

**Upper Tribunal
Immigration and Asylum Chamber**

Judicial Review Decision Notice

The Queen on the application of **Applicant**
FTH
v
SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondent**

heard on 9 - 11 May 2018

Having considered all documents lodged and having heard Ms C. Kilroy and Ms M. Knorr of counsel, instructed by Bhatt Murphy Solicitors, on behalf of the Applicant, and Mr. R. Kellar of Counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 9 - 11 May 2018.

Decision: The application is granted

ANONYMITY ORDER

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI/2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court orders otherwise, no report of any proceedings or any form of publication thereof shall directly or indirectly identify that Appellant. This prohibition applies to, amongst others, both parties.

THE HISTORY OF THE APPLICATION FOR JUDICIAL REVIEW

1. The Applicant, who was born on 10 August 1999, is a national of Eritrea. He is a Pentecostal Christian, who also fears indefinite conscription in Eritrea. He is seeking family reunification with his brother, YH, who has been recognised as a refugee in the United Kingdom. The Applicant's age is not in dispute, as on 2 January 2017 La Cour d'Appel de Rouen accepted that he was a child at that time. Helen O'Keefe, a mental health social worker, met with the Applicant on 23

January 2018 and 27 April 2018 and concluded that he was suffering from moderate to severe post-traumatic stress disorder arising from his experiences in Libya, during the sea crossing to Europe, in the Calais “jungle” and since making his application to enter the United Kingdom. She also found that his condition was exacerbated by his separation from his brother and the failure on the part of the Respondent to give reasons for refusing to grant him entry to the United Kingdom.

2. It is the Applicant’s case that he fled from Eritrea in 2015. He travelled through Sudan to Libya, where he was detained and forced to do building work before his uncle paid a ransom for his release. He then managed to cross the Mediterranean Sea and enter Italy and eventually arrived in Calais in July 2016 and took shelter in the Calais “jungle”.
3. His entitlements were not considered within the accelerated process established early in October 2016 and after the Calais “Jungle” was demolished between 24 and 26 October 2016, the Applicant was placed in the Centre D’Accueil Provisionere (“the CAP” Temporary Reception Centre) but was not interviewed whilst he was there. The CAP was closed on 27 October 2016 and the Applicant was transferred a Centre d’Accueil et d’Orientation pour Mineurs Isoles (a “CAOMI”) in Le Havre in order for a decision to be made as to whether he was eligible to be transferred to the United Kingdom. This consideration took place under a process designated as Operation Purnia Phase 2.
4. He was asked questions over the telephone in or around 24 November 2016. He was not provided an interpreter in his mother tongue, Saho. Instead, the interpreter at the other end of telephone call was speaking to him in Tigrinya and spoke very quickly. As a consequence, he found it difficult to understand some of the questions put to him.
5. YH was interviewed over the telephone without an interpreter on 30 November 2016 and on the same day a Home Office case worker decided that the Applicant did not qualify to be transferred to the United Kingdom. In a spreadsheet sent to the French authorities on 14 December 2016, they were told that his family link

had not been accepted. Towards the end of December 2016 the Applicant was part of a group of children at the CAOMI in Le Havre who was simply told that their applications had been rejected. He was not given any written or detailed reasons for the decision.

5. On 30 December 2016 the Public Prosecutor at Le Havre District Court made a protection order in relation to the Applicant, as he was an unaccompanied child, and he was entrusted to the care of the Seine Maritime child and youth social care services.
6. In his witness statement the Applicant said that he was subsequently taken to a French government office or court where he explained that he had a brother in the United Kingdom and wished to join him. This is confirmed by an untranslated questionnaire which indicates that the Applicant was interviewed at a Centre D'Accueil et D'Orientation ("CAO") sometime after 3 January 2017. The Applicant's name appeared on a spread-sheet sent by the French authorities to the UK authorities on 28 February 2017 containing the names of unaccompanied children whose cases the French authorities thought should be reviewed. On 8 March 2017 the UK Authorities informed the French authorities that a take charge request could be progressed if contact details [for FH] were located. It does not appear that the French authorities took any further action.
7. The Applicant believed that he was not going to be transferred to the United Kingdom and left the CAOMI in Le Havre on 16 April 2017. He travelled to Paris where he lived on the streets and then returned to Northern France and again lived rough near a port and tried unsuccessfully to cross the Channel. On 11 August 2017 the Refugee Youth Service in Calais referred the Applicant to Safe Passage, a not for profit organisation established to help unaccompanied child refugees and vulnerable adults find safe and legal routes to protection through advocacy, community organisation and legal work. By this time, he had become 18 on 10 August 2017. On 24 October 2017 he was provided with a place at adult Centre d'Accueil et d'Examen des Situations (a "CEAS") in Belval. Safe Passage also arranged for him to be provided with legal advice and assistance. He was initially advised by Ashursts Solicitors on a *pro bono* basis and they tried

unsuccessfully to obtain disclosure from the Respondent. He then instructed Bhatt Murphy Solicitors and they obtained a full legal aid certificate to represent him on 24 January 2018.

8. Meanwhile, Bhatt Murphy had sent a pre-action protocol letter to the Respondent on 22 December 2017 and had also requested disclosure of documents relating to the expedited process in which the Applicant had been involved and the decision to reject his claim. The Respondent sought more time to respond on 5 January 2018 and sent a partial reply on 24 January 2018. This dealt with procedural issues and, as the letter from Bhatt Murphy Solicitors, dated 25 January 2018, pointed out did not respond to the substance of the proposed claim or provide the necessary disclosure.
9. The Applicant lodged his claim for judicial review on 16 February 2018, challenging the on-going failure by the Respondent to make a lawful decision in relation to his application and/or to admit him to the United Kingdom. He also made an application for an urgent consideration of his application for expedition.
10. On 16 February 2018, Upper Tribunal Judge Rintoul listed the application for expedition for an oral hearing. This was listed for 23 February 2018. The day before this hearing the Respondent disclosed a copy of the Applicant's Op Purina Phase 2 interview and some other related documents.
12. In compliance with the directions made by Upper Tribunal Judge King, the Respondent filed and served her acknowledgment of service and summary grounds of defence on 9 March 2018. The Judge had also directed that there should be full disclosure within 14 days of notification of his decision. There was some but not complete disclosure in response to this order.
13. On 26 March 2018, Upper Tribunal Judge Finch refused the Respondent's application for a stay pending appeals set down in the Court of Appeal between 12 - 14 June 2018 and granted him permission to apply for judicial review at an oral permission hearing. On 3 May 2018 the Respondent applied for permission to appeal to the Court of Appeal against Upper Tribunal Judge Finch's decision to

refuse him a stay. No decision had been reached on this decision by the time of the full judicial review hearing.

14. Meanwhile, on or around 19 March 2018, the Applicant was transferred to another CEAS, where he was the only Eritrean, which had no wi-fi and was two or three hours walk from the nearest town. He was distressed at not being able to keep in touch with his brother and, therefore, he left the CEAS on or around 1 April 2018 and returned to Calais, where he had some friends, and resumed living rough. On 19 April 2018 he was admitted to the Centre Hospitalier de Calais after being hit on the head by a truncheon. His forehead was sutured at 34 points and it was believed that he had lost consciousness for a few minutes. He was prescribed painkillers and discharged to return in five days. Safe Passage then arranged for him to be accommodated by one of their volunteers, Brother Johannes, and he remains there.
15. By this time, on 19 and 21 March 2018, the Applicant's solicitors had written to the French authorities, enclosing supporting evidence of his relationship with YH, and on 4 May 2018 the French authorities confirmed that they were willing to send a take charge request under article 17.2 of Dublin III, if the Applicant lodged a claim for asylum in France. The Respondent sent a draft consent order to the Applicant on 4 May 2018. The terms of this proposed order were that the Respondent would give favourable consideration to a take charge request under Article 17.2 subject to (a) undertaking further identity checks to verify that YH was the Applicant's brother as stated and (b) the Respondent performing standard security checks prior to any transfer to the United Kingdom.
16. On 25 May 2018, when we were close to finalising our decision, we received further disclosure from the Respondent. As the documents appeared to be of central relevance to some of the issues before us, the parties were contacted by telephone after the intervening Bank Holiday and on 30 May 2018 the Applicant's legal representatives indicated that they wished us to take these documents into account. The Government Legal Department did not object to us doing so.

THE ORAL HEARING

17. At the start of the hearing, counsel for the Respondent confirmed that he was no longer seeking to pursue his application for permission to appeal to the Court of Appeal against the decision by Upper Tribunal Judge Finch to refuse him a stay.
18. There was also discussion of the draft consent order, which had been sent to the Applicant by the Respondent on 4 May 2018, and which had subsequently been amended in response to clarification being sought by the Applicant. Such clarification was not provided until 10 May 2018 when the Respondent wrote to the Applicant's solicitors enclosing an amended draft consent order stating that the Secretary of State for the Home Department was prepared to confirm that he would accept a take charge request in respect of the Applicant subject to security checks. These checks were said to include ones to ensure that there was nothing in his or his brother's history which gave rise to national security issues. He also indicated that there would be additional safeguarding checks as, although the Applicant was now over 18, there were apparent health issues. In addition, he confirmed that he now accepted that the Applicant was YH's brother and, therefore, would not require any DNA evidence. In addition, he said that if there were no security issues he would be able to accept a take charge request on the same or the next working day after receipt of such a request.
19. The fact that this clarification came part way through the substantive judicial review hearing and that the Applicant's solicitors needed to explain any offers to the Applicant in person and with the assistance of an appropriate interpreter meant that the Applicant was not in a position to give or refuse consent to the offer being made by the Respondent. Therefore, we continued to hear full submissions from counsel for the Applicant and counsel for the Respondent. We have referred to the content of their submissions, where necessary, in our findings below. It was also our view that the potential opportunity to enter the United Kingdom under the provisions of Article 17.2 of Dublin III did not amount to an alternative remedy to the current application, coming as it did too late for proper instructions to be taken.

DECISION

THE DUBLIN III REGULATION

20. The Dublin III Regulation (Regulation (EU) No. 604/2013 of the European Parliament and of the Council of 26 June 2013 *establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person* (recast)) forms the background to this application, whether or not, it was being applied in its totality to the Applicant. It contains the following articles:

Article 2 of Dublin III contains the following relevant definitions:

‘Application for international protection’ is defined by reference to the Qualification Directive which (in the relevant version) is ‘a request made by a third country national or a stateless person for protection from a Member State, who can be understood to seek refugee status or subsidiary protection status...’ (Reg.2(g)).

‘Applicant’ means a third-country national or a stateless person who has made an application for international protection in respect of which a final decision has not yet been taken.

Article 3 provides:

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

2. Where no Member State responsible can be designated on the basis of the criteria listed in the Regulation, the first Member State in which the application was lodged shall be responsible for examining it...’

Article 4 provides:

'1. As soon as an application for international protection is lodged within the meaning of article 20(2) in a Member State, its competent authorities shall inform the applicant of the application of this Regulation, and in particular of:...(b) the criteria for determining the Member State responsible... (c) the personal interview pursuant to Article 5 and the possibility of submitting information regarding the presence of family members, relatives or any other family relations in the Member States, including the means by which the applicant can submit such information...

2. The information referred to in paragraph 1 shall be provided in writing in a language that the applicant understands or is reasonably supposed to understand...'

Article 5 provides:

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

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

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

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

Article 6 provides:

'1. The best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation.

2. Member States shall ensure that a representative represents and/or assists and unaccompanied minor with respect to all procedures provided for in this Regulation. The representative shall have the qualifications and expertise to ensure that the best interests of the minor are taken into consideration during the procedures carried out under this Regulation. Such representative shall have access to the content of the relevant documents in the applicant's file including the specific leaflet for unaccompanied minors...

3. In assessing the best interests of the child, Member States shall closely cooperate with each other and shall, in particular, take due account of the following factors:

(a) family reunification possibilities;

(b) the minor's well-being and social development;

(c) safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking;

(d) the views of the minor, in accordance with his or her age and maturity...

4. For the purpose of applying Article 8, the Member State where the unaccompanied minor lodged an application for international protection shall, as soon as possible, take appropriate action to identify the family members, siblings or relatives of the unaccompanied minor on the territory of Member States, whilst protecting the best interests of the child...'

Under Chapter III ('Criteria for determining the Member State responsible'), Article 8 provides:

'1. Where the applicant is an unaccompanied minor, the Member State responsible shall be that where a family member or a sibling of the

unaccompanied minor is legally present, provided that it is in the best interests of the minor...'

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

Article 17 ('Discretionary clauses') provides:

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

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

The 'take charge' procedure is set out in Chapter VI.

Article 20 provides:

'1. The process of determining the Member State responsible shall start as soon as an application for international protection is first lodged with a Member State.

2. An application for international protection shall be deemed to have been lodged once a form submitted by the applicant or a report prepared by the authorities has reached the competent authorities of the Member State concerned. Where an application is not made in writing, the time elapsing

between the statement of intention and the preparation of a report should be as short as possible.

...4. Where an application for international protection is lodged with the competent authorities of a Member State by an applicant who is on the territory of another Member State, the determination of the Member State responsible shall be made by the Member State in whose territory the applicant is present. The latter Member State shall be informed without delay by the Member State which received the application and shall then, for the purposes of this Regulation, be regarded as the Member State with which the application for international protection was lodged.'

Article 21 provides:

1. Where a Member State with which an application for international protection has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible and in any event with three months of the date on which the application was lodged within the meaning of Article 20(2), request that other Member State to take charge of the applicant...'

THE EXPEDITED PROCESS

21. A few unaccompanied children had been transferred to the United Kingdom from the Calais camp under Article 8 of Dublin III during the period leading up to October 2016. Then, as Julia Farman, the Head of the European Intake Unit, explained in her witness statement, dated 5 April 2017, in early October 2016 an "accelerated" process under the Dublin III Regulation was drawn up between the UK and French "Dublin Units" in co-operation with the staff at the Sous Prefecture in Calais and France Terre d'Aisle ("FTDA"). However, she went on to explain that, on 7 October 2016, the French authorities announced their intention to clear the Calais camp by 17 October 2016. This deadline was subsequently extended until 24 October 2016. She also explained that, on 12 October 2016, she met with the Sous Prefecture staff in Calais 'to discuss how we were going to consider and process children who may be eligible to transfer to the UK under

Dublin in an expedited manner. It was agreed that the accelerated process we had [previously] developed would be applied to unaccompanied minors present in the camp but would need to be modified’.

22. She also explained that “on 13 October 2016, we further developed, in conjunction with the French Dublin Unit, Sous Prefecture Calais and the FTDA, how an expedited process for transferring minors with family links from the camp would work. This primarily meant condensing the process of registering the asylum claim into one registration form, and at the same time ascertaining any family details that could lead to an acceptance for transfer to the UK under the family reunion criteria of the Dublin Regulation. French and UK officials would work alongside each other to record bio-data details of the child, map their family tree, ascertain contacts about the family member in the UK, and note any health or medical issues”. She added that “every interview would be taken with the presence of an interpreter to translate for the child”.
23. She added that “the French officials would communicate decisions to the children. It was decided this should be done by the French rather than the Home Office officials because this was ultimately a French-led operation, with the UK providing support”. Some interviews took place for male children at the Calais camp between 14 and 23 October 2016 under Operation Purnia Phase 1 but there was not time to interview all of them.
24. The camp was cleared between 24 and 26 October 2016 and interviews commenced again in the CAP – Temporary Reception Centre, which provided 1,500 places for unaccompanied children in heated containers, on 27 October 2016. Again, not all of the children were provided with an interview and on 2 November 2016 the CAP area was cleared and the boys remaining in the area dispersed to CAOMIs in different departments within France. Julia Farman later confirmed that the children were looked after and cared for by the CAO directors, social workers and Prefectures who ran the CAOMIs but they were not their legal guardians.
25. Two hundred Home Office officers were deployed to France and interviewed

children at these CAOMIs between 7 and 25 November 2016 under Operation Purnia Phase 2. The children were assessed against the eligibility criteria contained in both section 67 of the Immigration Act 2016 and Article 8 of Dublin III. These officials had left France by 9 December 2016.

26. The witness statement by Mike Gallagher, dated 5 April 2017, stated that, in the CAOMIs in the area of south-east France to which he was deployed, each interview lasted about 20 minutes and involved an interviewing officer from the Home Office, an interpreter and a social worker and sometimes a French official. He also stated that “we specifically asked in each location for three interview stations to be set up in the same room and this request was always agreed to. We did this so that the interpreters could more easily support one another, and move to a new interview when needed without having to be called from a different room”. At the end of each day the completed interview forms were emailed to decision-makers based at Lunar House in London who decided whether an individual child was eligible.
27. Julia Farman also stated that “in relation to cases where the children were claiming to have family links in the UK which would make them eligible under the Dublin III, Home Office officials carried out the same process in relation to security checks and locating and checking UK based relatives as they had in relation to Phase 1 of Operation Purnia. Earlier in her statement, she had explained that this meant “contacting the UK based family and checking to see if the information they gave about the claimed family link matched with what the child had told us”. She also added that “during the expedited process...we only accepted cases where they had a qualifying family relationship as set out in Article 8 of the Dublin Regulation”.
28. From on or around 9 December 2016 it is clear from the emails now disclosed that the French authorities, supported by Cameron Bryson, the Assistant Director of the UK Border Force who had been temporarily seconded to the Dublin Unit of the Asylum Directorate at the French Ministry of Interior in Paris, were asking the UK authorities to provide sufficient reasons for rejecting children who had applied through the expedited process. This was because it was the French

authorities who were responsible for telling the children of these decisions and there was a serious concern of unrest at the CAOMIs and of children leaving and returning to live rough in Calais if they were not given sufficient reasons.

29. On 14 December 2016 the UK Authorities gave the French authorities a spreadsheet which listed the children who had been assessed in the expedited process. There was a column headed "status" which indicated whether they had been "transferred" or "not accepted". There was then another column headed "Assessment" which gave a brief explanation of the reasons for the assessment. For the children who had been assessed under the criteria contained in Article 8 of Dublin III, these included "cousin", "no family in UK" and "family link not accepted".
30. Florian Valet, then the Deputy Director of Asylum in France made it clear that this list was of no use to them as it did not tell the children why they had been rejected and may lead to meritless applications through the Dublin III process.
31. The emails now disclosed indicate that the UK Authorities did not agree to providing any further reasons as they had received legal advice that this would leave them open to potential legal challenges. It was as the result of on-going pressure from the French authorities and discussion between very senior French and UK officials that the UK authorities subsequently agreed to the establishment of a filtration process.

THE FILTRATION PROCESS

32. This process was finally agreed to on 6 January 2017. The relevant prefecture was responsible for the first "review" of evidence and then the DGEF undertook a second stage review. The UK authorities were not involved in this review of evidence and initially insisted that the process should be completed by 17 February 2017. It also said that it reserved the right to reject a request even where the initial filter suggested that a child may qualify. On 9 January 2017 Cameron Bryson was still reporting that the French authorities needed more information on the "family link not established" rejection in order to have a base

line on which to judge new information provided by a child.

33. A total of 530 cases were referred into the filtration process and from late January 2017 through to March 2017 French officials provided three different spreadsheets of cases they wanted the UK authorities to review. There was a column in these spreadsheets headed "assessment". This column contained simple comments, such as "cousin" or "family link not accepted" or "No contact details". There was also another headed "Retour Region" or which contained slightly more detail, such as "brother in UK". Sometimes there was a longer entry indicating that there was on-going discussion with relatives in the UK. The Applicant's name appeared on the third list, which was received by the UK authorities on 28 February 2017.
34. The Respondent's role was to review any available evidence and then indicate to the French authorities whether, if they made a take charge request under Dublin III, it was likely that the request would be accepted. When the UK authorities responded to the French authorities they colour-coded the lists, with green indicating that a take charge request was likely to be successful. Its final response was sent on 8 March 2017.
35. The number of cases colour coded green does not correlate with the very small number of cases eventually transferred under the filtration process and it was unclear what active part the UK authorities played, if any, in evidence gathering.

SUBSTANCE OF THE CLAIM

36. It is the Applicant's case that the manner in which his application was considered in the expedited and in the related filtration process was procedurally unfair and breached the basic tenets of common law fairness and natural justice and also the procedural safeguards contained in Dublin III and Article 8 of the European Convention on Human Rights. He relies in part on the decision of *R (on the application of AM (a child by his litigation friend OA and OA) v Secretary of State for the Home Department – Unaccompanied Children – Procedural Safeguards)* [2017] UKUT 00262 (IAC).

37. Counsel for the Respondent did not address us on this case at all at the hearing but relied on the decision of Mr. Justice Soole in *Citizens UK v Secretary of State for the Home Department* [2017] EWHC 2301 (Admin). This was a surprising approach as the Court of Appeal is due to consider these contrasting cases in a hearing set down for 12 - 14 June 2018; the fact that permission has been granted in all of the cases suggesting that the law is far from settled in this area.

38. It also appeared to us that there was a significant distinction to be drawn between the nature of the decision in *AM* and that in *Citizens UK*. In the former the Upper Tribunal was considering whether the manner in which individual cases were dealt with under the expedited process was fair. In the latter, the challenge was to the process itself and in paragraph 274 of his judgment, Mr. Justice Soole went no further than finding that:

“In the generality of [the expedited] system which was instituted, there was a proper inquiry in which Home Office officials asked the right question (i.e. as against the Article 8 criteria) and took reasonable steps to acquaint themselves with the relevant information to enable them to answer them correctly”.

39. Furthermore, in *Citizens UK*, Mr. Justice Soole was reliant on more limited evidence provided by the Respondent as to how the expedited process was designed to function. In the current case, there was a far wider range of evidence in relation to how the process was designed to function in general and how it actually worked in the Applicant’s individual case. There was also evidence about the filtration process, which was not before him, or before the Upper Tribunal in *AM*, and which suggests that in many ways it was a continuation of the expedited process and also gave rise to a number of instances of procedural unfairness.

40. Both counsel addressed us on whether the Applicant’s experiences amounted to a breach of the standards of fairness explicitly contained in the Dublin III Regulation, or a breach of common law fairness, sometimes referred to as breaches of natural justice, or whether his substantive or procedural rights under Article 8 of the European Convention on Human Rights had been breached.

41. We considered the second and third potential breaches first on the basis that it would only be necessary to consider the Dublin III aspect of this case if no breaches appeared to have occurred at common law or under Article 8 of the European Convention on Human Rights. In this way we were able to give appropriate weight to the fact that the Court of Appeal will be addressing the application of Dublin III between 12 – 14 June 2018 and yet also ensure that there is no further and unnecessary delay in the case of an 18 year-old who has already been unaccompanied and at risk for nearly two years and who is suffering from moderate to severe post-traumatic stress disorder.

COMMON LAW FAIRNESS

42. The case for the Applicant has remained constant throughout these proceedings. In contrast, the case relied on by the Respondent in his written statements was significantly expanded in counsel's oral submissions. This created an anomaly as he was both placing heavy reliance on the case of *Citizens UK* and also seeking to argue that the conventional approach to natural justice and common law fairness did not apply at all to the Applicant.
43. In paragraph 201 of *Citizens UK*, Mr. Justice Soole recorded that counsel for the Respondent "accepted that common law applies to the expedited process and that the process has to be fair and rational in accordance with the requirements of public law".
44. Counsel for the Respondent then submitted that "the content of that requirement depended on the circumstances: citing *Wiseman v Borneman* [1971] AC 297". This was the approach adopted in the Respondent's written case. In *Wiseman v Borneman*, Lord Morris held at 308 H to 309 C "that the conception of natural justice should at all stages guide those who discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of the law. But there is nothing rigid or mechanical about them. What they comprehend has been analysed and described in many authorities. But any analysis must bring into relief rather their spirit and their inspiration than any precision of definition or

precision as to application...Natural justice, it has been said, is only “fair play in action”.

45. In the same case, at 314 Lord Donovan adopted the words of Lord Tucker in *Russell v. Duke of Norfolk* [1949] 1 All E.R. 109, where he said, at p. 118:

"There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter which is being dealt with and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case”.

46. It appears to us that the last sentence in paragraph 314 has particular application in the current case where the fundamental submission made by the Applicant is that he did not have a reasonable opportunity of presenting his case in either the expedited or the filtration process and that, whatever, the circumstances surrounding the expedited and filtration processes, this aspect of natural justice/procedural fairness had to be applied.

47. Counsel for the Applicant did not dispute that the requirements of natural justice, or procedural fairness, as it is commonly referred to now, must depend on the circumstance of an individual case. This principle was clearly articulated by the House of Lords in the more recent case of *R v Secretary of State for the Home Department ex parte Doody* [1993] UKHL 8. Counsel for the Respondent was correct to note that this was a case which addressed the rights of prisoners who had been given a mandatory life sentence but it is clear from the substance of the judgment and the extract referred to below that the House of Lords accepted that certain principles of fairness had been established over time by the higher courts.

48. In particular, at page 14 Lord Mustill found that:

“What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the oft-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well-known. From them, I derive that 1. Where an Act of Parliament confers an administrative power, there is a presumption that it will be exercised in a manner which is fair in all the circumstances. 2. The standards of fairness are not immutable. They may change with the passage of time, both in general and in their application to decisions of a particular type. 3. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. 4. An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. 5. Fairness will often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. 6. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer”.

49. In relation to (1) above, the statute underpinning the power to admit the Applicant to the United Kingdom, if he was found to meet the criteria in Article 8 of Dublin III for the purposes of the expedited process and the subsequent filtration process, was the Immigration Act 1971.

50. Section 3 of the Immigration Act 1971 states that:

“(1) Except as otherwise provided by or under this Act, where a person is not a British citizen-

(a) he shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under, this Act”.

(b) he may be given leave to enter the United Kingdom...either for a limited or for an indefinite period”.

51. Section 33(5) of the Immigration Act 1971 also states that “This Act shall not be taken to supersede or impair any power exercisable by Her Majesty in relation to aliens by virtue of Her prerogative”. As a consequence, the Respondent, who exercises this prerogative, retains the power to permit an individual to enter the United Kingdom even when he is not granted formal leave to do so.
52. In relation to (2) and (3) there were a number of factors to be taken into account in relation to the Applicant’s individual case. One of these was, as noted by Mr. Justice Soole in paragraph 270 of *Citizens UK* was that the expedited process “was an ad hoc process, the fairness of which fell to be considered under the real constraints of a fast-moving humanitarian crisis in another state”. But he also noted at paragraph 268 of his judgment that:

“The first part of the context is the desperate plight of these most vulnerable young people in the most wretched conditions and in desperate need. It is no part of this judgment to understate the horror of their position which the evidence vividly depicts”.

53. It was the tension between these two factors which underpinned the dispute between the parties in the current case as to the proper application of the common law standards of procedural fairness. When considering these standards, we take into account points 5. and 6. at page [14] of *Ex parte Doody* which go to the core of the breaches said to have occurred in the current case. We also rely on the fact that at page 564 E to F., Lord Mustill also said:

“I accept without hesitation, and mention it only to avoid misunderstanding, that the law does not at present recognise a general duty to give reasons for an administrative decision. Nevertheless, it is equally beyond question that such a duty may in appropriate circumstances be implied, and I agree with the analyses by the Court of Appeal in *Reg. v Civil Service Appeal Board, Ex parte Cunningham* [1994] 2 All E.R. 310 of the factors which will often be material to such an

implication”.

54. It is our view that such a duty is to be implied where a child is unaccompanied in a foreign country, is suffering from what, even at that time, is likely to be have been moderate to severe post-traumatic stress disorder and does not have a legal guardian. (We note that it is the Respondent’s evidence that merely placing a child in a CAOMI did not amount to providing him or her with a legal guardian and that the Applicant was not formally referred into the legal care of the French state until 30 December 2016 after the expedited process was said to have been completed.)
55. Counsel for the Respondent submitted that cases involving prisoners’ rights, disputes in social clubs and cases before other tribunals, did not apply to the particular circumstances of the Applicant’s case. However, these cases were examined in detail by the House of Lords and clearly underpinned its conclusions in the leading decision in *Ex parte Doody*.
56. Furthermore, counsel for the Applicant referred to a number of cases where the duty to inform an applicant of the gist of the case that he has to answer and to provide him with the opportunity to make appropriate representations on his own behalf was said to occur in the immigration and asylum context. For example, in *R v London Borough of Hackney ex parte Decordova* (1994) 27 HLR 108 Laws J, as he then was, found that:

“The decision of July 29, 1993 falls, in my judgment, to be struck down as erroneous in law on the footing that no reasonable authority could have concluded that the letter which generated the decision, that of June 28, contained no new information. Not only that, however. In my judgment where an authority lock, stock and barrel is minded to disbelieve an account given by an applicant for housing where the circumstances described in the account are critical to the issue whether the authority ought to offer her accommodation in a particular area, they are bound to put to the applicant in an interview, or by some appropriate means, the matters that concern them. This must now surely be elementary law in relation to the function of decision-makers in relation to subject matters of this

kind. It applied in the law of immigration, and generally where public authorities have to make decisions which affect the rights of individual persons. If the authority is minded to make an adverse decision because it does not believe the account given by the applicant, it has to give the applicant an opportunity to deal with it”.

57. The procedural standards of fairness to be applied when conducting an interview relating to a protection claim were also analysed in the case of *R (Q) v Secretary of State for the Home Department* [2004] QB 36 and are referred to below.

58. In contrast, counsel for the Respondent placed significant weight on the constraints under which the Respondent was operating during the expedited and the filtration processes. However, we note that at paragraph 8 of *R (Refugee Legal Centre v Secretary of State for the Home Department* [2005] 1 WLR 2219 Sedley LJ held that:

“The choice of an acceptable system is in the first instance a matter for the executive, and in making its choice it is entitled to taken into account the perceived political and other imperatives for a speedy turn-around of asylum applications. But it is not entitled to sacrifice fairness on the altar of speed and convenience, much less of expediency; and whether it has to do so is a question of law for the courts...administrative convenience cannot justify unfairness. In other words, there has to be in asylum procedures, as in many other procedures, an irreducible minimum of due process”.

59. In his oral submissions counsel for the Respondent did not address this judgment or the need for “an irreducible minimum of due process”. Instead, he submitted that it was not necessary to apply the conventional procedural standards of fairness as the Secretary of State had been under no legal obligation to establish and operate Operation Purina and could just have left the children in question in Calais. He added that, if the children had just been left in Calais, they would have had no legal redress against the UK authorities.

60. This was not an approach which was followed by Mr. Justice McCloskey in

paragraph 77 of *AM* where he found that:

“Even if it were appropriate to hold that the Dublin Regulation did not apply, in whole or in part, to the expedited process it is difficult to identify any principled basis for concluding that this process was in some way immune from the orthodox duty of every United Kingdom public authority to comply with the common law principles and standards...”

61. The Respondent sought to rely on paragraph 157 of *Help Refugees* but this judgment related to the very particular statutory process adopted in section 67 of the Immigration Act 2016 as explained by Lord Justice Treacy:

“In our judgment, the process adopted involved no procedural unfairness essentially for the reasons given by Mr. Manknell. First, although the transfers take place pursuant to a statutory authorisation, the Act contains no provision for a written decision, reasons or formal challenge. The Act contains no link to any statutory immigration provisions for those purposes. Yet it must have been evident to Parliament that decisions on vulnerable individuals were a necessary part of the operation of the Act. It must have been evident that not all those who are eligible would be transferred because their number was capped to that specified. It was also the clear purpose of the Act that it should be operated swiftly, and without the bureaucratic or legal processes that attend so much else in the immigration field”.

62. In our view, this was a decision which was confined to cases assessed for the purposes of section 67 of the Immigration Act 2016 and there was no basis upon which it could be read across to apply to children not assessed for this purpose, which was clearly the case for the Applicant. Counsel did not take us to any other cases which departed from the general acceptance in *Citizens UK* that appropriate common law standards of procedural fairness should be applied.

63. Counsel for the Respondent also relied on paragraph 280 of *Citizens UK* in which Mr. Justice Soole found that:

“...I consider that the expedited process must be considered as a whole; and in the context of the reluctance to make applications for asylum in France and of the severe constraints of the operation. Having undertaken that assessment, my conclusion is that it was fair and reasonable and that there was no systematic failure”.

64. It was the case that the Applicant was reluctant to make a formal application for asylum in France but he did fully co-operate with the expedited process. This is significant as Mr. Justice Soole found in paragraph 232 of *Citizens UK*, after a hearing on 18 September 2017, that:

“The evidence demonstrates that, until sometime between the GLD’s letter of 13.1.17 and the Minister’s statement to the House of Commons on 8.2.17, the SSHD and her officials regarded and so described the expedited process as falling within the ambit of Dublin III (and the Dubs amendment). Thus there was no suggestion until that statement that the process fell outside Dublin III”.

65. The Applicant’s interview form within Operation Purnia 2 has also been disclosed and shows that at the top of the Interview Record someone has handwritten “REJECT – Dublin 8.1” and on the second page of the form, the decision maker has also ticked the box entitled “Dublin”. Therefore, it was reasonable for the Applicant, who was a child without the benefit of a legal guardian or a legal representative, to presume that his potential application for asylum was being considered under Dublin III for a transfer to the United Kingdom.
66. It was not until judgment was handed down in *Citizens UK* that any court or tribunal decided that the expedited process was not part of Dublin III and, even then, this has to be contrasted with the decision in *AM* where the Honourable Mr. Justice McCloskey found it was “not open to the Secretary of State to unilaterally and selectively disapply certain provisions of the Dublin Regulation and its sister implementing Commission Regulation as this [was] contrary to EU law”.
67. As we stated above, it is not necessary for us to resolve any dispute as to whether the expedited process was part of the wider Dublin III process or separate from it.

However, as the Applicant said in his witness statement, dated 5 February 2018, when the Calais camp was demolished he was told that unaccompanied minors with family members in the UK would be considered for transfer to the UK. It is our view that this was relevant to his subsequent actions after his claim was rejected and his failure at that point to make a formal application for asylum. In particular, the fact that even the Respondent's officials regarded the expedited process as part of Dublin III until 8 February 2017, explains why the Applicant did not make a formal application for asylum in France when he was interviewed at a CAO sometime in early January 2017.

68. It is also clear from paragraph 282 of *Citizens UK* that, if he had made such a formal asylum application with a view to being transferred under Dublin III, the adverse findings made against him in the expedited process were likely to have prejudiced such an application. If this was not the case, Mr. Justice Soole would not needed to have said "my conclusion is subject to one important qualification. Since the expedited process was without prejudice to Dublin III applications, I consider that it must follow that no account should be taken in any such future applications of material obtained in the course of this expedited process, e.g. of inconsistencies of information received".
69. Therefore, even if the Applicant had made an application for asylum with a view to being transferred to the United Kingdom under Article 8 of Dublin III before he became 18 on 11 August 2016, it is likely that the adverse findings made against him under the expedited process would have led to a refusal under this Article. As a consequence, the fact that the Applicant had not made a formal application for asylum was not a factor which can be held against him when considering the procedural fairness of the expedited and/or filtration process.
70. In addition, when the Applicant was still a child, he would have needed assistance to make an application for asylum and there is no evidence to show that such assistance was provided. As was noted in paragraph 45 of *ZT (Syria) v Secretary of State for the Home Department* [2016] 1 WLR 4894 "it is necessary to obtain the authorisation of a juvenile judge to take certain steps, such as applying for asylum, but the guardian can apply to a family court and become the legal

representative. At this stage, there is a person empowered to undertake measures in the name of the child and to access the procedure”.

THE CONSTRAINTS OF THE PROCESS

71. Counsel for the Respondent did not refer us to any case law which provided a justification for reducing accepted procedural safeguards protected by common law to not even the bare minimum in a situation where the Respondent was acting under constraints of time. In any event, for the reasons given below it appears to us that the evidence disclosed in the Applicant’s individual case indicates that any time constraints were restricted to one part only of the expedited process and that the filtration process provided additional time in which to ensure that procedural safeguards were put in place to ensure that the common law standards outlined in *Ex parte Doody* and the other cases referred to above were maintained.
72. Whilst it is true that the Respondent had only deployed his immigration officers to interview children in the CAOMIs in France between 7 November 2016 and 9 December 2016, these interviews were only part of the expedited process and the actual decisions to admit these children were taken by case workers based on a permanent basis at Lunar House in London. Therefore, no time constraints applied to that later part of the process. We also note that YH was contacted by officers based in the United Kingdom and no explanation has been provided for why he had to be interviewed over the telephone without an interpreter, as opposed to have been asked to attend an interview at Lunar House or elsewhere, where he could be provided with an appropriate interpreter. The initial time constraint relied upon appeared to be the time in which Home Office officials would have organised access to the children dispersed to the CAOMIs and did not concern the actions of officials in London.
73. Furthermore, we note that, as the decision making actually took place in London, the Respondent would have had easy access to his own records when deciding on a claimed family relationship and could have called up these files before either FTH or YH was interviewed. In the current case the Respondent had issued YH

with a residence permit, as a refugee, as recently as 21 November 2016. Therefore, his file should have been readily to hand and would have shown that FH had provided the same names, as the Applicant, for their mother, sister and brother and had also given the same town of origin and stated that he too spoke Saho as a first language.

74. It is also the case that the evidence now discloses that the French authorities were not putting pressure on the UK authorities to bring the totality of the process to a close. In contrast, as outlined above, the emails now disclosed indicate that from 9 December 2016, the French authorities were asking the Home Office to provide them with better reasons for the decisions to reject individual children's applications within the expedited process. For example, Florian Valat, stated that:

"In order to be able to provide answers to young people and thus reduce the pressure in CAOMI - but also to avoid judicial remedies, which we have no interest, or a multiplication of referrals in the "classic" context of the Dublin procedure - it would be very desirable for you to be able to re-examine these files as quickly as possible, and that agreements could be made for those cases where the necessary clarifications were made.

The objective is obviously not that you review all the negative decisions, and that is why we will make sure that you only look at the cases that seem obviously to justify it. The aim is that the minors, in any case, can be certain that their files have been properly studied".

75. Emails and spreadsheets were also being exchanged between the French and UK authorities up until at least 8 March 2017. The content of the emails from the French authorities and from Cameron Bryson indicates that the French authorities were very concerned about the welfare of the children remaining in the CAOMIs and were asking for better reasons so that the children did not leave the CAOMIs and return to the risk they would be exposed to in Calais and other port areas. There was no indication that they wished for any limitation on the period in which the process could be extended. In contrast, the UK Authorities initially said that they would only consider new information within the filtration process up

until 17 February 2017.

76. It is also clear that by refusing to provide the necessary detailed reasons for deciding that the Applicant's family links with YH were not accepted, the totality of the process involving the Applicant has been extended for more than a further two years. It is also now clear that the Respondent was acting on legal advice when he continued to refuse to disclose any further details of the reasons that these family links were not accepted up until 9 March 2018. It is also the case that the Respondent is still making piece meal disclosure of evidence which is relevant to the Applicant's claim two weeks after the last day of the substantive judicial review hearing.
77. As a consequence, although we must give weight to what Mr. Justice Soole referred to as "the severe and exceptional constraints of the operation" in paragraph 280 of *Citizens UK*, at the same time we do give significant weight to a number of breaches of procedural fairness in the manner in which the Applicant's case was assessed by the Respondent.

PROCEDURAL SAFEGUARDS

78. In relation to the procedural safeguards put in place within the expedited process, counsel for the Respondent relied on the judgment in *Citizens UK*. However, Mr. Justice Soole's findings related to the generality of the experience of the children in Calais. It did not concern the particularities of individual cases. For example, in paragraph 274 of his judgment, Mr. Justice Soole accepted on the basis of witness statements made by Home Office Officials that "the interviews in the CAOMIs were conducted with interpreters and, in some instances, social workers".
79. In his witness statement, dated 5 February 2018, the Applicant accepted that there was a white woman present in the room when his interview was conducted. However, the Respondent has not been able to identify her or confirm that she was one of the social workers who had accompanied the Home Office teams to France. The note at the top of his Section 67 1A form implies that there was no interpreter actually present in the room when he was interviewed. This confirms

the assertion made by the Applicant in his witness statement, dated 6 February 2018, that the interpreter was on the other end of a phone.

80. We have also taken into account the second email from Julia Farman, dated 20 April 2018, which had been annotated to show the replies given to certain questions by Nii Krotei, an immigration officer in the Asylum Intake Team, and who was part of the Home Office team that conducted interviews at the CAO in Seine Maritime. He confirmed that in some interviews the interpreter was not present in the room but was on the end of a phone. It was said that this happened when there were not enough interpreters with the team or where the child spoke a language which required an interpreter who was not with the team.
81. In his statement, the Applicant also said that his interview took place in a large room and there were interviews with other young people living at the centre taking place at the same time, some in person with British Home Office Officials and some by telephone. It was the Applicant's case that he was interviewed over the telephone. The Respondent has not provided any evidence from the person said to have interviewed the Applicant in France.
82. The Applicant also said that the interpreter he was speaking to on the telephone was speaking Tigrinya, despite the fact that he and others had asked for a Saho interpreter. He added that he had difficulty understanding the interpreter as his mother tongue was Saho and he only understood Tigrinya if it was spoken slowly and clearly and the interpreter on the call seemed impatient and spoke quickly. The entries on his S67 1A form are contradictory in relation to the language which any interpreter should speak. In response to question 1.10, "What is your main language and dialect?", the interviewer has noted Tigrinya and Saho. However, at the top of the previous page of the interview record there is a note which states "please note that applicant has hearing pro[blem] he can lip rid so needs a face to face interpreter in Saho". This entry suggests that the Applicant had been interviewed using an interpreter who did not speak his first language, Saho, that there had been problems with the interpretation and that he needed a face-to-face interview. There was no evidence that any attempt was made to arrange such an interview with a Saho interpreter being present or that the case worker in Lunar

House gave any weight to the adverse effect interviewing him over the telephone in a language that was not his first language may have had on the quality of his answers.

83. These were all serious omissions which had the potential to undermine the quality of the evidence he could provide during his very brief interview. We also note that it has been recognised that errors in interpretation may undermine the effectiveness of interviews in an asylum or immigration context, even where an interview is conducted face-to-face and with the correct interpreter. In particular, in *R (Dirshe) v Secretary of State for the Home Department* [2005] 1 WLR 2685, Latham LJ relied on the judgment by Pitchford J in *R (Mapah) v Secretary of State for the Home Department* [2003] EWHC 306 (Admin) where he held at paragraph 62 that:

“...The Claimant has demonstrated that:

- (1) Problems of interpretation can and do occur;
- (2) Questions, translated into the applicant’s language and replies given in that language, are not recorded as such but in the English translation;
- (3) Records cannot always, despite exhortation, be literally verbatim;
- (4) The reversal of the requirement for read back removed a measure of protection against unremarked mistakes in recording by the interviewer;
- (5) An applicant does not necessarily have the benefit of representation or his own interpreter;
- (6) Immigration officials and Tribunals of Appeal frequently judge credibility against a criterion of consistency;
- (7) Tape recording of an interview by the applicant or by the Secretary of State would do much to alleviate these problems if and when they occur.”

84. The Respondent relied on the rubric said to have been contained at the beginning of the interview form. In fact, this did not appear on the S67 1A form but only at the top of the form used when interviewing YH. 92. However, in his witness statement, dated 1 February 2018, YH said that he was interviewed over the telephone without the aid of an interpreter. He added that his English was quite

limited and was even more limited then and, therefore, he was only able to understand some of what the Home Office person said to him. He also said that he asked for an interpreter but the official just kept asking questions. He did not mention being assisted by a friend but later instructed his solicitors that this was the case but said that his friend's English was not much better than his. Neither is it confirmed that, even if a friend was present, he or she spoke English to an appropriate level.

85. The failure to provide appropriate interpreters means that we cannot be sure that either the Applicant or YH understood the questions they were being asked. Furthermore, the importance of an interviewee understanding the purpose of an interview was stressed by Lord Philips in paragraph 83 of *ex parte R (Q)* where he held, when criticising interviews carried out in that case, that:

“As already explained, on claiming asylum, whether or not any application for benefit is made, the claimant is interviewed as part of a general screening process. It appears to us that the interview is carried out without any clear statement that one purpose of the interview is to determine [whether the application was made as soon as reasonably practicable]. In our view fairness requires that the purpose of the interview should be more clearly explained to the claimant”.

86. The language used in both the interview with the Applicant and the interview with YH suggested that they were going to be reunited and did not suggest that they needed to argue for reunification by providing additional details or ensuring that their answers were correctly transcribed.

87. The latter was important as the answers recorded as being given to some of the questions in the Applicant's interview suggest that either the questions were not being interpreted effectively or that the interviewer was not recording appropriate information contemporaneously. For example, at question 1.20 of the form, the prompt to the interviewer reads “Is there any evidence to suggest that the individual has arrived at the Calais camp after 24 October” but the handwritten response reads “Yes – was there since June 2016”.

88. The prompt for question 1.22 reads “based on the information provided about family members in the UK, should the minor be processed as a Dublin III case?” The response is recorded as “No, as his brother hasn’t yet been granted any status”. This was factually incorrect, as the requirement in Article 8 of Dublin III is that the relative in question is “legally present” in the relevant state. As an asylum seeker, the Applicant’s brother would have been legally present as he would have been granted temporary admission pending the result of his asylum claim. (The recorded answer also indicates that the Home Office interviewer had not been provided with up to date information about YH from the Respondent’s own files.)
89. The appropriateness and quality of the interpretation was of central importance to the issue of procedural fairness as the Applicant’s claim was rejected on the basis of what were said to be discrepancies between the answers he and YH gave about the name of their maternal grandmother and whether their grandfathers were still alive.
90. In our view, the expedited process was also rendered additionally unfair by the fact that the decision on the Applicant’s eligibility was not taken by the immigration officer who had conducted the interview in France but by a case worker based in Lunar House in London on the basis of a note of the interview, which was not contemporaneous. The difficulties that can arise when the decision-maker has not had direct contact with an applicant was stressed by Lord Phillips at paragraph 98 of *R (Q)* where he held that:
- “This has highlighted what, in our opinion, are two further serious defects in the system adopted by the Secretary of State, at any rate until now. The first is that the decision-maker is not in the ordinary course of events the same person as the interviewer. This means that a view has to be formed as to the credibility of the applicant’s account by a person who has not seen the applicant but only read the answers noted on the screening form by someone else”.
91. The extract from the GCID – Case Record Sheet for the Applicant, which has now been disclosed, indicates that on 30 November 2016 a case worker, called Andrew Jones, recommended that the Applicant’s case be rejected under articles 8(1) and

8(2) of Dublin III on the basis that he had no qualifying family or relatives. No witness statement has been provided from Mr. Jones so it is not possible to assess what, if any, weight he gave to the fact that the form indicates that the Applicant had hearing problems and needed a Saho interpreter. It is also not clear whether he interviewed YH over the telephone and failed to note that he needed an interpreter or whether he was relying on a telephone interview conducted by yet another person.

92. Most crucially, it is also clear that the decision maker did not give the Applicant or YH any opportunity to review the notes made of their replies. In particular, the S67 1A form indicates that the Applicant was not given the opportunity to answer question 2.5 which read, "Have you understood all the questions asked?" or question 2.6 which read, "Is there anything you would like to add or change in your response?" We have also noted that in his witness statement the Applicant said that he was not even sure how what he had said was translated to the Home Office officials.

93. This was a fundamental procedural breach of common law fairness, as confirmed in *Ex parte Doody*. At paragraph 99 of *R (Q)* Lord Phillips found that:

"The second defect is not unconnected with the first and was identified by [Collins J in the Administrative Court where] where he stressed that it was important that the applicant should be given a reasonable opportunity to deal with and explain any matter which was to be relied upon against him".

94. In *Q* at first instance, Mr. Justice Collins addressed the issue of the need to be given the opportunity to address the case made against a claimant and found:

"20 ... Steps must be taken to ensure that the decision-making process is fair; so much will always be implied. In the circumstances, it is the more important that the Claimant should have a reasonable opportunity to deal with and to explain any matter, which is to be relied on against him. I recognise that Mr Garnham has stated that the Secretary of State will always be prepared to reconsider an adverse decision if further representations are made or evidence produced. That is to be

welcomed. But it is not a substitute for proper and fair primary decision-making...At the very least, the Claimant must be given the chance to rebut a suggestion of incredibility and to explain himself if he can..."

21. It is accepted that reasons should be given for an adverse decision...Suffice to say that [the reasons] need not be at all lengthy but they must enable the claimant to know why his claim has been refused."

95. This was mirrored at paragraph 92 of *Q* in the Court of Appeal where Lord Philips found that:

"Once a reasonably full picture is available so that a decision can be properly informed, the decision maker may of course accept the facts stated by the applicant and, having correctly directed himself as to the appropriate test, reach a conclusion as to whether he is satisfied that the applicant applied for asylum as soon as reasonably practicable after arrival. If he concludes that he is not, he must of course notify the applicant to that effect and give appropriate (albeit short) reasons".

96. In *Citizens UK* Mr. Justice Soole found that "in the CAOMIs the applicants had the opportunity to return with further information, e.g. as held by them on mobile phones". However, this opportunity was only meaningful in practice if an applicant knew why the family links had not been accepted and had been provided with a copy of any interview and decision.

97. This clearly did not happen in the Applicant's case as the decision was made on the same day as YH was interviewed over the telephone and without the Applicant having any sight of the entries on his Section 67 1A form or the "family tree" which was attached to it. (The latter was particularly important as there was no other record of any answers given by the Applicant about the composition of his family.)

98. The failure to provide the Applicant with any reasons or even the gist of why his application was rejected continued throughout the filtration process. As the

Applicant explained in his witness statement “a centre worker informed all the young people in the centre of the decisions taken by the British Government. There were about 50 young people in the centre and about 15 were accepted and the rest of us were rejected. Those of us who were rejected were not given any explanation for why we have been rejected; we were just told that it was no”.

99. There is nothing in the Respondent’s case to suggest that this was not the case. In fact, the emails now disclosed confirm that a decision was made not to provide reasons and that this decision was made on legal advice provided to the Respondent in order to avoid legal challenges.
100. The manner in which the Applicant’s case was dealt with in the filtration process is further complicated by the contradictory evidence disclosed to us by the Respondent over the course of these proceedings. For example, on 16 March 2018 the Respondent disclosed an extract from a spread sheet giving the Applicant’s reference number as 47728 and stating that he was at CAO 51 which was in Le Havre in Seine-Maritime. It said that his claim had been rejected under “Dublin” as his family link to FH had not been accepted. It was not clear what documents had been received but the last column said that the decision to reject his claim had been maintained.
101. However, Julia Farman’s witness statement, dated 20 April 2018, said that the UK authorities coded the Applicant’s case “green” in its 8 March 2017 response to indicate that there was potential for a future take charge request provided contact details could be provided for FH. She attached a further spread sheet at Exhibit JF 8 which confirmed that this was the case. She went on to assert that the disclosed extract from a spread sheet provided on 16 March 2018 had been from an internal spreadsheet used by the Respondent and was not a document, which had been shared with the French authorities. She also argued that the use of the phrase “decision maintained” was colloquial and did not actually mean that a take charge request would not be accepted. This does not indicate that the manner in which the Applicant’s case was “reviewed” during the filtration process was procedurally fair or that it could remedy any of the procedural errors made earlier in the expedited process.

102. We were particularly concerned about the lack of detail in the spreadsheets provided by the UK Authorities in the Appellant's case in the circumstances of YH having been interviewed and granted asylum by them and the concerns showed by the French authorities in the emails now disclosed about the lack of detail in these spreadsheets.
103. Julia Farman also stated that the UK authorities had responded to the French authorities on 8 March 2017 and then on 15 March 2017 a member of the Unit contacted the French Liaison Officer to ask the French authorities if there was anything further they wanted to produce to support the Applicant's case. The implication being that it was the French authorities who had failed to provide any further information. However, the French authorities had explained all along that they needed to understand the basis upon which the UK authorities had concluded that they could not accept the link between YH and the Applicant before they could provide any meaningful additional evidence.
104. On 14 March 2017, Charles Kapantais, a team leader in the European Intake Team, also sent an email to Julia Farman which read "possible to chase up the following cases on the Filter list for the documents that are due to be sent. Unable to trace new relatives with the current information we have". There is then an extract from a spread sheet referring to the Applicant, which named his brother and said that the family link was not accepted. There is also an extract for 7 April 2017 by Charles Kapantais on the ISCID, now disclosed with Julia Farman's second witness statement, which just states that "the case was reconsidered alongside any new evidence that may have been provided. In reconsidering the case it was concluded that the original decision was maintained". There is no other evidence to suggest that the Applicant has or has ever had another relative in the United Kingdom and this evidence merely serves to further undermine the integrity of the filtration process in his case.
105. In paragraph 281 of his judgment in *Citizens UK* Mr. Justice Soole stated that:

"the non-communication of adverse decisions and the sparse reasons provided to

the French authorities have given me particular pause for thought. However, I am satisfied that this did not vitiate the process or otherwise constitute unfairness in the particular circumstances. The non-communication was a requirement of the French authorities; and the terse spreadsheet information was a consequence of that requirement and of the pressures of the operation”.

106. It is clear from the evidence before us that Mr. Justice Soole was not provided with a full picture of the communications which had occurred between the French and the UK authorities or the real reason for the failure to provide detailed reasons which arose from the legal advice provided to the UK authorities.

107. We do not place any weight on any failure by the Applicant to remain in the CAOMI in Le Havre or his reluctance to engage with asylum procedures in France. One role of robust procedural safeguards is to encourage an applicant to engage with a system and place his trust in it. This was stressed by Lord Reed SC in *R (Osborn) v Parole Board* [2014] AC 1115 where he held that:

“67. There is no doubt that one of the virtues of procedurally fair decision-making is that it is liable to result in better decisions, by ensuring that the decision-maker receives all relevant information and that it is properly tested. As Lord Hoffman observed however in *Secretary of State for the Home Department v AF (no 3)* [2010] 2 AC 269, para 72, the purpose of a fair hearing is not merely to improve the chances of the tribunal reaching the right decision. At least two other important values are also engaged.

68. The first was described by Lord Hoffman (*ibid*) as the avoidance of the sense of injustice which the person who is the subject of the decision will otherwise feel. I would prefer to consider first the reason for that sense of injustice, namely that justice is intuitively understood to require a procedure which pays due respect to persons whose rights are significantly affected by decisions taken in the exercise of administrative or judicial functions. Respect entails that such persons ought to be able to participate in the procedures by which the decision is made, provided they have something to say which is relevant to the decision to be taken”.

THE BEST INTERESTS OF THE CHILD

108. At paragraph 273 of *Citizens UK* Mr. Justice Soole found, on the basis of the statements submitted as to the operation of the expedited process as opposed to evidence arising from individual cases, that:

“In my judgment the evidence shows a process which involved a conscientious assessment of the individual applications against the clear criteria contained in Dublin III Article 8 and which included the best interests of the child”.

109. However, in her witness statement, dated 20 April 2018, Julia Farman said that “in terms of the best interests assessment, we did not routinely carry them out on children being assessed in relation to the criteria under Article 8 of Dublin III. The best interests part of the form was only used when a child was being considered for transfer under section 67 of the Immigration Act 2016. It is true that Part 2 of the form used when interviewing children in the CAOMIs took the form of a Best Interests Assessment with a section on his family and his health and any special needs. However, it is now the Respondent’s case that this part of the form was only completed when a child was being considered for transfer under section 67 of the Immigration Act 2016. This was also in contradiction to the contents of Julia Farman’s witness statement, dated 5 April 2017 which was before Mr. Justice Soole where she said that the interviews in the expedited hearing would consider any health or medical issues a child may have. This clearly did not happen in the Applicant’s case as these sections of the form were left empty.

110. Counsel for the Respondent submitted that it was not necessary to undertake a best interests assessment, as it was in the interests of the children to be re-united with family members. However, he could not explain why it was necessary for a best interests assessment to be undertaken in relation to section 67 cases but not for children like the Applicant, when they were all unaccompanied children who were to be moved across an international border.

111. Counsel for the Respondent submitted that it was not in the best interests of the totality of the group of children at Calais, as a class, for their transfer to be delayed

by more complex procedures under the expedited process and, therefore, the applications had to be dealt with expeditiously. However, we are considering the best interests of the Applicant as an individual and the medical evidence indicates that the delay in resolving his application has exacerbated his moderate to severe post-traumatic stress disorder. In any event, it is our view that the bulk of the delay experienced by the Applicant has arisen from the fact that the expedited and filter procedures, as applied to him, did not meet the correct procedural standards which led to him being wrongfully deprived of the opportunity to join his brother in the United Kingdom in 2016 or early in 2017.

112. The Respondent also submitted that, as the basis for the process had been humanitarian, delay could also have placed the children at risk. We find that this may well have been the case when the children were still living in the “jungle” but the Applicant’s case under the expedited process was not dealt with at that time. It was considered when he had already been transferred to a CAOMI in Le Havre on 27 November 2016, where the physical risks, at least, had been reduced and his basic day-to-day needs were met.
113. Any attempt to extend this submission to include the filtration process is bound to fail in the light of the evidence now disclosed of the very real fears expressed by the French authorities that if proper reasons were not given children would place themselves at risk by leaving the CAOMIs, which was exactly what happened to the Applicant.

ARTICLE 8: PROCEDURAL FAIRNESS

114. It is now accepted by the Respondent that YH is the Applicant’s brother and that YH has been recognised as a refugee in the United Kingdom. He has also not disputed that YH has been in contact with the Applicant on a regular basis, whilst he has been living in France and trying to join him in the United Kingdom. Therefore, for the purposes of Article 8(1) of the European Convention on Human Rights, we find that a family life exists between the Applicant and YH.
115. But this family relationship was disputed by the Respondent throughout the

expedited process and the attitude taken by the Respondent to this relationship during the filtration process was somewhat confused and opaque. As the basis of the expedited and filtration process was family reunion, we find that the provisions of Article 8 applied throughout these processes. We also remind ourselves that in *Tuquabo-Tekle v The Netherlands* (Application No. 60665/00) the European Court of Human Rights held that:

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

116. In the current case the margin of appreciation had been narrowed by the establishment of an expedited process to bring certain children into the United Kingdom and the fact that Respondent now accepts that, subject to standard security checks, the Applicant is entitled to enter the United Kingdom in order to make an application for asylum here; albeit because of the passage of time that he will be entering under Article 17.2, and not Article 8, of Dublin III.

117. Therefore, the Respondent had to consider whether the manner in which the expedited and filtration process were operated was sufficient to protect the Applicant from arbitrary actions.

118. We rely on Mr. Justice McCloskey’s judgment in *AM* where he found that:

“(59) It is well established that Article 8 ECHR’s positive obligations can include a right to procedural fairness, particularly in decisions that have a serious impact on the Article 8 rights of children: McMichael v United Kingdom (1995) 20 EHRR 2015 at [102]; R (Gudanaviciene & Others) v

Lord Chancellor [2015] 1 WLR at [62], [65], [69] and [71]. The effect of this is that the child and their affected family members must be involved in the decision-making process, viewed as a whole, to a degree sufficient to provide them with the requisite protection of their interests. It has been held that a failure to ensure this can give rise to a breach of their rights to respect for family life which is disproportionate. McMichael at [87] - [92] and W v UK at [70] - [71].

(60) The test is to be distilled from the Strasbourg jurisprudence is whether those affected by the decision under scrutiny have been involved in the decision-making process, viewed as a whole, to a degree sufficient to provide them with the requisite protection of their interests. This procedural aspect of Article 8 is designed to ensure the effective protection of a person's substantive Article 8 rights..."

119. Applying this test and for the reasons given above in relation to our analysis of the Applicant's right to common law procedural fairness, we find that the procedural aspects of his rights under Article 8 of the European Convention on Human Rights were also breached.

120. The Respondent submitted that the procedural aspects of Article 8 of the European Convention on Human Rights did not apply because the circumstances in which the Applicant found himself did not meet the high threshold established in *ZT (Syria) v Secretary of State for the Home Department* [2016] EWCA Civ 10, where Beatson LJ held at paragraph 95 that "applications such as the ones made by these claimants should only be made in very exceptional circumstances where they can show that the system of the member state that they do not wish to use, in this case the French system, is not capable of responding adequately to their needs".

121. However, the Applicant's case can clearly be distinguished from that of the Applicants in *ZY (Syria)*. They had been living in the "jungle" in Calais in 2015; many months before the expedited process was established by the UK and French authorities. They had not applied for asylum in France but had asked the UK

authorities to make a take charge request under Dublin III without any asylum application being made. To that extent, they were seeking to bypass part of the Dublin III process. The factual matrix in the current case was very different. It was the UK and French authorities who had established an expedited process, which was solely focused on the criteria of Article 8 of the Dublin III and explicitly “bypassed” other elements of Dublin III in an effort to deal with the large number of children in Calais who asserted that they had relatives in the United Kingdom as quickly as possible.

122. In our view the Applicant’s involvement in the expedited and filtration processes cannot be characterised as an attempt to “by-pass” the totality of the Dublin III process. When the Calais camp was cleared he was placed by the authorities in the CAP temporary reception centre sometime between 24 and 26 October 2016 and he was then transferred to a CAOMI in Le Havre on 27 October 2016. Once there, he was assessed as part of Operation Purnia Phase 2. During this process it was reasonable for the reasons given above for him to believe that he was being assessed for transfer to the United Kingdom under Dublin III.
123. We have also noted that in paragraph 95 of *ZT (Syria)* Beatson LJ also found that the cases of children who had been at Calais were “intensely fact-specific” and we find that the Applicant’s case must be considered on its own very particular facts.
124. As a consequence, we find that the manner in which the expedited and the filtration process was applied to the Applicant gave rise to breaches of natural justice/common law fairness and also amounted to procedural unfairness for the purposes of Article 8 of the European Convention on Human Rights and the Applicant has been wrongfully deprived of the opportunity to join YH in the United Kingdom since 30 November 2016.
125. We have not found it necessary to consider whether it also gave rise to procedural breaches of Dublin III.

- (1) An Order quashing the Respondent's decision, dated 30 November 2016, to reject the Applicant's application for transfer to the United Kingdom under the expedited process.
- (2) An order quashing the Respondent's decision in the filtration process that the Applicant was not related to YH as claimed.
- (3) A declaration that these decisions and the Respondent's continuing refusal to admit FTH the United Kingdom were and are unlawful being in breach of natural justice, the common law standards of procedural fairness and the procedural dimensions of Article 8 European Convention on Human Rights.
- (4) The parties do provide written submissions as to costs and damages within 14 days of receipt of this decision.
- (5) There shall be liberty to apply.

Permission to appeal to the Court of Appeal

Permission to appeal will be considered after judgment is handed down and if an appropriate application for permission is made.

Nadine Finch

Signed:

Upper Tribunal Judge Finch

Dated: 12 June 2018

ANNEX

**Upper Tribunal
Immigration and Asylum Chamber**

Judicial Review Decision Notice

The Queen on the application of Applicant
FTH
v
SECRETARY OF STATE FOR THE HOME DEPARTMENT Respondent

FURTHER ORDER

UPON Upper Tribunal Judge King having refused the Respondent's application for a stay of proceedings on 1 March 2018

AND UPON Upper Tribunal Judge Finch having refused to grant the Respondent a stay of the oral permission hearing at the start of that hearing on 26 March 2018

AND UPON Upper Tribunal Judge Finch providing detailed written reasons for refusing the Respondent a stay of proceedings on 29 March 2018

AND UPON the Respondent lodging an application notice, dated 4 May 2018, requesting that the Tribunal urgently considers his application for permission to appeal the refusal of a stay to the Court of Appeal

AND UPON THE Applicant filing a written response to this application on 4 May 2018

AND UPON the Upper Tribunal refusing the Respondent permission to appeal

to the Court of Appeal on 14 May 2018 in relation to the application for a stay on the basis that:

- (1) The Applicant's application was primarily concerned with how procedures were applied in the context of his individual case, as opposed to any procedural and generic irregularities in the system itself. Therefore, it was not necessary to await the outcome of the hearing in the Court of Appeal in *The Queen (on the application of Citizens UK) v Secretary of State for the Home Department* and *Secretary of State for the Home Department v The Queen (on the application of AM & Others)*, which were set down for 12 - 14 June 2018.
- (2) The remedy sought by the Applicant is different to one that would be sought by a child.
- (3) Counsel for the Respondent indicated at the start of the substantive hearing of the Applicant's claim on 9 May 2018 that he was no longer seeking to pursue his application for permission to appeal to the Court of Appeal against the decision by Upper Tribunal Judge Finch to refuse to grant the Respondent a stay

AND UPON the Upper Tribunal's order, dated 12 June 2018, stating;

"Permission to appeal to the Court of Appeal

Permission to appeal will be considered after judgment is handed down and if an appropriate application for permission is made"

UPON the Applicant having filed and served his submissions on costs and damages on 13 September 2018

AND UPON the Respondent having filed and served his submissions on disposal on 2 October 2018

AND UPON the Upper Tribunal having reminded itself of the decisions previously given in this claim and considered the case law referred to by both counsel.

IT IS ORDERED THAT:

PERMISSION TO APPEAL TO THE COURT OF APPEAL

1.
 - (a) The Upper Tribunal's order, dated 12 June 2018, provided the appropriate party with an opportunity to seek permission to appeal to the Court of Appeal after the written decision was handed down.
 - (b) The Upper Tribunal indicated that permission would be considered only if an appropriate application for permission was made.
 - (c) Paragraph 44(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 states that "subject to paragraphs (4A) and (4B), a person seeking permission to appeal must make a written application to the Upper Tribunal for permission to appeal".
 - (d) The Respondent made a written application to appeal within his Submissions on Disposal, dated 4 July 2018.
 - (e) On 19 October 2018, the Applicant's solicitors confirmed that they relied on the arguments contained in paragraphs 19 - 20 of their Submissions on Costs and Damages in relation to the matter of whether the Respondent should be granted permission to appeal to the Court of Appeal.
2. Permission to appeal to the Court of Appeal against the decision to grant the Applicant's substantive claim for judicial review is refused on the basis that:
 - (a) In paragraph 19 of the Respondent's Submissions on Disposal, dated 29 September 2018, the Respondent submitted that, in light of the findings of the Court of Appeal in **AM and Ors**, the Tribunal was wrong to declare

that the Respondent's refusal to admit the Applicant gave rise to a breach of the procedural dimensions of Article 8 ECHR.

- (b) In paragraph 95 of *R (ZT (Syria) and others) v Secretary of State of the Home Department* [2016] I WLR 4894, Beatson LJ found that the cases concerning children who had been in the Calais camps were intensely fact-specific. At paragraph 88 of *Secretary of State for the Home Department v The Queen on the application of AM & Others* [2018] EWCA Civ 1815 Singh LJ relied on the fact that the Upper Tribunal in *AM* had reached a view that was inconsistent with the decision of the Court of Appeal in *ZT (Syria)*. However, as can be seen from paragraph 95 of Beatson LJ's judgment in *ZT (Syria)* his decision had been made in the context of applications made under Article 8 of the EHCR and outside of the Dublin III process. It was in that context that the Court of Appeal found that applications of this kind should only be made in very exceptional circumstances.
- (c) The circumstances of the current Applicant's case were very different. He had not applied to enter the United Kingdom, relying on his Article 8 rights. Instead he had been part of Operation Purina Phase 2, which was established many months after *ZT* had been living in the "jungle" in Calais. The present Applicant had brought a challenge to the manner in which he was treated in the expedited and filtration process operating in in 2016/2017. It was these processes, not any application made by him under Article 8 of the ECHR, which would have determined whether he was entitled to enter the United Kingdom.
- (d) Furthermore, in *FTH*, the Upper Tribunal made no mandatory order requiring him to be granted leave to enter. It restricted itself to making a declaration that the manner in which the expedited and filtration processes had been applied to the Applicant amounted to a breach of Article 8 of the ECHR, in so far as one of the essential objects of Article 8 is to protect an individual against arbitrary actions taken by a public authority; as confirmed in *Tuquabo-Tekle v The Netherlands* (Application No. 60665/00).

- (e) The Secretary of State was exercising his discretion when operating the expedited and filtration processes. In paragraph 85 of *ZT (Syria)* Beatson LJ found that “the exercise by the Secretary of State of her discretion is subject to the ordinary public law principles of propriety of purpose, relevancy of considerations and the longstop *Wednesbury* unreasonableness category”.
- (f) The Applicant would not be able to apply for damages in a French court for actions taken by the Secretary of State for the Home Department.
- (g) The manner in which the Respondent applied the expedited and filtration processes give rise to the basis for damages on the basis of the need for just satisfaction of the Applicant’s Article 8 rights.

DAMAGES

UPON the Upper Tribunal exercising its powers under section 16(6) of the Tribunals, Courts and Enforcement Act 2007

AND UPON the Applicant having made a claim for damages for the breach of his rights under Article 8 of the European Convention on Human Rights at paragraph (5) of Section 6 of his Claim Form, lodged on 16 February 2018

AND UPON the Upper Tribunal being satisfied that such an award would have been made by the High Court if the claim had been made in an action begun in the High Court by the Applicant at the time of making the application

AND UPON the Upper Tribunal finding, for the purposes of section (2A) of the Senior Courts Act 1981, that it was not highly likely that the outcome for the Applicant would not have been substantially different if the conduct complained of had not occurred, as the damages he is entitled to arose from his individual treatment within the expedited and filtration processes

AND UPON the Upper Tribunal taking into account section 8 of the Human Rights Act 1998 and

AND UPON the declaration made by the Upper Tribunal in its order, dated 12 June 2018, that the Respondent's decision to reject the Applicant's application for transfer to the United Kingdom under the expedited process and his decision in the filtration process that the Applicant was not related to YH, as claimed, amounted to an unlawful breach of the procedural dimensions of Article 8 of the European Convention on Human Rights.

AND UPON the Applicant submitting that an award of damages of between £15,000 and £18,000 would be appropriate

AND UPON the Respondent submitting that in the light of the decision in *AM and Ors v Secretary of State for the Home Department* [2018] EWCA Civ 1815 it would not be lawful or just and appropriate to make an award of damages or that, if damages were appropriate, they should amount to no more than £2,000.

1. As found in paragraph 114 of the Upper Tribunal's decision, dated 12 June 2018, family life existed, and exists, between the Applicant and his brother, YH. In addition, as found in paragraph 124 of the Upper Tribunal's decision, the Applicant had wrongly been deprived of the opportunity to join YH in the United Kingdom from 30 November 2016 until 27 July 2018 when he was transferred to the United Kingdom to be reunited with YH. Therefore, the period of separation amounted to 1 year and seven months and for eight months and ten days of that period he was still a child.
2. In paragraph 93 of *AM & Ors Singh* LJ found that Article 8 had no applicability in the cases before him. This was based on his finding in paragraph 88 that "as this Court made clear in *ZT (Syria)*, Article 8 will only have a role to play in very exceptional circumstances. In particular, it must be shown that the French legal system had systematic deficiencies in it, which rendered it incapable of providing an effective remedy to the Respondent children".

3. However, as found above in relation to the Respondent's application for permission to appeal to the Court of Appeal against the substance of our decision, in paragraph 95 of *R (ZT (Syria) and others) v Secretary of State of the Home Department* [2016] I WLR 4894, Beatson LJ found that the cases concerning children who had been in the Calais camps were intensely fact-specific. At paragraph 88 of *Secretary of State for the Home Department v The Queen on the application of AM & Others* [2018] EWCA Civ 1815 Singh LJ relied on the fact that the Upper Tribunal in *AM* had reached a view that was inconsistent with the decision of the Court of Appeal in *ZT (Syria)*. However, as can be seen from paragraph 95 of Beatson LJ's judgment in *ZT (Syria)* his decision had been made in the context of applications made under Article 8 of the EHCR and outside of the Dublin III process. It was in that context that the Court of Appeal found that applications of this kind should only be made in very exceptional circumstances.
4. The circumstances of the current Applicant's case were very different. He had not applied to enter the United Kingdom, relying on his Article 8 rights. Instead he had been part of Operation Purina Phase 2, which was established many months after *ZT* had been living in the "jungle" in Calais. The present Applicant had brought a challenge to the manner in which he was treated in the expedited and filtration process operating in in 2016/2017. It was these processes, not any free-standing application made by him under Article 8 of the ECHR, which would have determined whether he was entitled to enter the United Kingdom.
5. In paragraph 66 of *AM & Ors* Singh LJ noted that the Respondent relied on the fact that the Upper Tribunal, when giving judgment in that case, had given no consideration to the fact that France bore primary responsibility for processing [the children's] claims in the context of the application of Dublin III; that France itself was bound to ensure no breach of Article 8 of the ECHR occurred. However, the evidence which was gradually disclosed over the course of the current claim, indicated that it was the Respondent, and not the French authorities, who had taken the decisions which were primarily responsible for the Applicant not being reunited with YH in a timely manner. In addition, the Applicant was not under the jurisdiction of the French care system for much of

the period for which damages are claimed. The Applicant left the CAOMI in Le Havre on 16 April 2017 and then became 18 on 10 August 2017.

6. Furthermore, in paragraph 85 of *ZT (Syria)* Beatson LJ held that “the exercise by the Secretary of State of her discretion is subject to the ordinary public law principles of propriety of purpose, relevancy of considerations, and the longstop *Wednesbury* unreasonableness category and, because of the engagement of ECHR Article 8, the intensity of review which is appropriate in the assessment of the proportionality of any interference with Article 8 rights”.
7. In addition, the Applicant is not able to claim damages under the Human Rights Act 1998 in the French courts for a breach by the Respondent of his Article 8 rights
8. In relation to the quantum of any damages to be awarded to the Applicant, the Supreme Court indicated in its guidance in *R (Sturnham) v Parole Board (No 2)* [2013] 2 AC 254, that courts should be guided primarily by any clear and consistent practice of the European Court.
9. In *W v United Kingdom* (Application No. 9749/82) the European Court of Human Rights held, in paragraph 62 of its decision, that:

“It is true that Article 8 (art. 8) contains no explicit procedural requirements, but this is not conclusive of the matter. The local authority’s decision-making process clearly cannot be devoid of influence on the substance of the decision, notably by ensuring that it is based on the relevant considerations and is not one-sided and, hence, neither is nor appears to be arbitrary. Accordingly, the Court is entitled to have regard to that process to determine whether it has been conducted in a manner that, in all the circumstances, is fair and affords due respect to the interests protected by Article 8 (art. 8). Moreover, the Court observes that the English courts can examine, on an application for judicial review of a decision of a local authority, the question whether it has acted fairly...”.

9. In *D v Commissioner or Police for the Metropolis* [2015] 1 WLR 1833 the Court of Appeal distilled certain relevant general principles. The first was that awards for non-pecuniary harm should be equitable. The second is that where a declaration has also been made, as in this case, there needs to be a causal link between the breach of Article 8 and the harm caused. The Court of Appeal did acknowledge the importance of the remedy of declaratory relief but did not find that it may not also be appropriate to award damages.
10. In relation to the need for damages to be equitable we remind ourselves of paragraph 114 of *Al-Jedda v United Kingdom* (2011) 53 EHRR 789 where it was held that “The court recalls that it is not its role under article 41 to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred”.
11. Therefore, we have taken into account the following features:
 - (a) Due to the expedited and filtration processes not being applied to the Applicant in a proper manner, he was separated from YH for 1 year and 7 months and for 8 months and ten days of this period he was an unaccompanied migrant child.
 - (b) On 1 June 2018 the Respondent agreed to transfer the Applicant to the United Kingdom but his transfer did not occur until 27 July 2018 due to the delay on the part of the Respondent in giving approval to his travel arrangements.
 - (c) The evidence provided by Helen Cusack O’Keefe indicates that the Applicant was suffering from moderate to severe post-traumatic stress disorder throughout this period of time.
 - (d) He was also at times street homeless and he became street homeless when he was a child and could not be expected to make an informed choice about the options open to him.
 - (e) Whilst he was homeless, the Applicant was also assaulted by the French authorities, who took no steps to assist him to apply for asylum, and the

assault led to him being hospitalised.

- (f) The disclosure finally made in this claim indicate that the Respondent imposed time constraints on himself and that these were not supported by the French authorities.
 - (g) There is no evidence to suggest that, when the Applicant was told that his application within the expedited process had been refused, he was aware that there was a separate Dublin III process, which he could have entered.
 - (h) Throughout the proceedings the Respondent continued to deny that the Applicant was related to YH, as claimed, and applied for a stay on a number of occasions in order to delay a final hearing of his claim.
 - (i) The Respondent failed to provide full disclosure in relation to the manner in which the Applicant was treated during the expedited and filtration processes and most significant disclosure was only provided during the substantive hearing.
 - (j) Section 8(1) of the Human Rights Act 1998 states that the appropriate court or tribunal may grant any remedy which it finds to be just and appropriate.
12. In relation to the causal link between the breach of Article 8 and the harm caused. In her Mental Health Assessment Update, dated 29 April 2018, Helen Cusack O'Keefe confirmed that it was still her opinion that the most likely initial cause of the Applicant's PTSD symptoms were the traumatic events that occurred when he was very young in Eritrea, followed by the violence and traumatic hardships that occurred during his journey from Eritrea to Europe, and then in France. She then added that the hostile and unsafe environment he experienced in France and the delay in joining his UK-based brother were both precipitating and perpetuating symptoms of the Applicant's PTSD symptoms.
13. When considering the quantum of damages which would represent just satisfaction, we have reminded ourselves that it would not be possible to put the Applicant back into the position in which he was on 30 November 2016 or for the Respondent to simply re-make his decisions.
14. We have considered the cases referred to by the Applicant in his Submissions on

Costs and Damages and note that in none of those cases was there psychiatric evidence to confirm a diagnosis of moderate to severe post-traumatic stress disorder and that non-pecuniary damages were being awarded for distress and unspecified medical problems or anxiety. The difference that this can make to an award is exemplified by the different sums awarded in the JC Guidelines (14th Edition) for moderate as opposed to less severe psychiatric damage.

15. The delay in family reunion was longer in these cases but the damage suffered was far less and we find that the appropriate range for damages begins at around £10,000. However, it was then necessary to make a discount of around £2,000 to take into account the fact that it was likely that he was suffering from post-traumatic stress disorder prior to 30 November 2016.

16. However, we also remind ourselves that the case law referred to above recognises the need for equity and the making of an award which is just, fair and reasonable in all the circumstances of the Applicant's individual case. We find that he was an unaccompanied foreign national child, and latterly a young person, whose application was not adjudicated in a proper manner, who became street homeless, suffered a serious assault and whose post-traumatic stress disorder was exacerbated by the failure to apply appropriate procedures to his individual case in the expedited and filtration processes. Having taken these factors into account, we find that it would be just and equitable to increase the total damages to be awarded to the Applicant by £4,000 to take into account the particular individual circumstances in which he had to live due to the failure by the Respondent to apply appropriate procedural safeguards to his case in the expedited and filtration processes.

Having taken into account the law and the facts referred to above, we find that it would be just and appropriate to make an award of £12,000 in damages to the Applicant.

COSTS

IT IS ORDERED THAT:

1. The Respondent do pay the Applicant's reasonable costs in relation to the applications and hearings, other than the Applicant's costs arising from the Respondent's application to Upper Tribunal Judge Finch for a stay of proceedings at the hearing on 26 March 2018, the Respondent's application for permission to appeal the refusal of the stay to the Court of Appeal, dated 4 May 2018, and the Respondent's reliance up until the first day of the substantive judicial review hearing on his continuing application for permission to appeal to the Court of Appeal in relation to the decision to refuse him a stay.
2. The Respondent do pay the Applicant costs on an indemnity basis in relation to his costs arising from his application to Upper Tribunal Judge Finch for a stay of proceedings at the hearing on 26 March 2018, his application for permission to appeal the refusal of the stay to the Court of Appeal, dated 4 May 2018, and his reliance up until the first day of the substantive judicial review hearing on his continuing application for permission to appeal to the Court of Appeal in relation to the decision to refuse him a stay.
3. An order that costs are paid on an indemnity basis in relation to these parts of the overall case is reasonable. As May LJ found at paragraph 28 in *Reid Minty (a firm) v Taylor* [2001] EWCA Civ 1723: "What is, however, relevant to the present appeal is that litigation can readily be conducted in a way which is unreasonable and which justifies an award of costs on an indemnity basis, where the conduct could not properly be regarded as lacking moral probity or deserving moral condemnation".
4. The Respondent's action was unreasonable as he continued to apply for a stay when the Upper Tribunal had made it very clear that it believed that the case of FTH could be distinguished on its facts from those being appealed to the Court of Appeal. The medical evidence also indicated that the adverse effect of any further delay on the Applicant's poor mental health would not be proportionate. The Respondent was already well aware of the evidence relating to the Applicant's claim and was relying on this evidence in other similar cases before

the courts. The further evidence disclosed by the Respondent in the course of this case would also not have emerged if such a stay had been granted.

5. The Respondent also failed to take into account the decision in *R (AM & AO) v Secretary of State for the Home Department (stay of proceedings – principles)* [2017] UKUT 168.
6. In addition, no new and/or significant reasons were given for the renewed applications for a stay.
7. At the same time, when stays were refused new and unseen material and evidence emerged which brought into question the Respondent's proper compliance with his duty of candour and co-operation in judicial review proceedings.
8. Such costs to be subject to a detailed assessment on the standard basis, if not agreed.
9. There be a detailed assessment of the Appellant's legally aided costs.
10. Pursuant to rule 10(10) of the Tribunal Procedure (Upper Tribunal) Rules 2006, within 21 days of service of this Order, the Respondent shall pay a reasonable sum of costs on account pending detailed assessment.
11. Liberty to both parties to apply.

Non-compliance

Any failure to comply with any of the above directions may result in:

- (a) **an order for costs under rule 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008 against a party or that party's representative; and/or**

(b) the striking out of the proceedings or any part thereof under rule 8.

Nadine Finch

Signed:

Upper Tribunal Judge Finch

Upper Tribunal Judge Allen

Dated: October 2018