

BRIEFING NOTE

MS (a child by his litigation friend MAS) v Secretary of State for the Home Department

1. In a judgment handed down on 19 July 2018, the Upper Tribunal Immigration and Asylum Chamber (UTIAC) (Upper Tribunal Judge Grubb and Upper Tribunal Judge Blum) allowed an application for judicial review brought by an unaccompanied asylum seeking child (MS) living in France, seeking family reunion through the Dublin III Regulation with his brother, MAS who has settled status as a refugee in the United Kingdom. The Court found that the Home Office had failed to comply with its investigative duty upon receipt of a request (Take Charge Request “TCR”) from another Member State to take charge of MS’s asylum claim, including its duty to take reasonable steps to facilitate or secure DNA testing in France or admit MS to the UK for him to provide a voluntary DNA test.

2. For the first time in a judicial review of a Dublin III Regulation TCR refusal, the Tribunal having heard oral evidence from six witnesses, declared that MAS and MS were brothers. The judgment will have consequences for how cases by unaccompanied asylum seeking children will be heard going forward. It means that the question of the family relationship is one to be determined by the Court and is a welcome clarification of the right to an effective remedy in fact and law under Article 27, Dublin III Regulation and Article 47 Charter of Fundamental Rights.

3. MS is 17 years old and has suffered through multiple traumas, having fled Afghanistan, undertaken a treacherous journey to Europe taking many months, during which he slept rough and walked extremely long distances, and having survived alone in the makeshift camp in Dunkirk in terrible and wholly unsafe conditions, where he witnessed violence and disturbances, including a fire that destroyed the camp in April 2017. He is now in children’s accommodation in France, where he waits alone. He has been waiting in France to be reunited with his brother for 18 months. Under the Dublin III Regulation, once it is established that MAS is MS’s brother and that it is MS’s best interests, the UK must accept responsibility for considering his asylum claim and admit him to the UK.

4. MS registered a claim for asylum in France in June 2017 and submitted evidence supporting the family relationship including photographs, and evidence of financial support by MAS. The French authorities accepted the sibling relationship between MAS and MS, submitted a TCR under the Dublin III Regulation to request that the UK to accept responsibility for deciding MS's asylum claim.
5. The UK Home Office rejected the TCR and a subsequent reconsideration request on the basis that the Home Office did not accept that the evidence submitted established that MS and MAS were related as claimed.
6. The UK Home Office argued that a previous decision, *MK IK and HK v SSHD* [2016] UKUT 231 in which the Upper Tribunal had found that the SSHD had a duty to investigate upon receipt of a TCR, and that this included a duty to take reasonable steps to investigate the possibility of DNA testing to establish the family relationship was wrong and should not be followed. In short, the UK Home Office argued that all it was required to do on considering a TCR was to verify the information received from the French authorities. This did not include phoning MAS about the application, speaking to social services or considering any other evidence submitted by MS and MAS or taking any steps to help MS provide DNA evidence confirming the sibling relationship; the Home Office position was that it was confined to considering the evidence sent by France and checking the Home Office records.
7. On 20 December 2017 Upper Tribunal Judge Freeman, in accordance with the *MK* decision, made an order requiring the UK Home Office to take reasonable steps to facilitate and secure DNA evidence, this included considering admitting MS to the UK to enable him to provide a voluntary DNA test.
8. At the hearing on 17-18 May 2018 the UK Home Office explained that French domestic law prevents DNA testing, even voluntarily, apart from very limited circumstances and so legal representatives, for example, could not take a voluntary DNA sample in France without risk of criminal prosecution. As regards its own role, the UK Home Office's position was that it had no power in law to take DNA samples including in the areas in France subject to UK immigration law. The Home Office further decided that it would not admit MS to the UK so he could provide his own voluntary DNA evidence from within the UK.

9. The Home Office argued that the Tribunal had no role to determine whether MS and MAS were in fact brothers, and that the right to an effective remedy under Article 27 of the Dublin III Regulation was not engaged by a TCR refusal.
10. The Tribunal rejected the Home Office's arguments. It found that (1) there was an investigative duty on the UK Home Office upon receipt of a TCR affirming *MK, IK and HK* (2) this duty included investigating the possibility of DNA testing in France, and if that was not possible considering admission to the UK for that purpose (3) the investigative duty did not extend beyond a second refusal of a TCR subject to the requirement to act fairly and consistently with public law duties in responding to the TCR. It found as a consequence that the UK Home Office had acted unlawfully in refusing the TCR made by the French authorities and quashed the three decisions the Home Office had made refusing the TCR in the case.
11. By reference to jurisprudence of the Grand Chamber of the European Court of Justice the Tribunal found that right of the individual to an effective remedy included judicial scrutiny of a decision refusing a TCR. The Tribunal found that the question of whether MS and MAS were brothers was a hard edged question of fact which had to be determined by the Tribunal as it engaged fundamental human rights, the right to family life. The Upper Tribunal heard oral testimony from six witnesses on behalf of MS. The Upper Tribunal found that MAS was a "*convincing*" witness and his wife MOS was "*entirely credible*".
12. Having considered all the evidence the Upper Tribunal concluded that MS and MAS were brothers.
13. The Tribunal:
 - a. quashed the Home Office's decisions to refuse the take charge requests;
 - b. found that MAS and MS were brothers
 - c. decided that it was not appropriate to make a mandatory order for MS to be admitted to the UK as the UK Home Office had yet to make a lawful decision on the TCRs
 - d. ordered that the Home Office make a new decision on the Take Charge Requests by 3 August 2018.

14. MS hopes to be reunited with MAS as soon as practicable. Bhatt Murphy has written to the Home Office solicitors asking that the outstanding TCR be accepted and he be admitted to the UK.
15. The judgment is an important decision on the meaning of an effective remedy under the Dublin III Regulation. It means that other asylum seeking children whose family relationship is disbelieved will be able to ask the court to consider all the evidence in the round, including the possibility of the Court hearing oral evidence, and determine whether the family relationship is established and criteria under the Dublin III Regulation met. The decision also unequivocally upholds the investigative duty, mandated by domestic, EU and international law concerning the rights of children, on the UK Home Office upon receiving TCRs concerning unaccompanied minors.
16. The Tribunal refused permission to appeal on the investigative duty and granted the Secretary of State permission to appeal in relation to the effective remedy arguments only.

Immigration Officers unlawfully took DNA samples

17. As set out above, the UK Home Office position in this case was that immigration officers have no power in law to take DNA samples. In correspondence the UK Home Office solicitor also stated that entry clearance officers have no power to take DNA samples. MS relied upon a pilot scheme in 2009 in which immigration officers at the Asylum Support Unit took DNA samples, to argue that he could have a DNA test by UK immigration officers in the areas subject to UK immigration law in France, i.e. within the juxtaposed controls areas in Dunkirk and Calais. He also relied on a now withdrawn entry clearance policy that provided children could volunteer for DNA testing in overseas entry clearance applications. In the hearing the Home Office stated that the lawful basis of the 2009 scheme was “dubious” and its position was that immigration officers have no power in law to take DNA samples. It appears from the information provided to the Court by the Home Office that the Home Office unlawfully took DNA samples on people in 2009 during the currency of the pilot scheme.

18. Anyone who was subject to the scheme run by immigration officers in 2009 may have a claim that their rights have been breached since the Home Office's position appears to be that immigration officers took DNA samples unlawfully. . An investigation should be commissioned, including to establish how long the Home Office has been aware of its apparently unlawful conduct, the number of people affected and confirmation that those affected will be notified immediately of any potential claims.

MS was represented by counsel Charlotte Kilroy and Michelle Knorr (Doughty Street Chambers) instructed by Jane Ryan (Bhatt Murphy).