

Neutral Citation Number: [2018] EWCA Civ 1812

Case No: C4/2017/2802

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**ADMINISTRATIVE COURT**  
**Mr Justice Soole**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 31/07/2018

**Before :**

**LORD JUSTICE HICKINBOTTOM**  
**LORD JUSTICE SINGH**  
and  
**LADY JUSTICE ASPLIN**

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**Between :**

**The Queen (on the application of Citizens UK)**  
**- and -**  
**Secretary of State for the Home Department**

**Appellant**

**Respondent**

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**Ms Charlotte Kilroy and Ms Michelle Knorr (instructed by the Migrants' Law Project,  
Islington Law Centre) for the Appellant**  
**Sir James Eadie QC, Mr David Manknell and Ms Amelia Walker (instructed by the  
Government Legal Department) for the Respondent**

Hearing dates: 12-14 June 2018  
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**Judgment Approved**

## Lord Justice Singh:

### Introduction

1. This is an appeal against the order of Soole J dated 18 September 2017 dismissing the Appellant's claim for judicial review. Soole J also granted permission to appeal to this Court.
2. The claim related to the lawfulness of what has become known as the "expedited process", which was established by the Respondent in conjunction with the French authorities in October 2016 in response to the impending demolition of the makeshift tented encampment in Calais which was commonly known as "the Jungle" and to which I will refer as "the camp". By the expedited process the Respondent sought to assess the eligibility of unaccompanied asylum-seeking children ("UASC") to be transferred to the United Kingdom ("UK").
3. Soole J rejected the Appellant's arguments that the expedited process was unlawful on essentially three grounds:
  - (1) breach of European Union ("EU") law, in particular because it failed to comply with procedural protections guaranteed under Regulation 604/2013 ("Dublin III");
  - (2) breach of the common law requirements of fairness; and
  - (3) breach of the procedural protections afforded by Article 8 of the European Convention on Human Rights ("ECHR"), as set out in Sch. 1 to the Human Rights Act 1998 ("HRA").

The Judge did not separately address the argument based on Article 8 of the ECHR.

4. In reaching his conclusions the Judge expressly declined to follow the approach which had been taken by the Upper Tribunal (Immigration and Asylum Chamber) ("UT" or "UTIAC") in five cases which were considered together, in which the lead case was *R (AM) v Secretary of State for the Home Department* [2017] UKUT 00262, a judgment given by McCloskey J (the then President of the UTIAC) and UT Judge Allen.
5. In the *AM* set of cases (with the exception of *KIA*) the Secretary of State has appealed to this Court with the permission of the UT. We heard both appeals together. The generic issues in the two appeals are the same. The fundamental question which these appeals raise is whether the expedited process was unfair and therefore unlawful on any or all of the three grounds advanced by Citizens UK: under EU law; under the common law; and under the HRA. The Court has today also given judgment in the *AM* set of cases.
6. This Court has had the advantage of seeing further evidence, which was not before the High Court or the UT. On behalf of Citizens UK it is submitted that, even if the position were otherwise at first instance, the further evidence now demonstrates that there was fundamental unfairness in the expedited process. Complaint is also made

that there has been a breach by the Secretary of State of her<sup>1</sup> duty of candour and co-operation with the courts in judicial review proceedings.

7. We have had lengthy and helpful written submissions from all parties. We heard oral submissions from Ms Charlotte Kilroy for Citizens UK in this appeal and for the individual Respondents in the *AM* set of cases; and from Sir James Eadie QC for the Secretary of State. We are grateful to them, to junior counsel and to those instructing them for their hard work and the assistance they have given to the Court.

### Factual background

8. I am grateful to Soole J for setting out the factual background in detail in the “Narrative” section of his judgment, at paras. 38-108. In the course of his narrative Soole J recorded the Secretary of State’s evidence at paras. 42-75 and the evidence for Citizens UK at paras. 94-108. I can therefore be relatively brief here.
9. The demolition of the camp was announced on 7 October 2016 (judgment, para. 52). This led to discussions between the Secretary of State and the French authorities on 12 October 2016 with a view to expanding and modifying a pilot process for an “accelerated” Dublin III procedure, which had been under consideration over the summer of 2016. The expedited process was therefore developed at very short notice.
10. As the judgment records at para. 79, the expedited process was established in the light of the impending demolition of the camp and the Secretary of State’s acceptance that there were likely to be at least 200 unaccompanied asylum seeking children who had close family links in the UK living there and who therefore would be eligible for transfer to the UK under Dublin III. As Mr Cook explains in his first witness statement, at para. 59:

“The SSHD adopted a pragmatic, flexible and sensible approach which was both rationale [sic] and reasonable”.
11. The expedited process, which became known as ‘Operation Purnia’, ultimately consisted of two phases. The first phase was an interview, decision-making and transfer phase, which took place at the camp itself in the last two weeks of October 2016. Approximately 200 children were transferred to the UK in the first phase.
12. On 28 October 2016 the French authorities asked the Secretary of State to cease interviewing at the camp. In early November children began to be dispersed to CAOMIs<sup>2</sup> across France. That dispersal gave rise to Phase 2 of the expedited process. The interview process under Phase 2 lasted from 7 November 2016 to 25 November 2016. As a result transfers to the UK took place until 9 December 2016.

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<sup>1</sup> At the material time the Secretary of State was female, so I will use the words “she” or “her”, even though the office is now held by a man.

<sup>2</sup> Centres d’accueil et d’orientation pour mineurs isolés.

13. The second phase of the process related to 1,872 unaccompanied children who had not been fully processed in Phase 1. In the second phase 90 officials from the UK interviewed the children in 20 minute slots over a period of three weeks. Interviews with family members in the UK were conducted by telephone by UK based officials. Decisions were made by comparing the paper records of those two interviews.
14. Following both phases a total of approximately 550 children were identified as being eligible for transfer under Dublin III and transferred to the UK between October and December 2016. However, over 500 children claiming to have family members in the UK were not transferred at that time.
15. Refusal decisions were communicated not directly to the children but to the French authorities by means of a spreadsheet with a short word or phrase reasons for refusal on 14 December 2016. Most of the children were then told of the decision by the French authorities over the next few days.
16. As Soole J noted, initially the Secretary of State and her officials regarded the expedited process as falling within the ambit of Dublin III. However, on 8 February 2017, the Secretary of State made a statement in Parliament expressing the view that the expedited process was a “one-off process, based on the principles of the Dublin Framework but operated outside of it”: see the judgment of Soole J, at para. 88. The Judge accepted, at para. 279, that the confusion about the characterisation of the process, together with other shortcomings, contributed to confusion and distress for the children concerned.
17. If positive decisions were taken following the expedited process, family members in the UK would be informed: there was a ‘family member proforma’ document for this purpose. Otherwise, submits Ms Kilroy on behalf of the Appellant, neither family members nor the children were contacted by the Secretary of State. They were never told of the reasons for refusal nor given any opportunity to correct errors (whether actual or perceived) in the decisions.
18. Although there was in due course (as we shall see later) an opportunity to ask for a reconsideration, as the Judge recorded at para. 71, “in the vast majority of cases there was no new information” and so, on reconsideration, the initial decision was merely confirmed.

### Issues

19. The issues which arise on this appeal are the following.
20. First, under EU law:
  - (1) Was Soole J correct to conclude that applications for international protection within the meaning of Article 2(b) of Dublin III had not been made by UASC in the expedited process?
  - (2) Was Soole J correct to conclude that the process fell outside Dublin III and was not governed by its criteria and procedural protections?

- (3) Was it lawful for the Secretary of State to devise such a scheme under EU law?
21. Secondly, was the decision-making process fair as a matter of common law?
22. Thirdly, was it fair in accordance with the procedural requirements of Article 8 of the ECHR?

### Dublin III

23. Dublin III is the legislative measure introduced to fulfil the obligation in Article 78(2)(e) of the Treaty on the Functioning of the European Union (“TFEU”), allocating responsibility amongst Member States for examining asylum applications.
24. As Article 1 of Dublin III makes clear, the Regulation:
- “... lays down 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 ... (‘the Member State responsible’).”
25. Article 2 is the definition provision. Article 2(b) defines the phrase “application for international protection” as an application for international protection as defined in Article 2(h) of Directive 2011/95/EU.
26. Article 2(c) defines “applicant” to mean:
- “A third-country national ... who has made an application for international protection in respect of which a final decision has not yet been taken”.
27. Article 2(g) defines “family members”. Article 2(h) defines “relative”. Although it is wide enough to include the applicant’s adult uncle or aunt or grandparent, it does not include (for example) a cousin.
28. Article 2(j) defines “unaccompanied minor” to mean:
- “A minor who arrives on the territory of a Member State unaccompanied by an adult responsible for him or her ...”
29. Article 3.1 of Dublin III contains the central obligation on Member States to examine asylum applications lodged in the EU and confers responsibility for that examination on a single Member State allocated in accordance with the criteria set out in it.
30. Article 3.1 provides:

“Member States shall examine any application for international protection by a third-country national ... 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.”

31. Family reunification is governed by Article 8. Article 8.1 provides that:

“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. ...”

32. Article 8.2 provides:

“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.”

33. There are also discretionary provisions in Article 17. It is unnecessary to set them out in full here but reference should be made to *R (RSM) v Secretary of State for the Home Department* [2018] EWCA Civ 18, where they were set out in the Appendix to the judgment of Arden LJ and considered in detail in her judgment. Reference should also be made to the terms of Article 20, which can also be found there.

34. Chapter VI of the Regulation sets out procedures for “taking charge” and “taking back”. Again it is not necessary to set out those provisions in detail here.

35. Before this Court Sir James Eadie QC, who appeared on behalf of the Secretary of State, has emphasised that the expedited process did not prevent any child from going through the full Dublin III process. At all material times the “normal” full Dublin III process remained available, including to those who were unsuccessful in the expedited process. Furthermore, Sir James has emphasised that the Secretary of State only accepted cases in the expedited process where there was sufficient evidence available of a qualifying family relationship within Article 8 of Dublin III, as this Article contains the mandatory criteria for determining that the UK rather than France would be the responsible Member state: see the judgment of Soole J, at para. 62. Thus the Secretary of State did not accept cases where the family relationship did not meet the definition of family member or relative in Article 8, as defined in Article 2, for example a cousin would not qualify. Nor were cases accepted where the evidence

was insufficient (at that stage) to substantiate the claimed family link even if that link would have fallen within the scope of Article 8 as a matter of principle.

36. Sir James also emphasises that Dublin III is not an instrument for family reunion as such. It is not itself a route of entry to the UK. It is simply a mechanism for determining where, when a person has lodged an asylum claim, that claim should be examined and determined. Nor is there any obligation on the UK under Dublin III to examine the asylum claim of a child in another Member State simply because that child has a family member or relative in the UK. An obligation only arises where all of the criteria in Dublin III are met, including in particular that a valid “take charge” or “take back” request has been made to the UK by the Member State concerned.
37. Before I address the issues of EU law which arise in this appeal in more detail I consider that it would be helpful to summarise two decisions of this Court: *R (ZT (Syria) and Others) v Secretary of State for the Home Department* [2016] EWCA Civ 810; [2016] 1 WLR 4894; and *RSM*.

#### The decision of this Court in *ZT (Syria)*

38. In *ZT (Syria)* the claimants included three unaccompanied minors. They lived in a makeshift camp in France and had not sought assistance from the French authorities. They wished to join their adult siblings, who had already been granted refugee status in the United Kingdom. The UTIAC allowed their claims and issued a mandatory order requiring the Secretary of State to admit the claimants and examine their claims provided they first sent a letter to the French authorities claiming asylum. This Court allowed the Secretary of State’s appeal. The main judgment was given by Beatson LJ, with whom Moore-Bick and Longmore LJ agreed.
39. This Court held that normally an application must be made in the Member State where the person is. Although Beatson LJ recognised the need for expedition in many cases involving unaccompanied minors, he also observed that:

“An orderly process is also important in cases of unaccompanied minors. The need to examine their identity, age, and claimed relationships remains, and there is a particular need to guard against people trafficking.” (para. 87)
40. This Court recognised that Article 8 of the ECHR exists alongside Dublin III. However, applications outside the Dublin III procedure could only be made in very exceptional circumstances where the claimants could show that the system of the Member State that they did not wish to use “is not capable of responding adequately to their needs.” (para. 95). As Arden LJ explained in *RSM*, at para. 35:

“That means ... that Article 8 of the Convention cannot be invoked to bypass the processes laid down in Dublin III save in limited circumstances, such as where there are systemic

deficiencies that would lead to a violation of Convention rights.”

The decision of this Court in *RSM*

41. In *RSM* the main judgment was given by Arden LJ, with whom Peter Jackson and Singh LJJ agreed. One of the issues in *RSM* was whether there was a public law duty to consider exercising the discretion conferred by Article 17.1 of Dublin III. The Upper Tribunal had held that there was and indeed had ordered the Secretary of State to admit the applicant to the UK. The applicant was an unaccompanied minor in Italy. This Court rejected that argument.

42. At para. 110 Arden LJ said that Article 17.1 relates only to “applications for international protection lodged with” the UK. Therefore:

“The critical question is when is an application ‘lodged’ for this purpose?”

She went on to answer that question as being where an application has “actually been lodged.”

43. Furthermore, she concluded that it is clear from the Procedures Directive<sup>3</sup> that Member States can lay down where asylum applications are to be made. She said that:

“That must refer to the application itself, and not to an intention to make an application. It must follow ... that states may require the application to be made by an applicant who is present in the state. ...” (para. 118)

44. Further, Arden LJ rejected the submission that the decision of the Court of Justice of the European Union (“CJEU”) in Case C-670/16 *Mengesteab v Germany* [2018] 1 WLR 865 is authority which decides that a requirement for an applicant to be in the jurisdiction of the state when he lodges an application for asylum would not apply in EU law for the purposes of Dublin III, if that is what the receiving state’s domestic law requires. The CJEU in that case was not concerned with that issue as the applicant was in Germany at all material times (para. 114).

45. Furthermore, at para. 122, Arden LJ said that Article 8.2 of Dublin III is not “self-executing.” She accepted the Secretary of State’s submission that the host State has to make a take charge request, to which the requested State must respond. This approach, in her view, was consistent with the aim of Dublin III to create an orderly process for dealing with claims. She also observed that the policy of Dublin III is to be found in “the principle of mutual confidence, which is a fundamental tenet of EU law.”

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<sup>3</sup> Council Directive 2005/85/EC.



The first set of issues: EU law

46. In my judgement *RSM* supports the submissions in relation to the EU issues which have been made in the present case by Sir James Eadie on behalf of the Secretary of State. In my view, it is clear that an application for international protection is not the same thing as an *intention* to make such an application after a person has been transferred to another Member State. Furthermore, an application must usually be made in accordance with the procedures laid down in Dublin III. In the present context, as in *ZT (Syria)*, that would mean that an unaccompanied minor would have to make an application in France. If it then transpired that the mandatory criteria for a transfer to the UK set out in Article 8 were satisfied, that process would be followed.
47. However, that does not lead to the conclusion that the expedited process adopted bilaterally by France and the UK in the present context amounted to a procedure *under* Dublin III. Whether it did so or not is an objective question and is one for this Court to decide. That question is not determined by the subjective views of either the Secretary of State or officials at the Home Office at the time. In my view, it is clear that, as a matter of law, the expedited process was not a process under Dublin III.
48. The next issue which arises is whether, as Ms Kilroy submits, it was legally permissible for France and the UK or for the Secretary of State in this country to adopt the expedited process. Ms Kilroy submits that this was precluded and therefore unlawful by virtue of the existence of Dublin III.
49. I reject that submission. As Sir James Eadie submits on behalf of the Secretary of State, asylum is not within the *exclusive* competence of the European Union, in contrast to a subject such as the customs union: cf. article 3 of the TFEU. In contrast, asylum is within the *shared* competence of both the EU organs and Member States.
50. As I have already mentioned, by reference to *RSM*, there is nothing to prevent a Member State from adopting a procedure in its own domestic law which requires an application for asylum to be made on its own territory and not from outside that state. Similarly, in my view, there is nothing to prevent two Member States of the EU from bilaterally agreeing that they will adopt a process which sits alongside that in Dublin III. It would be otherwise if they agreed to derogate from the procedural safeguards in Dublin III. However, that is not what the expedited process was. As I have already mentioned, at all material times it was open to an unaccompanied minor in France to make an application for international protection, which would then have to be dealt with in accordance with the requirements of Dublin III. Even the fact that they were not selected for expedited transfer in anticipation of a formal consideration under Dublin III did not preclude them at any material time from making such an application in the future.
51. I have reached the conclusion that Soole J was right in his interpretation of the Dublin III Regulation and that the UT was wrong in the *AM* set of cases. Accordingly I would reject the appeal by Citizens UK insofar as it is based upon EU law.

The second issue: common law fairness

*The judgment of Soole J on common law fairness*

52. At para. 270 of his judgment Soole J said that the expedited process “fell outside Dublin III and operated under the real constraints of a complex and fast-moving humanitarian crisis in another sovereign state.”
53. At paras. 271-271 he did not accept that the full measure of Dublin III procedural requirements could simply be transplanted into the common law duty of fairness.
54. At para. 273 he said that, in his judgement, the evidence showed “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”.
55. At para. 274 he said that there was a proper enquiry in which Home Office officials asked the right questions (as against the criteria in Article 8 of Dublin III) and took reasonable steps to acquaint themselves with the relevant information to enable them to answer them correctly. The interviews in the camp/CAOMIs were conducted with interpreters and, in some instances, social workers. In the CAOMIs the applicants had the opportunity to return with further information. That information was then sent back to London for the decision to be made.
56. At para. 276 Soole J said that:

“In all the circumstances, which included the availability of the full Dublin process to those who were unsuccessful in the expedited process, I do not consider that the provision of representation or further review or remedy were necessary for the operation of a lawful system.”
57. Soole J recognised, at para. 277, that there were evident shortcomings in the provision of information to the applicants and those seeking to assist them. In particular the evidence showed confusion as to (i) the full ambit of the process, in particular whether it extended to the discretionary criteria of Article 17.1; and (ii) the true nature of the review/filter process which (as he accepted from the Secretary of State’s evidence) was in fact providing no more than an indication of acceptance in the event that an application for international protection and subsequent take charge request were to be made. Furthermore, as he observed in the same paragraph:

“The reasons for rejection were communicated only to the French authorities; and then in the very brief terms contained in the spreadsheet.”
58. At para. 280 Soole J said:

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

59. At para. 281 he said:

“In reaching this conclusion 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.”

60. For reasons that will become apparent, Ms Kilroy criticises that passage in particular in the light of further disclosure which has now been made by the Secretary of State in this Court. That information was not available to Soole J.

61. At para. 282 Soole J expressed this “one important qualification” to his conclusion:

“Since the expedited process was without prejudice to Dublin III applications, I consider it must follow that no account should be taken in any such future applications of material obtained in the course of the expedited process, e.g. of inconsistencies in information received. The scope for error in the expedited process is acknowledged. In the absence of a clear commitment to that effect I would make an appropriate order.”

It would appear that a suitable undertaking was then proffered by the Secretary of State to reflect para. 282 of the judgment.

62. At para. 283 Soole J said that he regretted that he was not able to agree with the Upper Tribunal in *AM* and the other individual cases. In any event, he noted, those cases may alternatively have depended on the application of Article 8 of the ECHR to their individual and fact-sensitive circumstances.

63. Accordingly Soole J dismissed the application for judicial review.

64. It will be apparent therefore that there were two features of the factual context in the present case which were influential on Soole J’s reasoning that there was no common law unfairness despite the “sparse reasons” set out in the spreadsheet which was sent

to the French authorities and the non-communication of adverse decisions. The first was that this was a requirement of the French authorities. The second was that there was time pressure in conducting the operation.

*The Appellant's submissions*

65. For reasons that have become apparent as a result of further information disclosed to this Court but which was not before Soole J Ms Kilroy submits that neither of those two reasons can any longer bear scrutiny. She submits that in fact it was not the French authorities who insisted that there should be only sparse reasons. They requested that more reasons be provided to the children who had not been accepted for transfer initially but it was officials of the Secretary of State who insisted that no more reasons should be given and they did so in part because that would create the risk of legal challenge.
66. Furthermore, Ms Kilroy submits that there was no particular time pressure because it was possible for there to be either what has been described as a review of the initial decision or what became known later as the “filter process”, which looked forward to what might happen if a formal application for asylum were to be made in France and a Take Charge Request then made to the UK under Dublin III. This took place over many months, lasting until at least the middle of February and in fact (she submits) March or April 2017. Moreover, Ms Kilroy submits that, until the direction given by the Judge at para. 282 of his judgment, the Secretary of State continued to take into account the information obtained in the expedited process. This therefore had the capacity to prejudice whether a child would subsequently be likely to have any realistic prospect of being considered successfully for a transfer under Dublin III if a formal application were to be made in due course.
67. Finally, Ms Kilroy points out that it is not only those children who perhaps eventually were unsuccessful in a formal Dublin III process who were prejudiced by the expedited process. There will also have been some children (the number can only be the subject of speculation) who would never have asked for their cases to be considered formally under Dublin III because they had already been given an indication, on the basis of the expedited process and nothing more, that they would be unsuccessful, at least unless there was new information provided. It was difficult for them to know what new information should be provided in circumstances where they did not know, for example, why their application to join a family member in the UK had been refused in the first place. It could have been because it was not believed that the person in the UK was a family member; or it could have been for some other reason. In the absence of reasons which went beyond what was set out in the spreadsheet, Ms Kilroy submits, there was obvious unfairness. This could not possibly have been sustained if this were any ordinary administrative decision making context. In the context of this case, Ms Kilroy submits, the special circumstances which persuaded Soole J to decide that there was no unfairness at common law cannot in the end in fact be sustained.

*Authorities relating to the duty of fairness at common law*

68. That the common law will “supply the omission of the legislature” has not been in doubt since *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180 (Byles J); see also the more recent decision of the House of Lords in *Lloyd v McMahon* [1987] AC 625. Accordingly, the duty to act fairly or the requirements of procedural fairness (what in the past were called the rules of natural justice) will readily be implied into a statutory framework even when the legislation is silent and does not expressly require any particular procedure to be followed.

69. The requirements of procedural fairness were summarised in the following well known passage in the opinion of Lord Mustill in *R v Secretary of State for the Home Department, ex p. Doody* [1994] 1 AC 531, at 560, in which he summarised the effect of earlier authorities:

“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 the 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 very 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.”

70. In *R v London Borough of Hackney, ex p. Decordova* (1994) 27 HLR 108, at 113, Laws J (as he then was) said, in the context of a housing decision but by reference to immigration law as well:

“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 accommodation in a particular area, they are bound to put to the applicant in 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 matter of this kind. It applies 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.”

71. The origins of the duty to act fairly in the context of an immigration decision can be traced back to the decision of the Divisional Court in *Re HK (An Infant)* [1967] 2 QB 617, at 630 (Lord Parker CJ).
72. Ms Kilroy is also entitled to place reliance on the decision of Sedley J (as he then was) in *R v Secretary of State for the Home Department, ex p. Moon* [1997] INLR 165, at 171-172.
73. Ms Kilroy is further entitled to place reliance on the decision of the Court of Appeal in *R v Secretary of State for the Home Department, ex p. Fayed* [1998] 1 WLR 763, in particular at 777, where Lord Woolf MR said:

“I appreciate there is also anxiety as to the administrative burden involved in giving notice of areas of concern. Administrative convenience cannot justify unfairness but I would emphasise that my remarks are limited to cases where an applicant would be in real difficulty in doing himself justice unless the area of concern is identified by notice. In many cases which are less complex than that of the Fayed the issues may be obvious. If this is the position notice may well be superfluous because what the applicant needs to establish will be clear. If this is the position notice may well not be required. However, in the case of the Fayed this is not the position because the extensive range of circumstances which could cause the Secretary of State concern mean that it is impractical for them to identify the target at which their representations should be aimed.”

74. At 786, Phillips LJ (as he then was) said, after referring to the decision of the Court of Appeal in *R v Gaming Board for Great Britain, ex p. Benaim and Khaida* [1970] 2 QB 417 that:

“That decision demonstrates two matters. (1) The duty to disclose the case that is adverse to an applicant for the exercise of a discretion does not depend upon the pre-existence of any right in the applicant. (2) The nature and degree of disclosure required depends upon the particular circumstances.”

75. It is also important to note, as pointed out by Ms Kilroy, that fairness is an objective question for the court to decide and does not require fault on the part of the public authority. This can be illustrated by reference to the decision of the House of Lords in *R v Criminal Injuries Compensation Board, ex p. A* [1999] AC 330, at 345, where Lord Slynn of Hadley said:

“It does not seem to me to necessary to find that anyone was at fault in order to arrive at this result. It is sufficient if objectively there is unfairness.”

76. From the judgment of the Court of Appeal in *R (Q) v Secretary of State for the Home Department* [2003] EWCA Civ 364; [2004] QB 36 (a case which concerned the fairness of a process for determining whether a person had applied for asylum as soon as reasonably practicable after arriving in the UK) there can be derived the following propositions:

- (1) It is possible to challenge a system as being unfair and not only an individual decision.
- (2) Fairness may require, as it did in the circumstances of that case, that the purpose of an interview should be made clear to those who are being interviewed: see para. 83.
- (3) The interviewers should be given clear instructions about what they are to do: see paras. 88-90.
- (4) It is not sufficient to say that the Secretary of State is willing to reconsider her first view and will always be prepared to reconsider an adverse decision. That is “not a substitute for proper and fair primary decision-making.” (para. 91).
- (5) Before the decision-maker concludes that a claimant is not telling the truth, he must be given the opportunity of meeting any concerns or at least should be informed of the gist of the case against him: see paras. 99-100.
- (6) It should be noted that in *R (Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481; [2005] 1 WLR 2219, at para. 8, Sedley LJ (giving the judgment of the Court) said:

“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 take into account the perceived political and other imperatives for a speedy turn-round 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 done so is a question of law for the courts. Without reproducing the valuable discussion of the development of this branch of the law in Craig, Administrative Law, 5th ed (2003), ch 13, we adopt Professor Craig's summary of the three factors which the court will weigh: the individual interest at issue, the benefits to

be derived from added procedural safeguards, and the costs to the administration of compliance. But it is necessary to recognise that these are not factors of equal weight. As Bingham LJ said in *Secretary of State for the Home Department v Thirukumar* [1989] Imm AR 402, 414, asylum decisions are of such moment that only the highest standards of fairness will suffice; and as Lord Woolf CJ stressed in *R v Secretary of State for the Home Department, Ex p Fayed* [1998] 1 WLR 763, 777, 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.”

77. Ms Kilroy also places reliance on the decision of the House of Lords in *R (Anufrijeva) v Secretary of State for the Home Department* [2003] UKHL 36; [2004] 1 AC 604. In that well known decision it was held that notice of a decision is required before it can have the character of a determination with legal effect because an individual must be in a position to challenge the decision in the courts if he or she wishes to do so: see para. 26 (Lord Steyn). It was not sufficient on the facts of that case that the applicant had in fact come to learn of the decision by the Secretary of State from a third party.
78. However, it seems to me, that that case is distinguishable because, in the present circumstances, the decision-makers (in the British Home Office) always envisaged that notification of the decision would in fact be given to the children affected. It is only that it was to be given by the French authorities. Secondly, this was a sensitive context, concerning co-operation with a foreign sovereign state, with Home Office officials acting on French soil. In those circumstances, there was nothing inherently unfair, in my view, about a process being agreed between the British and French authorities whereby the notice of the decision would be given by the French rather than the British authorities to the child concerned.
79. However, the position in relation to the reasons to be given is different.
80. The decision of the Supreme Court in *R (Osborn) v Parole Board* [2013] UKSC 61; [2014] AC 1115 is important in this context for three reasons.
81. First, the Supreme Court confirmed the proposition that the test for whether there has been procedural fairness or not is an objective question for the court to decide for itself. The court’s function is “not merely to review the reasonableness of the decision-maker’s judgment of what fairness required”: see para. 65 (Lord Reed JSC).
82. The second is the underlying rationales for why fairness is important. They include 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”: see para. 67. However there are other interests at stake as well. Another important rationale is the avoidance of the sense of injustice which the person who is the subject of the decision will otherwise feel. Lord Reed expressed this point in this way:



“... 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 procedure by which the decision is made, provided they have something to say which is relevant to the decision to be taken.” See para. 68.

83. The third matter is that fairness is conducive to the rule of law. As Lord Reed put it at para. 71: “the second value is the rule of law. Procedural requirements that decision-makers should listen to persons who have something relevant to say promote congruence between the actions of decision-makers and the law which should govern their actions ...”
84. That link, between procedural fairness (including for this purpose the giving of reasons) and maintenance of the rule of law was also made recently by the Supreme Court in *R (CPRE Kent) v Dover District Council* [2017] UKSC 79: [2018] 1 WLR 108, at para. 54, where Lord Carnwath JSC said:

“... Although planning law is a creature of statute, the proper interpretation of the statute is underpinned by general principles, properly referred to as derived from the common law. *Doody* itself involves such an application of the common law principle of ‘fairness’ in a statutory context, in which the giving of reasons was seen as essential to allow effective supervision by the courts. Fairness provided the link between the common law duty to give reasons for an administrative decision, and the right of the individual affected to bring proceedings to challenge the legality of that decision.”

*Application of the above principles to the facts*

85. It is well established that what fairness requires depends on the particular context, both legal and factual. That is what Lord Mustill said in the *Doody* case. That is why sometimes, again as Lord Mustill observed, it may not be possible to give a person the opportunity to make representations before a decision is taken and that opportunity may have to be given afterwards. This may be for reasons of urgency or the need to maintain confidentiality before a decision is taken. There may be other good reasons.
86. Before I address Ms Kilroy’s submissions in more detail, I should straightaway dispose of one matter in case it is thought to get in the way of her submissions. In the end I did not understand Sir James Eadie to take this objection in response to her submissions. It could be said that, because the expedited process was one which was entirely discretionary and which the Secretary of State had no obligation to introduce in the first place, the duty of procedural fairness did not apply. If that were the argument, I would not accept such a sweeping proposition of law. The point can be tested by reference to the facts of a case such as *R (Elias) v Secretary of State for*

*Defence* [2006] EWCA Civ 1293; [2006] 1 WLR 3213, which concerned an *ex gratia* compensation scheme for civilians who had been interned by the Japanese during World War II. That *ex gratia* scheme of compensation was administered by reference to certain criteria which had been set out in exercise of the Royal Prerogative. There can be no doubt that the Government had no obligation to introduce any such scheme but the fact is that it had chosen to do so and it had set up for itself certain criteria which had to be met by an applicant before compensation was payable under the scheme. In those circumstances, if the Secretary of State had failed to act fairly, for example by failing to give a person any opportunity to make representations as to why he or she qualified for compensation according to the criteria set out in the scheme, that would appear to be a breach of a legal duty to act fairly. It seems to me that it would be no answer to say that the Secretary of State was under no obligation to set up the scheme in the first place. That is irrelevant to the question of whether fairness is required once the decision has been taken to set up such an *ex gratia* scheme.

87. Secondly, it seems to me clear that the context in the present case was one in which the duty to act fairly did apply as a matter of principle. It is difficult to see any material distinction from the sort of decision making contexts in which the courts have imposed a duty to act fairly: for example the discretionary refusal of naturalisation as a British citizen, which was considered in *Fayed*; and decisions as to whether to give leave to enter to a person who has no right on any view to come to this country, as in *Re HK (An Infant)* and *Moon*. Furthermore, this is reinforced, in my view, when it is recalled that sometimes the adverse decision will be taken because a person is not believed (for example the person who is said to be a family member in the UK after a telephone interview).
88. Accordingly, it seems to me, the critical issue which arises in the present case is whether the particular circumstances in which the Secretary of State was operating sufficiently modified the duty to act fairly so as to relieve her from the usual requirements of procedural fairness. In that context I agree with Soole J that the most important concern is the “sparseness” of the reasons which were given for an adverse decision. Sometimes it will have been obvious what the reason was, for example where the spreadsheet simply says “cousin”, that must be a reference to the fact that the mandatory criteria for family reunification in Article 8 of Dublin III were simply not met. Because the case falls outside the scope of those mandatory criteria, it never came within the remit of the expedited process at all.
89. However, there were other cases (at least in principle) where the reason for an adverse decision was not so straightforward. In principle a person could have been a relevant family member. However, on the facts of the particular case the Secretary of State did not believe that the relationship had been established on the evidence which had been put forward, whether in the interview with the child in France or in the telephone interview with the alleged family member in the UK. Those were the facts of a case such as *AM*, which is one of the cases decided by the Upper Tribunal and in which the Secretary of State has appealed to this Court. In such a case, there can be no doubt, in my view, that were this an ordinary administrative decision-making process, including in the field of immigration, the law would require more than was given in this case. Fairness would not have been complied with.
90. This had several consequences. First, the person affected could have no meaningful way of knowing how to achieve a different outcome when, for example, the review or

“filter” process took place in the ensuing months in the early part of 2017. They simply did not know what the “target” was that they had to aim at.

91. Secondly, this meant that there was no realistic prospect of being able to challenge the decision. This, as we have seen, is one of the fundamental reasons why the law imposes a duty to act fairly: the ability to challenge the legality of a decision and so to vindicate the rule of law.
92. Sir James Eadie QC, on behalf of the Secretary of State, fairly acknowledged that the reasons for the decisions in this context were as they were, as set out in the spreadsheet. He acknowledged that they could be described as being “conclusions” but nevertheless submitted that, in the particular context of this situation, they were adequate. I do not accept that submission.
93. The fundamental submission which Sir James made was that the present decision-making context can be distinguished from others precisely because it was always open at all material times for a person to proceed under Dublin III. That would then have attracted the full panoply of procedural safeguards which are set out in the Regulation. Sir James submitted that the present context is distinguishable from those such as *Fayed* or even *Moon* or a hypothetical scenario such as the example about an *ex gratia* compensation scheme because the Secretary of State was not reaching any final decision. In my view, there are two flaws with that submission.
94. The first flaw is that it assumes that fairness is not required at an earlier decision-making stage simply because fairness is required at a later decision-making stage. I would not accept that as a matter of principle. In my view, in principle, a person is entitled to be treated fairly at all relevant decision-making stages. The fact is that, even though the expedited process was not one that arose under Dublin III (as I have already said earlier when discussing the issues of EU law), it was a process which led to a decision: a person who benefitted from it was transferred to the UK and this took place quickly without the need for the formal Dublin III process to be gone through. It follows that a person who was not accepted for transfer in the expedited process suffered an adverse decision and this led at the least to a delay in their being able to join a family member in the UK.
95. Secondly, even if that were wrong, it seems to me that the pure Dublin III process could not in practice be insulated from what had gone before, something which is crucial to Sir James’s submission. This is essentially for the reasons which Ms Kilroy has put before this Court.
96. First, the reality is that the Secretary of State’s officials did take into account what had happened in the expedited process later, when they were considering the review or “filter” stage.
97. Secondly, and this no doubt lay behind why Soole J felt it necessary to obtain the undertaking which the Secretary of State was willing to give in the High Court, the Secretary of State took into account what had happened in the expedited process at later stages up to the point at which that undertaking was given.

98. Thirdly, there will at least in principle have been children who gave up and never made a formal application under Dublin III precisely because they had been given an adverse decision as a result of the expedited process.
99. Finally, I should deal with a point which again I did not understand Sir James to pursue, certainly not with any great vigour. The point might be made that the urgency of the situation was such that reasons could not be given beyond what was set out in the spreadsheet. However, I accept Ms Kilroy's submission in response to that point. The evidence before this Court demonstrates that the Secretary of State even at the time concerned did write down some reasons which went beyond what was put in the spreadsheet. That was not, however, conveyed to the children at any time. It could have been.
100. As Ms Kilroy has submitted, there was no practical impediment to the giving of more detail at the time of the relevant decisions. This can be illustrated by an example of a Phase II interview record which has been shown to this Court concerning the applicant *AM* (an Eritrean national born on 1 October 2000). The pro-forma interview form recorded that the outcome of the decision was to reject the request for transfer to the UK. There were typed reasons for the decision in the following terms (these only became available later in those proceedings in the UT):

“Relative confirms no contact with minor since he left him in the Jungle. He first met the minor (nephew) in the Jungle and looked after him for 3 months before he left him to come to the UK (application for asylum is in progress). New family tree but didn't know [AM's] brother which would be [O's] sister's son?? I am not convinced that this relative is a true relative therefore decision made to reject case.”

At the top of the pro-forma was written in manuscript:

“Rejected – family link fail”.

101. Ms Kilroy submits that some of that reasoning was inaccurate but that is not material for present purposes. The important point for present purposes is, as she submits, that it was not impossible or even difficult for some brief reasons of that sort to be conveyed to the children affected at the relevant time. If they had been, it might have been possible for someone to make a meaningful response, for example correcting some inaccuracy in the information. Conversely, if the reasoning was wholly accurate, it would have stopped them making a futile application for reconsideration still less a futile application for formal consideration under the full Dublin III process.
102. In my judgement, the process which was adopted by the Secretary of State in the present context failed to comply with the requirements of procedural fairness as a matter of common law.

The third issue: Article 8 of the ECHR

103. In the light of the conclusion to which I have come in relation to the common law it is unnecessary to lengthen this judgment further by addressing the procedural requirements that might arise under Article 8 of the ECHR. Suffice to say that they could not give greater rights than the common law would in a context such as this. In view of the considerable difficulties which lie in the way of an argument based on Article 8 of the ECHR in the light of the decision of this Court in *ZT (Syria)* it would not be fruitful, in my view, to explore this issue in more detail.
104. There is a further point that could be made. It is far from clear to me that Citizens UK can rely on the HRA, as it is arguably not a “victim” of the alleged breach of Convention rights. The test for standing in section 7 of the HRA is much more stringent than in judicial review proceedings generally and is tied to the test in Article 34 of the Convention. Article 34 does not permit what the European Court of Human Rights has described as an *actio popularis*. I reviewed this area of procedural law in *R (Pitt and Tyas) v General Pharmaceutical Council* [2017] EWHC 809 (Admin), at paras. 52-67; (2017) 156 BMLR 222 and in *R (Adath Yisroel Burial Society) v Senior Coroner for Inner North London* [2018] EWHC 969 (Admin), at paras. 6-10 (in giving the judgment of the Divisional Court).

The duty of candour and co-operation

105. In *R (Hoareau and Anr) v Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 1508 (Admin), in giving the judgment of the Divisional Court (which also included Carr J), I sought to summarise the relevant legal principles relating to the duty of candour and co-operation which applies in judicial review proceedings and the relationship of that duty to the concept of disclosure of documents: see paras. 8-24 of the judgment. As I understand it both Hickinbottom and Asplin LJ agree with that summary of the relevant legal principles and therefore it is unnecessary to set it out in full here. Reference should be made to it as if it were incorporated into this judgment.
106. Here I will do no more than outline some of the salient points:
- (1) Disclosure – in the sense of disclosure of documents – is not automatic in judicial review proceedings. When, before the Civil Procedure Rules 1998 were brought into force in 2000, courts used to make reference to “the duty of the respondent to make full and fair disclosure” (see e.g. the seminal case of *R v Lancashire County Council, ex p. Huddleston* [1986] 2 All ER 941, at 945, in the judgment of Sir John Donaldson MR), that should not be misunderstood as being a reference to “disclosure” in the modern sense of disclosure of *documents*. This is because, before 2000, disclosure of documents used to be called “discovery”.
  - (2) One of the reasons why the ordinary rules about disclosure of documents do not apply to judicial review proceedings is that there is a different and very important duty which is imposed on public authorities: the duty of candour and co-operation with the court. This is a “self-policing duty”. A particular obligation falls upon

both solicitors and barristers acting for public authorities to assist the court in ensuring that these high duties on public authorities are fulfilled.

- (3) The duty of candour and co-operation is to assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide. As I said in *Hoareau* at para. 20:

“... It is the function of the public authority itself to draw the Court’s attention to relevant matters; as Mr Beal [leading counsel for the Secretary of State in that case] put it at the hearing before us, to identify ‘the good, the bad and the ugly’. This is because the underlying principle is that public authorities are not engaged in ordinary litigation, trying to defend their own private interests. Rather, they are engaged in a common enterprise with the court to fulfil the public interest in upholding the rule of law.”

- (4) The witness statements filed on behalf of public authorities in a case such as this must not either deliberately or unintentionally obscure areas of central relevance; and those drafting them should look carefully at the wording used to ensure that it does not contain any ambiguity or is economical with the truth. There can be no place in this context for “spin”.
- (5) The duty of candour is a duty to disclose all material facts known to a party in judicial review proceedings. The duty not to mislead the court can occur by omission, for example by the non-disclosure of a material document or fact or by failing to identify the significance of a document or fact.

#### The evidence filed on behalf of the Secretary of State in the High Court

107. In the proceedings in the High Court the following evidence was filed on behalf of the Secretary of State. The first witness statement was by Gary Cook, of the Asylum and Family Policy Unit in the Border, Immigration and Citizenship Policy and Strategy Group at the Home Office, dated 5 April 2017. I will refer here only to the passages which are relevant for present purposes.
108. At paras. 32-35 Mr Cook described the Joint Ministerial Declaration of 20 August 2015, which set out a long term strategy to manage the flow of illegal migration and the repercussions of the humanitarian crisis. At paras. 38-50 Mr Cook set out the timeline of events, in particular in October 2016. At paras. 51-57 he described the expedited process.
109. At para. 51 Mr Cook said:
- “... In agreement with the French authorities, from 14 October 2016, the UK set up an expedited process for considering claims based on the family reunion criteria of the Dublin III Regulation, but without undertaking the procedural aspects of

the Dublin procedure, namely the requirement for an asylum claim to be registered in France and a take charge request made of the UK via DubliNet. Transfers from 17 October up until the completion of the transfers made as a result of interviews conducted at the CAOMIs, the majority of which were concluded by 9 December 2016, were therefore operated on an expedited basis outside of the Dublin framework. ...”

110. At para. 52 Mr Cook said:

“The decision to operate such a process was driven by operational considerations and came about primarily as the result of agreement between the UK and French Dublin Operational Units. I believe that such an approach was justified in order to respond to a unique humanitarian operation and support the French in delivering a safe and orderly camp clearance within a reasonable timeframe. ...”

111. At paras. 66-76 Mr Cook addressed the issue of an “opportunity for review”. At para. 69 he said:

“With respect to the children who remained in France who were not accepted under the expedited process, an agreement was reached with the French authorities whereby the UK Dublin Unit would review a list of cases provided by the French of children who maintained claimed family links in the UK and had new information not available at earlier interviews conducted by Home Office officials. It was agreed that the UK would look at the evidence provided and give an indication of whether this would be enough to accept a request to take charge under the Dublin Regulation, were a take charge request to be submitted. The intention of this process was to allow the French to communicate to those children who were likely to receive positive decisions that this would be the case, in order to encourage them to continue to engage with the system and prevent potential absconding from the CAOMIs. The UK was clear that a positive indication under this process did not equate to an acceptance under the Dublin Regulation, and that for any case to be accepted on that basis, a formal take charge request following the lodging of an asylum claim in France would first have to be made, with the UK reserving the right to deny the request upon formal consideration of the evidence submitted. Similarly, a negative response as part of this review process would not preclude France from making a take charge request of the UK with respect to that individual, if they thought it was appropriate. Again, the SSHD’s willingness to engage in this filter process went substantially beyond the requirements

imposed on her by the Dublin Regulation, and demonstrates her commitment to support the French Government. It was the responsibility of the French authorities to communicate the indications to the children, and also to inform them of the process for claiming asylum in France.”

112. At para. 70 Mr Cook said:

“At the same time, the UK agreed to provide the French Dublin Unit with a list of reasons for rejections of children with claimed family links in the UK under the expedited process. This was provided in spreadsheet form to the French Dublin Unit to use in the way they felt appropriate, and I understand this was subsequently shared with the directors of the CAOMIs. I would highlight again that it was for the French authorities to make decisions on how they wished to proceed with respect to children remaining on their territory with respect to whom they have a responsibility to process asylum claims, and engage Dublin where appropriate, or to otherwise accommodate them in the French system.”

113. The other main piece of evidence which was filed on behalf of the Secretary of State in the High Court proceedings was a witness statement by Julia Farman, of the European Intake Unit, UK Visas and Immigration at the Home Office, dated 5 April 2017. She was the acting head of the European Intake Unit and held that post since June 2016, when the Unit was created specifically to process requests for the UK to accept responsibility for unaccompanied asylum seeking children transferring from a participating EU Member State or associated country to join family in the UK under Dublin III.

114. At paras. 15-24 Ms Farman described the accelerated and expedited Dublin processes, in particular in October 2016. She stated that the first phase of interviewing in the Calais camp latterly became known as Operation Purnia Phase I and the second part was known as Operation Purnia Phase II. She then described Operation Purnia Phase I in more detail at paras. 25-53. She described the expedited process operated at the CAOMIs at paras. 54-69. She then described actions taken since Operation Purnia concluded at paras. 70-77.

115. At para. 72 Ms Farman said:

“The French Government had said on around 16 December 2016 that there were about 40-50 children’s cases which they thought the SSHD should consider again. The SSHD agreed that the French authorities should provide us with further submissions in respect of those cases. In the end the French provided us with about 530 or so children’s cases in various CAOMIs. The SSHD has considered these under an informal



‘filtration process’ – in essence she has looked at the evidence again and has conveyed to the French authorities if she would be likely to accept a TCR [Take Charge Request] or whether more information is needed. ... This was so that the French could communicate this to those children and encourage them to lodge an asylum claim and continue to engage with the process. ...”

116. At para. 73 Ms Farman said:

“From late January 2017 through to March 2017 the French officials provided three different lists of assessments that they wanted us [to] review. As I have stated above in total over 530 children were put forward. ...”

117. At para. 75 she said that:

“We also went back to the French authorities on a further five cases to confirm that we would very likely accept Take Charge Requests made without the need for any further information to be provided. We confirmed to the French authorities that of the remaining cases we would not accept a TCR at that time on the basis of the evidence that had been submitted.”

118. At para. 77 Ms Farman said that “in the vast majority of cases the child either produced the same information which did not demonstrate the claimed family link, or the relation in the UK was a cousin, and therefore did not meet the terms of Article 8 of the Dublin III Regulation. ...”

119. At paras. 78-89 Ms Farman addressed various criticisms which had been made of the expedited process on behalf of Citizens UK. In that context, at paras. 83-84 Ms Farman noted that criticism had been made that individual written decisions were not given to the children affected; and that the decisions were often boiled down to one word or phrase. She responded in the following way, at para. 85:

“As I have explained the SSHD was working under extreme pressure to try and process as many children as she could. In these circumstances I do not see how the Claimant [Citizens UK] could have expected the SSHD’s officials to provide detailed decision letters in respect of each child. In any event I would say that in some of the cases she mentions a one word reason or phrase would suffice to explain the position. For example she criticises the refusal of cases using one word ‘cousin’. As I have explained above, where a child only has a cousin or more distant relative in the UK this does not suffice

under the Dublin III Regulation to determine the UK as the relevant Member State with responsibility for examining the child's asylum claim. I do not understand why any further elaboration would be needed."

120. Before leaving her first witness statement, I should note that, at para. 90, Ms Farman concluded:

"I hope the above assists the Court to understand what the SSHD did from an operational standpoint to try and process unaccompanied children who had formerly been resident at the Calais camp. ..."

That passage makes it clear that she was well aware that her task in filing that witness statement was to assist the Court to understand what had happened.

121. There was a third witness statement filed on behalf of the Secretary of State in the High Court proceedings, by Mike Gallagher, of the Asylum Policy, Immigration and Border Policy Directorate at the Home Office, dated 5 April 2017. He was involved personally in France in Phase II of Operation Purnia. At para. 17 Mr Gallagher said that:

"The agreed process was that communications of decisions would not be made by the teams in France at any CAO. ..."

122. At para. 18 Mr Gallagher said:

"Details of how notification of the outcomes were to be made were not known to us as the team on the ground, other than that they would be communicated to French Government officials first, and then to the CAOs. ..."

123. Finally, in the High Court proceedings there was filed a witness statement by Raphael Sodini, of the Asylum Department at the French Ministry of the Interior. On the final page of that statement Mr Sodini said:

"... In this context, the British authorities were requested to complete, within a period of one month following the dismantling, all interviews of minors in CAOMI in order to determine who had the right under the Dublin III Regulation or under the specific provisions applicable to the United Kingdom to go to the said country for asylum application. The United Kingdom thus examined all the situations of minors present in CAOMI and sent to France the decisions rejecting or accepting the minors present.

France notified these decisions to young people present in CAOMI, and in the case of requests for family reunification, had been able to submit requests for re-examination to the British authorities generally based on supplementary information provided by the minors. Very few of these revisions were accepted by the British authorities.”

124. On 23 May 2017 Mr Gary Cook filed a second witness statement in the High Court proceedings. He made that additional statement in response to the amended remedy requested in the Claimant’s skeleton argument, which was an order requiring that the Secretary of State should consider afresh the decisions of those children who were the subject of adverse decisions, providing detailed reasons and the records of interviews.

The applications to adduce further evidence

125. There are before this Court two applications to adduce further evidence which was not before the High Court or the Upper Tribunal. The first application is made by the Claimant and is supported by the sixth witness statement of Ms Sonal Ghelani, dated 22 May 2018. The second application is made on behalf of the Secretary of State and is dated 25 May 2018.
126. Both applications must be granted since, as will become apparent, there is now a great deal of important evidence which is relevant to the issues and which was not before the High Court and, in my view, should have been. Clearly this evidence was not available to the Appellant in the proceedings below.
127. The material which Citizens UK applies to place before the Court includes recent statements and exhibits from Ms Farman and Ms Da Costa (Senior Lawyer at the Government Legal Department), who also has conduct of the cases before this Court, together with disclosure provided by the Secretary of State in another case in the Upper Tribunal: *R (FH) v Secretary of State for the Home Department* (JR/1256/2018). That material was provided by FH’s solicitor to representatives of Citizens UK after it was referred to in open court in the Upper Tribunal proceedings on 9 May 2018.
128. As Ms Ghelani observes at paras. 4-5 of her latest witness statement, the Upper Tribunal had noted in its judgment in the case of *AM* (para. 91) that no contemporaneous materials relating to the development or operation of the expedited process or the filter process were disclosed with the Secretary of State’s witness evidence in the cases before that Tribunal. Furthermore, Ms Ghelani states that requests for disclosure of contemporaneous records, communications and notes were repeatedly made by the applicants in *AM and Others*. Similarly such disclosure was requested by Citizens UK: see e.g. a letter from Islington Law Centre to the Government Legal Department dated 9 May 2017 and the response dated 12 May 2017. Ms Ghelani states that those requests were refused.
129. What Ms Ghelani says has now emerged in the case of *FH* is, by way of example:

- (1) The decision to end the expedited process was a decision taken by the UK authorities. The French authorities would have preferred the expedited process to continue for the purpose of reviewing those cases.
  - (2) The French authorities requested reasons for decisions and indicated that there were difficulties in producing further evidence in order to seek a review of earlier decisions which were the outcome of the expedited process without knowing those reasons. It was the Secretary of State who refused to provide such reasons.
  - (3) The filter process continued until at least 7 April 2017, which was more than three weeks after the claims in *AM and Others* were lodged in the Upper Tribunal. New information was still being sought in the filter process until at least the middle of March 2017.
130. The witness evidence referred to by Ms Ghelani includes the witness statement of Julia Farman in the case of *FH* dated 20 April 2018. This described the “filtration” process in general at paras. 5-17 and did so in much more detail than had been done in the present proceedings or in *AM*.
131. The application to adduce further evidence by the Secretary of State includes a further witness statement (numbered “Second” but strictly that should be “Third”) by Gary Cook dated 25 May 2018. In that witness statement he explains that he was Head of the EU and International Asylum Policy at the Home Office between 1 August 2016 and 16 February 2018. He makes the statement primarily to explain to this Court the Secretary of State’s position with regard to the level of detail in the reasons UK officials sent to the French authorities at the conclusion of the expedited process. He understands that this issue is raised in the *FH* case.
132. At para. 7 he says:
- “During discussions with the French authorities about the expedited process, it was not envisaged that there would be a separate filtration process.”
133. At para. 8 he says that the operational approach used for children who did not meet the criteria for expedited transfer to the UK was that the French authorities were responsible for communicating the decision. He goes on to say:
- “... We did agree to provide the French authorities with a list of reasons where children had been found not to meet the criteria. I understand that this spreadsheet was provided to them on or around 14 December 2016.”
134. At para. 9 he says:
- “It is true to say that the French expressed concern about the level of detail provided in the reasons once they had considered

this. ... In my view, this was a change of position from earlier discussions ...”

135. At para. 10 he says:

“I appreciate the Court may wish to understand the rationale behind those emails and the analysis behind the SSHD’s decision to provide a limited level of detail in the reasoning given to the French authorities to pass on to the children. I have read the statement of Cameron Bryson [to which I will return later in this judgment] and agree with what he says there concerning those emails. ...”

136. At para. 11 he says:

“An important objective for the SSHD in supporting the French-led operation to clear the Calais camp was to not undermine wider asylum policy. As set out in my first witness statement, this was a one-off operation, from which the SSHD envisaged no ongoing obligations beyond those she was already party to.”

137. At para. 12 he continues:

“In considering the level of detail to include in response to individuals assessed under the process, the SSHD therefore had to balance wider risks which would potentially undermine her approach to migration policy. In sending officials to assess individuals in France in such unique circumstances, the SSHD sought legal advice from her in house legal advisers.”

138. At para. 13 he stresses that he is not waiving legal professional privilege. However he continues:

“... I can say it concerned whether there would be risks to the SSHD’s wider asylum policy in giving detailed reasons to individuals who were outside the United Kingdom and who had not made an application under the Immigration Rules or UK legislation to enter the United Kingdom.”

139. At para. 15 he informs the Court:

“I hope this explains in more detail why the SSHD took the decision to keep the level of detail to a minimum. Whilst the French authorities did express some concerns, this led to the SSHD agreeing to a French request that we review a list of cases which became the filtration process. The French initially proposed that we consider a further 40-50 cases when new evidence was available. In fact, the SSHD’s officials reviewed around 530 cases. The decision to carry out this filtration process allayed the French authorities’ concerns expressed at the end of the expedited process about the level of detail provided in the reasons.”

140. At para. 16 he explains that to date the French have made a total of five Take Charge Requests relating to children who are considered under the filtration process (having been assessed as not meeting the criteria under the earlier expedited process) the Secretary of State has accepted those five requests and has transferred those children to the UK.

141. At paras. 17-19 Mr Cook says the following:

“17. I recognise that the Court may be concerned that the SSHD did not make the above sufficiently clear in her evidence before the Administrative Court, and I apologise for any confusion as to the SSHD’s position. The SSHD’s officials were under very tight time constraints to prepare the SSHD’s evidence in these proceedings at approximately the same time as having to deal with the complex policy challenge to her approach under section 67 of the Immigration Act 2016 (“the Dubs amendment”) in the Help Refugees matter and five individual challenges in the Upper Tribunal (four of which will be heard with this appeal being AM, SASA, SS and MHA). The challenge made by Citizens UK was very wide ranging and indeed changed substantially in nature by the time they were granted permission by the Court on 28 February 2017 as compared to their original claim as issued on 14 October 2016. The SSHD officials were also at the same time still completing their work in relation to the Calais camp as well as processing the standard take charge and take back requests made to and from other Member States’ Dublin Units. **I do recognise however that, notwithstanding the above, the SSHD should have made the position that she had received legal advice on the issue of the level of detail to provide the French authorities clear and I do so now with apologies to the Court.**

18. I also recognise the Appellant has raised numerous concerns about disclosure in the past and that the late disclosure of this material may cause concern. The Appellant did write to the SSHD several times concerning disclosure but this was not

then pursued by them at the hearing before the Administrative Court. In order to provide reassurance, I confirm that I have re-read my first witness statement in detail and stand by everything I have said there. I have also considered carefully if there is any other pertinent material which should be brought to the Court and Appellant's attention in keeping with the SSHD's duty of candour and confirm that there is not. I say this in light of the fact that my evidence was intended to provide a high-level explanation for events as one would expect. I explicitly stated this in my first witness statement.

19. To provide additional reassurance to the Court, I have searched my inbox for the terms 'Calais', 'camp' and 'children'. Due to the high volume of matches (respectively, 26,000 emails, 30,000 emails and 43,000 emails) I have only re-read emails sent and received between the dates of 24 October 2016 and 16 December 2016 where the subject suggests the email relates to policy decision. I am fully content that my account of events is accurate." (Emphasis added)

142. The material now adduced by the Secretary of State also includes a second witness statement in these proceedings by Julia Farman dated 25 May 2018. So far as relevant she says the following, at paras. 5-8:

"5. In light of the further disclosure the SSHD has made in these proceedings, I have carefully considered if there is anything else which the SSHD should disclose as part of her duty of candour. For the purposes of the FTH [i.e. *FH*] proceedings I used specific terms to try and locate emails such as the child's name and the names of UK officials and French officials but clearly that would be substantially more challenging with regard to a wide ranging policy challenge such as these proceedings. As one might expect the expedited and filtration processes generated many emails, which were sent to and between a large number of officials, alongside the wider business work with French and other Member States colleagues as part of the overall operation of my team.

6. I have read my witness statements adduced for the purpose of the Administrative Court proceedings and also in the case of FTH (JR/1256/2018) and I stand by what I have said there. I am content my account of events is accurate.

7. I do exhibit to this statement the lists generated during the filtration process to the extent they were not disclosed in the FTH proceedings. There are the first filter list sent by the French dated 20 January 2017 (JF8) and the second filter list dated 8 March 2017 (JF9). I understand the Appellant intends to make an application to adduce the documentation in FTH

before the Court of Appeal and so I do not exhibit the evidence I adduced in those proceedings in these proceedings which include the third filter list and the SSHD's response.

8. I also exhibit the spreadsheet containing the list of reasons which was given to the French on 14 December 2016 (JF10).”

143. The Court now has before it a witness statement from a person who did not file evidence in the High Court. This is Cameron Bryson, an Assistant Director in Border Force, who was between 1 September 2016 and 31 March 2017 seconded to the Dublin Unit of the Asylum Directorate of the French Ministry of Interior in Paris. He was the point of contact for the UK Home Office and the French Ministry for matters relating to unaccompanied minors in the Calais area and was responsible for co-ordinating the transfer to the UK of those accepted following the camp clearance.

144. At para. 4 Mr Bryson says that he has read the witness statements of others, including Mr Cook, Ms Farman and Mr Gallagher and states that they explain accurately the events leading up to the closure of the Calais camp and the introduction of the expedited process. He therefore intends “to explain only the events leading to the introduction of a ‘filter process’ to reconsider the decisions of some of those unaccompanied minors not accepted for transfer to the UK.”

145. At para. 6 he says that on 8 December 2016, in anticipation of a formal announcement that the operation to transfer minors to the UK had been completed, he was asked by the then Deputy Director of Asylum in France (Florian Valat) to request from the UK authorities the list of all those minors who were not being accepted by the UK.

“In particular he asked for the reasons as to why these minors were not being accepted in the UK to enable the French authorities to explain to these minors what their next steps might be. I did so immediately. I was aware that there was concern amongst HO [Home Office] officials about how we could do this due to the operational constraints we were under but also due to concern about the implications for wider immigration policy.”

146. At para. 7 Mr Bryson says:

**“On 12<sup>th</sup> December 2016, I verbally informed French officials that, based on legal advice, the UK would not be able to share detailed reasons for refusal with the French authorities due to concerns that this could lead the Home Office vulnerable to a legal challenge in the future. On 13<sup>th</sup> December, I forwarded a list to the French authorities which detailed whether a minor had been accepted or not. In the ensuing correspondence with French officials I again explained**



why the UK could not give detailed reasons for refusal. **The French did raise some concerns about this.**” (Emphasis added)

147. At para. 8 he says:

“I believe as a consequence of French concern, I was asked by French officials on 19 December 2016 if the UK could review some specific cases where further information had been obtained by the minors. Having passed this request on to officials in the UK, I was initially instructed to inform the French that any further consideration would need to be submitted by DubliNet, the official mechanism for making a transfer request under the Dublin Regulations.”

148. At para. 9 he says:

“I am aware that this decision led to discussions between very senior UK and French officials which, as a result, led to the introduction of the ‘filter’ process for minors who had already received a negative decision. I informed French officials of our agreement to this, as well as the conditions under which it would operate, on 6<sup>th</sup> January 2017; the French and UK authorities then proceeded on this basis. ...”

149. At para. 10 he says that it is his understanding that the setting up of the filtration process dealt with the French concerns about the level of detail and reasons provided.

150. At para. 11 he says that he has read the evidence filed on the Secretary of State’s behalf in the Administrative Court and considered whether there are any other material matters he should bring to this Court’s attention concerning how the expedited and filtration process worked and confirms that he does not think that there are.

#### The relevant email correspondence

151. It is possible to reconstruct a relatively clear and comprehensible outline of the email correspondence by reference to the most relevant ones which have now been placed before this Court. I will consider them in chronological order.

152. On 8 December 2016 at 15.20 an email was sent by Mr Bryson to various officials at the Home Office summarising what M. Valat had conveyed to him:

“... With regard to those minors that are going to remain in France, Valat said that it was important that they were able to

explain to each and every minor why they were not going to the UK. He therefore asked for a list of rejections, by CAOMI with the reasons for refusal, to enable the French authorities to try to explain to the minors what their next steps might be. They did not want anything detailed and suggested something as straightforward as: age assessment (I suggest we clarify where there has been a self-declared over 18); unable to contact family in UK; family unable to receive the minor (e.g. doesn't meet the conditions); family doesn't want to receive the minor; and, no UK family. ...”

153. On 9 December 2016 the spreadsheet setting out in the right hand column such reasons as were provided to the French authorities was given to them.

154. On 13 December 2016, at 11.11 p.m. (in an email of which we have a translation as well as the original French) M. Valat said to Mr Bryson:

“To be clear, these lists are of no use to us. They only confirm that you have not accepted the young people who were not transferred. Everyone had already understood that.

What we need is the precise reason for the rejections, in particular for those who indicated that they could be transferred to the UK under Dublin.

We made this request last week, and it seems to me that we had agreed on that basis.

If there are grounds for these refusals, we have a collective interest in reporting them to the young people without delay. That will prevent futile requests for re-examination.

Otherwise, the young people especially will not understand, we will not be able to explain it to them and the situation will quickly become unmanageable for you as well as for us.

Therefore, I insist, we really need the complete lists by tomorrow morning.”

155. Mr Bryson then forwarded that email early the next morning, at 7.11 a.m. on 14 December 2016, to various officials at the Home Office. He said:

“To see the latest email from Florian [Valat] on the subject of the list we have provided. He is saying that what we have provided is of no use at all, all it does is to tell the minors they haven't been accepted, which they knew anyway. They need the basic reasons for refusal to explain why those applying

under Dublin have been refused in order to prevent a pointless request for a reconsideration.

He makes the point that they had asked for the full list last week and thought we had agreed on one. In my reply I have said that our legal department had advised against full disclosure because of the risk of challenge, ...”

A reply was sent to that email at 7.28 a.m. by a Lucy Coutinho; amongst those copied in were Mr Cook and Ms Farman. That is important because it indicates that they were privy to this email correspondence at the time but did not mention any of this when they made their witness statements in the High Court proceedings or at any time in these proceedings until May 2018.

156. Later the same morning, at 8.32 a.m., there was an email sent by Karyn Dunning to Mr Bryson, copied amongst others to Mr Cook and Ms Farman, which said:

“We are working on more detailed data but as per Lucy’s email last night:

Given what the lawyers have said, we are unlikely to be able to say more than the following: Dublin ‘the case of X was not accepted because we were unable to verify the claimed family connection.’ ...

**Anything more could open us up to legal challenge. ...”**  
(Emphasis added)

157. Later the same morning, at 9.48 a.m., there was an email from Shona Riach to Karyn Dunning and Mr Bryson, copied amongst others to Mr Cook and Ms Farman:

“I am afraid that the French are going to be disappointed. We need to protect our legal position and I don’t think we can or should go beyond the sort of language Karyn has set out. ...”

158. Later the same morning, at 11.17 a.m., Mr Bryson sent an email to Shona Riach and others, copied amongst others to Mr Cook and Ms Farman, in the following terms:

“I’ve just had a very lengthy conversation with Florian [Valat] and as things stand at the moment they have postponed their communication campaign until this evening in the hope that we will be able to give them more information (there is a video conference with the préfectures taking place at 16h00 French time when they will be instructing them what to do).

**I said that based on the legal advice that we have received, it is unlikely that we would be able to share any further details. Florian said that if this were the case, it was**

**unacceptable**, and that following on from the press release on Friday we were making matters very difficult for them to manage. He said that all they would be able to do now would be to tell them that they had been refused and that they should reapply through the formal Dublin process when they had hoped to be able to convince some of them that their best option was to remain in the French system. He does not understand our legal position as in his view anyone refused under the Dublin Regulation is entitled to be told the reasons for their refusal. Perhaps a fuller explanation could be shared with him (I haven't actually seen the legal advice so was unable to do so).

Florian also stated that they had warned the préfecture of Pas-de-Calais to expect large numbers of arrivals from the CAOMI in the coming days and told me that large numbers had already left over the weekend.

Florian thought a call to PAM might be useful, but did say that this would now be raised at a political level. I've already spoken to David given his meeting this evening and we also wondered whether it would be helpful to give a script to the French to assist them, for example 'you have been subjected to a rigorous age assessment process whereby the benefit of the doubt is given to a claimed minor and we will not reconsider', and, in the case of Dublin, expand on Karyn's script to say that they have the right to ask for a reconsideration but unless further information is provided that there will be no change to our original decision." (Emphasis added)

159. There are also before the Court now emails between 19 December 2016 and 22 December 2016 passing between the French and British officials relating to the desire on the part of the French authorities to have a review process.
160. On 5 January 2017, at 3.26 p.m., Lucy Coutinho sent an email to Mr Bryson and Ms Farman in which she asked them to consider a draft email she was proposing to send in the following terms:

"I have spoken to Cameron and Julia to get some further clarification. To confirm, the minors would still go through the standard Dublin process ie. have to claim asylum in France. Currently, very low numbers of minors have applied for asylum in France. The French have proposed an initial filtering process to try to keep the minors engaged, and to show them that the French are trying to help them. The idea would be that for a month or so, the minors would be able to provide the relevant Dublin documentation to the prefectures who do an initial sift and then pass on cases to DGEF to do a further sift. Therefore only those the French think are highly likely to be

eligible under Dublin are then told to apply for asylum in France and that they will be referred to the UK Dublin process. The French would then explain to the remaining minors that they are unlikely to be accepted under Dublin and should therefore claim asylum in France as that will be the best alternative. There is still a high risk that minors may abscond but that exists either way.

The benefits of agreeing to Florian's proposal would be to:

- help our ongoing relationship with France to show that we are being flexible where possible (as some of you will be aware the French Foreign Sec lobbied Hermione on the issue of minors this morn and flagged that it was likely to move back up the political agenda).
- Potentially reduce the number of Dublin cases referred to us that are unlikely to be eligible because they have already been filtered.

From other discussions, I know there was a concern about creating a new process, but I don't think this process is particularly different. If we agree to Florian's suggestion we can reiterate our view that we did a good job of interviewing the children and that if we agree to this process, we do not want to see all the children we previously identified as ineligible under Dublin being referred to us again. Whilst this will be essentially delaying the issue, the French believe this delay will give them a better chance of convincing minors to claim asylum in France"

161. Ms Kilroy particularly stressed the point made in that email that:

"... We do not want to see all the children we previously identified as ineligible being referred to us again."

As Ms Kilroy submits, that is a good example of how the outcome of the earlier expedited process continued to have an impact on what happened later.

162. On the same date, at 14.53 Mr Bryson replied, copying in Ms Farman:

"No we won't be involved in the initial filtering process. I think the only thing to add is that once DGEF have done their filter they would pass to us for an initial view of the likelihood of success based on the information provided (which is the crux of Florian's proposal as this is where we deviate from the established Dublin process), and, if that is likely, they would then tell the minor to apply for asylum and go through the normal Dublin process (if they refuse then that will be the end

of it for them). If the application is unlikely to be successful they will try to persuade the minor to apply for asylum in France. That way we don't have to do a formal rejection.”

163. On 6 January 2017, at 18.08, Mr Bryson wrote to M. Valat in the following terms:

“As we discussed and confirmed before Christmas, our original decision on Dublin cases stands. If a minor previously resident in Calais and assessed under Dublin now has new information, they will need to be ‘re-presented’ under the standard Dublin process – ie. the minor must claim asylum in France and you should identify which Member State is responsible for processing the asylum claim. If the UK is identified, you must formally submit a transfer request and the required documentation through DubliNet.

We understand that this process will continue to be adhered to but that you have proposed to implement a filtering process to identify minors that could be accepted for transfer to the UK under the Dublin Regulation (Article 8.1 and 8.2). The first stage will be undertaken by prefectures, and the second stage undertaken by DGEF. You would then like the UK to undertake an initial review too. We acknowledge that this process may help to persuade minors to remain in the CAOMIs and to claim asylum in France. We understand the challenges you face in this regard and obviously want to assist you as much as we can; therefore we are happy to agree to this filtering process under the following conditions:

- 1) For minors in the CAOMIs that we have already assessed under Dublin, we will consider only new information in relation to their family links in the UK until 17 February 2017. After this date, we do not expect to continue to provide an ‘initial filter’ of Dublin cases.
- 2) The full Dublin process still needs to be adhered to.
- 3) The UK reserves the right to reject a request even where the initial filter suggests the child may qualify.

We may revisit our agreement to the process if we do not think it is effective.

Outside of this filtering process for the Calais cohort, we will, of course, adhere to our Dublin obligations and consider any transfer requests in line with the Regulation.

I hope this is satisfactory and covers the points we discussed at our meeting. We can perhaps discuss the practicalities on

Monday? If you have any questions, please do not hesitate to contact me.”

164. In the light of the email correspondence which is now before the Court the following seems to be clear.
165. First, the only reasons which were ever communicated to the children affected were as set out in the spreadsheet provided to the French authorities on 9 December 2016.
166. Secondly, in the ensuing days the French authorities requested more detailed reasons to be given. This was refused by the British authorities at least in part on the ground that this would give rise to the risk of legal challenge.
167. Thirdly, the French authorities asked for a review or what was called later a filter or filtration process. This then occurred from January until at least the middle of February 2017. Although there was some reference to a filter process in the evidence filed on behalf of the Secretary of State in the High Court, it was not clearly explained in the evidence that there had been the possibility of such reconsideration. If it had been this might have shed a different light on the apparently urgent nature of the process as it was understood by Soole J.
168. In my view, there was a serious breach of the duty of candour and co-operation in the present proceedings. An incomplete picture was left in the mind of the reasonable reader, including Soole J, as a result of the evidence that was filed below. I dare say this was not deliberate. I note in this context that Ms Farman did file further evidence relating to the filter process in the Upper Tribunal in the case of *FH*, which suggests that there was no deliberate attempt to suppress these matters. There is no reason to think that there was bad faith. Nevertheless, the effect, even if it was unintentional, was that significant evidence was not brought to the attention of the High Court.
169. Although one of the reasons which has been given to explain this is that there was time pressure, I note that at no time, either before Soole J gave judgment in September 2017 (having heard the case in May) or subsequently until May 2018 was there any attempt made on behalf of the Secretary of State to file further evidence. That had to be done with only a few weeks to go before the hearing of these appeals in the middle of June. It also seems to have been done only once certain matters had become known (by chance it would seem) in an unrelated case: *FH* in the Upper Tribunal in early May 2018. In that sense it is purely by chance that this Court has now come to learn of these important matters, including what was said in contemporaneous emails in December 2016 and January 2017.
170. The most serious omission, in my view, was the failure by those presenting evidence on behalf of the Secretary of State to inform the High Court that the reason why the reasons for an adverse decision in the expedited process were “sparse” (to use Soole J’s phrase) was not because of the urgency nor because the French authorities demanded that (as he thought and said in his judgment) but because the British authorities did not wish to give more reasons and that this was because of a perceived risk of legal challenge to the decisions.

171. As I have said earlier in reviewing the main authorities on the duty to act fairly, one of the rationales for that duty is precisely to permit a person to know whether they have any basis for mounting a legal challenge to a decision; and to enable a court or tribunal to assess whether a decision is wrong. These are elementary but fundamental features of the rule of law. They explain why reasons for a decision *should* be given; they are not reasons for why they should *not* be given.
172. For those reasons I conclude that:
- (1) there was a serious breach of the duty of candour and co-operation by the Secretary of State in this case; and
  - (2) the evidence now before this Court supports the fundamental submission made by Citizens UK that the process adopted in this case was unfair and unlawful as a matter of common law.

### Conclusion

173. For the reasons I have given I would reject the Appellant's grounds of appeal under EU law but would accept them in relation to the duty of procedural fairness under the common law. I do not think it necessary or helpful in this case to explore further the issue of fairness that might have arisen under Article 8 of the ECHR.
174. Accordingly I would allow this appeal.
175. I consider that it would suffice to grant a declaration that there was a breach of the duty of fairness under the common law. Given that this is a generic challenge by a non-governmental organisation and that the expedited process is now long in the past, I do not consider that any other remedy would be necessary or appropriate.

### Costs

176. The parties have been unable to agree the appropriate costs order after seeing copies of the judgments in this case and in *AM* in draft. The Secretary of State submits that there should be no order as to costs in both cases. Citizens UK and the individual Respondents in *AM* submit that they should have their costs in full and that they should be assessed on an indemnity basis if not agreed.
177. I do not accept the submissions made on behalf of either side in their entirety. In my view, the overall justice of the two cases can be reflected in an order that the Secretary of State should have to pay 50% of the other side's costs, to be assessed on the standard basis if not agreed, in each case. I have had regard to all of the circumstances but would mention the following salient features of these cases. First, the issues overlapped to a significant extent in the two cases, even though the appeals in *AM* were brought by the Secretary of State. Secondly, the applicants in each case have achieved a substantial victory in that this Court has held that the expedited process was unfair and therefore unlawful at common law. Thirdly, the Secretary of State did not appeal on the facts of the individual cases in *AM*. Fourthly, this Court



has found that there was a serious breach of the duty of candour and co-operation. However, account also needs to be taken of the fact that the Secretary of State has succeeded on several of the issues and indeed her appeal was allowed in the *AM* set of cases because the mandatory orders made by the Upper Tribunal should not have been made. Finally, I do not consider that the conduct of the Secretary of State was such as to justify a costs order to be made on an indemnity basis.

**Lady Justice Asplin:**

178. I have had the opportunity of reading the draft judgments of both Singh and Hickinbottom LJJ with which I agree. I too consider the breach of the duty of candour in this case, whilst not deliberate, to have been very serious. It led to Soole J being materially misled. Furthermore, the relevant evidence only came to light by chance as a result of other proceedings. It seems to me that it should be borne in mind that the duty is a continuing one which must be addressed not only when first responding to a judicial review but throughout that litigation.

**Lord Justice Hickinbottom:**

179. During the last twenty years, conflicts in the Middle East and North East Africa have led to mass migration to Europe. For many migrants, the United Kingdom has held particular attraction. They have travelled through Europe to Calais, from where the English coast appears to be deceptively close.

180. From 1999, the migrants set up a variety of camps on unoccupied land around Calais, in which they awaited an opportunity to enter the United Kingdom. From 2015, the main camp was the so-called “Jungle de Calais”, in which there were several thousand occupants by mid-2016. Most were young men. But some hundreds were unaccompanied children. The numbers in the camp grew every day.

181. For most, they were unwilling to claim asylum in France. Had they done so, the provisions of Dublin III would have kicked in, and would have determined which country was responsible for considering and deciding their status as refugees. If an unaccompanied child had claimed asylum in France and had had a family member or sibling legally present in the United Kingdom, then it is very likely that it would have been in his best interests to have been transferred to the United Kingdom to be reunited; and the United Kingdom would have been responsible for determining his asylum application (see Article 8 of Dublin III, quoted at paras. 31-32 above). However, even that incentive was insufficient to persuade most unaccompanied children with family members here to make an asylum application in France.

182. The humanitarian crisis in the Calais camp was, at least temporarily, compounded in October 2016, when the French authorities announced that the camp would be cleared. As described briefly above (at paras. 9 and following), and more fully in the judgment of Soole J (at paras. 38-108), that led to discussions between the Secretary of State and the French authorities with a view to agreeing a procedure for identifying those unaccompanied minors who had close family links in the United Kingdom and,

if they applied for asylum in France and if the full Dublin III procedure had been applied to them, would consequently have been transferred to the United Kingdom for the determination of their refugee status.

183. Speaking for myself, in being placed in the position that she was, I have considerable sympathy with the Secretary of State, although of course not of the same nature or depth as the sympathy drawn by the children themselves. The children were on French soil, and were the responsibility of the French authorities. The Secretary of State had no legal responsibility for any of them unless and until a child applied for asylum in France and a request for transfer was made under Dublin III. The proposed expedited procedure, which had been under discussion prior to the decision of the French authorities to clear the camp, was in very many ways a commendable response to the humanitarian crisis that had developed in the camp. Given that the dispersal of those in the camp was set for later October, there was enormous pressure of time to work out and implement the procedure. The evidence is that individual case workers sent to France to interview relevant children, and otherwise implement the procedure as eventually determined, put enormous time and effort into the project.
184. However, once the Secretary of State had embarked upon that course, it was incumbent upon her to act lawfully in implementing it. In particular, she had a duty to act fairly. Although the conventional view is that the common law does not impose a general duty on all decision-makers to give reasons, the law has increasingly recognised that, with openness and transparency, fairness also often requires that reasons for decisions be given. In addition to improving the quality of decisions and instilling public confidence into the decision-making system, reasons not only assist the courts in performing their supervisory function over decision-makers but they are often required if that function is not to be disarmed. Reasons enable an interested party (and in due course, in an appropriate case, a court or tribunal) to understand why a decision has been made, and to come to a view as to whether it has been made lawfully or unlawfully.
185. For the reasons given by my Lord, Singh LJ – with which I entirely agree – in my view, the procedure set up by the Secretary of State to assess the eligibility of unaccompanied children to be transferred to the United Kingdom so that they could be reunited with their close families and their asylum claims could be determined here was procedurally unfair because, systemically, no or no more than inadequate reasons were given for a negative decision.
186. I therefore agree with Singh LJ that the appeal should be allowed; but that relief should be limited to declaratory relief in respect of the breach of the common law duty of fairness we have identified.
187. After particularly careful consideration, and again for the reasons set out by Singh LJ, I have also concluded that the Secretary of State breached her duty of candour to and co-operation with the court in failing to inform the High Court that at least one of the reasons why the reasons for a negative decision were thin was because of the perceived risk of legal challenge to such a decision. I need not refer again to the authorities cited by Singh LJ. As Laws LJ put it in *R (Quark Fishing Limited) v Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 at [50]:

“[T]here is... a very high duty on public authority respondents, not least central government, to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide.”

188. Whilst on the evidence I am not satisfied that the breach here was deliberate, in my view it was nevertheless a serious breach; and clearly led to Soole J being misled, and materially so. Indeed, given the procedural unfairness that this Court has found as a result of the failure to give adequate reasons in respect of negative decisions under the expedited process, the breach of the duty of candour in this regard can be seen in a particularly stark light.
189. In my respectful view, the judgments of Singh LJ in *Hoareau* (see para. 105 above) and this case serve as a timely reminder to public bodies as to both the scope and importance of the duty of candour to the court when they are responding to a judicial review.