

**The Queen on the
Application of AA (a child)**

Applicant

-v-

**SECRETARY OF STATE FOR
THE HOME DEPARTMENT**

Respondent

ORDER

BEFORE Upper Tribunal Judge Perkins

UPON hearing from David Chirico for the Applicant and Owain Rhys James for the Respondent;

IT IS ORDERED THAT

1. The Applicant's application for judicial review is dismissed for the reasons given in the appended judgment.

COSTS

2. The Applicant shall pay the Respondent's reasonable costs in this claim, to be assessed if not agreed;
3. The order for costs against the Applicant shall not be enforced without permission of the court following an application under Section 26(1) of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, such application to be adjourned generally with permission to restore;
4. There shall be a detailed assessment of the Applicant's publicly funded costs.

PERMISSION

5. The question of permission to appeal to the Court of Appeal shall be determined as follows:
 - (i) The Applicant shall serve and file any grounds in support of an application for permission to appeal no later than 12.00 p.m. on Tuesday 1 March 2022;
 - (ii) The Respondent shall serve and file any submissions in response no later than 12.00 p.m. on Thursday 3 March 2022.

(iii) The Applicant shall serve and file any reply no later than 4.00 p.m. on Thursday 3 March 2022.

(iv) The question of permission shall be determined on the papers as soon as possible thereafter.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 28 February 2022

IN THE UPPER TRIBUNAL

RESERVED JUDGMENT GIVEN FOLLOWING HEARING

JR/741/2021

Field House,
Brems Buildings
London
EC4A 1WR

27 July 2017

**THE QUEEN
(ON THE APPLICATION OF)
AA**

Applicant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

BEFORE

UPPER TRIBUNAL JUDGE PERKINS

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Mr D Chirico, Counsel, instructed by Bhatt Murphy Solicitors appeared on behalf of the Applicant.

Mr O James, Counsel, instructed by the Government Legal Department appeared on behalf of the Respondent.

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ON AN APPLICATION FOR JUDICIAL REVIEW

APPROVED JUDGMENT

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JUDGE PERKINS:

1. This applicant is a minor. On 23 June 2021 Upper Tribunal Judge Canavan made an order granting the applicant anonymity and specifying that no report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the applicant and to the respondent. Failure to

comply with this direction could lead to contempt of court proceedings: see rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. For the avoidance of doubt I confirm that order remains in force.

2. On 23 July 2021 Upper Tribunal Judge Lane gave permission to bring these proceedings after considering a paper application.
3. The Applicant is a citizen of Afghanistan who was born in November 2004. He is now 17 years old and is presently living in Northern France.
4. I have appropriate and well prepared bundles from the parties which I have considered. In addition to the pleadings I have been helped particularly by the skeleton arguments of the applicant dated 18 October 2021 and of the respondent dated 1 November 2021. They were prepared by counsel who appeared before me.
5. The applicant claims to have left Afghanistan when he was aged 14 years and to have travelled to France with the help of agents. He says that he was ill-treated on his journey and frightened when the French authorities decided that he was an adult.
6. In March 2021 a French judge found that the applicant was the age that he claimed to be and made an order giving him the benefit of some kind of local authority care for the rest of his minority.
7. There is a report from a French psychologist recommending that the applicant is reunited with his family in the United Kingdom and an independent social worker's report saying much the same.
8. He has close relatives lawfully in the United Kingdom who would be pleased to receive him. There seems little doubt that his best interests lie in joining his family there but that, although important, is not determinative.
9. He has been advised, probably for good reason, that he qualified for admission to the United Kingdom under the provisions known conveniently as "Dublin III" when they were in force.
10. The parties agree that, in order to satisfy the requirements of The Immigration, Nationality and Asylum (EU Exit) Regulations 2019 and so gain the benefit of "Dublin III" a Take Charge Request had to be made by the French authorities no later than 11:00 pm on 31 December 2020. They further agree that no such application was made.
11. The French authorities are not party to these proceedings and I do not criticise them because they have not been asked to explain why no application was made but it seems that the application was not made because the French authorities overlooked, or did not appreciate, the potential importance of making the request in time. It seems that it would have been both in the applicant's and their interests to make such an application because it was in the best interests of the applicant to remove to the United Kingdom to be with his family and a timely application may well have led to the French authorities responsibly freeing themselves from their obligations to assist the applicant and the applicant settling in the United Kingdom where he wants to be with close family members who are willing to support him.

12. There is evidence that the applicant's advisors reasonably and genuinely thought that a timely application had been made but it is agreed that it had not.
13. The reasons for the applicant's sense of vexation are easy to see. If the French authorities had made the "Take Charge" application that his solicitors thought they had made then the applicant would probably have been established in the United Kingdom with his relatives some time ago.
14. However it does not follow from this that the applicant has a good case in public law.
15. According to paragraph 5 of the grounds, the applicant only became aware of the failure of the French authorities to apply in time on 16 February 2021. Since that date, again according to paragraph 5 of the grounds, the respondent has:
 - (i) decided on 25 February 2021 to refuse A's request that she exercise her discretion to apply the criteria set out in Article 8.2 to him (i.e. to treat him as a person for whom a transfer request had been made in time);
 - (ii) decided, on or around 17 March 2021, to refuse a transfer request made, presumably at some point in February or March 2021, by the French authorities; and
 - (iii) refused, at all times since 24 March 2021, to comply with the applicant's representatives' specific and proportionate requests for provision of documents relevant to his claim (including the French request which was the subject to the decision made on or around 17 March 2021, and a copy of that decision.)
16. These are the decisions under challenge in the present case.
17. According to paragraph 7 of the grounds:

In her decisions under challenge, the Respondent has:

 - (i) Unlawfully fettered her discretion (declining even to consider the exercise of a discretion in a case where a transfer request was not made 'in time');
 - (ii) Failed to reach any decision as to whether it is in the Applicant's best interests to accept and consider the out-of-time transfer request;
 - (iii) Breached A's Article 8 rights; and/or
 - (iv) Apparently adopted a policy or practice of refusing to provide documentation at the pre-action stage of litigation in this category of claim and/or unlawfully refused to provide that documentation in the present case.

18. Grounds (i) and (ii) are, I find, intrinsically linked and are attempts to show that the respondent had a discretion to treat the Take Charge application as if it had been made in time, which is clearly something that the respondent did not do.
19. The applicant argues, uncontroversially, (although section 3-3C of the Immigration Act 1971 is cited appropriately) that the respondent has wide discretionary powers to admit a person to the United Kingdom even when leave would not be given under the immigration rules.
20. The applicant then argues, again uncontroversially, that there is no express legal mechanism restricting that discretion to an application made in a particular form or by a particular class of applicant.
21. The applicant maintains that it follows from this that his application was answered unlawfully because there was no consideration of discretionary power.
22. The applicant also argued that a discretion cannot be so prescribed by policy that it ceases to be a discretion. The applicant relies on Laws LJ in R(West Berkshire DC) v Secretary of State for Communities and Local Government [2016] 1 WLR 3923, which was adopted by Morris J in R (MAS Group Holdings Ltd) v Secretary of State for the Environment [2019] EWHC 158 (Admin) cited with approval in
23. With respect to Mr Chirico, although I follow the initial stages of his argument, I find his submissions controversial, and, on reflection, wrong, in the contention that the *general* discretion to admit people to the United Kingdom is something that must be considered in every application however it is expressed.
24. It is quite clear that regulations exist to end the United Kingdom's obligations under "Dublin III". In broad terms, it does not apply to applications such as this that were made after a certain date. It was not argued before me (and probably could not be argued before the Upper Tribunal) that such a policy, and therefore the regulations that implement it, is unlawful.
25. There is nothing inherently objectionable about policies that create "bright lines" and it is not at all unusual where such a bright line is drawn that someone feels aggrieved but it does not follow that there must be some mechanism for dimming the bright line in any provisions where a bright line is drawn.
26. It is not a matter for me but I recognise that there might be room for arguing that "bright line" policies can be unlawful if there is no mechanism for avoiding unjustly harsh consequences but that is plainly not the case here. The applicant can apply for entry on the grounds that he has a human right to be permitted to enter the United Kingdom and let that application be determined or he can apply for discretionary admission for some other reason. He has not done either of these things. He still can.
27. I find that the respondent has not fettered her discretion. She has no discretion to treat the applicant as if his "Dublin III" application was made in time. Any application would have been under transitional provisions and they do not provide for extending time.

All the Respondent could do lawfully under "Dublin III" is to refuse the application. The Respondent could not lawfully treat the applicant as if the application had been made in time because that would plainly be contrary to the requirements of the statutory instrument. Far from showing that the Respondent acted unlawfully, ground (i) invites the Respondent to act unlawfully which, correctly, she has declined to do.

28. I appreciated that the applicant is a child and this makes his interests a primary consideration but that, of itself, does not make the application made into one that was not made. Any obligation to consider the interests of the child under Dublin III clearly do not apply unless Dublin III applies but I have decided for the reasons given that it does not.
29. Neither is there any merit in the contention that the Respondent has breached the Applicant's "article 8 rights". There is no point in a general "best interests" finding when the applicant has not applied for anything other than something that he cannot have. It has always been open to him to apply on general human rights grounds, presumably relying on article 8 of the European Convention on Human Rights and there is no reason to doubt that any such application would be answered lawfully. It is not the Respondent's fault that the application has not been made.
30. The Respondent's answer to ground 4 alleging a failure to disclose appears mainly in the skeleton argument. It is simple. The Respondent has disclosed everything. I have been given no good reason to go behind that.
31. I dismiss this application.