R (on the application of AM and others) v Secretary of State for the Home Department (liberty to apply – scope – discharging mandatory orders) [2017] UKUT 00372 (IAC)

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review

The Queen on the application of AM, SASA, MHA, and SS

Applicants

v

Secretary of State for the Home Department

Respondent

The Honourable Mr Justice McCloskey, President

Having considered all documents lodged, together with the submissions of Miss C Kilroy and Miss M Knorr, both of counsel, instructed by the Migrants' Law Project, Islington Law Centre, on behalf of the Applicants SASA and MHA, and by Bhatt Murphy Solicitors on behalf of the Applicants AM and SS, and of Mr B Keith, of counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 21 June 2017.

1. *Section 25 (2) (c) of TCEA 2007 invests the upper Tribunal with the same powers as the High Court in matters of liberty to apply.*

2. *The mechanism of liberty to apply may be invoked for the purpose of pursuing a declaratory order that the Tribunal's principal order in judicial review proceedings has not been satisfied, particularly (but not exclusively) where the latter is a mandatory order.*

3. *In evaluating the scope of liberty to apply in any given case the Tribunal will seek to give effect to the overriding objective.*

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4. *A mandatory order may be discharged where it has served its main purpose and its perpetuation will advance no discernible end.*

McCloskey J

The Applications

(1) In each of these four cases the Applicants have brought applications seeking the following relief:

> *"A declaration that the Respondent has not complied with paragraph 2 of the Tribunal's order of [*date]".

That section directed that the Respondent *"… shall start the process of making a fresh lawful decision forthwith and shall complete that process at latest by midnight on [date]."*

The applications continue, in each case:

> *"We are exercising the liberty to apply mechanism in order to seek a declaration to that effect … "*

Each of the four applications is dated 12 June 2017, but were preceded by notifications detailing the basis for the applications on 6 June 2017 to which the Respondent replied on the same day maintaining that the 2 June 2017 decisions are lawful and setting out her position on the liberty to apply application, which elicited a response from the Applicants on 7 June 2017.

(2) The Upper Tribunal responded to these applications by a combined order dated 14 June 2017 whereby (a) the Respondent, the Secretary of State for the Home Department (the "*Secretary of State"),* was directed to respond, evidentially or otherwise, by a specified time and date and (b) the applications were listed on an expedited basis before me on 21 June 2017.

(3) The Respondent did not comply with the aforementioned order. Rather, on 15 June 2017, in all four cases, the Respondent lodged an application in the following terms:

> "*The SSHD seeks an order that the previous order of the Tribunal be set aside. If the Applicants wish to challenge the decision of 02 June 2017 they should issue fresh JR proceedings. This application should be refused. In the alternative the directions should be varied to allow the SSHD sufficient time to respond. The hearing of 21 June should be vacated for the same reason …*
>
> *There cannot be any prejudice to the Applicant in the SSHD having a longer and sufficient period to respond."*

I shall explain *infra* the meaning of "*the decision letter of 02 June*".

Previous Orders and Judgments

(4) The four orders of the Tribunal under scrutiny were variously made on 16 and 17 May 2017. They are in the following, identical terms:

> *"It is ordered that:*
>
> *(1) The Respondent shall admit* [AM] *to the United Kingdom forthwith using best endeavours at all material times and at latest by midnight on 22 May 2017.*
>
> *(2) The Respondent shall begin the process of making a fresh lawful decision forthwith and shall complete that process at latest by midnight on 22 May 2017.*
>
> *(3) Liberty to apply."*

Each of these orders was promulgated as a "short form" order upon the completion of each of the hearings, which were of the "rolled up" species. The practice of the Upper Tribunal is to promulgate a composite judgment and order in judicial review cases. The full judgment was not available at the stage when the hearings were completed. As a result the Tribunal had resort to the "short form order" mechanism.

(5) In all four cases the Secretary of State, under the mechanism of liberty to apply, has applied for, and has been granted, extensions of the time limits specified in (1) and (2) of the orders. As regards (1) of the orders, the current state of play is that the Applicants AM and SS have been admitted to the United Kingdom. The Applicant SASA is expected to be admitted tomorrow (22 June 2017). As regards the Applicant MHA the Tribunal, in making a further extension of time order (today), has directed the Secretary of State to make a full evidential response via the twin media of a witness statement, to be made by a properly selected witness, and disclosure of all material documents, by 13.00 hours on 26 June 2017 [all four Applicants have now been admitted to the United Kingdom and have claimed asylum].

(6) The combined judgments and orders of the Tribunal (to be contrasted with the short form orders) are dated 12 May 2017 (in two cases) and 17 May 2017 (in the other two). These judgments differ according to the differing factual matrix of each individual case. However, in their operative sections they are materially indistinguishable. In all cases the Tribunal held that the Secretary of State's initial decisions (belonging to the so-called "expedited process"), the decision making process and the perpetuation of such decisions via a continuing refusal to admit the Applicants to the United Kingdom were unlawful, in the following series of respects:

(a) The Secretary of State acted unlawfully in purporting to apply the Dublin Regulation and its sister measure in an incomplete and selective fashion: see AM [2017] UKUT 262 (IAC) at [93] – [115].

(b) Irrespective of whether the Dublin Regulation and its sister instrument governed the expedited process, the Secretary of State acted unlawfully in operating a procedurally irregular and unfair decision making process: see AM

at [116] – [129]. This latter conclusion is encapsulated in [129] of the judgment in AM:

> *"To summarise, AM can lay claim to a series of procedural, or due process, protections and safeguards enshrined in three separate legal regimes: EU law, the Human Rights Act 1998 and the common law. Based on the analysis, findings and conclusions set forth above he has been denied the safeguards identified. The decision making process resulting in the Secretary of State's original and continued refusal to admit him to the United Kingdom for the purpose of family reunification with AO was, for the reasons explained, irredeemably flawed. It has, without legal justification, breached AM's procedural rights. This applies irrespective of whether the Dublin Regulation governed the expedited process. AM's challenge must succeed in consequence."*

This was prefaced by the following, in [122]:

> *"The expedited process in the group of five cases to which this challenge belongs was beset with procedural deficiencies and shortcomings and egregious unfairness. These contaminants are either not contested or incontestable. The conduct of the two interviews alone warrants a conclusion of procedural unfairness. The materiality of these procedural frailties is beyond plausible argument. The acid question is whether these procedural irregularities can be excused on the basis of the humanitarian challenge and the need for expedition. These are the two factors on which the Secretary of State relies. These must be recognised as important considerations and we readily acknowledge the major challenge the two Governments concerned faced. However, we consider that the exercise of balancing them with all the other factors summarised below results in a resounding negative answer to the question posed. Fundamentally, there was far too much at stake for these isolated and vulnerable children to warrant any other answer."*

This passage in turn was preceded by the Tribunal's detailed analysis of, and commentary upon, the decision making process, at [36] – [44].

(7) As regards the other judgments delivered it is appropriate to refer to one passage only. In SASA (JR/2476/2017), the Tribunal stated at [35]:

> *"AM has decided two central issues of law which are common to all of the cases in this group namely the application of the Dublin Regulation to the Secretary of State's decision making and the requirements of procedural fairness in the context of the expedited process: see [86] – [128]. The AM analyses and conclusions apply fully to the case of SASA."*

Continuing, at [36]:

> *"The principal consequences flowing from the above are as follows:*
>
> *(i) By failing to give full effect to the Dublin Regulation and its sister measure, the Secretary of State acted unlawfully.*
>
> *This illegality included blanket exclusion of consideration of cousins under Article*

17(2).

(ii) SASA was unlawfully deprived of a series of procedural safeguards and protections.

(iii) SASA's subsequent quest for admission to the United Kingdom under Article 8 ECHR cannot be defeated on the basis that he did not first attempt to secure the same outcome under the Dublin regime."

The Tribunal added at [39]:

> *"An alternative conclusion is readily made. If this Tribunal's primary conclusion that this Applicant (and all the others) engaged in a process governed by the Dublin Regulation is incorrect, the alternative conclusion that the ZT (Syria) test expounded in [95] is nonetheless satisfied is available. This takes as its starting point the finding that the expedited process, whatever its precise legal characterisation, was replete with defects and shortcomings. Laudable though the aim of expedition was this cannot serve to redeem the serial frailties identified in [23] – [28] above and in [36] – [43] of AM. On this alternative approach, reasoning by analogy with ZT (Syria), the conclusion that the process in which the Applicant participated was "not capable of responding adequately to [his] needs" and failed to provide an "effective way of proceeding" is irresistible. The reason for this fundamentally is that the process devised and operated lacked the scope, structures, depth, penetration and flexibility necessary to ensure basic procedural fairness, adequate enquiry, sufficient evidence gathering and proper fact finding. The effect of this is that the adoption of both approaches yields the same conclusion namely that the "exceptionally compelling circumstances" test does not apply to this challenge."*

(8) Having regard to the sequence by which the inter-related hearings unfolded, the most detailed consideration to the question of remedy is to be found in the judgment in AM. At [130], the Tribunal described this as an "*important*" question, noting the decision of the Court of Appeal in ZT (Syria). This was followed by, at [131] – [133]:

> *"[131] In the present litigation context we are bound to take into account that the "Calais expedited process" is done and dusted. The Tribunal could, in theory, formulate a remedy requiring the Secretary of State's officials to seek the permission of the French authorities for the purpose of travelling to the reception centre in France where AM is accommodated and conducting a procedurally fair and regular inquisition followed by all appropriate subsequent steps, which would include thorough enquiries of OA and his family circumstances. However this would entail delay and uncertainty, coupled with the imponderable of the necessary co-operation of the French authorities. It would also be cumbersome and expensive.*
>
> *[132] We take into account simultaneously the desirability of any remedial order not interfering with appropriate further best interests and child safeguarding checks and enquiries. Given the inadequacies of enquiry and procedural defects which we have diagnosed, the outcome of such steps could, in principle,*

frustrate the family reunification aspirations of AM and OA. While we attribute substantial weight to the evidence of the two protagonists, which we consider plausible, we must recognise that this will not necessarily be determinative of the ultimate outcome for both.

[133] The considerable delays to date must further be weighed. In addition, each segment of continuing delay is plainly inimical to the Applicant's best interests. We also take into account that the immediate practical effect of AM's admission to the United Kingdom will be his absorption within the statutory care system, without prejudice to a final decision. Thus while on the one hand it would not achieve immediately his goal of family reunification, on the other this would protect his best interests while final checks and enquiries are completed. Furthermore, this step will enhance the prospects of a fresh decision making process which will respect his right to procedural fairness and other due process safeguards and guarantees and, simultaneously, facilitate the Secretary of State's corresponding legal obligation. AM's swift transfer to the United Kingdom would also be a positive step from the perspective of his mental health."

The Tribunal then expressed its conclusions thus, at [134]:

"Thus there is a delicate and intensely fact sensitive balance to be struck. Having considered the submissions of both parties' representatives, we have concluded, in the exercise of our discretion, that the appropriate remedy is the following:

(i) An Order quashing the Secretary of State's initial decision whereby the transfer of AM from France to the United Kingdom in November/December 2016 was refused.

(ii) A declaration that the aforementioned decision and the Secretary of State's continuing refusal to admit AM to the United Kingdom are unlawful being in breach of the Dublin Regulation and its sister measure and/or the procedural dimension of Article 8 ECHR and/or the common law requirements of procedural fairness.

(iii) An Order requiring the Secretary of State:

(a) to forthwith make all necessary and immediate arrangements for the transfer of AM from France to the United Kingdom, using best endeavours at all times and not later than midnight on 22 May 2017; and

(b) to begin forthwith a fresh decision making process in AM's case, to be completed by the same deadline.

(iv) There shall be liberty to apply."

The Secretary of State's Further Decisions

(9) By four separate letters dated 02 June 2017 the Secretary of State's officials purported to comply with the Tribunal's orders. Each of these fresh decisions contains the following passage:

> *"The order of Mr Justice McCloskey did not state specifically the basis on which the 'fresh lawful decision' should be made, or the particular evidence that should be considered or disregarded. Therefore, in making this decision the SSHD has taken into account the evidence listed below and considered the following questions:*
>
> *(1) Whether your client would qualify for transfer under the Calais expedited process, which was based on the criteria and definitions for* [sic] *family members, siblings and relatives set out in Articles 2, 8.1 and 8.2 of the Dublin III Regulation;*
>
> *(2) Whether your client meets the criteria set out in the judgment of the Court of Appeal in ZT (Syria) for transfer to the UK on the basis of Article 8 of the ECHR."*

In each of these cases the decision maker proceeded to answer the two questions posed in the negative.

(10) The further decisions on behalf of the Secretary of State have the following additional features:

(a) A reliance on records of interviews which this Tribunal, by its judgments, had held were procedurally unfair.

(b) A repetition of previous assessments of asserted family relationships, based on the procedurally unfair interview records.

(c) A primary conclusion that Article 17 of the Dublin Regulation does not apply because no "take charge" request has been received from the French authorities.

(d) An alternative conclusion that Article 17(2) does not apply in any event because of rejection of asserted family relationship.

(e) A failure to carry out any considered assessment of the Applicants' best interests.

(f) Finally, the following noteworthy assertion:

> *"The SSHD notes that the effect of the order to admit your client, at the same time and by the same date has the order to make a fresh decision on whether to transfer your client, makes the practical effect of this decision null. We assume that it is*

your clients' intention to claim asylum on arrival in the UK, following which the SSHD will consider the claim according to the usual processes."

(11) The Secretary of State's further decisions in the cases of SASA and MHA contained, respectively, one further ingredient of substance not replicated in the other two cases. In the case of SASA it is recalled that the Secretary of State's original negative decision was based exclusively on the fact that SASA and his United Kingdom based relative are in a cousin/cousin relationship. However, within the further decision there is an analysis of certain pieces of documentary evidence giving rise to the assertion of "*inconsistency during the expedited process … "*, in turn yielding the conclusion that the United Kingdom persons concerned are not related to SASA. In common with the other cases this exercise relied upon a decision making process which this Tribunal has held to be procedurally unfair.

(12) In the case of MHA (JR/2492/2017) the judgment of this Tribunal contains, at [27] – [32] an assessment of the Secretary of State's unlawful failure to conduct a proper assessment of this Applicant's best interests. The Tribunal stated *inter alia,* at [32]:

> *"Here it suffices to identify the following clear facts and factors. First, it is overwhelmingly in MHA's best interests to escape from his current plight and ever worsening predicament in France. Second, there is no indication that any feature of SHA or his circumstances contradicts swift reunification of the two brothers. Third, SHA's short term, medium term and long term future in the United Kingdom will not inevitably involve removal to some other country. Fourth, there is no indication that family reunification cannot be maintained even in the event of such removal. Finally, in the short to medium term there is no other realistic or feasible prospect of family life for this teenager."*

These passages are to be considered in conjunction with the following excerpt from [19]:

> *"Each of these touchstones … points clearly to a reasonable prediction that inter-partes consensus in SHA's case is unlikely and that protracted litigation is a probability."*

In brief compass, in the Secretary of State's further decision there is no engagement with any of the above.

(13) The further ingredient in the Secretary of State's new decision in the case of MHA relates to his brother, SHA and emerges in the following passages:

> *"… SHA is not legally present in the UK. The SSHD understands that the remaining authorities have accepted that they are the state responsible for his care as he was awarded subsidiary protection in Romania on 10/07/2015. SHA has previously claimed asylum in the UK following illegal entry …. This was refused ….* [Subsequently] *the*

Home Office erroneously dropped SHA out of the Third Country Unit (TCU) process after incorrectly assuming that SHA's removal to Romania would be processed through the Dublin III regulation. As such, the SSHD incorrectly identified that she had missed the six month procedural deadline for processing such removals. When it came to light that the TCU drop out was an error, the SSHD's position is that she had no obligation to substantively consider SHA's asylum claim within the UK. SHA was informed of TCU's intention to remove him to Romania on 12/05/2017."

This is followed by an apparent assertion of receipt from Romania of a "*transfer acceptance under the readmission agreement dated 04/04/2016*" and the following passage:

"*SHA has now been served with a fresh decision refusing his asylum claim …*

The Romanian authorities have confirmed that they will accept the transfer of SHA to Romania under the readmission agreement and efforts are being made to effect this."

All of the foregoing gives rise to the Secretary of State's conclusion that MHA's case is non-compliant with Article 8(1) of the Dublin Regulation coupled with the further conclusion that it would not be in MHA's best interests to transfer to the United Kingdom given SHA's impending removal to Romania.

First Issue: Breach of the Tribunal's Orders?

(14) Bearing in mind the Secretary of State's application to set aside or extinguish the Tribunal's case management order of 14 June 2017 – see [3] above – I refer at this juncture to Mr Keith's submission that a more generous revised timetable would enable the Secretary of State to adduce evidence of why the decisions of 02 June 2017 are in the terms in which they appear. Having regard to the substantive progress in three of the four cases and the most recent order made in the case of MHA – see [5] above – I extended the relevant time limit: from 16 June to 30 June 2017.

(15) However, as I ruled orally at the hearing, I was unable to identify any merit in the Respondent's request for an extended period to respond substantively to the Applicant's "liberty to apply" applications. I accepted Ms Kilroy's submission that any reworking/enlargement of the Secretary of State's further decision letters dated 02 June 2017 would probably be in conflict with the line of authority exemplified by R v Westminster County Council, ex parte Ermakov [1995] EWCA Civ 42. Ms Kilroy's submissions further reflected the strikingly faint and unparticularised terms in which Mr Keith, clearly acting on instructions, had developed the Secretary of State's applications.

(16) Mr Keith, loyally, also sought to stand over the vague hint in each of the further decision letters that the judgments may not have been fully understood by the

officials who proceeded to make the further decisions in purported compliance. This submission invites the following riposte:

(i) This is an issue in respect whereof suitable witness statement evidence might in principle have been admissible. There is none.

(ii) The Secretary of State has at all material times been represented by a legal team of counsel and solicitors.

(iii) In the post-judgment phase the Secretary of State's legal team have not been slow to attack (some might say disparage) the Tribunal's judgments and orders. These incursions have not included any suggestion that they are unclear or otherwise difficult to understand.

(iv) The Secretary of State has invoked the mechanism of liberty to apply for a variety of purposes: it has at no time been invoked for the purpose of seeking clarification or elaboration of the Tribunal's orders and judgments.

(17) It is appropriate at this juncture to highlight one particular aspect of the Tribunal's judgment in AM. At [133], debating the merits of a remedy mandating AM's admission to the United Kingdom, the Tribunal stated:

> "…. *This step will enhance the prospects of a fresh decision making process which will respect his right to procedural fairness and other due process safeguards and guarantees and, simultaneously, facilitate the Secretary of State's corresponding legal obligation.*"

The simple, but startling, fact is that in making the fresh decisions required by the second element of the Tribunal's substantive order, the Secretary of State's officials have ignored this passage in its totality.

(18) To the above I add the following. It is a fact that the Secretary of State did not, in the wake of the Tribunal's judgments and orders, seek any illumination or elaboration. I consider that none was required. The Tribunal, in its judgments, found that the Secretary of State had acted unlawfully in a series of clearly identified respects. I consider that, in its formulation of remedy, it was not necessary for the Tribunal to engage in an exercise of repetition. The Secretary of State, arguably the most experienced and prolific of all public authority litigants in the United Kingdom and surrounded and bolstered by a posse of legal advisers, did not on any reasonable showing require this further cosseting in the text of the Tribunal's judgment. Furthermore, the Secretary of State's representatives did not delay in preparing an application for permission to appeal and were under no evident handicap in formulating their grounds.

(19) Notwithstanding, it was at all times open to the Secretary of State – under the rubric of "liberty to apply" – to return to the Tribunal for the purpose of receiving any desired clarification and/or elaboration of the Tribunal's four Orders to facilitate the

Secretary of State's constitutional duty of obedience and compliance. The Tribunal would have viewed this as a responsible step as well as a mark of respect for the judiciary by the executive arm of the separation of powers which underpins the constitutional arrangements of the United Kingdom. However, this step was not taken.

First Conclusion

(20) The further decisions of 02 June 2017 constitute, in my judgement, a hopelessly inadequate attempt to comply with this Tribunal's orders and judgments. In its four judgments, the Tribunal spelled out clearly the legal shortcomings and deficiencies in the Secretary of State's decision making processes. It held that these were procedurally irregular and unfair. Its conclusions were reflected in its orders. In the context of the present applications, the spotlight falls on the second provision of each of the orders: see [4](2) above. In short the Secretary of State, duly educated and guided by the Tribunal's judgments, was ordered to embark upon and complete a further, lawful decision making process culminating in fresh decisions. Self-evidently such process and its outcomes would have to address and rectify the preceding unlawful exercises.

(21) As [130] – [134] of the judgment in AM in particular makes clear the exercise of the Tribunal's discretion in the matter of remedy in these cases, was far from straightforward. The Tribunal's overarching aim was, as ever, to devise a remedy that was practical and effective. The Tribunal is at a loss to understand why the Secretary of State's officials did not appreciate that this required of them, as a minimum, to devise a new procedurally fair decision making process which would not repeat the errors and shortcomings of its predecessors: indecent haste, cutting corners, manifestly inadequate question and answer interviews, no – or no adequate – consultation and communication among all concerned in the process and a lack of proper enquiry. None of these public law defects and misdemeanours has been rectified in the Secretary of State's new decisions. It is evident that each of these decisions was the product of a purely paper, static and introverted exercise. The conclusion that these decisions are in breach of the Tribunal's orders follows inexorably.

(22) This conclusion is a cause of profound disappointment for the Tribunal. In evaluating why this has occurred the Tribunal cannot avoid reflecting upon the way in which this most recent series of Article 8 ECHR/Dublin Regulation cases, which continue to grow slowly in this jurisdiction, has been contested on behalf of the Secretary of State. In [91] – [92] of its judgment in AM the Tribunal stated:

> *"[91] In a context where there have been repeated requests for disclosure, in both this case and the others, the evidence does not include any case notes, file notes, emails or other contemporaneous records. Nor is there any material documenting the training and instructions, if any, given to interviewers and interpreters, with one limited exception which seems directed more to decision makers. Furthermore, the evidential gaps thereby created have not, in many material instances, been rectified through the medium of witness statements. Given the major procedural dimension of this judicial*

review challenge and the absence of any agreement or concession on various material factual issues, this is one of those cases where, it becomes necessary for the Tribunal to find certain material facts, as was recognised by Lord Brown in Tweed v Parades Commission [2006] UKHL 53 at [52]-[57]. This exercise will extend to considering whether inferences arising from the absence of the kind of materials noted may reasonably be made. Linked to this is the Secretary of State's duty of candour.

[92] It is appropriate to recall the decision of the Court of Appeal in R (Das) v SSHD [2014] EWCA Civ 45. In that case, the Court drew attention to a striking gap in the evidential matrix, namely "the absence of any evidence on behalf of the Secretary of State before the Court below or before this Court to explain her decision making in this case": see [79]. The Appellate Court approved the principal formulated by the first instance Court, namely inferences adverse to the Secretary of State's case may properly be drawn in such circumstances. The following passage in the first instance judgment, at [21], is especially noteworthy:

> *"The basis for drawing adverse inferences of fact against the Secretary of State in judicial review proceedings will be particularly strong, because in such proceedings the Secretary of State is subject to the stringent and well known obligation owed to the Court by a public authority facing a challenge to its decision …."*

The obligation to which the Judge was referring is the duty of candour. This duty was considered in extenso in the decision of this Tribunal in R (Mahmood) v SSHD [2014] UKUT 00439 at [15] ff. The duty of candour was reviewed more recently by the Court of Appeal in R (Khan) v SSHD [2016] EWCA Civ 416: see especially [35] – [45] per Beatson LJ. Lord Walker's succinct formulation of the duty leaves nothing unsaid. Every respondent public authority has a duty:

> *"…. to co-operate and to make candid disclosure by way of affidavit of the relevant facts and (so far as they are not apparent from contemporaneous documents which have been disclosed) the reasoning behind the decision challenged in the judicial review proceedings …"*

See Belize Alliance of Conservation Non-Government Organisations v Department of the Environment [2004] UKPC 6 at [86]."

(23) The Secretary of State's entrenched practice in this sphere of litigation of failing to spontaneously disclose material documents has been a matter of continuing concern to the Tribunal. It has also become a hallmark of the post-Orders phase during which the Secretary of State, invoking the liberty to apply mechanism, has been driven to apply to the Tribunal for extensions of the time limits prescribed in its principal orders. The one exception to this occurred in the case of MHA when certain documents were attached to the witness statement grounding the Secretary of State's application to the Tribunal for an Order extending time. However, these documents, which took the form of email exchanges between the Secretary of State's officials and their French counterparts, were so heavily redacted that some of them

were virtually unintelligible. In these circumstances, it became necessary for the Tribunal to order disclosure to it of the documents in unredacted form, accompanied by a witness statement explaining the reasons for the redactions. I consider that it should not have been necessary for the Tribunal to go to these lengths.

(24) This discrete conclusion is reinforced by the witness statement of a GLD lawyer provided to the Tribunal in compliance with the order mentioned immediately above. In this the lawyer explains that the extensive redactions had two main purposes, namely to protect the personal data of the authors and recipients of the various written communications and to delete material bearing on the other related cases on the ground of relevance. Finally, the lawyer explains that as regards one of the documents exhibited – there were 25 in total – a redaction was made with a view to protecting legally privileged material.

(25) It forms no part of the Tribunal's function, at this stage, to evaluate the sustainability of these explanations. The real point is that in fulfilment of the Secretary of State's duty of candour to the Tribunal and the specific duties of co-operation and assistance enshrined in the overriding objective, these explanations should have been proactively proffered in the body of the witness statement. They are uncomplicated and compact in nature and this could have been achieved in the span of a couple of sentences. Furthermore, ideally, the Secretary of State should have sought the Tribunal's authorisation in advance of compiling the initial witness statement and heavily redacted exhibits, the more so in circumstances where the Secretary of State was seeking a favourable exercise of judicial discretion. All of this is singularly regrettable.

(26) In another witness statement filed on behalf of the Secretary of State, the acting Head of the UKVI European Intake Unit, in purported justification of the non-disclosure of documents which satisfied the tests of *prima facie existence* and *prima facie relevance*, averred:

> "…. *Officials do not routinely keep minutes/attendance notes of every telephone call with French operational counterparts.*"

This prompts two responses. First, having regard to the context of all cases belonging to this sphere of litigation, it is, as a minimum, surprising that the importance of the cases, coupled with the solemn constitutional duty of compliance with the Tribunal's orders, are evidently not considered to be of sufficient gravity to warrant the simple step of making notes of material verbal communications. Some independent observers might, legitimately, find this claim perplexing. Others might wonder whether this asserted non-recording of contemporary communications is harmonious with Government policy, procedure and guidance. The second observation is that the deponent hints that records of this kind <u>are</u> sometimes generated: but no justification is proffered for failing to routinely and spontaneously disclose same – and in full – to the Tribunal.

(27) This collection of cases has displayed yet another disturbing feature. In the wake of its judgments the Tribunal, following careful reflection, found itself obliged to take two relatively unprecedented steps. First, reflecting its concerns about the aggressive and disparaging nature of the Secretary of State's application for permission to appeal, it considered it necessary to respond by drawing attention to the unfortunate terms in which parts of the application were couched. Second, more disturbing, having received from the Applicants' representatives a Note to the Administrative Court Judge in Citizens UK v SSHD prepared by counsel for the Secretary of State, the Tribunal considered it necessary to write to the Government Legal Department in the terms of the letter and enclosure appended to this judgment. These documents speak for themselves.

(28) The Tribunal received a response from the Government Legal Department to the aforementioned letter. Its terms were cursory and perfunctory. It neither acknowledged nor engaged with the Tribunal's profound concerns about the Note to the Administrative Court. It contained no recognition that issues of professional misconduct could potentially arise. It was not written by the Treasury Solicitor. The response did accept (inevitably) that the Tribunal's letter would have to be brought to the attention of the Administrative Court Judge.

(29) There is another feature of this cohort of cases which I must mention. In most of these cases the Tribunal has received large swathes of *inter-partes* communications. These have related to all manner of procedural and interlocutory issues. I consider that the GLD communications have in many instances been antithetical to the ethos of judicial review. They were frequently inappropriately confrontational and defensive, resonant of a (hopefully) bygone era of private litigation trench warfare. Linked to this, there is an unavoidable concern that excessive time, effort and energy have been invested in communications of this kind when the focus should more properly have been on complying with reasonable requests for disclosure of documents and kindred requests. This, in turn, has diverted the resources of both the Applicants' legal representatives and the Tribunal into unnecessary contentious issues and areas. All of this was pre-eminently avoidable.

(30) Most recently, in the latest of the cases belonging to this cohort, the Tribunal has found it necessary to say the following:

> *"[52] I have received, and considered, the parties' further written representations mooted above. On behalf of the Applicant, there is no challenge, at this stage, to the order being formulated in the terms provisionally indicated. The only issue of substance raised is that the order should include a specific clause requiring active communication and co-operation on the part of the Secretary of State with the Applicant's representatives. The purpose of this is expressed in the following terms:*
>
> > *"… to ensure that both parties have relevant information to assist*

with facilitating transfer and so that the vulnerable Applicant is kept informed of progress."

This is trenchantly opposed on behalf of the Secretary of State. This dogged resistance has become a feature of all cases belonging to this cohort. It is a further reflection of the way in which the defence of these cases has habitually been conducted by the Secretary of State. [This issue is addressed fully in the Tribunal's "liberty to apply" judgment in AM, supra.] Furthermore, it airbrushes provisions to this effect which I have included in 'liberty to apply' orders made in ease of the Secretary of State extending time limits for admission of the claimant concerned. I am frankly at a loss to understand why a provision of this kind is resisted so doggedly. The more so when experience of this litigation shows that the active involvement of, and reasonable communication with, the claimant's legal representatives and others, including charitable organisations and volunteers sur place, can positively enhance compliance with the Tribunal's orders. Furthermore, there is no evidence that mutual cooperation and communication of this kind can have a negative effect on compliance.

[53] I reject the submission that the inclusion of a provision of this case in the Tribunal's orders would impose an "onerous" burden on the Secretary of State. This submission is made in the terms of a bare assertion, without particularisation. Furthermore, it is confounded by what I have stated above. I also reject the submission that a provision of this kind would be "unclear". I consider that mature, adult litigants who have a keen sense of the rule of law should not require kindergarten-type elaboration. Good sense, good faith and reasonableness are the three stand out ingredients in complying with a provision of this kind. In the world of contemporary litigation, there should be no requirement for subsequent judicial monitoring. This is, however, available to cater for something unpredicted or unforeseeable. In the abstract, and given the Tribunal's experience of these cases, it would be highly surprising if the imposition of a requirement on the part of the Secretary of State's officials and legal representatives to engage in appropriate communication with the Applicant's legal representatives, in the interests of securing compliance with a judicial order, were to prove "onerous". However, should this expectation, for whatever reason, be unfulfilled, the mechanism of liberty to apply will accommodate any need for judicial re-examination."

[AR v SSHD, unreported, JR/6014/2017]

These passages require no elaboration.

(31) All of the foregoing has unfolded in a public law ligation context. In all of the cases concerned, the Secretary of State has been subject to –

"… a very high duty ….. to assist the court with full and accurate explanations of all the facts relevant to the issue the Court must decide."

[R (Quark) v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1409 at [50]].

The duty imposed on every public authority in judicial review proceedings to make disclosure of material documents is a reflection of the public law character of the proceedings. There is no *lis inter-partes*, in marked contrast with private law litigation. Furthermore, I consider that the conduct of judicial review proceedings by public authorities should at all times be guided by the concept of a partnership with the court.

(32) In Tweed v Parades Commission for Northern Ireland [2006] UKHL 53, Lord Bingham of Cornhill stated at [2]:

> "*The disclosure of documents in civil litigation has long been recognised throughout the common law world as a valuable means of eliciting the truth and thus of enabling courts to base their decisions on a sure foundation of fact.*"

This applies *a fortiori* in judicial review. Furthermore, in contemporary judicial review, proceedings are conducted on the footing that the demonstration of some contradiction, inconsistency or incompleteness in the respondent's affidavits (witness statements) is no longer a pre-requisite to ordering disclosure: per Lord Brown in Tweed at [56]. Finally, as Lord Brown emphasised at [57], courts have for some time expected respondents to routinely exhibit all material documents to their affidavits/witness statements.

(33) I conclude, reluctantly, that the Secretary of State's conduct of all of these cases has been inappropriate. It has failed to adhere to the high standards expected of government departments in judicial review litigation. The allegiances owed by the Secretary of State to the court in public law proceedings arise out of a species of partnership. The essential tenets of this partnership are that the public authority concerned will, figuratively, play its cards face up and the court, in turn, will be mindful of its supervisory (not appellate) jurisdiction, will accord such deference as is appropriate according to the context and will fashion remedies which respect the differing roles of the public authority as primary decision maker and the court as supervisory judicial authority. All of this is embedded in the separation of powers and the rule of law itself.

(34) In one of the liberty to apply orders the Tribunal, acceding to the Secretary of State's application for a further extension of time, said the following, at [3]:

> "*I emphasise:*
>
> *(a) This is, once again, a backstop, not a vague aspirational target; and*
>
> *(b) Active communication and cooperation between the parties' representatives is of paramount importance.*"

I consider that, having regard to the governing principles expounded above, it should not have been necessary for this Tribunal to express itself in these terms. That said, one month later there is no evidence that the Secretary of State has absorbed the central message of the order. Quite the contrary: there has been dogged resistance to frequent and proactive communication and co-operation with the Applicant's legal representatives and the agencies, charities *et al* with whom they typically interact and much time has been invested in purporting to justify this. Stated succinctly, the Secretary of State, in this discrete respect, has defied the Tribunal's order. This is another, freestanding matter of profound concern.

(35) I am, reluctantly but unhesitatingly, driven to the conclusion that the Secretary of State has not taken either the Tribunal or its orders seriously enough.

Second Conclusion: The Reach of 'Liberty to Apply'

(36) The question is very simply framed: in the circumstances prevailing, is it incumbent upon the Applicants to issue fresh judicial proceedings for the purpose of securing an order declaring that the Secretary of State has failed to comply with the Tribunal's principal orders: or can they invoke the "liberty to apply" provision?

(37) The mechanism of liberty to apply is a valuable adjunct to the court's powers. Unsurprisingly it has its origins in judge made law and, therefore, belongs to the inherent jurisdiction of the High Court. See Halsburys Laws of England, Vol 12A (2015), paragraph 1602. The authors of The White Book 2017, Volume 2, observe (at paragraph 3.1.13) that where an order makes provision for liberty to apply –

> "…. *The court making the order does not lose seisin of the matter: the inclusion of a liberty to apply indicates that it is foreseen that further applications are likely in the course of implementing the decision.*"

While, as I have noted, this would formerly have been viewed through the lens of the inherent jurisdiction of the High Court, the modern approach is to apply the court's general power of case management, giving effect to the primacy of the overriding objective.

(38) A survey of the relatively few reported cases which have considered the scope of "liberty to apply" reveals that bright line rules or principles do not abound. One of the clearest principles is that liberty to apply serves to "work out" the order of the court, rather than vary it (Halsbury, *op cit*). In the jurisprudence of the Commonwealth, there is a useful synopsis in Koh v Koh [2002] 3 SLR 643, per Choo JC:

> "*The 'liberty to apply' order is a judicial device intended to supplement the main orders in form and convenience only so that the main orders may be carried out. Within its ambit, errors and omissions which do not affect the substance of the main*

order may be corrected or augmented, but nothing must be done to vary or change the nature or substance of the main orders ….

What amounts to a variation depends on the context of the individual case."

The Judge also spoke of "*a further order to give effect to the original order*". All of this is consonant with the leading United Kingdom cases, it being sufficient to refer to Cristel v Cristel [1951] 2 KB 725.

(39) This being quintessentially a matter belonging to the realm of procedural law, in any case raising questions concerning the scope and limitations of liberty to apply in a given order I consider that regard should also be had to the applicable provisions enshrined in the overriding objective. These include, inexhaustively, expedition, finality, certainty and saving costs.

(40) The Upper Tribunal, of course, cannot lay claim to the fund of residual powers lying within the inherent jurisdiction of the High Court. The bridge between the powers of these two judicial organs is provided by section 25 of the Tribunals, Courts and Enforcement Act 2007 which, in material part, states:

"*(1) In relation to the matters mention in (2), the Upper Tribunal –*

(a) Has, in England and Wales or in Northern Ireland, the same powers, rights, privileges and authority of 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.***"

[My emphasis]

I consider that section 25(2)(c) has the effect that the Upper Tribunal may exercise the same "liberty to apply" powers as are exercisable by the High Court. To the extent that any reinforcement of this analysis is required, section 25(3) provides that section 25 (1) "*… shall not be taken ... to limit any power to make Tribunal procedure rules*" and, within the body of the latter, rule 5 provides that the Upper Tribunal may regulate its own procedure, subject to the provisions of the 2007 Act and this includes, per rule 5(2), a power to "*…. give a direction in relation to the conduct or disposal of proceedings at any time ….*". Unsurprisingly, no argument to the contrary was presented on behalf of the Secretary of State.

(41) I return to the present context of the Tribunal's order requiring:

"*(1) The Respondent shall admit* [the Applicant] *to the United Kingdom forthwith using best endeavours at all material times and at latest by midnight on 22 May 2017;*

(2) The Respondent shall begin the process of making a fresh lawful decision forthwith and shall complete that process at latest by midnight on 22 May 2017."

The Applicants are seeking a declaration that the Secretary of State has not complied with (2). At the time when this application was initiated, the Secretary of State had failed to comply with the time limit specified in (1) of the Tribunal's several Orders and had, timeously, sought and received variations from the Tribunal whereby the time limit was extended. The Tribunal's principal Orders were, carefully and deliberately, framed in less than absolute terms which contemplated that the Secretary of State might be driven to seeking extensions of time. It was implicit in the orders that reasonable extensions of time would be granted if good reason to do so were demonstrated. In each of these cases, the Tribunal has been persuaded to extend time on the basis that good reason for doing so has been established. It follows, logically, that there has been no breach by the Secretary of State of paragraph (1) of the principal Orders.

(42) However, paragraph (2) of the Tribunal's principal Orders is in marked contrast with paragraph (1). In particular, it does not contain the qualification of "*using best endeavours*" and it is couched in relatively monochromatic terms. For the reasons given in [14] – [35] above, I have concluded that the Secretary of State has failed to comply with the Tribunal's orders in this respect. I am further satisfied that an application for a declaratory order to this effect is harmonious with the principled framework expounded above, fundamentally because it belongs to the realm of the outworkings of the Tribunal's orders and, simultaneously, promotes several of the principles enshrined in the overriding objective.

Order

(43) The foregoing analysis and conclusions give rise to the following Order:

The Tribunal hereby declares that the Secretary of State has unlawfully failed to comply with paragraph (2) of the Tribunal's principal orders in these cases.

Costs

(44) I discern no reason for departing from the general rule that costs follow the event, the parties having had an opportunity to formulate representations on this discrete issue. Accordingly, the Respondent shall pay the Applicant's reasonable costs of this further application, to be assessed in default of agreement. Further, the Applicant's costs shall be assessed to reflect their status of publicly funded litigants.

Postscript

(45) Following circulation of this judgment in draft, with all of the Applicants having

been admitted to the United Kingdom and having submitted claims for asylum, at the hand down stage the Tribunal was informed of the Secretary of State's intention to make fresh decisions in all cases whereby the discretion to examine the said claims under Article 17(1) of the Dublin Regulation will be exercised. The Tribunal, under the aegis of liberty to apply, was asked to comment, if considered appropriate.

(46) I would observe that, for a variety of reasons, this was a responsible step to take.

(47) Any mandatory order is susceptible to an application for variation or discharge. I shall treat the Secretary of State's notification as such an application. Having afforded the Applicants' representatives an opportunity to make representations, being satisfied that the earlier mandatory orders have served their purpose and that no identifiable end will be served by their perpetuation, **the Tribunal hereby discharges the mandatory orders (1) and (2) noted in [4] above.** I add that the course proposed by the Secretary of State noted in [45] seems in principle appropriate and will be facilitated by the Tribunal's aforementioned discharge order.

(48) This litigation saga hereby reaches its terminus, I trust.

Signed: Leonard McCloskey.

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

Dated: **06 September 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:

APPENDIX 1

I write to you on behalf of the President of the Upper Tribunal (Immigration and Asylum Chamber), the Hon. Mr Justice McCloskey.

The Tribunal has already drawn to your attention the inappropriate content of the Respondent's Notice of Appeal in its Notice dated 27 May [first attachment]. It does not find your response satisfactory.

The President has now seen, and considered, the Respondent's "Note" to the trial judge in Citizens' UK v SSHD. He is gravely concerned by much of its content. This document contains various assertions of judicial impropriety, a lack of judicial impartiality and equality of treatment of the parties and improper purpose. It is significantly inaccurate, incomplete and unbalanced. It contains, in substance, collateral allegations of judicial misconduct, casting grave aspersions on the impartiality and integrity of the President and another senior judge of this Chamber.

Elaboration and particularisation of the above can be found in the insertions in the version of the Note attached [second attachment].

The President notes that the central, clearly expressed purpose of the Note is to invite the trial judge in a court of coordinate jurisdiction to attribute minimal, or no, weight to the judgments of this Chamber. The Respondent has sought to achieve this goal through the medium of a document suffering from the multiple imperfections noted above and elaborated in the second attachment.

This, self-evidently, is a matter of profound concern.

A further matter of concern is that, so far as this Chamber is aware, no steps have been taken to withdraw or rectify the document in the circumstances of the exchange noted in the second paragraph hereof.

An additional, discrete concern is that this document has been created – and has been neither withdrawn nor significantly rectified – in circumstances where there is an unresolved application to this Chamber for permission to appeal to the Court of Appeal in AM. Furthermore, this document will, predictably, be paraded before the Court of Appeal in any application for permission to appeal or any substantive appeal.

The steps requiring to be taken immediately to rectify this highly regrettable state of affairs are obvious.

It is assumed that a matter of this gravity will be immediately drawn to the attention of the Treasury Solicitor.

Finally, you will, presumably, forward this to both counsel concerned who, in turn, will doubtless wish to consider their professional responsibilities.

This letter is copied to all parties' representatives.

APPENDIX 2

NOTE: ***the italicised passages in this document are the Tribunal's insertions***

IN THE HIGH COURT OF JUSTICE

CO 5255/2016

QUEEN'S BENCH DIVISION

ADMINISTRATIVE COURT

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BETWEEN

THE QUEEN (On the application of
CITIZENS UK)

Claimant

- and-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

DEFENDANT'S NOTE ON THE UPPER TRIBUNAL'S
DECISIONS IN AMAND RELATED CASES

Introduction

1. This Note is served on behalf of the Defendant and addresses the Tribunal's decisions in the cases of AM, and SS, which were handed down very shortly before the start of the hearing in Citizens UK.

2. The Court is of course entitled to have regard to those decisions of the Tribunal, but for the reasons set out below, it is submitted that a particularly high degree of caution needs be applied when considering the Tribunal's views in these cases. Above all, the Defendant submits that the Citizens UK case in the High Court is the appropriate forum for careful consideration of the evidence and issues in this case, and that in the particular circumstances of this case the Court should consider these issues for itself, and it would be unsafe to make any assumption that the Tribunal's view of these issues was a fair or reasonable starting point.

3. The SSHD is actively seeking to appeal the Tribunal's decisions, and a copy of the application for permission to appeal is attached for reference.

Submissions

4. The context in which the Tribunal made its decisions is important. This claim (Citizens UK) was issued in October 2016, and the Claimant's Amended Grounds (where they first sought to challenge the expedited process) were served in mid-January. At the hearing before Lang J on 28 February 2017, when permission was granted, there was substantial argument about the timetable. It was agreed by the Court that the case required expedition, but the necessity of the SSHD having a fair opportunity to present her evidence was also recognised. Expedition was ordered, and the timetable that was set provided for a three-day hearing (including a reading day) beginning 22 May. The SSHD has put in a very considerable amount of work to prepare the SSHD's response in that timescale, and the Court has as a result the detailed evidence before it from very senior officials responsible for the expedited process.

5. The Tribunal claims on the other hand were issued only after the grant of permission in Citizens UK, and not until 13 March 2017. The SSHD made an application to have them stayed pending the imminent hearing in this case, but by its judgment dated 29 March 2017, the Tribunal refused that application, considering that to wait until after the hearing in Citizens UK "would impose a limitation serious impacting on the Applicants' right of access to a court", and that the Tribunal "reject[s] the argument of substantial judicial overlap" (paragraph 28 of the judgment on the stay).

(i) The whole of the Tribunal's decision refusing the Secretary of State's stay application is available to be read. At [23] the Tribunal identified certain guiding principles. At [24] it stated:

> ***"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."***

At [25] the Tribunal undertook the exercise of balancing "… 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 …. [and] … the ages, vulnerability and plight of the two litigants ….

Fairness, reasonableness and proportionality loom large in an exercise of this kind."

The Tribunal's reasoning and conclusions are set forth in [26] – [28].

All of the above is blithely ignored by the Respondent.

6. However, despite the reasoning that there was not significant judicial overlap, the Tribunal then subsequently proceeded to admit into evidence (against the objection of the SSHD) all of the evidence from Citizens UK, and ultimately to decide the lawfulness of the decisions by reference to some of that material. Indeed the Tribunal made clear at the hearing of the AM case on 5 May 2017 that it wished counsel to address it on the procedural aspects of the claim. Given that this inevitably would involve the same issues at the Citizens UK claim, the SSHD renewed her application for a stay behind Citizens UK which the Tribunal refused. The Tribunal then heard submissions made almost exclusively with reference to the bundle in Citizens UK for the rest of that day and there was not time for Counsel for the SSHD to make any submissions on that day.

(i) The Tribunal reasoned that it was seized of individual rights cases, in sharp contrast to the Administrative Court proceedings. Furthermore, the Tribunal made its ruling at a time of the Secretary of State's choosing and when the Secretary of State's evidence in <u>Citizens UK</u> was not available.

(ii) This was a two day hearing, spread over 05 and 11 May 2017. The oral submissions of Counsel for the Secretary of State were made on the <u>second</u> day. There was no suggestion of lack of time.

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7. The Tribunal also conducted its consideration of the cases in an extraordinarily compressed timetable. This had consequences which seriously disadvantaged the SSHD, and impaired the Tribunal's decision-making:

(i) The hearings were listed without reference to availability of Counsel for the SSHD;

(ii) The time available for oral submissions by the SSHD on the substantive issues (for all the Tribunal cases) was restricted to less than 4 hours on a single day. This was insufficient, especially as the Tribunal had not considered the SSHD's evidence or submissions prior to this point;

(iii) A simple but obvious practical disadvantage was that the Tribunal considered the Claimant's Skeleton Argument from in the Citizens UK case, but did not have the SSHD's Skeleton Argument until part-way through the proceedings, as the date for service of the same had not occurred. Although subsequently provided with it, the Tribunal does not appear to have considered it before giving its decision.

(iv) The Tribunal's timetable was dictated by the factors summarised in [24] of its stay ruling and reiterated in [25]. The timetable was intensely context sensitive. It was compressed, but not "extraordinarily" so, particularly when compared with timetables in analogous previous cases. The broad margin of appreciation available to every court in cases management matters is disrespectfully ignored.

(v) The listings followed upon the Upper Tribunal's assessment of the need for expedition having regard to the factors identified in the stay decision – see [24] and [25] especially – which itself acknowledged expressly the need for "fairness to the Secretary of State" in the context of

timetabling matters: see [34]. All parties were treated with absolute equality in all aspects of timetabling. The main exception to this was the specific accommodation which the Tribunal provided to counsel for the Secretary of State in respect of listing arrangements, both proposed and finalised, on 17/18 May 2017. The Secretary of State was at all times represented by the same Junior Counsel instructed in Citizens UK.

(vi) The reference to the submissions of counsel for the SSHD occupying "less than four hours on a single day" is correct, as regards AM. The assertion that counsel's oral submissions were "… for all the Tribunal cases … restricted to less than four hours on a single day" is disturbingly incorrect. Counsel for the SSHD made oral submissions to the Tribunal on all of the separate hearing dates relating to the other four cases.

(vii) The uncompleted and undeveloped point relating to the Secretary of State's skeleton argument in Citizens UK contains nothing of substance.

8. The Tribunal appears to have prioritised, at all costs, producing decisions in the individual cases prior to the hearing in Citizens UK. It is the Defendant's view that this has been at the expense of the opportunity of considering the material in this case with the care and detail that it required.

(i) This unfortunately phrased mere comment airbrushes in its totality the Tribunal's reasoning and conclusions in its stay ruling. The impropriety of the allegation of carelessness and what follows in [9] below require no elaboration. What follows in [10] – [12] simply erases large swathes of the Tribunal's judgment in AM.

9. It may be the haste with which these cases were considered that have contributed to the errors made by the Tribunal.

This is more disrespectful bare comment and an impermissible expression of the author's personal opinion, which is irrelevant and inadmissible in a document of this kind.

10. The SSHD considers that the errors of law made by the Tribunal are clear: these are set out in the application for permission to appeal. The High Court is invited to consider the legal questions carefully and independently. Of necessity, the grounds of appeal in the Tribunal cases focus on the most important errors, and those which go directly to the Tribunal's

conclusions, but it is emphasised that the SSHD fundamentally disagrees with the Tribunal's approach on almost all aspects of this case.

11. The SSHD does not set out here all of the errors in the Tribunal's decision: for the reasons set out above it is submitted that it is fundamentally important for the fair adjudication of these issues that this Court considers the issues for itself, rather than by way of review of the Tribunal's views.

3

12. It may nevertheless be helpful to give particularly obvious examples of where the Tribunal failed to consider the SSHD's evidence:

(i) The Tribunal appears to have entirely overlooked the fact that the process operated without prejudice to the Dublin Ill Regulation. The process fast-tracked a substantial group of children who could be readily and confidently identified as meeting the criteria in question, but that for all children remaining in France, they retained full access to the Dublin procedure, and were essentially in the same position as those unaccompanied asylum-seeking children elsewhere in France and Europe. This error then fed into the Tribunal's key conclusions. The Tribunal asserted, for example, that the standards of fairness that it required were because the decisions involved "the making of life changing and destiny shaping decisions for the children involved", seemingly unaware that the underlying position of the children not transferred under this process was not determined: the right to consideration of a take-charge request under the Dublin Ill Regulation from France being unaffected.

(ii) The Tribunal refers to the SSHD's Summary Grounds of Defence (paragraph 36), seemingly without appreciating that at this point the Grounds were responding to the original, unamended, claim, and were not concerned with the expedited process, but rather with the Claimant's original case based on the Joint Declaration.

(iii) There is no detailed acknowledgement or rebuttal of the arguments set out in the SSHD's Skeleton Argument and Detailed Grounds of Defence.

(iv) In respect of the "filter" process that was followed following completion of Operation Purnia Phase 2, the Tribunal apparently considered that there was no '(clear evidence" of the nature of this, seemingly unaware of paragraph 69 of Mr Cook's statement, and 70-77 of Ms Farman's statement. This is one of a number of instances .where the Tribunal appears unwilling to engage with or accept evidence from "litigation statements". In general the Tribunal appears to

have been unwilling to accept the evidence presented to it, for reasons that are largely unexplained in the Judgments.

22 May 2017