JR/11283/2014

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of H S F
(Anonymity direction made)

Applicant

v

Secretary of State for the Home Department

Respondent

Before Upper Tribunal Judge Hanson

Application for judicial review: substantive decision

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Applicant is granted anonymity throughout these proceedings. No report of these proceedings (in whatever form) shall directly or indirectly identify the Applicant. Failure to comply with this order could lead to a contempt of court".

Having considered all documents lodged and having heard the parties' respective representatives, Mr Symes, of Counsel, instructed by Wilsons Solicitors, on behalf of the Applicant and Mr Anderson, of Counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 7 October 2019.

Decision: the application for judicial review is granted

The adjournment request:

1. There has been a long procedural history with regard to this application that need not be set out at this stage. There have been a number of late developments resulting in leave being granted to the Applicant to amend the grounds of claim and, on 1 October 2019, an order granting the Applicant leave to admit a second witness statement dated 9 August 2019.

2. On 4 October 2019 the Respondent made an application for the substantive hearing on 7 October 2019 to be adjourned which was refused by another judge of the Upper Tribunal who was not persuaded there was any merit in the Respondent's submission she had not been afforded adequate time in which to consider the applicant's 'new claim' nor that it was in the interests of justice to adjourn the matter at that late stage.

3. Mr Anderson was instructed to renew the application on behalf of the Secretary of State. At [3 – 4] of the Detailed Grounds of Defence dated 3 October 2019 it is written:

> "3. It is respectfully submitted that the Respondent has not been afforded adequate time in which to fully consider and respond to what is effectively a new claim, which has been accompanied by new evidence in the form of a further witness statement from the Applicant. The Applicant has provided no explanation whatsoever as to why his application to amend his grounds was not made until some 14 months after he received the Respondent's supplementary decision. The Applicant has not previously argued that this was a matter which should be dealt with by way of the Upper Tribunal making findings of fact. While the Respondent submits that the Applicant is wrong so to argue, the Respondent has not had a proper opportunity to consider his further evidence and the claim that the Upper Tribunal should treat this application as involving issues of precedent fact is a fundamentally new claim, of potentially wider significance than the instant case.
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> 4. In the circumstances, the Respondent respectfully applies for an adjournment of the hearing listed for 7 October 2019 and for directions to be made in order to ensure the orderly progress of this matter to a conclusion."

4. Mr Anderson was asked what the Secretary of State needed the additional time for in light of the fact the witness statement and Applicant's skeleton argument in which the alleged 'new issue' had been raised had been in the Respondent's representatives possession for some time. Other than indicating that it would give time to consider the content of the documents there was no indication of anything that will be done that had not already been done or that required further time to do, such as to warrant the hearing being adjourned this late in the day.

5. It is also of note that at [70] of Mr Anderson's skeleton argument it is written "*the Respondent of course reserves the right to cross examine the Applicant if the Upper Tribunal considers it appropriate to proceed, but does so without prejudice to the contention that the Respondent is prejudiced in being able to prepare to do so*".

6. The key question when considering whether to adjourn the hearing or not is that of fairness. Whilst it is accepted that many things have occurred late in the day it is not considered the principle of fairness, or the overriding objectives, require the proceedings to be adjourned to a later date. In any event Mr Anderson was clearly able to represent the interests of the Secretary of State in relation to this matter and no prejudice to either party in refusing the adjournment request was made out.

The correct approach

7. The above question arises as a result of a dispute between the parties concerning the approach to be taken by the Upper Tribunal when considering the issues at large in this appeal.

8. The Respondent relies upon the decision of the Upper Tribunal Judge O'Connor, in *R (on the application of RM) v Secretary of State for the Home Department (Dublin; Article 27 (1); procedure) [2017] UKUT 00260 (IAC)* the head note of which reads:

> *"(1) the scope of a challenge to a transfer decision brought, pursuant to art.27 of Regulation 604/13 (Dublin III), on the basis that the decision infringes the second paragraph of art. 19(2) of Dublin III is limited to 'traditional' public law grounds.*
>
> *(2) Section 15 (5A) of the Tribunal's, Courts and Enforcement Act 2007 applies to applications for judicial review, in which the application for permission to bring such proceedings was received by the Upper Tribunal on, or after, 8 August 2016."*

9. The Applicant relies upon a later decision of Upper Tribunal Judge Grubb and Upper Tribunal Judge Blum, of *R (on the application of MS) (a child by his litigation friend MAS) v Secretary of State of the Home Department (Dublin III: duty to investigate) [2019] UKUT 9 (IAC)* the head note of which reads:

> *"(1) A Member State considering a Take Charge Request ("TCR") made by another Member State under the Dublin III Regulation has a duty to investigate the basis upon which that TCR request is made and whether the requirements of the Dublin III Regulation are met. (R (on the application of MK, IK (a child by his litigation friend MK) and HK (a child by her litigation friend MK) v Secretary of State for the Home Department (Calais; Dublin III Regulation – investigative duty) IJR [2016] UKUT 00231 (IAC) followed).*
>
> *(2) The Member State's duty is to "act reasonably" and take "reasonable steps" in carrying out the investigative duty, including determining (where appropriate) the options of DNA testing in the requesting State and, if not, in the UK (MK, IK explained).*
>
> *(3) The duty of investigation is not a 'rolling one'. The duty does not continue beyond the second rejection, subject to the requirements of fairness (MK, IK not followed).*
>
> *(4) Fairness requires that the applicant, even after a second rejection, must know the 'gist' of what is being said against him in respect of the application of the criteria relevant to the TCR and must have an opportunity to make representations on the issues and material being relied on if that has not previously been the case. In those circumstances, fairness requires that the respondent consider any representations and material raised (perhaps for the first time) to deal with a matter of which the individual was 'taken by surprise'*

in the second rejection decision. To that extent only, the duty continues and may require the requested State to reconsider the rejection of the TCR.

(5) In judicial review proceedings challenging a Member State's refusal to accept a TCR, it is for the court or tribunal to decide for itself whether the criteria for determining responsibility under the Dublin III Regulation have been correctly applied. This may require the court or tribunal to reach factual findings on the evidence and it is not restricted to public law principles of challenge.

(6) The tribunal or court's role should not be taken as an open invitation to parties to urge the court or tribunal to review and determine the facts in a Dublin case and, as a concomitant, to admit oral evidence subject to cross-examination. Often there will be no factual dispute: the issue will be a legal one on the proper application of the Dublin III Regulation. Even if there is a factual issue, the need to assess the evidence may not always mean also admitting "oral" evidence subject to cross-examination. It will only be so if it is "necessary in order to resolve the matter fairly and accurately"."

10. It is not disputed the Applicant is entitled to an effective remedy, Article 27(1) the Dublin III Regulations (Regulation (EU) No 604/2013) provides:

> '1. The applicant or another person is referred to in Article 18(1)(c) or (d) shall have the 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.'

11. The case of *RM* concerned the scope of a challenge to a transfer decision brought pursuant to Article 27 of Dublin III on the basis the decision in that case infringed the second paragraph of Article 19(2). The Upper Tribunal found any challenge was limited to traditional public law grounds following an examination of case law then available to the Tribunal. At [52 – 53] the Tribunal wrote:

> "52. For the reasons given above, and having considered Article 27(1) of Dublin III in the context of the wording of the Regulation as a whole, its general scheme, its objectives and its context, I conclude, as Advocate General Sharpston did in Karim (at [AG44]) that the, *'intensity of any appeal or review process is not laid down in the [Dublin III] regulation and must therefore be a matter for national procedural rules…".*
>
> 53. I am satisfied that adherence of the Tribunal to traditional principles of judicial review does not, either in this case or more generally in challenges brought to decisions made in relation to the second subparagraph of Article 19(2), result in a breach of either Article 27 of Dublin III or Article 47 of the Charter."

12. The question of a precedent fact is not unheard of within the judicial review jurisdiction albeit that it is not an issue that frequently arises. Mr Symes referred to it as "unconventional judicial review".

13. The Tribunal in *RM* when examining the structure of a Dublin III decision found as follows:

> "58. More significantly, however, is my view that Mr Toal's submission does not align itself with the structure and application of Dublin III. There are three stages to the process leading to a transfer decision, to be

undertaken by a member state in which an asylum applicant is present (i.e. the United Kingdom in the instant case).

59. First, it is for that member state to determine for itself which member State is responsible for considering the asylum applicant's claim. This assessment is to be undertaken based on the criteria in Chapter III of Dublin III. The "*second subparagraph of* [Article] *19(2)* of Dublin III] *establishes the framework within which* [the] *process* [of establishing the member state responsible] *must be conducted"* (Karim at [23]).

60. Second, if it is concluded that another member state is responsible, the member state in which the asylum applicant is present may make a takeback or take charge request to this second member state (in the instant case, France). After making the necessary checks this second member state (France) must decide either to accept, or reject, the request made of it. A failure to decide within the time limit specified within Dublin III is treated as being "*tantamount to accepting the request*". In the case of dispute between the two member states the matter may be referred to a 'conciliation committee', which will impose a final and irrevocable solution in relation to the disputed issue.

61. A transfer decision (the third stage) can only be made by the member state in which the asylum applicant is present (the UK) where there has been an actual, or deemed, acceptance by another member state (France) to the takeback/take charge request, or such solution has been imposed by a conciliation committee."

14. The Tribunal in *RM* did not accept this is a precedent fact jurisdiction on the basis that acceptance of the takeback request was sufficient. At [62] it stated:

> "62. On this analysis, it is plain that the structure and application of Dublin III does not support the contention that the power of a member state to make a transfer decision is dependent on the prior establishment of the matters identified in Article 19(2); rather, the power to make a transfer decision in relation to an asylum applicant present on the territory of a member state is dependent on the actual or deemed acceptance by another member state of a takeback/take charge request made in relation to that application, or such a solution has been imposed by a conciliation committee."

15. The Respondent's position in the current case is that following Bulgaria being deemed to have accepted responsibility for assessing the claim no further enquiry into the merits of the transfer decision is permitted. This is challenged by the Applicant who submits the positive duty to effectively review issues of fact and law may require post-decision matters to be assessed. Mr Symes in support of this contention refers to the decision in *Hasan [2018] EUECJ C-360/16*, a decision which postdates *RM* and the finding in that case that post transfer decision evidence was not admissible in judicial review proceedings examining Article 19(2) cases, where at [31] it is written:

> "…. an applicant must have an effective and rapid remedy available to him which enables him to rely on circumstances subsequent to the adoption of the decision to transfer him, when the correct application of the Dublin III

Regulations depends upon those circumstances being taken into account."

16. Reliance is also placed by Mr Symes upon the decision in *Ghezelbash [2016] EUECJ C-63/15*, a case predicated on evidence that post-dated a transfer decision.

17. The Upper Tribunal in *MS*, whilst considering a different factual matrix, examined in considerable detail the question of whether the Tribunal should for itself consider whether the criteria for determining responsibility under Dublin III Regulations are met on the facts. The Tribunal examined in some detail the decision of the Grand Chamber in *Ghezelbash* in relation to which the Tribunal in *MS* wrote:

> "175. We begin with the Grand Chamber decision in Ghezelbash. In that case, the CJEU was concerned with a challenge to a decision to transfer the applicant from the Netherlands to France on the basis that under the 'criteria 'in article 12 of the Dublin III Regulation, France was responsible for examining his asylum application as he had been granted a visa residence document in France. Having been requested by the Dutch authorities to "take charge" of the applicant's asylum claim, the French authorities accepted responsibility under the Dublin III Regulation. The Grand Chamber accepted that article 27, read in the context of the Dublin III Regulation as a whole, meant that the applicant was entitled to challenge the application on the 'criteria' upon which the transfer decision was based. The applicant was not restricted, as had been the case under Dublin II, to a challenge to the conditions he would face in the EU country to which he would be returned relying upon article 3 of the ECHR. The Grand Chamber recognised that such a challenge is not inconsistent with the overall scheme, including the timescales for reaching decisions on responsibility under the Dublin II Regulations. The Grand Chamber drew support for a more extensive right of challenge which extended to cover both "fact and law" from Recital (19) which is in the following terms:
>
> > "In order to guarantee effective protection of the rights of the persons concerned, legal safeguards and the right to an effective remedy in respect of decisions regarding transfers to the Member State responsible should be established, in accordance, in particular, with Article 47 of the Charter of Fundamental Rights of the European Union. In order to ensure that international law is respected, an effective remedy against such decisions should cover both the examination of the application of this Regulation and of the legal and factual situation in the Member State to which the applicant is transferred.""

18. That judgment was examined by the Tribunal in *MS* in further detail leading to the finding at [179]:

> "179. It is readily apparent to us that the Grand Chamber accepted that a 'transfer decision' could be challenged by an individual on the basis that the 'criteria' determining responsibility for examining an asylum application had been <u>wrongly or incorrectly</u> applied. The challenge is not limited to the legality of such a decision. Further, it is clear to us that

the Grand Chamber envisage such a challenge to "cover questions of both fact and law" (at [36])."

19. The Tribunal in *MS* also examined the decision in *Mengesteab (Case C-670/16)* in which the Grand Chamber applied the decision in *Ghezelbash* and accepted that the remedy envisaged by article 27 applied to allow for a challenge to a 'transfer decision' even where the requested Member State is willing to take charge even after the time for making a TCR under Article 21 of Dublin III Regulation has expired and the subsequent state is deemed to have taken responsibility.

20. In relation to any conflict between the above Tribunal decisions I find the correct guidance on the appropriate approach is that set out at [190] of *MS* in the following terms:

> "190. What, then, is the role of the Tribunal in these proceedings? In Ghezelbash, the Grand Chamber affirmed that the effective remedy "cover[s] questions of both fact and law" (at [36]). There is no suggestion that the court or tribunal in determining whether the criteria in the Dublin III Regulation have been "correctly" applied is limited to determining the legality of the decision based upon public law principles. We were not referred by either party to any passages in the relevant CJEU decisions to suggest otherwise."

21. The Tribunal in *MS* considered the opinion of Advocate General Sharpston in Ghezelbash in which this issue was considered and in which it is noted that the Advocate General did not state that Article 27 requires a full enquiry into the facts in relation to the application of the Dublin III Regulation criteria but rather recognised that it involved the assessment of the lawfulness of the decision and whether it was taken on a sufficiently solid factual basis. The Tribunal in *MS* also state the Advocate General (AG) recognises the scope of the review was a matter for the domestic courts subject to their procedures but that the review process must have the appropriate intensity given the principle of effectiveness and specifically contemplated that it was for the domestic courts to determine whether a successful challenge would result in the decision-maker having to reconsider the decision or whether the court could take the decision for itself.

22. The Tribunal sets out its conclusions in relation to the AG's opinion at [193] in the following terms:

> "193. The Advocate General's opinion is far from an unambiguous statement of the approach that Ms Kilroy invites us to take. It does, however, provide some support for the view that the challenge is not restricted to legality alone in the requirement for any decision to have a "sufficiently solid factual basis". It is, perhaps, illuminating that the CJEU made no comment on this aspect of the Advocate General's opinion, confining itself to stating, as we have pointed out, that the review covers "questions of fact and law". That may, in its simplicity be, in effect, an unambiguous acknowledgment that the individual must have the ability to challenge the application of the criteria not only as legally wrong, but also as factually wrong. We have concluded that it is."

23. The Tribunal find there is no insurmountable procedural obstacle to a factual enquiry being undertaken in judicial review proceedings referring at [195] to a passage in Auburn, Moffet and Sharland, *Judicial Review: Principles and Procedure* (2013) (at para 20.23) where it is stated:

> 'Parliament has provided that a public body's power or duty to act in a particular way depends upon the existence of a particular factual situation and the public body's assessment of that factual situation is challenged, in certain cases the court will determine whether the relevant factual situation actually exists. In such cases, the court will not permit the public body to confirm itself power to act (or to deny itself power to act) by an erroneous conclusion as to the relevant fact.'

24. The above is not an invitation for a court or tribunal to admit oral evidence subject to cross-examination in all cases. The majority of judicial review claims contain no factual dispute in Dublin III cases; the issue ordinarily being whether there has been a proper lawful application of the Regulations. It is also the case that even if there is a factual dispute it may not be necessary to call oral evidence for a court or tribunal to determine the same. It is settled law that it will only be if it is necessary in order to resolve a matter fairly and accurately that oral evidence is likely to be permitted.

25. Mr Anderson on behalf of the Secretary of State places reliance upon the earlier decision of *RM* arguing that this tribunal must follow that decision unless there are compelling reasons arise not to do so. Mr Anderson repeats the conclusion of *RM* that in a question of this nature a deciding body is restricted to assessing the merits of any challenge on traditional public law grounds. Mr Anderson relies in particular upon Article 18 Dublin III which sets out the obligations on a member state responsible in Article 19 relating to the cessation of responsibilities. Mr Anderson specifically refers to Article 19(2) which provides:

> 'The obligations specified in Article 18(1) shall cease where the Member State responsible can establish, when requested to take charge or take back an applicant or another person is referred to in Article 18(1)(c) or (d), that the person concerned has left the territory of the Member State for at least three months unless the person concerned is in possession of a valid residence document issued by the Member State responsible.'

26. The Respondents case is that this condition of residence for the required period had not been made out on the evidence before the decision maker.

27. This provision is pertinent to the Applicant's claim as he asserts that he left Hungary and returned to Turkey, where he remained for approximately six months, and was therefore out of the territory of European Union for more than the requisite three month period such that the responsibility for determining his claim should therefore now rest with the United Kingdom.

28. Article 22 of Dublin III states a Member State shall make necessary checks and give a decision on the request to take charge of an applicant within two months of receipt of the request and, at Article 22(7), that failure to act within the two month

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

29. These provisions are not disputed in this case, the issue being whether the criteria have been satisfied permitting the United Kingdom government to make a take charge request or whether the fact the Applicant had been out of the territory of a Member State for in excess of three months meant any responsibility for another state to take back the Appellant had expired. As noted in *RM* the first stage of the assessment is for that member state to determine for itself which member State is responsible for considering the asylum applicant's claim. This assessment is to be undertaken based on the criteria in Chapter III of Dublin III. The "second subparagraph of [Article] 19(2) of Dublin III] establishes the framework within which [the] process [of establishing the member state responsible] must be conducted" (Karim at [23]).

30. Mr Anderson submitted that the decision *RM* remains good law and that for the Applicant to exercise an effective remedy it was not necessary to revisit the facts.

31. It is accepted there are factual differences in the authorities relied upon particularly by the Applicant, but it is not made out that *RM* remains the determinative authority having been decided as it was in 2017 prior to the decisions of the Grand Chamber referred to by Mr Symes and considered by the tribunal in *MS*. I find that the decision in *MS* decided in 2019 contains a more accurate reflection of the current legal position and applicable principles when determining challenges to Dublin III decisions.

32. It is not suggested judicial review is not an effective remedy. Whilst *MS* did not engage with *RM* (it is not clear from reading the later determination whether that tribunal was referred to the earlier determination) that does not mean *MS* cannot or should not be followed.

33. As recognised by the Grand Chamber it is necessary for both fact and law issues to be considered to enable an individual to have a proper effective remedy. Whilst Mr Anderson asserts the findings of the Tribunal in *MS* at [193] relating to Advocate General Sharpston's opinion cannot be right, no evidence was provided to this tribunal of any successful challenge by way of appeal by the Secretary of State to that decision.

34. As announced in court, I accept Mr Symes's submissions regarding the proper approach to the challenge in this case and choose to follow the tribunal decision in *MS,* which postdates *RM,* and which had the benefit of decisions of the Grand Chamber not available to the earlier tribunal which clearly establish merit in Mr Symes argument.

The merits

35. This is also a case in which there is a hard-edged factual issue namely the question of whether the Applicant resided in Turkey for longer than the period specified in Article 19 of Dublin III. If he did responsibility upon the member state subject to the takeback request never legally arose and responsibility has always remained with the United Kingdom.

36. The Applicant was called to give oral evidence was subject to cross-examination by Mr Anderson.

Precedent fact decision

37. The Applicant has been consistent throughout these proceedings in his claim. The essential facts summarised in Mr Symes in his skeleton argument at [9 – 10], are in the following terms:

> "9. A fled Iraq on 20 October 2013. He travelled to Bulgaria via Turkey. He experienced mistreatment in Bulgaria as set out most fully in the medical report. He travelled to Hungary where he spent several days, including a short period of time whilst detained for illegal entry. His agent then procured his transportation to Turkey (without A having agreed to depart the EU) before making arrangements for his travel across the EU via countries unknown to A. A arrived in the UK and claimed asylum on 23 July 2014.
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> 10. A hit on the EURODAC system indicated a prior asylum claim in Hungary on 20 January 2014, and prior unlawful presence in Bulgaria on 3 November 2013 (B 16), R requested both countries to take responsibility for A's asylum claim; Hungary refused, but Bulgaria was deemed to have accepted responsibility by default on 21 August 2014 (B 21). A's asylum claim was certified as amenable to third country procedures on 21 August 2014 (B 19 – 20), and A's advisers having made representations as to why to return to Bulgaria would contravene A's rights to be free from inhumane and degrading treatment (as well as raising the Article 19 (2) issue) (B 24ff), that claim was certified as "clearly unfounded" on 15 September 2014, on the basis that the evidence did not establish systemic or other human rights deficiencies there (C1ff)."

38. The procedural history is also of some importance and is set out at [11 -13] of Mr Symes skeleton argument in the following terms:

> "11. A's claim has a lengthy procedural history. The essential facts are these.
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> a. The claim was lodged on 16 September 2014 (in the Administrative Court, as it was at that time generally understood that any "safe third country" challenge needed to request a declaration of incompatibility), accompanied by the statement of grounds (B7ff): two challenges were made, as to the compatibility of a return to Bulgaria with A's right to be free from inhumane and degrading treatment (Grounds 1, 3 and 4), and as to Bulgaria's responsibility for the asylum claim in any event given A's departure from the EU for more than 3 months (Ground 2). The removal hitherto proposed for 17 September was deferred.
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> b. The claim was refused permission by the Administrative Court on 3 July

2015. The Court of Appeal granted permission to appeal for the judicial review on 12 October 2015 (D3) and remitted the matter back to the Administrative Court, where the case was stayed on 15 February 2016 (D5) in line with lead cases on the returnability of asylum seekers to Bulgaria. On 29 June 2016 R invited A to withdraw this claim following the dismissal of those claims in the Administrative Court (F71-F72).

c. On 11 July 2016 A wrote (F73-74) noting that Ground 2 remained a live issue between the parties and that accordingly it would be appropriate for the parties to agree to the amendment of the grounds, maintaining the challenge as to return to Bulgaria being incompatible with A's fundamental rights and more fully particularising Ground 2; as R did not agree (F75-76), A made a formal application on 10 August 2016 (F77).

d. A formally applied for medical evidence from Dr Cohen to be admitted in these proceedings on 2 December 2015 (F48ff) and to amend his grounds for judicial review. No ruling has been made on that application, which remains outstanding. However subsequent developments have overtaken that application.

e. On 23 November 2017 the decision of the Court of Appeal in *HK (Iraq)* [2017] EWCA Civ 1871 upheld the decision of the Administrative Court that, on the then available evidence, human rights claims raised against the removal of asylum seekers to Bulgaria could be lawfully certified as clearly unfounded. On 24 January 2018 (F2) A wrote to the Administrative Court recognising that for present purposes *HK,* Article 19(2) aside, determined the original Grounds of the judicial review against him; hence it was proposed that the claim advanced now only on the second ground.

12. On 5 July 2018 (C23ff) R wrote a Response Letter in respect of Certification Decision (AKA "Supplementary Letter") arguing that

a. The burden of proof in an Article 19(2) case was on the requested Member State;

b. A's claim to have departed the EU for 3 months was based wholly on his own unsupported testimony and lacked any supporting corroboration, there being no probative or indicative evidence of the kind specified in the Commission Implementing Regulation;

c. There was no review process envisaged under the scheme of Dublin III and thus R's decision was lawful given the limited information then available;

d. In any event the indicative evidence now supplied by way of A's witness statement was wanting: it was neither "*detailed*" nor "*verifiable*" as certain matters now raised by R were considered to deprive it of those characteristics (C27 -28).

13. A has repeatedly provided interview and witness statement of evidence attesting to his time outside the EU in Turkey:

a. In his asylum screening interview (23 July 2014: E4/2.1);

b. In his "Immigration Service" interview (23 July 2014): E19;

c. In his Travel History interview (28 July 2014): (E 24/2.7, E 26/3.2.1);

d. In his statement of 15 September 2014 (necessarily brief and taken in difficult conditions, as it was made over the telephone) A9ff, A16 [35-36]);

e. In the medicolegal report from the Helen Bamber foundation (F4, F12 [25]);

f. In the witness statement of 9 August 2019 (A1-A8) responding to the points made by R in the supplementary refusal letter of 5 July 2018."

39. The Respondent in the supplementary refusal letter of 5 July 2018 acknowledges the issue of the Applicant being out of the territory of the EU for over three months had been raised in a letter of 12 September 2014, the evidence submitted to the Home Office in the asylum screening interview, travel history interview, medical report and witness statement of 15 September 2014.

40. The decision-maker asserts at [12] that the burden of proving the Applicant had left the territory of the European Union for longer than three months is on the requested Member State, in this case Bulgaria, and not on the requesting Member State. The Implementation Regulations are referred to at [14] setting out what is considered to be 'probative' evidence required to show a cessation of responsibility under Article 19(2) which, in relation to departure from the territory of the member state, includes an exit stamp, extracts from a third country bordering on a Member State bearing in mind the route taken by the applicant and the date on which the frontier was crossed, written proof from the authorities that the alien had been expelled, extracts from third country registrars substantiating residence, tickets conclusively establishing a departure from or entry at an external frontier, report/confirmation by the Member State from which the applicant left the territory of the Member State, stamps from third countries bordering on a Member State bearing in mind the route taken by the applicant and the date the frontier was crossed. 'Indicative' evidence is said to be detailed and verifiable statements by an applicant, reports/confirmation of the information by an internal organisation such as UNHCR, report/confirmation of the information by family members, travel companies etc, fingerprints except in cases where the authorities decided to take fingerprints when the alien crossed the external frontier, in such case they constitute probative evidence as defined. Also tickets, hotel bills, appointment cards for doctors, dentists etc in a third country, information showing an applicant's use of the services of a carrier or travel agency, or other circumstantial evidence of the same kind.

41. The Respondent's response to the Applicant's claim set out at [16 -23] of the Supplementary Letter is as follows:

"16. The Home Office maintains that at the time the formal requests were made to both Hungry and Bulgaria on 1 August 2014, the evidence available to the Home Office at that point in time, considered solely of your clients testimony, not supported by any other evidence probative or indicative, which was communicated to both Member States.

17. The purpose of the process under the Dublin Regulation to identify a single Member State responsible for determining an applicant's claim for international protection under the Dublin III Regulation (EU Regulation 604/2013) criteria begins with the communication of the formal request and ends, either with an acceptance, or following a challenge process, an acceptance or final rejection of the request in question. Clearly, if sufficient probative or indicative evidence (as outlined above), is presented, or known to the requested Member State at the time the Formal Request is made, or before a decision has been made, that Member State can decide not to accept responsibility for the case on this basis.

18. However, there is no review process foreseen once an acceptance has been received. An acceptance under the Dublin III Regulation has to be based on the information and evidence available at the time the Formal Request is made and accepted, otherwise the determination of a responsible Member State could be challenged *ad infinitum* and therefore defeat the primary purpose of the Regulation, which is to identify and determine at a particular point in time, a responsible Member State such that the applicant can - without undue delay - come to a substantive consideration of their claim for international protection.

19. Neither at the time the United Kingdom's formal requests to Bulgaria and Hungary on 1 August 2014, were made, nor in the period before a deemed acceptance was received, was either probative or indicative evidence presented which would meet the criteria listed in paragraph 16 and 17 above.

20. Furthermore, in the intervening period no new evidence, has been presented which would have made a case for a compelling engagement of Article 19(2) likely at the time the formal request was made, after the deemed acceptance by Bulgaria, or even if this were possible, at the time of the certification of the asylum claim on 21 August 2014, or when the Article 3 ECHR response letter dated 12 September 2014 was drafted and approved.

21. It must be considered that in light of the information available, the evidence provided by your client of his having left the EU member States cannot be considered not probative. There is no document exhibiting an exit stamp, no extracts from third country registrars, no report or confirmation from a Member State substantiating residence, no tickets, entry/exit stamps etcetera. Such evidence was not provided in 2014 and has not been presented to date.

22. Neither is the indicative evidence in this case is compelling. Firstly, the statements of your client in respect of his leaving Hungary and presence in Turkey until June 2014 are neither "detail" nor "verifiable" as required by the Regulation. There is for instance:

    - No information as to why your client or his agent decide to travel back to Turkey having spent so much time and effort crossing from Turkey into Bulgaria and again from Bulgaria into Hungary. Given that your client was already in Hungary, it would have been much easier for your client to continue his journey to Western Europe, if, as your client states the agent's goal was to bring your client to a safe country. In fact this move, was illogical in light of the agents claimed goals, as the agent clearly did not wish his "customer" to stay in Bulgaria and Hungary and must have already had plans in place to move your client to Western

Europe.

- Given that other parts of your clients witness statement are particularly detailed, the account of the claim journey back to Turkey is, in contrast, both brief and vague. There is for instance no information on:
- whether your client agreed or disagreed with this decision,
- no description of the route or mode of transport used,
- no description as to how the applicant reached the unknown address in Istanbul, conditions/location of where he was living, who else was there, measures taken not to be noticed etcetera
- how he spent his time,
- whether he ventured out, despite not having papers
- how he checked the progress of his onward travel,
- how he funded his claim six-month stay,
- whether he was in contact with family members, how, and for what purpose
- who the friend or person was, whom he claims prevented him from committing suicide,
- how he travelled out of Turkey etcetera
- given that your client was encountered twice when travelling from Turkey to Bulgaria and onto Hungary early in 2014, it seems remarkable that your client was then able to make the journey from Turkey to the French coast, without once being encountered by Turkish, Bulgarian, Hungarian, Serbian, Austrian, German or French officials. There is no second set of EURODAC fingerprint evidence definitely placing your client re-entering the EU after his claim sojourn in Turkey.

23. In light of the fact your client, neither at the time of his various statements prior, during or after the conclusion of the Dublin III Regulation determination procedure has not established that he left the European Union for at least three months. It is also considered that the Secretary of State would have reached this decision even without regard to the specified categories in the Commission Implementing Regulation cited.

42. It is not disputed that the decision-maker advised the authorities as part of the formal takeback request of the Applicant's claim. A copy of the transfer request sent to Bulgaria on 1 August 2014 is to be found at E32 – E36 of the judicial review bundle and the request to Hungary of the same date at E 37 – E 39. In the section headed "Other useful information" it is written:

> "Applicant claimed asylum in the UK on 23.7.2014. Applicant stated to have travelled from Iraq to Turkey, Bulgaria, Hungary, Turkey and entered the UK and that the transit took about one month and that he travelled in 3 or 4 different lorries.
>
> EURODAC search confirmed that he entered Bulgaria illegally on.3.11.2013 and claimed asylum in Hungary on 20.1.2014.
>
> Applicant admitted having been fingerprinted in Bulgaria approximately in

December 2013. He stated that after he was fingerprinted he remained there for one months and 10 – 15 days. He then stated to have travelled to Hungary where he stayed less than a week in a city in a building and that he was also in prison for 2 or 3 days. He then stated to have travelled to Turkey where he stayed for around 6 months but he is not entirely sure and the agent provided him with accommodation in Istanbul. He then stated to have travelled to an unknown country staying for 3 – 4 days and then travelled to France where he stayed for about 20 days in a woodland before he entered the UK on 21.7.2014. Please note that applicant did not provide us with any documentary evidence of his travel to Turkey. He stated that he used his own passport when he travelled to Turkey and that the agent took the passport from him after he entered Turkey. Applicant stated that he travelled from Iraq to Turkey but he didn't mention how long he was in Turkey. He also stated that he applied for a Visa to Turkey as he was a lorry driver, but he didn't state if he was granted this Visa or not.

43. The Applicant explained in his asylum screening interview of 23 July 2014 his route of travel, as set out in the takeback request, but did not state the journey from Iraq to Turkey, Bulgaria, Hungary, Turkey, and to the UK took one month. The question the Applicant was asked was how long was the transit which he stated was one month which must relate to the period in which he travelled from Turkey to the UK and not the journey from Iraq to the UK as a whole.

44. In the Immigration Service interview of the same day the Applicant provided a slightly different version of events claiming that he had travelled from Iraq to Turkey and by lorry straight to the United Kingdom. The Applicant, however, also confirmed in the same interview that his agent had taken him to Hungary but then pulled him back to Turkey. The Applicant lied to the interviewing officer about whether he had been fingerprinted or made a claim for asylum in Hungary or Bulgaria where he claimed he had not made any claim for international protection which was later shown to be incorrect.

45. In the Travel History Interview the Applicant was asked where he went after he left Hungary to which he stated that he went to Turkey. The Applicant was therefore asked on what date he arrived in Turkey to which he replied he was not sure. The Applicant was asked how long he remained there which he stated was around six months but that he was not entirely sure, that the agent provided the accommodation in Istanbul, that the agent provided for everything, that he did not work whilst in Turkey, that he left after six months or so but was not sure of the date, and that he was put in a lorry and into a flat in an unknown country.

46. In his statement of the 15 September 2014 at [35 – 36] the Appellant stated:

> "35. I tried to leave Bulgaria a number of times and I finally managed to leave the country. We were helped by a person whose house was on the border. He took us to his house at night and the next day in the morning we set out and we crossed the border. We walked for two and a half hours and the rest was by car. We were then in Hungary. I have been through a very difficult time, travelling and sleeping rough, and this makes it more difficult for me to remember the exact dates but I know I was in Hungary in January 2014. I was fingerprinted in Hungary but I did not claim asylum. I was in detention for 3

or 4 days. After I was released I stayed in a camp for 4 or 5 days and then I left the country and I went back to Turkey. My mother and uncle had sought the help of an agent to take me to a safe country and it was the agent's decision; he didn't want me to stay in another country. I did not know where I was going until I arrived in the UK. I was under the control of that agent and he was in contact through telephone; he would hand me from one person to another.

36. I stayed in Turkey for 5 to 6 months. I stayed in the agent's flat and he paid for my food during this period. He said I should stay there until he managed to take me somewhere safe. While I was there I wanted to kill myself because I was fed up with my situation with my life. I was sad and I didn't want to continue. Then the agent arranged for me to go to France, which took me 10 days to arrive. Then I stayed in France for around 20 days after which I travelled to the UK. I was so fed up with the situation in France and I used a rope to try to hang myself but a Kurdish guy who I met there saved me. I then travel to the UK and claimed asylum."

47. The Applicant's witness statement of 9 August 2019 confirmed that the 2014 witness statement was taken over the telephone whilst he was in detention. The statement also responds to issues raised in the Respondent's letter of 5 July 2018 providing further details of the Applicant's experiences in Hungary, details of the journey to Turkey after leaving Hungary, the Applicant's experiences in Hungary, and his journey from Turkey to the United Kingdom.

48. The Applicant was cross-examined by Mr Anderson in which he repeated his claim to have been in the hands of an agent and in which he answered questions regarding his experiences in Turkey. The Applicant claimed in his witness statement that he was free to leave the camp in Hungary where they were kept from early morning until evening, and that after approximately 4-5 days in the camp the agent came to see him and took him away after which he travelled to Budapest by train with an unknown person and by van and lorry before arriving in Istanbul. The Applicant claims he remained in the flat in Istanbul for between five to six months and that although he complained to the agent that he was not happy about being taken back to Turkey he was told by the agent that he would try to take the Applicant to a safe country later as he had been paid in advance so he had to be taken to a safe country. The Applicant explained he had no documents that allowed him to stay in Turkey and so could only venture out occasionally. In his oral evidence the Applicant confirmed this account and the claim the agent had asked him to work for him to assist with his people smuggling activities but that the Applicant refused. The Applicant confirmed that his mother paid the agent any increased costs. The Applicant confirmed he was aware he had been brought to the United Kingdom and remained in contact with his mother who had remained in contact with the agent. The Applicant accepted there was no evidence from the agent or his mother regarding his second stay in Turkey.

49. What is clear from the papers is that the Applicant has been consistent in his evidence of having left Hungary and returning to Turkey. Mr Anderson, although the Applicant indicated some confusion during cross-examination, was unable to

materially undermine the credibility of the Applicants claim.

50. The Respondent's position has been predicated upon a belief that much of the Applicant's account is implausible. There is merit in Mr Symes submission that the Respondent's conclusions appear to be based upon a viewpoint and understanding of a person in the UK rather than the experiences of a person under the control of an agent.

51. The Respondent appears to have been aware of the deficiency in the assessment of the application in the decision letter dated 15 September 2014 resulting in the supplementary decision letter of 5 July 2018.

52. There appears no consideration of whether [21] of that letter is realistic. A person under the control of an agent travelling across international boundaries travelling illegally may not be likely to have type of evidence referred to and stated to be 'probative' or 'indicative'. Consideration has to be given as to whether a person in their individual circumstances is likely to have such material. The Applicant never claimed he had.

53. In relation to the 'indicative' evidence it is arguable the decision-maker's conclusions and questions are in part irrational demonstrating a failure to understand the reality of the situation of a person in the control of an agent seeking to bypass lawful immigration control. It has often been said that a number of the external borders of the EU are porous with internal borders being practically non-existent in light of the free movement principles. In some cases an individual is only be required to cross one international border at which evidence of a right to enter has to be shown before being able to travel freely within Europe. Notwithstanding the tighter immigration controls employed by the United Kingdom there are numerous accounts of individuals being able to enter the UK illegally. The recent example of the 39 deaths in the refrigerated container lorry in Essex in a classic example of the ability of those seeking to enter the UK to be able to do so without detection.

54. The recent decision letter is also inaccurate in claiming no information was provided as to why the Applicant or his agent decided to travel back to Turkey. The Applicant did not make this decision, it was the agent's decision and the explanation for doing so was to enable the agent to bring the Applicant to a safe third country. That is not implausible. The decision-maker considered such a choice irrational in light of time and effort spent crossing from Turkey to Bulgaria and Bulgaria and Hungary but none of those countries were the intended destination. Thus, although the decision-maker claims it may be easier to continue the journey to Western Europe from Hungary this does not make it implausible, if it was not considered viable, to transport a person from Hungary into other parts of Europe or elsewhere to enable another route to be followed. The Applicant's evidence is also that while in the hands of the agent it was the agent who made the decisions. It is not unrealistic to assume that people smugglers have their own methods of bringing individuals in their care into the UK or elsewhere which may

include routes they know to be successful, those who can assist, such that an agent will then be paid. It is also the case the decision-maker speculates in terms of the intention of the agent in such a statement.

55. The assertion by the decision-maker that the account of the claimed journey back to Turkey was brief and vague and that there was no information on the various points set out has been explained in the evidence and has now been resolved in the Applicant's latest witness statement of 9 August 2019. The decision-maker was, however, fully aware of the Applicant's claim and despite there being a number of interviews with the Applicant it does not appear any effort was made during the course of those interviews to fully explore with the Applicant these issues. It is not unrealistic to expect that if an issue arises relevant to whether the criteria for a Dublin III transfer request are satisfied to enable a takeback request to be made the decision-maker will ensure that all appropriate and available enquiries are made on such issues. Article 5 of Dublin III provides that an interview must ensure "the proper understanding of the information supplied" which did not occur in this case. In this case the Applicant has been consistent throughout yet other than a cursory examination by the decision-maker there has been no effort to undertake the necessary degree of anxious scrutiny into this issue.

56. In *Mushtaq [2015] UKUT 224* (IAC) it was found that that Entry Clearance interviews serve the basic twofold purposes of enabling applications to be probed and investigated and, simultaneously, giving the applicant a fair opportunity to respond to potentially adverse matters. The ensuing decisions must accord with the principles of procedural fairness. The Upper Tribunal recognising at [19] that fairness will often require that the interviewer invite the subject to clarify or expand an answer or probe a response.

57. This approach has received recent support from the Court of Appeal, Underhill LJ, in *Balajigari [2019] EWCA Civ 673* in which it was found on the facts of that case that the respondent's approach in deciding to refuse an application for leave to remain was legally flawed principally because the respondent proceeded directly from finding that the discrepancies occurred to a decision that they were the result of dishonesty without giving the applicants an opportunity to proffer an innocent explanation.

58. The statement by the decision-maker that given the Applicant was encountered twice travelling from Turkey to Bulgaria and then on to Hungary in 2014 it seemed remarkable he was able to make the journey from Turkey to the French coast without being encountered by any of the named officials is an irrational observation in light of the substantial number of individuals able to travel across Western Europe as evidenced by the numbers in Calais and other Channel ports in relation to whom not all have been encountered prior to being fingerprinted in France. It is also not made out that everybody who arrives in France or at any of the migrant camps awaiting the means to transit into the United Kingdom will be encountered or fingerprinted by the French or other authorities.

59. I find merit in Mr Symes submission that the decision-maker's rejection is based upon implausibility and speculation applying an incorrect and unrealistic standard to the assessment of the evidence.

60. The weight of the evidence suggests that the decision-maker made the impugned decisions in the terms specified, particularly the supplementary letter of 5 July 2018, as she did not believe the Applicant's claim. The claim had not been put to the Applicant for further clarification resulting in the third country certificate being issued on the basis of the decision-maker's disbelief of the claim.

61. It is also the case that at no point in the original decision did the Respondent outline the existence of Article 19(3), full consideration of which would have necessitated a far more detailed interview to enable a proper understanding of the Applicant's position.

62. As noted by Mr Symes, Dublin III places significant weight on the procedural safeguards, including recognising the right to information, which requires a requirement to clarify the consequences of moving between Member States (4(1)(a)), the hierarchy of criteria and the possibility of responsibility shifting between Member States (4(1)(b)), the importance of the personal interview (4(1)(c)), the possibility of challenging a transfer decision (4(1)(d)) including that, where necessary for the proper understanding of the applicant with the information to be supplied orally, for example in connection with a personal interview.

63. There is also merit in the submission that the decision fails to touch on the real issue in this case resulted in an unfounded decision. It is also arguable the principles of fairness together with requirement of the Respondent to consider the evidence with the required degree of anxious scrutiny, both traditional public law remedies, have been infringed in this matter.

64. The Respondent's initial decision did not deal with the Article 19 point at all despite the decision-maker being aware of the Applicant's position regarding time out of the territory of the European Union. That decision is therefore unlawful. The decision of July 2018 asserts there is no challenge to the third country acceptance but that is wrong both in fact and law in a case in which the Applicant has been consistent that he does not satisfy the criteria for transfer pursuant to Dublin III.

65. I find the Applicant has established his case on the evidence and that the impugned decisions are infected by public law error material to the Respondent's decision. No allegation of dishonesty in the applicant's claim is made out or even run in the impugned decision, the question is whether the Applicant's evidence is reliable. As Mr Anderson correctly submitted if it was found the Applicant was outside the EU this means that the UK becomes the responsible State for considering the Applicant's asylum claim. As noted above the Respondent has not shaken the Applicant's case or undermined it to a sufficient degree to warrant an

adverse credibility finding in relation to the Applicant's claim to have left the territory of the European Union for more than a three-month period. I find this aspect of the Applicants claim made out on the available evidence. Whilst Mr Anderson submits the Applicant's account is not plausible this is not established on the evidence when considered as a whole. The decision-maker was required to do more than he or she did in light of the material before the decision-maker.

ORDER

a) The application for judicial review is allowed.

b) The 21 August 2014, 15 September 2014 and 5 July 2018 decision are quashed.

c) The respondent is to pay 75% of the applicants costs of and incidental to the proceedings, the applicant having succeed in part, to be assessed if not agreed.

d) There be a detailed assessment of the applicants publicly funded costs.

e) Permission to appeal to the Court of Appeal refused. The application amounts to no more than disagreement with the rejection of the submission of Mr Anderson that the approach in *RM* should have been followed in this case and disagreement with the finding the impugned decisions are infected by public law error. All relevant considerations were taken into account as a reading the decision shows and the fact the conclusions are not of the respondents choice does not support the claim in the alternative. The application for permission fails to establish an arguable case warranting a grant of permission to appeal.

Signed: _____

Upper Tribunal Judge Hanson

Dated: **2 December 2019**

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on:

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 question 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 given (Civil Procedure Rules Practice Direction 52D 3.3(2)).