R (on the application of RSM and Another) v Secretary of State for the Home Department (unaccompanied minors – Art 17 Dublin Regulation – remedies) [2017] UKUT 124 (IAC)

The Queen on the application of RSM, a child by his litigation friend ZAM
and ZAM

Applicants

v

Secretary of State for the Home Department

Respondent

Before The Hon Mr Justice McCloskey, President
Upper Tribunal Judge Finch

(I) The question of whether the Secretary of State has made a decision on the exercise of the discretionary power in Article 17 of the Dublin Regulation is one of fact which will be determined on the basis of evidence, direct or inferential.

(II) Article 17 is an integral part of the Dublin regime. The suggestion that the Article 17 discretion falls to be exercised only where the family reunification criteria in Article 8 are not satisfied is misconceived.

(III) Article 17 has a role in circumstances where one of the overarching values of the Dublin Regulation, namely expedition, is not being fulfilled in the procedures and systems of the host Member State.

(IV) Relevant government policy statements constitute, as a minimum, material considerations to be taken into account in deciding whether to exercise the discretionary power in Article 17. The Lumba principle is also engaged.

(V) The judicial assessment of the efficacy of the Dublin systems and procedures in the host Member State will invariably be fact sensitive and will take into account the overarching aims and objectives of the Dublin Regulation, including the maintenance of inter-Member State solidarity and mutual trust and respect, together with expedition.

(VI) Expedition has special force in the case of unaccompanied children.

(VII) The discretion to judicially determine essentially academic issues in judicial review proceedings will normally be informed by the overriding objective.

JUDGMENT

McCloskey J

Introduction

1. We emphasise at the outset that both Applicants continue to have the protection of anonymity and reproduce below the extant Tribunal Direction. Accordingly, no report of these proceedings or any communication whatsoever shall directly or indirectly identify either of the Applicants or any member of their family.

2. These judicial review proceedings were conducted in two orthodox phases. First, there was an *inter-partes* hearing on 05 December 2016 when the issue of permission was determined. By our *ex tempore* decision and order of the same date (subsequently formalised: see Appendix 1), we granted the Applicants permission to apply for judicial review and made certain directions.

3. An *inter-partes* substantive hearing followed, on 19 December 2016. By our *ex tempore* decision and order of the same date (subsequently formalised – see Appendix 2), the Applicants were held to have succeeded. The order made by the Tribunal against the Respondent, the Secretary of State for the Home Department (the "*Secretary of State*") was formulated thus:

   (a) The Secretary of State is hereby ordered to admit the first Applicant, RSM, to the United Kingdom.

   (b) It is hereby declared that there has been a failure by the Secretary of State to lawfully exercise the discretion conferred by Article 17 of the Dublin Regulation.

   Most recently, further orders have materialised, under the rubric of liberty to apply: see Postscript.

4. None of the aforementioned decisions/orders sets forth fully the Tribunal's reasoning and analysis. The second decision in particular could not be delayed having regard to the facts and factors which underlay the Tribunal's conclusion that the Applicants must succeed. The Tribunal made clear to the parties that it would provide a comprehensive judgment if necessary, particularly in the event of the Secretary of State seeking permission to appeal to the Court of Appeal. An application of this kind having materialised, the Tribunal hereby honours its commitment. While this may regrettably entail some degree of repetition, this seems to us unavoidable.

5. Judicial review proceedings are frequently, but not invariably, conducted within a framework of agreed and/or uncontroversial or neutral facts. This does not always apply to cases of the present species, mainly on account of the factor of expedition

and the resulting limited opportunity of the Respondent, the Secretary of State for the Home Department (the "Secretary of State"), to carry out appropriate investigations. Thus, as in previous cases of this kind, we shall address *infra* the question of whether the key factual ingredients of the Applicants' case have been established to the requisite degree

6. While there was a clear and obvious need for expedition in these proceedings, the Tribunal was able to devise case management mechanisms, both prior to the permission hearing and by creating a post-permission phase in advance of the substantive hearing, which furthered two imperatives. First, the Applicants and their legal representatives were enabled to augment the evidence presented initially to the Tribunal. Second, the Secretary of State was afforded a reasonable opportunity to make an evidential contribution and, in the event, a not insubstantial contribution materialised. Notably, at the final stage of the proceedings, namely the substantive hearing, there was no suggestion on behalf of the Secretary of State of unfairness on account of excessive haste.

RSM's Background

7. It is asserted that the first Applicant, RSM, is a national of Eritrea, aged 14 years and has been residing in Rome since April 2016, having fled his country of origin and, subsequently, Yemen with his mother and younger brother who, tragically, lost their lives (with many others) whilst attempting the journey by sea from Egypt to Italy. The second main assertion in the Applicants' case is that the second Applicant is his adult aunt who, having previously been recognised as a refugee and having acquired British citizenship, lives in the United Kingdom and is willing and able to receive the first Applicant and care for him.

8. RSM's case possesses the following additional factual ingredients. He had an uneventful childhood in his country of origin, Eritrea, where the family unit included his mother and younger brother, during his first 10 years approximately. The family fled Eritrea, travelling to Yemen where they lived for approximately 3 years. War having broken out in Yemen, they then fled to Sudan and onward to Egypt, accompanied by an older relative, his father's first cousin.

9. Following a sojourn of some three months in Egypt, all four arranged to travel by sea to Italy. A sudden and unplanned separation from his mother and brother having intervened, RSM and father's cousin made the hazardous crossing successfully. Soon thereafter, contact by telephone having been maintained in the intervening period, RSM's mother and younger brother died in June 2016 by drowning in undertaking the same journey. They and many others lost their lives in one of the refugee maritime tragedies which have, sadly, become so commonplace during the last couple of years. This happened some weeks following RSM's arrival in Italy and, inevitably, had a devastating effect on this then 13 year old boy.

10. RSM was initially accommodated in a Rome refugee camp following his arrival

around April 2016. There he shared a room with an Eritrean woman and another child, as a short term measure. His status being that of unaccompanied minor, though not thus recognised initially, a change in his accommodation arrangements was effected in September 2016. Since then, he has been accommodated in two State registered children's homes. This has been his plight during the last four months approximately. The evidence concerning his conditions and circumstances there is both balanced and well researched. Furthermore, it is uncontentious and we accept it. The adult relative who had accompanied RSM on his journey by sea from Egypt to Italy remained with him for a period. Being unplanned, this was a temporary measure. They were separated when RSM was transferred to the children's home. In his witness statement the relative says the following:

> "*Things have been very difficult for* [RSM]. …… *He has lost his mother and younger brother and all that he has known. He is now separated from me and is not with family …..* [He] *is desperate to be reunited with his aunt and her family and it is all he is focusing on but as time passes with nothing happening, he is losing hope that this will be achieved. He is really suffering. He is very upset and confused and he is very unhappy.*"

This statement is dated 01 November 2016. The intermittent contact between the two ended in December when the father's cousin was transferred from Italy to Portugal.

11. In the span of several witness statements, the second Applicant, ZAM (RSM's aunt), recounts, *inter alia*, the four visits she has made to RSM in Italy during the period June to November 2016. These statements provide evidence of very recent vintage. They confirm the changes of accommodation noted above. In her most evidence, the aunt describes RSM as "*even more unhappy and distressed and is increasingly angry*", with elaboration. She states:

> "*I am really worried about how he is coping with these terrible losses. I believe he needs my direct support every day and that it is really bad for him to be in a children's home in Italy. He is expressing much more anger and I don't know how his emotions will continue to change. I still worry that if he is not transferred quickly he may try to take matters into his own hands ….*
>
> *While he is happy to see me, when I leave this causes upset and hurt all over again ….*
>
> *I am concerned about the long term impact that the insecurity and separation will have on RSM and that the longer it goes on, the more damage the deaths of his mother and brother will cause and the greater the difficulty he will have in settling into life and being a child again in the UK.*"

12. ZAM's most recent witness statement, composed just days before the substantive hearing, contains the following:

> "*I would describe RSM in some senses of* [sic] *being like a computer ….*

When ….. I had first arrived and when I was leaving he was like the black screen of the computer, he was turned off blank and emotionless ….

It has been almost unbearable for me to understand how much RSM is suffering when I am not there and being able to do so little about it ….

It is very hard to explain to a child who is just 14 and after what he has been through why this process should take so long ….

Although RSM has now started to go to school, he tells me he 'hates it' …. and he gets 'sad memories' of his brother who he went to school with …. I'm concerned that if he becomes resentful about the home that he may decide to run away from it….

Even though he was angry at [his father's cousin] *he knew he was there and that he could see him. I think it will feel very different to him knowing he is completely alone in Italy ….*

It is very well known within the Eritrean community that there is a smuggling route for children and adults to travel from Italy to France and from there to the UK … I am not personally aware of anyone who has come to the UK via a lawful route from Italy. I know that RSM is aware of this and he has asked directly if travelling to France and then to the UK is an option for him. I have counselled him against this ……"

13. In other parts of the evidence RSM is described as "*a particularly vulnerable boy*" and is contrasted with more street wise and mature boys of less than his age. His adult cousin (ZAM's oldest daughter) states that RSM –

> "*…. seems even more deeply traumatised ….. he has become very negative and no longer believes good things will happen to him. I think in some respects he has lost his rationality …. As time goes on, he is losing trust and faith in us and we fear that one day RSM, a young adolescent boy, may decide to take matters in his own hands and abscond.*"

In this context, Mr Scott, in his most recent statement, draws on his personal experience of unaccompanied migrant children "*disengaging from the legal process*", adverting to factors including "*conflicting information from those in the community and smugglers and peer pressure*" and the propensity of some teenage boys to take reckless risks. These risks were taken by children in the "Jungle" in Calais, France in spite of the sustained efforts of community leaders and the support provided by charitable organisations and volunteers. Comparable support structures have been absent from RSM's life. Mr Scott's second witness statement exhibits an Oxfam report published in September 2016 which states:

> "*….. the Italian reception system has turned out to be inadequate for protecting lone*

refugee and migrant children and their rights. Even worse, during the first six months of 2016, 5,222 unaccompanied children were reported missing, having run away from reception centres. They become invisible, under the legal radar and are therefore even more vulnerable to violence and exploitation."

RSM's Mental Health

14. One of the main evidential planks of RSM's case is the report of Dr Claire O'Driscoll, a Clinical Psychologist, who travelled to Rome where she assessed RSM on 02 September 2016 at the offices of the charity Medecins Sans Frontiers. Dr O'Driscoll also engaged in discussions with certain other named persons. It is evident from her curriculum vitae that she has experience and expertise in the psychological assessment of young people.

15. Dr O'Driscoll's report is thorough and comprehensible. Dr O'Driscoll's report ranges from the general to the particular. As regards the former, it contains the following notable passage:

> "*…. It is imperative to remember that all children need shelter, protection, nurturance, sense of belonging and support. These needs are regarded as basic; essentials that must be met to a secure platform for developmental attainment and positive well-being …. and to protect against a plethora of negative psychological, educational and social outcomes.*"

She opines that children with the kind of history which RSM has experienced, with its ingredients of pre-migration trauma and post-migration tragedy and other life events, are "*…. at an increased risk of developing mental health difficulties*".

16. Dr O'Driscoll's assessment of RSM is that he is "*a very vulnerable adolescent*". He satisfies the diagnostic criteria for post-traumatic stress disorder. There are no indications of invention or exaggeration. In his current circumstances no provision is made for his emotional and social needs. His life lacks stability and security. Dr O'Driscoll expresses the following opinion:

> "*The continued delay in resolving RSM's immigration position presents as a significant perpetuating factor to his current psychiatric disorder. It also puts him at increased risk of his mental health deteriorating further. Delays in resolving his immigration status will ensure that he will not receive the care and support that he needs as he navigates his recent bereavements and endures his mental health symptoms ….*
>
> *RSM's mental health will deteriorate further the longer he remains separated from his family, especially when he moves to the accommodation for minors. He needs to join his family in the UK so that he can begin to process the loss of his mother and brother and establish a new sense of security and normality.*"

17. Dr O'Driscoll expresses an opinion regarding the following three specific issues (the headings are ours):

(i) RSM's move to children's accommodation:

"…. *He will potentially be even more isolated and receive less emotional support ….* [and] *may be expected to care for himself independently, which when one considers his current mental state is beyond what any 13 year old should be expected to do.*"

(ii) Recovery from his PTSD:

He is "*… at increased risk of his mental health deteriorating further ….* [and] *Recovery from his current psychiatric disorders is not possible until he has joined his family.*"

(iii) Risk of Suicide:

"*Further deteriorations in his mental health could impair his already diminished daily functioning or precipitate a suicidal crisis.*"

The theme that the perpetuation of RSM's current circumstances will have an adverse impact on his fragile mental health and will delay his recovery shines brightly in Dr O'Driscoll's report.

18. A further dimension has materialised. Dr O'Driscoll was asked to comment on the most recent of the second Applicant's witness statements. She suggests a possible "…. *deterioration in his mental health … accounted for by an increase in the intensity of his PTSD symptoms … an exacerbation of the negative impact of the trauma on his current mental health.*" Elaborating, Dr O'Driscoll describes parental death as "*one of the most traumatic events that can occur in childhood, noting simultaneously the absence of bereavement, emotional and spiritual support for RSM.*" Dr O'Driscoll emphasises (in terms) RSM with access to psychiatric or psychological assessment and if and insofar as necessary, a range of treatments: trauma-focuses cognitive behavioural therapy and narrative exposure therapy in particular, delivered by a trained mental health professional. She repeats her concern about the risk of further deterioration in RSM's mental health.

19. The most recent evidence bearing on this discrete subject is provided via the witness statements of ZAM and SA, digested in [11] – [13] above.

The Dublin Procedures In Italy

20. The second main *tranche* of evidence assembled relates to the systems and procedures for the processing of Dublin Regulation claims in Italy and, more particularly, how these have been actually functioning in RSM's specific case. The evidence bearing on this issue has evolved and now includes a significant contribution on behalf of the Secretary of State (*infra*).

21. It is convenient to reproduce here the core pleading on this issue in the grounds of challenge:

> "[RSM] *wishes to claim asylum and is entirely willing to register an asylum claim in Italy. He has, however, been unable to do so to date and all indicators are that there is likely to be lengthy further delay ….*
>
> *Under Italian law, children are not legally competent to register an asylum claim and are unable to do so until a guardian is appointed. However, due in particular to the unprecedented refugee crisis, there are extremely lengthy delays in the appointment of guardians in Italy. There are then two stages to registering the claim, which are likely to take several weeks or more, following which a referral might be made to the Dublin III Unit to consider making a take charge request to the responsible Member State. It is unclear in practice how long the Dublin III process will take once an asylum claim is registered because there are no known cases of Dublin III transfers of unaccompanied minors to the UK. However, indications are that at minimum, the maximum time frame of 11 months under Dublin III is likely to be required.*"

The sources of this evidence include the Applicants' solicitor, Mr Scott, together with several respected and well informed international organisations – UNCHR and AIDA in particular – and certain major charities: UNICEF, Save the Children and the Refugee Council. Mr Scott's sources are, in summary, a range of published materials, several reputable international organisations and certain identified Italian immigration lawyers.

22. We take the example of UNCHR (there are other examples). This organization has described the Dublin Regulation process in Italy as "*painfully slow*". There is no publicly funded legal advice or assistance. Italian law requires the appointment of a guardian in the case of every unaccompanied child. This can generate delays of up to eight months. Furthermore, the guardians have no specific training in the asylum field. More fundamentally, the guardianship system in Italy is creaking under acute pressures in the prevailing refugee crisis and is widely held to be under funded.

23. The evidence indicates that once the important milestone of appointing a guardian has been attained, the child's claim for asylum is compiled and registered. As the present case illustrates, the gap between these two events can be considerable. This phase can occupy time periods ranging from weeks to months. The next phase consists of examination of the asylum claim. This triggers the three time limits prescribed by the Dublin Regulation, namely any take charge request addressed by

Italy to the United Kingdom must be transmitted within three months; the United Kingdom must respond thereto within two months or, where the transmitting state so stipulates, one month; and the acceptance of a take charge request gives rise to a further period of six months for effecting transfer to the United Kingdom.

24. At this juncture we record certain landmark dates and events:

(i) RSM has been known to the Italian authorities since, at the latest, 29 April 2016 when he was assigned to a refugee camp in Rome.

(ii) On 03 June 2016 the tragic death of RSM's mother and younger brother occurred. Since then the sole aim of RSM and his relatives has been to achieve unification with ZAM and her family, all lawfully resident in the United Kingdom.

(iii) During the initial phase the Italian authorities evidently did not understand the real nature of the relationship between RSM and his father's adult cousin. At the beginning of the second phase, marked by the aforementioned tragedy, there was a failure to identify RSM as an unaccompanied, orphaned child seeking asylum and striving for unification with his family in the United Kingdom.

(iv) A letter dated 11 August 2016 written by the Director of RSM's refugee camp and addressed to the Applicants' solicitors (available in Italian only) appears to have played a significant role in the correct assessment of RSM and his transfer to a State home for children.

(v) The first clear recognition by the Italian authorities of RSM's status of unaccompanied asylum seeking child occurred on 13 September 2016 (some five months after his arrival in the country).

(vi) The appointment of a guardian for RSM (the Mayor of Rome) occurred on 21 October 2016.

(vii) On 16 November 2016 RSM's fingerprints were taken, marking the first stage of the asylum process.

(viii) Then the next stage of the asylum process, involving an interview of RSM, was scheduled for 04 January 2017. This step, in theory, would have precipitated the formal registration of RSM's asylum claim.

25. On the date when we promulgated our *ex tempore* judgment, 19 December 2016 (see Appendix 2), the state of the Applicants' evidence was as rehearsed above. In the events which occurred, the Tribunal remained involved, pursuant to the invocation of liberty to apply on behalf of the Applicants and certain further ancillary orders

ensued. It suffices to say that a "take charge" request in respect of RSM was transmitted by the Italian authorities to the Secretary of State, this request was accepted and, ultimately, the necessary authorisation order was given by the relevant Italian Court. The net result was a delay of two months between our decision and Order of 19 December 2016 and RSM's eventual admission to the United Kingdom on 16 February 2017. We observe only that there are question marks about the acts – and omissions – of the Secretary of State's officials throughout this period, including the bewildering failure to send this Tribunal's crucial order of 22 December 2016 to the Italian authorities.

The Secretary of State's Evidence

26. It is appropriate to preface the evidence filed on behalf of the Secretary of State with certain Ministerial statements providing an insight into the United Kingdom Government's published policy in this field. These statements were made in the context of the advance of the Immigration Bill through the two chambers of Parliament. The first clear policy, statutory in nature, finds expression in what became known as the "Dubs Amendment", dating from 21 March 2016:

> "*Unaccompanied Refugee Children: Relocation and Support*
>
> *(1) The Secretary of State must, as soon as possible after the passing of this Act, make arrangements to relocate to the United Kingdom and support 3,000 unaccompanied refugee children from other countries in Europe.*
>
> *(2) The relocation of children under (1) shall be in addition to the resettlement of children under the Vulnerable Persons Relocation Scheme.*"

This later became section 67 of the Immigration Act 2016, though in modified form, omitting reference to 3,000 children and requiring the appropriate number to be determined by the Government after consulting with local authorities.

27. On 21 April 2016 the Minister for Immigration gave a written statement to Parliament concerning what later became known as the children at risk resettlement programme which described as the results of –

> " ……. *work with UNHCR and informed by a round table with NGOs, local authorities and devolved administrations to provide a resettlement route to the UK, specifically designed for 'children at risk' from the Middle East and North Africa region* ……
>
> *This broad category encompasses unaccompanied children and separated children – those separated from their parents and/or other family members – as well as other vulnerable children such as child carers and those facing the risk of child labour, child marriage or other forms of neglect, abuse or exploitation ….*

We will commit to resettling several hundred individuals in the first year with a view to resettling up to 3,000 individuals over the lifetime of this Parliament, the majority of whom will be children."

That Statement also said as follows with regard to Dublin III family reunification:

"*It is important to use the tools available to help children reunite with family wherever possible. The Government are committed to meeting our obligations under the Dublin regulation. We have seconded additional resource to the European Asylum Support Office totally over 1,000 days of expert support to Italy and Greece to implement and streamline the Dublin process, including to quickly identify children who qualify for family reunion. And we continue to work with the French authorities to address the situation in Calais, including through a permanent bilateral standing committee to improve cooperation on Dublin transfers, particularly family reunion.*

….

The recent secondment of a senior asylum expert to the French Interior Ministry to improve the process for family cases has already resulted in a significant increase in the number of children being reunited with family in the UK. In the last six weeks 24 cases have been accepted for transfer to the UK from France under family unity provisions, more than half of whom have already arrived in the UK. Once an asylum claim has been lodged in another member state we have demonstrated that transfers can take place within weeks."

In the Parliamentary debate which followed on 10 May 2016, the Minister said the following in answer to a question regarding the implementation of the Dubs amendment:

"*Clearly, there is a renewed focus given our acceptance of the Dubs amendment to the Immigration Bill. I absolutely want to use that as a means of speeding up and making more effective the processing of those with links to family in the UK. Vulnerable children can then be reunited with their extended family in the UK, which is in their best interests, and will no longer be isolated in France, Italy or Greece.*"

The Minister continued:

"*As I have said, we want to make rapid progress. We are already taking children with family connections to the United Kingdom from France and we want to find ways of improving the process further so that, when cases are identified, we can take charge and ensure that those children come to the UK quickly. There are vulnerable children in Italy and Greece, which is precisely why we are opening a dialogue with those countries. We want to understand their systems properly and join up with them effectively so that we can identify such children and act to enable them to come to this country.*"

28. Government policy is also ascertainable from one of its publications, entitled "Immigration Act 2016 Fact sheet – Unaccompanied Refugee Children (Section 67)", dated July 2016. This contains *inter alia*, a series of "Key Questions and Answers", including the following:

> "***How will this work with the Dublin Regulation?*** *…….*
>
> *The Government will continue to work with other Member States to ensure that the Dublin Regulations, including the provisions on family unity, can work quickly and effectively. Over 30 children were accepted for transfer under Dublin from France between January and April this year and there are many more cases in train following intensification of co-operation between the UK and France, which included the secondment to the France Interior Ministry of a senior UK expert. We had a secondee in the Dublin Unit in Italy and are about to send another to the Dublin Unit in Greece …..*
>
> *We expect the Dublin Regulation will provide the legal framework for the transfer from other European Countries of many of the cases that fall under the Act.* ***Our aim is to use whatever tools work best for the countries and partners concerned and give us the best chance of transferring children quickly.***"

[Our emphasis]

To similar effect is the statement made by the Minister of State for the Home Office in Parliament on 31 October 2016:

> "*More widely in Europe, we are in active discussions with the UNHCR, other partner organisations and the Italian and Greek Governments* ***to strengthen and speed up mechanisms to identify and assess unaccompanied refugee children and transfer them to the UK where that is in their best interests ….. I believe we should be acting in the best interests of the child and for that reason we are focusing on prioritising family reunion cases.***"
>
> [Our emphasis.]

We consider that the witness statements filed on behalf of the Secretary of State fall to be evaluated by reference to the policy framework ascertainable from the above quotations.

29. Carl Dangerfield is the author of one of the witness statements filed on behalf of the Secretary of State. He describes himself as the UKVI Immigration Liaison Officer in Italy, where he has worked within the Italian Interior Ministry since March 2008. His duties include "enhancing" the effective implementation of the Dublin Regulation and promoting "*best practice on asylum and immigration*". Recently his duties have focused particularly on asylum seeking unaccompanied children.

30. Stimulated by an electronic communication from a colleague dated 27 September 2016, Mr Dangerfield, on 10 October 2016, first became aware of RSM's case and immediately discussed it with an Italian case worker. Enquiries established that RSM had been transferred from the reception centre to a children's home and an identified social worker was awaiting judicial authority to represent RSM in lodging an asylum claim. Mr Dangerfield's subsequent understanding was that the Italian Dublin Unit was "*organising an eventual fast track process*" in respect of RSM. Some 6 weeks later, on 23 November 2016, the social worker confirmed to Mr Dangerfield that she had attended the "*Italian Immigration Office*" and had been allocated a formal interview date of 04 January 2017 for "*the next stage of the process*". The following day Mr Dangerfield enquired of the Head of the Italian Dublin Unit whether the processing of RSM's asylum claim could be "*speeded up*". Chronologically, Mr Dangerfield's evidential contribution ends at this point. His witness statement was made just under one month later.

31. From Mr Dangerfield's witness statement, one distils an unequivocal acknowledgment of delay in the Italian system in RSM's case. In an exhibited email, dated 14 October 2016, Mr Dangerfield stated:

> "*The delay with the case has been with the initial confusion that the minor was accompanied and then the adult stated that the child was unaccompanied.*"

As the other evidence summarised above demonstrates, this discrete period of delay was approximately four months' duration. Judicial intervention, via these proceedings, ultimately occurred at a stage when RSM had been in Italy for some eight months. During the first half of this period, his case made no progress whatsoever through the Italian system. We deduce from Mr Dangerfield's clear statement that but for the erroneous classification of RSM by the Italian authorities, his case would have begun progressing some four months previously.

32. This discrete context possesses the following main ingredients:

(a) By their first letter to the Home Office, dated 26th September 2016, the Applicant's solicitors provided a detailed outline of RSM's case, advanced the contention that the United Kingdom had a duty to admit RSM under Article 8 ECHR and continued:

> "*For the avoidance of any doubt our client RSM seeks to claim asylum and have this claim determined in the UK and the UK has the power under Article 17 of Dublin III to take responsibility for this case. We would submit that this power should be exercised now ….*"

(b) This was followed by a formal pre-action protocol letter to the Home Office dated 10 October 2016, which attached the earlier letter. It stated in particular:

"*By this letter we are asking you for the second time to take the necessary steps to facilitate his entry to the UK immediately using your discretionary powers to grant leave to enter and/or pursuant to Article 17 of Dublin III.*"

(c) The Home Office made no response to either letter.

(d) Next, on 02 November 2016, these proceedings were initiated. The Claim Form sought the twofold relief of:

(i) A declaration that the Respondent's refusal to consider and to exercise her discretion under Article 17 Dublin III or otherwise admit [RSM] to the UK is unlawful and

(ii) a mandatory order requiring the Respondent to admit RSM to the United Kingdom forthwith.

(e) On 22 November 2016 the Secretary of State's Summary Grounds of Defence were served and filed. This does not so much as acknowledge, much less respond to, the Applicants' case under Article 17 of the Dublin Regulation.

33. This Tribunal was alert to the series of omissions outlined above at the stage of determining the permission application. Permission was granted following an *inter - partes* hearing on 05 December 2016. In our decision/order and directions of the same date, this Tribunal, *inter alia*, explained its preference for severing the permission hearing from the substantive hearing, stating at [9]:

"*… We are not satisfied that the Respondent's duty of candour has been discharged at this stage.*"

It continued, at [14]:

"*(a) We direct the Secretary of State to file a witness statement. This will be made by a suitably informed and senior official of the Home Office. It will address all of the issues bearing on the Dublin Regulation process for* [RSM] *and, insofar as material, more widely. It will also address the emails and the rather bare recent letter ….*

(b) The witness statement will further be directed to the question of the second Applicant: broadly, the Secretary of State's position vis-à-vis the second Applicant and in particular any steps or enquiries which should properly be made on that front at this stage or any justification proffered for inertia in this respect ….

(c) *The witness statement will attach all documentary materials which are required in the discharge of the Secretary of State's duty of candour.*"

In the final paragraph of its decision/order, this Tribunal stated, at [16]:

"*Finally, the absence of any reference to Article 17 of the Dublin Regulation in the Respondent's case is noted.*"

34. At this juncture, we revisit Ms Farman's first witness statement. Addressing the issue of the Secretary of State's "*discretion*" under Article 17, she states:

"*I should point out that other Member States will make take charge requests to the UK under Article 17 as well as Article 8. In general the SSHD would only exercise her discretion under Article 17 in a case where an individual had some family links to the UK but where he or she fell outside of Article 8. If Home Office officials received evidence that there was a close relationship between the unaccompanied minor and the family member in the UK which, although not falling within Article 8 of the Dublin* [Regulation] *was akin to such a relationship, the SSHD would likely consider using Article 17 to bring the minor to the United Kingdom ….*

I should also explain that with regard to transfers under Article 17 although they are within the SSHD's discretion, this does not mean that she simply will notify the Member State where the minor is that the UK will process the minor's asylum claim and that the Home Office will arrange transportation. Home Office officials would instead enter into a dialogue with the authorities of that Member State given they have custody of the child. It would also be for the transferring Member State to make the travel arrangements for a transfer under Article 17 whether or not a take charge request had been made under the Article …

It is difficult without a lengthy exercise to establish exactly when the SSHD has exercised her discretion to accept a take charge request under Article 17 as the data is not easy to interrogate. For example, a request under Article 8(1) might become an acceptance under Article 17(1). In the time available, the SSHD has not been able to carry out this process …

My understanding is that as RSM was being processed under Article 8 of the Dublin III Regulation, the SSHD has focused her attention on encouraging the Italians to work through this process rather than seeking to try to bring RSM to the United Kingdom through Article 17. To have two parallel routes of proceeding would have confused matters and as per the above, would not have resulted in RSM coming to the United Kingdom any more quickly ….

I would also say more generally that all Member States across Europe understand how the Dublin III Regulation works and what they are required to do when transferring children. If the SSHD were on a more frequent basis to seek to try and unilaterally rely on Article 17 to transfer children to the UK, especially if they were already within the auspices of Article 8, in my view this would cause confusion and take away the true

integrity and purpose of Article 8 family reunification."

[Emphasis added.]

35. The further issue addressed in Ms Farman's witness statement is the Secretary of State's approach to issues of expedition. She avers:

> "*… The Dublin III process works across Europe so that the transferring Member State makes the arrangements. While we can encourage the transferring Member State to expedite matters, we cannot compel them to do so in respect of particular cases as this is purely a matter for them ….*
>
> *It would be inappropriate for the SSHD to seek to interfere in that process as (i) she would be interfering in the sovereign affairs of another Member State and (ii) she is not aware of all the relevant factors which will have led a particular Member State to organise matters in the way that it has.*"

With specific reference to RSM's case, Ms Farman avers:

> "*The SSHD has sought to expedite RSM's case as appropriate taking into account the factors above.*"

In this context, Ms Farman attaches two letters from the Home Office to the relevant Italian authorities, dated 21 November and 09 December 2016 respectively. Each of these letters merely states that in the event of a "take charge" request materialising, this will be considered with expedition in the United Kingdom. Neither letter requests or advocates expedition on the part of the Italian authorities. We shall revisit this issue *infra*.

The Dublin Regulation Challenge

36. It is convenient to consider the Applicant's Article 17 challenge first. As already noted, this limb of the Applicant's challenge seeks the following relief:

> "*A declaration that the Respondent's refusal to consider and to exercise her discretion under Article 17 of Dublin III or otherwise admit* [RSM] *to the United Kingdom is unlawful.*"

In the supporting grounds, this is developed by the contention that the Secretary of State has erred in law in failing to consider the exercise of her discretion under Article 17.

37. During recent years, substantial quantities of judicial ink have been spilled in addressing the aims, rationale and structures of the Dublin Regulation in its

successive incarnations. It is unnecessary to add to any of this for present purposes. Rather, bearing in mind the present litigation context, it suffices to draw attention to its most important provisions. We have assembled these in Appendix 3 hereto.

38. The Secretary of State's resistance to the Article 17 relief pursued by the Applicants is predicated firmly on the basis that a decision under Article 17 has been made in RSM's case. This decision, it is argued, takes the form of a refusal to exercise discretion. The second element of the Secretary of State's case in this respect is that this refusal is lawful.

39. Our conclusion on the first of these issues is easily made. It is abundantly clear that prior to the initiation of these proceedings and *pace* the pre-action letters written by the Applicant's solicitors, no consideration was given to exercising the Secretary of State's discretion under Article 17. This finding is based on the evidence. There is no evidence, direct or inferential, upon which any other finding can reasonably be made. The second phase to be considered in this context is that which elapsed between the commencement of proceedings and the permission hearing. Once again, based on the evidence, there is no dispute that no Article 17 decision was made during this period. Ultimately, the witness statement of Ms Farman provided the territory upon which this particular issue was contested. Mr Ruck-Keene submitted that the Tribunal should construe Ms Farman's first statement to the effect that a decision under Article 17 has been impliedly made.

40. We are bound to reject this submission, earnestly though it was made. We have reproduced in [35]-[36] above the key passages in Ms Farman's main statement. We are quite unable to construe these in the manner advocated. We have taken particular note of the language and tenses employed and the synthesis. We are also alert to the context in which Ms Farman's witness statement was generated: see [31 – [34] above. The Secretary of State, via Ms Farman, was gifted a gilt-edged opportunity to demonstrate in evidence that consideration had in fact been given to exercising the discretion conferred by Article 17. The evidence which materialised in consequence falls manifestly short of showing this. Ms Farman's averments are couched in the most general and abstract terms imaginable. Furthermore, and in any event, from the perspective of reliability her statement suffers from multiple unsatisfactory references to her "understanding" of various matters. Insofar as certain averments are based on "*the documents and records available to me*" (witness statement, paragraph 3), the materials attached are extremely limited and, as regards this issue, irrelevant. Ms Farman's evidence suffers from the further infirmity that it was necessary for her to make a second witness statement in order to correct material inaccuracies in the first.

41. It follows inexorably from our analysis above, that the first limb of the Applicants' challenge succeeds. We would add the following, given the comparative novelty of Article 17 challenges and the quality of the arguments advanced and the clear impression created in the evidence and via counsel's submissions that the Secretary of State views Article 17 of the Dublin Regulation through an inappropriately narrow

lens.

42. One of the keys to the correct understanding and application of Article 17 is that it forms an integral part of the machinery established by the Dublin Regulation. Accordingly, it is to be understood and applied in a manner which furthers the aims and objectives of this instrument of EU legislation. Article 17 in no way corrupts or undermines the Dublin Regulation machinery: quite the opposite. The Secretary of State evidently considers that the Article 17 discretion falls to be exercised only where the family reunification criteria enshrined in Article 8 are not satisfied: see [35] above. This approach is, in our view, misconceived. This argument was founded on Recitals (17) and (18) [Appendix 3]. However, it overlooks the key words "*in particular*" in Recital (17). Furthermore, it neglects the breadth of the discretion conferred by the language of Article 17(1). It is also incompatible with the "*in particular*" qualification in Article 17(2). We are further satisfied that the broader construction which we favour is compatible with the principles of solidarity and mutual trust and respect enshrined in Recital (22) and Article 12 of the implementing Regulation.

43. We consider in particular that Article 17 has a role in circumstances where one of the overarching values of the Dublin Regulation, namely expedition, is not being fulfilled in the procedures and systems of the host Member State in any given case. The present case, imbued with powerful humanitarian elements and significant delays in Italy, provides a concrete illustration of the potential operation of Article 17. Beyond this we do not venture since this is not a case in which a negative decision under Article 17 is subject to the supervisory review of this Tribunal.

44. We also draw attention to the guidance provided by the Court of Appeal in Secretary of State for the Home Department v ZAT and Others [2016] EWCA Civ 810. While Article 17 did not feature in the challenge at first instance – see [2016] UKUT 61 (IAC) it surfaced at the appeal stage in consequence of certain arguments devised on behalf of the Secretary of State. At [85] the court stated:

> *"A further reason for rejecting Mr Eadie's submission in its absolutist form is Article 17 of the Dublin III Regulation. Since the relevant officials in the second Member State have power to assume responsibility in a case in which the Regulation assigns it to another Member State, it cannot be said that it is never open to an individual to request that state to do that. Mr Eadie suggested, or came close to suggesting, during the course of the hearing that a refusal to exercise the power under Article 17 was not justiciable. That, in my judgment, is unsound in principle and also finds no support in the authorities. Abdullahi v Bundesasylamt recognised only that the second Member State has a wide margin of discretion in deciding whether to assume responsibility pursuant to the provision in the Dublin II Regulation that is the equivalent of Article 17. In a context in which the exercise of power relates to relations between two Member States as to the operation of a treaty arranging for the allocation of responsibility for examining applications for asylum between Member States, this is clearly correct."*

The court then helpfully illuminated the contours and scope of judicial review challenge in this context:

> *"There will be a wide range of relevant considerations for the decision-maker to take into account: see all the factors that the Upper Tribunal stated were relevant to the assessment of proportionality. But subject to the effective scope of judicial review being narrower for this reason, the exercise by the Secretary of State of her discretion is subject to the ordinary public law principles of propriety of purpose, relevancy of considerations, and the longstop Wednesbury unreasonableness category and, because of the engagement of ECHR Article 8, the intensity of review which is appropriate in the assessment of the proportionality of any interference with Article 8 rights."*

45. The reference to "*all the factors that the Upper Tribunal stated were relevant to the assessment of proportionality*" is illuminated by reference to [37] of the court's judgment:

> *"The factors which were said to tip the balance in favour of all or some of the first four Applicants were summarised at [55] as:- age; mental disability; accrued psychological damage; a clear likelihood of further psychological turmoil and disturbance, a best case scenario involving a delay of almost one year; the previous family life in their country of origin enjoyed by all seven Applicants; 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 that family life would be re-established very quickly if the first four Applicants were 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."*

We would add, by way of almost otiose guidance, that every case will of course be intensely fact sensitive. However, the significance of these passages is that all of the factors identified by this Tribunal are, in principle, capable of being legitimate ingredients in the proportionality balancing exercise and, independently, are capable of having the status of obligatory considerations to be taken into account in the Article 17 context.

46. We consider that the Article 17 issue has one further dimension of significance. In [26] – [28] above, we have focused on a series of ministerial pronouncements which we consider to have the status of United Kingdom Government policy statements. Every discretion in law has, in principle, the potential to be exercised within a domain which includes an associated policy adopted by the public authority concerned. This, in our judgement, is precisely such a case. While the ministerial

statements are couched in general terms, their orientation is consistent and unmistakable. Viewed through the prism of orthodox public law doctrine, they constitute, as a minimum, material considerations to be taken into account where relevant discretionary powers fall to be exercised. On this limb of the Applicant's case, the discretionary power in play is that contained in Article 17 of the Dublin Regulation. All the evidence considered as a whole, it is clear that no consideration was at any time given by the Secretary of State's officials to the relevant published Government policies. This is an obvious and free standing vitiating factor.

47. In this context reference to the Lumba principle is also appropriate. This was articulated by Lord Dyson in these terms:

> "*… A decision maker must follow his published policy (and not some different unpublished policy) unless there are good reasons for not doing so. The principle that policy must be consistently applied is not in doubt …*"

(Lumba v SSHD [2012] 1 AC 245, per Lord Dyson JSC at [26])

It is generally held that this principle has its roots in another hallowed principle, namely the equal implementation of laws, in tandem with non-discrimination and the avoidance of arbitrariness.

48. It is convenient at this juncture to express our view – *obiter* of course – on the effect of a failure of this species in the context of a human rights challenge. In human rights cases, the question for the court or tribunal concerned is whether the decision of the public authority under challenge infringes the human right engaged. Where statutory appeals are concerned, the judicial authority must confront, and answer, this question. However, where the challenge is pursued via the medium of judicial review, as in this case, some calibration is required. All of this was addressed *in extenso* in the decision of this Tribunal in R (SA) v Secretary of State for the Home Department [2015] UKUT 536 (IAC), at [17] – [30], considered in the recent decision of the Court of Appeal in R (Caroopen and Myrie) v Secretary of State for the Home Department [2016] EWCA Civ 1307.

49. Bearing in mind that we did not receive full argument on this issue, we confine ourselves to two propositions, recognising that these might require reconsideration with the benefit of more extensive argument. The first is that Government policy statements may, in principle, sound on the issue of legitimate aim. The second is that a failure by the decision maker to take into account a relevant Government policy statement may illuminate the judicial assessment of whether the impugned decision is a proportionate means of furthering the legitimate aim in play.

The Article 8 ECHR Challenge

50. The test to be applied to this limb (the second) of the Applicant's challenge requires

consideration of the decision of the Court of Appeal in ZAT. At [95] the court stated:

> "*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 referred to in Mr Scott's fourth statement 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.*"

The first part of this guidance is properly understood only when one recognises that none of the claimants in ZAT had made an asylum application under the Dublin Regulation. Those in this position must demonstrate "*very exceptional circumstances*" in order to succeed in an Article 8 claim brought in this jurisdiction.

51. That is not this case since RSM has engaged with the Italian Dublin Regulation system and has continued to do so up to the point of this Tribunal's intervention. We consider it clear from the final two sentences of [95] that the Court of Appeal made a clear distinction between engaging and non-engaging immigrants. RSM belongs to the former category. In his case, therefore, the main question for this Tribunal is whether it is demonstrated that there is no effective way of proceeding in Italy.

52. We have emphasised the word "effective" for the following reasons. First, the judicial assessment of efficacy will invariably be fact sensitive, intensely so. Second, efficacy must be measured against the overarching aims and objectives of the Dublin Regulation. Third, these aims include the maintenance of solidarity and mutual trust and respect among the Member States of the Union. Fourth, crucially in the present context, the aims and objectives also include the overarching aim of expedition. Fifth, expedition has special force in the case of unaccompanied children in general – in this particular case expedition is especially acute.

53. We consider it uncontroversial to suggest that RSM's case was crying out for anxious attention and enquiry and maximum expedition from the beginning of June 2016, when the tragic deaths of his mother and younger brother became known to all concerned. His erroneously assessed status during the previous two months (the

first phase) may be understandable: but this merely served to augment the overall period of inaction and delay. We recognise that this Tribunal's assessment of the period of almost seven months which have elapsed subsequently (the second phase) must be cautious, given that there is limited evidence of the reasons why it has taken so long to achieve so little in the Italian system and, furthermore, the evidence of relevant Italian laws and procedures is not comprehensive. Caution is also dictated by the notorious fact that Italy is one of two EU Member States (Greece being the other) which have borne the brunt of the refugee crisis in Europe. Furthermore, it is no function of this Tribunal to conduct an exhaustive review of the acts and omissions of the relevant Italian authorities, including the judicial agencies.

54. Thus we confine ourselves to certain basic and clearly demonstrated facts. We consider it appropriate to juxtapose early June 2016 with a future date (as of the date of the substantive hearing – 19 December 2016) namely 04 January 2017. In doing so we take into account all of the other landmark dates and events noted above. This simple exercise exposes an unmistakable and glaring reality: RSM's claim for asylum has not yet been registered in Italy and 04 January 2017 represents the earliest date when this event may occur. This is particularly clear from Ms Farman's letter of 09 December 2016 to the Italian Dublin Unit in Rome. It is equally clear that this crucial milestone would have been attained some months ago but for the erroneous assessment that RSM was not an unaccompanied child: see Mr Dangerfield's email of 14 October 2016 to his colleague. This Tribunal does not sit in judgement of this error. Indeed it readily acknowledges the scope for human error in these cases. Rather, it takes this into account as one of the facts and factors, objectively demonstrated, to be weighed in the proportionality balancing exercise.

55. Next, we turn our attention to the likely post-January 2017 scenario. It is common case that, as a matter of probability, Italy will transmit to the United Kingdom a "take charge" request in respect of RSM. The crucial issue in this respect is timescale. The evidence bearing on this issue provides this Tribunal with no confidence that the expedition required in this particular, fact sensitive case will be achieved. We elaborate as follows.

56. First, there is no evidence whatsoever emanating from the Italian authorities: we record this simply as a fact. Second, the Secretary of State's evidence is vague and non-committal in this respect: see [30] – [36] above. Third, the evidence of the three concrete cases in which Italian "take charge" requests <u>have been</u> accepted by the United Kingdom discloses post-request delays ranging from almost four months to just under eight months. We acknowledge that in two of these cases the take charge request was communicated just under one month following the registration of the asylum claim. In this respect, the data concerning the third of the three concrete cases are not available.

57. In the present case, we take into account that the United Kingdom has made no plea to the Italian authorities for expedition in RSM's case. We weigh also the absence of any indication that the Italian authorities will proceed with any enhanced expedition

or prioritisation. Based on the evidence provided by the Secretary of State (which we emphasise), while RSM is likely to be the subject of a "take charge" request directed to the United Kingdom, this, based on an assumption of no supervening currently unforeseen obstacle or complication, is unlikely to materialise until the beginning of May 2017 (at best) and the beginning of September 2017 (at worst). This is our balanced forecast of the probabilities based on all the available evidence.

58. We are mandated to view the best interests of RSM as a primary consideration under both municipal law, via section 6 of the Human Rights Act 1998 (Article 8 ECHR), together with EU law i.e. the Dublin Regulation. In our judgement the best interests of this child point unremittingly and incontestably towards immediate reunification with the only family left to him. This ranks as a primary consideration in the task we are performing. In El Ghatet v Switzerland [Application No 56971/10], the ECtHR stated recently, at [46]:

> "*The Court has further held that there is a broad consensus, including in international law, in support of the idea that in all decisions concerning children, their best interests must be paramount (see Neulinger and Shuruk v. Switzerland [GC], no. 41615/07, § 135, ECHR 2010; M.P.E.V. and Others v. Switzerland, no. 3910/13, § 52, 8 July 2014; see also Tarakhel v. Switzerland [GC], no. 29217/12, § 99, ECHR 2014 (extracts)). For that purpose, in cases regarding family reunification the Court pays particular attention to the circumstances of the minor children concerned, especially their age, their situation in their country of origin and the extent to which they are dependent on their parents (see Tuquabo-Tekle and Others, cited above, § 44). While the best interests of the child cannot be a "trump card" which requires the admission of all children who would be better off living in a Contracting State (I.A.A. and Others v. the United Kingdom, cited above, § 46; see also Berisha, cited above, §§ 60-61), the domestic courts must place the best interests of the child at the heart of their considerations and attach crucial weight to it (see, mutatis mutandis, Mandet v. France, no. 30955/12, §§ 56-57, 14 January 2016).*"

Ultimately, our assessment of RSM's best interests emerges as the determinative factor in the proportionality balancing exercise.

59. We juxtapose the pronouncement in El Ghatet with what the Court of Appeal stated, in ZAT at [84]:

> "*The need for expedition in cases involving particularly vulnerable persons such as unaccompanied children is recognised in the Regulation and authorities such as Case C-648/11 R (MA (Eritrea)) v Secretary of State for the Home Department [2013] 1 WLR 2961 and Manchester City Council v Pinnock [2010] UKSC 45, [2011] 2 AC 104 at [64].*
>
> *....*
>
> *I accept Ms Demetriou's submission that the urgency of particular circumstances*

may require a shorter period than the periods specified as long stops in the Regulation."

The court added, at [87]:

"*There will be a need for expedition in many cases involving unaccompanied minors.*"

And at [90]:

"*Cases such as these are intensely fact sensitive.*"

We do not overlook the imperatives which the court identified and balanced in [87]:

"*The circumstances of the first four Respondents' cases, especially the psychiatric evidence, suggested in their cases there was a particular need for urgency. But an orderly process is also important in cases of unaccompanied minors. The need to examine their identity, age and claimed relationships remains and there is a particular need to guard against people trafficking.*"

We observe that none of these imperatives operates to the detriment of the relief pursued by the Applicants in these proceedings. The conduct of this litigation and, in particular, the facilities afforded to the Secretary of State to address certain issues and to file evidence between the permission and substantive stages, were specifically designed to ensure that the Tribunal would be adequately informed about issues of this kind. Furthermore, the order which we propose to make accommodates any legitimate concerns about RSM's best interests and recognizes fully the roles and responsibilities of the Italian authorities, judicial and otherwise.

60. We pose again the question distilled from [95] of ZAT: have the Applicants demonstrated that RSM's asylum claim which, at its heart, entails a plea to be transferred to the United Kingdom under Article 8 of the Dublin Regulation, is not being efficaciously processed? The formulation of this question is yet another illustration of the intensely fact sensitive questions to be expected in litigation of this *genre*. The answer to this question requires a balanced, evaluative judgement on the part of the judicial authority concerned. Every such evaluative judgement is measurable against familiar standards and criteria: the need to take into account all material facts and factors, the importance of disregarding the immaterial and, ultimately, the avoidance of irrationality. A constant alertness to all of the governing legal rules and principles which we have outlined above is also fundamental. We have approached our task in this way.

61. In our summarised, *ex tempore* decision promulgated on 19 December 2016 we addressed the Applicant's challenge by reference to the higher standard of very

compelling circumstances. While, as explained above, we consider that a somewhat less onerous standard applies to those (such as RSM) who have engaged with the Dublin Regulation system of the Member States concerned, this matters not as we have determined this challenge by reference to the higher test. We stated at [8]:

> "*We are of the opinion that the Applicants' challenges are well-founded. The ZAT threshold of very compelling circumstances is overcome. Stated succinctly, RSM's personal circumstances, on any showing, belong towards the upper end of the notional highly compelling spectrum and, based on the evidence amassed (which we emphasise), the Italian Dublin Regulation system has not served him with the anxious attention, efficacy or expedition for which his unique, highly fact sensitive situation has been pleading since April 2016 or June 2016 at latest. Eight months later we consider judicial intervention appropriate.*"

Elaboration is neither appropriate nor necessary. This passage expresses our evaluative judgement on the efficacy issue in this intensely fact sensitive context. It follows that, in this unique case, the second limb of RSM's challenge succeeds also.

Order

62. Giving effect to our conclusions above we order as follows:

    (a) The Secretary of State is hereby ordered to admit the first Applicant, RSM, to the United Kingdom.

    (b) It is hereby declared that there has been a failure by the Secretary of State to lawfully exercise the discretion conferred by Article 17 of the Dublin Regulation.

    (c) There shall be liberty to apply.

    As regards (a), we decline to impose any time limit for admission as this duly respects the roles and responsibilities of the Italian authorities and provides a layer of protection for RSM: see [60] above. Furthermore, this species of orders has operated successfully in other cases and the mechanism of liberty to apply, in (c), can be invoked if necessary.

Permission to appeal to the Court of Appeal

63. We are minded to grant permission to appeal to the Court of Appeal, on account of:

    (a) The desirability of the Court of Appeal pronouncing on whether this Tribunal has erred in law in its approach to the case of a vulnerable unaccompanied child who has initiated and pursued the Dublin Regulation

process in the host Member State, having regard to predictable further legal challenges of a similar kind. While the question of whether an error of law has been committed in the application of established principles to a highly fact sensitive matrix is unlikely to qualify for the grant of permission to appeal in many instances, we consider this course appropriate in the present case taking into account the changing profile of this species of litigation and its progressive escalation.

(b) The novelty and importance of the Article 17 Dublin Regulation issues: the essential question for the Court of Appeal will be whether this Tribunal has erred in its construction and application of Article 17. Our consideration of and conclusion in relation to governmental policy statements, in [47], will also fall to be considered as a discrete issue.

64. In essence, therefore, we grant permission in respect of the first three of the Secretary of State's four grounds of appeal. We refuse permission relating to the fourth, as it is based on the demonstrably misconceived premise that this Tribunal made "… *a mandatory order requiring the Respondent's* ***immediate*** *admission to the UK …..*" [our emphasis]. Immediate admission was not ordered: see [62](a) of this judgment and order. Our reasons for declining to impose any time limit were explained fully in the immediately succeeding passage. The reconfigured species of mandatory order which followed under the mechanism of liberty to apply – see [68] below – occurred in the circumstances rehearsed in the transcripts of the *ex tempore* rulings made on the dates noted, 24 January and 09 February 2017. We are unable to identify any arguable error of law of significance in this Tribunal's exercise of discretion in its selection of the appropriate public law remedy in the quite different and intensely fact sensitive circumstances pertaining some considerable time following the grant of the initial remedy – in a context in which, in the events materialising, the initial remedy did not provide practical and effective relief to the first Applicant, RSM. Contrast, in this respect, R (O) v Secretary of State for the Home Department [2016] UKSC 16, at [50] especially.

65. While we have taken note of the submissions on behalf of the Applicant relating to the possibility of an appeal to the Supreme Court in ZAT and Others providing authoritative guidance on the issues arising in these proceedings, we cannot overlook the significant degree of uncertainty concerning the future of any appeal in that case arising out of the imponderable of the availability of public funding. Furthermore, the Article 17 and policy issues arising in these proceedings are peculiar to the present case. Finally, continuing developments in this Chamber suggest that a not insubstantial number of other cases will benefit from the Court of Appeal reviewing the correctness in law of what we have decided.

66. We are, however, persuaded that there is merit in the Applicants' arguments relating to costs, in one respect and we grant permission to appeal subject to the condition that the costs order specified in [67] below will not be stayed. While we take cognisance of the separate argument advocating a further condition whereby the

Respondent should pay the Applicants' reasonable costs on appeal in any event, we consider that this is one step too far in the circumstances and is premature in a context where it would be inappropriate to attempt any forecast of the outcome of any legal aid application or any application to the Court of Appeal for a protective costs order. The Court of Appeal will be the appropriate forum for the ventilation and determination of further costs issues of this kind.

Costs

67. We order:

    (i) the Secretary of State shall pay the Applicants' costs, to be assessed in default of agreement.

    (ii) the Applicants' costs shall be assessed as their publicly funded status requires.

Postscript

68. On 20 January 2017 the mechanism of liberty to apply was invoked on behalf of RSM as he had not been admitted to the United Kingdom. This resulted in further listings before the Tribunal on 24 January and 09 February 2107 and delayed the promulgation of this final judgment. See [25] above. This gave rise to further mandatory orders of the Tribunal requiring the Secretary of State to admit RSM to the United Kingdom by a specified date and to equip him with a travel document insofar as necessary. Ultimately, the Applicant's admission to the United Kingdom was effected on 16 February 2017. In the interests of economy, the "liberty to apply" orders are not appended.

.

69. Finally, during the liberty to apply phase, the Applicants' legal representatives invited the Secretary of State's representatives to formally concede that the Tribunal's order of 19 December 2016 had been breached. We construe the Applicants' position to be one of pursuing a further remedy, in the form of a declaratory order, to reflect this. We shall treat this as a discrete, ancillary application. The concession sought was not provided.

70. It was implicit in our order dated 19 December 2016 that the Secretary of State should effect the admission of the first Applicant, RSM, to the United Kingdom within a reasonable time. The Tribunal would, clearly, be the arbiter of reasonableness in the event of an asserted breach. During the "liberty to apply" phase, some further evidence was lodged on behalf of the Secretary of State. As the Applicants' representatives acknowledge in their application, this may be incomplete and further evidence may be required. We consider that directions for further evidence would indeed be necessary. This would inevitably give rise to increased costs and may, ultimately, require a further hearing in order to determine the issue raised.

71. We remind ourselves that judicial review remedies are always discretionary. As we have made clear in [64] above, remedies in cases of this *genre* should provide practical and effective relief. This is a reflection of the factors of urgency and the plight of unaccompanied, isolated and vulnerable teenagers which characterise this species of litigation. Weighing this with our assessment that further directions giving rise to further costs and delay would in our judgement be necessary, we consider that the prolongation of this litigation for the purpose of obtaining a declaratory order which, in this highly fact sensitive context, would not provide a practical or efficacious remedy or guidance of utility in other cases is not justified.

72. In thus concluding we have taken into account the principle articulated by the House of Lords in R v Secretary of State for the Home Department, ex parte Salem [1999] 1AC 450, at 453 per Lord Slynn:

> *"My Lords, I accept, as both counsel agree, that in a cause where there is an issue involving a public authority as to a question of public law your Lordships have a discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se …*
>
> *The discretion to hear disputes, even in the area of public law must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future."*

We have also had regard to the exercise of the judicial discretion in the matter of public law remedies in the more recent pronouncement on this subject at the highest level in O (*supra*).

Signed: _____

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

Date: [initial] 17 **February 2017**
Enlarged and finalised: **31 March 2017**

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on:

Notification of appeal rights

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

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

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

APPENDIX 1

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of RSM and ZAM

Applicants

v

Secretary of State for the Home Department

Respondent

Before

The Honourable Mr Justice McCloskey, President
and Upper Tribunal Judge Finch

Having considered all documents lodged and having heard the parties' respective representatives, Mr M Fordham QC and Ms M Knorr, of counsel, instructed by Bhatt Murphy Solicitors, on behalf of the Applicants and Mr A Henderson, of counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 05 December 2016.

DECISION AND ORDER

(Approved and edited version: given ex tempore on 05/12/16)

McCloskey J

Preface

I emphasise at the outset that both Applicants continue to have the protection of anonymity and reproduce below the extant Tribunal Direction.

Direction – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a tribunal or court directs otherwise, the Applicants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Applicants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

(1) This is a case of some urgency in which the Upper Tribunal has acceded to the Applicants' request for expedition. The proceedings have been processed and managed accordingly. We outline in (2) – (5) below their skeletal framework.

(2) In very brief compass the first Applicant, RSM, is a national of Eritrea aged 14 years and is currently residing in Rome, having fled his country of origin and subsequently the countries of Yemen and Egypt, accompanied by his mother and younger brother at all times. RSM was unexpectedly separated from his mother and younger brother at the point of departure in Egypt. From there he travelled with a family relative to Rome where both lived together in a refugee camp for a period of some few months. During that period RSM learned that his mother and younger brother had tragically lost their lives, with many others, when later attempting the perilous crossing between Egypt and Italy. That, very succinctly, sketches the first chapter of RSM's story.

(3) The second main element of RSM's judicial review challenge relates to his living family members. He has an adult aunt who, having previously been recognised as a refugee in the United Kingdom, resides in this country and is willing and able to receive and care for him. This is a fact uncontested and of no little significance.

(4) The third main element in RSM's case is the evidence provided by Dr Claire O'Driscoll, a clinical psychologist whose expertise extends to teenagers. Dr O'Driscoll has provided a comprehensive report and supplement.

(5) Fourth, there is *tranche* of evidence relating to the systems and procedures in Italy for the processing and determination of asylum claims under the Dublin Regulation generally, coupled with evidence of how these are functioning in RSM's case.

(6) At the outset of today's hearing we canvassed tentatively with the representatives certain possibilities and options for the continued conduct of these proceedings. As the exchanges which materialised will have made clear, the main impetus for the Tribunal's inconclusive observations at this initial stage was the state of the Secretary of State's case. In summary, we had difficulty in identifying the evidence (if any) provided by the Secretary of State and we expressed surprise at the absence of a witness statement in due discharge of the Secretary of State's duty of candour.

(7) The candid response made by Mr Henderson to the questions and reservations raised by the Tribunal, supported by instructions provided by the GLD solicitor in attendance, confirmed the Tribunal's reservations in this respect. Mr Henderson did not seriously contest this discrete issue. His submissions, in this context, were well

judged.

(8) One of the possibilities which the Tribunal canvassed tentatively was that of adjourning today's hearing. Having heard the presentation of the Applicants' case by Mr Fordham who, as he put it, presented his arguments in full *de bene esse*, with the Tribunal's approval and in the course of further exchanges between Mr Henderson and the panel a surprising development eventuated, namely an application by Mr Henderson for an adjournment. We rule without hesitation that this application is ill timed and has no merit in any event. This is a case involving an unaccompanied 14 year old child whose plight is, on any showing, acute. It which has been granted expedition by the Tribunal. That this adjournment application was not foreshadowed in the summary grounds of defence or in a formal application or by letter or email or at the commencement of today's hearing in many ways speaks for itself.

(9) That brings us to the next question. Mr Fordham's stance is that the Tribunal should deal with this case as a rolled up hearing and proceed to grant the Applicants final relief without more. The first element of this submission has some merit not least because the Tribunal's initial directions in this case did indeed list the hearing as a rolled up one. The reasons why the Tribunal began to reflect on the advisability and propriety of that course of action are the following. First, the speedy 'rolled up' course seems to us to have met with disapproval in the judgment of the Court of Appeal in ZAT. Second, we are not satisfied that the Respondent's duty of candour has been discharged at this stage. Third, all of the evidence points to an indeterminate and interim state of affairs in the first Applicant's case. Fourth, it seems likely that the Applicants' evidence could be updated and augmented in certain material respects.

(10) In particular, we are alive to the possibility that further material evidence on behalf of the Applicants could be assembled and produced within a very short timeframe. For example, evidence of that kind could make considerably clearer the stage which the asylum claim has actually reached in Italy and what its short term prognosis is. Such evidence might also provide us with a clearer picture of RSM's circumstances in what appears to be a state children's home and, *inter alia,* whether he is in fact being educated there. Further evidence might also augment the evidential picture on the risk of absconding not just in general terms but more specifically in his case. Those are the reasons why we identified certain options at the outset of today's proceedings. The Applicants' preferred course of action is crystal clear and we have given careful consideration to it.

(11) The further ingredient in our approach at this stage of the proceedings arises from the decision of the Court of Appeal in ZAT and in particular paragraph 95. That should have been apparent, I trust, from my reference to the evidence bearing upon the current stage of the Applicants' asylum claim and the short term prognosis.

(12) Following careful probing, we understand Mr Henderson's position on behalf of the Secretary of State to be, first of all, that an adjournment is sought and, second or

alternatively, that permission should be refused. The basis of the latter submission is that based on the summary grounds of defence the Applicants' case does not overcome the threshold of arguability. Mr Henderson has confirmed that any more extensive submissions he may wish to make would be addressed not to the question of arguability but rather to the question of whether the Applicants qualify for the grant of final substantive relief.

(13) With some reluctance, we have come to the conclusion that we should not proceed with a rolled up hearing in these circumstances but temper that with an injection of the maximum expedition which we consider appropriate in these circumstances.

ORDER AND DIRECTIONS

(14) We grant the Applicants permission to apply for judicial review. Their case overcomes the modest threshold of arguability. To this we add the following directions:

a. We direct the Secretary of State to file a witness statement. This will be made by a suitably informed and senior official of the Home Office. It will address all of the issues bearing on the Dublin Regulation process for this Applicant and, insofar as material, more widely. It will address also the emails and the rather bare recent letter.

b. The witness statement will further be directed to the question of the second Applicant: broadly, the Secretary of State's position viz-a-viz the second Applicant and in particular any steps or enquiries which should properly be made on that front at this stage **or** any justification proffered for inertia in this respect.

   We recognise that a witness statement of this kind may legitimately contain hearsay evidence. However, if it is made by a Home Office official of suitable seniority and direct involvement that should be confined to a minimum.

c. The witness statement will attach all documentary materials which are required in the discharge of the Secretary of State's duty of candour.

d. The witness statement will be served and filed by 4 pm on Friday this week, that is 09 December 2016.

e. The Applicants are at liberty to adduce further evidence. The time limit for this step is 4 o' clock on 13 December 2016.

f. We list the substantive hearing provisionally on 19 December 2016.

g. The Applicants' solicitors will provide a full update in writing by 16.00 on 15 December 2016

h. Liberty to apply.

i. We reserve costs.

(15) I elaborate on the liberty to apply provision as follow. This is an expedited case which is on a fast track. We do not consider it appropriate to devise today a more prescriptive timetable than that contained in the directions made. However, the Applicants will be able, under the aegis of liberty to apply, to request that the substantive hearing be listed at very short notice indeed taking into account the availability of the Tribunal and the entitlement of the Respondent to be fully heard.

(16) Finally, the absence of any reference to Article 17 of the Dublin Regulation in the Respondent's case is noted.

Signed: 

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

Dated: **05 December 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 sent (Civil Procedure Rules Practice Direction 52D 3.3).

APPENDIX 2

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of RSM and ZAM

Applicants

v

Secretary of State for the Home Department

Respondent

Before

The Honourable Mr Justice McCloskey, President
and Upper Tribunal Judge Finch

Having considered all documents lodged and having heard the parties' respective representatives, Mr M Fordham QC and Ms M Knorr, of counsel, instructed by Bhatt Murphy Solicitors, on behalf of the Applicants and Mr D Ruck-Keene, of counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 19 December 2016.

APPROVED EX TEMPORE DECISION AND ORDER

BOTH APPLICANTS CONTINUE TO HAVE THE PROTECTION OF ANONYMITY.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a tribunal or court directs otherwise, the Applicants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the Applicants and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

19 December 2016

McCloskey J

(1) We shall announce our decision in very summary terms in the circumstances. Time is against all of us in this case and we do not have the luxury of delivering an extensive *ex tempore* judgment or reserving. What the parties need to know in every case, following a hearing, is the result. That is particularly true of the present case. What this means is that if a conventional full written judgment is required it will be provided in due course.

(2) In very brief compass, there are two Applicants for judicial review. I take this opportunity to emphasise that each has the protection of anonymity with the result that nothing should be disseminated or published which identifies either Applicant directly or could have the consequence of identifying them.

(3) We have set out in outline in our earlier decision the background to these proceedings. RSM, the first Applicant, is a national of Eritrea aged 14 years. He resides in Italy, isolated from family and friends. He fled his country of origin, travelling through the countries of Yemen and Egypt which he fled also. Up to the point of his departure from Egypt he was accompanied by his mother and younger brother. They survived their traumatic experiences. The events which separated RSM from his mother and younger brother were unscheduled, dramatic and extremely traumatic for him. Worse, regrettably, was to come. Following a short sojourn in Italy he learnt of the appallingly tragic circumstances of the deaths by drowning of his mother and sibling in the course of their attempts to reunite the three family members in Italy.

(4) The second judicial review Applicant is RSM's aunt, ZAM. She is his adult aunt. She resides in the United Kingdom where she was initially a recognised refugee and is now a British citizen. There is another family relative of no little importance, namely RSM's cousin who is of course the daughter of the second Applicant ZAM. SA has, with others, made a not insignificant evidential contribution to these proceedings during their most recent phase. SA is the oldest daughter of ZAM and she has one younger sister.

(5) These proceedings have been conducted in two phases. The first phase came to a conclusion with our order of 05 December 2016 at which stage we granted the Applicants permission to apply for judicial review. It was quite clear to the Tribunal at that stage that having processed the proceedings on a fast track the evidential picture was incomplete bilaterally. We addressed this firstly by requiring the Secretary of State to file a witness statement. Secondly, we acknowledged the potential further evidence to be provided on behalf of the Applicants.

(6) The Tribunal did not of course know what the outcome of those steps might be but, in the briefest of terms, dividing the proceedings into these two phases has had the consequence that the Tribunal at this, the conclusion of the second phase, is considerably more fully informed than at the earlier stage. The evidence provided

on behalf of the Secretary of State in the form of both witness statements and certain documentary evidence is as important for what it says and contains as for what it does not say and does not contain. On the Applicants' side the additional evidence has provided the Tribunal with a more rounded insight into RSM's personal circumstances and, secondly, into what emerges as a key question in these proceedings, namely how the Dublin Regulation system in Italy has worked for him to date, is working for him at the moment and is likely to continue working for him.

(7) Time does not permit us to express *in extenso* our reasons for coming to the following conclusion, which we express at this stage.

(8) We are of the opinion that the Applicants' challenges are well-founded. The ZAT threshold of very compelling circumstances is overcome. Stated succinctly, RSM's personal circumstances, on any showing, belong towards the upper end of the notional highly compelling spectrum and, based on the evidence amassed (which we emphasise), the Italian Dublin Regulation system has not served him with the anxious attention, efficacy or expedition for which his unique, highly fact sensitive situation has been pleading since April 2016 or June 2016 at latest. Eight months later we consider judicial intervention appropriate.

(9) In the circumstances prevailing we shall confine ourselves to one aspect of the relief claimed today. We consider that a mandatory order should be made addressed to the Secretary of State in terms which mirror what is contained in paragraphs 36 (ii) and 37 of the order dated 11 October 2016 made in the combined challenges of SA and AA, very recently decided (see SA & AA(R) v SSHD [2016] UKUT (JR) 507). This is the real, practical and effective remedy which it is essential for the Applicants to have as of today.

(10) We shall reflect a little further on the propriety of acceding to the Applicants' quest to obtain relief in the second, that is declaratory, form set forth in their claim form, namely a declaration that the Secretary of State has unlawfully refused to consider and exercise her discretion under Article 17 of the Dublin Regulation. All the evidence bearing on that has been of very late advent, as has the argument and we would like to consider both at a little further length.

(11) The upshot is that we make a mandatory order in the terms indicated namely the Secretary of State shall admit the first Applicant RSM to the United Kingdom. The full import and rationale of that order is as set forth in [37] of SA and AA. We add and emphasise that there shall be liberty to apply. That is a measure which provides protection to both the Applicants and the Secretary of State and achieves even-handed balance.

(12) As the present case has (and certain other recent cases have) shown even more dramatically the lines of communication for litigation instructions are surprisingly lengthy where the Secretary of State is concerned. Thus we do not require Mr Ruck-Keene to commit himself irredeemably today. To do so would be unfair and unreasonable. However, a stringent timescale is imperative. To this end, any application for permission to appeal will have to be made on notice to the other

parties by close of business on Wednesday 21 December 2016 viz within 48 hours. If anything further is required from the Tribunal, whether under the aegis of liberty to apply or otherwise, that should be notified by the relevant party to the Tribunal within the same time limit.

22 December 2016

Remedy

(13) The Secretary of State is hereby ordered to admit the first Applicant, RSM, to the United Kingdom.

[Final order to follow]

Permission to appeal to the Court of Appeal

(14) See final order to follow.

Costs

(15) (i) We order the Secretary of State to pay the Applicants' costs to be assessed in default of agreement.

(ii) The Applicants' costs shall be assessed as their publicly funded status requires.

Signed: Leonard McCloskey.

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

Dated: **22 December 2016**

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on:

Notification of appeal rights

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

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

APPENDIX 3: THE DUBLIN REGULATION

[1] We begin by considering certain of its recitals. Per recital (4), Dublin III is designed to operate as "*a clear and workable method for determining the Member State responsible for the examination of an asylum application*". Recital (5) states that the mechanisms devised -

> "*… should, in particular, make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for granting international protection and not to compromise the objective of the rapid processing of applications for international protection.*"

By recital (13):

> "*In accordance with the 1989 United Nations Convention on the Rights of the Child and with the Charter of Fundamental Rights of the European Union, the best interests of the child should be a primary consideration of Member States when applying this Regulation. In assessing the best interests of the child, Member States should, in particular, take due account of the minor's wellbeing and social development, safety and security considerations and the views of the minor in accordance with his or her age and maturity, including his or her background.*"

Recital (14) states:

> "*In accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with the Charter of Fundamental Rights of the European Union, respect for family life should be a primary consideration of Member States when applying this Regulation.*"

[2] Recital (16) states, in part:

> "*When the applicant is an unaccompanied minor, the presence of a family member or relative on the territory of another Member State who can take care of him or her should also become a binding responsibility criterion.*"

Recital (17) is directly linked to Article 17:

> "*Any Member State should be able to derogate from the responsibility criteria, in particular on humanitarian and compassionate grounds, in order to bring together family members, relatives or any other family relations and examine an application for international protection lodged with it or with another Member State, even if such*

examination is not its responsibility under the binding criteria laid down in this Regulation."

We note also Recital (18):

"*A personal interview with the applicant should be organised in order to facilitate the determination of the Member State responsible for examining an application for international protection.*"

[3] Turning to the Regulation proper, it is important to absorb the definition of "*unaccompanied minor*":

"*A minor who arrives on the territory of the Member State unaccompanied by an adult responsible for him or her, whether by law or by the practice of the Member State concerned, and for as long as he or she is not effectively taken into the care of such an adult ….*"

[4] There are certain other provisions of the Dublin Regulation of significance in the present context:

Article 3(1)

"*Member States shall examine any application for international protection by a third-country national or a stateless person who applies on the territory of any one of them, including at the border or in the transit zones. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.***"**

Article 5

"*1. In order to facilitate the process of determining the Member State responsible, the determining Member State shall conduct a personal interview with the applicant. The interview shall also allow the proper understanding of the information supplied to the applicant in accordance with Article 4.*

2. The personal interview may be omitted if:

(a) the applicant has absconded; or

(b) after having received the information referred to in Article 4, the applicant has already provided the information relevant to determine the Member State responsible by other means. The Member State omitting the interview shall give the applicant the opportunity to present all further information which is relevant to correctly determine the Member State responsible before

a decision is taken to transfer the applicant to the Member State responsible pursuant to Article 26(1).

3. *The personal interview shall take place in a timely manner and, in any event, before any decision is taken to transfer the applicant to the Member State responsible pursuant to Article 26(1).*

4 *The personal interview shall be conducted in a language that the applicant understands or is reasonably supposed to understand and in which he or she is able to communicate. Where necessary, Member States shall have recourse to an interpreter who is able to ensure appropriate communication between the applicant and the person conducting the personal interview.*

5. *The personal interview shall take place under conditions which ensure appropriate confidentiality. It shall be conducted by a qualified person under national law.*

6. *The Member State conducting the personal interview shall make a written summary thereof which shall contain at least the main information supplied by the applicant at the interview. This summary may either take the form of a report or a standard form. The Member State shall ensure that the applicant and/or the legal advisor or other counsellor who is representing the applicant have timely access to the summary.*"

Article 6

This prescribes a series of guarantees for children, in the following terms:

"*(ii) The best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation.*

(iv) For the purpose of applying Article 8, the Member State where the unaccompanied minor lodged an application for international protection shall, as soon as possible, take appropriate action to identify the family members, siblings or relatives of the unaccompanied minor on the territory of Member States, whilst protecting the best interests of the child. To that end, that Member State may call for the assistance of international or other relevant organisations, and may facilitate the minor's access to the tracing services of such organisations."

Article 8

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

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

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

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

5. *The Commission shall be empowered to adopt delegated acts in accordance with Article 45 concerning the identification of family members, siblings or relatives of the unaccompanied minor; the criteria for establishing the existence of proven family links; the criteria for assessing the capacity of a relative to take care of the unaccompanied minor, including where family members, siblings or relatives of the unaccompanied minor stay in more than one Member State. In exercising its powers to adopt delegated acts, the Commission shall not exceed the scope of the best interests of the child as provided for under Article 6(3).*

6. *The Commission shall, by means of implementing acts, establish uniform conditions for the consultation and the exchange of information between Member States. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 44(2).*"

Article 17

"*1. By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation.*

The Member State which decides to examine an application for international protection pursuant to this paragraph shall become the Member State responsible and shall assume the obligations associated with that responsibility. Where applicable, it shall inform, using the 'DubliNet' electronic communication network set up under Article 18 of Regulation (EC) No 1560/2003, the Member State previously responsible, the Member State conducting a procedure for determining the Member State responsible or the Member State which has been requested to take charge of, or to take back, the applicant.

The Member State which becomes responsible pursuant to this paragraph shall forthwith indicate it in Eurodac in accordance with Regulation (EU) No 603/2013 by adding the date when the decision to examine the application was taken.

2. *The Member State in which an application for international protection is made and which is carrying out the process of determining the Member State responsible, or the Member State responsible, may, at any time before a first decision regarding the substance is taken, request another Member State to take charge of an applicant in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations, even where that other Member State is not responsible under the criteria laid down in Articles 8 to 11 and 16. The persons concerned must express their consent in writing*

   The request to take charge shall contain all the material in the possession of the requesting Member State to allow the requested Member State to assess the situation.

   The requested Member State shall carry out any necessary checks to examine the humanitarian grounds cited, and shall reply to the requesting Member State within two months of receipt of the request using the 'DubliNet' electronic communication network set up under Article 18 of Regulation (EC) No 1560/2003. A reply refusing the request shall state the reasons on which the refusal is based.

   Where the requested Member State accepts the request, responsibility for examining the application shall be transferred to it. **"**

Article 18(1)(a)

"*The Member State responsible under this Regulation shall be obliged to:*

(a) take charge, under the conditions laid down in Articles 21, 22 and 29, of an applicant who has lodged an application in a different Member State . . ."

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 within the meaning of Article 20(2), request that other Member State to take charge of the applicant.*

   Notwithstanding the first subparagraph, in the case of a Eurodac hit with data recorded pursuant to Article 14 of Regulation (EU) No 603/2013, the request

shall be sent within two months of receiving that hit pursuant to Article 15(2) of that Regulation.

Where the request to take charge of an applicant is not made within the periods laid down in the first and second subparagraphs, responsibility for examining the application for international protection shall lie with the Member State in which the application was lodged.

2. *The requesting Member State may ask for an urgent reply in cases where the application for international protection was lodged after leave to enter or remain was refused, after an arrest for an unlawful stay or after the service or execution of a removal order.*

   The request shall state the reasons warranting an urgent reply and the period within which

3. *In the cases referred to in paragraphs 1 and 2, the request that charge be taken by another Member State shall be made using a standard form and including proof or circumstantial evidence as described in the two lists mentioned in Article 22(3) and/or relevant elements from the applicant's statement, enabling the authorities of the requested Member State to check whether it is responsible on the basis of the criteria laid down in this Regulation.*

   The Commission shall, by means of implementing acts, adopt uniform conditions on the preparation and submission of take charge requests. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 44(2)."

Article 22

"1. *The requested Member State shall make the necessary checks, and shall give a decision on the request to take charge of an applicant within two months of receipt of the request.*

2. *In the procedure for determining the Member State responsible elements of proof and circumstantial evidence shall be used.*

3. *The Commission shall, by means of implementing acts, establish, and review periodically, two lists, indicating the relevant elements of proof and circumstantial evidence in accordance with the criteria set out in points (a) and (b) of this paragraph. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 44(2).*

   (a) *Proof:*

      (i) *this refers to formal proof which determines responsibility pursuant to this Regulation, as long as it is not refuted by proof to the contrary;*

(ii) the Member States shall provide the Committee provided for in Article 44 with models of the different types of administrative documents, in accordance with the typology established in the list of formal proofs;

(b) Circumstantial evidence:

(i) this refers to indicative elements which while being refutable may be sufficient, in certain cases, according to the evidentiary value attributed to them;

(ii) their evidentiary value, in relation to the responsibility for examining the application for international protection shall be assessed on a case-by-case basis.

4. *The requirement of proof should not exceed what is necessary for the proper application of this Regulation.*

5. *If there is no formal proof, the requested Member State shall acknowledge its responsibility if the circumstantial evidence is coherent, verifiable and sufficiently detailed to establish responsibility.*

6. *Where the requesting Member State has pleaded urgency in accordance with the provisions of Article 21(2), the requested Member State shall make every effort to comply with the time limit requested. In exceptional cases, where it can be demonstrated that the examination of a request for taking charge of an applicant is particularly complex, the requested Member State may give its reply after the time limit requested, but in any event within one month. In such situations the requested Member State must communicate its decision to postpone a reply to the requesting Member State within the time limit originally requested.*

7. *Failure to act within the two-month period mentioned in paragraph 1 and the one-month period mentioned in paragraph 6 shall be tantamount to accepting the request, and entail the obligation to take charge of the person, including the obligation to provide for proper arrangements for arrival."*

Article 29

"1. *The transfer of the applicant or of another person as referred to in Article 18(1)(c) or (d) from the requesting Member State to the Member State responsible shall be carried out in accordance with the national law of the requesting Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request by another Member State to take charge or to take back the person concerned or of the final decision on an appeal or review where there is a suspensive effect in accordance with Article 27(3).*

If transfers to the Member State responsible are carried out by supervised departure or under escort, Member States shall ensure that they are carried out in a humane manner and with full respect for fundamental rights and human dignity.

If necessary, the applicant shall be supplied by the requesting Member State with a laissez passer. The Commission shall, by means of implementing acts, establish the design of the laissez passer. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 44(2).

The Member State responsible shall inform the requesting Member State, as appropriate, of the safe arrival of the person concerned or of the fact that he or she did not appear within the set time limit.

2. *Where the transfer does not take place within the six months' time limit, the Member State responsible shall be relieved of its obligations to take charge or to take back the person concerned and responsibility shall then be transferred to the requesting Member State. This time limit may be extended up to a maximum of one year if the transfer could not be carried out due to imprisonment of the person concerned or up to a maximum of eighteen months if the person concerned absconds.*

3. *If a person has been transferred erroneously or a decision to transfer is overturned on appeal or review after the transfer has been carried out, the Member State which carried out the transfer shall promptly accept that person back.*

4. *The Commission shall, by means of implementing acts, establish uniform conditions for the consultation and exchange of information between Member States, in particular in the event of postponed or delayed transfers, transfers following acceptance by default, transfers of minors or dependent persons, and supervised transfers. Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 44(2)."*

[5] The salient provisions of Commission Regulation 1560/2003, bearing in mind the present litigation context, are contained in, firstly, Article 12:

"1. *Where the decision to entrust the care of an unaccompanied minor to a relative other than the mother, father or legal guardian is likely to cause particular difficulties, particularly where the adult concerned resides outside the jurisdiction of the Member State in which the minor has applied for asylum, cooperation between the competent authorities in the Member States, in particular the authorities or courts responsible for the protection of minors, shall be facilitated and the necessary steps taken to ensure that those authorities can decide, with full knowledge of the facts, on the ability of the adult or adults concerned to take charge of the minor in a way which serves his best interests*

Options now available in the field of cooperation on judicial and civil matters shall be taken account of in this connection.

2. *The fact that the duration of procedures for placing a minor may lead to a failure to observe the time limits set in Article 18(1) and (6) and Article 19(4) of Regulation (EC) No 343/2003 shall not necessarily be an obstacle to continuing the procedure for determining the Member State responsible or carrying out a transfer."*

[6] This is supplemented by a series of provisions, which include those in Annex II detailing various methods of proving the existence of family members and, in other Annexes, prescribing the forms to be employed for requests for information and take charge requests.