



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

JR/1652/2020
(‘V’)

In the matter of an application for Judicial Review

The Queen on the application of

‘AA’

and

‘AMA’ (a child by his litigation friend, ‘DA’)

Applicants

versus

Secretary of State for the Home Department

Respondent

ORDER

(REISSUED PURSUANT TO RULE 42 OF THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008, AS UNDERLINED AT (6) BELOW)

BEFORE Upper Tribunal Judge Keith

HAVING considered all documents lodged and having heard *Ms J Sane*, instructed by Wilsons Solicitors LLP, for the applicants and *Mr J Fraczyk*, instructed by GLD, for the respondent at a hearing on 10th August 2021

IT IS ORDERED THAT:

- (1) The application for judicial review is granted, to the extent that the respondent’s decisions of 25th March 2020 and 11th March 2021 were a breach of Regulation 604/2013 (the Dublin III regulation), for the reasons set out in the attached judgment. The challenges to those decisions on grounds other than the Dublin III regulation are refused, for the same reasons.
- (2) There is a declaration that the respondent’s decisions of 25th March 2020 and 11th March 2021, which have previously been withdrawn, were unlawful. Based on their withdrawal, it is unnecessary to quash them.
- (3) The application for judicial review of the respondent’s decision dated 11th June 2021 is refused, for the reasons in the attached judgment.

Costs

- (4) The respondent is ordered to pay the applicants’ reasonable legal costs of their applications, up to 11th June 2021, the date of the respondent’s final Dublin III regulation decision, to be assessed, if not agreed. Costs incurred after that date are reserved.

Reasons

- (5) I considered the authority of M v London Borough of Croydon [2012] EWCA Civ 595, and the general principle that costs follow the event. However, I also considered and note Ms Sane's submissions that:
- a. The respondent agreed to reconsider her decision of 25th March 2020 and, after the applicants filed and served Amended Grounds of Claim on 16th March 2021, ultimately withdrew her decisions of 25th March 2020 and 11th March 2021;
 - b. The applicants have succeeded in establishing, after a fully contested hearing, that the respondent's decisions of 25th March 2020 and 11th March 2021, were in breach of the Dublin III regulation. Those challenges were not academic;
 - c. The respondent's conduct of the litigation incurred further costs. This included non-compliance with the Upper Tribunal's directions, as set out in the judgment; and electing only to withdraw the first two decisions on the morning of the resumed substantive hearing on 21st May 2021.
- (6) The applicants have succeeded in part of their applications. Bearing this and the factors set out above in mind, it is appropriate to award the applicants their reasonable legal costs, up to 11th June 2021, to be assessed if not agreed. Costs after that date are reserved, pending final resolution of the applicants' applications for damages.

Permission to appeal to the Court of Appeal

- (7) The applicants' application dated 1st September 2021 for permission to appeal is refused.

Reasons

- (8) The application for permission to appeal is based on five grounds, which, in turn, are sub-divided.
- (9) In relation to ground (1), the issue of contact via social media was explored and adequately reasoned at §§85 to 87; and 96 to 98 of the judgment. The nature of the evidence (WhatsApp contact) was unarguably considered and the Upper Tribunal was entitled to consider that the respondent's decision of 11th June 2021 had referred to the absence of communication, not solely telephone records. The Upper Tribunal was further entitled to consider that the same issue had been raised in the previous decision of 11th March 2021; and was in the context of AA and DA having re-established contact through social media (Facebook). The existence of social media evidence (including WhatsApp) was explored with the representatives at the hearing, and was in the context of both parties' duty of candour. The Upper Tribunal also unarguably analysed and explained at §97 why the applicants' explanations for the lack of full disclosure were not adequate.
- (10) Contrary to ground (2), the Upper Tribunal did not refer at §79 to the respondent having complied with her investigative duty. This passage of the judgment

supported the conclusion at §83 that the respondent's decision of 11th March 2021 was unlawful.

- (11) In relation to ground (3), the Upper Tribunal was entitled to analyse at §103 the presumption of AMA's best interests in reunification with AA, based on the theoretical framework as it applied to the facts known to the respondent. There was no arguable inconsistency between that analysis and the analysis of the March 2021 decision, which, at §80, the Upper Tribunal had criticised for reversing the presumption of AMA's best interests. The Upper Tribunal was similarly entitled to consider, at §98, the respondent's concerns about the report of Mr Horrocks and his views were unarguably and adequately considered. It was also permissible to analyse, at §100, the history of past separation as having a bearing on the reliability of AA's assertions about his future intention to play a more active role in AMA's life.
- (12) In relation to ground (4), the criticism that the Upper Tribunal failed to afford to weight to Mr Horrocks's report is a simple disagreement with the Upper Tribunal's analysis and findings. The Upper Tribunal's analysis of the "status quo" (the physical separation of AA and AMA, albeit supplemented by visits) was clearly explored at §104 and the Upper Tribunal was unarguably entitled to consider factors such as financial support and DA's new partner as relevant.
- (13) Contrary to ground (5), the Upper Tribunal was entitled to consider that the respondent had highlighted the issue about the lack of evidence of communications in her decisions of 11th March and 11th June 2021. In that context, the Upper Tribunal was entitled to consider that upon withdrawal of that earlier decision, the applicants had had the opportunity to adduce any further and full disclosure about communications. The Upper Tribunal unarguably considered the procedure and process by which the applicants were aware of the respondent's concerns; whether the respondent had investigated these concerns (at §109); and whether the applicants had had the opportunity to address those concerns.

Further directions

- (14) The applicants shall confirm to the Upper Tribunal and the respondent, by 4pm on 16th September 2021, whether they intend to continue to pursue the remedy of damages. If they do, at the same time, the applicants must apply to amend the grounds to provide full particulars of the damages sought and the basis of such damages.
- (15) Following the applicants' compliance with the further direction above, the Upper Tribunal shall consider what further directions are necessary for disposal of this application, including any orders as to costs.

Signed: *J Keith*

Upper Tribunal Judge Keith

Dated: **2nd September 2021 (Reissued 3rd September 2021)**

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

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

Solicitors:

Ref No.

Home Office Ref:

Notification of appeal rights

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

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

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



Case No: JR/1652/2020 ('V')

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Brearms Buildings
London, EC4A 1WR
And via Teams
On 10th August 2021

Before:

UPPER TRIBUNAL JUDGE KEITH

Between:

THE QUEEN
on the application of

'AA'

-and-

'AMA' (a child by his litigation friend 'DA')

(Anonymity direction continued)

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Applicants

Respondent

Ms J Sane

(instructed by Wilsons Solicitors LLP), for the applicant

Mr J Fraczyk

(instructed by the Government Legal Department) for the respondent

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

Unless and until a Tribunal or court directs otherwise, the applicants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. Failure to comply with this direction could lead to contempt of court proceedings.

J U D G M E N T

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Judge Keith:

Introduction

1. Both representatives attended the hearing via Teams, while I attended the hearing, which was open to the public, at Field House. The parties did not object to attending via Teams and I was satisfied that the representatives were able to participate in the hearing.

The application

2. The first applicant, AA, is a Somali national with recognised refugee status in South Africa. He is the non-resident father of the second applicant, AMA, a British national child born on 11th March 2012 in the UK to a naturalised British citizen mother of Somali ethnic origin, DA. AMA and DA live in the UK. They have never cohabited with AA, other than for very brief periods of a few weeks, twice in AMA's life, as discussed later in these reasons. AA was originally married under Islamic law to DA in 2011, but their marriage ended in 2019. They remain on friendly terms and DA supports the application of AA and AMA.
3. AA's most recent asylum claim was registered with the authorities of Greece, where he currently resides, on 13th October 2017. The Greek authorities made the first "Take Charge Request" or "TCR" under Article 17(2) of EU regulation 604/2013 (the Dublin III regulation) on 22nd October 2018. The respondent refused that request in a decision dated 25th January 2019. That decision has not been challenged by way of judicial review. On 14th February 2019, the Greek authorities asked the respondent to re-examine her decision, which the respondent refused on 27th June 2019. That decision has also not been challenged by way of judicial review. The Greek authorities then made a further request for reconsideration on 17th July 2019, which the respondent refused on an unspecified date, although a copy of the decision was forwarded to the applicant's representatives by the Greek authorities on 4th March 2020.
4. In the meantime, on 21st February 2020, the Greek authorities made a second TCR, on the same basis as the first, but with further evidence, which the respondent refused in her initial decision dated 25th March 2020. The applicants applied on 25th June 2020 for judicial review of that decision.
5. Following an initial refusal of that application on the papers (Upper Tribunal Judge Kekić) on 28th July 2020, at an oral hearing on 10th September 2020, Upper Tribunal Judge Allen granted permission for the application to proceed on all grounds. Following that decision, the parties asked this Tribunal to issue a consent order, whereby the application for judicial review was stayed pending the outcome of the respondent's review of new

evidence provided following the decision of 25th March 2020. The consent order was dated 22nd February 2021 and there were further directions which are referred to elsewhere in these reasons. Suffice it to say at this stage, the respondent issued a further decision of 11th March 2021, which maintained her refusal to accept responsibility for AA's asylum claim. The second decision considered further evidence, including that of an independent social worker ("ISW") report of Peter Horrocks. The applicants continued to challenge the original decision and the new decision in the same set of judicial review proceedings.

6. At the beginning of a substantive hearing of the judicial review application on 21st May 2021, Mr Fraczyk orally confirmed that the respondent was withdrawing her decisions of 25th March 2020 and 11th March 2021. The respondent then issued a final decision on 11th June 2021, maintaining her earlier refusal of the second TCR.
7. The background to the second TCR is that AA has been granted asylum in South Africa. AA and DA started their relationship via Facebook, as DA lives in the UK. She travelled to South Africa in or around June 2011; married AA on 25th June 2011; stayed with him in South Africa, during which time she fell pregnant; and returned to the UK on 23rd July 2011. DA explored the possibility of applying for entry clearance for AA, but the couple did not meet the requirements of the Immigration Rules. She visited him on two further occasions in South Africa, again for brief periods: a few months after AMA's birth in March 2012; and from late December 2014 to mid-February 2015, bringing AMA with her; and on each occasion returning to the UK with AMA. AA then left South Africa in 2015, because of what he claims is racism and xenophobia towards the Somali minority community from those within the South African majority society. He travelled to Somalia where he lived for a further period and then made his way to Greece in 2017, from where he seeks reunification, initially based on both marriage and parental status, but now solely based on being AMA's father, in the context of his asylum claim. The second TCR by the Greek authorities inaccurately states that AA has not previously applied for asylum elsewhere, which is plainly incorrect, as on his own account, he was granted asylum in South Africa.
8. The gist of the respondent's refusals is that whilst the respondent does not dispute AAs' biological parentage of AMA, and she now accepts, in the third decision, that family relations exist between AA and AMA, she does not accept the existence of family life between the two; or that refusal of the TCR is disproportionate. They have only physically met on two brief occasions, the last of which was more than five years ago, and the initial separation of AA and DA was a voluntary one and not in circumstances of any claimed fear of persecution. Put simply, AA and DA had entered into a

long-distance relationship, which has since ended. The respondent also did not accept the analysis of Mr Horrocks and took issue with his assessment of the claimed familial relationships between AA and AMA, suggesting that his comments about the regularity of contact was, and remains, unsupported by the evidence, which the respondent assessed as sparse.

Previous orders

9. When granting permission, Judge Allen had issued standard directions on 10th September 2020, including the service by the respondent of detailed grounds within 35 days of the order and full disclosure by both parties in relation to any written evidence within the same timeframe.
10. The respondent failed to file detailed grounds of defence within the relevant timeframe. In the meantime, on 16th November 2020, the applicants applied for an extension of time to file the ISW report of Mr Horrocks. That application was granted by Upper Tribunal Judge Hanson on 4th January 2021.
11. On 22nd February 2021, Upper Tribunal Lawyer Hussain issued case management directions whereby if the respondent wished to contest the claim on additional grounds, she must serve the applicants and the Upper Tribunal detailed grounds within 21 days.
12. The parties agreed the consent order dated 23rd February 2021, which stayed the proceedings, pending a review of the March 2020 decision, on receipt of further evidence. The March 2020 decision was not, at this stage, withdrawn. The applicants were directed to inform the Upper Tribunal within two days of the outcome of a review decision whether they intended to continue with their challenge and if they did, to file amended grounds of claim. The respondent had seven days from receipt of those grounds to file amended summary grounds in response, if so instructed.
13. On 13th May 2021, following applications by both parties, Upper Tribunal Lawyer Hussain indicated that the applicants' application to rely upon additional evidence in the form of witness statements of AA and DA; objective evidence regarding the risk to Somali nationals in South Africa; and a supplementary ISW report of Peter Horrocks would be considered as a preliminary issue at the beginning of the substantive hearing on 21st May 2021. Upper Tribunal Lawyer Hussain noted that the respondent objected to the application on the basis that it was disproportionate and might risk a postponement of the substantive hearing listed for 21st May 2021. Upper Tribunal Lawyer Hussain indicated that the parties should prepare for the hearing on the basis that the application to admit the additional evidence would be granted, although this was not to be treated as an expression of the likelihood that it would.

14. The same directions confirmed that the respondent was granted her application for an extension of time to file and serve detailed grounds of defence by 11th May 2021, while the applicant was directed to file and serve a reply to the detailed grounds of defence by 17th May 2021. Finally, the respondent was directed to file and serve a skeleton argument on 19th May 2021. She did so several hours late, albeit with production on that day.
15. I adjourned the hearing on 21st May 2021 in light of the respondent's withdrawal of both her decisions and I issued further directions. I noted Ms Sane's position (clearly stated) that the applicants did not regard their challenges to these withdrawn decisions as academic, not least because the applicants were seeking damages, both under the Dublin III regulation and in respect of the alleged breach of the right to respect for their family and private life under Article 8 of the European Convention on Human Rights ("ECHR"). The respondent then issued her June 2021 decision, following which the applicants filed amended grounds of application on 18th June 2021 and the respondent served amended detailed grounds of defence on 24th June 2021. Further standard directions were then issued on 26th May 2021.
16. The applicants served their written skeleton argument in advance, and, it appears, in accordance with directions that they be filed no less than 14 days before the relisted hearing, i.e., not later than 27th July 2021. In breach of those directions, the respondent applied, after hours on 4th August 2021, to file the respondent's skeleton argument. That application was opposed and was one of two preliminary applications that I dealt with at the start of the resumed hearing.

The hearing on 10th August 2021

17. I began the hearing by identifying with the representatives the documents that I was being asked to consider and the issues that they asked to be resolved today.
18. In terms of the documentation, there are two bundles, a main bundle containing the substantive documents, which I will refer to as the applicants' bundle or "AB"; and a separate authorities bundle. In addition to the authorities bundle, Ms Sane sent through several authorities via email and there were also cost submissions sent through on the morning of the hearing. In terms of the structure of the applicants' main bundle, regrettably it was not in date order and the numbering included a number of divider references, so for example there was a section AI followed by a number sequence and then a separate A2 section followed by its own number sequence together with sections B to D. The documents themselves were not in chronological order, so to some extent it was necessary to jump around between different parts of the bundle. I mention this to discourage the

structure of such bundles in the future, which did not help in respect of ease of reference.

19. I also agreed with the representatives, following identification of the relevant documents and having to deal with the two preliminary applications on the morning of the hearing, which took at least an hour, that I would deal with only questions of liability at this stage, and any question of remedies and costs would need to be dealt with at a later hearing or in submissions. Both representatives had indicated that that is what they had anticipated following the earlier hearing on 21st May 2021. I turn now to the two preliminary applications.

The application to serve the respondent's skeleton argument

20. In very simple terms, the application had been made late, the application notice explaining that because of professional commitments, the respondent's Counsel had been unable to prepare the skeleton argument on time. Mr Fraczyk urged me to consider that where, as here, he had had substantial involvement in the defence of the application for an extended period it would not have been appropriate to instruct alternative Counsel. Whilst the respondent did not belittle the importance of compliance with Tribunal directions, nevertheless the applicants had not been prejudiced as a result.
21. In response, Ms Sane referred to the well-known authority of Denton & Ors v TH White Ltd & Ors [2014] EWCA Civ 906 and the three factors in that decision. In particular, the delay was not insignificant; the explanation for the delay was wholly unsatisfactory and in an evaluation of all the circumstances of the case, the application should be refused. Instead, the respondent's oral submissions should be limited to those set out in the amended detailed grounds of defence.
22. I concluded that it was appropriate and in accordance with the overriding objective to allow the application to admit the respondent's skeleton argument. On the one hand, I was conscious that the delay was significant, and I concluded that the explanation for it was not satisfactory. On the third limb, however, considering all the circumstances of the case, Ms Sane accepted that while her preparation had been condensed into a shorter window than she would otherwise have had, she had been able to prepare adequately for the hearing. The prejudice to the applicant was therefore limited. Also, the skeleton argument would assist me in what was a complex case. Without in any way minimising the importance of compliance with Tribunal directions, as per R (Spahiu) v SSHD EWCA Civ 2604, I granted the application to extend time to admit the respondent's skeleton argument.

The applicants' application to adduce the additional evidence

23. As referred to earlier in these reasons, the applicants sought to rely upon several additional documents which had post-dated the 11th March 2021 decision. In view of a third decision having been made on 11th June 2021, which had considered much (but not all) of this additional documentation, Mr Fraczyk accepted that it was appropriate for the additional documents to be admitted, with one exception. The exception related to the media reports, copies of which were at pages AI[10] to AI[23] AB, which were said to relate to the applicant's flight from South Africa because of his claimed fear of persecution, following xenophobic attacks on the Somali community within South Africa. Ms Sane urged me to consider the documents in light of the factor, on which the respondent had placed weight, that the separation between AA and DA had not been voluntary.
24. For his part, Mr Fraczyk, in the context of an hour already having been spent on preliminary issues, indicated that he would leave it in the Tribunal's hands, suffice it to say that it was not appropriate for this Tribunal to make any finding as to why the applicant had in fact fled South Africa.
25. In the context where the media articles had been adduced and referred to as exhibits to an updated witness statement which had been admitted, and where, as here, the respondent had taken issue with the voluntary nature of separation between AA and DA, I regarded it as appropriate to admit the evidence, but in doing so, made it clear that it was not necessary for me to make any finding as to the reason why the applicant had left South Africa, bearing in mind this was not a statutory appeal of a protection claim.

The substantive issues

The applicants' application for judicial review

26. I turn next to the amended grounds, a copy of which is at pages A2[10] to A2 [61] AB. Given the length of the grounds, I do no more than summarise them, but I have considered them in full. The grounds have multiple sub-grounds, which substantially overlap.
27. The applicants continue to challenge all three respondent decisions, including the two earlier (now withdrawn) decisions of 25th March 2020 and 11th March 2021 and the final decision of 11th June 2021. The respondent's initial refusal to accept the second TCR under Article 17(2) of the Dublin III regulation is said to be unlawful because the only permissible exercise of discretion in accordance with AMA's best interests as a child and that of the family as a whole was to accept the TCR, in accordance with R (HA & Ors) v SSHD (Dublin III; Articles 9 and 17.2) [2018] UKUT 00297 at §32.

28. The decision was also said to breach the respondent's obligations under Article 8 ECHR, Articles 7 and 24 of the EU Charter of Fundamental Rights ("CFR"); and the reasons given for refusal failed to consider properly the evidence of clear and compelling humanitarian grounds based on prolonged and involuntary separation of a father and his young vulnerable child with whom he shares a family life and close bond. The second decision of 11th March 2021 was similarly flawed.
29. Moreover, the Dublin III regulation does not permit the withdrawal of a TCR decision and as far as the applicants are aware, the respondent has not notified the Greek authorities of her withdrawal of the first two decisions. Instead, the TCR decisions could be reversed through the exercise of a remedy or an inter-state conciliation mechanism under Dublin III. The appropriate way forward was for the respondent to reverse her decision and notify the Greek authorities. The applicants have a right to an effective remedy regardless of the withdrawal of the earlier decisions – see MS v SSHD [2019] EWCA Civ 1340. An individual asylum seeker has a right to enforce correct application of the Dublin III regulation, not being dependent upon a member state's discretion to withdraw or reconsider a previous refusal.
30. Without prejudice to that contention, the final decision of 11th June 2021 fails to consider the humanitarian grounds, that the only lawful decision based on the further ISW report was for the second TCR to be accepted. In particular, the respondent had misdirected herself by requiring evidence of "dependency" which was not required for the purposes of establishing family life between parents and their natural-born children born out of a lawful marital union (see Sen v Netherlands [2003] 36 EHRR 7) and she failed to have regard for the potential for full-blown family life (see Ahmadi v SSHD [2005] EWCA Civ 1721). The respondent failed to carry out a lawful assessment of AMA's best interests, including failing to comply with the respondent's own guidance on conducting best interest assessments. In particular, the guidance suggested that reunification would be in AMA's best interests unless there were contra-indicating factors relating to safety concerns. The guidance had not been considered or applied.
31. In terms of the factual context, and without rehearsing the full factual circumstances, which I set out in more detail in the findings, the applicants referred to an NHS medical assessment of 2018 relating to AMA, which confirmed his autism, and a social worker report from the Danish Refugee Council. Whilst the first TCR refusal and reconsideration decision had never been challenged, the respondent had had documents said to support a consistent theme of AMA's vulnerability at an early stage. The DRC social worker report had recommended that it was in the best interests of AMA to be reunited with AA.

32. In the second TCR of 21st February 2020, the Greek "Dublin" unit referred to AMA's autism and the strong emotional connection between AA and AMA. The Greek authorities also referred to the witness statements of AA and DA setting out the history of their relationship; their decision to divorce but the continuing relationship between father and son. They urged the respondent to consider this evidence. This was supplemented by written representations by the applicants' solicitors on 6th March 2020. The applicants' grounds reiterated the detail of the strength of the relationship between AA and AMA based on the ISW of Peter Horrocks, who concluded that it was very strongly in AMA's best interests be reunited with AA (see §49 at page A2 [26] AB). Having recited at length the immigration history, which I have only touched on briefly, the applicants' grounds recite the law and the respondent's guidance to caseworkers, version 2.0, published on 18th April 2019 (pages C [73] to [118] AB). The guidance recognised, at internal pages [39] to [40], that the re-establishment of family links would normally be regarded in the best interests of a child, save where a family member posed a serious risk to that child. Having recited at length various case law, finally at page A2 [42] AB, the first ground is identified and broken down into five numbered parts with additional parts that follow.
33. The first overarching ground is that the respondent's processing of the second TCR and refusal to accept responsibility was unlawful, being in breach of EU law, common law and Article 8 ECHR. First, the second TCR fell to be accepted and not rejected in view of the applicants' right to respect for family life and AMA's best interests.
34. Second, the respondent had failed to give any proper consideration to family life or the proportionality of maintaining their separation. It was clear that there was no question on the facts that AA and AMA shared family life. The refusal plainly interfered with their right to respect for family life and the respondent had offered no justification for that interference.
35. Third, in rejecting the second TCR, the respondent had demonstrably failed to consider clear and compelling humanitarian grounds based on family and cultural considerations including AMA's particular vulnerability; the strength of the ties between AA and AMA; the fact that ongoing separation was causing distress; AA's unsuitable living conditions in Greece; and the refugee protection claim, with related reasons for the family's involuntary separation and the absence of alternative and appropriate options for family reunification outside the UK, as explained by the DRC social worker.
36. Fourth, the respondent had failed to comply with the requirement to assess and treat the best interests of AMA as a primary consideration. The respondent's conclusion that it was not in AMA's best interest to be reunited was unreasonable and irrational. The claimed lack of evidence that AA was

emotionally involved in AMA's upbringing since 2012 or financially supported him was flawed because the starting point was that it was in the best interests of AMA to be raised by both parents regardless of whether DA was his primary caregiver up till now. The applicants reiterated the respondent's own policy on re-establishment of family links. The respondent failed to give proper reasons why AMA's best interests in family reunification were outweighed by the facts in this case in the absence of any countervailing risk factors to his safety or welfare.

37. Fifth, the respondent had investigatory obligations under the Dublin III regulation and to act fairly in accordance with common law obligations by investigating claimed family relationships and giving the applicants the opportunity to address any credibility concerns. If the respondent had been minded to reject the Greek authorities' assessment, then fairness required that they be told of the concerns with sufficient time to respond. It was unclear why no such steps had been taken by the respondent and any further reasons set out in pre-action protocol correspondence did not satisfy the requirement under the Dublin III regulation.
38. In relation to the second ground, the applicants asserted that the UK is the responsible member for AA's asylum claim and that the applicants' fundamental rights have been breached. The basis for that submission overlaps substantially with the first ground, reiterating that the only decision consistent with Article 17(2) of the Dublin III regulation is to exercise discretion, particularly where the ECHR guidance is that family life is generally found to exist between a father and his child born within a lawful marital union. The fact that the applicants had provided limited documentation did not meet the high threshold of "exceptional circumstances", so as to justify refusal of the second TCR. In any event, the respondent had failed to engage with evidence substantiating the exceptionally strong ties between AA and AMA.
39. The respondent had failed to demonstrate that interference with the applicants' rights was necessary or proportionate and that was something which the Upper Tribunal itself must assess, considering evidence, even that which was not before the decision-maker. In terms of relevant factors for a proportionality exercise, there was the fact that reunification in the UK was the only realistic and reasonable prospect for family reunification as the family could not be reasonably expected to reunify in Greece where AA had no stable home or means of survival and DA could not be expected to leave the UK where she had citizenship and another adult child with whom she cohabited. The long separation of AA and AMA was also relevant.
40. The third ground was that the decision of 11th March 2021 was unlawful based on five subcategories. The first was that the decision was silent on the

criteria in relation to Article 17(2) of Dublin III and conflated the requirement of parental relationship with family relations, with only the latter being required under Article 17(2). The decision had ignored the evidence before the respondent.

41. Second, the respondent had advanced new arguments for rejecting the claim under Article 8 ECHR, saying that no family life had existed because there was no parental relationship. This ignored the legal presumption of family life and regard for a potential future family life to be developed.
42. Third, the respondent had provided inadequate reasons on the evidence for concluding that the applicants did not share family life, impermissibly attaching only limited weight to the report of Peter Horrocks, an acknowledged expert whose reports have been relied upon in several Tribunal cases. Moreover, any concerns that the respondent had had about untranslated documents were ones which the respondent should have raised to be able to allow the applicants the opportunity to respond. Reliance on the lack of visits between AMA and AA was unreasonable, bearing in mind the evidence of why travel to Greece was not possible. An assertion that there was no evidence ignored the ample evidence that had been provided since the first TCR. Any consideration that AA and DA were now separated and that AMA would not live with AA was an irrelevant consideration. The grounds then reiterated the respondent's failure to conduct a best interests assessment and the contra-indications as to what might otherwise be in the best interests of AMA to be reunited with his father.
43. Fifth, it was unreasonable or irrational for the respondent to conclude that reunification was not in AMA's best interests, on the basis that there were no facts suggesting continuing contact would be impossible or extremely difficult. The decision ignored the evidence including the witness statements and the ISW reports that ongoing separation and a lack of physical contact constituted significant limitations to developing a normal relationship. This was evidence with which the respondent had simply failed to engage.
44. The fourth ground related to the decision of 11th June 2021, which the applicants assert was also unlawful. The respondent had erred in importing a requirement of a relationship of dependency and had failed to identify any exceptional circumstances capable of displacing the presumption that the bond between AA and AMA amounted to a family life. In addition, the respondent had failed to consider the existence of humanitarian grounds, based on family and cultural considerations, assessed through the prism of best interests. The respondent had further erred in requiring too high a standard of burden of proof and misunderstanding the evidence in relation

to AMA's autism. The respondent had repeated the same errors as in the previous decision.

The respondent's amended detailed grounds of defence

45. The respondent asserted that many of the grounds of application duplicated one another.
46. Next, any challenge to the withdrawn decisions was academic. There was no authority to support the assertion that refusal of a TCR under the Dublin III regulation could not be withdrawn. To the extent that the challenge remained in relation to an alleged historic breach of Article 8 ECHR, the provision was not engaged or infringed. Moreover, AMA's best interests were accommodated by the fact that he had lived with and been cared for by his mother, DA, since his birth in the UK in 2012. To the extent that any unlawfulness arose, it was incidental and did not give rise to an Article 8 ECHR right being engaged or infringed.
47. In respect of Article 17(2) of the Dublin III regulation, the withdrawn decisions had not been silent as to whether Article 17(2) was satisfied. The respondent was mindful that she had a broad discretion to accept a TCR, and even though that discretion was not untrammelled, it was a wide one.
48. In relation to the Article 8 ECHR claim, it was unsurprising that the respondent had included an Article 8 analysis in the 11th March 2021 decision. This was in the context of an analysis of family life as distinct from the broader concept of family relations.
49. Article 17(2) is a subsidiary category of protection at the bottom of the hierarchy of protection under the Dublin III regulation. It was possible for the respondent to consider an application made under Article 17(2) through the lens of Article 8 ECHR (see R (HA & Ors) v SSHD [2018] UKUT 297. To the extent that there was an allegation that the respondent had failed to consider family relations, that was in any event incorrect as the respondent had expressly accepted that there may be some degree of emotional ties but there were no compelling, compassionate or exceptional circumstances.
50. In respect of the assertion that the respondent had failed to provide adequate reasons, the respondent relied upon six reasons:
 - 50.1. The applicants had failed to provide the respondent with full disclosure of readily available documents from the outset, without an explanation and in circumstances where they could have been provided. This included not only translations of communications but also an ISW report which was only later provided. There had not been

a full disclosure of the applicants' social media accounts and instead limited reliance upon a small selection of photographs and messages.

- 50.2. The ISW report of Mr Horrocks did not outline in any detail the overall length or pattern of any purported frequency of contact.
- 50.3. The respondent's duty of investigation could not be used to cover clear and obvious shortcomings in the applicants' disclosure and it was not for the respondent to assume general responsibility for the translation of documents (noting §164 of R (BAA) v SSHD [2020]).
- 50.4. The factor about the failure by DA and AMA to visit AA in Greece was not determinative of the respondent's decision and was merely one of several factors which the respondent had considered.
- 50.5. The applicants' reference to the respondent stating, in her 11th March 2021 decision, that "no evidence had been submitted of contact over the last eight years" was not accurate. Instead, the respondent had referred at §18 (page AI 136 AB) to no evidence having been submitted that AA had taken reasonable steps and made a visa application for reunification during the eight-year period. That was plainly a factor that the respondent was entitled to consider.
- 50.6. The reason for, and fact of, the separation of AA and DA was a permissible factor to consider, material to the existence of a parental relationship and the overall humanitarian circumstances.
51. Next, the respondent denied that any illegality had arisen. The respondent had not misdirected herself in law in respect of dependency. The June 2021 decision had acknowledged that a TCR could be granted even where Article 8 ECHR was not engaged. The argument regarding the presumption of a parental relationship ignored the fact that the TCR was pursuant to Article 17(2), rather than under other provisions of the Dublin III regulation. The respondent had not ignored the potential of development of family life but had reached the conclusion, considering the voluntary nature of separation that had endured for many years.
52. In addition, the respondent's conclusion on humanitarian grounds was not flawed. She had not tethered herself to the concept of a parental relationship or a particular level of financial support and her findings in respect of contact were appropriate based on the material before her. The respondent's conclusion on voluntary separation was similarly open to her to reach and the respondent had not relied upon a misconceived analysis in relation to autism. She had assessed AMA's best interests as including factors ranging beyond AMA's autism.

53. The respondent's assessment of AMA's best interests was not flawed. The applicants had invoked Article 8 ECHR in circumstances where the starting point was in fact an Article 17(2) application and in which there is no parental relationship. The respondent had considered Mr Horrocks' reports and assertions in respect of the effect on AMA, noting the likelihood of financial support and an analysis of AMA's care needs.
54. In addition to the amended grounds supporting the application for judicial review and the detailed grounds of defence, I also considered both parties' written skeleton arguments, together with additional oral submissions. Rather than recite those submissions in full, which are lengthy and significantly overlap with one another, I instead refer to the submissions and my resolution of them as I deal with the issues in turn. In dealing with the issues in turn, because there are so many grounds and sub-grounds within each of the headings, instead of adopting the ground numbers identified in the pleadings, I set out the broad category of issues; my discussion of the relevant law; and their application to each of the three impugned decisions.

Whether challenges to the first two decisions are now academic

55. On the one hand, Ms Sane rejected the assertion that the challenges to the first two decisions were now academic, because they were withdrawn, on two bases. The first was that this would deny the applicants a remedy under Article 27 of the Dublin III regulation, which states:

"Article 27

Remedies

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

56. Ms Sane argued that even if at common law, on public law principles, the respondent might seek to withdraw decisions, this could not operate at the level of EU law and there was no mechanism for depriving an applicant of their rights to such remedy. However, as Mr Fraczyk pointed out, by virtue of regulation 9(5) of the Immigration, Nationality and Asylum (EU Exit) Regulations 2019, where the request by the applicants was made to the UK before the "commencement day" under those regulations, (30th December 2020) but a final decision was not taken before commencement day, the saving provisions were limited to certain Articles of the Dublin III regulation, namely Articles 2; 6; 22 and 25, but not the remedy provisions

under Article 27. Mr Fraczyk argued that while Article 27 continued to apply to the first decision of 25th March 2020, it did not apply to the March 2021 decision.

57. However, the effect of the Exit Regulations is not an issue that I need to resolve in determining liability, particularly where I have not had detailed submissions on the effect of the Exit Regulations in circumstances where the party who is alleged to have breached the Dublin III regulation, has withdrawn her impugned decisions and would thereby benefit from the revocation of Article 27. It is unnecessary for me to resolve it at this stage because, as already made clear in the grounds, the challenge is not only in the context of the Dublin III regulation, but also Article 8 ECHR. Ms Sane had made clear the reservation of the applicants' position at the hearing on 21st May 2021, when the respondent sought to withdraw the first two decisions, that nevertheless she would be seeking damages in respect of breaches for each of these three decisions. For the reason that the applicants seek damages for breach of their article 8 ECHR rights, that alone rebuts the argument that the challenge to the decisions is academic. I am fortified in that conclusion by the fact that whilst withdrawing the impugned two earlier decisions, the respondent has never accepted that they were unlawful, in breach of the Dublin III regulation, or the applicants' rights under Article 8 ECHR. Indeed, in her defence of the applications, the respondent continues to maintain the lawfulness of those decisions.

Lawfulness of the decision of 25th March 2020

58. I refer to an excerpt of the request of 21st February 2020 at page AI [254] AB, which states:

"The applicant had previously applied to be reunited with the mother of his son, [DA]. A Take Charge Request was sent on 22 October 2018, which was rejected by your authorities. However, as you will notice in the attached statements, the relationship between the applicant and his former wife has changed whilst he maintains a strong emotional connection as well as a daily communication with his son. Moreover the son of the applicant is suffering from autism.

According to Article 17.2 of the Dublin III regulation, the member state in which an application for international protection is made ... may at any time request another member state to take charge."

59. The request refers to having sent the respondent all the relevant documents, the explanatory statements of AA, his attorney in Greece; and DA; proof of the constant communications of the AA with AMA, as well as the written consent of both parties. Ms Sane confirmed that amongst the documents which had been enclosed with the second TCR were the following:

59.1. Written consent forms;

- 59.2. copies of AA and DA's marriage certificate and AMA's birth certificate;
- 59.3. photographs of AMA and DA visiting AA in South Africa in 2012 and 2014;
- 59.4. a best interests assessment report by the Danish Refugee Council dated 9th October 2018, a copy of which was at page B [125] to [126] AB, describing the family life between the applicants, their ongoing contact and the fact that AA seemed to be a capable and caring father; the difficulties encountered by DA in raising AMA as a single parent and concluding that it was "highly recommended that it is in the best interests of [AMA] in the UK to be with his father and reunited as a family";
- 59.5. an excerpt of an NHS medical assessment confirming AMA's diagnosis of autism, dated 9th April 2018 at pages B [127] to [129] AB;
- 59.6. screenshots of WhatsApp and video calls, showing the applicants had been in regular contact since AA's arrival in Greece in 2017 (pages B [59] to [75] and B [107] to [112] AB);
- 59.7. a legal note from the Danish Refugee Council dated 12th February 2019 at page B [93] AB addressing AA's situation in Greece; and
- 59.8. finally, a witness statement from AA dated 15th July 2019 at B [82] AB.
60. Moreover, the applicants assert that the Greek authorities also enclosed with the second TCR a second witness statement of AA dated 4th November 2019 addressing his family life with AMA; and their daily communication and his strong wish to be reunited with AA; and the involuntary nature of their separation; as well as a witness statement from DA dated 11th December 2019 describing a close relationship between AA and AMA and the ongoing separation between the two negatively impacting on AMA and causing him distress.
61. In response, the TCR decision of 25th March 2020, at pages B [51] to [52] AB stated as follows:
- "In responding to your request, the UK has considered the following:"
62. It referred briefly to a list of bullet points which included documentation and evidence referred to and then stated:
- “• We have noted that AA and DA have now separated and AA wants to be reunited with his son AMA.
 - DA is now in a new relationship.

- AMA has been under the sole care of his mother DA since she gave birth to him in the UK, apart from one trip or visit to AMA in South Africa in December 2015 to February 2015 [presumably the first reference to 2015 should be 2014].
- Taking into account the best interests of AMA, he has a parent/guardian in the UK, who has been supporting and meeting the child's needs since birth, there are [sic] no information or evidence to show that the applicant was involved emotionally or financially in the upbringing of the child since 2012. We do not find that there is justification to apply discretion in the applicant's favour."

63. The above citation is not an extract, but comprises the entirety of the respondent's analysis and reasoning in refusing the second TCR, in the March 2020 decision. Mr Fraczyk did not make any substantive additional submissions other than to assert that the respondent had been entitled to reach the decision she had.

The Law

64. Article 17(2) of the Dublin III regulation states:

"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."

65. I also bear in mind the reported Upper Tribunal decision of R (BAA & Or) v SSHD (Dublin III: judicial review; SoS's duties) [2020] UKUT 00227 (IAC), and the headnotes in that case, which include the following:

"(1) Article 17(2) of Regulation 604/2013 of the European Parliament and of the Council ("Dublin III") confers a discretion on a Member State to examine an application for international protection "in order to bring together any family relations, on humanitarian grounds, based on family or cultural considerations". Although the discretion is wide, it is not untrammelled: R (HA & others) (Dublin III; Articles 9 and 17.2) [2018] UKUT 297 (IAC). As in the case of any other discretionary power of the Secretary of State in the immigration field, Article 17(2) must be exercised in an individual's favour, where to do otherwise would breach the individual's human rights (or those of some other person), contrary to section 6 of the Human Rights Act 1998.

(2) The Secretary of State's Article 17(2) decisions are susceptible to "ordinary" or "conventional" judicial review principles, of the kind described by Beatson LJ in ZT (Syria) v SSHD [2016] 1 WLR 4894 as "propriety of purpose, relevancy of considerations and the longstop Wednesbury unreasonableness category" (para 85).

(3) Where a judicial review challenge involves an allegation of violation of an ECHR right, such as Article 8, it is now an established principle of domestic United Kingdom law that the court or tribunal must make its own assessment of the lawfulness of the decision, in

human rights terms. If, in order to make that assessment, the court or tribunal needs to make findings of fact, it must do so.

(4) Nothing in paragraphs (1) to (3) above is dependent upon Article 27 (remedies) of Dublin III applying to the facts of the case. Nevertheless, what the Upper Tribunal held in R (MS) (Dublin III; duty to investigate) [2019] UKUT 9 (IAC) regarding the scope of Article 27 is correct and nothing in the Court of Appeal judgments in MS [2019] EWCA Civ 1340 suggests otherwise. The reference to a "transfer decision" in Article 27 encompasses a refusal to take charge of a Dublin III applicant. That includes a refusal to take charge under Article 17(2).

(5) It would be remarkable if the Secretary of State's investigatory responsibilities were materially narrower in an Article 17(2) case which concerns an unaccompanied minor and his or her best interests, than they would be in respect of any other take-charge request under Dublin III. Where the request under Article 17(2) raises issues that involve an asserted family life within Article 8 ECHR/Article 7 of the Charter of Fundamental Rights, then, in the normal course of events, the Secretary of State's degree of engagement with the relevant United Kingdom local authority should be no less than in the case of any other unaccompanied minor, where the take-charge request is made under Article 8 of Dublin III on the basis that the relation in the United Kingdom is a sibling or a "family member" or "relative" as defined."

Discussion and conclusion on 25th March 2020 decision

66. I conclude that the March 2020 decision did not engage first with the applicants' primary assertion that family life, a subset within family relations, existed between AA and AMA, despite their lack of cohabitation and any financial support by AA. Similarly, the decision was not correct when it said that there was no information or evidence to show that AA was involved in AMA's upbringing since 2012. At the very least, there was evidence before the respondent which it was incumbent upon her to assess as to the nature of the claimed family relationship between the two. It is not uncommon for there to be such family relations, notwithstanding substantial distances between a child and their parent, for many years, and indeed, by way of example, that is not a situation unfamiliar to Judges of the Immigration and Asylum Chamber in the context of applications under Paragraph 297 of the Immigration Rules.
67. The reference to "no evidence" in the decision was illustrative, in my view, of the respondent's failure, first to consider the question of whether there were family relations for the purposes of Article 17(2) of the Dublin III regulation; and second, to assess properly the claim of family life and the extent to which the refusal would otherwise engage Article 8 ECHR and would be a disproportionate breach of any right to respect to family life. It is unnecessary for me to refer to the extensive case law, including the presumption of family life said to exist between a parent and child in the context of a marriage where, as here, the respondent plainly failed to engage with the evidence that was before her.

68. I therefore declare that the respondent's decision of 25th March 2020 was not in compliance with the respondent's obligations under the Dublin III regulation. In that respect, the decision was not lawful.
69. I come on to the question of whether the decision was in breach of the applicants' rights to respect for their family life under Article 8 ECHR in my discussion and conclusions in respect of the final decision of 11th June 2021.

The decision of 11th March 2021

70. By the stage of her decision on 11th March 2021, the respondent had Peter Horrocks' first ISW report. In his report, as referred to in Ms Sane's skeleton argument, Mr Horrocks referred to the applicants having developed as close and meaningful a relationship as could be expected by phone and video link, and were in almost daily contact (see §§4.12 and 4.24 of the report). Mr Horrocks said that AA had developed a very high level of commitment to the best interests of his son (§4.22). AMA had formally been diagnosed with autism and was a vulnerable child, who would face challenges in all aspects of his functioning and was at risk of experiencing harm in his education, social and emotional development because of his disability. His vulnerability was compounded by the absence of AA, who was committed to supporting him (see §§4.13 and 4.16 of the report).
71. Peter Horrocks's view was that AMA's emotional needs and development were adversely affected by the ongoing separation from AA; and that DA was struggling to support AMA's needs in the UK and that AA's presence in the UK would enable him to play a more active role in AMA's life. Mr Horrocks concluded with a very strong recommendation, at section 4, that it would be in the best interests of AMA to be reunited with AA and that there was a significant risk that continued separation would inhibit further development of their relationship.
72. In contrast to the March 2020 decision, the March 2021 decision both acknowledges Mr Horrocks's report and focusses on Article 8 ECHR, and in particular, the question of whether family life existed between AA and AMA. On the one hand, Ms Sane argued that in doing so, the decision impermissibly narrowed the focus on the existence of family life, rather than the wider question of family relations for the purposes of Article 17(2) of the Dublin III regulation. In response, Mr Fraczyk says that the respondent can hardly be criticised for doing so in circumstances where the central thrust of the claim is based on a claimed parental relationship and that the authority of BAA informs us that it is permissible to consider responsibility under the Dublin III regulation through the lens of Article 8. The decision analysed the existence of family life between §§9 to 23, and referred, at §24, to the proposition in Kugathas v SSHD [2003] EWCA Civ 31, that there is no presumption that a person has a family life, even with members of a

person's immediate family and that a court must scrutinise all relevant factors. Having referred to Kugathas, the analysis then goes on to consider and criticise Mr Horrocks's report, including the fact that the interviews via Zoom were not in an ideal manner; the lack of translation of the social media communications; the voluntary nature of AA and DA's separation.

73. The central criticism of Ms Sane is the starting point of the decision that there is no presumption that a person has a family life even with immediate family members. Kugathas was in the context of adult family members and ignores the presumption precisely to the opposite in Sen v Netherlands [2003] 36 EHRR and Boughanemi v France [1996] 22 EHRR 228 of a bond amounting to family life between parent and a minor child born through a marriage, that would only be broken save in exceptional circumstances. Even in the extreme case of Boughanemi where the father concerned had not even acknowledged the child as his own until 10 months afterwards and had not provided any financial support to the child in question, there was nevertheless a finding of family life between the two. In essence, the analysis had started off at the wrong presumption and had then imported considerations that would be more relevant, for example, to adult children such as the question of dependency, whether financial or emotional.

Discussion and conclusion on the 11th March 2021 decision

74. I once again regard Ms Sane's criticisms of this decision as sustained. On the one hand, I do not regard the respondent as being fairly criticised for focussing on Article 8 ECHR, in circumstances where it is family life that is relied on for the purposes of Article 17(2) of the Dublin III regulation. On the other hand, I accept the criticism that the respondent failed to start from the presumption of the existence of family life between a father and minor child. It is in that context that the concerns identified by the respondent may well otherwise have had a different weight. For example, voluntary separation between the two adult parents would not necessarily be sufficient to displace the presumption of family life between one of the adults and their child. Nor does the analysis regarding infrequency of contact, even if justified because of a failure by the applicants to provide full disclosure of their communications, explain why this is capable of displacing the presumption of family life where, as the respondent accepts, there is some degree of emotional ties, natural concern and affection between AA and AMA.
75. Moreover, as Mr Fraczyk accepted, the respondent's guidance to caseworkers: "Dublin III regulation – version 2.0 - Transferring asylum claimants into and out of the UK where responsibility for examining an asylum claim lies with the UK or with another EU member state or

associated state" (at pages C [73] to C [117] AB), stated, at pages C [111] to C [112] AB:

"The re-establishment of family links would normally be regarded as being in accordance with the Section 55 duty, but this may not always be the case. Whilst a non-exhaustive list, the re-establishment of family links would not be in accordance with Section 55, for example where it is identified that:

- the safety of the child or their family will be jeopardised
- the child has a well-founded fear of relevant family members
- the relevant family members are the alleged actors of persecution within the claim for asylum which has not yet been finally determined
- the child is a recognised or potential victim of trafficking in which the family were knowingly complicit
- the child has shown to have been previously exploited or abused or neglected by their family, or claims to have been previously exploited or abused or neglected by their family and this has not been conclusively discounted.

It is important that you demonstrate and record how you have considered a child's best interests in line with the Section 55 duty. All aspects of this consideration must always be clearly recorded both on the case file and on CID."

76. The respondent referred to AMA's best interests at §§24 to 29 of the 11th March 2021 decision (pages AI [137] to AI [138] AB). She noted that DA and AMA are settled in the UK and that AMA has had a safe and stable upbringing; that in respect of AMA's autism, there is a lack of clarity in terms of AMA's formal diagnosis but taking the case at its highest, AMA is a highly functioning child, and his development has not been adversely affected to any appreciable extent by the absence of AA. The respondent concluded that any direct contact between AA and AMA was limited, as DA and AA were no longer in a relationship. AMA's focus would be on his sole carer, DA. The respondent did not accept Mr Horrocks's conclusion that AMA would be likely to blame himself if AA were unable to join him in the UK. She regarded that as speculative and concluded that no evidence was submitted to show that AMA would be in danger or that his development would be adversely affected. He was making positive academic progress.
77. The respondent concluded that AMA's best interests are served by living with DA in a family unit and there are no factors that would make contact between AA and AMA impossible or extremely difficult and further, even if the best interests of AMA are for AA to be admitted to the UK, the refusal to agree to the second TCR was a proportionate means of achieving the legitimate objective of effective immigration control.

78. Ms Sane suggests that the respondent ignored her own guidance to caseworkers and reversed the presumption so that the decision suggests that the applicants have not shown there was a danger or adverse effect to AMA in refusing to accept the TCR. The guidance refers to the presumption that it would be in the best interests of AMA to be reunited with AA, absent a risk to AMA because of reunification.
79. Also, whilst the respondent's decision focusses upon the positive relationship between AMA and DA and the fact that AMA is progressing satisfactorily without the need for AA's care, this ignores the point that even if the current arrangements are sufficient to cater for AMA's needs (which is not accepted) that is not inconsistent with it being in AA's best interests to be reunited with AMA. In essence, the respondent has failed to analyse any contra-indications to the best interests of AMA being reunited with AA.
80. I agree with Ms Sane's criticism in relation to the respondent's analysis of AMA's best interests in the March 2021 decision. There is no reference to the guidance and whilst there does not need to be express reference to it, it is clear here that the respondent's analysis has reversed the burden onto the applicants of showing that AMA would be in danger, if there is continuing separation, as opposed to the case worker guidance suggesting that reunification would ordinarily be in the best interests of AMA, unless it were shown that there was a danger to AMA of reunification. The second flaw is the respondent's focus on the sustainability and sufficiency of the relationship of AMA and DA as the status quo, which ignores that this may all be true, but it would still be in the best interests of AA and AMA to be reunited, a proposition which Mr Fraczyk himself accepted, albeit he said that that was not an end to the overall analysis under Article 17(2), which also required an assessment of humanitarian reasons and also, in the context of Article 8 ECHR, of proportionality.
81. On that final point, Mr Fraczyk urged me to consider §28 of the decision letter, (page AI [138] AB), in which the respondent considered, in the alternative scenario of the existence of family life and it being in the best interests of the child to require AA's admission to the UK, that refusal to agree to the second TCR was a proportionate means of immigration control. However, whilst on the one hand, I accept Mr Fraczyk's submission that there does not need to be as detailed an explanation for a decision under Article 17(2) as there would be in a fully-fledged human rights decision, nevertheless §28 of the decision is little more than a bare assertion that refusal under Article 17 is proportionate. Put simply, there is no explanation for why the best interests are outweighed, as applied to the analysis of the facts set out by the respondent. There is similarly an absence of adequate explanation as to the proportionality of any refusal, for the purposes of Article 8 ECHR.

82. In summary, I conclude that to the extent that the second decision focusses on Article 8 ECHR, the analysis of family life starts off at the wrong footing and is flawed in that regard. The analysis of best interests ignores the respondent's own guidance and fails to explain and instead reverses the burden in relation to countervailing factors, said to displace the presumption of AMA's best interests being in reunification. The final stage of the analysis in respect of humanitarian considerations for the purposes of Article 17(2) of the Dublin III regulation and proportionality for the purposes of Article 8 ECHR is no more than a bare assertion, without adequate explanation or analysis.
83. In the circumstances, I conclude that the March 2021 decision was in breach of the respondent's obligations under Article 17(2) of the Dublin III regulation. In that respect, the decision was not lawful.
84. As with the first decision, I will come on to explain whether it breached the applicants' rights under Article 8 ECHR in the final part of this decision in respect of the third decision of 11th June 2021.

The decision of 11th June 2021

85. By this stage, the respondent had the opportunity to consider not only the initial ISW report of Mr Horrocks, but also the subsequent evidence, including his addendum report and the additional witness statements. In his addendum report, Mr Horrocks responded to the respondent's criticism of him in her second decision, including pointing out his expertise in carrying out assessment via remote means, which notably has been accepted by the Upper Tribunal in BAA. Also provided were the translations of the previously submitted screenshots of communications via WhatsApp and video calls. AA and DA also provided additional statements of 3rd and 5th May 2021 respectively. They reiterated in detail the nature of the relationship claimed between AA and AMA and the circumstances of the family's separation. In that context, the decision of 11th June 2021, at pages A2 [62] to [68] AB accepted, at §6, that there is a link of family relations between AA and AMA. There is current contact and a degree of concern and affection between the two.
86. Nevertheless, the respondent continued to dispute that family life for the purposes of Article 8 ECHR is engaged, noting that this was an application under Article 17(2) and there is no relationship of dependency between AA and AMA. Whilst the respondent accepted that her discretion under Article 17(2) is not untrammelled and that family relations may exist even where Article 8 ECHR is not engaged, the respondent concluded that the exercise of discretion under Article 17(2) would not be appropriate. In doing so, the respondent considered whether family life or family relations existed prior to AA and DA's separation, the strength of ties and the reasons for

separation. The respondent noted that AA and AMA had only met twice in person, for a matter of weeks, and that the relationship had "significant limitations". Moreover, whilst AA has provided some financial support to AMA before 2015, he has not done so since then. AMA has always been in the care of DA.

87. The decision also outlined the respondent's concerns about the claimed contact between AA and AMA and in particular, the lack of evidence, beyond bare assertion, that AA had been in contact on a virtually daily basis, over a nine-year period. The respondent would expect to see a much greater level of evidence, such as records of calls, or posts or message logs on social media. The claimed loss of AA's telephone did not justify failing to provide such material, particularly where source records could still nevertheless be provided as they were stored on the social media provider's records, not just a mobile phone. The respondent reiterated this was not forced separation where, even on the applicants' case, AA and DA voluntarily met in South Africa, where AA had recognised status as a refugee; they were married in 2011, but they almost immediately separated, through no reason relating to a fear of persecution, but rather because DA could not meet the requirements of the Immigration Rules to obtain entry clearance for AA to the UK. DA left AA after a very brief period and returned to the UK, where she gave birth to AMA. AA did not leave South Africa until years later, in the meantime living separately from DA. AA did not have an automatic right to live in the UK based on his relationship at the time he married DA.
88. The respondent expressly considered the assessment of AMA's autism and noted that the NHS is providing an appropriate care management plan for him. There was no evidence suggesting that AA's continuing absence would result in AMA's autism being better managed.
89. The decision referred to Peter Horrocks's reports, including the assertion of DA/AMA and AA speaking every day. However, in the absence of that material, Mr Horrocks' assessment was not justified upon the evidence before him and was speculative. The respondent also criticised what she regarded as his speculative assessment that there would be a significant risk to AMA if he believed that his father did not wish to see him. Mr Horrocks' comments on the benefit of AA's presence to a child with autism were not based on any medical expertise. Whilst Mr Horrocks has criticised the respondent's previous references relating to DA's new partner (such a partner cannot be a replacement father), in her own witness statement, DA has referred to her partner acting like a second father to AMA.
90. The respondent referred, at §§22 to 29 of her decision, (pages A2 [66] to [67] AB) to AMA's best interests. She considered not only the stability of the current arrangements but also the support that DA's new partner provides

to AMA. Any contact between AA and AMA would be limited if AA is admitted to the UK and dispersed, not necessarily anywhere near AMA in London. He would not be able work and is unlikely to be able to provide financial support. DA is AMA's primary caregiver, who has met all his needs for all his life. Moreover, in terms of any difficulties she may face, (referred to by Mr Horrocks), DA has not provided any details of any difficulties in her witness statements. In her recent statement of 5th May 2021, she refers to the importance of AMA seeing AA anytime he wants and having AA's guidance, which would be better for his welfare and development, but also acknowledges that she was able to bring up her other child as a lone parent.

91. Whilst the respondent acknowledged in the June 2021 decision that AMA is fond of AA, the evidence did not indicate that AMA is distressed by AA's absence and the evidence was also unclear about how frequently they speak to one another. They had also virtually no in-person contact for the entirety of AMA's life and even the evidence in relation to their meeting in South Africa is limited. Overall, the respondent concluded that it would be in AMA's best interests to live with DA and that an exercise of discretion would not be justified where AA provided only limited emotional support. Even if the physical separation caused a degree of emotional impact, that was only one factor in the consideration of AMA's best interests, and the wider assessment of discretion on humanitarian and compassionate grounds. At §31 (page A2 [68] AB) the respondent concluded that she was not persuaded that any impact upon AMA's emotional wellbeing and development would be as significant as Mr Horrocks contends, given her assessment of the facts, including the reality of AMA's current circumstances. Any impact would be manageable and the circumstances in respect of AMA did not outweigh the legitimate interests in effective immigration control and the Greek authorities' responsibility to process AA's asylum claim. Even on the principle of AMA's best interests, there was not sufficient weight to require the UK to voluntarily exercise its discretion and accept the TCR. Greece was the responsible member state to determine AA's asylum claim.
92. Ms Sane criticises the respondent's focus on dependency, albeit, as Mr Fraczyk points out, this is only one of several factors which the respondent considered. She also asserts that there is no requirement under the Dublin III regulation for the applicants to demonstrate constant or frequent contact over a nine-year period.
93. In relation to the medical evidence, Ms Sane submits that the proper question should not have been whether or how AA would assist with AMA's autism but whether, in the context of his autism, it would be in AMA's best interest to be reunited with AA, having regard to his particular

vulnerabilities. She argued that the respondent had erroneously and impermissibly considered a whole list of irrelevant considerations including the separation of DA and AA; their lack of cohabitation; the fact that AA is an asylum seeker and currently in a precarious financial position; and the fact that DA has a new partner. None of these are risk factors capable of weighing against the presumption of reunification being in AMA's best interests.

94. Mr Fraczyk essentially points out that the respondent has engaged with all the evidence, not narrowing her assessment to Article 8 ECHR (the criticism of the March 2021 decision), but taking it and wider factors into account, which were plainly permissible, but none of which was determinative. In reality, the applicants disagree with the respondent's decision, rather than there being any error of law on public law grounds. Even if I were to adopt the approach of considering for myself whether family life is established (see BAA) the evidence is not sufficient to support such a finding. In the alternative, if there is such a family life within the meaning of Article 8 ECHR (as distinct from family relations for the purposes of Article 17(2)) the refusal of the second TCR does not engage Article 8 and any interference is proportionate.

Discussion and conclusion on the June 2021 decision

95. I am conscious of the presumption of family life between a minor child, born within a marriage, and their parent (see Sen and Boughanemi). I am also conscious that pre-existing blood ties, coupled with a declared intention of care and future intention may be sufficient to engage Article 8 ECHR (Ahmadi). I am also conscious of the CFR and the right of a child to maintain a personal relationship and direct contact with their parent. The presumption (albeit rebuttable) is that family life exists between AA and AMA, absent exceptional circumstances. Moreover, family life for the purposes of Article 8 ECHR between parents and their children can take a variety of different forms, in particular, it may exist despite the lack of cohabitation or financial support, but with regular and loving contact. I am also conscious that the applicants have adduced several witness statements on behalf of both parents as well as the ISW reports of Peter Horrocks and a limited number of social media contacts. There is also the NHS assessment document.
96. I also acknowledge the validity of the respondent's concerns about the lack of full disclosure, by the applicants, of evidence which would otherwise be readily available, as part of the applicants' duty of candour. The lack of full disclosure is unexplained or at least not, in my view, satisfactorily explained, and the missing evidence is relevant to this case. Most of the evidence that

has been disclosed comprises on the one hand, the witness statements of AA and DA, or ISW reports written by Mr Horrocks and Danish Refugee Council notes. There are a few pages of social media printouts said to relate to ongoing contact and the single NHS letter. The respondent was entitled to doubt the reliability of witness statements of AA and DA as possibly self-serving, namely that they were not necessarily telling the truth in circumstances where something like disclosure of the call records or Facebook material would disclose the regularity of such contact and the nature and quality of the various relationships.

97. It is that evidence, relating to the contact (frequency, duration and nature) over the years between AA and AMA, which is relevant, but missing. I canvassed with Ms Sane and Mr Fraczyk anyone's ability to access, download and disclose, swiftly and with ease, the whole pattern of contact, for example through Facebook, (by which AA and DA met), as well as WhatsApp. As I discussed with the representatives, I take judicial notice of the fact that Facebook includes a "Download your information" function, which produces a log of the entirety of a member's activities, in a matter of moments. AA's failure to disclose the full picture of the communications with AMA, where those communications are at the very heart of his application for judicial review, is not explained by his assertion that he has lost, at times, his mobile telephone, even if he lost some locally stored photographs. As Mr Fraczyk pointed out, such phone loss would not affect in any way first, DA's access to her social media account; and second, the fact that social media accounts themselves are not dependent on access from a particular device. AA's choice of disclosing a small number of photographs and WhatsApp messages is analogous to disclosing a few pages of a book or narrative, when the full record (including when and where he accessed his social media account) could run to several hundred pages; or where the half-dozen pages may comprise the entirety of the contact between the two.
98. The lack of a cogent explanation for the full disclosure is in the context of the respondent repeatedly raising concerns about the lack of evidence. I do not accept that these concerns amount to the respondent imposing too high a standard of proof. It was equally permissible, in my view, for the respondent to be concerned about Mr Horrocks' report, on two bases. The first was the concern that Mr Horrocks had strayed into speculation in his view of the pattern of contact between AA and AMA, based on what appears to be little more than AA and DA's own assertions. The second was the concern about Mr Horrocks' view on AMA's best interests. While reunification may in theory be in AMA's best interests, in practice, that is only properly answered with an informed view of the historic pattern of contact.

99. I also do not accept Ms Sane's criticism that the respondent considered other factors that she ought not to have, namely AA's status and ability to financially support AMA; and DA having a new partner. Both are, in my view, properly relevant to the proportionality of the respondent's decision. AA referred, in his expression of future intentions, to wanting to support AMA financially and see him in person regularly. The absence of the ability to do so (in the event of dispersal to a different part of the UK and the inability to work) is a permissible consideration. So too, in my view, is the fact of DA having a new partner. While Mr Horrocks argues that a new partner cannot replace AA as AMA's father, the fact that DA has a new partner is relevant to Mr Horrocks' assessment of DA as a lone parent (where she may in fact have significant support from that partner) and, in the context of personal finances, her ability to travel to Greece to accompany AMA to visit AA. While DA refers, in her witness statement, to it not being appropriate as she is no longer married to AA, this is not explained further. Indeed, virtually nothing is known about DA's new partner and the support and extent of the role he plays in AMA's life.
100. I also do not accept Ms Sane's criticism that it was impermissible for the respondent to consider that between AMA's birth in 2012, and 2015, DA and AA chose to live in separate countries, for reasons unconnected with any protection claim. While Ms Sane points out that this imports criticisms of the parents' choices (if there is any criticism) into an evaluation of family life between parent and child, the answer is that the pattern of contact over time, through choice, not persecution, is relevant to AA's stated future intention, if admitted to the UK, to play a more active role in AMA's life. AA and DA had chosen to begin their relationship in South Africa, where AA had legal status and no fear of persecution. The pattern that followed, prior to 2015, was of almost complete separation, with sporadic visits. That pattern was plainly open to the respondent to consider in her assessment of whether AA's stated future intentions were reflected in the past pattern of contact, for several years, prior to any claim of persecution.
101. The respondent has accepted the existence of family relations between AA and AM, for the purposes of the Dublin III regulation. That is hardly surprising in circumstances where there is a biological relationship and it may well be, taking the documentary evidence at its highest, that there has been recent contact between AA and AMA.
102. While I have concerns about, and understand the reservations that the respondent has, about the existence of family life between AA and AMA for Article 8 ECHR purposes, I am just about prepared to accept (with reservation) that family life exists. This is on the basis that even with the small part of the picture revealed, it is possible to accept the recent (even if

very recent) resumption of contact between AA and AMA as amounting to family life, even if it is via social media only.

103. Where the absence of full disclosure has a further impact is in the evaluation of the weight of AMA's best interests to be reunified with AA; and the proportionality of refusing the second TCR. AMA's best interests must be a primary consideration, but they are not paramount. As Ms Sane rightly points out, there are no contra-indications, as set out in the case worker guidance (relating to potential harm to AMA) as to why reunification would not be in AMA's best interests. In assessing those best interests, AMA himself, albeit as a relatively young child, told Mr Horrocks that he wants to be reunited with his father. However, the respondent was also entitled to consider those best interests not just within that theoretical framework (i.e., the presumption of the best interests of reunification of parent and child) but on the facts known to her, which go wider than just AMA's wishes, and include a permissible concern that not all the relevant facts or evidence have been disclosed. The best interests of reunification might be materially different in cases of full and transparent disclosure of the circumstances, as opposed to inexplicably limited disclosure.
104. Turning to the humanitarian grounds based on family or cultural considerations (Article 17(2) of the Dublin III regulation) and whether the effect the refusal of the TCR was of sufficient gravity to breach the applicants' Article 8 ECHR rights, and if it was, whether it was proportionate, the respondent was entitled to consider that her decision maintains a status quo which has endured for the entirety of AMA's life. That status quo is of AMA living in the UK, with DA as his primary care giver and, based on the limited disclosure, a recent renewal of contact with AA. AMA's educational and welfare needs as a child with autism are met and Mr Horrocks' views of AA's role (current and potential) in supporting AMA, as a child with autism, were ones that the respondent was entitled to regard as speculative, without full disclosure of all the evidence. The respondent is entitled to regard the possibility of future visits by DA and AMA to AA in Greece, as part of the status quo, as realistic. On AA's own account, he is not destitute or homeless, but lives in a friend's 5-bedroom home, and is in receipt of Greek state benefits. While I do not suggest that AMA would be able to stay with AA in what is described as crowded accommodation, AA's assertion in his witness statement that DA would be unable to afford to travel to visit, does not go into further detail about her financial circumstances, whether individually or pooled with her partner, bearing in mind that whilst married to AA, she travelled to South Africa with AMA to visit him on two occasions in alternate years before 2015. DA's claimed responsibility for her other daughter in the UK ignores the fact that her daughter is an adult, at university. DA asserts that it is not culturally respectful or appropriate to visit AA with AMA, as they are

divorced. She does not explain further why it would be culturally inappropriate, as AMA's mother, to accompany her minor child to visit his father, albeit where neither would share accommodation with AA.

105. I conclude that the respondent's refusal of the second TCR, interferes with the applicants' Article 8 ECHR rights and the effects are of sufficient gravity (again, just) to engage with those rights, bearing in mind AMA's best interests; his wishes; and the effect of refusal, which is to maintain separation of AA and AMA, pending Greece's decision on AA's asylum claim, with visits by DA and AMA to AA in Greece in the meantime.
106. The respondent is entitled to conclude that, on humanitarian grounds, her refusal to accept responsibility for the second TCR is proportionate, in AMA's particular circumstances, and crucially, in the context of inexplicably limited disclosure by AA. There is a clear public interest in immigration control. The Greek authorities will be able to determine AA's asylum claim, and while they do so, AA has accommodation and financial support. AA and AMA can continue to develop their contact via social media, supplemented by in-person visits from DA and AMA. The status quo, while inhibiting further face-to-face contact between AA and AMA, is in the context of evidence which does not support their relationship being more than at the earliest stages of renewed contact. In the meantime, AMA has the full support, resources and care of DA and her partner. It is relevant that AMA is not financially or practically dependent, for his day-to-day needs, on AA. AMA's best interests in reunification are, on these specific facts, and in the context of the lack of full disclosure of evidence, outweighed by the public interest in immigration control.
107. In summary, the respondent's refusal to allow AA entry to the UK, was, and is, proportionate and not in breach of the applicants' Article 8 ECHR rights. This means that the withdrawn decisions of March 2020 and March 2021 did not breach the applicants' Article 8 ECHR rights.
108. In relation to the June 2021 decision, the respondent's refusal to accept the second TCR does not have the consequence (because of refusal to admit AA) of breaching the applicants' Article 8 ECHR rights. The respondent carried out a proportionality assessment consistent with Article 8 ECHR.
109. While the Dublin III regulation has wider considerations (and is not dependent on Article 8 ECHR), I am satisfied that the respondent took into account all relevant factors, and did not rely on impermissible factors, in considering whether to exercise discretion on humanitarian grounds. The respondent's decision to refuse the second TCR was unarguably open to her to reach, on public law grounds. The respondent had raised concerns about

the gaps in the evidence, and did not fail in her duty to investigate the gaps in evidence.

110. For the above reasons, the respondent did not breach her obligations under Article 17(2) of the Dublin III regulation in reaching her decision of 11th June 2021. The decision of 11th June 2011 was lawful.
111. Any decision in respect of remedy and costs will need to be the subject of further submissions and I invite the parties to draw up the appropriate orders on liability.

J Keith

Signed: _____

Upper Tribunal Judge Keith

Dated: **2nd September 2021**

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