Upper Tribunal

Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of ZAT, IAJ, KAM, AAM, MAT, MAJ and LAM

Applicants

v

Secretary of State for the Home Department

Respondent

Before The President, the Honourable Mr Justice McCloskey

and the Vice President, CMG Ockelton

Having considered all documents lodged and having heard Mr M Fordham QC, Ms C Kilroy, Ms A Pickup, Ms M Knorr and Ms J Sane, all of counsel, on behalf of the Applicants, instructed by the Migrants' Law Project of Islington Law Centre and Bhatt Murphy Solicitors, respectively and Mr D Mankell and Mr T Sadiq, of counsel, on behalf of the Respondent, at a hearing at Field House, London on 18 and 20 January 2016

Decision: Permission to apply for judicial review is granted, the substantive application succeeds and the Applicants are granted a mandatory order in the terms appended to this judgment.

McCLOSKEY J

Anonymity

(1) All of the Applicants are granted anonymity on account of their ages and vulnerabilities. The effect of this discrete order is that any communication or publication which either

identifies any of the Applicants or could have this effect is prohibited.

Introduction

(2) This application for judicial review raises issues of the keenest difficulty for the determination of individual rights against the background of the rule of law and for the exercise of a jurisdiction that is at the same time humanitarian and alive to the national and international regulatory context. The first four Applicants are in France. They are at a makeshift camp the features of which we describe in the next few paragraphs. It is said that they wish to claim the status of refugee under the United Nations Convention Relating to the Status of Refugees. The other three Applicants are in the United Kingdom. They have been recognised as refugees under the Convention. It is claimed that each is a sibling of one or two of the first four Applicants. All of the Applicants seek an order that will enable them to be together in the United Kingdom, in various combinations, while refugee claims by the first four Applicants are determined.

(3) The spotlight in these proceedings is on an area just across the English Channel from Dover. It has become known colloquially as "the jungle". This is a bleak and desolate place adjacent to Calais on the coast of northern France. It attracts this appellation not without good reason. Unlike other jungles, this place is inhabited by human beings, not animals.

(4) "The jungle" did not materialise overnight. Its development has, rather, been an organic process. The eyes of Europe, with a mixture of shock and revulsion, have been fixed firmly on this location during most of the past year. The description of the jungle in some parts of the evidence as a camp, or settlement, is misleading. It is more accurately described in the uncompromising language of the substantial number of organisations and individuals who have shown an interest and have attempted to provide some alleviation for the occupants.

(5) The evidence adduced in these proceedings regarding "the jungle" speaks unremittingly with a single voice. It is unnecessary to reproduce it *in extenso*. One example will suffice. In early January 2016 a concerned English public representative stated:

> "*I have just returned from the camps in Calais and Dunkirk where thousands of migrants have temporary homes. The conditions are so bad that describing them ….. cannot capture the squalor. You have to smell conditions like these and feel the squelch of mud mixed with urine and much else through your boots to appreciate the horror.*"

Descriptions such as "a living hell" abound. The evidence includes graphic photographs which speak for themselves. Elaboration is unnecessary. It is estimated that "the jungle" has some 6,000 occupants at present. In summary, the conditions prevailing in this desolate part of the earth are about as deplorable as any citizen of the developed nations could imagine.

(6) It seems likely that there is no real basis for many of its occupants remaining indefinitely in "the jungle" and enduring the conditions that obtain there. Many are probably not refugees in any general sense or in any sense entitled to recognition. Rather, they are migrant nationals of a number of countries outside the European Union, who, while intending to make a claim for refugee status, decline to make the claim in France due to perceived advantages, correct or otherwise, of doing so in the United Kingdom. Like the United Kingdom and other member states of the European Union, France has obligations to asylum claimants and because of the United Kingdom's 'opt out' of recent relevant EU legislation, the duties owed by France are in many respects more onerous than those applying in the United Kingdom. In general terms there is no basis at all for thinking that a person who claims asylum in France will not be treated properly and will not have the benefit of the reception and other facilities which those duties entail. The first four Applicants, however, are in a special, indeed unique, situation because of their ages, their vulnerability, their psychologically traumatised condition, the acute and ever present dangers to which they are exposed in "the jungle", the mental disability of the fourth Applicant, the (claimed) relationships linking all seven Applicants, the particular relationship between the third and the fourth Applicants and the firm likelihood that the outcome of asylum applications made by the first four Applicants in France would be a "take charge" acceptance by the United Kingdom.

The Judicial Review Challenge

(7) This is a so-called "rolled up" application for permission to apply for judicial review. The Respondent is the Secretary of State for the Home Department (the "*Secretary of State*"). The thrust of the Applicants' case is that the refusal of the Secretary of State to admit the first four Applicants to the United Kingdom forthwith is unlawful. The relief sought consists of mandatory and declaratory orders. Expedition was granted and an *inter partes* hearing followed.

General

(8) We observe at the outset that in the Secretary of State's pleading, there are no denials of the various assertions made on behalf of the Applicants. It is, however, formally pleaded that the assertions relating to the ages of the first four Applicants, the mental health condition of the fourth Applicants, the asserted relationship of dependency between the third and fourth Applicants, the sibling relationship of the first four Applicants with the final three Applicants, the historical sufferings of the first four Applicants, the conditions in which they have been residing recently, their attempts to reach the United Kingdom and their treatment by the French authorities are not admitted. Having acknowledged this, we summarise the factual matrix on which the Applicants advance their case in the following terms.

(9) While mindful that judicial review proceedings do not provide a paradigm fact finding forum, we are conscious that the onus rests on the Applicants to make good their key assertions to our satisfaction, that is to say on the balance of probabilities. We have considered all of the evidence presented through this prism. We have also taken into account that, given the speed at which this litigation has progressed, it has not been realistically possible for the Secretary of State to investigate fully the evidence upon which the Applicants

rely and/or to present contrary evidence. This is a factor which we weigh in our consideration of whether the main factual elements of the Applicants' challenges have been established to the necessary standard. Bearing in mind, *inter alia*, that this judgment is urgently required, we consider it inappropriate to attempt a comprehensive resume of the evidence. We have considered all of the evidence with care, paying particular attention to its most significant and salient aspects.

(10) Another intrinsic feature of judicial review litigation is that it is not ideally suited to the exercise of resolving disputed factual issues. This is one of the reasons for the imposition on applicants (or claimants) of a burden of proof which entails establishing material facts to the standard of the balance of probabilities. These proceedings have generated a substantial quantity of evidence. The contributors include some of the Applicants, their legal representatives, lawyers practising in France, representatives of humanitarian organisations and others. This evidence has been provided mainly in the form of detailed witness statements and reports. It is of notable pedigree and consistently satisfies the requirements of reliability and objectivity. We have evaluated all of this evidence with care and have conducted the penetrating analysis required by the principle of heightened scrutiny. Having done so, we are satisfied that the core elements of the Applicants' cases are established. We shall elaborate on this assessment *infra.*

(11) This assessment does not preclude the possibility that relevant decision making authorities, whether in the United Kingdom or France, may form a different view on certain factual issues. We acknowledge that those authorities are the primary fact finding agencies. The judgment of this Tribunal does not usurp their functions or responsibilities. The intervention of this Tribunal occurs at a particular moment in time when the Applicants have exercised their constitutional entitlement to seek judicial adjudication of the rights which they assert and the corresponding duties to which they contend the United Kingdom Government is subject. The agencies charged with the legal responsibility of making decisions post dating this judgment will all be bound by the well established public law constraints of fair and independent decision making, the avoidance of irrationality, a procedurally fair decision making process and the duties to take into account everything material while disregarding all that is immaterial. To this inexhaustive list one adds the specific duties imposed by the relevant measures of EU legislation. It is scarcely necessary to add that this Tribunal is not concerned with possible legal challenges to future decisions.

(12) Our evaluation of the totality of the evidence has one further dimension. We consider it highly probable that if the first four Applicants had pursued asylum claims under the Regulation No 604/2013/EU ("the Dublin Regulation") in France, they would have established an entitlement to a "take charge" request by the French authorities, directed to the United Kingdom and a consequential transfer to England. This is one of the issues which we shall address *infra* in our consideration of what has emerged as the critical issue in these challenges, namely the proportionality of the impugned decisions of the Secretary of State.

Factual Matrix

(13) From the submissions on behalf of the parties and the substantial evidence provided we have identified four main factual issues. The first of these is the conditions prevailing in "the jungle". The second concerns the Applicants: who they are, their background and histories, their mental states and fears, their sibling relationships and the prospects of the first four Applicants reunifying with their respective siblings among the other Applicants if entry to the United Kingdom can be achieved. The third main issue concerns the laws, practices and arrangements prevailing in France regarding the formulation, processing and determination of applications for asylum. The fourth, which is related to the third, concerns the prevailing conditions in France for the reception and treatment of asylum applicants.

(14) "The jungle" consists of some 18 hectares of uneven, sandy heathland on a former landfill site some four kilometres to the east of Calais. Its occupants have gradually swollen to around 6,000. In July 2015 it was recorded that up to 3,000 people lacked electricity, lighting, sanitary facilities and water supply. It was littered with waste and excrement. The occupants had installed a variety of dangerous and insalubrious temporary shelters, consisting mainly of tarpaulins and precarious shacks. True it is that during the months which followed, some slight improvements were effected, probably due in large measure to an order dated 02 November 2015 made by the Tribunal Adminstratif de Lille.

(15) In its judgment the Court noted the following:

> "….. *As a result of manifestly inadequate access to water and toilets and the lack of refuse collection operations, the population at the camp are living in conditions which do not meet their basic needs in terms of hygiene and access to drinking water and which expose them to health risks;* ***As a result, there is a serious and manifestly unlawful breach of their right not to be subjected to inhuman and degrading treatment****. ….*"
>
> [Emphasis added.]

The Court made a mandatory order. This obliged the Prefet of Pas-de-Calais to take certain specified measures, to be commenced within eight days: the provision of water access points; the installation of 50 toilets; the introduction of a refuse collection operation; the cleaning of the site; and the creation of internal access routes to facilitate the emergency services. Notably, this order also specifically required the Prefet to –

> "*…. within 48 hours of services …. begin carrying out a census of unaccompanied minors in situations of distress and to liaise with the …. Regional authority in relation to their care ….*"

The order was also addressed to the Minister of the Interior and the Minister of Social Affairs, Health and Women's Rights.

(16) One of the lessons of history is that the desperate plight of human beings can bring out the best in mankind. This is true of "the jungle". A striking theme of the evidence is the charity, solidarity and near heroism which the plight of the occupants of this site has stimulated. Volunteers of all kinds – doctors, social workers, lawyers and others – feature prominently in the evidence. The most recent evidence includes a statement of one of these exemplary persons. This makes clear that while the measures taken pursuant to the Lille Court order effected some improvement, this has been offset by the growing number of camp occupants. The appalling and highly dangerous living conditions continue. The dangers include trafficking, violence, exploitation of unaccompanied children and the abuse, including rape, of women. Other sources of danger to human health include toxic white asbestos giving rise to the risk of carcinogenic disease. The volunteer in question summarises, with commendable understatement:

> "*In summary, the claimants are residing in conditions which are physically harmful and wholly unsuitable for any human being but particularly harmful for children and other vulnerable people ….*
>
> *The claimants do not have adequate access to the basic necessities of life to ensure that they are able to live with dignity. Instead they live under constant threat of violence from camp residents and the French authorities.*"

[The*" claimants*" are the first four Applicants.]

(17) Switching our focus to the seven Applicants, all of them claim to be Syrian nationals. The three are unaccompanied minors, each aged 16 years when these proceedings were commenced. The fourth is aged 26, suffers from a serious mental illness, claims to be the brother of the third Applicant and is looked after by the latter. The first four Applicants have all fled the war in Syria, claiming to have suffered extreme trauma there. They have travelled from Syria to the northern port of Calais in France. They have been living, with some 6,000 others, in "the Jungle". Applicants (5) – (7) claim to be related to Applicants (1) – (4) in various permutations. They too are Syrian nationals and have been granted the status of refugees in the United Kingdom. The first four Applicants previously enjoyed family life with the second three in Syria, in differing combinations, and all seven crave reunification in the United Kingdom. Swift reunification is the central aim and object of these proceedings.

(18) There are psychiatric reports to the effect that the first three Applicants are suffering from recognised stress disorders. In the case of the fourth Applicant, a psychiatric disorder and post-traumatic stress disorder have been diagnosed. Further psychiatric and neurological assessments are advised and this Applicant is described as completely dependent on his younger brother, the third Applicant.

(19) Another of the central themes of the evidence is that of the fears and apprehensions of the first four Applicants. These are linked in no small measure to the treatment they claim to have suffered in their country of origin, their age, the absence of parental or other adult support in their lives, the circumstances in which they have been surviving since departing their home country and their respective psychological conditions. The lawyers' witness statements make clear that by reason of this constellation of factors communications with and taking instructions from the first four Applicants have been consistently difficult exercises. The lawyers describe in persuasive and measured terms these Applicants' fears and mistrust of the French authorities. From these sources of evidence one also learns of the first four Applicants' desperation to be reunited with their refugee siblings in the United Kingdom.

(20) The third of the main factual issues which we have identified in [11] above concerns the arrangements, practices and facilities prevailing in France for the presentation, processing and determination of asylum applications, particularly those made by unaccompanied children. On this issue, in common with the other principal issues, the Applicants' legal representatives have clearly been unstinting in their efforts to ensure that the Tribunal is equipped with relevant evidence of appropriate quality and accuracy. This particular category of evidence emanates particularly from the reports of certain agencies and organisations and practicing French lawyers.

(21) A report compiled by the Council of Europe Commissioner for Human Rights in September 2014 recorded that France was experiencing "*major difficulties in terms of the reception of asylum seekers*". This gave rise to, *inter alia*, shortcomings in the provision of accommodation and other services and facilities. Deficiencies in legal and social support for asylum applicants were also highlighted. So too was the plight of unaccompanied foreign children. These concerns were echoed by other international organisations. Similar concerns were highlighted in the Asylum Information Database ("*AIDA*") report of January 2015. This noted, *inter alia*, that eligibility to be accommodated in reception centres was dependent upon a pending asylum claim and the grant of a temporary residence permit. Insufficient and inappropriate reception conditions for unaccompanied asylum seeking children were considered to impair their effective access to the asylum procedure.

(22) In a 2012 report, certain features of the operation of the Dublin Regulation in France were highlighted. First, only a small percentage of orders for transfer to other Member States was executed. Second, unaccompanied foreign minors who lodged an asylum application in France and who fall within the responsibility of another Member State are not in practice transferred there. This report is supplemented by the detailed evidence of a practicing French lawyer. This draws attention to the unavailability of public funding for legal advice at the stage of preparing and formulating applications for asylum to the relevant local Prefecture. Some limited *pro bono* legal advice has been made available to the occupants of "the jungle", albeit with significant limitations. Unaccompanied foreign minors are not legally competent to make a claim for asylum. Such claims must be made on their behalf through a specified State funded agency, followed by the appointment of a species of administrator or representative. The process of registering a child's asylum application takes at least three months. This is followed by a decision on whether the Dublin Regulation process applies. "Take charge" requests of another Member State are unlikely to materialise until almost a year has elapsed from the beginning of the process. At this juncture it is appropriate to interpose one particular passage in the evidence of the French lawyer:

> "*In practice, it is very rare for children to make asylum claims in France. Under French law, a foreign unaccompanied minor is entitled to stay on the territory without any kind of authorisation or residence permit. As a result, child protection services/FTDA do not particularly encourage children to make applications. The view is that there is no need, because once they enter the care system, they are adequately protected until their 18th birthday in any event. Upon turning 18, those who entered the care system before their 15th birthday, receive a French residence permit and those who did not must apply for asylum.*"

We note that this accords with other evidence of French law emanating from a French government agency.

(23) One of the mechanisms of the Dublin Regulation (*infra*) is the transmission of a "take charge" request by the first decision making state, in which the asylum applicant is present, to another EU Member State. The evidence shows that in 2015 France transmitted a total of four such requests to the United Kingdom. Of these, three were rejected and the fourth was accepted, resulting in the transfer of the subject between the two States. None of these requests concerned an unaccompanied minor. While there is insufficient data in the evidence provided to enable a fuller assessment of the significance of these figures to be made they are, as a minimum, confirmation of the undisputed evidence, the source whereof is two practising French lawyers, that it is French Government policy to discourage the making of asylum claims by children on its territory. We note further the evidence that only one successful family reunion claim by a child under the Dublin Regulation, in France, is known to have occurred and there have been no such cases during the past five years. It is clear that alien children on French territory do not require by law any form of residence permit and it is government policy to tolerate them until they achieve their majority.

(24) It is not easy to reach any general relevant conclusion on this material. Clearly the attitude of the French State to unaccompanied minors is more benevolent than any Europe-wide legislation would require. The assumption that such individuals should be allowed to reside in French territory and should have the benefits of an interim right of residence until their eighteenth birthday gives more than they would obtain routinely in the United Kingdom or many other EU Member States; and the practice of not returning unaccompanied minors to other member states in which they may have made a claim in transit to France is a generous one. On the other hand, the administrative difficulties in making an asylum claim in France, of which there is much evidence, may distance children and others from the possibility of family reunion recognised in the Common European Asylum Policy (the "CEAS" - treated below). Similarly, we do not think it would be right to draw any meaningful conclusions from the statistics of "take charge" requests, to which we have alluded above and on which the Applicants placed weight. As noted in the evidence of the French lawyer set out above, an unaccompanied minor in France may well prefer to rely on the general benefits arising from his or her status. There IS no indication of what number of such requests might be expected in the context of the benefits attributable to minors under French law and practice; AND there is no basis for suggesting that the French authorities recognise or process fewer claims than might be expected.

(25) In our review of the evidential matrix we make reference, finally, to the Anglo-French accord executed at Calais on 20 August 2015. Within this instrument one finds a heavy emphasis on the primacy of security, public order, policing and breaches of the law. The analysis that these are its main themes seems uncontroversial. The plight and predicament of

the human beings involved qualifies for secondary consideration only. The document describes "*a migratory phenomenon without precedent and with a substantial humanitarian element*". In a short section dealing with the need to protect the most vulnerable and the imperative of combating human trafficking, the two Governments committed themselves to, *inter alia*, the provision of adequate information, advice and support, coupled with "protected accommodation" to assist the vulnerable in removal to places of safety and making asylum claims. The evidence, viewed as a whole, suggests that any measures of this kind implemented subsequently have been acutely inadequate.

Findings

(26) As a prerequisite to the exercise of applying the governing legal rules and principles, there must be a substratum of findings on the material issues. Recalling the framework set forth in [7] – [12] above, the central factual elements of the personal aspects and circumstances of the Applicants are the subject of clear and currently undisputed evidence. We are mindful that because of the urgency, and the manner, in which these cases have come before us, there has been little or no opportunity for the Secretary of State to investigate the claims of relationships, prior associations mental disorder and kindred issues. However, for the purposes of these proceedings we act on the positive and persuasive evidence before us while recognising that our doing so cannot be regarded as a final determination of those issues. The equation within which future decision making pertaining to the Applicants is undertaken may be infused with additional evidence not available to this Tribunal.

The Secretary of State's Stance

(27) At this juncture it is convenient to record the essence of the Secretary of State's stance. In pre-proceedings correspondence and in the formal pleading which has followed more recently, the Secretary of State has denied that she owes any present legal duty to any of the Applicants. The foundation of this denial is the procedural mechanism contained in EU Regulation No 604/2013 ("*Dublin III*") and, specifically, Articles 20(1), 21(1), 22(1) and 29(1). The Secretary of State contends that in accordance with these provisions, it is incumbent on the first four Applicants to lodge an application for international protection with the French authorities, to be followed by a "*take charge*" request made by the French Government of the United Kingdom Government, a response thereto by the latter and, ultimately (if appropriate) the transfer of these Applicants to the United Kingdom by the French authorities with a view to reunification with their siblings there, if feasible. In short, the Secretary of State has taken her stand firmly on the mechanisms and procedures of the Dublin Regulation.

The Dublin Regulation

(28) The Dublin Regulation, a measure of the European Parliament and Council, entered into operation on 01 January 2014. This instrument of EU law prescribes 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 a stateless person. "Examining" in this context, means determining.

(29) Given the context of the present challenges, the following provisions are of particular significance:

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

(b) By Article 8, the responsible Member State in the case of an unaccompanied minor is that State where a family member or a sibling of the minor is legally present, subject to the application of the best interests criterion; where it is established that a relative legally present in another Member State can take care of an unaccompanied minor, unification will be effected, subject to the best interests criterion.

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

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

(e) By Article 21(1):

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

[Emphasis added.]

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

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

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

(30) Reduced to its bare essentials, the process established by the Dublin Regulation entails an initial application by the person concerned to the competent authority of the EU Member State where that person is present, the consideration of such application and an ensuing decision. One of the central pillars of the Dublin Regulation is the discrete regime devised for allocating the responsibility among Member States for the examination of international protection applications. "Examination", in this context, denotes determining such applications on their merits. It may be preceded by an initial, more limited decision by a host Member State to transmit to a second Member State a request to "take charge" of the person applying. Where a request of this kind is made and accepted, the transfer of the applicant from the first to the second Member State should follow. In this scenario, the second Member State must "examine" and determine the merits of the protection application. The applicant has a right to challenge the first Member State's initial decision before a court or tribunal, per Article 27.

(31) Before turning to summarise the submissions of the parties' respective Counsel, which were of conspicuous ability, we observe that the common ground is not insubstantial. Subject to the issue of the Tribunal's findings which, in the event, are favourable to the Applicants – see [26] above – the common ground among the parties is that all of the Applicants are entitled, in principle, to invoke Article 8 ECHR in the circumstances prevailing; the Secretary of State's refusal to accede to the first four Applicants' requests to admit them immediately to the United Kingdom in order to achieve family reunification with the last three Applicants interferes with the right to respect for family life of all of the Applicants; a legitimate aim, namely the maintenance of effective and orderly immigration control is engaged; and the central question to be determined is whether the Secretary of State's refusal is a proportionate means of achieving this legitimate aim. In these circumstances, in their analyses of Article 8, the submissions of both counsel travelled quite directly to the proportionality exercise, which rapidly became the main battleground.

(32) One key feature of the Applicants' challenge, as noted above, is that they do not wish to pursue the Dublin Regulation procedures in France, on the basis of their assertion that, in the circumstances prevailing, these do not provide them with an adequate and efficacious

solution to their predicament. More specifically, they contend that, in their special circumstances, the Dublin Regulation fails to vindicate their rights under Article 8 ECHR. They argue in any event that they have a free standing entitlement to assert their rights under Article 8 at this stage, irrespective of the adequacy and efficacy of the operation of the Dublin Regulation in France. Mr Fordham's submissions further highlight that there is nothing in the Dublin Regulation precluding the admission of the first four Applicants to the United Kingdom at this stage. It is convenient at this juncture to quote from the Applicants' grounds:

> "*There is a complete absence of any information to indicate that the Dublin III process will work or has ever worked for unaccompanied minors or vulnerable adults in France, or consistent and reliable funded French legal representation to assist them exceptionally to make it work. There are obvious systemic deficiencies in the Dublin III process in France for unaccompanied minors. The Applicants cannot reasonably be expected to rely on the French system as a means of protecting their rights …..*
>
> *There is no evidence that vulnerable individuals are being identified and advised properly by the French authorities or the* [Secretary of State], *no evidence that any information provided to residents in the "Jungle" includes reference to rights to a lawful transfer to the UK under Dublin III and no evidence that any contact group established has sought to establish efficient procedures for family reunification under Dublin III whether for unaccompanied minors or anyone else. The* [Secretary of State] *has been asked to provide information about these matters but has failed to do so.*"

The Main Arguments

(33) The contours of the Applicants' challenge are susceptible to the following summary. First, their succinct riposte to the Secretary of State's refusal is that, in the circumstances prevailing, the Dublin Regulation procedures are quite inadequate to provide the practical, expeditious and effective protection which the first four Applicants need. Second, the Applicants contend that Article 8 ECHR gives rise to a positive obligation on the part of the United Kingdom to admit the first four Applicants to its territory and, in this context, they also pray in aid its mirror provision in the EU Charter of Fundamental Rights, Article 7. Third, it is contended that the Secretary of State's refusal to act infringes the general public law duties of reasonableness and proportionality and, further, is incompatible with the domestic "best interests" duty. Finally, the Applicants contend that the Secretary of State's refusal is in breach of her published policy. We shall examine each of these grounds seriatim.

(34) The fundamental contention advanced is that the Secretary of State is under a present legal duty to admit each of the first four Applicants to the United Kingdom. The Applicants' pleaded case, as outlined above, has four distinct elements. However, Mr Fordham QC, representing all of the Applicants, positioned the Article 8 ECHR challenge at the heart of their case. In doing so, while not expressly abandoning any of the other three grounds, he was disposed to acknowledge that if the Article 8 challenge does not succeed, realistically none of the other grounds will do so. Thus the question for this Tribunal becomes: does fulfilment of the right to respect for family life enjoyed by all seven Applicants under Article 8 ECHR oblige the Secretary of State to admit the first four Applicants to the United Kingdom now?

(35) Mr Fordham reminded us of how what he termed the "exit" human rights principle operates under the scheme of the Dublin Regulation. This is illustrated in EM (Eritrea) [2014] AC 1321. The context was a decision to remove the claimants, all third country nationals, from the United Kingdom to Italy. The Supreme Court, allowing the claimants' appeals, stated, at [58], per Lord Kerr of Tonnaghmore JSC:

> "*I consider that the Court of Appeal's conclusion that only systemic deficiencies in the listed countries asylum procedures and reception conditions will constitute a basis for resisting transfer to the listed country cannot be upheld. The critical test remains that articulated in Soering – v – United Kingdom [1989] 11 EHRR 439. The removal of a person from a Member State of the Council of Europe to another country is forbidden if it is shown that there is a real risk that the person transferred will suffer treatment contrary to Article 3 of ECHR.*"

In thus deciding, the Supreme Court acknowledged one of the essential underpinnings of the Dublin Regulation namely (per Lord Kerr) a "*presumption that members of an alliance of states such as those which compromise the European Union will comply with their international obligations*": see [40].

(36) Next, turning to the *soi-disant* "entry" human rights principle, Mr Fordham's submissions highlighted a provision of the Convention other than Article 3, namely Article 8 and a different stream of jurisprudence. Much of this is conveniently digested in the opinion of Lord Wilson JSC in R (Quila) – v – Secretary of State for the Home Department [2012] 1 AC 621, at [30] – [43].

(37) The scope for invoking Article 8 ECHR in support of the duty for which the Applicants contend is illustrated particularly by two decisions of the ECtHR. The first is Tuquabo – Tekle – v – The Netherlands [Application No 60665/00], where the applicant claimed that the Netherlands was under a positive obligation under Article 8 to admit her son, aged 13 years and with whom family life had been enjoyed previously in their country of origin, Eritrea, for the purpose of re-establishing family life with the family unit in question. The ECTHR adopted the following approach, in [42]:

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

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

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

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

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

See [52].

We note that the Court's earlier decision in Sen – v – Netherlands [2003] 36 EHRR 7 is to similar effect.

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

(39) In considering the mother's and daughter's claims under Articles 3 and 8 ECHR, the ECtHR drew on, *inter alia*, Articles 3, 10 and 22 of the United Nations Convention on the Rights of the Child. These provisions, respectively, concern the best interests of the child principle, the obligation on States to handle family reunification applications in a positive, humane and expeditious manner and the separate duty on States to provide appropriate protection and humanitarian assistance to child refugee applicants, whether alone or accompanied. The ECtHR also invoked a 2002 publication of the UN Committee on the Rights of the Child, which recommended, *inter alia*, that unaccompanied minors be informed of their rights and have access to legal representation in the asylum process. The Committee made a separate recommendation for improved co-operation and exchange of information among all relevant agencies. The Court decided the Article 8 claims of mother and daughter as follows, at [90]:

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

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

(40) The final limb of the Applicants' arguments seeks to reason by analogy by invoking the decision of the House of Lords in Chikwamba – v – Secretary of State for the Home Department [2008] UKHL 40. This decision illustrates the strong public interest underpinning the maintenance and enforcement of immigration control being outweighed by Article 8 ECHR in a context where the effect of refusing the claimant's Article 8 application was to require her to return to her country of origin, where conditions were harsh and unpalatable, simultaneously disrupting the family life which she enjoyed with her husband and baby in the United Kingdom, thereby requiring her to make a spousal entry application from overseas which appeared likely to succeed.

(41) Mr Fordham sought to draw the parallel with the Secretary of State's insistence that the first four Applicants can enter the United Kingdom via the Dublin Regulation process only, thereby subjecting them to a lengthy period of delay of uncertain proportions, continued exposure to the appalling conditions in "the jungle" in the short term, persisting mental anguish having a further detrimental impact on their already significantly damaged mental states and, throughout most of the period, being accommodated in "Reception Directive" conditions bearing no realistic comparison with the immediate family life which would be restored with their siblings if returned to the United Kingdom forthwith. Onto this is grafted the contention that the United Kingdom siblings have refugee status in this country, all have residence cards and two are in gainful employment. The final limb of this discrete submission that if the first four Applicants were compelled to remain in France and pursue Dublin Regulation applications there, they are very strong candidates for the making of a "take charge" request by France to which the United Kingdom will eventually accede.

(42) The submissions of Mr Manknell on behalf of the Secretary of State highlighted that the Applicants' presence in France is unlawful, they are not asylum claimants, they do not have the status of refugees, they have made no application for entry clearance to the United Kingdom under a combination of Article 8 ECHR and the Secretary of State's reunification policy and they have chosen not to invoke the mechanisms of the Dublin Regulation. As a result, he argued, they have excluded themselves from enjoyment of the better living conditions which would materialise were they to do so.

(43) Turning to the legal framework, Mr Manknell drew to our attention the statement of Advocate General Jaaskinen in Federal Republic of Germany – v – PUID [Case C-4/11], at [1]:

> "*The European Union has harmonised both the procedures and substantive rules of refugee law, thereby establishing a complete body of rules within the Common European Asylum System. It is founded on respect for relevant rules of international law, including the principle of Non-Refoulement. It restricts examination of an asylum application to a single Member States and provides for transfer of the asylum seeker to the Member State responsible for processing an asylum application if asylum is sought elsewhere in the European Union.*"

We interpose the observation that the "CEAS" has been one of the major policy strategies of the EU during the past two decades.

(44) Mr Manknell further directed us to the somewhat fuller statement to this effect contained in Tabrizagh – v – Secretary of State for the Home Department [2014] EWHC 1914 (Admin), at [121]. Per Laing J:

> *"There are four relevant parts of the System as it applies to the United Kingdom. They are:*
>
> *(i) Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third-country national ("the Dublin Regulation").*
>
> *(ii) Council Directive 2004/83/EC on minimum standards for the qualification and status of third-country nationals as refugees or as persons who otherwise need international protection and the content of the protection granted ("the Qualification Directive").*

> *(iii) Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers ("the Reception Directive")*
>
> *(iv) Council Directive 2005/85/EC on minimum standards on procedures in member states for granting and withdrawing refugee status ("the Procedures Directive").”*

Her Ladyship continues, at [123]:

> *“The System (in its earlier form and as recast) makes detailed provision designed to ensure, throughout the European Union, basic common standards in every aspect of the treatment of asylum claimants. A primary aim (evident from the recitals to the relevant instruments) is to reduce secondary movements caused by disparities in the standards applied by different member states. The Dublin Regulation seeks to achieve this aim by ensuring that, in general, there is only one member state which can be responsible for deciding an application for asylum made by someone who is present in the territory of a member state, but has in the past been present in the territory of another.”*

Laing J’s further observation of note, at [124], is that one finds within these four measures of EU law the detailed outworkings at institutional level of the right to asylum guaranteed by Article 18 of the Charter of Fundamental Rights of the European Union

(45) Mr Manknell also reminded us of the terms in which the Court of Justice of the European Union (“CJEU”) has explained the rationale and aims of the Common European Asylum System and the Dublin Regulation. In Abdullahi – v – Bundesasylamt [Case C-394/12], the Court, having observed that the Dublin Regulation (a predecessor of the current incarnation) must be construed not only in the light of its wording, but also in the light of its general scheme, objectives and context and in particular its evolution in connection with the system of which it forms part, continued, at [52] – [53]:

> *“In that regard, it should be borne in mind, first, that the Common European Asylum System was conceived in a context making it possible to assume that all the participating States, whether Member States or third States, observe fundamental rights, including the rights based on the Geneva Convention and the 1967 Protocol, and on the ECHR, and that the Member States can have confidence in each other in that regard (N.S. and Others, paragraph 78).*
>
> *It is precisely because of that principle of mutual confidence that the EU legislature adopted Regulation No 343/2003 in order to rationalise the treatment of applications for asylum and to avoid blockages in the system as a result of the obligation on State authorities to examine multiple applications by the same applicant, and in order to increase legal certainty with regard to the determination of the State responsible for examining the asylum application and thus to avoid forum shopping, it being the*

> *principal objective of all these measures to speed up the handling of claims in the interests both of asylum seekers and the participating Member States (N.S. and Others, paragraph 79).”*

The Court then noted that, through the medium of further Directives, the EU asylum rules have been harmonised “*to a large extent*”: [54]. The Court held that where it is proposed to transfer a third country asylum applicant to another Member State for the purpose of examining his asylum application (which involves the “take charge” mechanism) thereby giving effect to the “first country of arrival” criterion enshrined in Article 10(1) of the Dublin Regulation –

> “*… . The only way in which the applicant for asylum can call into question the choice of that criterion is by pleading systemic deficiencies in the asylum procedure and in the conditions for the receipt of Applicants for asylum in that Member State, which would provide substantial grounds for believing that the applicant for asylum would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union.*”

(46) Mr Manknell further submitted that there is no evidence of a generalised breakdown in the arrangements and procedures for the presentation and consideration of international protection claims under the Dublin Regulation prevailing in France. He pointed to evidence which indicates the availability of at least some level of advice and assistance to third country applicants and legal aid to challenge a substantive decision. He further emphasised that third country nationals in France enjoy the protection, not only of the Dublin Regulation but also that of the relevant recast Directives (listed in the quotation in [41] above).

(47) One of Mr Manknell’s discrete submissions was that, typically, legal challenges under the Dublin Regulation are directed to a contentious “take back” decision – as in EM (Eritrea) – and are advanced on the basis of an asserted breach of Article 3 ECHR/Article 4 CFR. He emphasised the high threshold which such challenges must overcome, contending that the same threshold should apply to the challenges of these Applicants, taking into account that their cases are founded on a weaker, qualified Convention right viz Article 8. In this context he reminded us that the test devised by the ECtHR in a challenge to an expulsion decision based on Articles 8 and 9 ECHR was that of a real risk of a flagrant breach of either or both of these Convention rights: R (B) v Secretary of State for the Home Department [2014] EWCA Civ 854, at [19]–[21].

(48) Mr Manknell, finally, laid emphasis on an amalgam of factors: the unorthodox nature of the claims made and remedy pursued in these proceedings; the assertion of a right on the part of the first four Applicants to enter the United Kingdom effectively without any legal barriers; resort to the judicial process in lieu of the Dublin Regulation model; and the different contexts in which the decisions in Tuquabo-Tekle, Mayeka, and Chikwamba were made. While contending that these decisions reaffirmed the well established touchstones of striking a balance, every state’s right to control entry to its territory and the margin of appreciation in play, Mr Manknell characterised them as highly fact specific. His concluding submission was that the Dublin Regulation enshrines various safeguards which strike the Article 8 proportionality balance. It establishes a regime containing built in measures for the protection

and promotion of family life, including special measures for the protection of unaccompanied minors and the achievement of family reunification.

OUR CONCLUSIONS

(49) As we have already noted, in EM (Eritrea) the Supreme Court held that the systemic deficiencies threshold does not supplant or trump, but coexists with, the Soering principle. In short, the Dublin Regulation exists, and operates alongside, the ECHR and, in the United Kingdom, the Human Rights Act 1998. In passing, while the Supreme Court reached this decision by reference to the test formulated by the CJEU in R (NS-Afghanistan) – v – Secretary of State for the Home Department (Joined Cases C-411/10 and C-493/10) [2013] QB 102, the consideration that the CJEU subsequently framed the applicable test in Abdullahi in slightly different terms is not an issue which we have to resolve in these proceedings.

(50) It is not suggested, correctly in our view, that either of these regimes has any inherent value or status giving one precedence over the other. They are not in competition with each other. However, as this litigation demonstrates, they may sometimes tug in different directions. Where this occurs full cohesion, or harmonisation, is unlikely to be achievable and some accommodation, or compromise, must be found.

(51) The challenges of the Applicants illustrate the potential for decision making to arise at an interface between these two regimes. Where this occurs in a context such as the present, the fundamental question for the decision maker or judicial organ will be whether to give precedence to, or confer exclusivity on, the EU regime operates to infringe one or more of the protected Convention rights of any affected person. In the present case, we are not concerned with any of the absolute Convention rights. Rather, our focus is confined to the qualified right enshrined in Article 8. Given our assessment of the parties' approach to interference in [31] above, in which we concur, the question to be determined judicially in an "interface" case of this kind is whether a disproportionate interference with the Article 8 rights of a person or persons claiming to be a victim within the compass of section 7 of the Human Rights Act 1998 is demonstrated.

(52) What is the correct approach to the Dublin Regulation in a case of this kind? We consider that the Dublin Regulation, with its rationale and overarching aims and principles, has the status of a material consideration of undeniable potency in the proportionality balancing exercise. It follows that vindication of an Article 8 human rights challenge will require a strong and persuasive case on its merits. Judges will not lightly find that, in a given context, Article 8 operates in a manner which permits circumvention of the Dublin Regulation procedures and mechanisms, whether in whole or in part. We consider that such cases are likely to be rare.

(53) We give effect to the approach outlined above in the following way. In doing so, we draw attention to a passage in the brief *ex tempore* decision delivered at the conclusion of the hearing:

> "*It is trite to highlight that these are intensely fact sensitive cases. They are particularly strong on their unique facts, especially as regards Applicants (3) and (4). We have been alert to our duty to conduct a penetrating scrutiny of the voluminous evidence applying the heightened standard required.*"

The first theme of this passage requires no elaboration. The second is a reference to the familiar principle of anxious scrutiny. It is difficult to conceive, in the abstract, of cases in which this principle has greater purchase. Having said that, we recognise, of course, the innate capacity of humankind to shock and abhor. Thus the possibility of still stronger cases cannot be discounted. We confine our attention to the acutely fact specific matrix constituted by a combination of our findings and much uncontested evidence suffering from no inherent frailties or deficiencies.

(54) We reiterate the test which we consider is to be applied: have the Applicants demonstrated a disproportionate interference with their rights to respect for family life under Article 8 ECHR consequent upon the Secretary of State's refusal to admit Applicants (1) – (4) swiftly to the United Kingdom outwith the full rigour of the Dublin Regulation procedures and mechanisms? The answer to this question involves a balance of the public interest engaged, namely the maintenance of immigration control which, in this instance, involves primarily insistence upon the uncompromising application of the Dublin Regulation process (on the one hand) and the family life rights of all seven Applicants (on the other). In the interests of clarity, we add that the private life dimension of Article 8 ECHR does not form part of any of the Applicants' challenges. This is a family reunion case, pure and simple.

(55) What are the ingredients and factors in the proportionality equation which are said to tip the balance in favour of the Applicants? These are rehearsed *in extenso* in [7] – [22] above. Subject to the qualification that any attempted summary is likely to be inadequate, they are age, particularly as regards the first three Applicants; mental disability, as regards the fourth Applicant; accrued psychological damage, as regards all of the first four Applicants; the clear likelihood of further psychological turmoil and disturbance, in the event of the best case scenario Dublin Regulation process delay of almost one year materialising; the previous family life in their country of origin enjoyed by all seven Applicants, in their various permutations; the pressing and urgent need for family reunification on the very special facts of these cases; the wholly inadequate substitute for family reunification which pursuit of the Dublin Regulation avenue would entail in the short to medium term; the absence of any parent or parental figure in the lives of the first four Applicants; the potential for the re-establishment of the various combinations of family life to be realised very quickly indeed in the event of the first four Applicants being permitted to enter the United Kingdom; the availability, willingness and capacity of the last three Applicants to provide meaningful care and support to the first four; and the avoidance of the mentally painful and debilitating fear, anxiety and uncertainty which the first four Applicants will, predictably, suffer if swift entry to the United Kingdom cannot be achieved.

(56) Turning to the legitimate aim side of the scales, we reiterate our assessment that strict and full adherence to the Dublin Regulation regime forms a major component of the overarching public interest engaged, namely the State's entitlement to impose effective controls on the admission of aliens to the territory of the United Kingdom and, given the CEAS dimension and all of its characteristics, qualifies as a potent factor in the proportionality balancing exercise. The aim in play was formulated by Lord Bingham of Cornhill in R (BAPIO Action Limited) v Secretary of State for the Home Department [2008] UKHL 27, at [4], in these terms:

> "*It is one of the oldest powers of a sovereign state to decide whether any, and if so which, non-nationals shall be permitted to enter its territory and to regulate and enforce the terms on which they may do so.*"

(57) We remind ourselves of the judicial role in this context. In R (SB) v Governors of Denbigh High School [2007] 1 AC 100, Lord Bingham of Cornhill stated, at [30]:

> "*It is clear that the court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting …..*
>
> *There is no shift to a merits review, but the intensity of review is greater than was previously appropriate and greater even than the heightened scrutiny test ….*
>
> *The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time ……*
>
> *Proportionality must be judged objectively, by the court ….*"

While mindful of the operation of the margin of appreciation, or discretionary area of judgment, in every exercise of this kind, we note, as did Lord Wilson in Quila (*supra*), at [46], that the refusal decisions of the Secretary of State impugned in these proceedings are not imbued with any "*special sources of knowledge and advice*". Similarly, we take into account, as did the Court of Appeal recently in R (Sehwerert) – v – Secretary of State for the Home Department [2015] EWCA Civ 1141, at [46], that lesser weight is to be accorded to the Secretary of State's assessment of the balance to be struck between the public interest and the rights of the individual in circumstances where the Secretary of State's insistence upon full adherence to the Dublin Regulation embodies a generalised assessment, a broad brush, to be contrasted with a specific, considered response and decision on a case by case basis. As the pre-proceedings correspondence and the Secretary of State's pleaded defence make clear, the platform upon which the Secretary of State has contested these proceedings is quite unrelated to the individual circumstances, needs and merits of any of the seven Applicants.

(58) We are satisfied that the Secretary of State's refusal to permit the swift admission to the United Kingdom of the first four Applicants *would* interfere disproportionately with the right to respect to family life under Article 8 ECHR enjoyed by all seven Applicants *if* the first four Applicants could properly be seen as claimants to refugee status who, because of the operation of the Dublin Regulation, to be able to have their claims determined in the United Kingdom where their siblings are. In their cases, the negative aspects of pursuing a full blown Dublin Regulation claim in France would detrimentally affect all seven Applicants in the manner set forth in [55] above. The sole difficulty then is that having as yet made no claim, the first four Applicants' present status is not that of persons seeking asylum. Rather, they are family members *simpliciter*. Having prepared the scales in the manner outlined above, our conclusion is that the balance tips in favour of the Applicants provided that they are prepared to set in motion their asylum claims processes in France. The Order we make achieves an accommodation between the two legal regimes in play. It strikes an appropriate balance by preserving the general structure of the CEAS and the Dublin Regulation principles in particular, while simultaneously ensuring that once a claim by any of the first four Applicants has been made the administration of the CEAS will not be permitted to interfere disproportionately with the Article 8 rights of that Applicant or his family member.

ORDER

(59) It is convenient, at this juncture, to append the transcript of the *ex tempore* decision pronounced at the conclusion of the hearing. This contains the text of our substantive Order. To this we add the following ancillary provisions.

PERMISSION TO APPEAL

(60) We refer to [10] of the transcript annexed. Having now considered the terms in which permission to appeal is sought we accede to the Secretary of State's application. We concur with counsel's suggestion that expedition would be desirable.

COSTS

(61) We refer to [11] of the transcript annexed. Having promulgated our full judgment, we have now received considered submissions on the issue of costs. The general rule is that costs follow the event. The Applicants have succeeded. Their success is unqualified. We consider that the general rule clearly applies. Accordingly, the Respondent is ordered to pay the Applicants' costs in full, to be assessed in default of agreement. This aspect of our order is stayed, with liberty to apply. We do not concur with the suggestion on behalf of the Secretary of State that the composition of the Applicants' legal team was excessive, in these complex and unprecedented proceedings. The Applicants benefit from public funding and notice of issue of public funding certificates was provided to the Upper Tribunal when the claims were issued.

[As the decision has not yet been published through the normal official channels, this PDF copy was provided by Full Fact from the copy circulated by the Judicial Office.]

POSTSCRIPT

(62) We are indebted to counsel for their able and succinct arguments. We add with pleasure that the conduct of these proceedings was exemplary.

Signed: _____

The President, The Honourable Mr Justice McCloskey

Upper Tribunal, Immigration and Asylum Chamber

Dated: 29 January 2016

Applicant's solicitors:

Respondent's solicitors:

Home Office Ref:

Decision(s) sent to above parties on:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was given (Civil Procedure Rules Practice Direction 52D 3.3(2)).

APPENDIX

JR/15401/2015

JR/15405/2015

In the Upper Tribunal (Immigration and Asylum Chamber)

Heard at Field House on 18 January 2016 and 20 January 2016

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Before

THE HON. MR JUSTICE McCLOSKEY, PRESIDENT

MR C M G OCKELTON, VICE PRESIDENT

Between

The Queen on the Application of

(1) ZAT, (2) IAJ, (3) KAM

(4) AAM, (5) MAT, (6) MAJ

And (7) LAM

Applicants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

[As the decision has not yet been published through the normal official channels, this PDF copy was provided by Full Fact from the copy circulated by the Judicial Office.]

Representation:

Mr M Fordham QC appeared with Ms C Kilroy, Ms A Pickup, Ms M Knorr and Ms J Sane, all of counsel, on behalf of the Applicants, instructed by Bhatt Murphy solicitors and Islington Law Centre.

Mr D Manknell and Mr T Sadiq, both of counsel, instructed by the Government Legal Department, appeared on behalf of the Respondent.

Mr Justice McCloskey

1. Given the dire circumstances in which Applicants (1) to (4) find themselves and the fluctuating and possibly worsening nature of the situation which has been brought to our attention in all of the evidence, including the most recent evidence adduced today on the second day of hearing, we accede to the plea for immediate promulgation of a judicial decision with reasons to follow.

2. We have reached our decision which is unanimous. Arguably, the most important legal consideration in the matrix of these challenges is that the European Union Dublin III régime (Council Regulation 604/2013) and the Council of Europe measure, the Convention for the Protection of Human Rights and Fundamental Freedoms, which has effect in the United Kingdom via the Human Rights Act 1998, a quite separate régime, coexist.

3. It is trite to highlight that these are intensely fact sensitive cases. They are particularly strong on their unique facts, especially as regards Applicants (3) and (4). We have been alert to our duty to conduct a penetrating scrutiny of the voluminous evidence applying the heightened standard required. Having done so, we consider that the Applicants succeed. Their claims under Article 8 ECHR are established.

4. The remedy to which the Applicants are entitled is one which, in our judgment, should not if possible frustrate the operation of the Dublin III procedure, insofar as harmony between the two aforementioned regimes can be achieved in this context. We consider that this can be attempted by the grant of a mandatory order in terms somewhat different from the order sought by the Applicants but which will nonetheless achieve the vitally important goal of providing a practical and effective remedy. We recognise that complete harmony is not achievable.

5. We are therefore proposing to make an order in the following terms. Upon each of the Applicants (1) to (4) making to the French authorities a claim for asylum within the sense of

article 2(h) of the Procedures Directive [2011/95 EU], and article 20(2) of the Dublin Regulation [604/2013 EU], the Secretary of State shall admit each Applicant to the United Kingdom with a view to determining the applications under the provisions of the Dublin Regulation. Permission to apply for judicial review is granted.

6. Costs are reserved.

[*Having considered the parties' submissions regarding the proposed order*]

ORDER

7. We grant permission to apply for judicial review.

(With reference to the text provided to and settled by the Tribunal).

8. Upon any of the Applicants (1) to (4) or their representatives sending to the French authorities a letter claiming asylum, and upon that Applicant's solicitors providing to the Respondent a copy of that letter and confirmation of it having been sent, the Respondent shall admit that Applicant to the United Kingdom with a view to determining their application under the Dublin III Regulation [604/2013/EU].

Permission to Appeal

9. We make no ruling today upon the Secretary of State's application for permission to appeal to the Court of Appeal for two main reasons. The first is we shall be handing down judgment within a very swift and short period. And, secondly, we consider it inappropriate to make a ruling in circumstances where we have no grounds. The Court of Appeal will receive no assistance whatsoever from this Tribunal if we determine to grant permission to appeal without reference to the grounds formulated. This application can be renewed upon the handing down of the judgment or shortly thereafter. You shall wish to take cognisance of our particular procedural rule that permission to appeal to the Court of Appeal is as a general rule determined upon handing down a reserved judgment.

Costs

10. We continue to reserve the issue of costs while noting our tentative proposition to Mr Manknell that there may be no answer to an application to costs and Mr Fordham's submission to like effect and in considerably stronger terms, again taking into account that there has been considerable immediacy in the latter phase of these proceedings and a fully reasoned judgment is not yet available.

Addendum

11. We shall hand down our full judgment at 10.00am on 29 January 2016.

THE HON. MR JUSTICE McCLOSKEY

PRESIDENT OF THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Date: 21 January 2016