance on the order made in *JCWI v President of the Upper Tribunal* [2020] EWHC 3103 (Admin). That case concerned guidance published by the President of UTIAC during the Covid-19 pandemic. The guidance addressed whether appeals from the First-tier Tribunal could be determined in the Upper Tribunal on the papers without an oral hearing, due to the COVID-19 pandemic. The Court found that the guidance was unlawful. The guidance was quashed and the Court required the President of the Upper Tribunal to undertake to use all reasonable endeavours to notify all individual appellants who had lost appeals after a determination on paper, of the terms of the judgment and to indicate that they should seek legal advice.

104. The order in *JCWI* might have been permissible in the very particular circumstances of that case. This is because the undertaking to use reasonable endeavours to give notice to appellants was required of the Upper Tribunal and related to decision making in courts and tribunals. This is a particular matter about which courts have expertise. Such a situation is very different from requiring the Secretary of State to send communications to member states which raises, among other matters, issues of the conduct of foreign affairs. I therefore do not make any further order, and would leave the Secretary of State to give practical effect to the declarations made by this Court.

Conclusion

105. For the detailed reasons set out above: (1) I would admit the witness statement of Ms Farman; (2) I would consider the challenges to Policy v.3 and v.4, as well as the challenge to Policy v.5; (3) I find that there are two parts of the policy guidance which gave advice which was erroneous in law; and (4) I would grant declarations to that effect.

Mr Justice Dove:

106. I agree.