Neutral Citation Number: [2020] EWCA Civ 494

Case No: C2/2018/3103

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGES ALLEN AND FINCH
Claim No JR/1256/2018

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/04/20

Before :

THE MASTER OF THE ROLLS
SIR TERENCE ETHERTON

LORD JUSTICE FLAUX
and
LORD JUSTICE HICKINBOTTOM

- -

Between :

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

- and -

THE QUEEN ON THE APPLICATION OF FTH

Respondent

- -
- -

Robert Kellar QC (instructed by **Government Legal Department**) for the **Appellant**
Charlotte Kilroy QC and **Michelle Knorr** (instructed by **Bhatt Murphy**) for the **Respondent**

Hearing date: 10 March 2020

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Approved Judgment
(as amended)

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Sir Terence Etherton MR, Lord Justice Flaux and Lord Justice Hickinbottom :

Background

1. This claim arises out of the United Kingdom's humanitarian response to the decision of the French Government in October 2016 to close and demolish a camp close to Calais, the so-called "Jungle de Calais", in which several thousand migrants from the Middle East and North East Africa who had no leave to enter or remain in the European Union had congregated. The majority in the camp were young men, but there were also hundreds of unaccompanied asylum-seeking children ("UASCs") including, it was thought, at least 200 who had close relatives in the UK.

2. Had those children made an asylum application in France, the processes set out in Regulation No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person ("Dublin III") would have been triggered, including the criteria set out in Chapter III for determining which state is responsible for any asylum claim.

3. Under those criteria, the responsible state is generally the first Member State into which the applicant irregularly arrived (article 13 of Dublin III). For an adult, however, under article 17, it is always open for a Member State in its discretion to examine and determine an asylum claim even if it is not responsible under the hierarchy of criteria for state responsibility set out in Chapter III of Dublin III. Further, there is a specific provision for unaccompanied children. Under article 8 of Dublin III, if the child seeking asylum is unaccompanied and has a sibling or other close relative in another Member State then, if it is in the child's best interests, that other state is responsible for considering and determining his application for asylum; and the provisions in article 8 and Chapter VI relating to the uniting of the child and his relative in that other state to facilitate that consideration and determination apply. In short, the Member State in which the applicant makes an asylum claim, after carrying out due enquiries, makes a take charge request to the other state and that other state, after carrying out any further enquiries it wishes, either agrees to take charge or refuses to do so. A refusal to take charge by the other state may be challenged by way of court proceedings in the other state.

4. Dublin III has internal provisions designed to achieve appropriate procedural fairness and speed. For example, the Member State in which the asylum claim is made has to provide legal and linguistic assistance to an applicant, where necessary (article 5); and a take charge request has to be made "as soon as possible and in any event within three months" and a response provided "as soon as possible and in any event within two months" (article 21(1) and 22(1)).

5. For one reason or another, however, most of the children in the Calais camp (including the Appellant) refused to make an application for asylum in France which would have triggered that Dublin III mechanism. As a result, when the French Government announced on 7 October 2016, on only a month's notice, that it proposed to demolish the camp, the UK Government, which had no legal obligation towards these children on French soil, decided to pursue a bilateral process agreed with the French Government

based on the criteria for transfer set out in article 8 of Dublin III, but without the children making any asylum claim and with the considerable expedition made necessary by the circumstances (hence the term, "expedited process"). If the criteria were satisfied then, under the expedited process, the child would be transferred to the UK which would then determine an application for asylum which the child would make here.

6. The expedited process adopted was described in detail in Soole J's judgment in R (Citizens UK) v Secretary of State for the Home Department [2017] EWHC 2301 (Admin), [2018] 2 All ER 573 at [38]-[108], and more succinctly in Singh LJ's judgment in the same case on appeal ([2018] EWCA Civ 1812; [2018] 4 WLR 123 at [9]-[18]), for which we are grateful. In this judgment, references to "Citizens UK" are to the judgment in the Court of Appeal, unless otherwise indicated.

7. Briefly, the UK and French Governments developed "Operation Purnia". It ultimately consisted of two phases. The first phase took place at the camp itself during the last two weeks of October. It consisted of an interview with the child, and interviews by telephone with those in the UK who were asserted to be close relatives or witnesses to such a relationship.

8. There were, however, far more children in the camp than the UK had been led to believe. On 28 October 2016, the French authorities asked the Secretary of State to stop interviewing at the camp, to allow the remaining children to be dispersed to one of the 73 *Centres a'accueil et d'orientation pour mineurs isoles* (Centres for Unaccompanied Minors) ("CAOMIs") throughout France, so that the camp could be demolished. That dispersal gave rise to the second phase of the operation, in which 90 officers from the UK interviewed 1,872 children who had not been interviewed and accepted for transfer in the first phase, at the CAOMIs, in twenty minute sessions over three weeks in November 2016. Again, interviews with asserted family members in the UK were then conducted over the telephone by UK-based officials.

9. Decisions as to transfer in each phase were essentially made by comparing the child's account in interview with that of the asserted family member(s). Where there were significant discrepancies, the alleged relationship was generally not accepted, and the child was not transferred but rather remained in France. As a result of both phases of the expedited process, a total of about 550 children were identified and transferred to the UK.

10. Hundreds of other children claiming to have close family members in the UK were not transferred through this process. Refusal decisions were not communicated directly to the children, but to the French authorities by means of a spreadsheet with a word or short phrase in respect of reasons which was then transmitted to the children by those authorities over the next few days. The Secretary of State notified French officials that, based on legal advice, the UK would not be able to share detailed reasons for refusal due to concerns about vulnerability to legal challenge; and the French authorities raised some concerns about this. The evidence was that reasons were very limited because of a concern that fuller reasons would lead to legal challenges.

11. A request was made by the French authorities for the Secretary of State to review, initially, 50-60 specific cases where further information had been obtained from the children; which in turn led to a general "filter" or "filtration" process in which over 550

cases were reviewed by the Secretary of State during January and February 2017. This led to a small number of additional children being transferred.

12. Citizens UK, a non-governmental organisation heavily involved in providing help and assistance to the young people in the camp and later the CAOMIs, challenged the lawfulness of the expedited process on what might be called generic grounds. In Citizens UK, this court held that the procedure adopted in the process was unfair and unlawful as a matter of common law, notably in failing to give adequate reasons for refusal of transfer which meant that the children affected (and those assisting them) had no meaningful way of knowing how to achieve a different outcome in the review process or realistically challenging a refusal (see [90]-[91]). It also concluded that the Secretary of State had seriously breached her duty of candour and cooperation with the court by failing to inform the High Court that at least one of the reasons why the explanations for a refusal decision were very thin was because of the perceived risk of legal challenges to such decisions.

13. In response to the submission made by Sir James Eadie, on behalf of the Secretary of State, that the common law did not require fairness in the expedited process because of the availability to the children of the Dublin III procedure, Singh LJ (delivering the leading judgment, with which Hickinbottom and Asplin LJ agreed), said:

> "93. The fundamental submission which Sir James made was that the present decision-making context can be distinguished from others precisely because it was always open at all material times for a person to proceed under Dublin III. That would then have attracted the full panoply of procedural safeguards which are set out in [Dublin III]…. [T]he Secretary of State was not [here] reaching any final decision. In my view, there are two flaws with that submission.
>
> 94. The first flaw is that it assumes that fairness is not required at an earlier decision-making stage simply because fairness is required at a later decision-making stage. I would not accept that as a matter of principle. In my view, in principle, a person is entitled to be treated fairly at all relevant decision-making stages. The fact is that, even though the expedited process was not one that arose under Dublin III…, it was a process which led to a decision: a person who benefited from it was transferred to the UK and this took place quickly without the need for the formal Dublin III process to be gone through. It follows that a person who was not accepted for transfer in the expedited process suffered an adverse decision and this led at the least to a delay in their being able to join a family member in the UK.
>
> 95. Secondly, even if that were wrong, it seems to me that the pure Dublin III process could not in practice be insulated from what had gone before, something which is crucial to Sir James's submission. This is essentially for the reasons which Ms Kilroy [for the claimant/appellant] has put before this Court.

> 96. First, the reality is that the Secretary of State's officials did take into account what had happened in the expedited process later, when they were considering the review or 'filter' stage.
>
> 97. Secondly,… the Secretary of State took into account what had happened in the expedited process at later stages up to the point at which that undertaking was given.
>
> 98. Thirdly, there will at least in principle have been children who gave up and never made a formal application under Dublin III precisely because they had been given an adverse decision as a result of the expedited process."

14. Singh LJ dealt with the further generic argument made on behalf of the claimant, that the procedural defects breached article 8 of the ECHR, briefly, at [103] as follows:

> "In the light of the conclusion to which I have come in relation to the common law it is unnecessary to lengthen this judgment further by addressing the procedural requirements that might arise under article 8 of the ECHR. Suffice to say that they could not give greater rights than the common law would in a context such as this. In view of the considerable difficulties which lie in the way of an argument based on article 8 of the ECHR in the light of the decision of this court in ZT (Syria) it would not be fruitful, in my view, to explore this issue in more detail."

15. Before describing the individual cases considered at the same time as the generic issues in Citizens UK (see paragraphs 20 and following below), it would be helpful to deal with the earlier jurisprudence upon which Singh LJ relied. "ZT (Syria)" is a reference to the judgment of this court in R (ZT (Syria)) v Secretary of State for the Home Department [2016] EWCA Civ 810; [2016] 1 WLR 489 ("ZT (Syria)"), another case concerning three UASCs in the Calais camp who wished to come to the UK to join their siblings; but who, due to concerns about the system in France, refused to trigger the Dublin III transfer processes by applying for asylum in France. They simply directly requested asylum in the UK from the Secretary of State; and judicially reviewed her refusal to admit or consider their applications. The Upper Tribunal allowed the claim, and made a mandatory order requiring the Secretary of State to admit the claimants to the UK, so that they could make asylum claims here which the Secretary of State would then have to consider and determine. This court, allowing the appeal, held that a UASC who first arrived in one Member State but sought to apply for asylum in another Member State, must generally invoke Dublin III in the first state rather than resort to legal proceedings in the other state.

16. Beatson LJ (with whom Moore-Bick and Longmore LJJ agreed) referred to well-established Strasbourg jurisprudence (in cases such as Sen v Netherlands (ECtHR Application No 31465/96) (2001) EHRR 7, Tuquabo-Tekle v Netherlands (ECtHR Application No 60655/00) [2006] 1 FLR 798 and Mayeka v Belgium (2006) 46 EHRR 23) to the effect that a state might owe a positive duty under article 8 of the ECHR to admit persons to its territory for family reunification (see [64]-[65]). Drawing on observations of Laws LJ in R (CK) v Secretary of State for the Home Department [2016] EWCA Civ 166, he continued to say (at [65]) that none of these earlier cases

dealt with the relationship between Dublin III and article 8, which exist side-by-side, the issue being:

> "… the relative weight of the two regimes and the strength of the human rights case needed to override the processes and procedures of the Dublin system. In a case where an individual is in one member state ('the first member state'), in what circumstances, if any, will article 8 of the [ECHR] impose a positive duty on another member state ('the second member state') to admit the individual, here an unaccompanied minor or vulnerable adult, where the individual has not used the Dublin processes and procedures in the first Member State?".

17. Beatson LJ held that those who seek to "bypass" the Dublin III procedure must demonstrate "objective reasons which justify that decision", subjective concerns being insufficient (see [82]). Whilst accepting that the application of Dublin III procedures might result in a disproportionate interference with an individual's rights under article 8 – and acknowledging the intensely fact-specific nature of the relevant balancing exercise – he concluded that there was generally an obligation on the individual to exercise his or her rights to make an asylum application (including any challenges to a refusal of it) in the Member State he or she is in, i.e. the first member state. He said (at [95]):

> "I consider that applications such as the ones made by these respondents should only be made in very exceptional circumstances where they can show that the system of the member state that they do not wish to use, in this case the French system, is not capable of responding adequately to their needs. It will, in my judgment, generally be necessary for minors to institute the process in the country in which they are in order to find out and be able to show that the system there is not working in their case. This is subject to the point that, as I have stated, these cases are intensely fact-specific. There will be cases of such urgency or of such a compelling nature because of the situation of the unaccompanied minor that it can clearly be shown that the Dublin system in the other country does not work fast enough. The case of the Syrian baby left behind in France when the door of a lorry bound for England closed after his mother got onto the lorry… is an example. But save in such cases, I consider that those representing persons in the position of the respondents should first seek recourse from the authorities and the courts of the member state in which the minor is. Only after it is demonstrated that there is no effective way of proceeding in that jurisdiction should they to turn to the authorities and the courts in the United Kingdom."

18. Article 8, in the context of Dublin III, was considered by this court again in RSM (Eritrea) v Secretary of State for the Home Department [2018] EWCA Civ 18; [2018] 1 WLR 5489. An Eritrean migrant fled to Italy and claimed asylum there. His aunt, who had obtained refugee status in the UK, wrote to the Secretary of State asking her to take over her nephew's asylum claim under article 17 (an aunt not being a close

relative for the purposes of article 8 of Dublin III), upon which the Secretary of State took no action. A claim for judicial review was made, seeking a declaration that the Secretary of State had erred in law in not exercising her discretion under article 17 and for a mandatory order requiring her to admit the claimant. The Upper Tribunal allowed the claim. This court allowed the Secretary of State's appeal, Arden LJ (with whom Peter Jackson and Singh LJJ agreed) confirming that ZT (Syria) held that "… article 8 cannot be invoked to bypass the processes laid down in Dublin III save in limited circumstances, such as where there are systemic deficiencies that would lead to a violation of Convention rights" (see [35]); and the high hurdle set in ZT (Syria) still applied "where the asylum seeker engages with the system", as RSM himself had (see [142]).

19. In a separate judgment, again agreed by the other members of the constitution, Singh LJ succinctly identified the fatal flaw in the claimants' argument. Having referred to the ZT (Syria) test, he compared it with the approach taken by the Upper Tribunal, namely to ask the question: "Have the claimants demonstrated that RSM's asylum claim… is not being efficaciously processed?" (see [173]-[174]). He considered that "effectively processed" would be a more appropriate term than "efficaciously processed"; but, in any event, he continued (at [175]):

> "More importantly, the focus of what this court was saying in the ZT (Syria) case was on the effectiveness of the legal *system* of the other Member State concerned, whereas what the Upper Tribunal did was to focus on the *particular* case before it." (emphasis in the original).

20. At the same hearing as Citizens UK, but in a separate judgment (R (AM) v Secretary of State for the Home Department [2018] EWCA Civ 1815; [2019] 1 All ER 455), the same constitution of this court considered four individual cases on appeal from the Upper Tribunal (Immigration and Asylum Chamber) (McCloskey J and Upper Tribunal Judge Allen). The main relief sought was:

> "(2) A declaration that the expedited process decision and the [Secretary of State's] continuing refusal to admit the child applicant to the UK are unlawful being in breach of [Dublin III] and/or the procedural dimensions of article 8 ECHR and/or common law requirements of procedural fairness.
>
> (3) An order that the [Secretary of State] forthwith make all necessary and immediate arrangements for the transfer of the child applicant from France to the UK using best endeavours and not later than midnight on [dates ranging between 22-25 May 2017]."

Although the claimants relied upon a breach of article 8 of the ECHR as a result of the procedural deficiencies in the expedited process, there was no claim for damages for a breach of human rights: the focus of the relief sought was very much on admission to the UK for the purposes of making an asylum claim here. In each case, the claimant was a minor at all material times, i.e. he was under 18 even at the time of the Upper Tribunal judgment.

21. The Upper Tribunal found that, whether the expedited process was regarded as a Dublin III procedure (as the tribunal found it to be) or not, there had been substantial procedural defects in that process as applied to each individual child; and the decision not to transfer was consequently unlawful as being in breach of the common law, EU law and article 8. Some of those defects in the process were of course recognised by this court in Citizens UK. As relief, the Upper Tribunal granted the declaration and mandatory order to transfer each child to the UK in the terms as sought; and, in fact, the children were all transferred to the UK shortly thereafter.

22. The Secretary of State appealed. In relation to the allegation of common law unfairness, Citizens UK was effectively determinative. Singh LJ, again delivering the lead judgment in this court, concluded that the expedited process fell outside Dublin III (see [84]). In relation to the article 8 claim, he set out the parties' respective submissions. Ground 5 of the Secretary of State's grounds of appeal, set out at [53(v)], was that:

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

The submissions in support were set out at [66]:

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

The representations from Counsel on behalf of the claimants/respondents were summarised as follows (see [77]):

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

23. Singh LJ dealt with the issue at [87]-[89]:

> "87. Ground 5 relates to article 8 of the ECHR. I would accept the submissions made by Sir James on behalf of the Secretary of State on this issue. This is essentially for two reasons.
>
> 88. First, the Upper Tribunal reached a view which, in my judgement, is inconsistent with the decision of this Court in ZT (Syria). It seems to have regarded article 8 and its procedural requirements as essentially inter-changeable with the procedural requirements of Dublin III and/or the common law. However, as this court made clear in ZT (Syria), article 8 will only have a role to play in very exceptional circumstances. In particular it must be shown that the French legal system had systemic deficiencies in it, which rendered it incapable of providing an effective remedy to the respondent children: see ZT (Syria) at [95] (Beatson LJ); and also the judgments of this court in [RSM (Eritrea)] at [132]-[144] (Arden LJ) and [173]-[175] (Singh LJ).
>
> 89. Secondly, I agree with the Secretary of State that the Upper Tribunal gave insufficient recognition to the importance of the fact that the children concerned were under the jurisdiction of the French care system."

24. Singh LJ concluded (at [93]):

> "For the reasons I have given, I would accept the submissions made on behalf of the Secretary of State that… article 8 of the ECHR has no applicability in these cases".

The Individual Facts

25. The Respondent is an Eritrean national, born on 10 August 1999. His brother, YH, is also an Eritrean national and about ten years older than he. They are both Pentecostal Christians.

26. Fearing religious persecution and conscription into the Eritrean army, YH left Eritrea in 2014 with the assistance of a paid agent, travelling through Libya, Italy and France to the UK, his intended destination. He arrived in the UK, concealed in a lorry, on 19 August 2015. He claimed asylum the following day. When asked why he did not apply for asylum in France, where he spent two months, YH said:

> "An agent told me that they do not give asylum here. They will only register you and they will not give you any support. Besides he said that this is not a place where we agree to take you."

YH was granted refugee status on 21 November 2016, and now lives in the North of England.

27. In 2015, with the same fears as his brother, the Respondent also fled Eritrea, with a view to joining his brother in the UK. He travelled through Sudan, Libya and Italy, before getting a train to Calais where he arrived in July 2016, aged 17. He took shelter in the Calais camp.

28. He was a minor; but was not reached in phase one of the expedited process in October 2016. After the closure of the camp, he was transferred to the Le Havre CAOMI where, in November 2016 (the month when YH was granted a UK residence permit as a refugee), he was interviewed by the UK authorities by telephone without an interpreter as part of the second phase. His claim that YH was his brother was not believed because of inconsistencies between their accounts, the Secretary of State's records stating:

> "Inconsistencies with the grandmother's full name and maternal and paternal grandparent's death. He was unable to recall his brother's date of birth and he thinks he was born in 1999. Whilst the age was being disputed on the S67 form, no BP7 has been completed."

There was, in the event, never any material dispute about the Respondent's age. On the 14 December 2016 spreadsheet, the reason for the refusal was given as "Family link not accepted". The Respondent was told of that decision shortly afterwards. He was given no reasons.

29. On 30 December 2016, he was taken to the Le Havre District Court where it was accepted that he was a minor. A protection order was made entrusting his care to Seine Maritime Child and Youth Social Care Services. Shortly afterwards, it seems that he was interviewed at some other court or public office, where he was asked questions about his age and family, and he explained that his brother was in the UK and wanted to live with him. He explained that he was afraid of the Eritrean Government because of his religion and fear of being conscripted. He was asked whether he wished to claim asylum in France, and he answered "No". In his statement dated 5 February 2018 in support of his claim for judicial review, he explained:

> "Many people warned me not to give my fingerprints, I was told that if I gave my fingerprints, later if I managed to get to the UK the UK would use my fingerprints to send me back to France." (paragraph 11).

> "I was asked [at the December 2016 interview] whether I wanted to claim asylum in France, to which I answered no. I wanted to join my brother [YJ] in the UK and I understood that if I claimed asylum in France, I would have to remain in France and have my case considered by the French government whereas I understood that the process with the Home Office while I was in the children's centre was how I could join my brother [YH] in the UK. As explained above, people had warned me repeatedly not to apply for asylum in France or have my fingerprints taken there, as this would mean that I would not be allowed to join my brother in the UK." (paragraph 21(2)).

He was told that he would hear back within the next three months, and in the meantime he could stay at the CAOMI.

30. On 28 February 2017, the French authorities sent the Secretary of State a spreadsheet with the names of UASCs whose applications under the expedited process should be reviewed, including the Respondent; and, on 8 March 2017, that was returned by the

Secretary of State with an indication that the Appellant's claim could be progressed "if contact details for [the Respondent] were located". The French authorities appear to have taken no action on that note.

31. On 16 April 2017, believing that he was not going to be transferred to the UK, the Respondent left the Le Havre CAOMI and lived rough, first in Paris and then back in Northern France. He unsuccessfully tried to cross the Channel.

32. On 10 August 2017, the Respondent had his 18th birthday. The following day he was referred by the Refugee Youth Service to Safe Passage, a non-governmental organisation established to assist UASCs and vulnerable adults. Through their assistance, later that month he was placed in the adult *Centre d'accueil et d'examen des situations* (Evaluation and Welfare Centre) ("CEAS") at Belval, and obtained pro bono legal assistance from English lawyers. This was the first legal assistance he received.

33. On 24 January 2018, he obtained a full legal aid certificate. This claim for judicial review was lodged on 16 February 2018, i.e. after the first instance judgments in the AM cases (12-31 May 2017) and in Citizens UK (18 September 2017), but before the judgment of this court in those cases (31 July 2018). Given that timing, and the fact that the circumstances of the Respondent were similar to those of the AM claimants and the legal team being the same, understandably the form of the claim was similar to those in AM. In particular, it was submitted that:

    i) The Respondent's ability to make an asylum claim in France was not an effective route to secure his rights under article 8 of the ECHR (or, as he was now an adult, article 8 of Dublin III) (paragraphs 4.5 and 5.4.9).

    ii) The "very exceptional circumstances" threshold in ZT (Syria) did not apply to his case (paragraph 5.4.10).

    iii) Alternatively, if it did apply, then that threshold was met as a result of the factors set out at paragraph 5.4 of the claim, notably (a) he had been a child when the decision under the expedited process was made (so that article 8 of Dublin III applied), but he was now an adult (so that, under Dublin III, only the discretionary criteria of article 17 applied) (paragraph 5.4.4); and (b) he had had particularly traumatic experiences as a child whilst travelling from Eritrea to France, including being physically abused and exploited as forced labour in Libya for several months, and so had an urgent need for physical and psychological recovery and social integration (paragraph 5.4.6).

    In addition to declaratory relief, just as the AM claimants sought mandatory relief requiring the Secretary of State to make all necessary and immediate arrangements for the transfer of their transfer to the UK, the Respondent sought a mandatory order requiring the Secretary of State to accept him for transfer to the UK (paragraph 7.1(2)); but, unlike the AM claimants, the Respondent also claimed damages for the alleged breach of article 8.

34. In March 2018, the Respondent's solicitors wrote direct to the French authorities with documents gathered in the course of preparing the proceedings in support of the asserted relationship between the Appellant and YH. The Respondent was told that, to pursue his request to be united with his brother, he needed to make an application for asylum

in France; but he declined to make an appointment with the French authorities in relation to making such a claim. On 4 May 2018, in response to an enquiry from the Secretary of State, the French authorities confirmed that, if the Respondent made an asylum application, they would make a take charge request on the UK under article 17 of Dublin III. Following further correspondence in which the Secretary of State accepted the relationship and confirmed that he would accept any take charge request made, on 31 May 2018 the Respondent made an asylum claim in France and, the following day, the French authorities made a take charge request which was accepted by the Secretary of State the next day. The Respondent was transferred to the UK on 27 July 2018. His asylum claim was duly considered, and allowed: he was granted a UK resident permit as a refugee on 26 April 2019.

35. Meanwhile, in a determination promulgated on 12 June 2018 – still prior to the judgments of this court in Citizens UK and AM – the Upper Tribunal (Upper Tribunal Judge Allen, who was part of the constitution of the tribunal in AM, and Upper Tribunal Judge Finch) held that, in the Respondent's case, the defects in the expedited process rendered the process unlawful as being (i) in breach of the procedural guarantees in Dublin III, (ii) in breach of the common law requirements of fairness and (iii) in breach of the procedural requirements of article 8 of the ECHR. In relation to article 8, it specifically held:

i) Although not accepted in the expedited process, by the time of the tribunal hearing the Secretary of State had accepted that YH was the Respondent's brother, and the Respondent had remained in touch with him and wished to be united with him. Family life therefore existed for the purposes of article 8, i.e. article 8 was engaged (see [114]-[115]).

ii) Where a Member State makes a decision which engages article 8, it is well-established that article 8 imposes a positive obligation on the state to involve any child and his or her family affected by the decision to a degree sufficient to provide them with requisite protection of their article 8 interests. A failure to ensure such engagement may give rise to an infringement of article 8 which, subject to the state showing that the infringement is proportionate, may amount to a breach of that article (see [118], relying on the Upper Tribunal determination in AM at [59]-[60]).

iii) ZT (Syria) is distinguishable because, unlike the claimants in that case, by taking part in the expedited process, the Respondent was not seeking to "bypass" Dublin III. At the time, the Secretary of State considered the expedited process to be a Dublin III procedure; and, during the expedited process, it was in any event reasonable for the Respondent to believe that he was being assessed for transfer to the UK under Dublin III (see [121]-[122]). Beatson LJ in ZT (Syria) at [95] emphasised that the consideration of article 8 claims of UASCs who had been in the Calais camp were "intensely fact-specific"; and the Respondent's case had "its own very peculiar facts" (see [123]).

iv) As a consequence of the article 8 procedural breach, the Respondent had been wrongfully deprived of the opportunity to be with his brother in the UK from 30 November 2016 until their eventual uniting on 27 July 2018 (see [124]).

36. The tribunal consequently quashed the Secretary of State's decisions to refuse the Respondent's transfer under the expedited process, and her decision on review not to accept that YH was the Respondent's brother; and made a declaration (at paragraph (3) of the Order) that:

> "… these decisions, and the [Secretary of State's] continuing refusal to admit the [Respondent] to the UK were and are unlawful being in breach of natural justice, the common law standards of procedural fairness and the procedural dimensions of article 8 [ECR]".

No order for mandatory order was required because, as we have described, the Secretary of State had already accepted a take charge request on 2 June 2018, prior to the delivery of the tribunal's judgment (see paragraph 34 above).

37. Following further written submissions, on 20 November 2018 (after the judgment of this court in AM), the tribunal concluded that damages in the sum of £12,000 would be a just and appropriate award for the breach of article 8.

The Appeal: The Parties' Submissions

38. The Secretary of State appeals on one, narrow ground, namely:

> "The tribunal's declaration in respect of article 8 ECHR was inconsistent with the judgement of this court in [AM] wherein it was held that article 8 had 'no applicability' in this context".

The reference to article 8 having "no applicability" is of course to Singh LJ's conclusion in [93] of AM, quoted above (paragraph 24).

39. The submissions of the parties were far-ranging; but, as we understand them, on the issue raised in the ground of appeal, they were essentially as follows.

40. Mr Kellar, for the Secretary of State, accepted that the factual circumstances of this case – a minor in France who wished to be reunited with a close relative in the UK – engaged article 8 of the ECHR. In our view, that concession was properly made. He submitted, however, that the circumstances did not give rise to any breach of article 8.

41. He submitted that the Upper Tribunal erred in failing to draw the analytical distinction, made by Singh LJ in AM at [88] (quoted at paragraph 23 above), between a breach of the common law duty of fairness (which focuses on the right to fair procedure) and a breach of article 8 (which focuses the substantive rights in the ECHR, although a breach of those rights can be effected by a failure to adopt a fair procedure: see, e.g., TP and KM v United Kingdom (ECtHR Application No 28945/95) (2002) 34 EHRR 2 at [83]; and P, C and S v United Kingdom (ECtHR Application No 56547/00) (2002) 35 EHRR 31 at [136]-[137]).

42. In respect of the article 8 rights of UASCs in France with close relatives in the UK, the principle derived from ZT (Syria) is that the availability of the Dublin III process (taken with the supportive judicial process) in France sufficiently respects that child's right to family life, so long as the process is effective. Whilst the application of article 8 is quintessentially fact-sensitive, generally, the Dublin III process and procedures strike a

proper and proportionate balance between the public interest in having a coherent international immigration system and the private rights and interests of asylum seekers including their rights under article 8. It is in only very exceptional (i.e. very rare) circumstances that that process will not be effective; but it may be shown, for example, that the process in France does not work quickly enough to ensure that the article 8 rights of the child are sufficiently respected and protected. It is only when the Dublin III process is inadequate in such a way that the UASC in France can properly have recourse to the UK authorities or courts.

43. The fact that in ZT (Syria) the claimants sought to "bypass" Dublin III by making a direct application to the Secretary of State, and in this case the Respondent engaged in the Secretary of State's own expedited process, is not to the point. As found by this court in Citizens UK at [50], at all material times – before, during or after the expedited process – it was open to a UASC such as the Respondent in France to have made an application for asylum in France, which would have triggered the whole Dublin III machinery, including that in respect of transfer under article 8 (or, as an adult, article 17).

44. Until he was 18, the Respondent was in the care of the French authorities, who had an obligation to him under article 8 of the ECHR. As noted in ZT (Syria) at [45] and in the Upper Tribunal judgment in this case at [70], although there is no evidence of steps taken by (or advice given to) them, it was open to those authorities to apply for asylum in France on behalf of the Respondent as a minor asylum-applicant with the permission of the court or through the appointment of a guardian/legal representative. No doubt in not making such an application in this case, those authorities took into account that, even after the expedited process, the Respondent had an implacable wish that an asylum application not be made, because of subjective concerns engendered by people telling him that such an application "would mean that he would not be allowed to join his brother in the UK" (see paragraph 29 above).

45. Although the Upper Tribunal found that "the adverse findings made against [the Respondent] in the expedited process were likely to have prejudiced [a formal application under Dublin III]" (see [68]), Mr Kellar did not accept that procedural defects in the expedited process would have fatally "infected" the Secretary of State's response to any later request to take charge under Dublin III. He submitted that, even if they had (with the result that any transfer request made by France to the Secretary of State under Dublin III was bound to be refused), that did not undermine the adequacy or effectiveness of the available Dublin III process in terms of the protection of the Respondent's article 8 rights. If the Secretary of State had wrongly refused a take charge request, then that could have been the subject of a legal challenge. In a case such as the Respondent's, Dublin III as supported by the judicial system was effective to ensure that his article 8 rights were properly respected, save in very exceptional circumstances.

46. Mr Kellar submitted that that analysis, applying ZT (Syria) in a case which has been considered and refused under the expedited process, is clearly correct; but, in any event, in AM, ZT (Syria) was applied by this court in circumstances legally and factually indistinguishable from those in the Respondent's case. On this issue, AM is binding on this court. Hence, the narrow ground of appeal employed.

47. Finally, he submitted that the facts of the Respondent's case were materially indistinguishable from the facts of the AM cases, so that it could not be said that, if the very exceptional circumstances test applied, it was met in this case.

48. Ms Kilroy, for the Respondent, submitted that the Respondent's case is distinguishable from ZT (Syria), as the Upper Tribunal distinguished it, on the basis that in that case the claimants sought to bypass the procedures in place (i.e. those under Dublin III); whereas in this case, far from bypassing the relevant procedures, the Respondent positively engaged in the procedure made available by the Secretary of State (i.e. the expedited process). Although the expedited process was designed to bypass some elements of the Dublin III process such as the making of an application for asylum prior to consideration of transfer, it was the Secretary of State, not the Respondent, who sought that bypassing. The delay in the Respondent being reunited with his brother resulted from decisions taken by the Secretary of State, not the French authorities. No French decision or action was in issue. In the usual way, the Secretary of State must bear responsibility for her own decisions made here, and challenged here. Therefore, the very exceptional circumstances test in ZT (Syria), which was focused on possible deficiencies in French authorities and/or courts, had no part to play.

49. Ms Kilroy frankly accepted that distinguishing this case from AM was more challenging, but she sought to do so on essentially two grounds.

50. First, the focus of the AM claims was the admission of the claimants to the UK for the purposes of making an asylum application here: a mandatory order for their transfer was sought, and the Court of Appeal held that such an order was not appropriate. In this case, the Upper Tribunal did not grant such a mandatory order, but merely a declaration that there had been a breach of article 8, such that the Respondent had suffered a loss of opportunity to be admitted to the UK and reunited with his brother, through the lawful implementation of the expedited process, much earlier than he was.

51. Second, Ms Kilroy referred to the authorities which emphasise that consideration of article 8 in cases of this sort are particularly fact-sensitive; and she submitted that this case is materially different and distinguishable from AM on its facts.

    i) In her written submissions, she relied mainly upon the particular vulnerability of the Respondent, resulting from the hazards of his journey from Eritrea to France.

    ii) In her oral submissions, Ms Kilroy focused on two other aspects. First, the claimants in AM obtained legal advice during the filter process and thus obtained admission to the UK in 2017. That was a year earlier than the Respondent who did not have any legal advice until well after the filter process had been completed and not until he was an adult when, for the purposes of seeking a transfer to the UK, he could only rely on the discretionary article 17 as opposed to article 8 of Dublin III.

    iii) Finally, prejudice to the specific claimants as a result of the procedural failings in the expedited process was not found (nor even relied upon) in the AM cases, whereas in this case the Upper Tribunal made firm findings of the prejudice suffered by the Respondent as a result of the Secretary of State's failings. In particular, the tribunal found that the adverse findings made against the

Respondent in the expedited process would likely have prejudiced any later Dublin III application and would likely have resulted in a refusal of a take charge request even if made under article 8 of Dublin III whilst he was still a child; so that (the tribunal said) "the fact that the [Respondent] had not made a formal application for asylum was not a factor which can be held against him when considering the procedural fairness of the expedited and/or filtration process" (see [68]-[69]). The deficiencies in the expedited process had consequently fatally "infected" the Dublin III processes that would have been engaged if the Respondent had made a later asylum claim in France. Therefore, Ms Kilroy submitted, even if (contrary to her primary submission) the very exceptional circumstances test applied in this case, the Respondent satisfied it on the (unchallenged) facts of this case as found by the tribunal.

Discussion

52. There is one, narrow ground of appeal, namely that the Upper Tribunal's finding that article 8 was breached was inconsistent with AM, which is binding on this court and materially indistinguishable from this case.

53. In AM and in this case, it was common ground that, where a UASC in one country wishes to be transferred to another country to be reunited with a sibling, article 8 is engaged. In our view, that is clearly right. The crucial issue for us is whether article 8 was infringed; and particularly, given the discrete ground of appeal, whether AM is authority, binding on the facts of this case, that it was not infringed.

54. As we have described (see paragraph 20 above), the claim in AM was directed towards obtaining a mandatory order requiring the Secretary of State to make arrangements to transfer the individual claimants from France to the UK so that their asylum claims could be lodged and determined here. No claim for damages was made. It is therefore understandable that the judgment of this court in that appeal was not especially focused on article 8.

55. It seems clear to us, however, from [88] of Singh LJ's judgment read in the context of the arguments he earlier set out, that, even though the expedited process operated outside Dublin III, AM held that the Secretary of State's obligations under article 8 to a UASC in France were limited to the very exceptional circumstances as described in ZT (Syria), even where that child had been the subject of the expedited process. That is because, where the Dublin III procedure (including the enforcement procedures available through the French judicial system) was available to such a UASC, that would usually have provided sufficient protection for his or her article 8 rights by (amongst other things) providing an effective remedy. The Secretary of State's independent obligations under article 8 would only have arisen if, for some reason, it could be shown that there was a deficiency in the system which meant that the UASC was denied such a remedy by that route.

56. That being part of the ratio of AM, it is of course binding on us. The issue for us to determine is, therefore, whether this case is materially distinguishable.

57. Ms Kilroy submitted that it is distinguishable, on four grounds, set out in paragraphs 50-51 above.

58. First, she submitted that there was a difference in the relief granted. In AM, in addition to declarations, the tribunal made a mandatory order requiring the Secretary of State to make urgent arrangements for the transfer of each child to the UK. As we have indicated, that relief was the focus of the claim and the appeal. In the Respondent's case, the tribunal made no such order, merely granting appropriate declarations and later awarding damages for the breach of article 8.

59. We do not consider the order made to be a material distinction between the cases, because we do not see how the issue of actual or potential relief can sensibly bear upon the necessarily prior question of whether there was a breach of article 8. We also note that, like the claimants in AM, the Respondent in this case did claim an order seeking mandatory relief – that was understandable in the light of the tribunal determination in AM which this case closely followed in form. That relief was not required in this case only because, as we have described, by the time of the tribunal determination, the Secretary of State had already agreed to a take charge request in respect of the Respondent (see paragraph 34 above); and so mandatory relief in respect of transfer was not required.

60. Second, although not expanded orally, in her written submissions Ms Kilroy submitted that the Respondent was particularly vulnerable as a result of the adverse impact of his journey to France. As we understood the submissions, however, it was not contended that the Respondent's undoubted physical and mental suffering was materially greater than the claimants in AM. Insofar as that suggestion was made, we would reject it. By way of example, in the particular case of AM himself, it is clear that, as a result of the processes and delay to which he was subjected, he suffered very substantial depression and despair resulting in a dissociated state and potential risk of suicide (see [12] of the Upper Tribunal's judgment).

61. Third, Ms Kilroy submitted that there was a substantial factual difference between the cases in that, in the AM cases, the claimants were each under 18 at all material times through to their actual transfer to the UK. Further, whilst in France, they obtained advice from UK lawyers. In the Respondent's case, he did not receive any legal advice in France (e.g. on the application of Dublin III, and as to whether and when to make an asylum application in France with a view to triggering the Dublin III machinery) until he was over 18 years of age, by which time he had fallen out of the scope of article 8 of Dublin III (under which, as a child, he would have been entitled to transfer to the UK to be with his brother) and, for transfer, he could only then rely upon the general discretionary provision in article 17 (see paragraph 3 above). Ms Kilroy further submitted that the Respondent cannot be criticised for not seeking to trigger the Dublin III procedures after he had been refused under the expedited process because, at that stage, even the Secretary of State considered the expedited process to be within Dublin III. In support, she relied particularly on the Upper Tribunal's finding (at [67] of its determination) that the fact that the Secretary of State's officials themselves considered the expedited process to be a Dublin III process explained why the Respondent did not make a formal asylum application in France when he was interviewed in December 2016.

62. It is clear, however, that, the Respondent was determined that he would not make an asylum claim in France, required to trigger the Dublin III procedures; and that remained his position unless and until he had received guarantees that, if he made such a claim, the French authorities would make a take charge request to the UK which the UK would

accept. Even given the Upper Tribunal's factual finding with regard to the 30 December 2016 interview, we do not consider that there is any evidential basis for the proposition that, had he received earlier legal advice, he would have made an asylum claim in France to trigger those procedures.

63. Fourth and finally, Ms Kilroy submitted that, unlike AM, the Upper Tribunal in this case (at [68]-[69] of its determination) made firm findings in relation to prejudice suffered by the Respondent as a result of the flawed expedited process. Notably, the tribunal found that even if, as a child, he had made an application for asylum with a view to being transferred to the United Kingdom under article 8 of Dublin III, it is likely that the adverse findings made in the expedited process would have led to a refusal of transfer.

64. The court in AM, however, had this risk of "cross-infection" well in mind. In Citizens UK, a submission on behalf of the Secretary of State that a Dublin III process could be considered in isolation from a prior (defective) expedited process was rejected by the court, because the Secretary of State did in fact later take into account what had happened in the expedited process (e.g. when her officials were considering the review or "filter" stage). Further, Singh LJ (at [98]) accepted that:

> " …. there will at least in principle have been children who gave up and never made a formal application under Dublin III precisely because they had been given an adverse decision as a result of the expedited process."

65. Whilst these findings were made in the context of the issue of whether common law fairness was required at all in the expedited process, they are material when considering the ambit of AM as a precedent because, as Singh LJ said at [2] of his judgment in AM, the issues in the two cases considerably overlapped and the judgments in both cases (handed down on the same day) were to be read together. Read with Citizens UK, AM held that, even where a UASC had been rejected in the (defective) expedited process, there would be no breach of article 8 if, as a result of believing that the negative findings of the expedited process were either a Dublin III decision or would prejudice a later Dublin III process, the child did not make (or delayed in making) an asylum claim in France. In coming to that conclusion, Singh LJ took into account that fact that the UASCs in France would have been in the care of the French authorities, which would themselves have had an article 8 obligation towards them which would have included an obligation to make an asylum application in France (including, if necessary, an application for transfer to the UK) on their behalf in appropriate circumstances; and the obligation to give proper legal and linguistic assistance required by Dublin III.

66. In our view, this case indistinguishably falls within the proposition established by AM, which is binding upon us.

Conclusion

67. For those reasons, we do not consider that AM is distinguishable from this case; and we are bound to conclude that the Upper Tribunal erred in finding a breach of article 8. On the basis of that authority, as a result of the procedural deficiencies in the expedited process, although the Secretary of State breached her common law obligations of procedural fairness, she did not breach article 8.

68. We consequently allow the appeal. Subject to any further submissions on the precise terms of the order, we will:

i) amend paragraph (3) of the Upper Tribunal's order of 12 June 2018, to restrict the declaration made (set out at paragraph 36 above), as follows:

> "A declaration that these decisions were unlawful as being in breach of the Secretary of State's duty of procedural fairness at common law"; and

ii) quash the order of 20 November 2018 that the Secretary of State pay the Respondent damages, which was dependent upon the finding that she had been in breach of article 8.