Neutral Citation Number: [2018] EWCA Civ 2098

Case No: C4/2017/3221

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (DIVISIONAL COURT)
LORD JUSTICE TREACY AND MR JUSTICE OUSELEY
[2017] EWHC 2727 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/10/18

Before :

LORD JUSTICE McCOMBE

LADY JUSTICE KING
and
LORD JUSTICE HICKINBOTTOM

- -

Between :

THE QUEEN ON THE APPLICATION OF HELP REFUGEES LIMITED

Appellant

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- and -

THE AIRE CENTRE

Intervener

- -
- -

Nathalie Lieven QC, Laura Dubinsky and **Eesvan Krishnan** (instructed by **Leigh Day**) for the **Appellant**
Ben Jaffey QC, David Manknell and **Amelia Walker** (instructed by **Government Legal Department**) for the **Respondent**
Caoilfhionn Gallagher QC, Katie O'Byrne and **Jennifer Robinson** (instructed by **Freshfields Bruckhaus Deringer**) for the **Intervener**

Hearing dates: 25-26 July 2018

Further written submissions: 7-13 August 2018

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Approved Judgment

Lord Justice Hickinbottom :

Introduction

1. This claim concerns the United Kingdom's response to the humanitarian crisis in Europe brought about by the mass migration of unaccompanied asylum-seeking children ("UAS children") from the Middle East and North Africa, particularly as a result of the conflicts in Syria and Sudan.

2. It is not the first such claim. In R (Citizens UK) v Secretary of State for the Home Department [2018] EWCA Civ 1812 ("Citizens UK") and R (AM and Others) v Secretary of State for the Home Department [2018] EWCA Civ 1815, this court differently constituted (Hickinbottom, Singh and Asplin LJJ) considered the lawfulness of a process established by the Secretary of State in conjunction with the French authorities in October 2016 to assess UAS children living in the migrant camp known as the "Jungle de Calais" against criteria derived from Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 ("Dublin III"), with a view to those who satisfied the criteria being immediately transferred to the UK for their asylum claim to be made and determined here. Dublin III is the legislative measure introduced to fulfil the obligation in Article 78(2)(e) of the Treaty on the Functioning of the European Union, allocating responsibility amongst Member States for examining asylum applications.

3. This claim concerns a different scheme. Under section 67 of the Immigration Act 2016 ("the 2016 Act"), the Secretary of State was required, as soon as possible after the passing of the Act, to make arrangements to relocate to the UK and support a "specified number" of UAS children from other countries in Europe, that number to be determined by him in consultation with local authorities. The number eventually specified was 480. References in this judgment to "section 67" are to section 67 of the 2016 Act.

4. The Claimant is a charity concerned with meeting the humanitarian needs of refugees and other displaced people. Supported by the Intervener ("the AIRE Centre", "AIRE" being an acronym for "Advice on Individual Rights in Europe"), a charity with particular interest in the rights of unaccompanied children, the Claimant challenged the lawfulness of the process of statutory consultation engaged upon by the Secretary of State with local authorities prior to specifying the number for the purposes of section 67, and also the adequacy of the reasons given by the Secretary of State to children who were assessed for relocation to the UK under section 67 but found not to comply with the relevant criteria. For the sake of completeness, I should say that the Claimant brought other legal challenges, but they are no longer extant; and I need say nothing further about them.

5. A Divisional Court comprising Treacy LJ and Ouseley J refused the challenge on all grounds ([2017] EWHC 2727 (Admin)). The Claimant, again supported by the AIRE Centre, appeals on the basis that the Divisional Court erred in law in concluding that the consultation and reasons were legally adequate.

6. Before us, Nathalie Lieven QC, Laura Dubinsky and Eesvan Krishnan appeared for the Claimant; Caoilfhionn Gallagher QC, Katie O'Byrne and Jennifer Robinson for the AIRE Centre; and Ben Jaffey QC, David Manknell and Amelia Walker for the

Secretary of State. The quality of the written and oral submissions was uniformly high, and I thank all counsel and those instructing them for their contribution.

UAS Children: Routes into the UK

7. "Unaccompanied asylum seeking child" is defined in paragraph 352ZD of the Immigration Rules as a person who, when he or she submits an asylum application, is under 18 years of age, is applying for asylum in his or her own right, is separated from both parents, and is not being cared for by an adult who in law or by custom has responsibility to do so. The Secretary of State allows about 30% of applications for asylum by UAS children. However, (i) the percentage is much higher (about 75%) in respect of children from Syria and Sudan, (ii) some of those whose applications are refused are ultimately successful on appeal, and (iii) under paragraph 352ZC of the Immigration Rules, an unsuccessful UAS child applicant will in any event be given temporary leave for 30 months or until he is 17½ years old, whichever is the shorter period, on the basis that he cannot be returned until he reaches adulthood.

8. Although the welfare and support of children is a devolved function in Scotland and Wales, immigration is reserved. Therefore, the UK Government is responsible for UK entry criteria for UAS children; but the welfare and support of such children in Scotland and Wales are matters for their own national governments acting through their own local authorities. The welfare and support of UAS children in England is of course still a matter for the UK Government.

9. Section 67 is just one route by which UAS children might lawfully come into the UK. There are several other schemes under which they might lawfully come.

   i) Under article 8(1) of Dublin III, where an applicant for asylum in a Member State is a UAS child, the Member State responsible for determining the application is "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…"; and article 8(2) requires the child to be united with that relative under transfer provisions set out in Chapter VI of the Regulation. Consequently, if a UAS child in (e.g.) France applies for asylum there, but has a close relative in the UK, then Dublin III requires the Secretary of State to accept the physical transfer of the child here on a request from the French Government and to be responsible for the child's asylum application. In addition, article 17 of Dublin III provides for other circumstances in which the Secretary of State may, but is not obliged, to accept a transfer. Once transferred, most Dublin III children will not still be unaccompanied – they will live with their identified close relative – but some transfers break down, resulting in the state becoming responsible for the support of the child.

   ii) The Vulnerable Persons Resettlement Scheme ("the VPRS") is a programme under which the UK is committed by 2020 to resettle up to 20,000 migrants fleeing the Syrian conflict who are currently in refugee camps in countries surrounding Syria.

   iii) The Vulnerable Children Resettlement Scheme is a programme under which the UK, working with the United Nations High Commissioner for Refugees ("the UNCHR"), has agreed, in addition to the VPRS commitment, to resettle 3,000

migrants from the Middle East and North Africa region (hence it is referred to as "the MENA Scheme").

iv) The Secretary of State accepts migrants who have been granted refugee status by the UNCHR ("mandate refugees"), or who have been referred to him by the UNCHR under a scheme called the Gateway Protection Programme. The former has no limit on numbers. The latter allows for the resettlement of up to 750 migrants per year.

Article 8 of Dublin III is concerned with only UAS children. In each case (ii) to (iv), the scheme is not solely aimed at – but those in fact relocated here may include – UAS children.

10. In addition to UAS children who arrive in the UK legally, many arrive spontaneously. Some arrive at airports; but most arrive by sea. From 2015, there was a significant sudden increase in the number of UAS children arriving in Kent from Northern France. Because the Children Act 1989 (and the equivalents of the devolved administrations) imposes upon a local authority a duty to safeguard and support any child in its area who is in need and who has no person with parental responsibility for them, that placed an enormous burden on Kent County Council. By the end of 2015, it had 1,000 UAS children in its care – 40% of all the children whom it was required to look after.

11. Kent County Council sought assistance from other local authorities under section 27 of the Children Act 1989, under which an authority must comply with a request for assistance from another authority if it is compatible with its own duties and obligations and does not unduly prejudice the discharge of any of its own functions; and a voluntary protocol was put in place to support the transfer of children from Kent to other local authority areas which included additional funding from central government. Over about a year in 2015-16, 100 children were transferred by these means; but this was insufficient to address the problem of increasing numbers of UAS children in Kent, and it was considered that a more formal national scheme was required to ensure an equitable distribution of UAS children between local authority areas.

12. In 2016, the National Transfer Scheme ("the NTS") was established to ensure more equitable distribution of UAS children. Ministers wished the new scheme to be voluntary, but, as entirely voluntary arrangements had not been successful in the past, they wanted to underpin the scheme with statutory powers that could be used to ensure a more equitable distribution of UAS children if necessary. Therefore, from 31 May 2016, under the heading "Support etc for certain categories of migrant", and subheading "Transfer of responsibility for relevant children", section 69 of the 2016 Act has enabled a local authority in England to make arrangements with another such authority in respect of a "relevant child" defined in section 69(9) as, in effect, a UAS child. That provision is on its face voluntary in nature; although, under section 71, where an authority makes a request of another authority to enter into an arrangement in respect of a child and the requested authority does not comply with the request, the Secretary of State may direct it to give reasons for its refusal. However, more potently, under section 72, the Secretary of State has powers effectively to require transfers to be made and accepted. He may prepare a scheme whereby relevant functions can be transferred from one authority to another; and, by section 72(3), he "may direct the transferring authority and each receiving authority under a scheme under this section to comply with the scheme". The NTS was introduced from 1 July 2016.

13. Four further aspects of the scheme are worthy of note at this stage.

    i) The introduction of the scheme was accompanied by an age-dependent increase in the daily rates of Home Office funding to local authorities for UAS children of 20-33%.

    ii) The NTS applied to individual local authorities, but it was to be administered in part on a regional basis, England being split into nine regions, with Scotland and Wales each also being treated as a "region" for these purposes. Each region has a Strategic Migration Partnership ("SMP"), a network of relevant statutory agencies and local organisations, funded by the Home Office, designed to coordinate work on migration and refugee issues.

    iii) To give some structure to the consideration of whether any particular authority was bearing an excessive burden in respect of UAS children, after consulting with (amongst others) local authorities, the Secretary of State determined that, if, within a local authority area or region, UAS children exceeded 0.07% of the total child population, then generally that authority or region should not be expected to receive any more UAS children and the transfer mechanism should kick in. This is often referred to as "the 0.07% threshold". To put that into context, in the second half of 2016, it was estimated that there were over 700 children who would require to be transferred to other authorities on that basis.

    iv) As originally enacted, sections 69-72 applied only to local authorities in England. However, section 73 gave the Secretary of State the power to make regulations for enabling those sections to apply to Wales, Scotland and Northern Ireland, for example by way of amendment to "any enactment" including the 2016 Act itself. From the documents we have seen, it seems that the original intention was to extend the provisions to those other countries by mid-2017; but, in the event, they were extended to all three countries only from 7 February 2018, by regulation 3(2) of the Transfer of Responsibility for Relevant Children (Extension to Wales, Scotland and Northern Ireland) Regulations 2018 (SI 2018 No 153).

Section 67 of the Immigration Act 2016

14. The Bill that was eventually to be the 2016 Act completed its House of Commons' stages on 1 December 2015.

15. However, at that time, the humanitarian crisis in Europe was worsening. The increase in the number of migrants (including UAS children) in Northern France accelerated, reflected in an increase in the number of migrants making or attempting to make unauthorised access to the UK through ports in Kent. In March 2016, part of the Calais camp was cleared. There were concerns that the French authorities would take further steps to disperse all those who lived in the camp. Amongst some, there was a deepening conviction that the UK ought to do more to help.

16. During the passage of the Bill through the House of Lords, Lord Dubs tabled an amendment to include a new section requiring the Secretary of State, as soon as possible and in addition to the VPRS commitment already made, to make arrangements to relocate to the UK 3,000 UAS children who were in other European countries. The

amendment was approved by the House of Lords in Committee; but, on 25 April 2016, it was rejected by the House of Commons.

17. However, the following day, Lord Dubs tabled a revised amendment in the following form:

> "(1) The Secretary of State must, as soon as possible after the passing of this Act, make arrangements to relocate to the United Kingdom and support a specified number of unaccompanied refugee children from other countries in Europe.
>
> (2) The number of children to be resettled under subsection (1) shall be determined by the Government in consultation with local authorities.
>
> (3) The relocation of children under subsection (1) shall be in addition to the resettlement of children under the [VPRS]".

18. On 4 May 2016, that amendment was effectively adopted by the Government, subject to the understanding that steps would be taken to avoid "the pull factor", i.e. the incentivisation of children to make the arduous and dangerous journey from the Middle East or North Africa to, and then across, Europe with the aspiration of being admitted to the UK. Under the heading "Unaccompanied refugee children: relocation and support", the amendment thus became section 67 of the 2016 Act which received Royal Assent on 12 May 2016, section 67 coming into effect on 31 May 2016.

19. It is clear from the wording of the section that it was Parliament's intention to assist UAS children in Europe by resettling some of them in the UK, over and above the UK's then-current obligations, whilst acknowledging the restriction on the degree of such assistance as a result of commitments to (amongst others) other UAS children, and the finite resources available to local authorities which would be responsible for looking after them. Hence the requirement, in section 67(2), that the Government should determine the number of children to be resettled under section 67 "in consultation with local authorities". It is inherent in the provision that it is generally in the best interests of the targeted group of children (UAS children in parts of Europe) that they be transferred to the UK; but that those interests have to be balanced against the interests of other children for whom local authorities are responsible, and the public interest in ensuring that there is reasonable resource capacity in the system to accommodate the UAS children transferred. Section 67 thus requires that the specified number for the purposes of transfer under that provision should represent the highest number of UAS children in Europe that could reasonably be accommodated in the UK given the other commitments of local and national government (including commitments to other children).

20. In addition to those resettled under the VPRS (who are specifically excluded by section 67(3), by a consent order including an appropriate declaration in the proceedings below the Secretary of State formally accepted that the "specified number" of children to be relocated under section 67 is exclusive of children who are transferred under Dublin III. The Secretary of State also accepts that it excludes children who are resettled here under the MENA Scheme.

The Implementation of Section 67

21. The facts concerning the implementation of section 67 are found in the evidence of Alison Samedi, the Head of Domestic Asylum Policy at the Home Office at the relevant time (First Witness Statement dated 24 November 2016, Second Witness Statement dated 14 April 2017, and Third Witness Statement dated 2 May 2017); and of Gary Cook, the Head of EU and International Asylum Policy at the Home Office (First Witness Statement dated 24 November 2016, Second Witness Statement dated 13 April 2017, and Third Witness Statement dated 11 July 2018). They are also set out at length in the Divisional Court judgment. I shall focus on the facts that are relevant to the grounds of appeal before us.

22. On 13 May 2016, the day after the 2016 Act received the Royal Assent, the Immigration Minister wrote to each UK local council leader, chief executive and finance director, and each SMP lead. In the letter he set out details of the NTS as enacted in section 69-72 of the 2016 Act, including the following: (i) his "strong preference" that the scheme should remain voluntary, (ii) the scheme should be based on a regional model, and (iii) no region should be expected to exceed 0.07% of UAS children as a proportion of the total child population in its area.

23. The letter also dealt with "Resettlement schemes", including an update on the MENA Scheme. In relation to section 67, he said this:

> "Last week the Prime Minister announced that we would accept Lord Dubs' amendment to the Immigration Bill and will resettle unaccompanied children from within Europe – specifically from Greece, Italy and France – who were registered there before 20 March, and where it is in their best interests to do so. Before specifying the number of children we will seek to resettle from within Europe, we will consult with local authorities, taking account of the wider picture of support for [UAS] children, asylum seekers, refugees and resettled persons in each area. I will write separately with more details shortly."

Therefore, from the outset it was clear that, in implementing section 67, the Government intended to (i) focus on UAS children in France, Greece and Italy, and (ii) have a cut-off date for registration of entry into Europe to minimise the "pull factor".

24. The same day, the Minister wrote to the Convention of Scottish Local Authorities ("COSLA"), i.e. the national association of Scottish councils, in essentially the same terms. In that letter, in respect of the NTS, he added:

> "… In their current form, the measure will apply to England only. We are keen to ensure there is more equitable distribution of UAS [children] across the whole of UK and so we are minded to extend these provisions to the rest of the UK by way of affirmative regulations once there has been further dialogue with the Devolved Administrations and local government organisations about each country's particular circumstances.

> However, I have always made clear that my strong preference is that the [NTS] should remain voluntary and that the Immigration Bill provisions should be used to facilitate voluntary transfer. I am extremely grateful for the constructive way in which COSLA has engaged with my officials and I am keen for that dialogue to continue.
>
> …
>
> I understand that work is underway in Scotland to look at what might be required to support UAS [children]. My officials have also been in touch with leads from [SMPs] about UAS [children] transfer and they are keen to support discussions with local authorities. They will be in touch shortly to arrange a regional information session to discuss details."

25. The response of COSLA, which was coordinating matters so far as the Scottish local authorities were concerned, was, to adopt Mr Jaffey's phrase, less than encouraging. On 18 May 2016, its Policy Manager sent the Home Office an email saying that COSLA did not think it was necessary to have a meeting with the Scottish local authorities on the transfer of UAS children from other authorities because of a number of barriers to taking this forward in Scotland "not least of the lack of capacity within the care system". That reflected earlier correspondence: for example, on 16 February 2016, in response to a request to discuss the plans for a national dispersal system for UAS children, COSLA sent the Home Office an email saying that "unfortunately there is not spare capacity sitting ready to accommodate young people who may need to be resettled from elsewhere in the UK". This was a consistent message from Scotland. As at 14 October 2016, COSLA "had been clear that Scotland had no spare capacity in the care system" (see paragraph 46 below). The same general concern about capacity was still being made in relation to the UK dispersal of UAS children on 7 April 2017, when COSLA wrote to Ms Samedi saying:

> "Capacity – there is a lack of capacity in the Scottish care system, any additional capacity, if it can be created at all, will take time to build."

26. On 7 June 2016, there was a national event designed to "kick start the consultation process" (see paragraph 20 of Ms Samedi's First Statement). The briefing note for that meeting indicated that:

    i) it was the intention to place all UAS children brought to the UK under any of the schemes through the NTS, which the Government was committed to have in place by 1 July 2016; and it was hoped that all local authorities would join the scheme;

    ii) if a UAS child arrived in a local authority area with below 0.07% UAS children as a proportion of the total child population, the expectation was that that child would be cared for by that authority; if the percentage was higher than 0.07%, then the expectation would be that the child would be transferred to an area with a lower percentage; and

iii) following regional meetings over the following two weeks, each local authority and region would be asked to:

> "○ Confirm that they will be part of the national transfer scheme;
>
> ○ Consider what arrangements will work best for regional coordination in your region;
>
> ○ Consider how many unaccompanied refugee children in Europe could be cared for in your area (in the context of likely UAS [children] demands)".

27. Over the following weeks, regional events were held to which local authority leaders and other representatives were invited. Some regions had more than one event. Details of these meetings are set out in paragraphs 68 and following of Ms Samedi's Second Statement. The meeting for Scotland was held in Edinburgh on 18 July 2016.

28. It was intended to implement sections 69-72 of the 2016 Act (i.e. the NTS provisions) by a National Transfer Protocol. Various drafts of the protocol were circulated to COSLA. We do not have all of those drafts, but we do have version 8 which was the interim protocol operational from 1 July 2016. That indicated that it provided:

> "… guidance on the operation of the [NTS] and the way in which local authorities in England can transfer UAS [children] into the care of another local authority under section 69 of Part 5 of the [2016 Act], and local authorities in Scotland, Wales and Northern Ireland can enter into similar voluntary arrangements."

29. In respect of "The reception and transfer processes", the guidance said:

> "Where an unaccompanied child first presents in a local authority which is over the ceiling of 0.07% UAS [children] to child population, the local authority is expected to arrange for the transfer of the child through the [NTS], unless there are clear reasons why it would not be appropriate to transfer the child. Key transfer rules:
>
> a) If the region in which the child first presents is under the ceiling of 0.07% then the child would be expected to be transferred to a local authority **within** that region.
>
> b) If the region is over the ceiling of 0.07% then the child would be expected to be transferred **out of** the region using the transfer protocol.
>
> c) Due to the preponderance of unaccompanied children arriving in Kent, the county of Kent will be treated as a region in itself until further notice. This will allow transfers from Kent to be effected to all other areas where capacity is available, including other parts of the South East. This will be reviewed in advance of 1 April 2017.

> The percentage of 0.07% is not a target but will be used to indicate when a local authority has reached the point where they would not be expected to receive any more unaccompanied children...".

There is nothing to suggest that the drafts upon which COSLA commented were materially different in form or content.

30. The most comprehensive COSLA response to the draft protocol is found in its email to the Home Office of 15 June 2016 (after the national event in Scotland to which I have referred), which commented on draft version 5, as follows:

> "1. The protocol needs further work before it can function at a UK-wide level. There are assumptions throughout that the Scottish legislation/procedures mirror English ones, but unfortunately it's not as straightforward as that. Specific provisions within Scottish legislation need to be identified and stated…. Thought also needs to be given to transfers across the border and the implications of moving children from one system to the other.
>
> 2. We are concerned about the centrality of the 0.07% threshold within the protocol which seems to have become the benchmark for equity within the system without any consultation with us. We are struggling to see how this represents a proportionate share for Scotland, would appreciate further information about how this threshold was identified, and a discussion about whether or not it is the most appropriate level.
>
> 3. We would appreciate more information on how the different functions described within the protocol will be resourced and who will take on the regional and national coordination roles? There are significant risks associated with the regional coordination role and anticipate objections from COSLA politicians and senior management if our SMP is asked to take this on. Will local authorities who participate receive funding for a local coordinator or are they expected to resource one? If it is to be the latter then this undermines the voluntary nature of the proposals.
>
> 4. The responsibility for age assessment seems to have shifted from local authorities to the Home Office. Has there been consideration of the implications of this?
>
> 5. Finally and perhaps most importantly, what is described within the protocol does not feel like a voluntary scheme, and in fact seems to give less flexibility to local authorities to opt out of transfers than suggested by the powers contained within the Immigration Act. Is this to apply to all local authorities or just those who opt into the scheme?"

Those concerns were reiterated by COSLA in a further letter to the Home Office on 23 June 2016, which referred to "a potentially massive burden on any [local authority] joining the scheme" as a result of the 0.07% "cap".

31. It seems that these points were not addressed – and, certainly, not addressed to the satisfaction of COSLA – by the time of the publication of the version 8 guidance or, indeed, by September 2016. A document dated August 2016, "UASC National Transfer Scheme – Stakeholder Evaluation", which drew together observations on the regional events, said:

> "• All English regions expected to participate in the scheme – either individual authorities or whole region
>
> • Ongoing engagement with Scotland and Wales to ensure protocol reflects their concerns".

32. On 8 September 2016, the Immigration Minister wrote to all local council leaders asking for confirmation through their respective SMPs, by 21 September 2016, of three matters:

> "The first is to request those local authorities that have not already done so to register for the [NTS] which launched at the beginning of July. The Government is clear that we want to see a fair distribution of unaccompanied children between local authorities, with the NTS the mechanism to achieve this.
>
> The second is to request that you confirm the total number of unaccompanied children that could be placed in your authority for the remainder of this financial year, noting the 0.07[%] threshold under the NTS.
>
> The third is to consider taking children and their families under the [MENA Scheme]…".

33. Having dealt in more detail with the NTS and MENA Scheme, the letter continued (under the heading "Unaccompanied refugee children ('the Dubs amendment')"):

> "In addition to the [MENA Scheme], the Government committed to bring over unaccompanied refugee children from within France as set out in the [2016 Act] (commonly known as 'the Dubs amendment'). We have been working closely with the three Member States – France, Greece and Italy – as announced by the former Prime Minister David Cameron, to identify suitable cases and introduce processes where necessary to transfer these children to the UK.
>
> The [2016 Act] requires us to consult local authorities before arriving at a total number for the scheme. This was also discussed during the regional events. I recognise that this commitment puts additional pressure on local authorities. This is why it is vital that we are able to agree a number that works in

> the best interest of local authorities recognising the children already in your care, [UAS] children who arrive spontaneously, and those we are bringing to the UK through our formal schemes.
>
> **Placing unaccompanied [UAS] and refugee children**
>
> We have always been clear that unaccompanied children will be treated the same irrespective of their method of entry into the UK, including those arriving clandestinely. It would be unfair to prioritise the placement of unaccompanied children based on arrival method. For this reason, all unaccompanied refugee children who are brought to the UK under a formal scheme, but are not reuniting with family members, will be placed into local authority care through the NTS. Local authorities will receive the same daily funding rates for these unaccompanied looked after children as they do for all other [UAS] children placed through the NTS.
>
> Unaccompanied children will only be brought to the UK where it is deemed to be in their best interests and the Home Office will share information we obtain on individual children with the relevant local authority ahead of transfer. It is crucial that the NTS is fully operational to transfer and properly support unaccompanied refugee children who are brought to the UK, and make a success of this new initiative."

34. After repeating the three matters upon which confirmation was sought – and that a response should be made by 21 September 2016 – the letter said:

> "If you have questions, please contact your SMPs or contact officers using the contact details in the annex."

35. COSLA responded by sending, on 12 September 2016, the following email to each of the Scottish local authority leaders and chief executives:

> "We are aware that you have received a letter from Robert Goodwin, the Immigration Minister, dated 8 September, asking for your input on three different schemes relating to [UAS] children. You will also be aware of the significant work that the MPD team, as hosts of the [SMP] for Scotland, are doing with your officers relating to these asks from the Home Office to identify an approach that is suitable for Scotland. Given the on-going work and the outstanding questions we have for the Home Office on the detail of these schemes we do not recommend that local authorities respond individually at this time. Doing so could commit your local authority to the existing transfer protocol with which we have serious concerns, and potentially a high cap of UAS [children] of 0.07% of your child population (c 730 for Scotland as a whole, but for some authorities it would be a 30-40% increase in the number of looked after and accommodated children). We have several outstanding requests

> to the Home Office to discuss and negotiate on the detail of these schemes before progressing them further in Scotland and it is disappointing that this letter does not reflect the different position in Scotland. A holding position would therefore allow us to continue negotiations with the Home Office to ensure that the schemes are suitable and workable in the Scottish context."

36. In the event, no Scottish authority responded to the Home Office request for information, except Renfrewshire County Council. It had been engaging with the Home Office since July 2016, and, as a result of that process, by the end of September 2016 it had offered to support six UAS children.

37. The 8 September 2016 letter asked for a response by 21 September. On 22 September, there was a scheduled teleconference between Ms Samedi and the SMP leads, at which she asked for outstanding responses by the end of the month. The South East England SMP later asked for further time, and its response was sent into the Home Office on 14 October 2016.

38. On 14 October 2016, the Secretary of State and the Minister of State for Vulnerable Children and Families wrote a joint letter to the leader of each local authority. By this time, the closure of the Calais camp had been announced by the French authorities, but it had not yet been implemented. However, the need for places from local authorities had become acute. Of UAS children who did not have close relatives in the UK, the letter said:

> "Unaccompanied children who are not being reunited with relatives will be looked after children and we intend to use the [NTS] to place these children with local authorities. We would be very grateful if local authorities could bring forward any places they have so we can quickly place children into long term care arrangements…. We are conscious that we will be bringing children into the UK at the same time that UAS [children] who arrive spontaneously need to be cared for (although the number is much reduced from the intake last year) and when we still need to make the distribution of UAS [children] more equitable across the country. The [NTS] will be managing all three cohorts and we will be looking to place UAS [children] with local authorities based on the needs of the child rather than their route of entry."

Still no further offers of places from Scottish authorities were forthcoming.

39. By 14 October 2016, no response had apparently been received from the South West SMP, a matter to which I shall return (see paragraph 66 below). Numerical responses had been received by the Home Office totalling 397 places. That figure was rounded up to 400, and then reduced to 350 to account for children transferred to the UK under Dublin III but whose family reunion broke down. In addition to those replies, some authorities responded, not with a specified number of places, but with an indication in one form or another that they would be prepared to take UAS children up to 0.07% of their total children population. Those were not converted into numbers of places and added to the section 67 figure. As Ms Samedi explained:

"63. … The West Midlands, East of England, South East, Yorkshire and Humber, and North West provided responses for each [local authority] within the region and some [local authorities] within those regions sent individual letters to the Home Office…. [A] separate strand of work was underway with Scotland and Wales to look at how the NTS could work outside England and so they did not provide a figure for the number of children they could accept…". (Ms Samedi's Second Statement).

"40. … From the responses we received up to 14 October, we calculated that a total of 397 places were available for the transfer of unaccompanied asylum seeking or refugee children in this financial year [i.e. up to 5 April 2017]. This figure was rounded to 400 and comprised places for children being transferred from other local authorities, such as Kent, that were over the 0.07[%] threshold and any unaccompanied children transferred to the UK under section 67… or under the [MENA Scheme]. It did not include places for those [UAS] children who arrived illegally in a local authority area that was significantly below the 0.07[%] threshold).

41. While the figure provided through the consultation could only be a snapshot, it provided a reasonably clear indication of the additional number of unaccompanied children that local authorities felt they could care for in this financial year and followed a significant period of consultation with local authorities. It is therefore the figure that has been used to inform decisions about the numbers of unaccompanied children who could be transferred to the UK under section 67 or under the [MENA] Scheme." (Ms Samedi's First Statement).

"33. I would like to say at the outset that although we consulted at the same time on the NTS, [section] 67 and the [MENA Scheme], we in fact allocated all of the **specified** numbers we received from the [local authorities] and SMPs in response to the consultation to [section] 67 cases – with the exception of a modest deduction (50) for family reunion breakdowns. The responses to the consultation elicited a concrete number of places totalling 397 along with a range of other responses with no specified numbers or no response at all.

34. To provide some context of the challenges faced, I should like to highlight that to bring all [local authorities] that are currently over the 0.07% threshold below that figure, we would still need to transfer more than 700 cases within the UK. We would also need to transfer all new spontaneous arrival cases into those [local authorities] to other [local authorities] below their threshold. This is not a small challenge and if we had deducted these sorts of numbers from the specified numbers we received

> from [local authorities], we would have had no places left for [section] 67 cases.
>
> 35. Instead, we recommended to Ministers that the specific figures returned in the consultation, for which the final response we were expecting was received on 14 October 2016, form the basis of the specified number, with a modest allowance (50) for the breakdown of family reunion cases. We anticipated that those [local authorities] that did not specify a number but were already participating in the NTS would continue to do so, which would provide further capacity to meet demands from spontaneous cases. Places arising after 14 October 2016 (the final cut reckoning of places identified through the consultation) would however then have to go towards priorities other than [section] 67. I consider this was an entirely rational and reasonable approach to take and one that can be justified given the various factors the [Secretary of State] had to balance out combined with the extensive experience of the challenges faced in placing UAS [children] during the first three months of its operation." (Ms Samedi's Second Statement: emphasis in paragraph 33 in the original).
>
> "223. It is important to highlight that we allocated the entire remaining places of the specific 400 number volunteered by [local authorities] to new arrivals from Europe under section 67, with the expectation that any further capacity or unquantified capacity could be put towards the operation of the NTS to reduce the burden on areas such as Kent and Croydon." (Ms Samedi's Second Statement).

40. Therefore, in short, it was Ms Samedi's evidence that, subject to a deduction of 50 places to reflect the breakdown of Dublin III family reunion cases, the section 67 specified figure comprised the aggregate of the specific numbers received from local authorities by 14 October 2016 in response to the Ministerial letter of 8 September 2016; but, where a response without a specified number or where a response with a specified number was received after 14 October 2016, then that was not reflected by an increase in the specified number for the purposes of section 67. It was expected that other capacity (including that reflected in non-numeric and late responses) would go towards meeting commitments to UAS children other than section 67, including the transfer of such children from local authority areas such as Kent where the numbers of UAS children being looked after was particularly high. Of course, at this time the Secretary of State was concerned only with capacity, not with where a particular UAS child might go within the UK. At a conceptual level, a section 67 child who was allocated to an area which had not made an in-time numerical response would enable a place in an area which had submitted such a response to take (e.g.) a UAS child transferred from Kent under the NTS. Who was in fact allocated where did not affect capacity at all.

41. However, by this time (14 October 2016), the French authorities had announced the closure and demolition of the Calais camp on 7 October, which resulted in discussions between the Secretary of State and the French authorities from 12 October with a view

to expanding and modifying a pilot process for the "accelerated" Dublin III procedure to which I have already referred, which had been under consideration over the summer of 2016 but which was now developed and implemented at very short notice (as described in the judgment of Singh LJ in Citizens UK at [9] and following).

42. Unfortunately, as Mr Cook explains (in paragraphs 60 and following of his First Statement), the number of UAS children in the camp was uncertain and, in the event, substantially underestimated. A survey in August 2016 by the Appellant and France Terre D'Asile ("FTDA") suggested that there might be 800-900 children in the Calais camp, of whom about 650 were UAS children. A further FTDA survey in early October put the total number of children in the camp at 1,274, including 410-430 children of Syrian or Sudanese nationality, 30 children aged under 12 or under, and 50 children assessed as being at a high risk of sexual exploitation. Given the overlap with Dublin III cases, it was estimated that 250-400 non-Dublin III cases would be eligible under the criteria being developed for eligibility for section 67 transfer. That was broadly in line with the estimate of local authority capacity assessed in the manner I have described.

43. That congruence was important because, as explained by Mr Cook in his First Statement:

> "64. Given the operational constraints…, the [Secretary of State did not consider that she could establish whether one individual's claim to be (i) likely to qualify for asylum in the UK or (ii) vulnerable with reference to a broader criterion such as being at general risk of trafficking or exploitation, would be more valid than another individual's claim without a level of in-depth interviewing and evidence gathering (likely to take many weeks or in some cases months). Therefore, to proceed with individualised assessments of each child in the timescales Home Office officials were working to would have required the Government to either accept no cases, or to accept all *claims*. As the [Secretary of State] might reasonably expect all children present in the camp to be able to make such a claim, this would lead to considerable difficulty in respect of the available local authority capacity.
>
> 65. The [Secretary of State], therefore, decided that for the purposes of section 67 the UK should accept all children falling within particular criteria…". (emphasis in the original).

In other words, it was proposed to adopt criteria which, it was considered, UAS children would satisfy in numbers approximately the same as the assessed capacity for local authorities in the UK to support them. If a child satisfied the criteria which applied at the time of the assessment, then that child would be transferred to the UK as a "section 67 child". If the child did not satisfy the criteria, then that child would not be transferred.

44. It was intended to obtain information from UAS children in France for the purposes of assessing whether they satisfied either the expedited family ("Dublin III") criteria and/or the section 67 criteria in a single operational process ("Operation Purnia").

Consequently, the latter criteria were finalised quickly. On 20 October 2016, the Immigration Minister signed the Equality (Unaccompanied Minors in Calais) (No 1) Authorisation under Part 4 of Schedule 3 to the Equality Act 2010, which, for the purposes of section 67 transfers, authorised discrimination in favour of children under 13 years of age of any nationality, and all Syrian and Sudanese children. As I understand it, that formed the basis of the criteria against which children in the Calais camp were initially assessed for the purposes of transfer under section 67. 800 individuals were interviewed in the camp. By 8 November 2016, about 130 children had been identified as satisfying those criteria and transferred to the UK.

45. However, on 28 October 2016, the French authorities asked the Secretary of State to stop interviewing at the camp. In early November, children began to be dispersed to *Centres d'accueil et d'orientation pour mineurs isolé étrangers* (Reception and guidance centres for foreign unaccompanied minors) ("CAOMIs") throughout France. That dispersal led to a further phase of interviewing the children at their CAOMI. Nine teams of 10-12 staff each were sent to France by the Secretary of State, and, in the period 7-25 November 2016, they conducted 1,872 interviews. I shall return to that process shortly.

46. In the meantime, the story in Scotland is taken up by Derek Mitchell of COSLA. Although we do not have a copy of his witness evidence, but in April 2017, in the course of this litigation, he provided a statement which is recited in the Divisional Court judgment at [74], as follows:

> "At the time the consultation closed in October, after months of engagement with ourselves and local authorities, we [i.e. COSLA] had been clear that Scotland had no spare capacity in the care system, did not feel that the transfer protocol was suitable for Scotland given the devolved legislative systems, and had concluded that until the transfer scheme was extended to cover Scotland through secondary legislation, Scottish local authorities could not participate."

He continued:

> "It was not until mid-late October during the closure of the Calais camps that we identified section 67 applied UK wide and outwith the NTS, at which point I put out a call for any placements on 28/10/16 as you've seen from the evidence. Offers were made in response to an emergency humanitarian situation and did not imply any ongoing capacity in the care system in Scotland."

47. It seems that there was a conversation between someone at the Home Office and Mr Mitchell on the morning of 28 October 2016 – by which time the Calais camp had been closed and demolished, and the occupants dispersed throughout France – that changed his understanding on two, related matters. It seems that, until then, COSLA (wrongly) understood that (i) section 67 did not apply to Scotland, and (ii) by giving a figure for capacity for UAS children in response to the Ministerial letter of 8 September 2016, a Scottish local authority would (or at least might) commit itself to the NTS including a commitment to take UAS children up to 0.07% of the total children in its area.

48. Having been disabused on both counts, and in the face of the compounded humanitarian crisis resulting from the closure of the Calais camp, in an email Mr Mitchell sent to Ms Samedi on the afternoon of 28 October 2016, COSLA said:

> "Given the situation that was described to Derek [Mitchell of COSLA] this morning, investigating further we hope that local authorities will agree with us that [section 67] does allow Scottish local authorities to accept these 'Dubs' children.
>
> Additionally, I'll very shortly be sending a letter which outlines our outstanding issues with the protocol and NTS itself."

49. That letter was sent to Ms Samedi later that day. It said:

> "Thank you very much for working with us over the last six months as we have supported local authorities in Scotland to explore how greater numbers of [UAS] children can be brought here. We are aware that the clearance of the refugee camps in Calais and the resettlement of unaccompanied children from there to the UK has significantly increased the pressure on the Home Office to progress this, and in response we have significantly compressed the timescale that we are working towards. Our aim is to pull together a package that outlines the basis on which local authorities in Scotland could take on more UAS [children] and the associated risks within the next couple of weeks. Individual local authorities will then need to make a decision on whether or not they proceed on that basis, and that will be the focus of a paper to COSLA Leaders when they meet on Friday 25 November.
>
> ….
>
> We seek **a guarantee from the Home Office that the transfer of unaccompanied children to Scotland will be determined by the capacity of individual local authorities to support young people, and that the Home Office will respect the position that local authorities are uniquely positioned to determine their own capacity.** At the moment it looks like most places that will be offered by Scottish local authorities will suit the needs of 16-17 year olds only." (emphasis in the original).

The letter also asked for a response on legal issues concerning the transfer of children from England to Scotland (where the (devolved) statutory scheme for the welfare and support of children for whom a local authority is responsible is substantially different from that in England); and for some comfort in respect of the costs to Scottish authorities of any UAS children taken by them.

50. The same day (28 October 2016), COSLA sent an email to the Chief Executive of each of the Scottish local authorities, asking for them to provide any places they might have

for the urgent taking in of UAS children from the former Calais camp "in the next fortnight". It said:

> "If you have any available placements in your area for looked after children at the moment that could be offered to these young people please get in touch with us. Even one or two places would make a difference.
>
> Again, to be clear, this request comes on top of the work we are doing to support local authorities to consider their participation in the [NTS] for [UAS] children. The legal status and funding for the children who arrive from Calais will be the same as those in the [NTS]. However, crucially, we believe that the legal issues regarding the basis of transfer to Scottish local authorities do not exist for this group because they are being brought directly under section 67…. There will be full treatment of the issues with the [NTS] brought to the November meeting of COSLA Leaders which will inform decision making about participation in the wider scheme. Taking on these young people from Calais under the Dubs amendment would not commit local authorities to doing anything further in relation to the [NTS], but should be taken into account if the [NTS] were to become compulsory.
>
> **Therefore to be clear we are asking local authorities if there are any placements available to take young people arriving from Calais over the coming fortnight. They will be transferred under section 67… and are not part of the [NTS] negotiations which are ongoing.**" (emphasis in the original).

51. Following this letter, by 3 November 2016, Scottish authorities had offered about 50 placements; and, having satisfied the section 67 criteria, UAS children were transferred to the UK to take up some of those places.

52. On 8 November 2016, for the purposes of transfers under section 67, a submission was made by the Home Office Asylum Policy Group to the Immigration Minister to change the discrimination authorisation under the Equality Act 2010 to authorise discrimination within the cohort in favour of Syrian or Sudanese children under the age of 16 (rather than 18) years of age, i.e. criteria that were more restrictive than the earlier criteria. The discrimination in favour of all children under 13 regardless of nationality was to remain unchanged.

53. The reason for this was clear: by early November 2016, it was understood that many more children would satisfy the earlier criteria than the assessed capacity of the UK local authorities could cope with. By this time, the estimate of children who had been in the camp at the time of clearance was over 2,000. Having recited the data from the recent FTDA survey, the advice stated (at paragraph 4: emphasis in the original):

> "**The results of our consultation with local authorities established that there are approximately 400 places within local authority care in England for all unaccompanied**

> **asylum seeking and refugee children transferred between now and the end of the financial year.** This includes spaces available for non-family cases from Greece and Italy as well as France, family cases where it emerges that the family member is unable or unwilling to look after the child, and any transfers of spontaneous arrivals from local authorities already under pressure. Details of the results of the consultation with local authorities is included in **Annex C**. This consultation meets our commitment under section 67…. Although we have since had offers from local authorities that did not originally respond to the consultation (e.g. a number of Scottish local authorities pledged approximately 50 places last week, and we have had a handful of offers from Welsh authorities), we believe the 400 figure remains robust and accurate. Of the 400 places, we propose that up to 350 will be made available for unaccompanied children whom may reasonably meet the terms of the Immigration Act 2016, with a further 50 spaces available for spontaneous arrivals, and family cases that may need local authority care. Kent is still caring for approximately 800 children and we are committed to reducing their UAS [children] population and Croydon's to within the 0.07% threshold as soon as possible. This is dependent on other local authorities accepting children from those areas."

54. The advice went on to say that on the basis of the then-current estimate of the numbers of children who had been in the Calais camp, in addition to the 130 children already transferred, 550 non-Dublin III children would satisfy the criteria then in place. As that number substantially exceeded the assessment of local authority capacity, the recommendation was to make the criteria more restrictive, which would (it was estimated) reduce the number of children in France who would satisfy the criteria to about 300, which left flexibility for additional transfers from Italy and Greece and if the number meeting the new criteria from France was greater than expected. It is not suggested that the Secretary of State could not lawfully vary the criteria by which section 67 children were to be assessed from time-to-time. He could clearly do so.

55. On the same day (8 November 2016), the Home Office published "Guidance: Implementation of section 67 of the Immigration Act 2016 in France: Version 2", which are the criteria at the focus of this claim and appeal. They set out the following general eligibility criteria:

> "To be eligible a child must meet **one** of the following criteria:
>
> - they are aged 12 or under
>
> - they are referred directly by the French authorities, or by an organisation working on behalf of the French authorities, to the Home Office as being at high risk of sexual exploitation
>
> - they are aged 15 or under and are of Sudanese or Syrian nationality (these nationalities have a first instance

> asylum grant rate in the UK of 75% or higher, based on the asylum statistics for the period from July 2015 to June 2016)
>
> - they are aged under 18 and are the accompanying sibling of a child meeting one of the three criteria outlined above
>
> And they must meet all of the following criteria:
>
> - transfer to the UK must be determined to be in the best interests of the child
> - the child must have been present in the Calais camp on or before 24 October 2016
> - the child must have arrived in Europe before 20 March 2016

56. The guidance sets out how assessment against those criteria was to be conducted. Stage 1 – "Registration, Nationality and Age Screening" – was to be conducted by recording information on a standard form, namely "the S67 IA Calais Form". The evidence as to how the children were interviewed is not as full as it might be. In particular, it is not entirely clear whether this is a reference to the ten-page questionnaire attached to Gary Cook's Second Statement as GS35; but it seems that it probably is, or that, if different, the two forms gave rise to similar questions.

57. The questionnaire contains questions concerning family members in the UK focused on the Dublin III criteria; but also questions clearly relevant to the section 67 criteria, e.g. in relation to age and siblings in the camp (and their age) and an assessment of age, best interests and health needs, and whether the individual has been referred by the French authorities as being at high risk of sexual exploitation and whether there is evidence of a risk of trafficking or exploitation. This of course reflects the fact that the single exercise was designed to respond to both sets of criteria.

58. The age assessment of children in France was the subject of a separate annex, and was to be conducted on a different basis from such assessments conducted here, with the child essentially having the benefit of any doubt. As I have described, that is reflected in the form of the questionnaire. The annex said:

> "All those who claim to be a child must be asked for documentary evidence to help establish their age. If the claimed age is doubted and there is no evidence to support their claim, you must conduct an initial age assessment. The initial age assessment stage is divided into 3 possible outcomes:
>
> 1. treating the individual as an adult as their physical appearance and demeanour very strongly suggests that they are significantly over 18 years of age;
> 2. giving the benefit of the doubt and accepting their claimed age; or

> 3. treating the individual as a child until further assessment of their age has been completed."

59. Stage 3 concerned the children who satisfied those criteria, as follows:

> "… If the individual passes these tests they need to be referred to the [NTS] for placement within local authority care. No individual should be placed for transfer unless a local authority placement has been secured first. Please refer to the National Transfer Scheme protocol."

60. Mr Cook's statement attaches, as GC45, a statement of Julia Farman (Acting Head of the European Intake Unit within UK Visas and Immigration) dated 5 April 2017, prepared for the claim brought by Citizens UK. That explains (at paragraph 60) how, at the end of each day, completed forms and photographs were sent by email to Home Office officials in the UK, who would then consider whether a particular child was eligible for transfer to the UK under section 67 or the Dublin III criteria. Those officials would complete a spreadsheet, which would then be sent to the French authorities. The final spreadsheet was dated 3 December 2016 but was apparently sent to the French authorities on about 14 December 2016 (see Citizens UK at [133] referring to Mr Cook's evidence in that case). It has columns for each individual showing (amongst other things) the relevant CAOMI, nationality, language, gender, date of birth and age, "status" (i.e. whether accepted or not) and "assessment". In respect of children who were rejected for transfer against the section 67 criteria, in the "assessment" column is one of two formulae: "Age 18+" or "Criteria not met". On instructions, Mr Jaffey confirmed that only those two reasons for refusal were set out in that column; and, of the approximately 1,800 children in total, 388 are shown as being rejected on the basis that they were over 18 years of age, with the balance shown as "Criteria not met".

61. It appears to have been agreed between the French authorities and the Secretary of State that the former would inform the children of the results of their interview and consideration of their case under both the Dublin III criteria and section 67, giving them the reasons for any refusal as given to them by the Secretary of State in the spreadsheet, i.e. for those assessed against the section 67 criteria merely "Age 18+" or "Criteria not met".

62. The "specified number" of UAS children to be transferred to the UK, for the purposes of section 67, was determined by the Immigration Minister on behalf of the Secretary of State on 20 December 2016 on the basis of an advice and recommendation dated 13 December 2016. As I have indicated (see paragraph 39 above), in her evidence Ms Samedi explained that, having received numeric responses before 14 October 2016 in sum of 400, and deducting 50 places for the estimated 10% of breakdown cases in the expected 500 Dublin III reunion cases:

> "It is important to highlight that we allocated the entire remaining places of the specific 400 number volunteered by [local authorities] to new arrivals from Europe under section 67, with the expectation that any further capacity or unquantified capacity could be put towards the operation of the NTS to reduce the burden on areas such as Kent and Croydon."

The Divisional Court accepted that evidence. There was and is no reason not to do so.

63. The advice explained how the figure of 350 was reached, the covering memorandum explaining that this figure included the 200 UAS children already transferred from France as part of the Calais camp clearance operation. The advice then continued (at paragraph 5: all emphases in the original):

> "**However, local authority placements are not static and, owing to the need to bring the Calais children more to the UK more quickly, we have had to work with local authorities to make places available sooner than they had planned.** In addition, local authorities have offered places additional places since the consultation, whilst others have removed places or placed restrictions on the types of children they are prepared to take (e.g. by age). In order to ensure a transparent [redacted] we recommend setting the specified number in line with the responses received to the consultation, rather than trying to continually adjust the number based on ongoing discussion with local authorities. The risk of not setting the number in line with the consultation responses is that local authorities could purport to offer places for section 67 children that significantly limits our ability to place spontaneous arrivals and relieve the pressure on over-burdened areas such as Kent and Croydon; the primary objective of section 69 of the Immigration Act 2016. Further, it is our assessment, following discussions with local government, that we do not consider there to be significantly more places available for section 67 children – when considering the wider pressures on places from asylum seeking children, including failed Dublin cases and elsewhere – than came through from the consultation.
>
> **We, therefore, recommend setting the specified number for section 67… at 350. Do you agree?**"

64. The Minister did agree. There then followed a period for the approval of the Government and the development of a communications plan, before the Minister announced the specified number in Parliament on 8 February 2017.

65. On 10 March 2017, the section 67 criteria I have described were withdrawn, and the Home Office issued a policy statement setting out new criteria and processes for the remaining transfers under section 67 which covered Greece and Italy as well as France. By this time, 200 children had been transferred to the UK under section 67. These new criteria were based on a reference by the relevant authorities in France, Greece or Italy, in the following terms:

> "To be eligible for transfer to the UK under section 67:
>
> - unaccompanied children must have been present in Europe before 20 March 2016….; and

- it must be determined, following individual assessment, that it would be in the child's best interests to come to the UK, rather than to remain in their current host country, be transferred to another EU Member state, or to be reunited with family outside of Europe.

In deciding which children to refer, France, Greece and Italy will be asked to prioritise unaccompanied children who are:

- likely to be granted refugee status in the UK; and/or

- the most vulnerable, due to factors which could include but are not limited to, the UN Convention on the Rights of the Child 1989 ["the UNCRC"] individual risk factors. These factors include child victims of trafficking and sexual abuse; survivors of violence; and children with mental or physical disabilities."

66. On 27 March 2017, the Home Office received a letter from the South West SMP referring to the collation of local authority responses to the Minister's letter of 8 September 2016. As I have indicated, the Home Office thought that there had not been any consultation response from that SMP. However, investigations showed that a response had been sent on 6 October 2016, which indicated that that region could take 123 UAS children. Ministers were made aware of the mistake on 13 April 2017; and it was decided to add the 123 (rounded up to 130) places to the section 67 specified number. On 26 April 2017, the Minister announced that increase in a Written Statement to Parliament. The specified number was thus increased to 480.

Grounds of Appeal

67. Ms Lieven relies upon two grounds of appeal.

68. First, section 67(2) requires the "specified number" of UAS children to be accepted by the UK from other countries in Europe to be determined by the Government (effectively, the Secretary of State) "in consultation with local authorities". For the purposes of this appeal, Ms Lieven submits that the Secretary of State failed to discharge that statutory duty to consult, in three ways.

i) The consultation request did not require the response to be in a particular (i.e. numerical) form. Some authorities expressed their willingness to take UAS children up to the 0.07% threshold. Ms Lieven submits that those offers should have been converted into numbers; and the Secretary of State erred in not either doing so or requiring the relevant local authorities to do so. If those offers had been expressed as numbers, Ms Lieven calculates that they would have added at least 95 places to the figure of 480 eventually specified (Ground 1A).

ii) There was confusion with regard to closure of the consultation. The exact closure date was uncertain, and authorities were in any event unaware of the exact closure date whenever it might have been. That confusion was caused by the way in which the Secretary of State consulted; and it led authorities to pledge at least 97 places after 14 October 2016 (which, the Secretary of State now says,

was the closure date) but before 20 December 2016 when the specified number was first fixed (Ground 1B).

iii) The Minister's request for consultation responses on 8 September 2016 was inadequate because it caused or encouraged confusion in Scotland by engendering the belief that a Scottish local authority could not give a number for UAS children that could be placed with that authority without at least risking a commitment to the NTS. It was not until that confusion was dispelled, on 28 October 2016, that Scottish authorities (other than Renfrewshire, which had indicated, in time, six places) put forward an offer of 50 places (Ground 1C).

Ms Lieven submits that the consultation was unlawful, and as a result the Secretary of State came to an assessment of the specified number for the purposes of section 67 on the basis of incomplete and/or incorrect information. Those places were thus effectively "lost" for the purposes of the specified number under section 67.

69. Second, Ms Lieven submits that the Secretary of State breached his common law duty of procedural fairness by failing to give adequate reasons to the UAS children who were rejected for section 67 transfer to the UK (Ground 2).

70. Before considering these grounds in turn, it would be helpful to clear the decks by dealing with two matters, namely (i) the nature of the criteria against which individuals were assessed for transfer to the UK under section 67, and (ii) the relevance of the fact that the ultimate "beneficiaries" of section 67 are children.

The Eligibility Criteria

71. At [160] of its judgment, the Divisional Court rejected "with some emphasis" the Appellant's submission that those who, against the published criteria to which I have referred, were found eligible for transfer were entitled to be transferred, because of the numbers cap; and so the court "found it difficult to say that a conventional approach to procedural fairness is required… in this case". Ms Lieven contends that the court was wrong to reject that submission.

72. I appreciate that the criteria with which we are concerned commenced with the words, "To be eligible a child must meet…". However, whilst in my view this is not at the heart of this appeal, I do not consider that that means that, if a child meets all the criteria at the relevant time (i.e. at the time of the assessment), he is not entitled as a matter of policy to be transferred to the UK. It is well-established that a decision-maker must follow his published policy, unless there is a good reason for not doing so (see R (Lumba) v Secretary of State for the Home Department [2011] UKHL 12; [2012] 1 AC 245 at [26] per Lord Dyson JSC, at [202] per Baroness Hale of Richmond JSC and at [313] per Lord Phillips of Worth Matravers PSC). Therefore, where there is a policy with published criteria against which the conferring of a potential benefit will be assessed, an individual is entitled to be assessed against the criteria that were in place at the time of the assessment, with a reasonable expectation that, if he satisfies them, he will obtain the benefit (see R v Secretary of State for the Home Department ex parte Khan [1984] 1 WLR 1337 at 1347 per Parker LJ).

73. Furthermore, that was clearly the view of the Secretary of State in relation to the section 67 criteria; and she proceeded on that basis. Mr Cook explains that, because of the impossibility of operating any residual discretion in a sensible way:

> "The [Secretary of State]… decided that for the purposes of section 67 the UK should accept all children falling within particular criteria." (see paragraph 43 above).

74. Therefore, although the Secretary of State was in the usual way entitled to change her policy (including the criteria against which section 67 applicants would be assessed), an individual who was considered for transfer under section 67 was entitled to be assessed against the published criteria of the time; and, if he satisfied them, he had a reasonable expectation of being transferred.

75. Consequently, I do not agree with that part of the analysis of the Divisional Court. However, as an issue, that seems to be empty in this case, because the Secretary of State appears to accept that, subject to his ability to depart from his own policy if there are good grounds for doing so, if a child satisfies the criteria in place at the relevant time then he will be transferred to the UK. In the context of this case, it is difficult to conceive of any such grounds for departure. Mr Cook does not suggest that there are any; and, certainly, there is no evidence of any individual satisfying the criteria but not being transferred.

76. If and insofar as Mr Jaffey submitted that the duty of procedural fairness did not apply in the circumstances of this case, I deal with that below in connection with Ground 2 (see paragraphs 120 and following below, and particularly paragraphs 129-130).

The Secretary of State's Obligations to Children

77. Ms Gallagher's submissions were focused upon the position of the target of section 67, namely UAS children in Europe, who have fled conflict in their homelands, are alone and separated from their family, are often suffering from physical and psychological trauma as a result of their experiences, and are at risk of exploitation and trafficking. She submitted, with force, that they are among the most vulnerable people on earth.

78. The obligations upon the Secretary of State in respect of such children in domestic enactments and policy, outside section 67 itself, are not very helpful. Ms Gallagher submitted, and I accept, that section 55 of the Citizenship, Borders and Immigration Act 2009, under which any function of the Secretary of State in relation to immigration and asylum must be discharged "having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom" reflects the spirit of article 3(1) of the UNCRC (see below); but it does not apply to children (such as the UAS children in this case) who are *not* in the UK. However, paragraph 2.34 of the relevant statutory guidance, "Every Child Matters, Change for Children" (November 2009) states that, whilst the duty does not strictly apply to children overseas:

> "UK Border Agency staff working overseas must adhere to the spirit of the duty and make enquiries when they have reason to suspect that a child may be in need of protection or safeguarding or present welfare needs that require attention."

79. The international obligations appear to provide a firmer foundation for her submissions. Whilst Ms Gallagher accepted that it was not open to her to argue that article 3(1) of the UNCRC is directly enforceable in UK domestic law (the minority view of Lord Kerr of Tonaghmore JSC in R (SG) v Secretary of State for Work and Pensions [2015] UKSC 16; [2015] 1 WLR 1449 at [257]), as I understood it, her key submission was that all of the Secretary of State's decision-making in relation to section 67 has to be considered through the prism of that article, which provides:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

80. That is echoed in article 24(2) of the Charter of Fundamental Rights of the European Union, which succinctly says:

> "In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration."

81. These are clear and wide provisions. They apply to all decisions and actions concerning children, from which it is clear that they are intended to apply to state policies that have an impact on children, as well as decisions relating to a particular child. They apply wherever the children might be. Furthermore, states are specifically required to "contribute, through international cooperation, to global implementation" of UNCRC rights (paragraph 7 of the Committee on the Rights of the Child, General Comment No 5: General measures of implementation of the [UNCRC] (27 November 2003)).

82. As a consequence, Ms Gallagher submitted that, having embarked upon the determination of the specified number for the transfer of UAS children from other European countries to the UK for the purposes of section 67 – and then in the implementation of the process by which the children were identified for transfer under that section – the Secretary of State was required to recognise the standards underpinning these international law obligations. In particular, as a consequence, to be lawful, the consultation process required a "heightened standard of fairness"; and the procedural aspect of the best interests principle requires all children to be treated as individual rights holders, for states to "guarantee child-sensitive due process", and such children to "have access to administrative and judicial remedies against decisions affecting their own situation" (paragraph 15 of Joint General Comment No 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families and No 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return (16 November 2017)).

83. I have considered these submissions with care. However, on the facts of this case, I do not consider that a detailed consideration of the role played by article 3(1) in our domestic jurisprudence is required or warranted.

84. First, as I have indicated, it is inherent in section 67 that it is generally in the best interests of the targeted UAS children in Europe to be transferred to the UK. The criteria adopted were designed to elicit the most vulnerable, and those with the strongest

asylum claims. In accordance with the best interests principle, as I have indicated (see paragraph 19 above), section 67 requires that the specified number for the purposes of transfer under that provision should represent the highest number of UAS children in Europe that could reasonably be accommodated in the UK given the other commitments of local and national government (including commitments to other children). The interests of the potentially affected children therefore have particular importance and weight. In my view, article 3(1) reinforces, but does not substantively add to, the Secretary of State's obligations under section 67.

85. Second, this case concerns the adequacy and hence the lawfulness of the section 67(2) consultation and the reasons given to UAS children who were rejected for transfer under section 67. It focuses upon procedural requirements and fairness.

86. Before the Divisional Court (see [33]), and now before us, Ms Gallagher submitted that "a heightened standard of fairness" was required of the consultation carried out under section 67 because its context was one "closely affecting the interests of very vulnerable children who were at serious risk of harm, hardship or abuse". I am not convinced that that formulation is necessarily helpful. It seems to me that the *standard* of fairness is unvarying and immutable.

87. However, that is not to say that the fact that the relevant decision-making on behalf of the Secretary of State involves highly vulnerable children is of no moment in the consideration of common law procedural fairness. Clearly, it is a very important factor. Although in my view it is unhelpful to refer to a varying standard of procedural fairness, the *content* of the common law duty – and what the duty requires in any particular circumstances – is highly fact-specific and can vary greatly from one context to another (see, e.g., R (Moseley) v Haringey London Borough Council [2014] UKSC 56; [2014] 1 WLR 3947 at [36] per Lord Reed JSC). An important factor in that context is that the decisions in issue affect highly vulnerable children.

88. I shall return to the content of the duty when I deal with the individual grounds.

Ground 1: The Duty to Consult

89. I therefore now turn to Ground 1, namely that the Secretary of State failed to discharge the express statutory duty to consult local authorities, prior to specifying the number of UAS children who would be accepted by the UK under section 67(1).

90. We were referred to a number of authorities in relation to the scope of that duty, but it is unnecessary to drill deeply down into them. For the purposes of this appeal, the following propositions can be gleaned from them.

    i) Irrespective of how the duty to consult has been generated, the common law duty of procedural fairness will inform the manner in which the consultation should be conducted (R (Moseley) v Haringey London Borough Council [2014] UKSC 56; [2014] 1 WLR 3947 at [23] per Lord Wilson JSC).

    ii) The public body doing the consulting must put a consultee into a position properly to consider and respond to the consultation request, without which the consultation process would be defeated. Consultees must be told enough – and in sufficiently clear terms – to enable them to make an intelligent response (R v

North and East Devon Health Authority ex parte Coughlan [2001] QB 213 at [112] per Lord Woolf MR, and Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts [2012] EWCA Civ 472 at [9] per Arden LJ). Therefore, a consultation will be unfair and unlawful if the proposer fails to give sufficient reasons for a proposal (Coughlan at [108]); or where the consultation paper is materially misleading (R v Secretary of State for Transport ex parte Richmond upon Thames London Borough Council (No 2) [1995] Env LR 390 at page 405 per Latham J) or so confused that it does not reasonably allow a proper and effective response.

iii) As I have indicated (see paragraph 87 above), the content of the duty – what the duty requires of the consultation – is fact-specific and can vary greatly from one context to another, depending on the particular provision in question, including its context and purpose. Citing the judgment of the Privy Council in The Mayor and Corporation of Port Louis v The Attorney General of Mauritius [1965] AC 1111 at page 1124 ("the nature and the object of consultation must be related to the circumstances which call for it"), Lord Reed JSC in Moseley said (at [36]):

> "[Statutory duties of consultation] vary greatly depending on the particular provision in question, the particular context, and the purpose for which the consultation is to be carried out".

Lord Wilson (at [23]) also referred to the requirements being linked particularly to the purpose of the consultation.

iv) A consultation may be unlawful if it fails to achieve the purpose for which the duty to consult was imposed (Moseley at [37]-[43] per Lord Reed).

v) The courts will not lightly find that a consultation process is unfair. Unless there is a specification as to the matters that are to be consulted upon, it is for the public body charged with performing the consultation to determine how it is to be carried out, including the manner and extent of the consultation, subject only to review by the court on conventional judicial review grounds. Therefore, for a consultation to be found to be unlawful, "clear unfairness must be shown" (Royal Brompton at [13]); or, as Sullivan LJ said in R (Baird) v Environment Agency [2011] EWHC 939 (Admin) at [51], a conclusion by the court that:

> "… a consultation process has been so unfair as to be unlawful is likely to be based on a factual finding that something has gone clearly and radically wrong."

vi) The product of the consultation must be conscientiously taken into account before finalising any decision (Coughlan at [108]).

91. The purpose of the consultation here was considered by the Divisional Court at [42]:

> "The purpose of the exercise was to enable the [Secretary of State] to reach a decision about a specified number for the purposes of section 67. It was not an exercise in ascertaining objections to or support for or preferences as to a course of

> action. It was an exercise which required gathering information in whatever form the [Secretary of State] rationally thought appropriate for the purpose of reaching her judgment on the figure to be specified."

92. As the Divisional Court indicated, identifying the figure to be specified required more than simple maths. Indeed, it involved a singularly sophisticated exercise involving the balancing of a wide variety of rights and interests, including the best interests of the children potentially affected (including, but not restricted to, UAS children in Europe) and a panoply of social and economic factors which required the exercise of very considerable and complex assessment and judgment by the Secretary of State.

93. That judgment had to be exercised on the basis of a large number and variety of relevant factors, some of which were highly and rapidly variable, including the capacity of local authorities in the relatively short-term to care for UAS children over and above those for whom there was already a national and/or local commitment, which was clearly an essential consideration. That in itself involved a realistic assessment of the likely numbers of children for whom local authorities would be responsible in that period including those in respect of whom there was a commitment under the VPRS and MENA Schemes, mandate refugees, Dublin III children during the course of assessment of their best interests and after any breakdown of the reunification with their family, and children who might spontaneously arrive in the UK. The assessment had to be conducted in a highly uncertain and volatile situation in respect of migrants in Europe, and particularly Calais. The numbers of UAS children were not known with any accuracy: the Secretary of State had to take into account the possibility that numbers had been underestimated.

94. The Secretary of State also had to ensure that, whatever might happen elsewhere, the UK could continue to comply with its international obligations and respond to any other humanitarian crisis if and when it arose. The exercise also required a realistic assessment of the available facilities within local authorities to look after such children, into which had to be worked the level of enthusiasm of local authorities for looking after UAS children which was not uniform and which included what might be described as over- (as well as what might be described as under-) enthusiasm. As Ms Samedi put it (paragraph 234 of her Second Statement):

> "There remains a disconnect between the places publicly offered and the reality in accessing those places at an operational level."

Although the Secretary of State understood that some groups of UAS children are less attractive than others, she took the view – which she was clearly entitled to take – that the commitment to each UAS child should be equal, irrespective of their origin, age, ethnicity or route to the UK. Although individual local authorities would be responsible for the care of these children, it involved the assessment on a national level, because of the recognition that some local authority areas such as Kent, because of their geographical location, had (and would continue to have) a large number and high proportion of spontaneous arrivals who would require dispersal to other areas of the UK.

95. Within that complex situation of both "demand" and "supply", section 67 clearly expressed the Parliamentary intent that the UK should do more than its then-current

commitments towards UAS children in Europe, in the face of the humanitarian crisis that had arisen in (particularly) France, Greece and Italy; and in the light of its international obligations under the UNCRC. However, it was also important that the specified number of UAS children could reasonably be accommodated by local authorities who have the statutory burden of looking after such children. It therefore required a balancing exercise.

96. The consultation was part of that overall assessment exercise. Although the number had to be determined by the Government "in consultation with local authorities", the statutory provisions gave no parameters for the consultation. The manner and extent of the consultation was therefore a matter for the Secretary of State, subject to challenge on only conventional judicial review grounds. The scope of the consultation was governed by its purpose, which was to ensure that the specified number under section 67 was pitched at a level that took account of both the obligations on the Secretary of State arising from section 67 itself, as read in the light of the best interests principle, to determine the highest number; but as tempered by the rights and interests of others including the public interest (which itself included complex social and financial policy considerations). The Secretary of State was therefore required to determine the reasonably highest figure. However, what was reasonable in this regard was essentially a matter for the judgment of the Secretary of State.

97. Section 67(2) required the Secretary of State to consult with local authorities to collect information that would enable her to make that assessment. She sought information to enable her to assess the capacity for local authorities to take on the burden of further UAS children; and to ensure the number was not pitched at a figure such that sufficient places within local authorities could not be found without putting an unreasonably onerous burden on them. The assessment of capacity for section 67 UAS children could not be calculated with mathematical precision: because of the variables, some of which I have described, it was necessarily "broad brush". The section 67(2) consultation was required to provide the Secretary of State with sufficient information to enable her to make that assessment. Whether it was sufficient was a matter for the Secretary of State himself, subject only to a challenge on conventional judicial review grounds. In particular, it was clearly not irrational or otherwise unlawful for the Secretary of State not to require a response about capacity from each local authority; nor was she required to allocate all notified capacity to the section 67 specified number. She was required to come to a broad assessment based on the available information as to how many more places for UAS children local authorities could accommodate, taking into account their other commitments.

98. On any view, the nature of the assessment exercise necessarily gave the Secretary of State a very wide discretion in how the assessment was made, including how the consultation was conducted and whether the available information enabled her to determine the specified number as section 67 required.

Ground 1A: Consultation: Percentage Responses

99. In response to the consultation request, instead of expressing a willingness to take a particular number, a few authorities expressed in one form or another their willingness to take UAS children up to the 0.07% threshold. If expressed numerically, Ms Lieven has calculated that these would have amounted to at least 95 places. However, these places were not included in the specified number.

100. Ms Lieven submits that, if the Secretary of State had required the consultation response to be in a particular form, then she was obliged to make that clear; and, in any event, if a local authority responded in the "wrong" form, she was obliged to ask the authority to clarify what they had intended. Ms Lieven submits that the Divisional Court was wrong to treat percentage figures as reflecting a commitment to the NTS and "not as relating to section 67" (see [119]), which was arbitrary given that consultees had not been told that a response in that form would be treated in that way. There is no basis for assuming, as (she submits) the Divisional Court did, that a local authority response in the form of a percentage meant that its offer related to the transfer of children already in England rather than taking section 67 children.

101. I do not consider there is any force in this ground. The Divisional Court did not assume that local authorities which put forward percentages were offering to take only the transfer of children already in England through the NTS. As the Divisional Court explained (in [118]), for understandable reasons the Secretary of State asked authorities for their capacity for UAS children as a whole, not simply for section 67 children. It followed that the Secretary of State had to make a judgment about how the consultation responses should be treated, because, given the commitments in respect of other UAS children (including those who spontaneously arrive in the UK, and the redistribution of UAS children from Kent and other authorities with high levels above the 0.07% threshold), all capacity could not be used for section 67 children. It was decided that the specified number should be all the places specifically identified by local authorities before 14 October 2016, with capacity for other commitments being catered for by later or unquantified offers (see, e.g., Ms Samedi's evidence quoted at paragraphs 39 and 62 above). "Unquantified offers" is a reference to offers which did not include a specific number, but (e.g.) only a commitment or indication that the authority was prepared to take UAS children up to the 0.07% threshold.

102. The Divisional Court described that as "a fairly crude tool to apportion capacity" (see [119]) – that is no doubt right, and doubtless there are other ways in which the apportionment could have been done – but it held that it was not arbitrary or otherwise unlawful. I agree.

i) The terms of the consultation request were clear: it asked for confirmation of "…the total *number* of unaccompanied children that could be placed in your authority for the remainder of this financial year…" (emphasis added). As the Divisional Court said (at [122]), there was no reason for a local authority to suppose that the Secretary of State would, or would necessarily be in a position to, derive a specific number from a percentage figure.

ii) The Divisional Court also rightly said (again, at [122]) that, when the responses themselves are considered, Ms Lieven's submission makes an unrealistic assumption about the true attitude and capacity of the relevant authorities as shown in the responses themselves. Although they expressed a commitment to the 0.07% figure that was part of the NTS mechanism, "there was no evidence of spare capacity ready and available for willing authorities to offer for the purposes of section 67, had they only known of how to express its existence". Mr Jaffey referred us to specific examples. In committing to the NTS, Wokingham Borough Council merely accepted that it "may need to take young people up to our 0.07% threshold", the authority raising concerns about that being a large proportion of the care population and as to the cost implications.

East Sussex County Council's response was also equivocal: it said it would be "committed to taking our share based on our child population" but that was "subject to everyone else joining in". It expressly declined to identify a specific number.

iii) The Divisional Court noted, and accepted, the evidence of Ms Samedi (quoted at paragraph 94 above, and referred to at [122] of the Divisional Court's judgment) that "there was a 'disconnect' between what some political leaders offered in public and reality and between expressions of willingness in principle and actual placement when the time for it came", so that some already overburdened authorities might offer spaces which would (if taken up) require the transfer of other children to other authorities because the 0.07% threshold was already exceeded (again, at [122]). The evidence is that, in respect of at least one authority, that was indeed the case. In assessing the specified number for section 67, the Secretary of State had to take into account such realities. In particular, she had to take into account the large numbers of UAS children who were being looked after by a small number of authorities, such as Kent; and the need to disperse those children to other parts of the UK, and thus the need for capacity for such dispersal to take place. That was important to ensure that those children were properly looked after.

103. I therefore agree with the Divisional Court (at [120]): no doubt other approaches to this issue were possible, but I see nothing irrational about this method of apportioning statements as to capacity to reach the specified figure for section 67.

104. This ground consequently fails.

Ground 1B: Consultation: Closure date

105. Ms Lieven submits that, although the 8 September 2016 Ministerial letter set a closing date of 21 September 2016, in the event the Secretary of State did not proceed on the basis that the consultation closed on that date, and indeed asserted on several later dates that the consultation was continuing.

i) On 20 October 2016, at an interlocutory hearing of this claim, it was said on the Secretary of State's behalf that the consultation was on-going.

ii) On 24 October 2016, in correspondence from the Government Legal Department on behalf of the Secretary of State, it was said that she had "begun a consultation with local authorities as required by subsection (2)" and reference was made to "this continuing consultation".

iii) In the Summary Grounds of Opposition to the Judicial Review dated 2 November 2016, the Secretary of State indicated that the consultation was still on-going.

The Secretary of State did not say that the consultation ended on 14 October 2016 until the Detailed Grounds of Defence dated 24 November 2016.

106. That confusion, submits Ms Lieven, also extended to the consultees. For example, the Wales SMP was still collecting offers for UAS children's places after 14 October 2016,

"apparently unaware that the cut-off date had passed" (Divisional Court judgment at [90]). Ms Lieven has identified at least 97 places offered before 20 December 2016 that were not counted towards the specified number because they came in after 14 October 2016. Therefore, she submitted, the consultation was unlawful, in that it failed to be expressed in such a way as to facilitate an effective response, and failed in its purpose to ascertain the number of children that local authorities could and would take.

107. The Divisional Court dealt with this argument in [57]-[61] of its judgment. It was unimpressed by it. Nor do I consider that it has been made good, essentially for the reasons given by the Divisional Court.

108. The Ministerial letter unequivocally required responses by 21 September 2016, an inevitably tight timetable in view of the requirement of section 67 to make arrangements for the relocation of the children "as soon as possible". That was extended to 14 October 2016 to accommodate the South East Region SMP. That extension was not generally publicised; but, in fact, specific numeric responses received by that date were included in the specified number.

109. As the Divisional Court accepted (at [58]), it would have been preferable for the Secretary of State to have publicised her decision to accept responses made in the period 21 September to 14 October 2016; and for there not to have been the uncertainty as to closing date that there appears to have been. However, the court considered that such "procedural blemishes" did not have an adverse impact on the fairness or lawfulness of the procedure (see [59]). I agree.

110. As I have described, the consultation sought information from each local authority as to the total number of UAS children it could accommodate as looked after children in the period to the end of the financial year (i.e. to April 2017). It did not suggest that all of those capacity figures would be directly translated into the specified number for the purpose of section 67; nor could it, given the other central and local government commitments to UAS children, and the complex assessment that the determination of the specified number required. It followed that the Secretary of State had to make a judgment about how the consultation responses should be treated. For the reasons I have given (see paragraphs 101-102 above), the decision that the specified number should be the whole of the number of places specifically identified by local authorities before 14 October 2016, with capacity for other commitments being catered for by later or unquantified offers, was lawful.

111. But, again, in my view, any failing in the consultation did not render the consultation unlawful for a further reason. As I have indicated, by the time the Immigration Minister on behalf of the Secretary of State made the assessment of the specified number (i.e. 20 December 2016), both the Minister and the Secretary of State were well aware that 50 places had been put forward by Scottish authorities after 14 October 2016, because that was explained in the 8 November 2016 advice and recommendation (see paragraphs 52-54 above). There is no evidence that any local authority failed to put forward any indication of capacity to take UAS children as a result of any of the alleged failings, and it would have made an offer if it had known that it had extra time; and there is nothing to suggest that the Minister did not have in mind, and did not take into account, the places that had been put forward after 14 October 2016 as explained to him by the time he specified the number for the purposes of section 67.

Ground 1C: Consultation: Scotland

112. Ms Lieven submits that the Secretary of State failed to discharge the statutory duty to consult because the Minister's request for consultation responses on 8 September 2016 caused or encouraged confusion in Scotland by engendering the belief that a Scottish local authority could not confirm the total number of unaccompanied children that could be placed with that authority for the remainder of this financial year without at least risking a commitment to the NTS including a commitment to taking UAS children up to the 0.07% NTS threshold. The confusion arose as a result of the 8 September 2016 letter asking all local authorities (including those in Scotland) to register for the NTS; asking them to consider their capacity to take UAS children with reference to the 0.07% threshold; and stating that children transferred from Europe under section 67 would be placed into care through the NTS. The linkage between taking section 67 children and being part of the NTS was also apparent from other documents. It is therefore understandable, Ms Lieven submits, that COSLA wrote to all Scottish authorities on 12 September 2016 advising that they should not respond to the request for numbers, because:

> "Doing so could commit your local authority to the existing transfer protocol with which we have serious concerns, and potentially a high cap of UAS [children] of 0.07% of your child population…".

The Secretary of State's letter of 14 October 2016 again indicated that it was intended to use the NTS to place the cohort of section 67, as well as those of internal relocations and spontaneous arrivals.

113. As a result, other than Renfrewshire, no Scottish authority put forward any figure by 14 October 2016. When the confusion was dispelled on 28 October 2016, Scottish authorities offered 50 places; from which it is clear, Ms Lieven submits, that the Scottish local authorities had significant capacity in the system, which would have been offered promptly if the consultation had been effective. The Secretary of State's public law failure in making a consultation request that did not enable a properly informed response was, thus, material.

114. The Divisional Court dealt with Scotland at [70]-[83] of its judgment, its response to this issue being dealt with particularly at [80]-[81]. It found that it was not unreasonable of the Secretary of State to formulate the specified number without adding in the offers from Scottish authorities made after 14 October 2016, because:

i) The Secretary of State could not be criticised for COSLA's misunderstanding that section 67 applied across the UK whilst the NTS provisions did not yet do so.

ii) In any event, "confusion about section 67 and the NTS or not" (see [83]), COSLA had consistently, both before and after the coming into effect of section 67, made it plain that there was very limited spare capacity in Scotland for UAS children, so it was unsurprising that only a small number of places were offered during the consultation period.

iii) The offers were made after the consultation closing date of 14 October 2016, and the Secretary of State was justified in not allocating such places directly to the specified number.

iv) The offers that were made after 14 October 2016 were made in response to the crisis resulting from the closure of the Calais camp, on a "snapshot" basis, rather than on the basis that such places would remain open for UAS children. The offers were expressly made on the basis that they did not represent ongoing capacity in the system that could be kept open. Indeed, at the same time as making the offer, COSLA was saying that no indication of capacity could be given until the end of November 2016.

115. Ms Lieven now contends that the Divisional Court was wrong to conclude that the consultation was not unfair in this regard, on two bases.

116. First, she submits that the Divisional Court was wrong in law and on the facts to have proceeded on the basis that COSLA's confusion about section 67 and the NTS could not be a matter of complaint against the Secretary of State who had, through the Ministerial letter of 8 September 2016, caused or encouraged such confusion, and thus did not reasonably allow a proper and effective response.

117. Second, Ms Lieven submits that the Divisional Court was wrong to conclude that, in any event, any confusion was immaterial because the constant picture from COSLA was one of very limited resources for UAS children and the November 2016 offers were a humanitarian response to the crisis caused by the closure of the Calais camp. She submits that "the best indication of what the Scottish local authorities regarded as their capacity for section 67 children were the offers actually made in October-November 2016, once the confusion created by the Ministerial letter had been dispelled" (paragraph 40 of the Claimant's skeleton argument).

118. However:

i) Until after 14 October 2016, COSLA was apparently of the understanding that section 67 did not apply UK-wide, i.e. that it did not apply to Scotland (see paragraph 47 above). If that were the case, it must have been under the impression that no response to the 8 September 2016 requests by Scottish authorities could have affected the specified number for the purposes of section 67.

ii) Ms Lieven did not suggest that the confusion was other than inadvertently engendered by the Secretary of State; but she submitted that the consultation was in fact confusing in the way she had identified. However, in my view, the request in the 8 September 2016 letter in respect of capacity for UAS children was clear enough, namely a request that:

> "… you confirm the total number of unaccompanied children that could be placed in your authority for the remainder of this financial year…".

It is true that the request ends with the words "… noting the 0.07[%] threshold…", and that the letter indicated that "all unaccompanied refugee

children who are brought to the UK under a formal scheme… will be placed into local authority care through the NTS"; but COSLA had been intimately involved in the negotiations in relation to the application of the NTS to Scotland, and had clearly been informed that the provisions of the NTS did not apply to Scotland. The question concerning capacity could clearly be answered without any commitment to the NTS, if necessary by making express the absence of such a commitment. If there was any confusion, then the letter of 8 September 2016 gave the details of Home Office officers who could be contacted in the event of any questions.

iii) In my view, the Divisional Court was entitled – indeed, right – to conclude that the Secretary of State was not responsible for any confusion in the mind of COSLA. COSLA's understanding that section 67 did not apply to Scotland was not reasonably held: COSLA must have been aware that immigration was a reserved function. Further, the 8 September 2016 Ministerial letter could not reasonably have been construed as meaning that the putting forward of a capacity number for UAS children by a Scottish local authority would risk committing that authority to joining the NTS.

iv) Ms Lieven submitted that it did not matter if COSLA's understandings or concerns were unwarranted or unreasonable: they were in fact generated by the 8 September 2016 letter. But that letter was, in my view, at least reasonably clear as to what was required of local authorities so far as capacity numbers were concerned. As a consultation request, nothing further was required of it.

v) In any event, as the Divisional Court found, any confusion was immaterial. It found that the offers made in October and November 2016 were a response to the humanitarian crisis that resulted from the closure of the Calais camp, and was not an indication of generally spare capacity in the Scottish system which was the target of the consultation. That was a finding clearly open to the Divisional Court on the evidence before it; and, in my respectful view, it was also clearly right. When COSLA's correspondence on 28 October 2016 (see paragraphs 48-50 above) is looked at in its full context, it is clear that what was sought by COSLA from the Scottish local authorities was not a response to the 8 September 2016 Ministerial letter (which sought confirmation of the capacity for in terms of the total number of unaccompanied children that could be placed in each authority or region for the remainder of the financial year), but an offer of immediately available places in response to the humanitarian crisis that had intervened as a result of the closure of the Calais camp. That request referred to placements being available within the following fortnight, not in the period to April 2017 as sought by the letter; and its correspondence with the Secretary of State made clear that the places would not remain open. It was also understood by the Secretary of State to be a response to the immediate crisis (see paragraph 156 of Ms Samedi's Second Statement). It does not matter that, in fact, the places filled as a result – and five places in Glasgow are recorded as being filled within five days of their offer –were of children transferred under section 67 (paragraph 155 of Ms Samedi's Second Statement). Contrary to the submission of Ms Lieven, the offers made in October and November 2016 were therefore not the best – or even good – evidence of the numbers that Scottish authorities would have put forward in response to the Ministerial consultation letter had

there not been the confusion within COSLA. In any event, COSLA was clear: when the consultation closed in October, Scotland "had no spare capacity in the care system" (see paragraphs 25 and 46 above, and [126] of the Divisional Court judgment).

vi) But, in my view, again any failure in the consultation did not make the process unfair or unlawful for a further reason. As I have described, by the time of the assessment of the specified number, the Minister and the Secretary of State were well aware that places had been put forward after 14 October 2016, because that was explained in the 8 November 2016 advice and recommendation (see paragraphs 52-54 above). Indeed, in that document there was specific reference to the 50 Scottish places. Again, there is nothing to suggest that the Minister did not have that properly in mind at the time he specified the number for the purposes of section 67.

Ground 1: Conclusion

119. For those reasons, each strand of Ground 1 fails. In my view, none of the subgrounds undermines the lawfulness of the consultation.

Ground 2: Reasons

120. UAS children in France were assessed for transfer under section 67 against published criteria. For practical purposes, those who satisfied the criteria were transferred; and those who did not were not.

121. I have described the reasons that were given to each UAS child who was assessed but rejected as not satisfying the section 67 criteria (see paragraph 60 above). The assessment for section 67 and the assessment under the Dublin III criteria were part of a single process, and the results of the assessment were put into a single spreadsheet. In respect of the 1,800 children who were assessed under the section 67 criteria, just under 400 were told that they had been rejected as being over 18 years of age, and the remaining approximately 1,400 were told simply that they had not met the relevant criteria. Ms Lieven submits that such reasons were inadequate in the context of this case.

122. The general principles concerning the duty of fairness at common law – in particular when that duty requires reasons to be given and, where it does, the adequacy of reasons given – were considered by Singh LJ in Citizens UK at [68] and following. It is unnecessary for me to repeat them. So far as this appeal is concerned, the following propositions are relevant and uncontroversial.

i) The common law will readily imply requirements of procedural fairness into a statutory framework even where the legislation itself is silent.

ii) When procedural fairness is in question, the court's function is "not merely to review the reasonableness of the decision-maker's judgment of what fairness required" (R (Osborn) v Parole Board [2013] UKSC 61; [2014] AC 1115 at [65] per Lord Reed JSC), but to consider objectively whether there has been procedural unfairness.

iii) The rule of law requires effective access to justice. Therefore, generally, unless (e.g.) excluded by Parliament, there must be a proper opportunity to challenge an administrative decision in the court system. As a consequence, unless rendered impractical by operational requirements, sufficient reasons must be given for an administrative decision to allow a realistic prospect of such a challenge. Where the reasons given do not enable such a challenge, they will be legally inadequate.

123. The Divisional Court held (at [161]):

i) The delivery of the decision to each UAS child was properly left to the French authorities.

ii) It would have been legally sufficient to tell the child that he or she was not eligible for transfer or is not going to be transferred.

iii) In fact, each child was given a short-form decision (e.g. he or she was over 18) which conveyed plainly sufficient reason for the rejection in the circumstances.

124. Before us, (i) was not in issue. It is now trite law that, for an administrative decision to have legal effect, it must be conveyed to an individual to whom it is adverse (R (Anufrijeva) v Secretary of State for the Home Department [2003] UKHL 36; [2014] 1 AC 604); and the lawfulness and appropriateness of the delivery of the decision by the French authorities was confirmed in the circumstances of this case in Citizens UK at [78] and was rightly common ground before us.

125. However, (ii) and (iii) remain in issue; and, in respect of them, I am afraid I am unable to agree with the conclusions of the Divisional Court.

126. Mr Jaffey accepts that a rejection of the transfer of a UAS child on the basis that the section 67 criteria are not met is judicially reviewable. That must be right. The importance of challenge by way of judicial review in these circumstances is made more stark by the fact that, unlike the Dublin III accelerated process, there was and is no provision for the internal review or other means of challenging such a rejection – although, as Citizens UK illustrates, the presence of such means would not necessarily prevent a breach of the duty of procedural fairness in not giving reasons for the initial decision (see, e.g., [94] per Singh LJ).

127. The right to judicial review must have substance. As I emphasised in Citizens UK at [184], reasons not only assist the courts in performing their supervisory function, they are often required if that function is not to be disarmed.

128. Mr Jaffey's response to the submission that the reasons here were not adequate was two-fold.

129. First, he relied upon the proposition, derived from cases such as R (Tucker) v Director General of the National Crime Squad [2003] EWCA Civ 57, that there will be no requirement to give reasons for a decision where it is impractical to require them. To show that that applied in this case, he relied upon paragraph 16 of Mr Cook's Second Witness Statement, where he said this:

> "… [T]o have tasked the UK case work teams with producing individual decision letters for all children would have likely… delayed the conclusion of the operation…. In my view, it would not have been possible for [the Secretary of State] to have produced detailed written decisions to be distributed to all children individually in centres across France in the time available. Instead, [he] informed the French authorities of the assessment [i.e. either "Age 18+" or "Criteria not met": see paragraph 60 above] which they then communicated to the children…".

130. That was an argument put on behalf of the Secretary of State in Citizens UK, albeit "certainly not with any great vigour"; and, in the event without success, because the evidence was that some reasons were identified in writing in the course of the assessment, but these were never given to the children although they could have been (see [99]). The argument fails here for essentially the same reason. Mr Cook says simply that it would have been impractical for a "detailed letter" setting out reasons for rejection in each case, perhaps a reference to the sorts of letters rejecting immigration applications which we are used to seeing: but such detail was not required here. The nature of the questionnaire was such that the reasons for any failure in satisfying the criteria had to be evidenced, because they were simply sent back to the Home Office in the UK for a decision on the criteria to be made by them on the basis of usually no more than the questionnaire answers themselves (see paragraph 60 above). The submission that the urgency and other circumstances of the situation meant that it was impractical to give more than the sparse (and otherwise inadequate) reasons cannot be made good.

131. Following the hand down of the judgments in Citizens UK, Mr Jaffey understandably changed tack. He submitted that, unlike the reasons given in relation to rejection on the basis of the Dublin III criteria, the reasons given for rejection in relation to the section 67 criteria *were* adequate. "Age 18+" in this context was as clear as "cousin" in the context of the Dublin III criteria; because, just as cousin is an insufficient relationship for the Dublin III criteria to apply, being over 18 years of age would put an individual outside the scope of the section 67 criteria. For the latter, excluding age, "nationality was in almost all cases determinative". So, if a child were told in respect of section 67, "Criteria not met", then he would be able to challenge the decision by putting forward a case that the Secretary of State had erred in law in not accepting him as the nationality he claimed to be (presumably Syrian or Sudanese).

132. However, I consider that that submission falls very far short of being persuasive. The proposition that, excluding age, "nationality was in almost all cases determinative" is an assertion, not a submission based on evidence. It seems to me that the reasons for an adverse decision are potentially far more complex than that. For example, if a boy presenting as a 14 year old Sudanese national is refused on the basis of "Criteria not met", he would have no way of knowing whether he had been refused because his claimed nationality was disbelieved, or because he was considered to be aged over 15, or because he had arrived in Europe or the Calais camp too late, or because he had not satisfied the best interests test. If a girl who presented as being under 18 years of age and the sister of an accompanying qualifying child were refused on the basis of "Criteria not met", she would not know whether her claim had been refused because the sibling relationship had been disbelieved or on some other ground. The refusal to accept a

claimed relationship is one of the "not so straightforward" cases identified in Citizens UK (at [89]) as likely to require more than sparse reasons. These examples were given by Ms Lieven in paragraph 1 of her submission of 13 August 2018; but, as she submits, they betray an overarching or systemic difficulty with a refusal on the ground that "Criteria not met". In relation to the reasons ground, this case is not materially distinguishable from Citizens UK; indeed, at most, "Criteria not met" simply excluded the reason for rejection as being on the grounds of the individual being assessed as an adult, which is barely a reason at all. In my view, if anything, the reasons for a rejection of a child as not satisfying the section 67 criteria were generally less adequate than those for a rejection of a child as not satisfying the Dublin III criteria which were found to be legally inadequate in Citizens UK. On the basis of them, for at least the majority of UAS children rejected for transfer on the basis of the section 67 criteria, there was no real prospect of being able to challenge the decision. That means that the procedure set up by the Secretary of State was in breach of the common law duty of fairness, and thus unlawful.

133. Before this court, there has been no allegation that the Secretary of State breached his duty of candour to the court, as there was in Citizens UK where the issue was discussed at length in the judgment of Singh LJ at [105] and following. However, the evidence as to the reason why the reasons given to the children were so sparse was the same before that court and this; and it is worthy of note here. As I have indicated (see paragraph 60 above), the final spreadsheet setting out the reasons for rejection that were passed on to the children by the French authorities was dated 3 December 2016. The evidence was that the French authorities wished to give more detailed reasons: they considered the spreadsheets to be "of no use" (see Citizens UK at [154]). However, the Secretary of State had received legal advice as to the level of reasons that should be given. The relevant evidence is dealt with in detail by Singh LJ in Citizens UK; but the most illuminating email is perhaps that timed at 8.32am on 14 December 2016 from Karyn Dunning (who was working on the data for UK Visas and Immigration) to Cameron Bryson (an Assistant Director in Border Force) (and copied to others, including Mr Cook), which is before this court as well as before the court in Citizens UK (where it is quoted in part at [156]), which read:

> "We are working on more detailed data but as per Lucy's email last night:
>
> Given what the lawyers have said, we are unlikely to be able to say more than the following:
>
> Dublin: 'The case of X was not accepted because we were unable to verify the claimed family connection.'
>
> Dubs: 'X was assessed as ineligible under the published criteria for section 67 of the Immigration Act in France.'
>
> Anything more could open us up to legal challenge
>
> I don't believe that position has changed so whilst I understand the request from the French colleagues they pretty much have as much detail as we are being told we can share albeit we are breaking this down further in case that position does change…".

134. Therefore, (i) the Secretary of State appears to have worked on more detailed reasons for rejection, but did not share these with the French authorities, because of concerns about "legal challenge"; and (ii) had the reasons for rejection of a child as not satisfying the section 67 criteria been adequate, it seems that that would have been purely coincidental and not a matter of design. For the reasons I have given – which do little more than confirm the conclusion of Citizens UK – in my judgment, the reasons given for rejecting a child assessed against those criteria were patently inadequate.

Conclusion

135. I would consequently reject each part of Ground 1 of the grounds of appeal, but would allow the appeal on Ground 2. Subject to submissions on the precise form of relief, I consider that, in respect of that ground, it would be sufficient and adequate relief to grant a declaration that there was a breach of the duty of fairness under common law.

Lady Justice King:

136. I agree.

Lord Justice McCombe:

137. I also agree.