R (on the application of AO & AM) v Secretary of State for the Home Department (stay of proceedings – principles) [2017] UKUT 00168 (IAC)

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review

Notice of Decision/Order/Directions

The Queen on the application of AO and AM

Applicants

v

Secretary of State for the Home Department

Respondent

Before the Honourable Mr Justice McCloskey, President

Having heard Mr P Reynolds, of counsel, instructed on behalf of the Respondent, the moving party, by the Government Legal Department and Mr M Fordham QC, Ms C Kilory and Ms M Knorr, both of counsel, instructed by Bhatt Murphy Solicitors on behalf of the Applicants at a hearing at Field House, London on 28 March 2017.

(i) The Upper Tribunal has the same power as the High Court to stay proceedings.

(ii) The most important factors influencing the exercise of this discretionary power will normally be found in the overriding objective.

(iii) Great caution is required where a stay application is founded on the contention that the outcome of another case will significantly influence the outcome of the instant case.

(iv) A stay application will require especially compelling justification in a case qualifying for urgent judicial decision.

(v) The cases of unaccompanied, isolated teenagers marooned in a foreign land suffering from major psychological trauma and seeking, via litigation, the swiftest reunion possible with a separated family member will always, in principle, have a powerful claim to judicial prioritisation.

DECISION ON STAY
[given orally on 28 March 2017]

McCLOSKEY J

Introduction

(1) This decision determines the applications made by the Respondent, the Secretary of State for the Home Department (the "*Secretary of State*"), for a stay of both sets of proceedings. The relief pursued is framed in the following terms:

> "*An order that this claim be stayed along with all other related proceedings behind the Administrative Court case of* ***Citizens UK v SSHD*** *(CO/5255/2016) as the issues in dispute are the same ….*"

The following order is sought in the alternative:

> "*… as an alternative that the Tribunal transfer this claim and all other claims raising the same issue to the Administrative Court so that all related claims can be case managed appropriately with reference to the overriding objective.*"

It may be observed that this alternative form of relief rather faded away in both the oral and written submissions of Mr Reynolds.

(2) The background to the lodging of these stay applications included certain *inter-partes* correspondence which was brought to the attention of the Tribunal. This was prompted by the awareness of the Secretary of State's legal representatives that the initiation of these two claims in the Tribunal, together with others, was imminent. This correspondence became the initial vehicle for the Secretary of State's contention that all proceedings of a certain kind commenced in the Upper Tribunal should be stayed pending determination of the Citizens UK v SSHD (hereinafter "CUK") litigation in the Administrative Court.

(3) By letter dated 17th March 2017, written under my direction, the Upper Tribunal wrote to the lawyers concerned to the following effect:

(a) UTIAC is a creature of statute and exercises no inherent jurisdiction. Its powers are contained in a combination of primary and secondary legislation. UTIAC is unaware of any power to order a stay in respect

of any claim which has not been issued in this Chamber.

(b) The parties' representatives were invited to identify the two cases most suitable for the determination of stay applications by the Secretary of State, "suitability" in this context embodying the various ingredients in the overriding objective.

(c) A timetable was directed.

These twin applications have materialised in consequence.

Citizens UK v SSHD

(4) This is a judicial review claim brought by a registered charity in the Administrative Court. Procedurally, these proceedings have the following landmarks:

(a) The claim was initiated on 14 October 2016.

(b) On 28th October 2016 permission to apply for judicial review was refused by a paper decision.

(c) The Claimant's grounds were amended on 18 January 2017.

(d) On 28 February 2017 an oral permission hearing was held, giving rise to an order granting permission to apply for judicial review and directing that an expedited substantive hearing be held on 23/24 May 2017.

(5) The flavour and essence of this judicial review claim are captured in the following passages extracted from the amended grounds:

> "*1. This anxious, urgent and compelling case arises out of the British/French partnership in dealing with asylum seekers at a notorious refugee settlement in Calais known as the 'Jungle' ….*
>
> *2. The …. destruction of the jungle camp and dispersal of its inhabitants …. have very serious implications for the welfare and safety of particularly vulnerable asylum seeking children, many of them with rights of speedy facilitated passage to the United Kingdom ….*
>
> *4. …. A large number of children wishing to come to the United Kingdom (the 'dispersed children') were eventually dispersed on coaches to centres (CAOMIEs) across France with the promise that their requests to enter the United Kingdom either under Section 67 of the Immigration Act …. or under … Dublin III would be considered by the Defendant's officials ….*
>
> *The expedited process which was implemented by the Defendant in accordance with that promise has drawn to a close and yet hundreds of dispersed children remain in the CAOMIEs, many of whom have outstanding*

family reunification claims which have not been properly considered by the Defendant."

(6) Continuing, the grounds draw particular attention to a joint United Kingdom/French policy, namely "Managing Migratory Flows in Calais: joint declaration on UK/French co-operation", dated 20 August 2016 (the "*Joint Declaration*"). The Claimant's case is that arising out of the Joint Declaration the Secretary of State is subject to a series of legal obligations ("the Obligations"), namely:

(i) To identify all children in the camp, in particular unaccompanied children and to assess their eligibility for transfer to the United Kingdom;

(ii) To provide the children with full and accurate information about the Dublin III regime, including the family reunification provisions and the associated available arrangements.

(iii) To ensure that the children have safe accommodation allowing easy access to the arrangements.

(iv) To ensure that safe accommodation does not remove the children further away from the support network of those agencies and representatives who have been facilitating family reunification.

The grounds canvass also the duty of investigation and the duty of providing adequate and intelligible reasons for decisions. It is contended that these duties fall to be calibrated and discharged in the context of Dublin III, the EU Charter of Fundamental Rights, the Human Rights Act 1998 and the Convention on the Rights of the Child 1989. There is also a discernible orthodox public law overlay.

(7) CUK contends that there is powerful evidence demonstrating a failure by the Secretary of State to discharge the aforementioned duties. In this context I highlight certain further passages in the grounds:

> "*The Claimant's position is that any act of disregard and default of the Obligations would not only be unlawful but a matter of grave concern. Judicial review is a last resort. But it serves to secure accountability for relevant acts and omissions of the Defendant having had the Obligations squarely brought to her attention …*
>
> *These Obligations, which arise in the context of a long standing failure by the Defendant and the French authorities to identify and protect children in the Jungle in Calais, provide them with information about their rights and set up a functioning system to allow them to access rights to family reunification in the United Kingdom*
>
> *…*

The dispersed children now face a further disruption and dispersal from CAOMIEs due to close their doors, in some cases before the expedited process has concluded and in all cases before the dispersed children have completed Dublin III family reunification procedures. Having established the expedited process on French soil with the support and co-operation of the French authorities, the Defendant has an additional obligation arising out of common law principles concerning access to justice ….. and rights to procedure fairness under Article 8 ECHR ….. to take all steps open to her to ensure that further dispersal from the CAOMIEs does not interrupt access to that process and in particular to any remedies available to dispersed children in respect of the operation of that process. Access to legal remedies includes access to NGOs and other representatives who may be able to facilitate the provision of UK based legal advice to dispersed children and their families …."

CUK is, therefore, challenging a series of acts and omissions on the part of the Secretary of State. This is reflected in the formulation of the "decision to be judicially reviewed" in the Claim Form:

> *"The failure and refusal to recognise and comply with the legal obligations identified in the letter before claim …. (*which required a response by 11 October 2016)".

Finally, I draw attention to the remedies claimed: these are purely declaratory, seeking confirmation that the Secretary of State was subject to the "Obligations" and that there has been an unlawful failure to discharge same.

These Two Claims

(8) These two claims, together with five others, were lodged in the Upper Tribunal during week commencing 13 March 2017. Factually they are of course quite different. However, in substance they share much common ground. The Applicant AO challenges the following:

> "*Failure to transfer* [him] *to the UK in accordance with his substantive Dublin III rights and his Article 8 rights …. refusal/failure to act since 16 December 2016 and ongoing and including decision of 09 March 2017."*

The relief pursued is:

(i) A mandatory order requiring the Secretary of State to admit the Applicant to the UK forthwith.

(ii) An Order quashing the Secretary of State's decision to refuse to transfer the Applicant to the UK under her expedited Dublin III process.

(iii) A declaration that the Secretary of State has failed in her duties to

properly investigate the Applicants' claim and has acted unlawfully.

Both the focus of the legal challenge and the remedies pursued are the same in the two cases. Furthermore, both Applicants have applied for anonymity and expedition, while AO has also applied for interim relief.

(9) Based on what is pleaded, the Applicant AO was an unaccompanied minor during the greater part of the events forming the background to his claim. His 18th birthday occurred on 08 March 2017. He is of Eritrean nationality, fled his country of origin some two years ago and has been seeking to join his brother, AMO, who has refugee status and resides in the United Kingdom. His case is described as "*very compelling and extremely urgent*". Evidentially, it is supported by, *inter alia*, the report of a consultant psychiatrist which diagnoses post-traumatic stress disorder, contains the assessment that the Applicant is "*… close to the limit of what he could bear in terms of flashbacks, anxiety, feeling unsafe and sleep deprivation*" and advises that:

> "*…. further delay due to legal processes is therefore not at all in* [the Applicant's] *best interests and may lead to further re-traumatisation and irreversible damage to his mental health.*"

Within this expert testimony one also finds the phrases *"extremely distressing"* and "*detrimentally affecting his mental state*".

(10) It is averred that this Applicant was identified as a child eligible for consideration under the Secretary of State's expedited Dublin III Process, was interviewed accordingly and provided evidence about his brother in the United Kingdom, culminating in the notification to him from French officials that, in common with the other children remaining in the CAOMI in question, the Secretary of State had refused transfer to the United Kingdom, without adequate particulars, elaboration or reasons. This appears to have been followed by an unsuccessful review application.

(11) Most recently, a response to the pre-action letter dated 09 March 2017 indicates the following: the Applicant was assessed in the expedited Dublin process; he was not accepted initially because further investigations regard his brother were necessary; this issue has now been resolved; the Secretary of State has asked the French authorities to submit a take charge request under Dublin III; and any further evidence supporting the Applicant's asserted relationship with his brother should be provided to the French authorities. The most recent evidence indicates that a stalemate continues.

(12) The case of the other Applicant, AM, has certain similarities. AM is an unaccompanied and orphaned national of Eritrea, aged 16 years, who aspires to join his uncle, a recognised refugee living in the United Kingdom. He has been diagnosed as suffering from a major depressive

disorder and post-traumatic stress disorder symptoms. The expert in his case advises that he –

> *"… is severely struggling with the delay in being reunited with his uncle ….*
>
> *He is suffering from psychiatric disorder, which is being exacerbated by his current situation where he feels subjectively unsafe …*
>
> *I do not believe that psychiatric or psychological treatment in France will improve his state, in fact I would not recommend this at all as it would be likely to destabilise him further. He is at risk of becoming increasingly suicidal if prompt reunification does not occur as his mental state will deteriorate further."*

In common with the other Applicant, AM was admitted to the expedited Dublin Regulation process, he was escorted from the now demolished "jungle" in Calais to a "CAOMI" and was interviewed, following which he was informed that he had been refused transfer to the United Kingdom on the ground of "family link not accepted". This phrase is, evidently, a pro-forma or ("boilerplate") belonging to a spreadsheet mechanism.

The Stay Applications

(13) The kernel of these stay applications is ascertainable from the witness statement of the GLD senior lawyer grounding these applications. This contains the following material averments:

> *"4. The SSHD considers it would be appropriate for these claims to be stayed behind the Citizen's UK Claim as the issues raised in both these claims (and indeed the various other related claims issued in the Upper Tribunal) are in essence identical ….*
>
> *15. …. as the Tribunal is aware, seven* [individual] *claims have been issued ….*
>
> *21. While …. the Citizens UK claim is a systematic* **systemic? *[sic]*** *challenge and these proceedings in the Upper Tribunal and related matters are all brought in respect of individuals …..*
>
> *all of the points they raise in this claim are also in issue in the Citizens UK Claim ….*
>
> *24. I acknowledge and appreciate that the Applicant in this claim and indeed all the other claims will point to the fact that the Applicants are unaccompanied asylum seeking minors who wish to be reunited with their family after a difficult and traumatic journey to Europe. I also recognise that the Applicants have adduced psychiatric evidence as to their condition. The SSHD does appreciate that it is important that the Applicants' position is resolved quickly, however she would suggest that this factor while important cannot outweigh other equally as pressing consideration such as the need for appropriate case management. Further while the legal claims may be stayed this does*

not mean of course that the Applicants cannot proceed with claiming asylum in France and pressing for a take charge request to be made.

25. Further these individuals have recourse to assistance in France if they are willing to accept it including presumably to medical care ….. AM is being supported by the French authorities …. and he is being assisted to register an asylum claim in France …..

26. In the case of AO, he has elected not to claim asylum in France which is why he may become homeless. The SSHD has made clear that she will very likely accept a take charge request ….

The Applicants contend that the children put through the expedited process were selected precisely because they were considered to require expedition. This is not correct ….. They were selected simply because they had been formerly resident in Calais and the camp had now closed and the SSHD was trying to process large numbers of children quickly."

Continuing, the deponent advances "*two important reasons which militate very heavily in favour of a stay*" namely:

(a) the need for judicial certainty; and

(b) the conservation of limited judicial resources.

It is further suggested that a stay is "*the most sensible way of proceeding*". Finally, the witness statement ends with the following plea:

"*36. The SSHD is complying with the procedural timetable in both these claims. She is due to file her detailed grounds and any evidence by 12 April 2017 in the Help Refugees claim. In addition she faces these claims in the Tribunal and also will likely be commencing appeal proceedings in the Court of Appeal in the RSM case with which the Tribunal is very familiar".*

39. The SSHD recognises that for these claims to be properly considered the Tribunal requires her to fully particularise her defence and to submit evidence substantiating her case. It will however simply be impossible for the SSHD to provide the Tribunal with this level of assistance in this case and other related Upper Tribunal matters at the same time as defending the Help Refugees and Citizens UK claims."

(14) The submissions of Mr Reynolds on behalf of the Secretary of State developed the main passages in the solicitor's witness statement. They had, inevitably, a heavy focus on the CUK litigation and entailed drawing to my attention the nine "case studies" which formed part of the evidence in those proceedings. One of these (No. 9) relates to the Applicant AM. The thrust of Mr Reynolds' argument was that these two cases "raise fundamentally the same points of law" as CUK "in the same material factual circumstances". Mr Reynolds also questioned the asserted urgency of these cases. Finally, in response to a question from the Bench, he confirmed that in the CUK litigation the Secretary of State is on

schedule to comply with the requirement to file all evidence by 04 April 2017.

The Applicants' Riposte

(15) The interlocking elements of the arguments canvassed on behalf of the Applicants included the following in particular: the submissions on behalf of the Secretary of State acknowledged that the CUK challenge will not delve into the facts of individual cases; whereas CUK is a systemic challenge, these two challenges are individualised; there is nothing unprecedented about parallel human rights cases proceeding; reliance on the ZS decision provides no reliable guide to the proper determination of these applications; and, ultimately, the challenges of these two Applicants will be determined by reference to the various touchstones identified in ZAT and Others, in particular the implications of the Applicants having pursued unsuccessfully the expedited process in France, the consequential inapplicability of the "exceptional circumstances" test, the factor of intense review and reliance on many of the proportionality factors endorsed in [37] of the Court of Appeal's judgment. Mr Fordham QC also reminded the Tribunal of the decisions in MK at [26] and [36] (duty of enquiry) and RSM, at [43] (the interaction between Articles 8 and 17 of the Dublin Regulation).

(16) I have also considered in full the informal "pleading" on behalf of the Applicants which was compiled and provided to the Tribunal during the pre-litigation phase outlined in [2] – [3] above. This emphasises, *inter alia*, the Tribunal's duty under Section 6 of the Human Rights Act 1998, the need to treat the best interests of the younger Applicant as a primary consideration, the impact of Article 8 ECHR on the factual frameworks advanced and the compelling necessity for swift judicial adjudication. In this context Mr Fordham drew attention to the irony that a stay order precipitated by a generic claim brought by a charity seeking clarification of the law in this sphere could stimulate substantial delays in determining these two claims and the others belonging to the cohort.

(17) Finally, my attention was drawn to United Nations General Comment No, 14 (2013), paragraphs 25-29 especially, which contain the following salient passage:

> *"The courts must provide for the best interests of the child to be considered in all such situations and decisions, whether of a procedural or substantive nature, and must demonstrate that they have effectively done so."*

In this context I was invited to consider the interesting analysis in "Using International Law In Domestic Courts (Fatima), paragraph 11.12:

> *"The exercise of discretion by courts is characterised by a consistent recognition of, and respect for, upholding the United Kingdom's treaty obligations, including those that are incorporated as a matter of domestic law. This is seen particularly clearly where judicial discretion is exercised*

regarding the grant or maintenance of injunctions and interim injunctions."

The Governing Principles

(18) I begin with two propositions which I consider uncontroversial. First, the decision whether to stay proceedings in any forum and, if so, on what terms involves the exercise of a relatively broad – though not of course unfettered – judicial discretion. Second, the most important factors influencing the exercise of this discretion will normally – though not invariably – be found in the multi-faceted overriding objective.

(19) The issue of jurisdiction is uncomplicated. Section 49(3) of the Senior Courts Act 1981 provides:

> "*Nothing in this Act shall affect the power of the Court of Appeal or the High Court to stay any proceedings before it,* ***where it thinks fit to do so****, either of its own motion or on the application of any person, whether or not a party to the proceedings."*
>
> [My emphasis.]

By section 25 of the Tribunals, Courts and Enforcement Act 2007:

> "*In relation to the matters mentioned in subsection (2), the Upper Tribunal …. has …. the same powers, rights, privileges and authority as the High Court .*
>
> *(2) The matters are:*
>
> *(a) The attendance and examination of witnesses,*
>
> *(b) The production and inspection of documents and*
>
> *(c) All other matters incidental to the Upper Tribunal's functions."*

Section 25(3) provides:

> "*Subsection (1) shall not be taken –*
>
> *(a) To limit any power to make Tribunal procedure rules,*
>
> *(b) To be limited by anything in Tribunal procedure rules other than an express limitation."*

Rule 5(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008, under the rubric "Case Management Powers", provides:

> "*Subject to the provisions of the 2007 Act and any other enactment, the Upper Tribunal may regulate its own procedure."*

By Rule 5(2):

> *"The Upper Tribunal may give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction."*

This is followed by Rule 5(3):

> ***"In particular, and without restricting the general powers in paragraphs (1) and (2), the Upper Tribunal may …..***
>
> ***(j) Stay ….. proceedings ….."***

[My emphasis]

By the route charted above, the power of the Upper Tribunal to order a stay of proceedings is not in doubt.

(20) Section 49(3) of the Senior Courts Act 1981 is an express acknowledgement of the judge made nature of both the power to stay proceedings and the principles to be applied. It has been long recognised that the power of the High Court to stay proceedings is inherent in nature: Re Wickham [1887] 35 CH D 272 at 280, per Cotton LJ. In an earlier era, a stay had the Draconian effect of bringing proceedings to a conclusion, unless it was of the conditional variety. This has, however, been superseded by contemporary practice: Rofa Sport Management v DHL International UK [1989] 2 All ER 743. Accordingly, in modern litigation a stay does not have the drastic consequences of its 19th and early 20th century ancestors. The conditional stay sought in these proceedings is not to be confused with one of its ancestors namely the permanent stay.

(21) The issue of staying proceedings was the subject of detailed consideration by the Court of Appeal in AB (Sudan) v Secretary of State for the Home Department [2013] EWCA Civ 921. The Court, firstly, contrasted a stay of proceedings with a stay of enforcement of a judicial decision or order. It emphasised that stay issue involve case management decisions. It added, at [25]:

> *"Such decisions will rarely be challenged and even more rarely be reversed on appeal."*

The appeal in question sought to challenge a decision of the Vice-President of UTIAC to refuse to grant a stay of a judicial review application pending the possible appeal to the Supreme Court in EM (Eritrea). The Court, at [26] cited with approval the Vice-President's formulation of the governing principles:

> "*27. A stay on proceedings may be associated with the grant of interim relief, but it is essentially different. In determining*

whether proceedings should be stayed, the concerns of the court itself have to be taken into the balance. Decisions as to listing, and decisions as to which cases are to be heard at any particular time are matters for the court itself and no party to a claim can demand that it be heard before or after any other claim. The court will want to deal with claims before it as expeditiously as is consistent with justice. But, on the other hand, it is unlikely to want to waste time and other valuable resources on an exercise that may well be pointless if conducted too soon. If, therefore, the court is shown that there will be, or there is likely to be, some event in the foreseeable future that may have an impact on the way a claim is decided, it may decide to stay proceedings in the claim until after that event. It may be more inclined to grant a stay if there is agreement between the parties. It may not need to grant a stay if the pattern of work shows that the matter will not come on for trial before the event in question. The starting point must, however, be that a claimant seeks expeditious determination of his claim and that delay will be ordered only if good reason is shown.

28. In cases where a request for a stay on proceedings is coupled, expressly or by necessary implication, with a request for interim relief, the court will need to take into account the factors relevant to both types of decision, and may need to take into account a third: that by securing interim relief and a stay, the applicant may be asking the court to use its powers to give him, for as long as he can secure it, a benefit that he may not obtain at the trial."

As these passages make clear, the overriding objective looms large in the determination of every stay application.

(22) The Court added the following observations of specified relevance in immigration cases:

"28. Immigration law has a tendency to develop rapidly, indeed sometimes at bewildering speed. The constant flow of developments arises from the industry of legislators, rule-makers, judges and practitioners. Not only does the law in this area change fast. So also do the political, military, social and economic circumstances in the numerous countries from which asylum seekers or other migrants may come.

29. Both the tribunals and the courts have to keep pace with these constant changes. When a new appellate decision is awaited it is not unusual for parties in pending similar cases to seek a stay of their proceedings.

30. Sometimes it is obviously necessary to grant such a stay, because the anticipated appellate decision will have a critical impact upon the proceedings in hand. There is also, however, a need for realism. In the world of immigration it is a fact of life

that the law which the judge applies is liable to change in the future, quite possibly in the near future. This cannot usually be a reason for staying proceedings. I started dealing with immigration cases some fourteen years ago. I cannot remember any occasion during that period when important decisions on one or more aspects of immigration law were not eagerly awaited from the appellate courts.

31. As Pill LJ observed in R (Bahta) v SSHD [2011] EWCA Civ 895 at [70], what the Court of Appeal says is the law, is the law, unless and until overruled by a superior court or by Parliament. Likewise country guidance decisions should generally be applied unless and until they are reversed or superseded.

32 In my view the power to stay immigration cases pending a future appellate decision in other litigation is a power which must be exercised cautiously and only when, in the interests of justice, it is necessary to do so. It may be necessary to grant a stay if the impending appellate decision is likely to have a critical impact on the current litigation. If courts or tribunals exercise their power to stay cases too freely, the immigration system (which is already overloaded with work) will become even more clogged up."

(23) I distil from AB (Sudan) the following principles in particular:

(a) Every claimant is entitled to expect expeditious judicial adjudication. The strength of this expectation will be calibrated according to the individual litigation equation.

(b) The judicially imposed delay flowing from a stay order requires good reason.

(c) Judicial choreography whereby one case is frozen awaiting the outcome of another is justified for example where the assessment is that the latter will have a critical impact upon the former.

(d) Great caution is to be exercised where a stay application is founded on the contention that the outcome of another case will significantly influence the outcome of the instant case.

(24) To these principles I would add the following: a stay application will require especially compelling justification in a case qualifying for urgent judicial decision. The cases of unaccompanied, isolated teenagers marooned in a foreign land suffering from major psychological trauma and seeking, via litigation, the swiftest reunion possible with a separated family member will always, in principle, have a powerful claim to judicial prioritisation.

Conclusions

(25) Ultimately, the determination of these stay applications requires an

exercise of balancing many of the ingredients enshrined in the overriding objective: the avoidance of excessive cost, the unnecessary expenditure of finite public resources, the right of every litigant to expeditious justice, the minimising of litigation delays, managing the interface and overlap between two judicial organisations, the allocation of limited judicial resources and, broadly, the convenience of all concerned. I must also weigh carefully the ages, vulnerability and plight of the two litigants. Furthermore, alertness to a broader panorama is essential since the determination of these two applications will clearly be influential in, though not automatically determinative of, the progress and case management of the five other live new cases which have been initiated in tandem with these. Fairness, reasonableness and proportionality loom large in an exercise of this kind.

(26) I consider the impact of the range of considerations which I have identified to be the following:

(a) These are two individual rights cases. This is the feature which distinguishes them most clearly from the CUK Challenge.

(b) In the CUK Challenge, the Secretary of State's evidential response will probably not be directed to individual cases except insofar as relevant and as required by the duty of candour. Much of the Secretary of State's evidence is likely to be generic in nature. The facts of the nine "case studies" may prove to be uncontentious.

(c) All such generic evidence will form a necessary part of the Secretary of State's evidence in the seven Upper Tribunal cases. The exercise of preparing such evidence will not have to be repeated. It will, rather, be a single, self-contained exercise. Furthermore, it is reasonably predictable that much of this evidence will take the form of extant documents: official reports, memoranda, email communications, letters and, possibly, communications of a diplomatic character. Whatever form it takes, this exercise is now at a highly advanced stage.

(d) The <u>additional</u> evidence required in the Secretary of State's response to the individual claims in the Upper Tribunal will, predictably and in principle, be case specific and fact sensitive. It is represented on behalf of the Secretary of State that some evidence of this kind is expected to materialise in the CUK Challenge. This will be harmonious with good husbandry in resource expenditure.

(e) My evaluative assessment is that a reasonable proportion of the ground work required for the preparation and presentation of the Secretary of State's evidence in these two cases will have been completed in the context of the CUK litigation by 04 April 2017. No aspect of this investment of human and financial resources will fall to be repeated. There will be no duplication.

(27) Next I turn my attention to the timetable pertaining to the CUK Challenge.

This is contained in the Order of the Administrative Court dated 04 March 2017. It makes provision for a series of bilateral steps to be undertaken and completed during a period of approximately ten weeks, all of this on an expedited basis. I take into account that this Order represents the outcome of the considered judgment and planning of both parties' legal representatives and the Judge concerned. It has been composed and finalised on the basis that all of the time limits are achievable.

(28) I accept that it will be more convenient, less expensive and more comfortable for the Secretary of State and her lawyers if these two cases were to be stayed in the manner proposed. However, this would impose a limitation impacting seriously on the two Applicants' right of access to a court, in circumstances where they have a compelling claim to speedy judicial adjudication. If they are entitled to a remedy it must be swift, practical and effective. Furthermore, given the distinction between the Administrative Court proceedings and these cases I reject the argument of substantial judicial overlap. Ultimately, I consider the aforementioned rights of the Applicants to be determinative. The factors advanced on behalf of the Secretary of State do not, singly or in combination, suffice to displace, limit or delay the full enjoyment of these rights in the fact sensitive context of these two cases.

Order and Directions

(29) I refuse the Secretary of State's applications accordingly.

(30) The Secretary of State's written representations on the issue of the further timetabling and management of these two cases will be provided by close of business on 29 March 2017.

(31) The Applicants' riposte will be provided by close of business on 30 March 2017.

(32) The parties' representatives will file an agreed draft case management order, or their competing case management orders, by 12 midday on 31 March 2017. The Upper Tribunal will aspire to, but cannot guarantee absolutely, appropriate further directions/ by late 31 March 2017 – and in any event by 08.00 on 03 April 2017.

(33) I shall continue to hold in reserve for as long as is possible 04 April 2017 to deal with interim relief and/or "rolled up" applications.

(34) I recognise the possibility that a slightly later date for the hearing of any such application may be required in fairness to the Secretary of State. Beyond this I do not venture. The parties' representatives are aware of the practical outworkings of this.

(35) There shall be liberty to apply.

(36) Costs are reserved.

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

Date: **28 March 2017**

Sent to the Applicant, Respondent and any interested party / the Applicant's, Respondent's and any interested party's solicitors on (date):
Home Office Ref: