R (on the application of AM (a child by his litigation friend OA and OA) v Secretary of State for the Home Department (Dublin – Unaccompanied Children – Procedural Safeguards) [2017] UKUT 00262 (IAC)

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review

Notice of Decision

The Queen on the application of
AM (a child by his litigation friend OA) (1) and
OA (2)

Applicants

v

Secretary of State for the Home Department

Respondent

Before The Honourable Mr Justice McCloskey, President and Upper Tribunal Judge Allen

Having considered all documents lodged by the parties and having heard the parties' respective representatives, Ms C Kilroy and Ms M Knorr, of counsel, instructed by Bhatt Murphy Solicitors on behalf of the Applicants and Ms A Walker, of counsel, instructed by the Government Legal Department on behalf of the Respondent, at hearings at Field House, London on 05 & 11 May 2017.

(i) *Regulation 604/13/EU (the Dublin Regulation) occupies the field to which it applies and operates as a measure of supreme EU law therein.*

(ii) *It is not open to the Secretary of State to unilaterally and selectively disapply certain provisions of the Dublin Regulation and its sister implementing Commission Regulation as this is contrary to EU law.*

(iii) *The dilution and disapplication of the procedural fairness and kindred*

protections enshrined in the Dublin Regulation, the implementing Regulation, Article 8 ECHR and the common law are not justified on the grounds of expedition and humanitarian challenge.

(iv) *Any remedial order in this type of case should take into account the best interests of the child concerned and the need to accommodate child safeguarding checks and processes.*

ANONYMITY

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI2008/269) I make an Anonymity Order. Unless the Upper Tribunal or Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This prohibition applies to, amongst others, all parties.

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McCLOSKEY P

Introduction

(1) The background to these judicial review proceedings can be ascertained from my preliminary ruling in this case and the related case of AO at the hearing conducted on 29 March 2017 (see Appendix 1). By such ruling I refused the Secretary of State's application for a stay of proceedings pending determination of the Administrative Court case of Citizens UK v SSHD (CO/5255/2016), which is scheduled to be heard on 23/24 May 2017. There is also another somewhat related pending case in the Administrative Court, R (Help Refugees Limited) v SSHD (CO/5312/2016).

(2) This is one of seven cases in which judicial review permission applications were lodged in this Tribunal at around the same time, in late March 2017. By virtue of their common features they belong to the same group. They may be loosely described as "post-Calais" cases.

(3) In broad outline, all of them involve unaccompanied teenagers from non-EU countries currently residing in France and asserting a range of pressing personal needs and circumstances. All seven children survived for varying periods in the notorious "Jungle" in Calais, in northern France, until its demolition in mid-October 2016. These seven children were members of a substantially larger group of around 2,000 identified by, or on behalf of, Home Office officials as candidates for possible transfer to the United Kingdom. In conjunction with the demolition of the "Jungle" the dispersal of all of these children to 73 *ad hoc* French state operated reception centres, scattered throughout France, ensued. This was accompanied by the *soi – disant* "expedited process", a joint Anglo – French exercise, giving rise to decisions that all seven children would be refused transfer to the United Kingdom. It appears that a small number of positive transfer

decisions were made during the brief window immediately preceding the demolition and dispersal exercises.

(4) Those initial refusal decisions of the Secretary of State, more recent decisions to like effect and the Secretary of State's decision making processes all form part of the matrix of the judicial review challenges which have materialised. In the formal pleading the target of the Applicant's challenges is the Secretary of State's continuing refusal to transfer them to the United Kingdom. The remedy sought by each of the Applicants is a mandatory order requiring the Secretary of State to admit them to the United Kingdom. In two of the seven cases, which were initiated more or less simultaneously, the Secretary of State has acceded to this petition. As a result there are five remaining judicial review Applicants of whom AM is one.

(5) I granted this Applicant permission at the stage of refusing the Secretary of State's application for a stay. For purely administrative reasons, this case was, ultimately, paired with that of SASA in which I had directed a "rolled up" hearing. The other three remaining cases – MHA, KIA and SS – have been heard in the same mode. As of today's date judgment has either been handed down or circulated in draft in all five cases. All of the Applicants have succeeded and the remedy granted is the same in each case.

Interim relief

(6) In Section 3 of the Judicial Review Claim Form, under the rubric of "Details of the Decision to be Judicially Reviewed", it is stated:

> "*Failure to transfer the first Applicant to the UK in accordance with his substantive Dublin III rights and his Article 8 rights ……*
> *Refusal/failure to act since 16/12/16 ongoing.*"

This formulation is common to all of the Applicants, each of whom pursued the mandatory order noted above. All of the Applicants also pursued, by interim relief, an order mirroring the substantive relief claimed. This gave rise to an order of the Tribunal. I refer to Appendix 1 hereto. In short, reflecting the advent of significant new evidence in all of the cases and for the other reasons given, an interim relief order was made requiring the Secretary of State to make new decisions in all cases. While, as the title indicates, the order was designed to embrace all five live cases, the parties' representatives understood the present case to be excluded as permission to apply for judicial review had already been granted. As a result the Secretary of State made no fresh decision in AM's case.

(7) By way of further introduction, another interlocutory order was made authorising amendment of the Applicants' grounds in all five cases. Amended grounds were duly devised in the other four cases. No new decision of the Secretary of State having been made amendment did not occur in the instant case.

AM's Challenge

(8) This Applicant asserts that he is aged 16 and of Eritrean nationality. The cornerstone of his case is that he wishes to establish family life with a person whom he claims to be his uncle, "OA", a recognised refugee residing in Manchester. On the facts, the lynchpin of the Secretary of State's case is that this asserted relationship is not accepted This is the sole ground upon which the Secretary of State's impugned refusal decision was based.

(9) This Applicant was interviewed by Home Office officials at the French reception centre (the "CAOMIE") to which he and some 40 other children had been transferred from Calais. This occurred on 06/07 November 2016. Certain aspects of the evidential matrix relating to this interview and subsequent events will be examined *infra*. It is common case that, in this context, he provided details relating to OA, whose evidence will also be considered *infra*.

(10) Evidence in support of the asserted relationship includes OA's residence permit, a photograph of the two people together and identification documents said to relate to the Applicant's maternal grandmother. There is also evidence of an Arabic interpreter whose expertise is unchallenged and which I shall treat as expert evidence, in the form of a witness statement. This explains the differing descriptions of the first name of the Applicant's mother, "Fatima" and "Fatna". In addition OA has, through the medium of a witness statement of the Applicant's solicitor (Mr Scott), provided further detail of his telephone contact with the Home Office Official (*supra*). He highlights in particular the lack of prior notice, the unsatisfactory circumstances, linguistic and communication difficulties and the absence of any opportunity to consider and certify the record of interview.

(11) The evidence includes a report of Dr Susannah Fairweather, Consultant Psychiatrist. This was based on the various documentary materials identified and an assessment of the Applicant by Skype about which the author says the following:

> "*There were limitations to the assessment due to the medium used .....*
>
> *However, it became increasingly apparent that the difficulty in establishing an adequate rapport .... was not primarily due to a lack of face to face contact but his withdrawn and emotionally 'cut-off' mental state.*"

Dr Fairweather opines as follows:

> "*My psychiatric assessment found him to be suffering from major depressive disorder ....*

It also became apparent he has considerable post-traumatic stress disorder symptoms but not to the extent he meets diagnostic threshold. These symptoms are linked to the severe violence he witnessed others being subjected to whilst he was held in captivity in Libya. However, given his withdrawn state in the assessment, it is very likely he has under reported his symptoms and over time he may disclose more. He has severely struggled with the delay in being reunited with his uncle, manifesting on occasion with suicidal ideation."

(12) Other significant passages in Dr Fairweather's report include the following:

"*I am in no doubt that* [the Applicant's] *current situation is both causative and exacerbating of his psychiatric disorders. It does not meet his developmental needs of adult support, social relationships and stable accommodation. His needs are only being met in a very basic way – make shift accommodation, some level of education .... and food .... It is clear that* [the processes] *have had a detrimental impact on his mental state, as seen as his increased suicidality with plan on how he would act. This shows his state of desperation and hopelessness ....*

The delay is having a significant exacerbating impact on his mental state causing him increased distress and increasing his despair .... [He] *is severely struggling with the delay in being reunited with his uncle ....*

This relationship has particular meaning, given his orphan status .... A withdrawn state indicates a decline in his mental state .....

Existing in this dissociated state over a chronic time period is very detrimental for children. In my professional experience, it worsens prognosis over time and makes it harder to treat young people as this emotional functioning becomes their norm despite it actually being maladaptive and pathological for them .....

[He] ***is at risk of becoming actively suicidal if prompt reunification does not occur as his mental state will deteriorate further ….***

[His] *prognosis would be significantly improved with a prompt transfer to the UK so he can be with an adult he identifies as supportive and whom he trusts, ie his uncle.*"

[My emphasis.]

(13) In the fluctuating matrix of this case the Applicant, at one stage, ran

away from the CAOMIE. Dr Fairweather comments on this development thus:

> "*In my psychiatric opinion, it is highly concerning that* [the Applicant] *has run away and is not making contact with those that know him. He is highly vulnerable to exploitation given his psychiatric disorder and symptoms and his desperation for his situation to be resolved. His risk of self harm and suicide is likely to be escalated given he will be facing further stressors such as a need to find accommodation and food. In my opinion, he requires social stability to support recovery from his mental health disorder as soon as possible.*"

Fortunately this recent development was shortlived and the evidence establishes that the Applicant returned to the centre shortly before the substantive hearing.

(14) Dr Fairweather's detailed report, digested above, followed upon her initial "Summary of Psychiatric Assessment", dated 14 March 2017 which, clearly, was prepared by her for the purpose of ensuring that her summarised views formed part of the evidence to be included in the judicial review permission bundle.

The Secretary of State's Response

(15) Much of the Secretary of State's pre-proceedings and post-proceedings responses are devoted to the subject of the expedited process. The Secretary of State's initial response was made in a letter dated 24 February 2017 replying to the pre-action protocol ("PAP") letter. This contains the following passage:

> "*All minors who had been resident in the Calais migrant camp were transferred to specialist centres across France on Wednesday 02 November* [2016]*. Home Office staff assisted the French authorities during this process and accompanied the children on the buses leaving Calais. Specialist UK staff were deployed to centres across France to assess children who may be eligible to come to the UK* ***either under the family reunion criteria of the Dublin Regulation or the criteria set out in the Guidance on Implementation of section 67 of the Immigration Act 2016 in France, published in GOV.uk …..***
>
> *I can confirm that your client was assessed as part of this process. Your client was not accepted under the family reunion process because there were a number of inconsistencies between the family details provided between your client in the UK and the applicant in France ….*
>
> *The SSHD was therefore unable to determine that your client met the*

definition of family or relative under Articles 8.1 or 8.2 of the Dublin III Regulation."

[My emphasis.]

The letter continues:

"*Any further evidence should be supplied to the French authorities. Following an asylum claim in France, the French authorities can ask the SSHD to consider a take charge request in the light of this material.*"

Addressing the decision in R (ZT) (Syria) v SSHD [2016] EWCA Civ 810, the author states:

"*….. it is only in exceptionally compelling circumstances that an individual can turn to the authorities and Courts in the United Kingdom. The evidence you have provided does not suggest your client meets this threshold.*"

I observe, in passing, that this letter does not attempt to engage with the disclosure requests made by the Applicant's solicitors.

(16) The second element of the Secretary of State's response is contained in the witness statement of Julia Farman of the UKVI European Intake Unit. This essentially replicates the aforementioned PAP response letter. Furthermore, it suggests that the "*only contact*" which the Applicant and OA claim to have had took place in "the Jungle" in Calais. Ms Farman also adverts to the need for vigilance where there is a risk of child trafficking. She also describes the conduct of OA as "*a paradigm example of asylum shopping*", without engaging with the indelible fact that OA was granted asylum in the United Kingdom. She questions why they did not seek asylum together in France and enters a *caveat* about the Applicant's best interests. This is followed by an elaborate critique of Dr Fairweather's initial summary report. It also evinces an intention to seek to cross examine Dr Fairweather (which has been taken no further). Ms Farman's witness statement adds essentially nothing to the evidential matrix. It is replete with adversarial argument and mere comment.

(17) The evidence includes a quite heavily redacted version of the witness statement filed on behalf of the Secretary of State in the Help Refugees Case (*supra*). Its author, Mr Cook, describes himself as the Head of EU and International Asylum Policy in the Home Office. His witness statement is dated 24 November 2016. He asserts that by this date over 300 children had been transferred to the United Kingdom "*as part of the UK Government's support for the Calais camp clearance operation*". He deposes that there are over 4,000 unaccompanied asylum seeking

children in the case of UK local authorities. Between January and November 2016 some 480 unaccompanied asylum seeking children were accepted in the UK from Europe for the purpose of determining their asylum claims. Approximately three quarters of these transfers were under the Dublin Regulation, the balance being pursuant to section 67 of the Immigration Act 2016. The deponent refers repeatedly to the Dublin Regulation. The transfers of children under section 67 are distinguished on the basis that members of this cohort do not qualify for transfer under the Dublin Regulation.

(18) There is a notable reference to Article 17 of the Dublin Regulation in Mr Cook's statement:

> "*It was initially thought that the transfer of children to the UK under section 67 could use Article 17 …. which is a discretionary clause, to provide the legal mechanism for transfer in cases where the child had no close family in the UK*".

Mr Cook then refers to "*work on improving*" the implementation, together with steps designed to bring about "*a significant improvement in our operation"* of, the Dublin Regulation. This is followed by certain averments addressing specifically the Calais context:

> "*Prior to the operation by the French authorities to clear the Calais camp, which began on 24 October 2016, the UK Government made substantial efforts to identify children eligible for transfer to the UK and to encourage the French authorities to make the necessary request to transfer them to the UK under the Dublin Regulation. As a result of these efforts over 80 unaccompanied asylum seeking children were transferred from France to the UK from 01 January to 01 October 2016.*"

Mr Cook then recounts the formation and activities of a dedicated Home Office Team which liaised with the relevant French authorities concerning the camp demolition in Calais. He continues:

> "*…. UK Officials have been working closely with the French authorities to improve the operation of the Dublin Regulation and speed up the identification, processing and transfer to the UK of unaccompanied children in the Calais camp with close family links here ….*
>
> *It was not agreed that UK officials could operate in the camp before the week commencing 17 October 2016.*"

Mr Cook continues:

> "*In late September 2016, the estimated number of children in the*

Calais camp was circa 860, of whom 640 were unaccompanied ….

The UK made clear to the French authorities that the priority must be to ensure as many children as possible with close family in the UK were transferred out of the camp ahead of clearance …. [and] *…. moved to safe accommodation.*"

(19) According to Mr Cook, in early October 2016 agreement was reached between Home Office officials and their French counterparts. He avers:

"*… The UK reached agreement with the French authorities to combine the three asylum registration interviews for the unaccompanied asylum seeking children into one interview for the Dublin process. In addition, French agreement was given for Home Office officials to work alongside FTDA* [a charity] *to register asylum claims in the Calais camp. This work significantly reduced the processing time for assessing applications in Calais under the Dublin Regulation from around 10 days to approximately 48 hours, depending on the outcome of the checks undertaken by the Home Office. The UK secured agreement to undertake interviews in the camp from 17 October until 28 October except for 24 and 25 October when the camp clearance was underway.*"

Next, from 22 October 2016 the French authorities arranged for all children to be accommodated in a secure area of the camp. For the Home Office, the prevailing conditions were plainly far from perfect:

"*The situation ahead of and during the French operation to clear the Calais Camp from 24 October 2016 was extremely fluid and operationally challenging. The lack of accurate data on the number of children in the camp and their profile meant that the Home Office had to be flexible and adapt its approach to circumstances …..*"

The narrative continues:

"*On 24 October 2016 the SSHD made a statement to Parliament in which she stated that the UK had transferred almost 200 from Calais under Dublin or section 67. Importantly, the SSHD explained that UK officials had only had access to the camp for the last 7 days and that in that time 800 children were interviewed.*"

Mr Cook records the UK Government's substantial concerns about the efficacy of data and information gathering facilities in the camp and explains that with effect from 28 October 2017 "*… interviewing and transfers ceased*". At this stage, some 300 unaccompanied children had been transferred to the UK, while 1850 children were dispersed to

reception centres. Mr Cook observes:

> "*This was almost double the initial estimates of both the French authorities and the NGOs operating in the camp in early October and over three times the estimates from late August.*"

(20) Mr Cook has also made a detailed witness statement in the Citizens UK case. This contains a dedicated section entitled "The Expedited Process". He avers that the agreement reached with the French authorities, taking effect from 14 October 2016, was to –

> "*… set up an expedited process for considering claims based on the reunion criteria of the Dublin Regulation, but without undertaking the procedural aspects of the Dublin procedure, namely the requirement for an asylum claim to be registered in France and a take charge request made of the UK via DubliNet. Transfers from 17 October up until the completion of the transfers made as a result of interviews conducted at the CAOMI's, the majority of which were concluded by 09 December 2016, were therefore operated on an expedited basis outside of the Dublin framework.*"

Continuing, Mr Cook explains that in order for a child to be transferred to the United Kingdom under the expedited process the following six conditions had to be satisfied:

> "*(a) The UK was satisfied that the child was under the age of 18; and*
>
> *(b) They had a claim family member or relative in the UK that would qualify under Article 8(1) or 8(2) of the Dublin Regulation; and*
>
> *(c) UK Visas and Immigration* [UKVI] *case workers were satisfied, based on the evidence available to them, including evidence collected during interviews with the minor and interviews with their claim family member, sibling or relative in the UK and any relevant supporting documentation that the relationship was as claimed; and*
>
> *(d) For Article 8(2) cases, the relative stated that they were willing and able to take care of the child and that this was backed up by local authority assessments where these had been completed; and*
>
> *(e) Relevant security and criminality checks on the child and receiving family member, sibling or relative were passed; and*
>
> *(f) The Home Office was satisfied that it would be in the best*

interests of the child to be transferred to the UK."

(21) Mr Cook elaborates on the expedited process thus:

> "*Where the claimed family relationship was one that would qualify under Article 8(1) or Article 8(2) of Dublin, the family member, sibling or relative in the UK was contacted to establish that the claimed relationship was genuine and whether the person(s) in the UK would be willing to receive the child .....*
>
> *Those with an Article 8(1) relationship* [ie a "family member or a sibling"] *were accepted for transfer to the UK whether or not the family member or sibling stated that they were able to take care of the child, whereas under Article 8(2)* ["a relative"] *cases were not accepted unless the relative stated that they were able to take care of the child. At the same time, checks were requested from the local authority where the relative resided to conduct an assessment of the reception conditions available to the children.*"

Next, Mr Cook makes clear that in some cases children were transferred to the United Kingdom and then placed in the temporary care of local authorities pending completion of the enquiries and steps noted above. The immediately following averments in Mr Cook's witness statement, in [56], make clear (as confirmed by other evidence) that the Secretary of State operated a blanket prohibition on the transfer of children in the expedited process under Article 17 of the Dublin Regulation.

(22) Mr Cook expresses the belief that by operating the expedited process the Secretary of State exceeded her obligations under the Dublin Regulation by dispensing with the twin steps of an asylum claim in France and a take charge request by France to the UK. This is of course a pure question of law, not a matter for Mr Cook, which will be addressed later in this judgment.

(23) Mr Cook's witness statement also devotes several paragraphs to the discrete topic of "Opportunity for Review". I summarise his key averments thus:

(i) In his view it would not have been possible for the Secretary of State to produce individualised written decisions in each of the cases. (No reason for this is proffered.)

(ii) He considers that for some cases the cryptic formulae of "*aged over 18*" or "*relationship cousin*" was a sufficiently reasoned decision in any event.

(iii) By 09 December 2016 decision-making had been completed in all cases bar 40.

(iv) Negative decisions were reviewed provided that they entailed the provision of "*new information not available at earlier interviews conducted by Home Office officials*".

(v) In cases where a review yielded a positive decision "*… a formal take charge request following the lodging of an asylum claim in France would first have to be made, with the UK reserving the right to deny the request upon formal consideration of the evidence submitted*". (While it is suggested that in some cases reviews gave rise to positive decisions, no corresponding disclosure of documentation of this kind has been made.)

Finally, Mr Cook explains that all decisions were collated by the Home Office on a spreadsheet which was provided to the French Dublin Unit and, in turn, conveyed to the Director of each reception centre: see *infra.*

(24) Certain documents generated contemporaneously during the events of the final quarter of 2016 are included in the evidence. Among these is a GLD letter dated 26 October 2016 generated in the Citizens UK litigation. This letter responds to certain requests for information and disclosure made by the Claimant's solicitors. One of the questions addressed was:

"*What training on Dublin III have* [officials] *…. received? Please provide details and training notes. This request refers to officials in the UK's Dublin unit and officials seconded to Calais/Northern France.*"

The response was:

> "*Please see attached training materials and templates redacted as appropriate.*"

One of the documents attached is entitled "Dublin III Regulation: Adult Provisions", which begins as follows:

> "*This note is intended for use by Home Office operational staff working in France on camp clearances ….*
>
> *The aim of this note is to assist with considering cases involving adults under the Dublin Regulation ….*
>
> *The following cases may be considered for transfer to the UK for consideration of their asylum claim, provided they have claimed asylum in France and a take charge request has been submitted by France.*"

This is followed by certain "*illustrative examples*". This is clearly a Home Office document.

(25) The GLD letter attached a second document entitled "UASC Decision

Maker Process". Having regard to its contents, this clearly relates to unaccompanied minors. Articles 8, 9, 10 and 17 of the Dublin Regulation are reproduced in full. Following the text of Article 17 is the statement:

> "*Article 17 is most commonly applied by the UASC team when considering cases of applicants applying to join relatives who do not meet the definition of Article 8.1 and 8.2.*"

The text continues:

> "*For the most part decision makers are required to assess whether applicants and their claimed UK relatives are indeed related as claimed. If the relationship is accepted, the transfer is in the best interests of the child and checks reveal no issues then the formal request is accepted and arrangements are made for transfer.*"

Various pre-acceptance "*checks*" are then particularised, followed by a section entitled "Verifying relationships" which contains the following passages:

> "*There are numerous ways that relationships can be demonstrated depending on the relationship but the main methods are as below: …..*
>
> *Applicants often provide documentation in an effort to verify the relationship …. such as family books, Taskira's and other documents …..*
>
> *In cases with UK reps we tend to get sent a lot of witness statements from app and relative provided as evidence as* [sic] *relationship. There is also a trend of psychological reports recommending that the minor is transferred to join family in the best interests of their health. We do not accept either of these alone. We would still require documents or another form of verification least* [sic] *to accept relationship for transfer.*"

(26) This discrete evidential matrix is completed by a further exchange of communications between the Citizens UK solicitors and the GLD. In an email dated 16 December 2016 the GLD stated:

> "*The current phase of transfers which arose from the closure of the camp is being concluded. This is a planned process, done in conjunction with the French authorities. We have taken all reasonable steps to interview all the children who were transferred from the camp to the children's centres in France* ***in line with the published guidance***."

I have drawn attention to the highlighted words since it is not clear in any

of these cases what the "*published guidance*" is and this issue has not been addressed in either disclosure or the Secretary of State's witness statements. The GLD lawyer next reproduces the following question:

> "*If these documents are not being applied to those adults and children, please disclose the current policy/policies/processes applicable to them.*"

This is answered thus:

> "*The SSHD will continue to comply with her obligations under the Dublin Regulation and will continue to transfer unaccompanied refugee children to Britain who can prove they have family members living in the UK, in line with the timescales set out in the Regulation.*"

Followed by:

> "*The SSHD is also complying with her duties under section 67 of the Immigration Act 2016 in respect of children who would not have an entitlement to come to the UK under Dublin III.*"

(27) This was later supplemented by a GLD letter dated 13 January 2017 which states, *inter alia*:

> "*There is no guidance specifically relating to Dublin III cases. The obligations are set out clearly within the Regulation and the SSHD considers that she fully abides by them. The SSHD has already sent you training material for HO officials which was produced as a result of the need to assess a large number of cases in a short space of time as part of the Calais camp being dismantled. In any event, in respect of the Dublin III Regulation, the only relevant aspect of your claim was your allegation that the SSHD was under an obligation to provide children in the camp in Calais with information about the Dublin III process. Your client's claim does not include any challenge to the operation of the Dublin Regulation itself.*"

In the ensuing section of the letter, under the rubric "*Usual Dublin process*", it is stated:

> "*We can confirm that in the week leading up to the dismantling of the Calais camp, and immediately following,* ***there were adjustments to the way in which the take charge process under the Dublin III regulation would normally be operated.*** *These adjustments concerned the process only and did not affect the substance or nature of the consideration of any claimed family relationship in the UK which would otherwise be accepted under the Dublin III Regulation. By adjusting the process in this manner, whilst fully respecting and adhering to her obligations under the Dublin III*

Regulation, the SSHD was able to support the Calais camp operation in an expedited time frame."

[Emphasis added.]

In response to the request to supply the numbers of children transferred under Articles 8.1 and 8.2 of the Dublin Regulation in October 2016 and subsequently, the letter states:

"*Over 750 unaccompanied asylum seeking children have been transferred to the UK as a result of the Calais camp clearance operation, of which over 550 were transfers under the Dublin Regulation. The SSHD will publish total figures for the Calais Camp clearance operation in due course.*"

(28) The evidence bundles assembled in the Citizens UK proceedings have formed part of the materials considered in this group of cases. Mr Cook's witness statement has been summarised above. It is supplemented by other witness statements, including one of Ms Farman. While this overlaps substantially with that of Mr Cook, it contains the following noteworthy averments:

(i) As of August 2016 the average time lapse in the United Kingdom from receipt of a take charge request to decision was 10 days.

(ii) Prior to the Calais camp clearance child inhabitants wishing to make an asylum claim registered this with the French charity France Terre D'Asile ("FTDA"), evidently acting as agent of the French Governmental authorities. This was followed by submission of the claim to the appropriate authority, the Sous Prefecture in Calais and attempts to appoint an ad hoc administrator to support the child in the asylum process, with a view to a take charge request ensuing.

(iii) From early October 2016 "*accelerated and expedited Dublin processes*" agreed with the French authorities were operated for a finite period.

(iv) The mechanism of single appointment/single registration was devised in order to inject speed.

(v) By this mechanism "*French and UK officials would work alongside each other to record bio-data details of the child, map their family tree, ascertain contacts about the family member in the UK and note any health or medical issues*".

(vi) This would entail a single interview with an interpreter in attendance and photographing every child with a view to producing a travel document.

(vii) Home Office officials worked in tandem with FTDA in the camp from 14 to 22 October and on 28/29 October 2016.

(viii) As regards logistics some 200 Home Office officials were deployed during the aforementioned period, generating some 80 interviews in the span of 7 days.

(ix) Following the dispersal of the children to the sundry reception centres in various regions of France and an interlude of some five days, the expedited process continued, involving some 90 Home Office staff together with interpreters and UK social workers.

(x) This was following by yet another identifiable phase, occupying the period 07 – 25 November 2016 and involving 9 UK teams each with 10 – 12 members carrying out 1872 interviews at 73 reception centres in France. Any children already interviewed in Calais were interviewed again during this phase.

(xi) At the end of every day all completed interview pro-formae and photographs were transmitted by email to the Home Office where a spreadsheet was compiled and a decision on "*… whether the child was eligible for transfer under section 67 or the Dublin criteria*" was made. Where the child was considered to have Dublin Regulation eligibility "*security checks and locating and checking UK based relatives*" followed. By 14 December 2016 a composite list containing all acceptance and refusal decisions was provided to the French authorities. The expedited process itself was "*largely completed*" by 09 December 2016. There were then 42 outstanding cases which were completed subsequently.

(29) There are some striking averments in Ms Farman's witness statement. First, the expedited process is described as "*… ultimately a French – led operation, with the UK providing support and only in agreement with the French authorities*". Second, it is averred that the assessment of every child was made "*against the family reunification criteria of the Dublin Regulation*" only, together with the section 67 "*published criteria*". Third, of some 530 cases reconsidered (or reviewed) by the Home Office at the instigation of the French authorities, around 10 had positive outcomes during the period January to March 2017 and, in each of these discrete cases, the transfer mechanics were of the orthodox Dublin Regulation variety, namely a take charge request and acceptance thereof. Fourth, the Home Office, in the interests of speed, would not have countenanced devoting as much as two hours to the exercise of interviewing a child.

(30) The last of the Secretary of State's witness statements which featured in evidence and argument is that of one Mr Gallagher, a policy adviser in the Home Office Asylum Policy, Immigration and Border Policy Directorate. He recounts that between 07 and 19 November 2016 he was a member of one of the 9 Home Office teams deployed in France. His team was assigned to work in 10 reception centres in South Eastern France. Its

membership comprised six Home Office employees, three interpreters and two Kent County Council social workers. Each child was interviewed in the presence of an interviewer and a social worker at one of three interview "stations" established *ad hoc* in a single room. French officials did not routinely attend.

(31) Each interview (per Mr Gallagher) began with photographing the child and recording name, nationality and date of birth. The duration of each interview was "*about 20 minutes*". This has some individual variation. Some children provided additional information following completion of the interview, the pre-requisite being that the visiting team was still at the centre. It would appear that visits to each centre occupied a couple of days. Home Office officials and social workers in tandem carried out "some age assessments" of residents. Every transfer decision was made by Home Office officials in the United Kingdom. Each interview pro-forma was completed manually by the interviewer. A spreadsheet of the interviews was transmitted electronically to the team based in Dover daily. The "time compression" factor was aggravated by considerations of distance, conditions in individual reception centres and avoidance of the "*very real concern*" of disruption of interviews by the subjects.

(32) The final element of the Secretary of State's response is the formal pleading contained in the Detailed Grounds of Defence. This contains a description of the "expedited process", linked to the following assertion that the impugned decision –

> "*…. was reached following interviews with AM and OA in November 2016 pursuant to an expedited process developed by the SSHD in response to the closure by the French authorities, at short notice, of the 'jungle' …..*
>
> *The expedited process was a time limited process and related to unaccompanied children who were or had been resident in the Camp and who claimed to have a qualifying family in the UK (for the purpose of Article 8 of the Dublin III Regulation) and allowed admission to the UK without all of the requirements of* [Dublin] *being satisfied.*"

The pleading continues:

> "*The expedited process was an exceptional short-term measure, time- limited to the Camp clearance operation. It was a reasonable and rational measure for the SSHD to adopt, but she was not legally required to have done so. The process did not and does not give rise to any continuing legal obligations beyond what is set out in the Dublin III regulation ….*
>
> *The expedited process, involving an assessment of the claimed family link, was designed to enable the expedited processing and transfer of children who would otherwise be eligible to have their asylum claims*

transferred to the UK under Dublin III Article 8 in the exceptional circumstances pertaining to the Camp closure and the dispersal of the children to 73 CAOMIS across France. It successfully resulted in the transfer of over 550 children within a very short period of time."

The explanation proffered for the refusal to transfer this Applicant is described pithily as "*discrepancies in the accounts given by AM and his claimed relative*".

(33) The Secretary of State's pleading further avers that the so-called expedited process –

> "*… did not supplant, replace or subvert* [the Dublin Regulation process] *…*
>
> > *Moreover, the whole point of the expedited process was that, in aid of the expedition given the exceptional circumstances of the Camp closure, the 'initial procedural stage' would not be required.*"

"*Initial procedural stage*" is a phrase taken from [100] of ZAT and Others. The Secretary of State's core argument is, in brief compass, that the Applicant must demonstrate that the Dublin III process in France provides him with no effective resolution of his circumstances. The pleading continues:

> "*At the heart of the SSHD's case is that she was not compelled to make fresh decisions on any further material under the expedited process, that process having concluded ….*
>
> *Alternatively, even if there is a general public law duty on the SSHD to consider further evidence and review all of her decisions, the process for doing this is ….. through the Applicant availing himself of the functioning Dublin III system by claiming asylum and the Member State where the child is present making a take charge request.*"

This is followed by a contention that the evidence to be properly considered by this Tribunal should be limited to the evidence extant at the time of the December 2016 refusal decision.

(34) The Secretary of State's detailed grounds of defence in the Citizens UK proceedings also featured in argument before us. One of the main contentions which this enshrines is that the Secretary of State, by engaging in a process which involved the identification and interview of children on French territory, exceeded the obligations imposed by the Dublin Regulation. While it is averred that the Secretary of State "*set up*" the expedited process, this is manifestly inconsistent with the evidence of

Ms Farman noted in [30] above. The expedited process is described as a "*one-off operation*". This is followed by a series of contentions that various provisions of the Dublin Regulation (specifically Articles 4, 5, 6, 22, 26 and 27) had no application to the expedited process. *Ditto* Article 19 of Directive 2003/9/EC (the Reception Directive) and Article 17 of Directive 2005/85/EC (the Procedures Directive).

(35) In the Citizens UK case the summary grounds of defence contain the following noteworthy passages:

> "[5] *The Secretary of State is working closely with the French authorities in Paris and in Calais to ensure that as far as possible any unaccompanied asylum seeking children who would qualify for transfer to the UK under the Dublin III Regulation on the basis of close family links (primarily under Article 8 of the Regulation, once they have claimed asylum in France and a request has been made by the French authorities) are transferred to the UK before the camp is closed ....*
>
> [7] *In advance of the expected closure of the camp, and on the invitation of the French Government, Home Office Asylum Experts began working with partners from the French administration and voluntary sector in Calais to further accelerate the identification of eligible cases and fast track them through the Dublin process as an exceptional and temporary measure ....*
>
> [9] *In practice the Dublin process is now being completed in as little as 48 hours and children are arriving daily in the UK.*"

The date of this pleading, 26 October 2016, is of some significance.

The Expedited Process in AM's Case

(36) As appears from [15] – [35] above, the expedited process has been the subject of protracted attention in communications written by and on behalf of the Secretary of State, witness statements in other pending litigation contexts and formal pleadings. There are certain other noteworthy sources of evidence which are of a rather different kind, focussing on specific aspects of the application of the expedited process to AM individually. We outline these in the following paragraphs.

(37) First there is the completed pro-forma of the interview of this Applicant, which invites the following analysis:

(i) He was asked a total of 17 questions.

(ii) These questions related to his identity, gender, date and place of birth, nationality, main language, telephone details and any

family members in the United Kingdom.

(iii) In this way the Applicant identified his claimed maternal uncle, his telephone contact particulars, his whereabouts (the United Kingdom), their interaction in the Calais "jungle" and their last contact, being a telephone conversation two days previously.

(iv) Part 2 of the pro forma specifies a series of questions to be put to the interviewee under the rubric of "best interest assessment". None of these questions was put to the Applicant. The Secretary of State's explanation of this is that children being "*assessed against*" Article 8(1) and (2) of the Dublin Regulation did not receive best interests assessments. We observe that this is not compatible with Article 6(1), Article 8 (1) or Article 8 (2) of the Dublin Regulation.

(v) Paragraphs 1.34 and 1.35 of the pro-forma require the interviewee to be asked whether all of the questions posed have been understood and to be invited to provide "*anything you would like to add or change to your response*": neither of these questions was put to the Applicant.

(vi) Similarly, there is no answer to any of the six questions formulated under the rubric of "Family".

(vii) *Ditto* the questions:

> "*Based on the information we have given, would you prefer to come to the UK to claim asylum other than claim asylum in France?*
>
> *What are the reasons why you would like to come to the UK rather than stay in France?*
>
> *If needed, probe: family/other links, language skills.*"

(viii) *Ditto* the questions relating to "*health/special needs*".

(ix) *Ditto* the two questions to be answered by the interviewer under the same rubric.

(x) Two further questions replicating those noted in (v) above were evidently not put to the Applicant (numbers 2.5 and 2.6).

(xi) Next, the interviewer was required to answer a series of questions relating broadly to the interviewee's best interests (paragraphs 2.7 – 2.11): none of these was answered.

(xii) Next, in paragraph 2.12, provision is made for the signature of the social worker and the date thereof: there is a blank.

(xiii) This is followed by Part 4, a "Continuation Sheet", which evidently records information provided by the Applicant relating to his parents, grandparents and only sibling. Within this section, the following is recorded:

> "*Material aunts and uncles: my mother has only one brother …. Osman Ababakar Osman Ali*".

This relationship is asserted by both the Applicant and the author of the witness statements noted in [11] above. In the Home Office record, the spelling of the second name is "Ababakar". In both the witness statement of OA and the exhibited UK residence permit, the spelling is "Abubakar". In all other respects, the spelling is identical.

(38) The evidence includes the Applicant's response to the interview record set out in a statement of Mr Scott. First, he confirms that there were communication difficulties. Second, he avers that his mother's name was incorrectly recorded and he challenges the accuracy of the responses recorded to questions concerning maternal aunts and the date of his parent's deaths. The pro-forma questions were not directed to, and did not probe, his early life association with OA and, in consequence, none of this was documented.

(39) Disclosure of a further "Interview Record" has also been made. This is another pro-forma document. It purports to record a telephone conversation between a Home Office official and OA. It also documents the "Decision Outcome", viz "reject", which is followed by this rationalisation:

> "*Relative confirms no contact with minor since he left him in the jungle. He first met the minor (nephew) in the jungle and looked after him for 3 month* [sic] *before he left him to come to the UK (application for asylum is in progress). Knew family tree but didn't know* [the Applicant's] *brother which would be* [the relatives] *sister's son?? I'm not convinced that this relative is a true relative therefore decision made to reject case*".

This document requires confirmation of a "*senior case worker check*" and the name of such person: neither is provided. The document is dated 15th November 2016.

(40) The "Interview Record" documents a series of questions put to OA during a telephone conversation. No date or times are specified. It yields the following analysis:

(i) At the outset of the conversation OA, evidently without hesitation, identified the Applicant accurately, specified his year of birth accurately, asserted the uncle/nephew relationship and

confirmed the Applicant's anxiety to come to the United Kingdom.

(ii) He stated that he was unaware of the Applicant's exact whereabouts on this unspecified date. The pro-forma aside in this part of the form clearly exhorted decision makers to make adverse inferences where a reply of this kind was made, without reference to considerations such as how the child – an unaccompanied minor from a foreign country recently dispersed from the "Jungle" in traumatic circumstances – could fairly and realistically be expected to reliably confirm such information to any family relative. Nor is any allowance made for the time factor.

(iii) OA provided his Home Office reference number and full name.

(iv) OA is recorded as providing an unintelligible email address.

(v) OA was then asked a series of questions about family relationships, in response to which *inter alia*, he identified the Applicant's mother as "F A M (A)" and his father.

(vi) In response to the question "*How often do you speak with your relative in France*", the interviewer recorded "*No contact between me and him as no such communication available, first meeting and known of him when in the jungle and separated from there after three months*". The evidence establishes that this question and answer formed one of the cornerstones of the Secretary of State's negative decision. The documented text confirms that this was <u>not</u> a verbatim response and, further, that it was not probed by the interviewer.

(vii) Next, OA confirmed that he and the Applicant had made contact in the "jungle" prior to April 2016, following which they "*remained together for three months*".

(viii) OA then identified the region of Eritrea from which the Applicant originates.

(ix) Next OA stated that there would be "*no problem*" with his landlord in the Applicant joining him in his NASS accommodation, which consists of two bedrooms and is shared by two others.

(x) OA then replied affirmatively to the enquiry concerning his willingness and availability to accommodate the Applicant, provide him with meals, ensure his access to schooling and medical care and to facilitate a property check by Social Services.

(xi) At the end of the pro-forma was a requirement to indicate "*any inconsistencies in the interview when compared to the information supplied by the minor*": this box is blank.

(xii) Furthermore, the interviewer was exhorted to "*ask further questions and note the responses below*": there is no entry.

(41) Some further comments on this interview record are appropriate. First, it is clear that some of OA's responses were not recorded verbatim. Second, there is no indication of any attempt to clarify or augment any of the responses made. This is particularly significant with regard to the response to question 20:

> "***How often do you speak with your relative in France?*** *No contact between me and him as no such communication available, first meeting and known of him when in the jungle and separated thereafter three months.*"

This reply was an obvious candidate for probing and elucidation: however neither occurred. Furthermore, the pro-forma questions contained no enquiry relating to any previous family life linking the Applicant with OA. One of his responses is especially striking:

> "*He is my relative. I would do all the possible means to accommodate him as I looked after him in the jungle.*"

Finally, the pro-forma makes no provision for recording any communication difficulties – linguistic, technical, environmental or otherwise.

(42) We juxtapose the above with a witness statement from OA, dated 27 February 2017, which has three main themes. First, he explains in some detail his blood relationship with the Applicant. Fundamentally he claims to be the brother of the Applicant's deceased mother. Second, he outlines his interaction with the Applicant during earlier years. Being the Applicant's only living family member in Europe, he expresses his desperation that they be reunited. OA describes the following:

> "*… I was contacted by someone from a UK Government office, I am not sure which, on the phone. They spent about one hour on the phone with me. they asked me about my relationship with* [AM]*, my history and they asked for my National Insurance number, but I was not asked for any documents. They also asked me if I would be willing and able to care for him if he came to live with me and I said yes.*"

Subsequently he sent photographic ID, his contact details, a letter containing his National Insurance number and a letter confirming his willingness to care for the Applicant to the CAOMIE.

(43) OA's account of the telephone interview is that he was called, without prior notice, when walking along a busy, noisy, urban street. The questions were asked quickly. He found some of them difficult to

understand. They were not repeated. The interview was conducted with an interpreter in an Arabic dialect which he did not recognise and had some difficulty understanding. He was given no opportunity to verify or confirm the correctness of what was being recorded. The interview record was not sent to him subsequently. OA avers that the name of the Applicant's mother which he provided was incorrectly recorded. Furthermore, he is adamant that he did not reply that he did not know the name of the Applicant's older brother. He further avers that while the record documents the ages of the Applicant's parents when they died, he would not have been capable of supplying this information. OA further avers that the response to question 31, which requested "*details of everyone living at your accommodation, their dates of birth and their nationalities ....*", which on its face is detailed and complete, was not made by him. Rather, when this question was posed he passed his mobile phone to the person concerned who, coincidently, was walking with him at the time. None of this is recorded. OA also draws attention to the manifestly incorrect email address documented.

(44) The initial negative decision in this Applicant's case was made by an official who had not conducted, attended or otherwise participated in either of the aforementioned interviews. The rank of this official is unclear. This person evidently made the decision following consideration of the two interview records. There is no indication that the decision was preceded by any consultation or other interaction with either of the interviewers. Thus the accuracy, clarity, intelligibility and completeness of the interview records was plainly of critical importance.

(45) We shall consider *infra* the issues of the Secretary of State's duty of candour and the duty to disclose all material documents.

Legal Framework

The Dublin Regulation

(46) In ZT (Syria) the judgments of this Tribunal and the Court of Appeal harmonised, with the single exception that this Tribunal's characterisation of the potency of the Dublin Regulation was considered to be insufficiently strong. The Court of Appeal took no issue with this Tribunal's formulation of the legal framework and governing legal principles. The starting point is the presumption – a rebuttable one – that EU Member States will comply with their international obligations, which include the duties imposed on them by the Dublin Regulation. Linked to this are the principles of mutual confidence and solidarity. These are the ingredients underlining the Court of Appeal's conferral of highly elevated status on the Dublin Regulation, echoing its earlier decision in CK (Afghanistan) v SSHD [2016] EWCA Civ 166.

(47) Having regard to the contours of the present challenge Article 8 of Dublin is of central importance and it is appropriate to reproduce its first four paragraphs:

"1. *Where the applicant is an unaccompanied minor, the Member State responsible shall be that where a family member or a sibling of the unaccompanied minor is legally present, provided that it is in the best interests of the minor. Where the applicant is a married minor whose spouse is not legally present on the territory of the Member States, the Member State responsible shall be the Member State where the father, mother or other adult responsible for the minor, whether by law or by the practice of that Member State, or sibling is legally present.*

2. Where the applicant is an unaccompanied minor who has a relative who is legally present in another Member State and where it is established, based on an individual examination, that the relative can take care of him or her, that Member State shall unite the minor with his or her relative and shall be the Member State responsible, provided that it is in the best interests of the minor.

3. Where family members, siblings or relatives as referred to in paragraphs 1 and 2, stay in more than one Member State, the Member State responsible shall be decided on the basis of what is in the best interests of the unaccompanied minor.

4. In the absence of a family member, a sibling or a relative as referred to in paragraphs 1 and 2, the Member State responsible shall be that where the unaccompanied minor has lodged his or her application for international protection, provided that it is in the best interests of the minor. "

Article 2(g) defines "family members" in the following terms:

"*insofar as the family already existed in the country of origin, the following members of the applicant's family who are present on the territory of the Member States:*

....

— when the applicant is a minor and unmarried, the father, mother or another adult responsible for the applicant, whether by law or by the practice of the Member State where the adult is present,

— when the beneficiary of international protection is a minor and unmarried, the father, mother or another adult responsible for him or

her whether by law or by the practice of the Member State where the beneficiary is present."

Article 2(h) defines "relative" as –

"*… the applicant's adult aunt or uncle or grandparent who is present in the territory of a Member State, regardless of whether the applicant was born in or out of wedlock or adopted as defined under national law.*"

(48) The following substantive provisions of the Dublin Regulation are of significance:

(a) By Article 6, the best interests of the child shall be a primary consideration at all stages; due account shall be taken of, *inter alia*, family reunification possibilities; the minor's well being and social development and safety and security considerations; unaccompanied minors shall be provided with a representative; and following the lodgement of an unaccompanied minor's application for international protection, appropriate action shall be taken as soon as possible to identify the family members, siblings or relatives of the unaccompanied minor on the territory of other Member States, whilst protecting the child's best interests.

(b) Article 17, the so - called "discretionary clause", empowers Member States to take charge of an applicant notwithstanding the absence of any obligation to do so via the application of the take charge criteria.

(c) Per Article 18(1), the responsible Member State shall take charge of an applicant who has lodged an application in a different Member State, under the conditions specified in Articles 21, 22 and 29.

(d) By Article 20(1), under the rubric "Start of the Procedure", the process of determining the responsible Member State begins as soon as an application for international protection is first lodged with one of the Member States; and, per Article 20(2), this act occurs as soon as the application, whether in writing or otherwise, is received by the competent authority.

(e) By Article 21(1):

"*Where a Member State with which an application for international protection has been lodged considers that another Member State is responsible for examining the application, it may,* ***as quickly as possible and in any event within three months of the date on which the application was lodged*** *…… request that other Member State to take charge of the*

applicant."

[Emphasis added.]

The responsible Member State shall be the first in circumstances where it has not made a take charge request of the second within the aforementioned time limits.

(f) Article 22(1) provides that where a "take charge" request is made, the "requested Member State" shall make the necessary checks and give a decision on the request "*within two months of receipt*".

(g) By Article 29, where the requested Member State agrees to take charge of the person concerned, there shall be consultation between the Member States concerned and the ensuing transfer shall be effected "*as soon as practically possible and at the latest within six months of acceptance of the request ....*" This is accompanied by a series of procedural, humanitarian and default provisions.

(49) As the decision in R (MK) v SSHD [2016] UKUT IJR (IAC) 231 *(infra)* highlights, the applicable procedural safeguards in this field are to be found in both the Dublin Regulation and its sister instrument (*infra*). Under the Dublin Regulation:

(a) By Article 4 there is a duty to provide every applicant with specified information, including "*the criteria for determining the Member State responsible, the hierarchy of such criteria*… " and the objectives of the Dublin Regulation.

(b) There must be a personal interview of the applicant: Article 5(1).

(c) Such interview must "*allow the proper understanding of the information supplied to the applicant in accordance with Article 4*": *ditto.*

(d) The interview must be conducted in a language understood by the applicant, with the facility of an interpreter where required: Article 5(4).

(e) The interviewer must be a qualified person: Article 5(5).

(f) A written summary of the interview containing "*at least the main information supplied by the applicant*" must be provided to the applicant and/or his legal or other representative: Article 5(6).

(g) "*In assessing the best interests of the child, Member States shall closely co-operate with each other and shall, in particular, take due account of the following factors:*

(a) Family reunification possibilities;

(b) The minor's wellbeing and social development;

(c) Safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking.

(d) The views of the minor, in accordance with his or her age and maturity."

Per Article 6(3)

(h) Per Article 6(4):

> "*For the purpose of applying Article 8, the Member State where the unaccompanied minor lodged an application for international protection shall, as soon as possible, take appropriate action to identify the family members, siblings or relatives of the unaccompanied minor on the territory of Member States, whilst protecting the best interests of the child*".

The exchange of relevant information between Member States shall be in a specially devised form: Article 6(5).

(i) Every child applicant must have a representative with suitable qualifications and expertise: Article 6(2).

The Commission's Implementing Regulation

(50) The sister measure of the Dublin Regulation is Commission Regulation (EC) 1560/2003 (the "*implementing Regulation*") as amended by Commission Implementing Regulation (EU) No 118/2014. This prescribes criteria and mechanisms for the application of Dublin. It has the expressed aim of establishing arrangements which –

> "*…… must be clearly defined so as to facilitate co-operation between the authorities of the Member States …. as regards the transmission and processing of requests for the purpose of taking charge and taking back, requests for information and the carrying out of transfers.*"

The Dublin procedural safeguards and protections are supplemented in the following provisions in particular:

(a) Take charge requests shall be made in the standard form provided: Article 1. They must include all appropriate evidence.

(b) The consideration of take charge requests by the requested Member State must be undertaken "… *exhaustively and objectively, on the*

basis of all information directly or indirectly available to it …": Article 3.

(c) Every decision refusing a take charge request "*… shall state full and detailed reasons*": Article 5.

(d) In certain defined situations decisions concerning children must observe the heightened standards enshrined in Article 12, including the presence of a qualified representative at the personal interview held under Article 5 of Dublin III.

(e) Requests replies and all written correspondence between Member States shall be via the 'DubliNet' electronic communications network: Article 15.

(f) A *laissez-passer* for the purposes of transfer is acceptable: Article 22.

(g) The "*elements of proof and circumstantial evidence*" mentioned in Article 22(2) of Dublin, for the purpose of establishing the responsible Member State, shall be included in every take charge request, having regard to the broad range of types of "probative evidence" and "indicative evidence" specified in Annex II: Article 1(1)(a).

Article 8 ECHR: Substantive Protection

(51) The stream of ECtHR jurisprudence to which this Tribunal had regard in ZAT, in due discharge of its duty under section 3 of the Human Rights Act 1998, was considered in part by the Supreme Court in R (Quila) v Secretary of State for the Home Department [2012] 1AC 621, at [30] – [43] per Lord Wilson JSC. The scope for invoking Article 8 ECHR in support of the duty for which the Applicants contend is illustrated particularly by two decisions of the ECtHR. The first is Tuquabo – Tekle v The Netherlands [Application No 60665/00], where the applicant claimed that the Netherlands was under a positive obligation under Article 8 to admit her son, aged 13 years and with whom family life had been enjoyed previously in their country of origin, Eritrea, for the purpose of re-establishing family life with the family unit in question. The ECtHR adopted the following approach, in [42]:

> "*The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There may in addition be positive obligations inherent in effective 'respect' for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation."*

Drawing together the governing principles, the Court continued, at [43]:

> "*(a) The extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest.*
>
> *(b) As a matter of well established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory.*
>
> *(c) Where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory.*"

(52) In its reasoning the Court, without purporting to prescribe an exhaustive list of touchstones, placed emphasis on the age of the children concerned, their current situation in their country of origin and the extent to which they are dependent on their parents. In [47], it described the settlement of the child concerned with his family unit in the Netherlands as "*the most adequate means for the various members to develop family life together*." In finding a breach of Article 8, the Court concluded that the Netherlands –

> "*… has failed to strike a fair balance between the applicant's interests on the one hand and its own interest in controlling immigration on the other.*"

See [52]. The Court's earlier decision in Sen v Netherlands [2003] 36 EHRR 7 is to similar effect.

(53) In Mayeka and Mitunga v Belgium [2008] 46 EHRR 23, the basic ingredients of a moderately complex matrix were a mother, a national of the Democratic Republic of Congo ("DRC"); the grant of refugee status to the mother in Canada; her daughter, then aged five years, who was accompanied by the mother's brother (the daughter's uncle), both of whom travelled from the DRC to Belgium; an aspiration that the uncle would continue to take care of his niece until the latter had secured permission to reunify with her mother in Canada; actions of the Belgium authorities involving the arrest of the uncle and the detention of the child for a period of some two months; and, following the child's release pursuant to a court order, her immediate deportation to the DRC where the Belgium authorities had identified the presence of another uncle, a student who protested that he did not have the means to look after the child.

(54) In considering the mother's and daughter's claims under Articles 3 and 8 ECHR, the ECtHR drew on, *inter alia*, Articles 3, 10 and 22 of the United Nations Convention on the Rights of the Child. These provisions, respectively, concern the best interests of the child principle, the obligation on States to handle family reunification applications in a positive, humane and expeditious manner and the separate duty on States

to provide appropriate protection and humanitarian assistance to child refugee applicants, whether alone or accompanied. The ECtHR also invoked a 2002 publication of the UN Committee on the Rights of the Child, which recommended, *inter alia*, that unaccompanied minors be informed of their rights and have access to legal representation in the asylum process. The Committee made a separate recommendation for improved co-operation and exchange of information among all relevant agencies. The Court decided the Article 8 claims of mother and daughter as follows, at [90]:

> "*The Court ..... reiterates that the Belgium State had positive obligations in the instant case, including an obligation to take care of the second applicant and to facilitate the applicants' reunification. By deporting the second applicant, the Court did not assist their reunification. Nor did they ensure that the second applicant would in fact be looked after in* [the DRC]*. In these circumstances, the Court considers that the Belgium State failed to comply with its positive obligations and interfered with the applicants' rights to respect for their family life to a disproportionate degree.*"

To summarise, the main features of this case were those of pre-existing family life between the separated persons concerned, an unaccompanied minor, special vulnerability and a positive obligation to facilitate family reunification.

(55) The close association between substantive and procedural protections emerges in some of the jurisprudence belonging to this discrete sphere. For applications by minors and refugee family reunion applications generally it has been held that there is an obligation under Article 8 ECHR to ensure that such applications are "*examined rapidly, attentively, and with particular diligence*": Senigo Longue & others v France (App 11903/09, 10 July 2014), [69]; Tanda-Muzinga v France at [73] and Mugenzi v France at [52]. Further *"the state's interest in foiling attempts to circumvent immigration rules must not deprive ... foreign minors, especially if unaccompanied, of the protection their status warrants"*: Mayeka at [81]. In such cases, "*the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant... Children have specific needs that are related in particular to their age and lack of independence, but also to their asylum-seeker status"*: Tarakhel v Switzerland *[*2015] 60 EHRR 28 at [99], ZT (Syria) at [75].

(56) Likewise, applications for refugee family reunion should be examined "*flexibly and humanely*" and in particular with sufficient flexibility where applicants cannot produce specific documents: Tanda-Muzinga at [76]. It is relevant to take into account the fact that family life was interrupted by reason of fleeing persecution and that there is no alternative means of resuming family life: Muzgenzi at [53] and any fears for the family member's safety, their precarious position, or particular vulnerabilities while waiting for visas: Mugenzi at [55].

(57) The consideration that there is no pre-existing family life between or

among the persons concerned does not exclude the engagement of the family life dimension of Article 8 ECHR: see R (Ahmadi) v SSHD [2005] EWCA Civ 1721, with its notable emphasis on the significance of future plans and intentions: see especially [17] – [18].

Article 8 ECHR: Procedural Protections.

(58) So much for the substantive reach of Article 8 ECHR in a context such as the present. The challenges in this case and its sister cases also have a significant procedural dimension, discernible in some parts of the jurisprudence digested above. In brief it is contended that the Secretary of State's decision making process was procedurally irregular and unfair. This engages the Senigo-Longue principle [*supra*] and is reflected in decisions such as R (Dirshe) v SSHD [2005] EWCA Civ 421; R (AN & FA) v SSHD [2012] EWCA Civ 1636 and JA (Afghanistan) v SSHD [2014] EWCA Civ 450. These decisions highlight the need for a procedurally fair interview process and the imperative of specific safeguards for children.

(59) It is well established that Article 8 ECHR positive obligations can include a right to procedural fairness, particularly in decisions that have a serious impact on the Article 8 rights of children: McMichael v United Kingdom (1995) 20 EHRR 205 at [102]; R (Gudanaviciene & Others) v Lord Chancellor [2015] 1 WLR 2247 at [62], [65], [69] and [71]. The effect of this is that the child and their affected family members must be involved in the decision-making process, viewed as a whole, to a degree sufficient to provide them with the requisite protection of their interests. It has been held that a failure to ensure this can give rise to a breach of their rights to respect for family life which is disproportionate. McMichael at [87] – [92] and W v UK *[*1988] 10 EHRR [68].

(60) The test to be distilled from the Strasbourg Jurisprudence is whether those affected by the decision under scrutiny have been involved in the decision making process, viewed as a whole, to a degree sufficient to provide them with the requisite protection of their interests. This procedural aspect of Article 8 is designed to ensure the effective protection of a person's substantive Article 8 rights. As the decision of the Court of Appeal in Gudanaviciene makes clear there is a close association with the protections afforded by Article 6 ECHR when issues concerning the procedural embrace of Article 8 arise: see the judgment of Lord Dyson MR at [70] – [71].

(61) In cases where procedural requirements arise under Article 8 ECHR their content may be informed by similar procedural rights arising under the United Nations Convention on the Rights of the Child ("CRC"), in particular an obligation to involve children in the decision-making process, taking reasonable steps to ensure that relevant and accurate information is assembled and, at heart, making properly informed decisions about the child's best interests: see Articles 3 and 12 of the CRC and the UN Committee on the Rights of the Child's General Comment 14 ("GC14").

The CRC and GC14

(62) The influence of the CRC and the associated GC14 have been recognised: see ZH (Tanzania) v SSHD [2011] 2 AC 166 [34] –[37]; R(MK, IK and HK) v SSHD at *[*21] – [25]; and Mayeka at [39] – [40]. Relevant rights under the CRC include:

(i) Article 3(1), on which Article 24(2) CFR is based, and which provides that "*in all actions concerning children, whether undertaken by public or private social welfare institutions, court of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*";

(ii) Article 10, which requires that applications by a child to enter a State Party for the purpose of family reunification shall be dealt with "*in a positive, humane and expeditious manner*".

(iii) Article 22 requires "*appropriate measures to ensure that a child who is seeking refugee status… shall… receive appropriate protection and humanitarian assistance*", and that states cooperate "*to protect and assist such child and… trace the…. members of the family… to obtain information necessary for reunification with his or her family*".

(iv) Article 39, which requires that States Parties "*take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.*"

(63) GC14 is of extensive reach. *Inter alia* it:

(i) confirms the central importance of a child's right to family unity including in situations where children are separated from family members as a result of migration [58], [59], [60] and [66];

(ii) states that where children are defending their interest in court proceedings confirming family reunification, the courts must provide for the best interests to be considered in all situations and decisions, whether of a procedural or substantive nature and must demonstrate that they have done so: [29];

(iii) recognises the particular vulnerability of asylum seeking children, with the attendant requirement that their particular vulnerability informs the best interests assessment: [75] – [76]. This recognition is consistent with the case-law of the Grand Chamber of the Strasbourg court which has held that "*The requirement of "special protection" of asylum seekers is particularly important where the persons concerned are children, in view of their specific needs and their extreme vulnerability"* and stressed the importance of ensuring that reception conditions for child asylum seekers must not "*create… for*

them a situation of stress and anxiety, with particularly traumatic consequences": see Tarakhel at [119];

(iv) confirms that where when a "best interests determination" is made "strict procedural safeguards" apply: [46]; and

(v) emphasises that facts and information relevant to a particular case must be obtained in order to draw up all elements necessary for a best interests assessment, an exercise which could include interviewing relevant persons: [92].

(64) GC14 has been held to rank as authoritative guidance as to the content of that right: R (SG) v Secretary of State for Work and Pensions [2015] UKSC 16, [2015] 1 WLR 1449, at [105] – [106], approved in Mathieson v Secretary of State for Work and Pensions [2015] UKSC 47 at [39]. In Mathieson Lord Wilson (giving the judgment of the Court) adopted the three-fold concept of best interests set out at [6] of GC14, at [39]:

> "The first aspect of the concept is the child's substantive right to have his best interests assessed as a primary consideration whenever a decision is made concerning him. The second is an interpretative principle that, where a legal provision is open to more than one interpretation, that which more effectively serves his best interests should be adopted. The third is a rule of procedure, described [in General Comment No. 14] as follows:
>
> Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned … Furthermore, the justification of a decision must show that the right has been explicitly taken into account …"

The Dublin Regulation: Procedural Safeguards

(65) The challenges in this group of cases have a further discrete dimension based on certain provisions of the Dublin Regulation, the Commission's implementing measure (see above) and this Tribunal's decision in MK. This decision involved consideration of the obligations on the SSHD to investigate claimed family relationships in considering whether children had substantive rights to family reunification under Dublin III. It was held that the SSHD had breached her investigative and evidence gathering duties in failing to investigate and facilitate DNA testing where the children's inability to prove their relationship with their mother was a barrier to admission: [36] and [43] – [44].

(66) This Tribunal further held that Dublin III subjects the SSHD to "*duties of enquiry, investigation and evidence gathering*" - [38] - and that the *discharge of these duties will be factually and contextually sensitive and is*

governed by the principle that the Secretary of State is obliged to take reasonable steps. It was considered that the same duties may arise via the procedural dimension of Article 8 ECHR and under the common law: [24], [26] and [36]. It was further held that those duties continue even after an initial refusal to accept a transfer and in particular where they were not discharged in refusing to accept a transfer: see [41] and [47]

(67) In R (NS Afghanistan) v Secretary of State for the Home Department [2013] QB102, the Grand Chamber held that when a Member State makes a decision under the discretionary clause of the Dublin Regulation, namely whether to examine an asylum application which is not its responsibility under the prescribed criteria, it is implementing EU law for the purposes of Article 6 TEU and Article 51 of the Charter of Fundamental Rights of the European Union ("CFR"). We agree with Ms Kilroy's submission that, by logical extension, the same reasoning must apply to Article 8 of the Dublin Regulation.

(68) In a very recent decision, CK and Others v Slovenia [Case C-578/16], the CJEU ruled on the correct interpretation of Articles 3(2) and 17(1) of the Dublin Regulation in the context of a preliminary reference arising out of the proposed transfer by Slovenia to Croatia of a Syrian national and an Egyptian national for the purpose of determining their claims for asylum. The Court held, firstly, that the application of the discretionary clause under Article 17(1) involves a question concerning the interpretation of EU law. The remainder of this decision, concerning Article 4 of the CFR, is of no moment in the present context.

(69) We reject Ms Walker's submission, based on [97] of the Court judgment and [62] and [67] of the Advocate General's Opinion, that CK is authority for the proposition that claims based on Article 17 are not "justiciable" (her word). We consider that, fundamentally, this is a decision on the construction and scope of Article 17. This non-justiciability argument is also confounded by ZT (Syria) at [85] (*infra*).

(70) Account must also be taken of the decision of the CJEU in K v Bundesasylamt [Case C245/11]. Here it was held, at [51] and [52], in the context of considering the Dublin Regulation dependency clause viz Article 16(3) in a situation where the asylum applicant had already transferred from the first Member State to the host -Member State and an asylum claim had been made, that the act of making a take charge request of the host Member State would be a purely formal one. Accordingly in certain circumstances compliance with an essentially formal (or remedial) requirement enshrined in the Dublin Regulation will not be an essential prerequisite to the discharge by Member States of their substantive obligations thereunder. Thus the making of a take charge request did not have the status of a *sine qua non*.

(71) The significance of the decision in K is its demonstration of the willingness of the CJEU to ensure the practical and effective operation of the Dublin Regulation by relegating certain specific requirements to the level of the purely formal. Judges and practitioners in a common law

jurisdiction would recognise this as an illustration of purposive construction. Furthermore this decision resonates with an important principle of the common law, the Padfield principle, which holds that legislation is to be construed so as to give effect to the policy and objects of the measure under scrutiny: Minister of Agriculture, Fisheries and Food v Padfield [1968] AC 997 at page 1033 per Lord Reid.

(72) The K decision is of some significance in the present context notwithstanding that the focus in these proceedings is on Article 8, rather than Article 16, of Dublin. Furthermore, it resonates with what the Court of Appeal stated in [83] – [84] of ZT. First, at [83]:

> "*Moreover, the authorities do not suggest that, event in what Mr Eadie described as the 'initial procedural stages', there is an absolute rule that the determination of the responsible Member State must be by the operation of the Dublin Process and Procedures in the Member State in which the individual is present.*"

And developing this theme at [84]:

> "*The need for expedition in cases involving particularly vulnerable persons such as unaccompanied children is recognised in the Regulation and authorities …. Chikwamba v Secretary of State for the Home Department [2008] 1 WLR 1420* and *Mayeka v Belgium* 46… *show that the operation of a procedural rule may be disproportionate …. the urgency of particular circumstances may require a shorter period than the periods specified as long stops in the Regulation.*"

We also draw attention to [85]:

> "*A further reason for rejecting Mr Eadie's submission in its absolutist form is Article 17 of the Dublin III Regulation. Since the relevant officials in the second Member State have power to assume responsibility in a case in which the Regulation assigns it to another Member State, it cannot be said that it is never open to an individual to request that state to do that. Mr Eadie suggested, or came close to suggesting, during the course of the hearing that a refusal to exercise the power under Article 17 was not justiciable. That, in my judgment, is unsound in principle and also finds no support in the authorities. ……In a context in which the exercise of power relates to relations between two member states as to the operation of a treaty arranging for the allocation of responsibility for examining applications for asylum between member states, this is clearly correct. There will be a wide range of relevant considerations for the decision-maker to take into account: see all the factors that the UT stated were relevant to the assessment of proportionality. But subject to the effective scope of judicial review being narrower for this reason, the exercise by the Secretary of State of her discretion is subject to the ordinary public law principles of propriety of purpose, relevancy of considerations,*

and the longstop Wednesbury unreasonableness category (Associated Provincial Picture Houses Ltd v Wednesbury Corpn [1948] 1 KB 223) and, because of the engagement of article 8 of the European Convention , the intensity of review which is appropriate in the assessment of the proportionality of any interference with Article 8 rights."

We accept Ms Walker's submission that one must be alert to the particular contexts of the decision in K and the reflections in [83] –[84] of ZT. Of course neither of these decisions is on all fours with the present case. But this consideration does not preclude an examination of the principled basis and juridical orientation of the passages under scrutiny. The main factor which links the decision in K with the present case (and the other members of this group) is the absence of a take charge request by the first Member State, coupled with how this was treated by the Court.

The Common Law: Procedural Safeguards

(73) Last, but far from least, since becoming seized of the family reunification claims in this case and the other members of the group the Secretary of State has been subject to a series of well recognised public law obligations. These have entailed, in particular, the duty to ensure a procedurally regular and fair decision making process; the duty to take into account all material facts and considerations; and the duty to prevent the intrusion of the immaterial. It may be said that the Tameside duty of enquiry, considered by this Tribunal in MK, was born out of the latter two duties and, in every context where it is engaged, constitutes an important mechanism for ensuring that the foregoing EU and Article 8 ECHR duties are discharged. So too does due observance of procedural regularity and fairness. To this I would add that the specific EU law duties to which the Secretary of State was at all material times subject did not operate to excuse, modify or dilute the content of these co-existing public law duties. All of them operate in harmonious co-existence and with mutual respect.

(74) There is a notable illustration of the impact of the common law in the specific context of asylum decision making in the decision of the Court of Appeal in Dirshe. There the central question was whether a refusal of asylum decision was vitiated on the ground of a procedural unfair decision making process. The court supplied an uncompromisingly affirmative answer. At [14] Latham LJ, delivering the judgment of the court, stated:

"The interview is a critical part of the procedure for determining asylum decisions. It provides the applicant with an opportunity to expand on or explain his written account and for the respondent, through the interviewing officer, to test that account and explore any apparent inconsistencies in that account. The interview could well be critical to any determination by either the respondent or appellate authorities as to the credibility of the applicant. The record of the interview is created by the interviewing officer, who is acting on behalf of the respondent. It follows that fairness requires that the

procedure should give to the applicant an adequate opportunity to challenge its reliability or adequacy."

Next, the court adopted the analysis of Pitchford J in R (Mapah) v SSHD [2003] EWHC 306 (Admin) at [62]:

"(1) Problems of interpretation can and do occur;

(2) Questions, translated into the applicant's language and replies given in that language, are not recorded as such but in the English translation;

(3) Records cannot always, despite exhortation, be literally verbatim;

(4) The reversal of the requirement for read back removed a measure of protection against unremarked mistakes in recording by the interviewer;

(5) An applicant does not necessarily have the benefit of representation or his own interpreter. Such an applicant will be at a disadvantage in identifying errors of translation;

(6) Immigration officials and Tribunals of Appeal frequently judge credibility against a criterion of consistency;

(7) Tape recording of an interview by the applicant or by the Secretary of State would do much to alleviate these problems if and when they occur."

(75) The judgment in Dirshe continues, at [16]:

"So long as the Secretary of State continues with the practice of relying upon a written record of the interview in its present form, the applicant must have an adequate means of ensuring that the record is, as we have said, both adequate and reliable".

Next, attention is directed to the variable factors of the skills and qualifications of the interpreter and the quality of the transcription by the Interviewing Officer, together with the factor of digest, or summary. The court emphasised the vital importance of providing a tape recording of such interviews. While the context under consideration in Dirshe does not mirror precisely that of the present case the general tenor of the judgment and the procedural concerns identified apply with a degree of modification and resonate in the present litigation context.

(76) While the decision of the House of Lords in R v SSHD, ex parte Doody and

Others [1994] 1 AC 531 involved a very different context, namely the release of prisoners sentenced to life imprisonment, I consider that the terms in which Lord Mustill devised his celebrated code of procedural fairness makes clear that it is of general application. Furthermore, its association with the EU and ECHR legal rules and principles outlined above is unmistakable. The passage in question (at page 560D) is not susceptible to cherry picking and demands reproduction in full:

> *"My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."*

Pausing briefly, it has not been argued on behalf of the Secretary of State – correctly in our estimation – that the common law principles outlined above did not apply to the so-called expedited process.

Public Law Protections Generally

(77) The operation of public law standards and duties in the context of the Dublin Regulation expressly recognised by the Court of Appeal in [85] of ZT (Syria), in the context of rejecting the Secretary of State's argument that Article 17 is not justiciable:

> "…*There will be a wide range of relevant considerations for the decision maker to take into account: see all the factors that the UT stated where relevant to the assessment of proportionality. That subject to the effective scope of judicial review being narrower for this reason, the exercise by the Secretary of State of her discretion is subject to the ordinary public law principles of propriety of purpose,*

relevancy of considerations and the long stop Wednesbury unreasonableness category .... and, because of the engagement of Article 8 of the European Convention, the intensity of review which is appropriate in the assessment of the proportionality of any interference with Article 8 rights."

Even if it were appropriate to hold that the Dublin Regulation did not apply, in whole or in part, to the expedited process it is difficult to identify any principled basis for concluding that this process was in some way immune from the orthodox duty of every United Kingdom public authority to comply with the common law principles and standards considered above. The unseen companion of the Secretary of State's officials in their journey across the Channel to 73 outposts in France and thereafter was the omnipresent common law.

Specific Issues

The Contours of AM's Challenge

(78) At the time of the initial impugned decision the question for the Secretary of State was whether the Applicant qualified for transfer to the United Kingdom. The determination of this question turned on the assessment of the Applicant's asserted nephew/uncle relationship with OA. Stated succinctly, the outcome was negative because the decision maker was not persuaded that this relationship had been established. This decision was made on an unspecified date in November/December 2016.

(79) Since 31 January 2017, the date of the PAP letter, the question for the Secretary of State has evolved. The PAP letter, while contending that the substantive criteria in the Dublin Regulation were satisfied in the Applicant's case, also unambiguously made the case that the Secretary of State had a duty to admit the Applicant to the United Kingdom under Article 8 ECHR and Articles 7 and 24(2) of the EU Charter of Fundamental Rights, citing Home Secretary v ZAT and Others [2016] EWCA Civ 810 ("ZAT"). Thus the legal landscape had altered and broadened significantly. In passing, there is no issue of delay on the part of the Applicant.

(80) We consider that the Secretary of State failed to recognise this evolution. This failure is abundantly clear from the PAP response, the witness statement of Ms Farman and the detailed grounds of defence. In short, since the PAP letter the Secretary of State's dominant preoccupation has been to defend and justify the mid-December 2016 refusal decision. This we consider misconceived for the reasons given. This myopic stance is reflected in the Judicial Review Claim Form, which challenges an ongoing failure on the part of the Secretary of State and invokes both the Applicant's Article 8 ECHR rights and his Dublin Regulation rights. Ultimately, the Secretary of State did not take the opportunity to make a fresh decision, protesting that, notwithstanding the marked evolution noted and the accumulation of substantial recent evidence, there was no

legal obligation to do so. On ordinary public law grounds alone this stance is questionable.

(81) In [5] of the Tribunal's ruling dated 12 April 2017 [cf Appendix 2] it was stated:

> *"All of these cases have one feature in common namely that fresh evidence has been generated. Broadly the fresh evidence takes the form of a series of witness statements and expert reports. None of this fresh evidence has been considered by the Secretary of State other than in the somewhat cursory fashion disclosed in the witness statements of Ms Farman. It is common case that these do not purport to contain or amount to a new decision, a reviewed decision or a reconsidered decision. This is based on the Secretary of State's unremitting position which is that fresh decisions will not be made voluntarily in any of these cases. This position is justified on the basis of the contention that the expedited process was of the "one off" variety and that all of the new evidence belongs exclusively to the framework of the Dublin Regulation process and, accordingly, can only be deployed within that process. Thus, it is argued, all new evidence belongs solely to a Dublin Regulation application for asylum to the French authorities."*

The ruling and its underpinning reasoning are set forth in [9] – [10]:

> *"[9] The following analysis arises irresistibly from the nature of the challenge that is brought in each of these cases. These are individual rights challenges. They are founded fundamentally on Article 8 of the Human Rights Convention. They base themselves on the principles which were espoused by this Tribunal in ZAT And Others and approved and developed by the Court of Appeal. The decision in ZAT makes clear that in certain circumstances Article 8 provides the appropriate legal vehicle for securing admission to the United Kingdom and it does so outwith and apart from the regime of the Dublin Regulation. Whether any of these Applicants ultimately succeeds in making good their claim in this fashion does not arise at this stage.*
>
> *[10] Once one applies that analysis the unsustainability of the Secretary of State's position becomes clear. The decision which the Secretary of State is obliged to make must be viewed through that lens. It is based on duty. First of all it is the ordinary public law duty of a public authority invested with relevant decision making powers and discretions to make a decision when reasonably required to do so. Second, it is based on section 6 of the Human Rights Act, which applies directly to the Secretary of State in this Article 8 context. It would be manifestly incompatible with the Convention rights of the Applicants if the Secretary of State were simply to refuse to assess the merits of a human rights claim at all*."

For essentially technical reasons, the parties' representatives believed

that this order did not encompass the present case, as permission had already been granted. The order did indeed expressly apply to this case also. In any event, our observation in [81] is unaffected.

(82) It was submitted on behalf of the Secretary of State that this Tribunal should consider only the evidence available to the Secretary of State at the time when the initial refusal decisions were made. This submission is based upon the misconception identified above. It also neglects, and fails to engage with, [5] – [12] of the Tribunal's earlier ruling. In addition this submission fails to take cognisance of both the target of the Applicant's challenge – an ongoing failure – and the fact that the Secretary of State has now considered the evidence in its totality in these proceedings. Furthermore, it has been repeatedly stated in a variety of contexts that human rights cases are about substance rather than form or technicality. Furthermore there is no clear indication that AM has received a review decision, in circumstances where his entitlement to this is not in dispute.

(83) In this context we would add that while expedition and finality are readily identifiable themes in the Dublin Regulation and its sister measure there is no suggestion that second, or subsequent, applications for protection are excluded – and no argument to this effect was advanced on behalf of the Secretary of State. EU law, at heart, is nothing if not a champion of substance over form. The availability of this facility would, of course, be subject to well recognised principles revolving around the concept of misuse of process and improper purpose.

(84) Finally in this context we consider the analogy with the "rolling review" which was developing in HN and SA (Afghanistan) v SSHD [2016] EWCA Civ 123 inapposite. That was not a human rights case involving vulnerable isolated children, nor did it consider a failure to make a decision and I refer to, without repeating, [12] of the Tribunal's earlier ruling in this case.

(85) In summary, the Secretary of State's submission identifies no principled basis for disregarding the post-December 2016 evidence and we reject it. While the analysis and conclusions at [78] – [84] vindicate this Applicant's challenge and, in principle, entitle him to a remedy there are other issues to be considered.

The Expedited Process Considered

(86) "Expedited" is the adjective repeatedly applied in the evidence to the October/December 2016 process. Whether it was preceded by a very short lived "accelerated" process (see Ms Farman's long witness statement) is of no real moment. The evidence makes clear that the expedited process was a joint French/British venture. According to Miss Farman – see [30] above – it was "*French-led"* with UK "*support*". We are alert to the reality that France was the host sovereign state and the United Kingdom was operating on French territory with the agreement and approval of the French government. We rather doubt whether any more profound analysis of this relatively simple issue is required. Furthermore,

in any event, such an exercise would be unsatisfactory given that the issue is mainly addressed through the medium of litigation witness statements with no associated contemporaneous records. How and why this has come to pass we do not know and decline to speculate.

(87) What is abundantly clear is that the process was both designed and operated in such a way that decisions were made quickly. While we note the references in the Secretary of State's evidence to a one month time period applicable to the expedited process, which featured also in Ms Walker's submissions, we find no convincing indications of an inflexible time measurement of this kind. Time pressures there undoubtedly were, driven by a combination of child welfare and resources. However, we note the specific indications in the evidence – for example Mr Cook's witness statement at [51] – that as of 09 December 2016, when the exercise was some two months old, the process of interviewing all the children was continuing.

(88) This simple, objective analysis confounds M. Sodini's 'one month' assertion which suffers from the further frailties of vagueness and want of particularity. Moreover, his witness statement is (improperly and unhelpfully) undated and unsigned and initially appeared to us to have been made midstream the expedited process (viz mid to late November 2016). We note and have no reason to doubt the clarification provided by the GLD's solicitor that it was in fact made in late March 2017. We take into account also the absence of any concrete evidence of a completion date: this is strikingly absent from Ms Farman's detailed timeline. Furthermore, it is clear that the review mechanism had the effect of extending the overall process to a total period of three to six months. Regrettably the evidence does not permit a more precise time measurement.

(89) Notwithstanding the above, it was argued by Ms Walker that the expedited process had to be begun and completed within a period of one month, by virtue of some kind of *ordonnance* on the part of the French authorities. We consider this argument unsustainable. First, no documentary evidence of this has been provided, albeit we have considered the claims to this effect in litigation witness statements. This witness evidence does not establish this point clearly or satisfactorily. It falls short of asserting, or establishing, a process so rigid and a time limit so absolute in a situation so fluid that an unforgiving and rigid guillotine fell irrevocably and on cue one month following the commencement date (which itself is not clear).

(90) Furthermore, this assertion is confounded by the Secretary of State's own evidence which, read fairly and *in bonam partem,* indicates that the first part of the period under scrutiny had a duration of some two months viz from early/mid-October to early/mid-December 2016, with an interruption of several days duration at the end of October/beginning of November on account of the "Jungle" demolition and associated dispersal of the circa 2,000 unaccompanied children. It is also clear from the same evidence that the second period, which was occupied by the "review"

exercise, added close to two further months to the overall timeframe.

The Respondent's Duties of Candour and Disclosure

(91) In a context where there have been repeated requests for disclosure, in both this case and the others, the evidence does not include any case notes, file notes, emails or other contemporaneous records. Nor is there any material documenting the training and instructions, if any, given to interviewers and interpreters, with one limited exception which seems directed more to decision makers. Furthermore, the evidential gaps thereby created have not, in many material instances, been rectified through the medium of witness statements. Given the major procedural dimension of this judicial review challenge and the absence of any agreement or concession on various material factual issues, this is one of those cases where, it becomes necessary for the Tribunal to find certain material facts, as was recognised by Lord Brown in Tweed v Parades Commission [2006] UKHL 53 at [52]-[57]. This exercise will extend to considering whether inferences arising from the absence of the kind of materials noted may reasonably be made. Linked to this is the Secretary of State's duty of candour.

(92) It is appropriate to recall the decision of the Court of Appeal in R (Das) v SSHD [2014] EWCA Civ 45. In that case, the Court drew attention to a striking gap in the evidential matrix, namely "*the absence of any evidence on behalf of the Secretary of State before the Court below or before this Court to explain her decision making in this case*": see [79]. The Appellate Court approved the principal formulated by the first instance Court, namely inferences adverse to the Secretary of State's case may properly be drawn in such circumstances. The following passage in the first instance judgment, at [21], is especially noteworthy:

> *"The basis for drawing adverse inferences of fact against the Secretary of State in judicial review proceedings will be particularly strong, because in such proceedings the Secretary of State is subject to the stringent and well known obligation owed to the Court by a public authority facing a challenge to its decision ...."*

The obligation to which the Judge was referring is the duty of candour. This duty was considered *in extenso* in the decision of this Tribunal in R (Mahmood) v SSHD [2014] UKUT 00439 at [15] ff. The duty of candour was reviewed more recently by the Court of Appeal in R (Khan) v SSHD [2016] EWCA Civ 416: see especially [35] – [45] per Beatson LJ. Lord Walker's succinct formulation of the duty leaves nothing unsaid. Every respondent public authority has a duty:

> "*.... to co-operate and to make candid disclosure by way of affidavit of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review*

proceedings …"

See Belize Alliance of Conservation Non-Government Organisations v Department of the Environment [2004] UKPC 6 at [86].

Did the Dublin Regulation apply?

(93) The main question of law which has emerged is: what is the correct analysis and characterisation of the "expedited process" within which the case of this Applicant and the other four related cases were considered and rejected?

(94) We consider that the answer to the question posed above is not to be found in the various labels and descriptions of Home Office officials employed from time to time, mainly in pre-proceedings communications and post-proceedings witness statements. This is, rather, fundamentally a question of law. It is not devoid of a factual element for the simple reason that, in common with any legal measure, the Dublin Regulation applies only in certain factual contexts or situations. Thus the underlying facts must be established. In this sense and to this extent the characterisation issue is a mixed question of fact and law. However, the factual dimension of the question does not in our judgement include the subjective claims, assertions, descriptions and labels of government officials.

(95) There are repeated claims in the Secretary of State's evidence that the United Kingdom, via the expedited process, exceeded its obligations under the Dublin Regulation. We readily accept that one of the aims of the process was to accelerate the time limits and periods specified in the Dublin Regulation. There is nothing incongruous or unusual about this. These are outer, or backstop, time limits which do not prevent Member States from producing quicker outcomes. Furthermore, expedition is a core principle of the Dublin Regulation. More important, this is perfectly lawful and it does not somehow disapply some or all of the surrounding provisions of the Regulation or its sister measure.

(96) If a Member State chooses to accelerate any of the time limits or waive or relax any of the formal requirements enshrined in the Dublin Regulation we consider that this will generally not involve any breach of EU law. The question which arises is whether a Member State which adopts a process of this kind can thereby claim to be exonerated from giving effect to, and can opt out of, a series of requirements and duties enshrined in other provisions of the Regulation and its sister measure. The burden of the Secretary of State's case is that this is an option lawfully available to a Member State. This is the crux of the question of law which we must examine and determine.

(97) At this juncture it is instructive to strip the Secretary of State's argument to its core essentials. The argument, shorn of gloss and embellishment, is that in the situation prevailing the Secretary of State was legally entitled

to ignore much of the Dublin Regulation and its sister measure and, as a matter of choice and convenience, to consciously give effect to its provisions only in a highly selective and limited fashion, with the cooperative participation of another EU Member State, France. The case made is that the Secretary of State could lawfully devise an alternative model which, at heart, borrowed, and purported to give effect to, only one of the Dublin "responsible Member State" provisions viz Article 8 while wilfully ignoring the others, in particular Article 17, together with a series of procedural safeguards. This analysis, in our judgement, flows inexorably from the Secretary of State's evidence, in particular the witness statements of Miss Farman and Mr Cook in the Citizens UK litigation, in tandem with the detailed grounds of defence and the submissions of Ms Walker.

(98) The Dublin Regulation being a measure of EU law, the latter regime provides the prism through which we must examine the factual matrix of the expedited process. For the purposes of this exercise the essential factual elements of this process, ascertainable from our summary of the evidence in [15] – [35] are in substance uncontroversial. We acknowledge that this assessment does not apply to some of the detail of the process. But that does not matter for the purposes of the present exercise.

(99) Thus, factually and in brief compass, the cornerstone of the exercise was a recognition by the Secretary of State that all members of the cohort in question, consisting of some 2,000 children, could, potentially, satisfy the responsible Member State criteria enshrined in Article 8 of Dublin. In simple terms the Secretary of State's officials then set about the task of endeavouring to determine which members of the cohort qualified for transfer to the United Kingdom under Article 8. Simultaneously, they sought to identify those members of the cohort who were adjudged to satisfy the so-called "Dubs amendment" criteria under section 67 of the Immigration Act 2017.Thus there were two transfer streams and, in this way, three possible outcomes for the members of the cohort:

(a) Transfer to the United Kingdom under the criteria of Article 8 of Dublin.

(b) Transfer to the United Kingdom under section 67.

(c) Non-transfer to the United Kingdom.

(100) We now focus our attention on legal characterisation of the expedited process. We take as our starting point the status of the Dublin Regulation as a measure of supreme EU law. To this we add the well established principle that the Community institutions can legislate only in areas within their exclusive competence. Where this occurs intrusion, legislative or otherwise, by Member States is impermissible. They must refrain from trespassing on EU occupied fields. Next, we consider Article 10 TEU which provides:

"Member States shall take all appropriate measures, whether general

or particular, to ensure fulfilment of the obligations arising out of this treaty or resulting from acts taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks."

(101) The above rules and principles of EU law belong to the realm of core juristic dogma, traceable to the landmark decisions in Van Gend en Loos [1963] ECR 1 and Costa v Enel [1964] ECR 585. The enduring impact of these decisions in the field of EU law requires no elaboration. As the authors of European Union Law (Dashwood *et al*, 6th ed) state, at page 237:

> *"… Law created by or under the Treaty of Rome had* [by Van Gend En Loos] *in principle been emancipated into the legal order of every single Member State, becoming an independent source of rights and obligations … ".*

And at page 238:

> *"It would be incompatible with attaining the Community's objective of creating a common market with common rules applying in all Member States to tolerate a situation in which countries decide which rules they want to respect and which rules they do not; the existence of the common market, and therefore the existence of the Community itself, depends upon Treaty rules being applied effectively and uniformly across the Member States and this implies the automatic and unconditional supremacy of directly effective Community law over conflicting provisions of national law."*

This latter passage resonates strongly in the present litigation context. Viewed through this elementary prism, the expedited process was a national measure to which two Members States subscribed and which attempted to devise and operate a Dublin Regulation surrogate, giving selective and partial effect to the dominant EU law measure overshadowing and enveloping the whole of this exercise.

(102) Logically, the next question focuses on the scope of operation of the Dublin Regulation. This is proclaimed in its long title. It is a measure *"… establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national".* The essential underpinnings of the successive Dublin measures include the principle of mutual confidence among EU Member States, the full and inclusive application of the Refugee Convention and Protocol within the Common European Asylum System ("CEAS"), the need for a system which will be practicable and efficacious, the imperative of inter-state co-operation, the overarching importance of expeditious decision making and the presumption (rebuttable) that Member States will comply with their international obligations, in particular observance and protection of fundamental rights. It may be said that the principle of mutual confidence, which dates from

the original Dublin measure some two decades ago, is of dominant force.

(103) The Dublin Regulation is properly viewed as a measure of EU law whereby one of the fundamental aims of the Union, namely the creation of an area of freedom, security and justice, is extended to a body of persons beyond that of EU citizens. Furthermore, Dublin is linked to the founding values of the Union: respect for human dignity, freedom, democracy, equality, human rights and the rule of law (per Article 2 TEU). Thus, non-EU citizens who successfully claim international protection via the Dublin Regulation access, for the purpose of living their lives and forging their futures, both a geographical area and a system of governance regulated by these core values. This is another dimension of the legal characterisation prism.

(104) The words *"asylum application"* and "*application for international protection*" feature repeatedly in the recitals and text of Dublin. Unsurprisingly, *"asylum application"* is given a very broad definition in EU law. While there is no definition in the definition clause of the Dublin Regulation, by virtue of Article 2(b) the definition of "*application for international protection*" in Article 2(h) of Directive 2011/93/EU (the recast Procedures Directive) applies. Taking into account that the United Kingdom Government is not bound by this instrument, we refer to the definition in its predecessor, Council Directive 2005/85/EC, which, in Article 2(b) provides:

> "*'Application' or 'application for asylum' means an application made by a third country national or stateless person which can be understood as a request for international protection from a Member State under the Geneva convention."*

By Article 6(1):

> "*Member States may require that applications for asylum be made in person and/or at a designated place.*"

The remainder of Article 6 contains certain kindred provisions envisaging the potential for national legislation of the procedural kind.

(105) At this juncture we turn to assess the substance and reality of the activities and conduct of the Secretary of State's agents throughout the period under scrutiny. In short, they were involved in identifying third country children present in France who qualified for transfer to the United Kingdom under Article 8 of the Dublin Regulation for the purpose of having their asylum applications determined. Pausing, if this were the only perspective in play the suggestion that these activities and the decisions which they generated were not subject to or governed by the Dublin Regulation would be positively startling. However, as our exposition of the broader EU law framework above demonstrates there is a broader perspective of substantial importance, going to the roots of EU law and the *raison d'etre* of the Community (to borrow the NS phraseology).

(106) It was open to the Secretary of State to devise and operate a decision making framework exceeding the respective rights and obligations conferred by the Dublin Regulation. We consider that EU law did not preclude this course. This is illustrated by two features of the expedited process in particular, both of which required the cooperation of the French authorities. The first was to (evidently) dispense with the formal requirement of registering an asylum claim in France. The second was to dispense with the requirement of France directing "take charge" requests to the United Kingdom. Each of these Dublin Regulation relaxations was designed to accelerate the backstop time limits prescribed by Dublin. All of this was laudable and pre – eminently reasonable.

(107) However, giving effect to our analysis above, EU law in general and the Dublin Regulation in particular establishes minimum rules which must be observed. The duty of observance is unyielding. Member States who exceed the requirements of such rules do not generally act incompatibly with EU law. More precisely, neither of the aforementioned features of the expedited process was incompatible with the philosophy, rationale, aims and objectives of Dublin: in particular mutual confidence, inter-state cooperation, expedition, the enhanced protection of minors and the promotion of family reunification.

(108) But we are unable to identify any rule or principle of EU law legitimising the Secretary of State's exclusion of key provisions of the Dublin Regulation and its sister instrument from the expedited process – and none featured in the arguments presented. Substantial swathes of these measures of EU law were simply airbrushed. The difficulty for the Secretary of State is that this superior and dominant system of law does not operate in this way. In all situations to which it applies, it is omnipresent and unremitting. Thus the expedited process was, in EU law terms, constitutionally impermissible. It was an act of unlawful Member State disobedience on the part of the United Kingdom.

(109) If, contrary to our view expressed in [94] above, it is necessary to answer the "Dublin Regulation question" by reference also to the evidence the conclusion that the Secretary of State was acting under the regime of the Dublin Regulation would be nigh irresistible. The evidence in our judgement admits of no other conclusion. The imprimatur of the Dublin Regulation is stamped clearly in the evidentiary materials and pleading considered in [15] – [35] above. Furthermore, the Secretary of State's attempted retreat from this position is both belated and unconvincing. This analysis is of course entirely consistent with the unequivocal policy of the Secretary of State, witnessed repeatedly in litigation in this Tribunal, to insist upon full adherence to the Dublin Regulation in all but the most exceptional cases.

(110) A further tool of analysis is provided by the concept of derogation. In substance, the Secretary of State was, throughout the period and activities in question, derogating from substantial swathes of the Dublin Regulation and its sister measure. As a matter of principle, derogation by a Member State from any rule or regime of EU law is, in general, lawful only where

this is authorised by the some other EU law provision, whether within or outwith the discrete code, or regime, in question. Neither the Dublin Regulation nor any other identified provision of EU law permitted the Secretary of State to derogate from any of the rules enshrined in the Dublin Regulation and its sister measure in the context under scrutiny. No argument to the contrary was presented.

(111) It was submitted by Ms Walker that the Secretary of State's expedited process and, in particular, the exclusion of Article 17 of Dublin therefrom was a time limited expedient which did not prevent any unsuccessful child from making and pursuing an Article 17 case thereafter. We consider that this argument provides no answer to the EU Law analysis and conclusions above. Fundamentally it fails to identify any legal rule or principle permitting wholesale derogation from Dublin and its sister measure and the effective suspension of the bulk of their combined provisions. The humanitarian considerations and the desirability of speed, central planks in both the Secretary of State's evidence and counsel's argument, do not provide the answer or legal justification. Nor does one find engagement with these legal issues in the detailed grounds of defence. Ultimately, the solitary argument advanced was that by reason of the absence of formally registered asylum claims and formal take charge requests, both waived by France, Dublin III did not apply to the expedited process. This argument fails for want of a legitimising legal rule or principle.

(112) Based on our assessment of both the Dublin Regulation and the broader rules and principles of EU law above, duly buttressed by the decisions in CK, K and ZT (Syria) at [85], we conclude that the Dublin Regulation and its sister measure applied to the expedited process.

(113) While a matter of less magnitude given the central thrust of AM's challenge and the context generally, we make the same conclusion in respect of the review mechanism, irrespective of whether this is to be considered as part and parcel of the expedited process or a separate procedure. While mindful of Ms Walker's submission that the review process was free standing of the expedited process, it was not argued, correctly in our estimation, that the review process was somehow exempt from the full panoply of legal standards and requirements identified above viz those to be found in the Dublin Regulation, its sister implementing measure, Article 8 ECHR and the common law. The issue of principle examined in [119] below was not canvassed in this context: the Secretary of State, inconsistently and incongruously, does not plead urgency and its offshoots in this context. The proposition that the review process had to be both substantively and procedurally lawful seems to us unassailable and the contrary was not argued.

(114) Our conclusion on the correct legal characterisation of the Secretary of State's expedited process has the following consequences in particular:

(i) By failing to give full effect to the Dublin Regulation and its sister measure, the Secretary of State acted unlawfully.

(ii) AM was in consequence unlawfully deprived of a series of procedural safeguards and protections.

(iii) AM's subsequent quest for admission to the United Kingdom under Article 8 ECHR cannot be defeated on the basis that he did not first attempt to secure the same outcome under the formal processes of the Dublin regime.

It follows that the Applicant has established the foundations for the grant of a remedy in these proceedings.

(115) As we shall explain *infra*, if we are wrong in our conclusion relating to the Dublin Regulation, the decision that the Secretary of State was acting in a procedurally irregular and unfair manner and, hence, unlawfully and the assessment that AM thereby has a basis for the grant of a remedy is made by either or both of two alternative legal routes, namely the procedural dimension of Article 8 ECHR and the common law. Thus if this aspect of the decision of the Court of Appeal in ZT (Syria) is to be construed narrowly, confined to the straightjacket of the Dublin Regulation regime, AM can have resort to either or both of two alternative routes to the grant of a remedy.

Procedural Fairness: Issues and Conclusions

(116) Having regard to the presentation of the Secretary of State's case, there are few contentious issues to be resolved. While many of the procedural deficiencies advanced on behalf of the Applicant were uncontentious, two in particular were controversial. The first was whether the children were adequately informed about the process in which they were participating, in particular the criteria which they would have to satisfy in order to secure transfer to the United Kingdom. The second was whether, in the unsuccessful cases, the effect of the expedited process was to delay and prejudice the children's prospects of being transferred to the United Kingdom for the determination of their asylum claims.

(117) The first of these contentious issues would have been more easily resolved if it had been addressed adequately in the Secretary of State's evidence. However, we have found the evidential contribution to this issue sparse and unsatisfactory. While, in argument, substantial reliance was placed on the witness statement of Mr Gallagher, his averments are confined to just 10 of the 73 reception centres in which circa 2,000 children were interviewed. There is no evidence relating to what occurred in any of the others. Furthermore, Mr Gallagher's witness statement does not spell out the communication of the qualifying criteria to the children concerned. Nor does it exhibit any relevant leaflet. This is particularly significant in the context of both the issue which he was addressing and the failure on the part of the Secretary of State to address this issue satisfactorily elsewhere in the evidence. There is clear and uncompromising evidence from a director in one of the other the reception centres (M. Rigau) supporting the complaint of a failure to provide

adequate information relating to the process and in particular the qualifying criteria: he asserts unequivocally that the latter were "unknown". The same complaint was made by staff in the centre in which AM was residing. None of this evidence is countered, adequately or at all, in the Secretary of State's response and we are disposed to accept it.

(118) The Secretary of State's evidence on the discrete issue of the distribution of an information leaflet is unsatisfactory and demonstrably incomplete. This is not remedied by the superficial and unparticularised references in the witness statement of M. Sodini in the Citizens' UK case. These contain nothing of sufficient clarity or substance to dissuade us from our assessment above. Thus we accept Ms Kilroy's submission on this discrete issue. Her submissions on the second of these discrete issues are equally cogent: the expedited process, realistically, placed all members of the cohort in limbo while all, understandably and inevitably, focussed exclusively on the "only show in town". No detailed forensic analysis is necessary in order to reach this obvious conclusion. It belongs to the real world then prevailing. Logically and realistically the same analysis must apply to the second phase of the overall exercise namely the review process.

(119) We turn to examine the broader question of principle raised. This can be related to the following passages in the detailed grounds of defence:

> "*The expedited process was an exceptional short-term measure … a reasonable and rational measure for the SSHD to adopt …*
>
> *The expedited process, involving an assessment of the claimed family link, was designed to enable the expedited processing and transfer of children who would otherwise be eligible to have their asylum claims transferred to the UK under Dublin III, Article 8 in the exceptional circumstances pertaining to the Camp closure and the dispersal of the children to 73* [reception centres] *across France.*"

It was not disputed by the Secretary of State that the expedited process had to be procedurally fair. Furthermore, many of the procedural deficiencies asserted on behalf of this Applicant (and the others) were not challenged. We add parenthetically that they could not conceivably have been challenged, the conduct of the interviews being a paradigm illustration. The argument advanced was that the procedure was fair in the context to which it belonged. The twin pillars of this argument were inter-related, namely the prevailing humanitarian challenge and the need for quick decision making.

(120) In every case the court or tribunal, conducting its ex post facto review, is the ultimate arbiter of the requirements of procedural fairness in the decision making context under scrutiny. It forms the "intuitive judgement", to borrow the memorable words of Lord Mustill in Doody.

(121) Both of these factors were, of course, prominent in the factual matrix

prevailing and cannot be gainsaid. However, the context had a series of other significant factors. Arguably, the stand out factor was that the expedited process involved the making of life changing and destiny shaping decisions for the children involved. For most, perhaps all, of the Applicants in this group of seven cases transfer to the United Kingdom represented their only realistic hope of family life. There were other highly significant contextual factors: age, flight, physical and psychological trauma (both recent and more distant), separation, isolation, suspicion, detachment and uncertainty. Vulnerabilities abounded. To these facts and considerations one adds the factors of unfamiliar environment, recent sudden upheaval in an alien country, acute uncertainty, mental fragility, stress and anxiety. One must also add to this list the real risk of communication difficulties and linguistic misunderstandings caused or exacerbated by one or more of the foregoing factors, notwithstanding the deployment of interpreters. This latter factor emerges clearly from the evidence assembled in all of these cases. Finally, the interviews were a crucial element of the decision making process. Onto the above we graft our analysis of the operation of the expedited process in [36] - [45] above.

(122) The expedited process in the group of five cases to which this challenge belongs was beset with procedural deficiencies and shortcomings and egregious unfairness. These contaminants are either not contested or incontestable. The conduct of the two interviews alone warrants a conclusion of procedural unfairness. The materiality of these procedural frailties is beyond plausible argument. The acid question is whether these procedural irregularities can be excused on the basis of the humanitarian challenge and the need for expedition. These are the two factors on which the Secretary of State relies. These must be recognised as important considerations and we readily acknowledge the major challenge the two Governments concerned faced. However, we consider that the exercise of balancing them with all the other factors summarised below results in a resounding negative answer to the question posed. Fundamentally, there was far too much at stake for these isolated and vulnerable children to warrant any other answer.

(123) Applying the second of the separate ZT (Syria) tests, the conclusion that the process in which the Applicant participated was *"not capable of responding adequately to [*his*] needs"* and failed to provide an "*effective way of proceeding"* is irresistible. The reasons for this fundamentally are that the process devised and operated lacked the structures, depth, penetration and flexibility necessary to ensure the indispensable elements of elementary procedural fairness, adequate enquiry, sufficient evidence gathering, conscientious consideration and proper fact finding. The expedited process involved mechanistic, arbitrary and rushed decision making. Depth and quality were sacrificed on the altar of haste and resource saving. Fundamentally, there was far too much at stake for these isolated and vulnerable to justify the corners cut and shortcuts taken. These conclusions apply irrespective of the correctness of our legal characterisation of the process as a Dublin one.

(124) It is unnecessary for the Tribunal to embark upon an erudite analysis of the respects (if any) in which the requirements of procedural fairness and regularity imposed by the three legal regimes under consideration – the Dublin Regulation and its sister measure in tandem, Article 8 ECHR and the common law – differed in the context under scrutiny. While the common law, through its adoption and development of the principles of natural justice and their modern incarnation, is the champion of procedural fairness, it is unlikely that an exercise of this kind would throw up any significant distinctions. However, we have not received detailed argument on this issue and, furthermore, it is not necessary to determine it. It suffices to note that Ms Walker's submissions did not, in substance, seek to establish any material distinctions differentiating the three regimes.

(125) This brings us to the alternative conclusion that if we are wrong to decide that the Dublin Regulation and its sister instrument governed the expedited process, the centrepiece of the Applicants' challenge, namely the complaint of procedural unfairness and irregularity, is made good via either or both of the other legal routes identified. We accept Ms Kilroy's submission to this effect.

(126) We would add the absence of any evidence that AM's quest for a remedy is complicated by the fact of any uncompleted administrative or legal process in France. Furthermore, unlike the other four related cases the Secretary of State did not make a fresh decision in AM's case. As is clear from [5] of this Tribunal's earlier ruling [Appendix 2 hereto] any lingering suggestion that Ms Farman's litigation specific witness statement constitutes a fresh decision, much less a properly made one, is unsustainable.

(127) At this juncture it is convenient to note Ms Walker's submission that there were two separate exercises namely the expedited process and the review process. While we do not readily discern any dividing line, luminous or otherwise, from the Secretary of State's evidence in particular, we consider this a matter of limited moment mainly for the reason that the proposition that the Secretary of State was obliged to act lawfully, both substantively and procedurally, at all material times is of the most elementary kind.

(128) In this context we address one specific issue. While we are alert to the faint suggestion in the Secretary of State's case that any children who successfully achieved transfer/admission in consequence of the review exercise did so only via a formal "take charge" request from France and the acceptance thereof by the United Kingdom, we cannot avoid the following observation. The absence of documentary evidence bearing directly on this issue is startling. Any reasonable court or tribunal would expect such evidence to include, as a minimum, copies of take charge requests and take charge acceptances, suitably redacted if considered appropriate. Furthermore, in the span of the five judicial review challenges belonging to this discrete group, there is not a shred of evidence of this kind. Nor is there <u>any</u> evidence of review decision

making or, most basically, review decisions. The principles considered in [91] – 92) above have particular resonance in this context.

The Outworkings of the Above Conclusions

(129) To summarise, AM can lay claim to a series of procedural, or due process, protections and safeguards enshrined in three separate legal regimes: EU law, the Human Rights Act 1998 and the common law. Based on the analysis, findings and conclusions set forth above he has been denied the safeguards identified. The decision making process resulting in the Secretary of State's original and continued refusal to admit him to the United Kingdom for the purpose of family reunification with AO was, for the reasons explained, irredeemably flawed. It has, without legal justification, breached AM's procedural rights. This applies irrespective of whether the Dublin Regulation governed the expedited process. AM's challenge must succeed in consequence.

Remedy

(130) By the route charted above we reach the important question of remedy. In ZT (Syria) this Tribunal concluded that a breach of the substantive dimension of Article 8 ECHR had been established, giving rise to a remedy entitling the Applicants to admission to the United Kingdom. The Court of Appeal did not disagree with the remedy granted in principle.

(131) In the present litigation context we are bound to take into account that the "Calais expedited process" is done and dusted. The Tribunal could, in theory, formulate a remedy requiring the Secretary of State's officials to seek the permission of the French authorities for the purpose of travelling to the reception centre in France where AM is accommodated and conducting a procedurally fair and regular inquisition followed by all appropriate subsequent steps, which would include thorough enquiries of OA and his family circumstances. However this would entail delay and uncertainty, coupled with the imponderable of the necessary co-operation of the French authorities. It would also be cumbersome and expensive.

(132) We take into account simultaneously the desirability of any remedial order not interfering with appropriate further best interests and child safeguarding checks and enquiries. Given the inadequacies of enquiry and procedural defects which we have diagnosed, the outcome of such steps could, in principle, frustrate the family reunification aspirations of AM and OA. While we attribute substantial weight to the evidence of the two protagonists, which we consider plausible, we must recognise that this will not necessarily be determinative of the ultimate outcome for both.

(133) The considerable delays to date must further be weighed. In addition, each segment of continuing delay is plainly inimical to the Applicant's best interests. We also take into account that the immediate practical effect of AM's admission to the United Kingdom will be his absorption within the statutory care system, without prejudice to a final decision. Thus while on

the one hand it would not achieve immediately his goal of family reunification, on the other this would protect his best interests while final checks and enquiries are completed. Furthermore, this step will enhance the prospects of a fresh decision making process which will respect his right to procedural fairness and other due process safeguards and guarantees and, simultaneously, facilitate the Secretary of State's corresponding legal obligation. AM's swift transfer to the United Kingdom would also be a positive step from the perspective of his mental health.

(134) Thus there is a delicate and intensely fact sensitive balance to be struck. Having considered the submissions of both parties' representatives, we have concluded, in the exercise of our discretion, that the appropriate remedy is the following:

(i) An Order quashing the Secretary of State's initial decision whereby the transfer of AM from France to the United Kingdom in November/December 2016 was refused.

(ii) A declaration that the aforementioned decision and the Secretary of State's continuing refusal to admit AM to the United Kingdom are unlawful being in breach of the Dublin Regulation and its sister measure and/or the procedural dimension of Article 8 ECHR and/or the common law requirements of procedural fairness.

(iii) An Order requiring the Secretary of State:

(a) to forthwith make all necessary and immediate arrangements for the transfer of AM from France to the United Kingdom, using best endeavours at all times and not later than midnight on 22 May 2017; and
(b) to begin forthwith a fresh decision making process in AM's case, to be completed by the same deadline.

(iv) There shall be liberty to apply.

Costs

(135) The Secretary of State shall pay the Applicants' reasonable legal costs and outlays which, in default of agreement, will be the subject of detailed assessment.

(136) There shall be detailed assessment of the Applicants' publicly funded costs.

Permission To appeal

(137) This will be addressed separately.

(138) Both the Applicant and OA have the continuing and indefinite protection of anonymity.

Signed: 

The Honourable Mr Justice McCloskey
President of the Upper Tribunal
Immigration and Asylum Chamber

Dated: **19 May 2017**

APPENDIX 1

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review

Notice of Decision/Order/Directions

The Queen on the application of AO and AM

Applicants

v

Secretary of State for the Home Department

Respondent

Before the Honourable Mr Justice McCloskey, President

Having heard Mr P Reynolds, of counsel, instructed on behalf of the Respondent, the moving party, by the Government Legal Department and Mr M Fordham QC and Miss C Kilroy and Miss M Knorr, both of counsel, instructed by Bhatt Murphy Solicitors on behalf of the Applicants

DECISION ON STAY

McCLOSKEY J

Introduction

(1) This decision determines the applications made by the Respondent, the Secretary of State for the Home Department (the "*Secretary of State*"), for a stay of both sets of proceedings. The relief pursued is framed in the following terms:

> "*An order that this claim be stayed along with all other related proceedings behind the Administrative Court case of* ***Citizens UK v SSHD*** *(CO/5255/2016) as the issues in dispute are the same ….*"

The following order is sought in the alternative:

"… as an alternative that the Tribunal transfer this claim and all other claims raising the same issue to the Administrative Court so that all related claims can be case managed appropriately with reference to the overriding objective."

It may be observed that this alternative form of relief rather faded away in both the oral and written submissions of Mr Reynolds.

(2) The background to the lodging of these stay applications included certain *inter-partes* correspondence which was brought to the attention of the Tribunal. This was prompted by the awareness of the Secretary of State's legal representatives that the initiation of these two claims in the Tribunal, together with others, was imminent. This correspondence became the initial vehicle for the Secretary of State's contention that all proceedings of a certain kind commenced in the Upper Tribunal should be stayed pending determination of the Citizens UK v SSHD (hereinafter "CUK") litigation in the Administrative Court.

(3) By letter dated 17th March 2017, written under my direction, the Upper Tribunal wrote to the lawyers concerned to the following effect:

(a) UTIAC is a creature of statute and exercises no inherent jurisdiction. Its powers are contained in a combination of primary and secondary legislation. UTIAC is unaware of any power to order a stay in respect of any claim which has not been issued in this Chamber.

(b) The parties' representatives were invited to identify the two cases most suitable for the determination of stay applications by the Secretary of State, "suitability" in this context embodying the various ingredients in the overriding objective.

(c) A timetable was directed.

These twin applications have materialised in consequence.

Citizens UK v SSHD

(4) This is a judicial review claim brought by a registered charity in the Administrative Court. Procedurally, these proceedings have the following landmarks:

(a) The claim was initiated on 14 October 2016.

(b) On 28th October 2016 permission to apply for judicial review was refused by a paper decision.

(c) The Claimant's grounds were amended on 18 January 2017.

(d) On 28 February 2017 an oral permission hearing was held, giving rise to an order granting permission to apply for judicial review and directing that an expedited substantive hearing be held on 23/24 May 2017.

(5) The favour and essence of this judicial review claim is captured in the following passages extracted from the amended grounds:

> "*1. This anxious, urgent and compelling case arises out of the British/French partnership in dealing with asylum seekers at a notorious refugee settlement in Calais known as the 'Jungle' ….*
>
> *2. The …. destruction of the jungle camp and dispersal of its inhabitants …. have very serious implications for the welfare and safety of particularly vulnerable asylum seeking children, many of them with rights of speedy facilitated passage to the United Kingdom ….*
>
> *4. …. A large number of children wishing to come to the United Kingdom (the 'dispersed children') were eventually dispersed on coaches to centres (CAOMIEs) across France with the promise that their requests to enter the United Kingdom either under Section 67 of the Immigration Act …. or under … Dublin III would be considered by the Defendant's officials ….*
>
> *The expedited process which was implemented by the Defendant in accordance with that promise has drawn to a close and yet hundreds of dispersed children remain in the CAOMIEs, many of whom have outstanding family reunification claims which have not been properly considered by the Defendant.*"

(6) Continuing, the grounds draw particular attention to a joint United Kingdom/French policy, namely "Managing Migratory Flows in Calais: joint declaration on UK/French co-operation", dated 20 August 2016 (the "*Joint Declaration*"). The Claimant's case is that arising out of the Joint Declaration the Secretary of State is subject to a series of legal obligations ("the Obligations"), namely:

(i) To identify all children in the camp, in particular unaccompanied children and to assess their eligibility for transfer to the United Kingdom;

(ii) To provide the children with full and accurate information about the Dublin III regime, including the family reunification provisions and the associated available arrangements.

(iii) To ensure that the children have safe accommodation allowing easy access to the arrangements.

(iv) To ensure that safe accommodation does not remove the children further away from the support network of those agencies and representatives who have been facilitating family reunification.

The grounds canvass also the duty of investigation and the duty of providing adequate and intelligible reasons for decisions. It is contended that these duties fall to be calibrated and discharged in the context of Dublin III, the EU Charter of Fundamental Rights, the Human Rights Act 1998 and the Convention on the Rights of the Child 1989. There is also a discernible orthodox public law overlay.

(7) CUK contends that there is powerful evidence demonstrating a failure by the Secretary of State to discharge the aforementioned duties. In this context I highlight certain further passages in the grounds:

> "25. *The Claimant's position is that any act of disregard and default of the Obligations would not only be unlawful but a matter of grave concern. Judicial review is a last resort. But it serves to secure accountability for relevant acts and omissions of the Defendant having had the Obligations squarely brought to her attention …*
>
> *These obligations, which arise in the context of a long standing failure by the Defendant and the French authorities to identify and protect children in the Jungle in Calais, provide them with information about their rights and set up a functioning system to allow them to access rights to family reunification in the United Kingdom*
>
> *…*
>
> *The dispersed children now face a further disruption and dispersal from CAOMIEs due to close their doors, in some cases before the expedited process has concluded and in all cases before the dispersed children have completed Dublin III family reunification procedures. Having established the expedited process on French soil with the support and co-operation of the French authorities, the Defendant has an additional obligation arising out of common law principles concerning access to justice ….. and rights to procedure fairness under Article 8 ECHR ….. to take all steps open to her to ensure that further dispersal from the CAOMIEs does not interrupt access to that process and in particular to any remedies available to dispersed children in respect of the operation of that process. Access to legal remedies includes access to NGOs and other representatives who may be able to facilitate the provision of UK based legal advice to dispersed children and their families ….*"

CUK is, therefore, challenging a series of acts and omissions on the part of the Secretary of State. This is reflected in the formulation of the "decision to be judicially reviewed" in the Claim Form:

> *"The failure and refusal to recognise and comply with the legal obligations identified in the letter before claim ….* (which required a response by 11 October 2016)".

Finally, I draw attention to the remedies claimed: these are purely declaratory, seeking confirmation that the Secretary of State was subject

to the "Obligations" and that there has been an unlawful failure to discharge same.

These Two Claims

(8) These two claims, together with five others, were lodged in the Upper Tribunal during week commencing 13 March 2017. Factually they are of course quite different. However, in substance they share much common ground. The Applicant AO challenges the following:

> "*Failure to transfer* [him] *to the UK in accordance with his substantive Dublin III rights and his Article 8 rights …. refusal/failure to act since 16 December 2016 and ongoing and including decision of 09 March 2017.*"

The relief pursued is:

(i) A mandatory order requiring the Secretary of State to admit the Applicant to the UK forthwith.

(ii) An Order quashing the Secretary of State's decision to refuse to transfer the Applicant to the UK under her expedited Dublin III process.

(iii) A declaration that the Secretary of State has failed in her duties to properly investigate the Applicants' claim and has acted unlawfully.

Both the focus of the legal challenge and the remedies pursued are the same in the two cases. Furthermore, both Applicants have applied for anonymity, interim relief and expedition.

(9) Based on what is pleaded, the Applicant AO was an unaccompanied minor during the greater part of the events forming the background to his claim. His 18th birthday occurred on 08 March 2017. He is of Eritrean nationality, fled his country of origin some two years ago and has been seeking to join his brother, AMO, who has refugee status and resides in the United Kingdom. His case is described as "*very compelling and extremely urgent*". Evidentially, it is supported by, *inter alia*, the report of a consultant psychiatrist which diagnoses post-traumatic stress disorder, contains the assessment that the Applicant is "*… close to the limit of what he could bear in terms of flashbacks, anxiety, feeling unsafe and sleep deprivation*" and advises that:

> "*…. further delay due to legal processes is therefore not at all in* [the Applicant's] *best interests and may lead to further re-traumatisation and irreversible damage to his mental health.*"

Within this expert testimony one also finds the phrases *"extremely*

distressing" and "*detrimentally affecting his mental state*".

(10) It is averred that this Applicant was identified as a child eligible for consideration under the Secretary of State's expedited Dublin III Process, was interviewed accordingly and provided evidence about his brother in the United Kingdom, culminating in the notification to him from French officials that, in common with the other children remaining in the CAOMI in question, the Secretary of State had refused transfer to the United Kingdom, without adequate particulars, elaboration or reasons. This appears to have been followed by an unsuccessful review application.

(11) Most recently, a response to the pre-action letter dated 09 March 2017 indicates the following: the Applicant was assessed in the expedited Dublin process; he was not accepted initially because further investigations regard his brother were necessary; this issue has now been resolved; the Secretary of State has asked the French authorities to submit a take charge request under Dublin III; and any further evidence supporting the Applicant's asserted relationship with his brother should be provided to the French authorities. The most recent evidence indicates that a stalemate continues.

(12) The case of the other Applicant, AM, has certain similarities. AM is an unaccompanied and orphaned national of Eritrea, aged 16 years, who aspires to join his uncle, a recognised refugee living in the United Kingdom. He has been diagnosed as suffering from a major depressive disorder and post-traumatic stress disorder symptoms. The expert in his case advises that he –

> *"… is severely struggling with the delay in being reunited with his uncle ….*
>
> *He is suffering from psychiatric disorder, which is being exacerbated by his current situation where he feels subjectively unsafe …*
>
> *I do no believe that psychiatric or psychological treatment in France will improve his state, in fact I would not recommend this at all as it would be likely to destabilise him further. He is at risk of becoming increasingly suicidal if prompt reunification does no occur as his mental state will deteriorate further."*

In common with the other Applicant, AM was admitted to the expedited Dublin Regulation process, he was escorted from the now demolished "jungle" in Calais to a "CAOMIE" and was interviewed, following which he was informed that he had been refused transfer to the United Kingdom on the ground of "family link not accepted". This phrase is, evidently, a pro-forma or ("boilerplate") belonging to a spreadsheet mechanism.

<u>The Stay Applications</u>

(13) The kernel of these stay applications is ascertainable from the witness

statement of the GLD senior lawyer grounding these applications. This contains the following material averments:

> *"4. The SSHD considers it would be appropriate for these claims to be stayed behind the Citizen's UK Claim as the issues raised in both these claims (and indeed the various other related claims issued in the Upper Tribunal) are in essence identical ....*
>
> *15. .... As the Tribunal is aware, seven* [individual] *claims have been issued ....*
>
> *21. While .... the Citizens UK claim is a systematic* **[systemic?]** *challenge and these proceedings in the Upper Tribunal and related matters are all brought in respect of individuals .....*
>
> *all of the points they raise in this claim are also in issue in the Citizens UK Claim ....*
>
> *24. I acknowledge and appreciate that the Applicant in this claim and indeed all the other claims will point to the fact that the Applicants are unaccompanied asylum seeking minors who wish to be reunited with their family after a difficult and traumatic journey to Europe. I also recognise that the Applicants have adduced psychiatric evidence as to their condition. The SSHD does appreciate that it is important that the Applicants' position is resolved quickly, however she would suggest that this factor while important cannot outweigh other equally as pressing consideration such as the need for appropriate case management. Further while the legal claims may be stayed this does not mean of course that the Applicants cannot proceed with claiming asylum in France and pressing for a take charge request to be made.*
>
> *25. Further these individuals have recourse to assistance in France if they are willing to accept it including presumably to medical care ..... AM is being supported by the French authorities .... and he is being assisted to register an asylum claim in France .....*
>
> *26. In the case of AO, he has elected not to claim asylum in France which is why he may become homeless. The SSHD has made clear that she will very likely accept a take charge request ....*
>
> *The Applicants contend that the children put through the expedited process were selected precisely because they were considered to require expedition. This is not correct ..... They were selected simply because they had been formerly resident in Calais and the camp had now closed and the SSHD was trying to process large numbers of children quickly."*

Continuing, the deponent advances "*two important reasons which militate very heavily in favour of a stay*" namely:

(a) the need for judicial certainty; and

(b) the conservation of limited judicial resources.

It is further suggested that a stay is "*the most sensible way of proceeding*". Finally, the witness statement ends with the following plea:

> "*36. The SSHD is complying with the procedural timetable in both these claims. She is due to file her detailed grounds and any evidence by 12 April 2017 in the Help Refugees claim. In addition she faces these claims in the Tribunal and also will likely be commencing appeal proceedings in the Court of Appeal in the RSM case with which the Tribunal is very familiar".*
>
> *39. The SSHD recognises that for these claims to be properly considered the Tribunal requires her to fully particularise her defence and to submit evidence substantiating her case. It will however simply be impossible for the SSHD to provide the Tribunal with this level of assistance in this case and other related Upper Tribunal matters at the same time as defending the Help Refugees and Citizens UK claims."*

(14) The submissions of Mr Reynolds on behalf of the Secretary of State developed the main passages in the solicitor's witness statement. They had, inevitably, a heavy focus on the CUK litigation and entailed drawing to my attention the nine "case studies" which formed part of the evidence in those proceedings. One of these (No. 9) relates to the Applicant AM. The thrust of Mr Reynolds' argument was that these two cases "raise fundamentally the same points of law" as CUK "in the same material factual circumstances". Mr Reynolds also questioned the asserted urgency of these cases. Finally, in response to a question from the Bench, he confirmed that in the CUK litigation the Secretary of State is on schedule to comply with the requirement to file all evidence by 04 April 2017 and, further, that this is expected to include witness statements from the officials who interacted directly with some of the "case study" children.

The Applicants' Riposte

(15) The interlocking elements of the arguments canvassed on behalf of the Applicants included the following in particular: the submissions on behalf of the Secretary of State acknowledged that the CUK challenge will not delve into the facts of individual cases; whereas CUK is a systemic challenge, these two challenges are individualised; there is nothing unprecedented about parallel human rights cases proceeding; reliance on the ZS decision provides no reliable guide to the proper determination of these applications; and, ultimately, the challenges of these two Applicants will be determined by reference to the various touchstones identified in ZAT and Others, in particular the implications of the Applicants having pursued unsuccessfully the expedited process in France, the consequential inapplicability of the "exceptional circumstances" test, the factor of intense review and reliance on many of the proportionality factors endorsed in [37] of the Court of Appeal's judgment. Mr Fordham QC also reminded the Tribunal of the decisions in MK at [26] and [36] (duty of

enquiry) and RSM, at [43] (the interaction between Articles 8 and 17 of the Dublin Regulation).

(16) I have also considered in full the informal "pleading" on behalf of the Applicants which was compiled and provided to the Tribunal during the pre-litigation phase outlined in [2] – [3] above. This emphasises, *inter alia*, the Tribunal's duty under Section 6 of the Human Rights Act 1998, the need to treat the best interests of the younger Applicant as a primary consideration, the impact of Article 8 ECHR on the factual frameworks advanced and the compelling necessity for swift judicial adjudication. In this context Mr Fordham drew attention to the irony that a stay order precipitated by a generic claim brought by a charity seeking clarification of the law in this sphere could stimulate substantial delays in determining these two claims and the others belonging to the cohort.

(17) Finally, my attention was drawn to United Nations General Comment No, 14 (2013), paragraphs 25-29 especially, which contain the following salient passage:

> *"The courts must provide for the best interests of the child to be considered in all such situations and decisions, whether of a procedural or substantive nature, and must demonstrate that they have effectively done so."*

In this context I was invited to consider the interesting analysis in "Using International Law In Domestic Courts (Fatima), paragraph 11.12:

> *"The exercise of discretion by courts is characterised by a consistent recognition of, and respect for, upholding the United Kingdom's treaty obligations, including those that are incorporated as a matter of domestic law. This is seen particularly clearly where judicial discretion is exercised regarding the grant or maintenance of injunctions and interim injunctions."*

The Governing Principles

(18) I begin with two propositions which I consider uncontroversial. First, the decision whether to stay proceedings in any forum and, if so, on what terms involves the exercise of a relatively broad – though not of course unfettered – judicial discretion. Second, the most important factors influencing the exercise of this discretion will normally – though not invariably – be found in the multi-faceted overriding objective.

(19) The issue of jurisdiction is uncomplicated. Section 49(3) of the Supreme Court Act 1981 provides:

> "*Nothing in this Act shall affect the power of the Court of Appeal or the High Court to stay any proceedings before it,* ***where it thinks fit to do so****, either of its own motion or on the application of any person, whether or not a party to the proceedings.*"
>
> [My emphasis.]

By section 25(1)(a) of the Tribunals, Courts and Enforcement Act 2007:

> "*In relation to the matters mentioned in (2), the Upper Tribunal …. has …. the same powers, rights, privileges and authority as the High Court .*
>
> *The matters are:*
>
> *(a) The attendance and examination of witnesses,*
>
> *(b) The production and inspection of documents and*
>
> *(c) All other matters incidental to the Upper Tribunal's functions."*

Section 25(3) provides:

> "*Subsection (1) shall not be taken –*
>
> *(a) To limit any power to make Tribunal procedure rules,*
>
> *(b) To be limited by anything in Tribunal procedure rules other than an express limitation.*"

Rule 5 of the Tribunal Procedure (Upper Tribunal) Rules 2008, under the rubric "Case Management Powers", provides:

> "*Subject to the provisions of the 2007 Act and any other enactment, the Upper Tribunal may regular its own procedure.*"

By Rule 5(2):

> "*The Upper Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction.*"

This is followed by Rule 5(3):

> ***"In particular, and without restricting the general powers in paragraphs (1) and (2), the Upper Tribunal may …..***
>
> ***(j) Stay ….. proceedings ….."***

[My emphasis]

By the route charted above, the power of the Upper Tribunal to order a stay of proceedings is not in doubt.

(20) Section 49(3) of the Supreme Court Act 1981 is an express acknowledgement of the judge made nature of both the power to stay

proceedings and the principles to be applied. It has been long recognised that the power of the High Court to stay proceedings is inherent in nature: Re Wickham [1887] 35 CH D 272 at 280, per Cotton LJ. In an earlier era, a stay had the Draconian effect of bringing proceedings to a conclusion, unless it was of the conditional variety. This has, however, been superseded by contemporary practice: Rofa Sport Management v DHL International UK [1989] 2 All ER 743. Accordingly, in modern litigation a stay does not have the drastic consequences of its 19th and early 20th century ancestors. The conditional stay sought in these proceedings is not to be confused with one of its ancestors namely the permanent stay.

(21) The issue of staying proceedings was the subject of detailed consideration by the Court of Appeal in AB (Sudan) v Secretary of State for the Home Department [2013] EWCA Civ 921. The Court, firstly, contrasted a stay of proceedings with a stay of enforcement of a judicial decision or order. It emphasised that stay issue involve case management decisions. It added, at [25]:

> "*Such decisions will rarely be challenged and even more rarely be reversed on appeal.*"

The appeal in question sought to challenge a decision of the Vice-President of UTIAC to refuse to grant a stay of a judicial review application pending the possible appeal to the Supreme Court in EM (Eritrea). The Court, at [26] cited with approval the Vice-President's formulation of the governing principles:

> "*27. A stay on proceedings may be associated with the grant of interim relief, but it is essentially different. In determining whether proceedings should be stayed, the concerns of the court itself have to be taken into the balance. Decisions as to listing, and decisions as to which cases are to be heard at any particular time are matters for the court itself and no party to a claim can demand that it be heard before or after any other claim. The court will want to deal with claims before it as expeditiously as is consistent with justice. But, on the other hand, it is unlikely to want to waste time and other valuable resources on an exercise that may well be pointless if conducted too soon. If, therefore, the court is shown that there will be, or there is likely to be, some event in the foreseeable future that may have an impact on the way a claim is decided, it may decide to stay proceedings in the claim until after that event. It may be more inclined to grant a stay if there is agreement between the parties. It may not need to grant a stay if the pattern of work shows that the matter will not come on for trial before the event in question. The starting point must, however, be that a claimant seeks expeditious determination of his claim and that delay will be ordered only if good reason is shown.*

28. In cases where a request for a stay on proceedings is coupled, expressly or by necessary implication, with a request for interim relief, the court will need to take into account the factors relevant to both types of decision, and may need to take into account a third: that by securing interim relief and a stay, the applicant may be asking the court to use its powers to give him, for as long as he can secure it, a benefit that he may not obtain at the trial."

As these passages make clear, the overriding objective looms large in the determination of every stay application.

(22) The Court added the following observations of specified relevance in immigration cases:

"28. Immigration law has a tendency to develop rapidly, indeed sometimes at bewildering speed. The constant flow of developments arises from the industry of legislators, rule-makers, judges and practitioners. Not only does the law in this area change fast. So also do the political, military, social and economic circumstances in the numerous countries from which asylum seekers or other migrants may come.

29. Both the tribunals and the courts have to keep pace with these constant changes. When a new appellate decision is awaited it is not unusual for parties in pending similar cases to seek a stay of their proceedings.

30. Sometimes it is obviously necessary to grant such a stay, because the anticipated appellate decision will have a critical impact upon the proceedings in hand. There is also, however, a need for realism. In the world of immigration it is a fact of life that the law which the judge applies is liable to change in the future, quite possibly in the near future. This cannot usually be a reason for staying proceedings. I started dealing with immigration cases some fourteen years ago. I cannot remember any occasion during that period when important decisions on one or more aspects of immigration law were not eagerly awaited from the appellate courts.

31. As Pill LJ observed in R (Bahta) v SSHD [2011] EWCA Civ 895 at [70], what the Court of Appeal says is the law, is the law, unless and until overruled by a superior court or by Parliament. Likewise country guidance decisions should generally be applied unless and until they are reversed or superseded.

32 In my view the power to stay immigration cases pending a future appellate decision in other litigation is a power which must be exercised cautiously and only when, in the interests of justice, it is necessary to do so. It may be necessary to grant a stay if the impending appellate decision is likely to have a critical impact on

the current litigation. If courts or tribunals exercise their power to stay cases too freely, the immigration system (which is already

(23) I distil from AB (Sudan) the following principles in particular:

(a) Every claimant is entitled to expect expeditious judicial adjudication. The strength of this expectation will be calibrated according to the individual litigation equation.

(b) The judicially imposed delay flowing from a stay order requires good reason.

(c) Judicial choreography whereby one case is frozen awaiting the outcome of another is justified for example where the assessment is that the latter will have a critical impact upon the former.

(d) Great caution is to be exercised where a stay application is founded on the contention that the outcome of another case will significantly influence the outcome of the instant case.

(24) To these principles I would add the following: a stay application will require especially compelling justification in a case qualifying for urgent judicial decision. The cases of unaccompanied, isolated teenagers marooned in a foreign land suffering from major psychological trauma and seeking, via litigation, the swiftest reunion possible with a separated family member will always, in principle, have a powerful claim to judicial prioritisation.

Conclusions

(25) Ultimately, the determination of these stay applications requires an exercise of balancing many of the ingredients enshrined in the overriding objective: the avoidance of excessive cost, the unnecessary expenditure of finite public resources, the right of every litigant to expeditious justice, the minimising of litigation delays, managing the interface and overlap between two judicial organisations, the allocation of limited judicial resources and, broadly, the convenience of all concerned. I must also weigh carefully the ages, vulnerability and plight of the two litigants. Furthermore, alertness to a broader panorama is essential since the determination of these two applications will clearly be influential in, though not automatically determinative of, the progress and case management of the five other live new cases which have been initiated in tandem with these. Fairness, reasonableness and proportionality loom large in an exercise of this kind.

(26) I consider the impact of the range of considerations which I have identified to be the following:

(a) These are two individual rights cases. This is the feature which distinguishes them most clearly from the CUK Challenge.

(b) In the CUK Challenge, the Secretary of State's evidential response will probably not be directed to individual cases except insofar as relevant and as required by the duty of candour. Much of the Secretary of State's evidence is likely to be generic in nature. The facts of the nine "case studies" may prove to be uncontentious.

(c) All such generic evidence will form a necessary part of the Secretary of State's evidence in the seven Upper Tribunal cases. The exercise of preparing such evidence will not have to be repeated. It will, rather, be a single, self-contained exercise. Furthermore, it is reasonably predictable that much of this evidence will take the form of extant documents: official reports, memoranda, email communications, letters and, possibly, communications of a diplomatic character. Whatever form it takes, this exercise is now at a highly advanced stage.

(d) The additional evidence required in the Secretary of State's response to the individual claims in the Upper Tribunal will, predictably, be case specific and fact sensitive. It is likely to require witness statements from Government officials with direct involvement in and knowledge of each of the individual cases. It is represented on behalf of the Secretary of State that some evidence of this kind is expected to materialise in the CUK Challenge. This will be harmonious with good husbandry in resource expenditure.

(e) My evaluative assessment is that a reasonable proportion of the ground work required for the preparation and presentation of the Secretary of State's evidence in these two cases will have been completed in the context of the CUK litigation by 04 April 2017. No aspect of this investment of human and financial resources will fall to be repeated. There will be no duplication.

(27) Next I turn my attention to the timetable pertaining to the CUK Challenge. This is contained in the Order of the Administrative Court dated 04 March 2017. It makes provision for a series of bilateral steps to be undertaken and completed during a period of approximately ten weeks, all of this on an expedited basis. I take into account that this Order represents the outcome of the considered judgment and planning of both parties' legal representatives and the Judge concerned. It has been composed and finalised on the basis that all of the time limits are achievable.

(28) I accept that it will be more convenient, less expensive and more comfortable for the Secretary of State and her lawyers if these two cases were to be stayed in the manner proposed. However, this would impose a limitation impacting seriously on the two Applicants' right of access to a court, in circumstances where they have a compelling claim to speedy judicial adjudication. If they are entitled to a remedy it must be swift, practical and effective. Furthermore, given the distinction between the Administrative Court proceedings and these cases I reject the argument of substantial judicial overlap. Ultimately, I consider the aforementioned

rights of the Applicants to be determinative. The factors advanced on behalf of the Secretary of State do not, singly or in combination, suffice to displace, limit or delay the full enjoyment of these rights in the fact sensitive context of these two cases.

Order and Directions

(29) I refuse the Secretary of State's applications accordingly.

(30) The Secretary of State's written representations on the issue of the further timetabling and management of these two cases will be provided by close of business on 29 March 2017.

(31) The Applicants' riposte will be provided by close of business on 30 March 2017.

(32) The parties' representatives will file an agreed draft case management order, or their competing case management orders, by 12 midday on 31 March 2017. The Upper Tribunal will aspire to, but cannot guarantee absolutely, appropriate further directions/ by late 31 March 2017 – and in any event by 08.00 on 03 April 2017.

(33) I shall continue to hold in reserve for as long as is possible 04 April 2017 to deal with interim release and/or "rolled up" applications.

(34) I recognise the possibility that a slightly later date for the hearing of any such application may be required in fairness to the Secretary of State. Beyond this I do not venture. The parties' representatives are aware of the practical outworkings of this.

(35) There shall be liberty to apply.

(36) Costs are reserved.

Edward McCloskey.

THE HON. MR JUSTICE MCCLOSKEY
PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Date: **29 March 2017**

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 sent (Civil Procedure Rules Practice Direction 52D 3.3).

APPENDIX 2

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review

Ruling and Directions

The Queen on the application of AO, AM, SASA, MHA, YS, KIA and SS

Applicants

v

Secretary of State for the Home Department

Respondent

The Honourable Mr Justice McCloskey, President

Having considered all documents lodged by the parties and having heard the parties' respective representatives, Ms C Kilroy and Ms M Knorr (together), of counsel, instructed by Bhatt Murphy Solicitors and Mr R Toal, of counsel, Islington Law Solicitors on behalf of the Applicants and Ms A Walker, of counsel, instructed by the Government Legal Department on behalf of the Respondent, at a hearing at Field House, London on 11 April 2017.

INTERIM RELIEF ORDER AND DIRECTIONS: ALL CASES EXCEPT AO AND YS

(1) These are applications for interim relief at this embryonic stage of the proceedings. Expedition is also sought. Each of these cases belongs to a group which may be loosely described as 'post-Calais' cases. They all involve unaccompanied teenagers each of whom has pressing needs and circumstances. It is necessary to bear in mind the remedy which is sought in each of these cases namely a mandatory order requiring the Respondent to admit each of the Applicants to the United Kingdom forthwith. That is the primary relief sought in every case. The applications for interim relief also seek the same remedy. Of the group

of seven cases two have been the subject of voluntary reconsideration by the Secretary of State namely the cases of AO and YS. As a result of this reconsideration the Secretary of State has reached a diametrically different decision and is now prepared to admit these Applicants to the United Kingdom.

(2) I accept the submission of Ms Kilroy that if the Secretary of State's earlier application to stay these cases had been successful then realistically these two cases would not have been reconsidered and this outcome would not have eventuated with the result that all seven Applicants would remain in precisely the same position. As it is, according to my arithmetic there are now five Applicants who continue to litigate in this Tribunal. In the case of AO I have already conducted a preliminary hearing ad have made an order of an interim species

(3) One of the features of all of these cases is that the decisions made on behalf of the Secretary of State in the somewhat mysterious process which was devised during late 2016 were made on the basis of the evidence then available. That was around December 2016 and in all of these five cases the Secretary of State concluded that admission to the United Kingdom under a process which remains somewhat obscure in many respects would be refused. Proceedings were initiated subsequently by these seven unsuccessful applicants.

(4) This Tribunal's first detailed consideration of these cases is recorded in its decision dated 29 March 2017 in AO and AM which refused the Secretary of State's applications for a stay. Since that date these proceedings have evolved permission to apply for judicial review has been granted in one case only (the case of AM) and in that case the Tribunal has adjourned the interim relief application.

(5) All of the cases have one feature in common namely that fresh evidence has been generated. Broadly the fresh evidence takes the form of a series of witness statements and expert reports. None of this fresh evidence has been considered by the Secretary of State other than in the somewhat cursory fashion disclosed in witness statements of Ms Farman on behalf of the Secretary of State. It is common case that those witness statements do not purport to contain or amount to a new decision, a reviewed decision or a reconsidered decision. This is based on the position adopted by the Secretary of State which is that the Secretary of State will not voluntarily make fresh decisions in any of these cases. This position is justified on the basis of the contention that all of the new evidence belongs exclusively to the framework of the Dublin Regulation process and, accordingly, can only be deployed within that process. Thus, it is argued, all new evidence belongs solely to a Dublin Regulation application for asylum to the French authorities.

(6) This brings me to the current state of play in all of these extant cases. The Upper Tribunal finds itself in an unsatisfactory position. It is the first recipient of all of the new evidence. The undesirability of that state of affairs was emphasised in this Tribunal's decision in HN (Afghanistan) that was the subject of consideration on appeal by the Court of Appeal

which expressed no disapproval of anything said in this Tribunal's decision. In short in any public law context there is a strong general rule that all evidence bearing on the relief sought by the litigant should first be considered by a public authority decision maker rather than in the context of legal proceedings. This may be viewed as an aspect of the exhaustion of alternative remedies principle. It also reflects the supervisory character of judicial review.

(7) This brings me to an issue of case management. The Tribunal has two basic choices. One is to determine the interim relief applications on the basis of all the available evidence. If that option were to be exercised the Tribunal would reject the Respondent's objection that the newly produced evidence should not be admitted. There are several reasons for this. They include, inexhaustively, the human rights dimension, the children's rights dimension and the public law character of the proceedings. They also include the consideration that the new evidence has been produced at a stage when permission has not yet been determined. Furthermore, it has not involved any breach of any procedural rule, any practice direction or any special case management direction formulated to date.

(8) The second main option involves not adjudicating upon the application for interim relief as formulated but adjourning that application for the purpose of the Secretary of State, who is the primary decision maker, considering all of the new evidence and making decisions. Without determining this particular issue finally at this stage I add the following with caution. The correct analysis may well be that any decisions arising out of the exercise mooted would not be properly characterised a review or reconsideration of the earlier decisions made in each of these cases around December 2016 within the ambit of the somewhat obscure process which was devised between the United Kingdom and French governments. Accordingly it would in my provisional view be wrong to apply the prism of those earlier decisions and that earlier process to all of the new evidence that is now available.

(9) The following analysis arises irresistibly from the nature of the challenge that is brought in each of these cases. These are individual rights challenges. They are founded fundamentally on Article 8 of the Human Rights Convention. They base themselves on the principles which were espoused by this Tribunal in ZAT And Others and approved by the Court of Appeal in ZAT and developed. The decision in ZAT makes clear that in certain circumstances Article 8 provides the appropriate legal vehicle for securing admission to the United Kingdom and it does so outwith and apart from the regime of the Dublin Regulation. Whether any of these Applicants ultimately succeeds in making good their claim in this fashion does not arise at this stage.

(10) Once one applies that analysis the unsustainability of the Secretary of State's position becomes clear. The decision which the Secretary of State is obliged to make must be viewed through that lens. It is based on duty. First of all it is the ordinary public law duty of a public authority invested with relevant decision making powers and discretions to make a decision when required to do so. Second, it is based on section 6 of the

Human Rights Act, which applies directly to the Secretary of State in this Article 8 context. It would be manifestly incompatible with the Convention rights of the Applicants if the Secretary of State were simply to refuse to assess the merits of a human rights claim at all.

(11) In light of the position which the Secretary of State has adopted I am proposing to take the less desirable of two courses. The more desirable course would be for the Secretary of State to acknowledge for the reasons which I have just articulated that there is a duty of decision making of the kind which I have outlined. However such acknowledgment is not forthcoming. As I am satisfied that such a duty exists in law and given the intrinsic desirability of the Secretary of State's considered assessment of and decision in respect of all the new material preceding this Tribunal's evaluation of the primary interim relief sought by the Applicants and, in due course, the substantive remedies pursued I propose by way of interim relief to order the Secretary of State to consider all of the new evidence together with such written representations as the Applicants may wish to make and to make decisions accordingly. This will be entirely without prejudice to the determination of any of the substantive issues which arise at any stage of these proceedings namely the interim relief stage, the permission stage or the substantive stage.

(12) Proceeding in this way means with reference once again to HN (Afghanistan) that the correct sequence is re-established. It so happens in HN (Afghanistan) that there was a dimension involving paragraph 353 of the Immigration Rules. But that makes no difference at all to the analysis which I have espoused. Furthermore, the right to make fresh representations in the context of any immigration or asylum or human rights decision is not based on paragraph 353 of the Rules. It is a common law, or public law, right. Paragraph 353 empowers the Secretary of State to treat the further representations in a certain way but it does not speak to the right to make them and accordingly the paragraph 353 dimension of HN (Afghanistan) does not provide a point of distinction with the present cases.

(13) The duty which I have identified will involve the following. It will involve conscientious consideration of all of the new evidence and any accompanying representations. It will require an open mind on the part of the decision maker. It will have to take into account the plight of the Applicants and the need for conscientious expedition. It will not involve some kind of preordained outcome based on the December 2016 decisions: first, for the reasons that I have given and second, because the landscape of each of the cases has developed very significantly since then. The decision maker will have to confront what the Court of Appeal decided in ZAT and what this Tribunal has decided in a series of cases which have not been either challenged in or reversed by the Court of Appeal namely the potential potency and reach of Article 8 of the Human Rights Convention in this kind of context. These are all factors which must be brought to account in the decision making which will follow.

(14) The final question is that of time limit. In both the stay application and

the ruling in AO and AM last week I have drawn attention to the expedition which has been accorded to these cases. That expedition will have to be applied also by the Secretary of State. I am ordering the Secretary of State to make decisions in all of the cases not later than 19 April 2017. If that time limit cannot be achieved in one or more of the cases so be it. The Tribunal may then well have to grasp the nettle of proceeding in the considerably less satisfactory fashion which I have identified but this option must first be exhausted to the extent possible. The Tribunal will be available with or without decisions from the Secretary of State to reconvene at extremely short notice for the purpose, if necessary, of focusing on the primary interim relief sought by the Applicants and determining those applications as they are currently framed. While I grant interim relief in these terms today I do not determine finally the interim relief applications. They are, rather, adjourned on those terms.

(15) Amendment of the Applicants' challenges may also foreseeably arise.

(16) I reserve costs and grant liberty to apply.

Signed: Edward McCloskey.

The Honourable Mr Justice McCloskey
President of the Upper Tribunal
Immigration and Asylum Chamber

Dated: **12 April 2017**

Sent to the Applicant, Respondent and any interested party / the Applicant's, Respondent's and any interested party's solicitors on (date):
Home Office Ref: