Neutral Citation Number: [2018] EWCA Civ 1815

Case No: C2/2017/2992
C2/2017/2994
C2/2017/2996
C2/2017/2993

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
McCloskey J and UTJ Allen

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31/07/2018

Before :

LORD JUSTICE HICKINBOTTOM
LORD JUSTICE SINGH
and
LADY JUSTICE ASPLIN

- -

Between :

Secretary of State for the Home Department	**Appellant**
- and -	
(1) The Queen (on the application of (1) AM, a child by his litigation friend OA, and (2) OA) **(2) The Queen (on the application of SASA, a child by his litigation friend MMA)** **(3) The Queen (on the application of SS)** **(4) The Queen (on the application of MHA)**	**Respondents**

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Sir James Eadie QC, Mr David Manknell and Ms Amelia Walker (instructed by the **Government Legal Department**) for the **Appellant**
Ms Charlotte Kilroy and Ms Michelle Knorr (instructed by **Bhatt Murphy**) for the **Respondents AM & OA and SS,** and (instructed by **The Migrants' Law Project, Islington Law Centre)** for the **Respondents SASA and MHA**

Hearing dates: 12-14 June 2018

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Approved Judgment

Lord Justice Singh:

Introduction

1. These are four appeals brought by the Secretary of State,[1] with the permission of the Upper Tribunal (Immigration and Asylum Chamber) ("Upper Tribunal" or simply "UT"). The lead case was *AM*, in which the Upper Tribunal (comprising McCloskey J, the then President of the Immigration and Asylum Chamber, and UTJ Allen) gave a lengthy judgment, which it then followed in the other three cases.

2. These appeals also raise issues which overlap considerably with the case of *R (Citizens UK) v Secretary of State for the Home Department*, which is an appeal by the Claimant in that case against the decision of the High Court (Soole J). This Court has today also given judgment in *Citizens UK*. For reasons that will be apparent, this judgment can accordingly be shorter than it might otherwise have been, since I will cross-refer to my judgment in *Citizens UK* where appropriate. This judgment should be read with that judgment since, for example, the relevant legislation is set out there.

3. All four cases concern the operation of what became known as the "expedited process", which was established by the Secretary of State in conjunction with the French authorities in October 2016 in response to the impending demolition of the makeshift tented encampment in Calais which was commonly known as "the Jungle" and to which I will refer as "the camp". By the expedited process the Secretary of State sought to assess the eligibility of unaccompanied asylum-seeking children ("UASC") to be transferred to the United Kingdom ("UK").

4. In essence the Upper Tribunal decided that the expedited process was unlawful on any or all of three bases:

   (1) breach of European Union ("EU") law, in particular because it failed to comply with procedural protections guaranteed under Regulation 604/2013 ("Dublin III");

   (2) breach of the common law requirements of fairness; and

   (3) breach of the procedural protections afforded by Article 8 of the European Convention on Human Rights ("ECHR"), as set out in Sch. 1 to the Human Rights Act 1998 ("HRA").

5. In reaching those conclusions the Upper Tribunal fundamentally differed from what was later said by Soole J in the *Citizens UK* case.

Factual Background

AM

[1] At the material time the Secretary of State was female, so I will use the words "she" or "her", even though the office is now held by a man.

6. AM was born on 1 October 2000 and is an Eritrean national. In 2015, he fled Eritrea and travelled to Europe via Libya and arrived in Calais in April 2016. When the camp was due to be demolished AM presented himself for registration as an unaccompanied child and was identified as potentially having an entitlement to be transferred to the UK under Dublin III because his uncle, OA, resided in the UK. On 2 November 2016 the French authorities took him to a CAOMI[2] in Baugé-en-Anjou. AM was interviewed by Home Office officials on 6 or 7 November 2016. The Secretary of State decided to refuse to transfer AM to the UK on 15 November 2016.

7. On 16 December 2016 a French official informed AM that his application for transfer to the UK had been refused and three days later, on 19 December 2016, he was informed that this was because his family link was not accepted. The same French official helped AM request a review of that decision, but no further decision was communicated to him. AM was relocated from the CAOMI to a hotel in Angers towards the end of February 2017.

8. AM's solicitor sent a pre-action protocol letter to the Secretary of State on 31 January 2017. The Secretary of State replied on 9 March 2017 stating that the application had been refused because of inconsistencies between the information provided by AM and OA. AM filed an application for judicial review at the Upper Tribunal on 14 March 2017.

9. Separately, AM's asylum claim was registered in France, but French officials decided not to make a "take charge request" under Dublin III while the Secretary of State was reviewing the initial decision.

10. On 23 March 2017 the Secretary of State applied for an order staying this case (and others like it) behind *Citizens UK*, which was at that time pending in the High Court. That application was refused at an oral hearing on 28 March 2017. AM applied for interim relief on 4 April 2017 and a hearing took place on 7 April 2017, at which the Upper Tribunal adjourned the issue of interim relief and ordered the Secretary of State to make a new decision by 19 April 2017.

11. No new decision was made prior to the substantive hearing of the claim for judicial review on 5 April 2017 and 11 April 2017. On 16 April 2017 the Upper Tribunal ordered the Secretary of State to admit AM to the UK and made a further order that he take a fresh decision. The Secretary of State made a new decision, which maintained her original position that the family link with OA was not accepted, on 2 June 2017.

12. On 12 June 2017, AM applied, under the liberty to apply provision in the order dated 16 April 2017, for a further order declaring that the decision of 2 June 2017 was not in compliance with the original order. The application was dealt with at an oral hearing on 21 June 2017 and on 5 September 2017 the Upper Tribunal held that the Secretary of State had failed to comply with the terms of its earlier order and required her to make a further new decision. The Secretary of State made a fresh decision accepting responsibility for AM's asylum claim on 4 October 2017.

[2] Centre d'accueil et d'orientation pour mineurs isoles.

13. The Upper Tribunal granted the Secretary of State permission to appeal to the Court of Appeal on 8 October 2017. It did so on the grounds as formulated at para. 4 of the Grounds of Appeal, as amended on 25 September 2017.

SASA

14. SASA was born on 27 October 2000 and is a national of Sudan. He fled Sudan and arrived at the Calais camp in June 2016. SASA was interviewed by Home Office officials in late October 2016, before the Calais camp was demolished. He was taken to a CAOMI in Le Pouldu by French officials on 2 November 2016. An interview with the Home Office was conducted on 12 November 2016 at the CAOMI and SASA provided contact details for his cousins. Following this the Secretary of State contacted one cousin, AHO, but did not contact another cousin, MMA.

15. On 15 December 2016 SASA was informed by French officials that his application for transfer to the UK had been refused, but no reasons were provided to him. Staff at the CAOMI requested a review on SASA's behalf on 21 January 2017, but no response was received. SASA left the CAOMI and became street homeless in France on 28 January 2017.

16. SASA's solicitor sent a pre-action protocol letter to the Secretary of State on 21 February 2017 and the Secretary of State replied on 7 March 2017, stating that the application was refused because the family relationship (cousin) does not fall within the scope of Article 8 of Dublin III.

17. SASA filed an application for judicial review at the Upper Tribunal on 14 March 2017. The Secretary of State applied for a stay on 23 March 2017. This was joined to the stay application made in AM and refused on 28 March 2017. SASA's interim relief application was also listed with AM on 7 April 2017. Following that hearing the Upper Tribunal ordered the Secretary of State to make a fresh decision by 19 April 2017. A fresh decision was made on 19 April 2017, which again refused to transfer SASA to the UK.

18. The substantive judicial review claim was heard on 12 May 2017. On 16 May 2017 the Upper Tribunal ordered the Secretary of State to admit SASA to the UK and make a fresh decision. A further decision refusing to accept responsibility for SASA's asylum claim was made on 2 June 2017. On 12 June 2017 SASA made an application under the liberty to apply provision for a ruling that the new decision did not comply with the terms of the original order. This application was dealt with at an oral hearing on 21 June 2017 and on 5 September 2017 the Upper Tribunal ruled that the Secretary of State had not complied with the original order and required her to make a fresh decision. The Secretary of State accepted responsibility for determining SASA's asylum claim on 4 October 2017, by which time he was physically in the UK.

19. The Upper Tribunal granted permission to appeal to the Court of Appeal on 8 October 2017, on the same grounds as in AM's case.

SS

20. SS was born on 13 December 1999 and is a national of Eritrea. In 2016 he fled Eritrea and travelled to Europe via Egypt. SS arrived in the Calais camp in September 2016. During the demolition of the Calais camp SS was identified as eligible for consideration under the scheme and moved to a CAOMI in Baugé-en-Anjou on 2 November 2016. SS sought transfer to the UK to be reunited with his uncle, AHA. It should be noted that AHA is also a cousin of SS, because AHA's paternal grandfather was the brother of SS's paternal great-grandfather. On 6 or 7 November 2011 Home Office officials interviewed SS at the CAOMI and conducted a telephone interview with AHA on 10 November 2016. French officials informed SS that his application had been refused on 16 December 2016 because his relationship with AHA had not been accepted.

21. On 31 January 2017 SS's solicitor sent a pre-action protocol letter to the Secretary of State. A reply was sent on 22 February 2017, maintaining the decision.

22. SS filed an application for judicial review at the Upper Tribunal on 14 March 2017. Following an interim relief hearing on 11 April 2017 the Upper Tribunal ordered the Secretary of State to re-consider her decision in light of new material supplied as part of the judicial review application. The Secretary of State made a new decision refusing to transfer SS to the UK on 19 April 2017.

23. The substantive judicial review claim was heard on 12 May 2017. On 16 May 2017 the Upper Tribunal ordered the Secretary of State to admit SS to the UK and required her to take a further fresh decision. The Secretary of State made a new decision refusing to accept responsibility for SS's asylum claim on 2 June 2017. On 12 June 2017 SS applied for a ruling that the new decision was not in compliance with the original order. The Upper Tribunal heard the application on 21 June 2017 and on 5 September 2017 ruled that the Secretary of State had failed to comply and must make a new decision. On 4 October 2017, the Secretary of State accepted responsibility for SS's asylum claim.

24. The Upper Tribunal granted permission to appeal to the Court of Appeal on 8 October 2017, on the same grounds as in AM's case.

MHA

25. MHA was born on 4 May 2000 and is a national of Iraq, although his family are Kurdish and his first language is Kurdish Sorani. MHA fled Iraq in 2015 and arrived in Calais later that year, together with his brother. In February 2016, MHA attempted to enter the UK with his brother, but they were separated before the border. MHA was interviewed by Home Office officials in Calais and stated that he wanted to join his brother who was now seeking asylum in the UK. On 17 November 2016 MHA was interviewed by Home Office officials in a CAOMI in Montignac. French officials told MHA that his application had been refused on 19 December 2016, but MHA did not understand because the decision was not communicated to him in Kurdish Sorani. Staff at the CAOMI submitted a reconsideration request on MHA's behalf but he was

not aware of this. On 10 February 2017 French social services took charge of caring for MHA.

26. MHA's solicitor sent a pre-action protocol letter to the Secretary of State on 6 March 2017. No response was received.

27. MHA filed an application for judicial review on 15 March 2017. MHA made an application for interim relief on 31 March 2017, which was listed for an oral hearing on 11 April 2017. At the hearing the Upper Tribunal ordered the Secretary of State to make a fresh decision by 19 April 2017. The Secretary of State made a new decision on 19 April 2017, which maintained her refusal on the basis that she was considering the removal of MHA's brother to Romania.

28. On 16 May 2017 the Upper Tribunal heard the substantive judicial review claim and the following day ordered the Secretary of State to admit MHA to the UK and make a fresh decision. On 2 June 2017 the Secretary of State made a further decision refusing to accept responsibility for considering MHA's asylum claim because she was attempting to remove MHA's brother to Romania. MHA applied for a ruling that this new decision was not in compliance with the original order and on 5 September 2017 the Upper Tribunal ordered the Secretary of State to make a further new decision. The Secretary of State accepted responsibility for considering MHA's asylum claim on 4 October 2017.

29. The Upper Tribunal granted permission to appeal to the Court of Appeal on 8 October 2017, on the same grounds as in AM's case.

The judgments of the Upper Tribunal

30. Originally there were seven claims for judicial review which were due to be heard together. The Secretary of State conceded two of those cases and so the UT had to consider the remaining five cases. Those five were the four cases with which this Court is now concerned and also the case of KIA, in which the Secretary of State has not appealed.

The judgment in AM

31. The judgment in the case of *AM* was given by the Upper Tribunal and is dated 19 May 2017 (it was promulgated on 23 May 2017).

32. After setting out the factual background, the issues and the parties' respective submissions, at paras. 91-92 the UT addressed the question of the duties of candour and disclosure. It noted that there had been repeated requests on behalf of the then applicants for disclosure, in the case of *AM* and in other cases. However, the UT observed that:

> "… The evidence does not include any case notes, file notes, emails or other contemporaneous records. … Furthermore, the evidential gaps thereby created have not, in many material

> instances, been rectified through the medium of witness statements. …"

33. It is clear, therefore, that the issue of candour was expressly in the minds of all concerned and certainly should have been in the minds of the persons who had filed witness statements on behalf of the Secretary of State, not only in the *AM* set of cases but also in *Citizens UK* in the High Court. If that was not already apparent by May 2017, it should have been in the many months which then elapsed right up to May 2018, when finally the evidential position was rectified before this Court.

34. At paras. 93-114 of its judgment the UT addressed the question: did the Dublin III Regulation apply? As the UT put it at para. 100, it focussed on the "legal characterisation of the expedited process." It was of the view, at para. 101:

> "… The expedited process was a national measure to which two Member 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."

The UT concluded that the Dublin III Regulation did apply to the expedited process and, accordingly:

> "… 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." (para. 108)

On that basis, the UT concluded, at para. 114(ii), that AM was in consequence unlawfully deprived of a series of procedural safeguards and protections which were in Dublin III. It also concluded, at para. 114(iii), that AM's subsequent quest for admission to the UK under Article 8 of the ECHR could not be defeated on the basis that he did not first attempt to secure the same outcome under the formal processes of the Dublin III regime. As the UT then said:

> "It follows that [AM] has established the foundations for the grant of a remedy in these proceedings."

35. However, at para. 114, the UT said that, even if it were wrong in its conclusion relating to the Dublin III 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. …"

36. At paras. 116-128 of its judgment the UT addressed the issues of procedural fairness outside the context of EU law. The UT observed at para. 119 that:

> "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."

37. At para. 122 the UT concluded that:

> "The expedited process in the group of five cases to which this challenge belongs was beset with procedural deficiencies and shortcomings and egregious unfairness. … The conduct of the two interviews alone warrants a conclusion of procedural unfairness. … 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."

38. At para. 123 the UT considered the decision of this Court in *R (ZT (Syria) & Others) v Secretary of State for the Home Department* [2016] EWCA Civ 810; [2016] 1 WLR 4894 and said:

> "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 [children] 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."

39. At para. 125 the UT again said that it would accept the "alternative conclusion" that, if it was wrong to decide that the Dublin III Regulation governed the expedited process, the challenge based on procedural unfairness was still made good via either or both of the other legal routes identified, namely Article 8 of the ECHR and the common law.

40. At para. 129 the UT set out what it described as the "outworkings" of its earlier conclusions, as follows:

> "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."

41. At paras. 130-134 of its judgment the UT addressed the question of what remedy should then follow. It concluded, in the exercise of its discretion, that the appropriate remedies would be the following:

    (i) An order quashing the Secretary of State's initial decision whereby the transfer of AM from France to the UK 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 UK were unlawful being in breach of the Dublin Regulation and its sister measure and/or the procedural dimension of Article 8 of the 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 UK, 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.

42. In Appendix 1 to its main judgment the UT set out its earlier decision of the Secretary of State's application to stay the proceedings pending the High Court decision in *Citizens UK*, an application which it had refused.

43. At para. 12 of that earlier judgment it is to be noted that the UT commented on the spreadsheet setting out the reasons in these cases as follows:

> "Family link not accepted".

The UT said that that phrase:

> "… is, evidently, a pro-forma or ('boilerplate') belonging to a spreadsheet mechanism."

The judgment in the case of SASA

44. In a judgment dated 14 May 2017 but which we understand was promulgated at the same time as the other judgments, the UT considered the application for judicial review of SASA. After setting out the factual background, including the interviews, the UT set out its consideration and conclusions at paras. 34-43 of its judgment. It concluded that there had been procedural unfairness, including on the basis of a breach of Dublin III.

45. At paras. 44-45 the UT considered the question of what remedies should follow. Again its order included a mandatory order requiring the Secretary of State to forthwith make all necessary and immediate arrangements for the transfer of SASA from France to the UK, using best endeavours at all times and not later than 22 May 2017; and to begin forthwith a fresh decision making process in that case, to be completed by the same deadline.

The judgment in the case of SS

46. In a judgment which is dated 12 May 2017 but which we understand was promulgated at the same time as that in the other cases, the UT summarised the factual background, including the interviews which took place in the case of SS, and then set out its consideration and conclusions at paras. 15-23. As in *AM*, and adopting its analysis at paras. 86-128 of the judgment in *AM*, the UT concluded that there had been procedural unfairness in the case of *SS* on any or all of three legal bases: the Dublin

III Regulation and its sister measure; Article 8 of the ECHR; and the common law: see paras. 19-20 of the judgment.

47. At paras. 24-33 the UT set out its conclusions as to the remedy which should then follow. This was in similar terms to that in *AM* and, in particular, included a mandatory order requiring the Secretary of State to admit access to the UK forthwith by 22 May 2017; and to begin the process of making a fresh lawful decision in that timeframe.

The judgment in the case of MHA

48. In a judgment dated 17 May 2017 but which we understand was promulgated at the same time as in the other cases, the UT considered the application by MHA. After setting out the factual background, including the interviews, the UT set out its consideration and conclusions at paras. 20-35 of its judgment. It again adopted its analysis in *AM* at paras. 86-128 of that judgment: see para. 20 of its judgment in *MHA*. It concluded that there had been no lawful assessment of MHA's best interests: see para. 33.

49. At para. 36 the UT granted what it considered to be the appropriate remedy which, again as in the case of *AM*, included an order requiring the Secretary of State to forthwith make all necessary and immediate arrangements for the transfer of MHA from France to the UK, using best endeavours and not later than 22 May 2017; and to begin forthwith a fresh decision making process to be completed by the same deadline.

The Secretary of State's grounds of appeal

50. As I have mentioned, permission to appeal to this Court was granted in all four cases by the UT on 8 October 2017.

51. The original application for permission to appeal was dated 22 May 2017 and set out a number of proposed grounds of appeal.

52. Subsequently, in a document dated 25 September 2017, the Secretary of State asked for permission to appeal generally. It was noted that, in *Citizens UK*, the High Court had taken a different view to the Upper Tribunal on important aspects of the case and that Soole J had granted permission to Citizens UK to appeal generally. Judgment was handed down in *Citizens UK* on 18 September 2017, when permission to appeal was also granted.

53. That said, the Secretary of State said that the following particular grounds of appeal would be advanced (as set out in para. 4 of the grounds of appeal dated 25 September 2017):

    (i) As to the facts, the Tribunal should have found on the evidence before it, as the High Court did on the same evidence, that the expedited process:

(a) was an *ad hoc* process, the fairness of which fell to be considered under the real constraints of a fast-moving humanitarian crisis in another state, and under exceptional operational constraints;

(b) involved a conscientious assessment of the individual applications against clear criteria;

(c) was against a background of a reluctance to make asylum applications in France;

(d) was a process in which Home Office officials asked the appropriate questions and took reasonable steps to acquaint themselves with the relevant information to enable them to make correct decisions;

(e) operated without prejudice to Dublin III transfers.

(ii) Transfers made under the expedited process should not be considered as transfers pursuant to the Dublin III Regulation. The expedited process operated outside and without prejudice to it. As a result, the procedural requirements of the Dublin III Regulation did not apply.

(iii) Article 17 of the Dublin III Regulation had no application to the process that was being operated in Calais.

(iv) In the circumstances of the situation in France at the time, and in light of the fact that the situation operated outside and in addition to the Dublin process, the process satisfied the standards of common law fairness.

(v) Article 8 of the ECHR, viewed through the prism of the Court of Appeal's decision in *ZT (Syria)*, did not require either a different approach to the decision-making, or for the children's admission to the UK outside the framework of the expedited process and the Dublin III Regulation.

(vi) The decision in this case was a decision taken under the expedited process. The fact that the Applicant was not admitted thereafter should not be characterised as an ongoing failure, nor was the Applicant entitled to a further reconsideration of a decision that they did not meet the criteria.

(vii) The remedy that was granted, of requiring the admission of the then Applicants to the UK, was not an appropriate remedy in the circumstances.

54. In its order granting permission to appeal the UT said that it was granting permission "in the terms of paragraph 4 of the revised grounds dated 25 September 2017" and that it was doing so in all four cases: see para. 8 of its order dated 8 October 2017.

The Secretary of State's submissions to this Court

55. The Secretary of State's principal submission in this appeal is that the High Court's analysis in *Citizens UK* was correct and is to be preferred to that of the Upper Tribunal in the *AM* set of cases: see para. 4 of the skeleton argument.

56. The skeleton argument on behalf of the Secretary of State then developed the seven grounds of appeal. They are as follows.

57. Ground 1 is that there was a misdirection as to the facts. It is submitted that the UT failed properly to understand and characterise the nature and purpose of the expedited process. The UT failed to do so despite having before it the same evidence that was before the High Court in *Citizens UK*. This failure by the UT is said to have led

directly to further errors in its assessment of key features of the process, including the fairness of the exercise:

(1) The UT should have found on the clear evidence before it, as the High Court did on the same evidence, that the expedited process:

> "was an *ad hoc* process, the fairness of which fell to be considered under the real constraints of a fast-moving humanitarian crisis in another state" (as found in *Citizens UK*, at para. 270 in the judgment of Soole J).

(2) The UT should have found on the evidence that the expedited process "involved a conscientious assessment of the individual applications against clear criteria" (*Citizens UK*, at para. 273).

(3) The UT should have found and taken into account that the expedited process was against "the critical and continuing background [of] the unwillingness of people in the camp to make applications [for asylum]" (*Citizens UK*, para. 250).

(4) The UT should have found that the expedited process was "a process in which Home Office officials asked the right questions … and took reasonable steps to acquaint themselves with the relevant information to enable them to answer them correctly" (*Citizens UK*, para. 274).

(5) The UT did not take into account (or make any finding concerning) the fact that the expedited process operated without prejudice to Dublin III transfers (as found in *Citizens UK*, at para. 282).

58. Ground 2 is that transfers under the expedited process were not transfers under Dublin III.

59. It is submitted on behalf of the Secretary of State that transfers under the expedited process should not have been considered to be transfers pursuant to the Dublin III Regulation. The expedited process operated outside and without prejudice to it. As a result, the procedural requirements of Dublin III did not apply.

60. In that context, the Secretary of State submitted that the decision of this Court in *ZT (Syria)* demonstrates that, outside the Dublin III process, the Secretary of State's obligations are limited to the exceptional circumstances in which Article 8 of the ECHR applies independently of it.

61. It was also submitted that an application for international protection is an essential prerequisite to the application of the Dublin III regime.

62. It was also submitted that it is essential under the Dublin III process for there to be a Take Charge Request by the relevant state (here France) to the UK.

63. Ground 3 is that Article 17 of Dublin III had no application to the process that was being operated. The UT recognised (correctly) that the expedited process did not apply Article 17 but, as noted by Soole J in *Citizens UK*, at para. 265, this was deliberate. Because the expedited process was limited to an assessment against the criteria in Article 8 of Dublin III, "Article 17 was simply not in play."

64. Ground 4 concerns common law fairness. It was submitted on behalf of the Secretary of State that the UT found that the procedure breached common law standards of fairness but that it was wrong to do so. This was essentially for the reasons given by Soole J in *Citizens UK*.

65. To the extent necessary the Secretary of State also relies on the analysis and conclusions of the Divisional Court in *R (Help Refugees) v Secretary of State for the Home Department* [2017] EWHC 2727 (Admin); [2017] 4 WLR 203. In that case the Court had before it the same witness evidence as in this case: the statements from Mr Cook, Ms Farman and Mr Gallagher. The Court was considering, amongst other issues, the fairness of the process that was followed during Operation Purnia, in respect of the children being considered for transfer under section 67 of the Immigration Act 2016 (commonly known as the "Dubs Amendment"). The Divisional Court addressed those issues at para. 148-169 of its judgment (Treacy LJ). The Secretary of State relies on that passage and in particular on the conclusion that a short and simple process was appropriate in the circumstances. Speaking for myself I do not consider that reference to that decision is of material assistance in the present appeal because: (i) that was a Divisional Court decision; (ii) it is under appeal to this Court (the hearing taking place in late July 2018); and (iii) the issues were not the same.

66. Ground 5 relates to Article 8 of the ECHR. It is submitted on behalf of the Secretary of State that Article 8 did not require either a different approach to the expedited process or for the admission of these four children to the UK outside the framework of the expedited process and the Dublin III Regulation. The Secretary of State relies in this context on the decision of this Court in *ZT (Syria)*. The Secretary of State also emphasises that the UT did not appear to give any recognition to the importance of the fact that the children concerned were under the jurisdiction of the French care system. The UT appears to have given no consideration to the fact that France bore primary responsibility for processing their claims in the context of the application of Dublin III; that France itself was bound to ensure that no breach of Article 8 of the ECHR occurred; and that the children's representatives had not made recourse to the French authorities or courts.

67. Ground 6 concerns the right to reconsideration. It was submitted on behalf of the Secretary of State that, even if there had been a breach of the procedural duty of fairness, the UT incorrectly characterised the relevant decision by the Secretary of State as being a "ongoing failure" to admit the children to the UK.

68. Ground 7 concerned remedies. As I have mentioned, one of the remedies that was granted by the UT in each of these four cases was to require the Secretary of State to admit the child concerned to the UK. It is submitted on behalf of the Secretary of State that that was not, on any view, an appropriate remedy in the circumstances. Having decided that the Secretary of State had not made a lawful decision, the Tribunal did not take the normal course in judicial review claims, of quashing the decision or making a declaration, with the effect of requiring a further decision to be made by the Secretary of State.

69. It is submitted, first, that this conclusion simply did not follow from the procedural breach which had been identified by the UT. Secondly it is submitted that in effect the UT "directly assumed control over the UK's borders." Thirdly, it is submitted that

the UT paid no regard to the fact that AM was in the care of the French authorities, and that primarily his best interests should have been assessed and upheld by his legal Guardian, and not by the UT.

70. In conclusion, this Court is invited to allow the appeal and set aside the UT's order. However, given that the Secretary of State will not in any event be seeking to return the Respondent children to France as a result of his appeal, it is not suggested that the case should be remitted to the Upper Tribunal.

The submissions on behalf of the Respondent children

71. In a composite skeleton argument filed on behalf of the four Respondents, the following submissions were made before this Court.

72. In response to ground 1, it is submitted that the UT made findings on the facts of each individual case. It is submitted that the Secretary of State fails to engage with the UT's reasoning based on the evidence of the individual claims before it.

73. In response to ground 2, the Respondents refer to and adopt the arguments of Citizens UK in its appeal on this issue. They submit that the UT was correct to hold that Dublin III did apply to the expedited process and that it had been breached.

74. In response to ground 3, again the Respondents submit that, since Dublin III did apply to the expedited process, Article 17 applied within that context.

75. In response to ground 4, the Respondents again make the observation that the Secretary of State has failed to address the specific findings made by the UT as to why there was procedural unfairness in the four individual cases.

76. As for the Secretary of State's generic submissions on this issue, the Respondents make in substance the same points as have been made by Citizens UK in its appeal against the decision of Soole J.

77. In response to ground 5, the Respondents submit in short that, having chosen to "bypass" the Dublin III procedural requirements, the Secretary of State's suggestion that the Respondents could only challenge those decisions by following the Dublin III process which had been eschewed, seeks to deny the Respondents their constitutional right of access to a court.

78. In response to ground 6, it is submitted that the Secretary of State's submissions are based on the same flawed basis as under ground 5.

79. In response to ground 7, on remedies, it is submitted on behalf of the Respondents that the approach taken by the UT was not wrong in principle; and that it is consistent with the Secretary of State's own approach in the expedited process, under which some children were transferred and placed in local authority care pending completion of checks that they should be reunited with their families. It is also submitted that the UT did not remove the children from any legal guardian in the French authorities. It simply required the Secretary of State to make all necessary and immediate arrangements for the transfer of children, as would have been so in the case of those

children whom the Secretary of State accepted under the expedited process could and should be transferred before any formal procedure had been used under Dublin III.

The duty of candour and co-operation

80. It is common ground that the duty of candour and co-operation, which applies in judicial review proceedings, also applies to such proceedings when they are brought in the Upper Tribunal and not in the High Court. Further, as I have indicated earlier, the Upper Tribunal in *AM* was concerned about such matters: see paras. 91-92 of its judgment in *AM*.

81. For the reasons which are set out in my judgment in *Citizens UK*, at paras. 164-172, I have reached the conclusion that there was a breach of that duty by the Secretary of State in the present proceedings also.

My assessment of the Secretary of State's grounds of appeal

82. I will address each of the Secretary of State's seven grounds of appeal in order.

83. The first ground of appeal has, in my view, been superseded by subsequent developments in the evidence in these proceedings as in *Citizens UK*. This is because this Court has a great deal more evidence than the High Court or Upper Tribunal had before them. This is, as I have already said, the result of what I regard as a breach by the Secretary of State of the duty of candour and co-operation.

84. I can address grounds 2 and 3 together, since they both concern the correct interpretation of Dublin III. I accept the submission made by Sir James Eadie QC on behalf of the Secretary of State that Article 17 (the subject of ground 3 of the appeal) had no application to the expedited process. Article 17 is a discretionary provision in Dublin III. For reasons that were explained in more detail by this Court in the case of *R (RSM) v Secretary of State for the Home Department* [2018] EWCA Civ 18, at paras. 109-126 (Arden LJ), it simply did not arise in circumstances such as the present. This is not least because there was no "application for international protection" made under Dublin III. I agree with Sir James that the expedited process was, on its correct analysis, limited to an assessment against the criteria for mandatory transfer which are to be found in Article 8 of Dublin III.

85. So far as ground 2 is concerned, again I accept the submission made by Sir James on behalf of the Secretary of State that the expedited process operated outside and without prejudice to Dublin III. As a result the procedural requirements of Dublin III simply did not apply to the expedited process. For the reasons which I have set out more fully in *Citizens UK*, at paras. 46-51, Soole J was correct in his conclusion on EU law. For the same reasons, the Upper Tribunal was, in my judgement, wrong as a matter of law on this issue.

86. Ground 4 concerns common law fairness. In *Citizens UK* I have set out in detail my reasons for concluding that Soole J was wrong on this issue, at paras. 85-102. For the same reasons I have come to the conclusion that the expedited process was unfair at

common law in the present cases. Moreover, I would note that the Secretary of State's submissions were framed at a generic level. She has not advanced submissions against the finding that there was unfairness on the individual facts of each of these four cases. I would therefore reject the Secretary of State's appeal on ground 4.

87. Ground 5 relates to Article 8 of the ECHR. I would accept the submissions made by Sir James on behalf of the Secretary of State on this issue. This is essentially for two reasons.

88. First, the Upper Tribunal reached a view which, in my judgement, is inconsistent with the decision of this Court in *ZT (Syria)*. It seems to have regarded Article 8 and its procedural requirements as essentially inter-changeable with the procedural requirements of Dublin III and/or the common law. However, as this Court made clear in *ZT (Syria)*, Article 8 will only have a role to play in very exceptional circumstances. In particular it must be shown that the French legal system had systemic deficiencies in it, which rendered it incapable of providing an effective remedy to the Respondent children: see *ZT (Syria)*, at para. 95 (Beatson LJ); and also the judgments of this Court in *RSM*, at paras. 132-144 (Arden LJ) and 173-175 (Singh LJ).

89. Secondly, I agree with the Secretary of State that the Upper Tribunal gave insufficient recognition to the importance of the fact that the children concerned were under the jurisdiction of the French care system.

90. I will address grounds 6 and 7 of the Secretary of State's appeal together. This is because it seems to me that ground 6 has been rendered academic in the light of subsequent developments on the facts of these four cases, in particular that the children concerned were all admitted to the United Kingdom pursuant to the directions made by the Upper Tribunal. However, in my view, there was a fundamental error in the approach which the Upper Tribunal took on the question of remedies which does need to be corrected on this appeal. That is specifically the subject of ground 7 of the Secretary of State's appeal. I accept the submission made in this regard by Sir James on behalf of the Secretary of State.

91. The error into which the Upper Tribunal fell is similar to the error which it made in the case of *RSM*: see paras. 161-165 (Arden LJ) and paras. 171 and 176 (Singh LJ). Even if there was a breach of the duty to act fairly (as I would conclude there was at common law), the normal principle in public law is that what follows is the need for a reconsideration by the decision-maker to whom the relevant functions have been entrusted by Parliament. The appropriate remedy would have been confined to a quashing order or a declaration.

92. It does not follow from a finding that there has been a breach of the requirements of procedural fairness that a court or tribunal has the power to make a mandatory order requiring a public authority to exercise its powers in a particular way. This is fundamental to the separation of powers as between the courts and tribunals, on the one hand, and the executive, on the other. Each must respect the other's proper functions.

Conclusion

93. For the reasons I have given, I would accept the submissions made on behalf of the Secretary of State that:

(1) there was no breach of EU law in these cases and the Upper Tribunal was wrong to hold that there was; and

(2) Article 8 of the ECHR had no applicability in these cases.

94. I would also accept the submissions made on behalf of the Secretary of State that the Upper Tribunal was wrong in law to grant the mandatory order which it did on the basis of the decision it made that there had been procedural unfairness in these cases.

95. Nevertheless, since the Secretary of State has not appealed on the individual facts of these four cases, and since, on the generic issue, I have reached the conclusion that the expedited process was unfair at common law, for the reasons given more fully in *Citizens UK*, I would reject the Secretary of State's ground 4, which relates to the common law duty of fairness.

96. That said, appeals lie against orders rather than the reasons for making those orders. In the present cases, the mandatory orders that were made by the Upper Tribunal were, in my view, wrongly made, for the reasons I have explained more fully earlier. In summary, this is because the consequence of a finding that there had been a breach of the requirements of procedural fairness ought to have been (at most) that the Secretary of State had to reconsider the decisions after a fair procedure; or perhaps more realistically a declaration that there had been a breach of the duty to act fairly. What was wrong in law was that the Upper Tribunal made mandatory orders requiring the Secretary of State to admit the Respondents into the UK. Although, on the facts of these particular cases, the Secretary of State's appeals have become academic in the sense that the Respondents were admitted into the UK and there is no suggestion that they could or would be returned to France, it is important, in my view, that this Court should mark the fact that the orders made in these cases were wrongly made as a matter of law.

97. For those reasons I would allow the Secretary of State's appeals against the mandatory orders that were made by the Upper Tribunal in each of these four cases.

Costs

98. The parties have been unable to agree the appropriate costs order after seeing copies of the judgments in this case and in *Citizens UK* in draft. The Secretary of State submits that there should be no order as to costs in both cases. Citizens UK and the individual Respondents in *AM* submit that they should have their costs in full and that they should be assessed on an indemnity basis if not agreed.

99. I do not accept the submissions made on behalf of either side in their entirety. In my view, the overall justice of the two cases can be reflected in an order that the Secretary of State should have to pay 50% of the other side's costs, to be assessed on the standard basis if not agreed, in each case. I have had regard to all of the

circumstances but would mention the following salient features of these cases. First, the issues overlapped to a significant extent in the two cases, even though the appeals in *AM* were brought by the Secretary of State. Secondly, the applicants in each case have achieved a substantial victory in that this Court has held that the expedited process was unfair and therefore unlawful at common law. Thirdly, the Secretary of State did not appeal on the facts of the individual cases in *AM*. Fourthly, this Court has found that there was a serious breach of the duty of candour and co-operation. However, account also needs to be taken of the fact that the Secretary of State has succeeded on several of the issues and indeed her appeal was allowed in the *AM* set of cases because the mandatory orders made by the Upper Tribunal should not have been made. Finally, I do not consider that the conduct of the Secretary of State was such as to justify a costs order to be made on an indemnity basis.

Lady Justice Asplin:

100. I agree.

Lord Justice Hickinbottom:

101. I also agree.