Neutral Citation Number: [2019] EWHC 3573 (Admin)

Case No: CO/3942/2018

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/12/2019

Before :

MR JUSTICE SAINI

- -

Between :

THE QUEEN (ON THE APPLICATION OF MK)	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Martin Westgate QC and Leonie Hirst (instructed by **Deighton Pierce Glynn LLP**) for the **Claimant**
Lisa Giovannetti QC, David Manknell and Jo Moore (instructed by **Government Legal Department**) for the **Defendant**

Hearing dates: 10 – 11 December 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE SAINI

MR JUSTICE SAINI :

This judgment is divided into 11 sections as follows and an annexe:

I. Overview

1. This claim for judicial review concerns the Government's processes for dealing with claims for asylum by unaccompanied children. The central issue raised is whether the nature of the delays in the making of decisions in respect of such claims render the system as a whole unlawful in public law. The parties in their oral and written submissions have designated this group of children as "UASC" or "UASCs", and I will adopt that shorthand term in the remainder of this judgment.

2. As a class, UASCs are likely to be highly vulnerable persons in respect of whom the receiving state must take particular care in its asylum reception and evaluation processes. As identified by Jason Pobjoy in the leading text in this field, *The Child in International Refugee Law* (CUP, 2017) (hereafter, "*Pobjoy*") at p.13, international law has long recognised that a refugee child is entitled to special care and attention. As appears below, domestic law, recognising these international law obligations, also makes special and specific provision for such children.

3. Given the particular and unique vulnerability of children, the courts will naturally be concerned to subject the Government's processes for dealing with UASCs to searching scrutiny, but must always be mindful that this is an area where resource allocation issues are also highly relevant. These matters are at the fore of this claim.

4. The Claimant is a Sudanese national born in 1999. He was transferred to the UK on 23 October 2016 as part of the Defendant's 'Operation Purnia', the scheme by which the Calais refugee camp (also known as "the Jungle") was to be cleared. The Claimant was transferred under an expedited process based on the Dublin III Regulation on the basis that his brother was already legally present in the UK. The Claimant claimed asylum on arrival. After a delay (which the Defendant rightly accepts was substantial and highly regrettable) the Claimant was finally granted asylum on 9 November 2018 (these proceedings having been issued in the meantime on 8 October 2018). That is, some two years after his original claim. I will return below to the important matter of the serious mental anguish which unaccompanied children in the position of the Claimant undoubtedly suffer while they are left in "limbo" by delays of this substantial nature.

5. The Claimant advances a specific challenge to the delay in the processing of his application, but he also mounts a wide-ranging systemic challenge to the legality of the Defendant's processes as a whole, arguing that the delays in the system as regards UASCs render it unlawful on a number of connected grounds.

6. Unusually for judicial review proceedings, there was a substantial volume of written evidence deployed by both parties before me. I will refer to that evidence in more detail below (it relates principally to the systemic challenges). I note at the outset that the truthfulness and accuracy of the evidence was not disputed. The inferences that I am asked to draw from the evidence are however very much in issue. I have read and taken into account that evidence but have given particular attention to those aspects on which Counsel focussed in their written and oral submissions. I will summarise the main parts of the evidence in the course of this judgment, and in Section IV in particular.

7. There was also substantial statistical evidence put before me (some of which was compiled from Part 18 Responses to Requests for Further Information and from FOIA requests). I did not ultimately find that evidence of any real assistance in relation to the issues I had to determine. I have however attached some of the material to this judgment (in the form of the table at Annexe A). As I explain more fully below, I do not consider the statistical material provides the court with a safe and reliable basis for drawing inferences as to the nature and effectiveness of the Government's processes for dealing with UASC claims.

8. Aside from that point, the argument before me has exposed the obvious fact that a court cannot properly identify (on a generalised basis) what the correct period of time is for making a final decision on an asylum application. That matter will always be case-specific and where individual delay in a particular case cannot be justified the courts are well able to provide relief in public law.

II. Grounds of Review

9. In order to deal with matters in the same way as the parties in their oral submissions, I have re-ordered the 4 grounds of challenge (as formulated in the order of Lewis J of 12 December 2018) to put the systemic grounds of challenge first.

10. As reformulated by me in this way, the Grounds may be summarised as follows:

(i) **Grounds 1, 2 and 3** allege what the Claimant calls "systemic unlawfulness" in determining asylum claims by unaccompanied children, on the following bases which overlap in substantial respects:

(a) **Ground 1**: the Defendant's arrangements fail to give effect to international and domestic legal obligations to ensure prompt determination of asylum claims by unaccompanied children, including the section 55 duty (under the Borders, Citizenship and Immigration Act 2009), and fail to give effect to their best interests as a primary consideration. The system as operated carries an inherent and unacceptable risk of arbitrary and unfair decision-making.

(b) **Ground 2**: the Defendant's policy fails to ensure that the child's best interests are a primary consideration in the determination of asylum claims, and is unlawful as contrary to the Defendant's "best interests" duties in domestic, EU and international law.

(c) **Ground 3**: the Defendant's arrangements for determining asylum claims by unaccompanied children discriminate unlawfully against children as compared to adults, in breach of Article 14 read with Article 8 ECHR.

(ii) **Ground 4** relates to the delay in determining the Claimant's individual claim. That delay is said to be (i) "irrational and unlawful" at common law; (ii) in breach of s.55 of the 2009 Act; (iii) contrary to the Council Directives 2003/9/EC, 2004/83/EC and 2005/85/EC (respectively, the "Reception", "Qualification" and "Minimum Standards" Directives); and (iv) an infringement of Article 8 ECHR.

11. I will address the systemic challenges (Grounds 1-3) in Sections VI-IX and then consider the Claimant's specific challenge (Ground 4) in Section X. I will begin however with the legal framework.

III. Legal Framework and Sources of Law

12. As appears below, there are two sources of relevant law in this claim. First, the law relating to asylum claims generally (including those which concern children), and second, the law relating to immigration decisions concerning children and their "best interests" (not limited to asylum claims). The body of international law concerning the rights of children (specifically, the UN Convention on the Rights of the Child) is also relevant by way of context. However, as identified by *Pobjoy* (page 22), there is no single instrument in international law that sets out the full range of obligations a state owes in respect of a refugee child.

13. As to the first relevant area (asylum law), the Claimant's submissions began by referring to a number of EU Directives as establishing the legal framework for the

determination of asylum claims. I was taken to the Reception Directive, the Qualification Directive, and the Procedures Directive.

14. The Defendant did not accept that these Directives have direct effect. I did not have to resolve that issue because the Claimant's representatives accepted that the legislative provisions of domestic law (including the Immigration Rules) reflected all of the provisions of EU law relied upon. I understood that it was ultimately common ground that nothing new or further is to be gained from the Directives.

15. Having, however, considered the terms of the Directives, in my judgment they establish, at a high level of generality, the following three principles which I would consider in any event to be uncontroversial: (i) first, that asylum claims should determined as soon as possible and within a reasonable time; (ii) second, that asylum claims by unaccompanied children must be given particular priority and care in view of the potential vulnerability of such children; and (iii) third, the best interests of a child applicant must be a primary (but not the sole) consideration both in establishing procedural guarantees for unaccompanied child applicants and in determining their individual asylum claims. As will appear below, I consider that these basic principles are fully reflected in the domestic immigration law of England and Wales.

16. Turning to that domestic law (which, in part, gives effect to the Procedures Directive), the Immigration Rules include provisions concerning all asylum applications and those specific to UASCs:

> "**Applications for asylum**
>
> 328. All asylum applications will be determined by the Secretary of State in accordance with the Refugee Convention. Every asylum application made by a person at a port or airport in the United Kingdom will be referred by the Immigration Officer for determination by the Secretary of State in accordance with these rules.
>
> …..
>
> 333. Written notice of decisions on applications for asylum shall be given in reasonable time. Where the applicant is legally represented, notice may instead be given to the representative. Where the applicant has no legal representative and free legal assistance is not available, they shall be informed of the decision on the application for asylum and, if the application is rejected, how to challenge the decision, in a language that they may reasonably be supposed to understand.
>
> 333A. The Secretary of State shall ensure that a decision is taken on each application for asylum as soon as possible, without prejudice to an adequate and complete examination. Where a decision on an application for asylum cannot be taken within six months of the date it was recorded, the Secretary of State shall either:
>
> (a) inform the applicant of the delay; or

(b) if the applicant has made a specific written request for it, provide information on the timeframe within which the decision on their application is to be expected. The provision of such information shall not oblige the Secretary of State to take a decision within the stipulated time-frame.

…"

"**Unaccompanied children**

350. Unaccompanied children may also apply for asylum and, in view of their potential vulnerability, particular priority and care is to be given to the handling of their cases.

351. A person of any age may qualify for refugee status under the Convention and the criteria in paragraph 334 apply to all cases. However, account should be taken of the applicant's maturity and in assessing the claim of a child more weight should be given to objective indications of risk than to the child's state of mind and understanding of their situation. An asylum application made on behalf of a child should not be refused solely because the child is too young to understand their situation or to have formed a well founded fear of persecution. Close attention should be given to the welfare of the child at all times.

352. Any child over the age of 12 who has claimed asylum in their own right shall be interviewed about the substance of their claim unless the child is unfit or unable to be interviewed. When an interview takes place it shall be conducted in the presence of a parent, guardian, representative or another adult independent of the Secretary of State who has responsibility for the child. The interviewer shall have specialist training in the interviewing of children and have particular regard to the possibility that a child will feel inhibited or alarmed. The child shall be allowed to express themselves in their own way and at their own speed. If they appear tired or distressed, the interview will be suspended. The interviewer should then consider whether it would be appropriate for the interview to be resumed the same day or on another day.

352ZA. The Secretary of State shall as soon as possible after an unaccompanied child makes an application for asylum take measures to ensure that a representative represents and/or assists the unaccompanied child with respect to the examination of the application and ensure that the representative is given the opportunity to inform the unaccompanied child about the meaning and possible consequences of the interview and, where appropriate, how to prepare themselves for the interview. The representative shall have the right to be present at the interview and ask questions and make comments in the interview, within the framework set out by the interviewer.

352ZB. The decision on the application for asylum shall be taken by a person who is trained to deal with asylum claims from children."

17. There is no legislative provision, whether under domestic or EU law, specifying a particular time within which an asylum claim must be determined but there is an implicit "reasonable time" limitation. As the Court of Appeal observed in R (S) v Secretary of State for the Home Department [2007] EWCA Civ 546 at [51]:

> "The Act does not lay down specific time-limits for the handling of asylum applications. Delay may work in different ways for different groups: advantageous for some, disadvantageous for others. No doubt it is implicit in the statute that applications should be dealt with within 'a reasonable time'. That says little in itself. It is a flexible concept, allowing scope for variation depending not only on the volume of applications and available resources to deal with them, but also on differences in the circumstances and needs of different groups of asylum seekers. But (as was recognised by the White Paper) in resolving such competing demands fairness and consistency are also vital considerations."

18. In R (TM (A Minor)) v SSHD (Minor - asylum - delay) [2018] UKUT 299 (IAC), the Upper Tribunal specifically rejected the argument that one could "read in" to the provisions an expectation that claims would be determined within 6 months. I respectfully agree with and adopt the observations of Judge Plimmer in that case [63-64]:

> "I do not accept [the] submission that six months is an appropriate benchmark or provides an "indicative timescale" in every asylum case. I do not accept that the later 2013 Directive, which the UK did not opt in to, is capable of doing anything other than reflecting a general benchmark agreed by other States. The language of Article 23 itself does not support the submission either. The key is whether the application has been decided "as soon as possible, without prejudice to an adequate and complete examination" in all the circumstances. The elapsing of six months simply triggers an applicant being: (a) informed of the delay; or (b) being entitled to receive, upon his request, information on the relevant timeframe. …"

19. Further, neither Article 23 of the Procedures Directive nor Paragraph 333A of the Immigration Rules provide for claims by UASCs to be determined more speedily than other claims. That is a realistic recognition that the time taken to resolve claims is highly case-specific.

20. I now turn to the provisions which are specific to children. Section 55 of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act") is central to this claim. That section creates what I will refer to in this judgment as "the section 55 duty" or (as interchangeably described in oral submissions by the parties) the "best interests" duty.

21. Section 55 of the 2009 Act is in the following terms:

> "Duty regarding the welfare of children
>
> (1) The Secretary of State must make arrangements for ensuring that—
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
>
> (b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.
>
> (2) The functions referred to in subsection (1) are—
>
> (a) any function of the Secretary of State in relation to immigration, asylum or nationality;
>
> (b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;
>
> …
>
> (6) In this section—
>
> "children" means persons who are under the age of 18
>
> …"

22. It is common ground that the section 55 duty applies both to the processing of asylum claims by made by children (including UASCs) and also to policy-making at the higher level.

23. The Secretary of State has issued statutory guidance on the implementation of section 55, pursuant to section 55(3), entitled "*Every Child Matters – Change for Children: Statutory guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children*" (November 2009) ("2009 Guidance").

24. The 2009 Guidance provides that the (then) UK Border Agency (now UKVI) must act according to the following principles (at §2.7):

> "Every child matters even if they are someone subject to immigration control.
>
> In accordance with the UN Convention on the Rights of the Child the best interests of the child will be a primary consideration (although not necessarily the only consideration) when making decisions affecting children.

> Children should have their applications dealt with in a timely way and that minimises the uncertainty that they may experience."

25. The 2009 Guidance further provides (at §2.20): "There should also be recognition that children cannot put on hold their growth or personal development until a potentially lengthy application process is resolved. Every effort must therefore be made to achieve timely decisions for them".

26. In order to provide some context to the references in the 2009 Guidance to the UN Convention on the Rights of the Child (CRC), I should set out the main elements of the relevant international law which I have taken from the parties' submissions but also supplemented from *Pobjoy*.

27. The United Nations High Commissioner for Refugees ("UNHCR"), the United Nations Committee on the Rights of the Child ("UNCRC"), and the United Nations Children's Fund ("UNICEF") have issued guidance on the processing of asylum claims by child applicants.

27. UNCRC's General Comment No. 6 on the "Treatment of Unaccompanied and Separated Children Outside their Country of Origin" (2005) provides:

    (a) the particular vulnerability of unaccompanied children "must be taken into account and will result in making the assignment of available resources to such children a priority" [16]; and

    (b) refugee applications filed by unaccompanied children "shall be given priority and every effort should be made to render a decision promptly and fairly" [70].

28. To similar effect, UNHCR's "Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees" (22 December 2009) provide that:

    (a) child applicants should enjoy specific procedural and evidentiary safeguards to ensure that fair decisions are reached on their claims [65]; and

    (b) claims by child applicants, whether accompanied or not, should normally be processed on a priority basis, which means reduced waiting periods at each stage of the asylum procedure [66].

29. UNHCR and UNICEF's joint publication, "Safe and Sound: What States can do to ensure respect for the best interests of unaccompanied and separated children in Europe" (October 2014) provides that "[c]hildren who lodge an application for international protection should receive priority processing, over adult cases reflecting the importance of the time factor for children" (p.41).

30. The CRC provides a comprehensive articulation of the minimum obligations that a state owes to a child. The CRC applies to "each child within [a state party's] jurisdiction" and prohibits any discrimination "irrespective of the child's or his or her parent's or legal guardian's… birth or other status" (Article 2(1)). The rights contained in the CRC therefore apply to all children in the jurisdiction of a state party, irrespective of their immigration status.

31. Article 3(1) of the CRC mandates that in all actions concerning children, "the best interests of the child shall be a primary consideration". This includes actions undertaken by "public or private social welfare institutions, courts of law, administrative authorities or legislative bodies".

32. The UNCRC's General Comment No. 14 on "The right of the child to have his or her best interests taken as a primary consideration" (29 May 2013) ("GC14") provides authoritative guidance on the interpretation and effect of Article 3(1) in domestic law: R (SG & Ors) v Secretary of State for Work and Pensions [2015] 1 WLR 1449, [105]. It explains that the best interests principle is a "threefold concept" (at [6]): a substantive right to have his or her best interests assessed and taken as a primary consideration, and the guarantee that this right will be implemented whenever decisions are taken affecting a child [6(a)]; a fundamental interpretative legal principle, which means that where a provision is open to more than one interpretation, the meaning which most effectively serves the child's best interests should be chosen [6(b)]; and a rule of procedure, which requires that decision-making affecting a child or children must include an evaluation of the possible impact of the decision on the child or children concerned. States must show how the substantive best interests right has been respected in the decision and how best interests have been weighed against other interests, both in broad issues of policy and in individual cases [6(c)].

33. GC14 [at 87] requires that: "[s]tates must develop transparent and objective processes for all decisions made by legislators, judges or administrative authorities, especially in areas which directly affect the child or children". This includes paying special attention to the effect of delay on children [at 93]: "it is therefore advisable that procedures or processes regarding or impacting children be prioritized and completed in the shortest time possible".

34. Article 3(1) applies to "all acts, conduct, proposals, services, procedures and other measures". Importantly, it is given effect in domestic immigration law through the section 55 duty under the 2009 Act. As explained by ZH (Tanzania), [2011] 2 AC 166, by Baroness Hale, section 55 translates "…the spirit, if not the precise language" of Article 3 of the CRC into domestic law (§23). The Supreme Court also affirmed that "[t]his duty applies, not only to how children are looked after in this country while decisions about immigration, asylum, deportation or removal are being made, but also the decisions themselves" (§24). See also, *Pobjoy* at pp.201-202 in relation to the application of the "best interests" principle.

35. I have set out the international law materials at length because in the following, qualified manner, they are relevant to the court's approach:

    (i) Our domestic legislation is presumed to be in accordance with international law with the result that interpretation of ambiguous legislation may be assisted by commitments made by the UK on the international plane.
    (ii) Article 3(1) CRC does not create any directly enforceable rights. I refer to the majority decision in R (SG and others) v Secretary of State for Work and Pensions [2015] 1 WLR 1449 (that there had been a breach of Art 3(1) CRC in that case, but no breach of domestic law).
    (iii) However, as Baroness Hale observed in ZH (Tanzania) at [25] where the interests of a child are engaged the courts are obliged to assess the child's best interests and to treat them as a primary consideration, although they are not a paramount or the primary consideration.

IV. The 2017 Policy

36. The Defendant's policy in relation to the determination of UASC claims is principally found in its published policy: "*Children's asylum claims*". At the time the Claimant's claim was determined, version 2 of the policy (published 9 October 2017) was in force ("the 2017 Policy"). The policy was updated on 15 August 2019, but for the purposes of this claim the parties are agreed there is no material difference between the two versions and references below are to the 2017 Policy.

37. The 2017 Policy was supplemented by other (unpublished) targets and arrangements in relation to UASC which include the Defendant's "D182" 6 month service standard (and its replacement by a new 20% interim target) (I will return to this below); and, for much of the period with which this claim is concerned, the decision-making 'hold' on Operation Purnia cases (again, I will return to this matter below).

38. The 2017 Policy applies to any asylum claimant below the age of 18. The policy was intended to ensure, among other things, that:

    i) "immigration, asylum and nationality functions are discharged having regard to the need to safeguard and promote the welfare of children who are in the UK", including that "the best interests of the child are a primary consideration at all times";

    ii) "protection is granted swiftly to those who need it"; and

    iii) "information about the asylum claim is collected in an appropriate way with decisions made promptly and communicated to the child in a way that acknowledges their age, maturity and particular vulnerabilities".

IV. The Evidence

39. The evidence before me was of three broad types:

    i) First, evidence taken from the reports of the Independent Chief Inspector of Borders and Immigration.

    ii) Second, evidence from Ms. Soothill, the Claimant's Solicitor, and experienced third-party professionals working in the field, as to delays routinely encountered by UASCs in their applications. That evidence included a particularly impressive report (to which I make further reference below) from Elder Rahimi Solicitors entitled "*Systemic delays in the processing of the claims for asylum made in the UK by unaccompanied asylum seeking children*" ("the ER Report"); and

    iii) Thirdly, evidence from the Defendant's officials: Nick Wale - Senior Policy Adviser, Michael Dunion - Head of Operations, North and East Asylum Operations within UKVI, and Suzanne Summerill - Operations Manager for Admin and Workflow for Asylum Operations in Leeds. Mr. Wale's evidence

was addressed to broader asylum policy issues including those concerning UASCs while the statements of Mr. Dunion and Ms. Summerhill were concerned with Operation Purnia (and the "Purnia Hold") and the facts of the Claimant's case. I pause at this stage to observe that this evidence was not available to the Upper Tribunal in the two cases earlier this year which addressed claims arising out of what is called the "Purnia Hold". These cases were R (TM (A Minor)) v SSHD (Minor - asylum - delay) [2018] UKUT 299 (IAC), and R (WA, IJ, NH) v SSHD (JR 1020/2018, 15987/2018, 2002/2018) (unreported).

40. I will now summarise what the evidence establishes at a high level of generality but will come back to specific elements of the evidence when giving my conclusions later in this judgment.

41. The evidence before me clearly established that there have been concerns about delay in dealing with UASC cases for some time. In 2013 the Independent Chief Inspector of Borders and Immigration produced a report which noted that:

(a) there were significant delays between the return of the Statement of Evidence (SEF) form and the asylum interview. That was not consistent with the requirement to give particular priority to children's cases.

(b) an average interval of 141 days between asylum claim and decision in the Midlands region was "unacceptably long" and was not reasonable.

42. I pause to note that this reference to 141 days is given particular importance in the Claimant's submissions when comparing it to what are said to be the substantially longer current periods of delay revealed in the statistics.

43. In a further report in 2017, the Chief Inspector referred to a 6 month customer service standard for 'straightforward' adult claims and 12 months for 'non-straightforward' adult cases. He noted that the number and percentage of cases classed as 'non-straightforward' (and hence not subject to a 12 month target) had increased since 2015. The report recommended that the Home Office publish service standards for UASC cases and ensure that the active review process was managed to produce timely decisions.

44. A third report by the Chief Inspector in March 2018 noted that there were still significant delays in the determination of UASC claims, with 'non-straightforward' cases waiting an average of 458 days for a decision. The report concluded that the Home Office needed to revisit all of the recommendations made by the 2013 report.

45. In March 2018, Elder Rahimi Solicitors published the ER Report which identified significant delays in all stages of the asylum determination process for UASC claims. I note the following specific points in the ER Report: (a) that claims by UASCs were more likely to be treated as "non-straightforward" and so excluded from the Defendant's 6 month customer service standard and (b) concerns by practitioners that cases that had already been delayed for more than 6 months were "barriered", so causing further delay. I will return to the ER Report briefly below when I summarise the evidence concerning the mental impact and anguish caused by delay.

46. A response to a Freedom of Information request before these proceedings were issued showed that as of April 2018 there were 3,467 unaccompanied asylum-seeking children in the UK awaiting a decision on their asylum claims. Of those, 2,253 (64.9%) had been waiting for longer than six months for a decision and 1,649 (47.5%) had been waiting for longer than 12 months. Updated statistics appear to show that of 2,431 decisions made on UASC claims in 2018, 1,639 (67%) took longer than 6 months to determine, 1,250 (51%) took over 12 months and 560 (23%) took over 24 months.

47. These statistics do not however address the more pertinent question as to *why* there are such delays and specifically which aspect of the process from application to resolution is responsible for the main delays. One certainly cannot assume (for reasons which appear later in this judgment) that the sole reason for the delay is a lack of prioritisation or resource allocation by the Defendant.

48. The average length of time for determining a UASC claim was 349 days in 2017 (compared to a non-UASC claim average of 224 days) and in January-March 2018 those figures were 542 days and 347 days respectively. See Annexe A, table 5. Again, in my judgment, one needs however to approach these average figures (and those below) with substantial caution because they do not reveal when the claims being determined in these periods had been first made.

49. Concerned by these points, I asked the parties in oral submissions for what I called a "plain-vanilla" current average figure for the number of days to decide a UASC claim. I was told there was no such figure and my own consideration of the statistics after the hearing did not provide sufficient material for me to construct one of my own. Specifically, I wanted to identify an average delay between asylum claim and decision to compare it to the 141 days which the Chief Inspector had found in 2013 to be "unacceptably long" (although that was at a time before the substantial increase in UASC applications).

50. Returning to the statistics before me, it seems that of the cases decided between 1 January 2017 and 31 March 2018, 57% of decisions were not served within 6 months, 41% of decisions were not served within 12 months and 12% of decisions were not served within 24 months. Over the course of 2018, the proportion of UASC decisions made within 6 months decreased from 36.47% to 11.4%.

51. Data revealed after the issue of these proceedings shows that for the whole of 2018 the average number of days between claim and decision in decided UASC cases had increased to 476 days, as against 303 days for adult cases. In the first quarter of 2019 the average intervals had again increased to 586 and 351 days respectively.

52. As at the end of November 2018 the backlog of 'work in progress' UASC cases was 3,885, which was considered to meet the capacity of most regional decision-making units for the next 6 months. The number of UASC cases in progress has increased to the end of April 2019; whilst the proportion of cases awaiting a decision for more than 12 months has decreased since January 2019, that is at the expense of more recent cases.

53. As indicated above, I also had before me compelling third party evidence which identified broader problems with delay in the determination of asylum claims by

unaccompanied children. This included evidence from highly respected professionals including Rosalind Compton of Coram Children's Legal Centre, Mark Shepherd of the Migrant Legal Project, Helen Johnson of the Refugee Council, Rebecca Flint of Asylum Aid, Esme Madil of Shpresa, Anna Skehan of Islington Law Centre. I also had regard to a late filed witness statement from Natalia Olmos Serrano, an immigration law practitioner, outlining a large number of delay cases she has dealt with, many of which relate to UASCs not subject to Operation Purnia and the "Purnia Hold".

54. Of particular importance is that the evidence indicates the impact of delay and the consequent uncertainty on the wellbeing of the children and young people affected. In my judgment, the evidence clearly supports the following conclusions as to the results of delay: there is a significant impact on children's mental health, with several exhibiting low mood, depression, hopelessness or suicidal ideation; for child applicants with pre-existing mental health conditions, the prolonged uncertainty caused by the delay prevented improvement in their health and engagement in treatment; there is heightened anxiety, particularly for younger clients and those who had turned 18 whilst waiting for a decision; children were unable to concentrate on schooling and could not engage with support services including counselling or psychotherapy. The serious impact on mental health is also reflected in moving terms in the Claimant's own evidence for these proceedings.

55. The ER Report is to similar effect and suggests that delay has become a serious systemic problem for unaccompanied minors in the UK asylum process. The main message I take from the report is that the asylum process itself is inherently traumatising and additional uncertainty from delays is compounding this, having a significantly negative impact on young people's mental health. I was particularly struck by some of the evidence the report included from specific children.

56. By way of example, the following real life experiences are recorded in the ER Report:

(a) <u>As to the inability to get on with daily life:</u>

"The delay affected my whole life."
"It was too much for me – the long wait. I didn't know what to do. Whenever I tried to find out they were just saying just wait and the waiting was so long. The worst part is the stress. I was always wondering where I would end up. I could not function properly I could not follow my education. I felt like I was in limbo waiting for this."
"It is not easy – always so depressing. It does not make you a full person. You think a lot about it and what will happen. I cannot concentrate on my education because of that. When you think about it – Why have some people got a decision and they are living easily. Why me – what mistakes have I made? You cannot relax and have your life at ease."
"It was making my feelings horrible. It made me crazy. I couldn't sleep as I was worried about my case and scared they might reject me. When I woke up I was feeling so tired. I was always thinking about my future and it went on 2 months, 3 months, you know."

(b) <u>Impact of uncertainty</u>

"Not knowing what would happen, discourages you from living your life fully. What is the point of education if I did not get my papers? I was not thinking properly. Most of the people my age who came with me were getting their papers. But I don't know what had happened with my case… I have not achieved what I should have."

57. As will appear in more detail below, there is an additional delay factor for those UASC brought to the UK as part of Operation Purnia. This resulted in the suspension of decisions in Purnia-related cases (referred to by the parties as "the Purnia Hold"), even where positive, for a lengthy period of nearly 18 months (from 13 March 2017 to 6 September 2018 for the majority of cases). During the period when the Purnia Hold was in operation its existence was not communicated to the affected UASC nor those assisting or advising them.

58. Finally, the Claimant's solicitors have also provided an updated table of judicial review claims (and pleadings) in UASC delay cases – both Purnia-related and 'non-Purnia' – which underline the widespread nature of the problems with delay in relation to UASC asylum determinations.

59. I now turn to summarise the main aspects of the evidence of the Defendant on the wider policy issues (principally given by Mr. Wale). The evidence on the Purnia Hold will be addressed later in the judgment when I consider the specific complaint of the Claimant.

60. Mr. Wale's evidence is lengthy and detailed. I will seek to identify the broad thrust of the evidence but my account will necessarily be at high level. By reference to the table set out below, the Defendant states that the number of asylum claims from unaccompanied children remained relatively low in the years immediately before the migration crisis of 2015.

Year	UASC claims
2008	**3,976**
2009	**2,857**
2010	**1,515**
2011	**1,248**
2012	**1,125**
2013	**1,265**
2014	**1,945**
2015	**3,253**
2016	**3,290**
2017	**2,399**
2018	**2,872**

61. In 2015, the UK saw a 67% increase in the number of asylum claims from unaccompanied children from the previous year. This was followed by a further slight increase in 2016, which saw the highest number of UASC claims since 2008 when the UK received 3,976 UASC claims. Together with the broader increase of asylum intake, the increase of unaccompanied asylum-seeking children arriving in the UK placed significant pressure on the asylum system according to the Defendant.

62. The Defendant's evidence emphasises that the processes put in place by her to consider asylum claims from unaccompanied children should not be seen in isolation. Asylum claims from unaccompanied children are a relatively small proportion of the overall asylum intake that the Defendant must manage. In 2018, UASC claims accounted for just 10% of overall asylum intake. This has remained stable over a number of years – in 2017 and 2016 UASC claims were just 9% and 11% of overall asylum intake respectively, in 2015 it was 10% and in 2014 it was 8%.

63. The Defendant's system for considering asylum claims extends beyond UASC. All asylum claimants have their respective claims considered on their individual merits following a close examination of the information provided by the claimant and any information relevant to the claim. These decisions are made by a number of decision-making teams located across the UK, who are charged with making an initial decision on each case.

64. The significant increases in asylum intake – particularly from 2014-2016 – have placed growing pressure on the Defendant's resources in the context of an obligation to carefully consider each and every asylum claim. The Defendant says that this necessarily required a careful and ongoing exercise in balancing competing priorities. The Defendant emphasises in her evidence that asylum claimants – UASC and non-UASC – are often very vulnerable people, fleeing persecution or war and who may have experienced significant trauma, either in their home country or on their journey to the UK, or both. She says that she must continually balance her resources to manage the system as effectively as possible.

65. As to UASCs specifically, the Defendant says her approach is underpinned by a recognition that asylum claims made by unaccompanied children must be considered in a different way to those of adult claimants (reference is made to the Immigration Rules I have set out above). This is further recognised in the *Children's asylum claims* guidance, which provides detailed guidance to Home Office staff about '*How to assess claims from children'***.**

66. Following the creation of UKVI in 2013, 'service standards' were introduced into the work of Asylum Operations, and the wider UKVI casework teams as part of the Home Office's commitment to customer service. The introduction of service standards was considered to make targets clearer and ensure that the claimants had a better sense of when they could expect to receive a decision on their claim. The principal service standard for Asylum Operations was to make an initial decision on 98% of straightforward claims within 6 months (182 days). This target was referred to as the 'D182 target'. This system was in place from 2014 to December 2017 when the target was reduced to 90% of straightforward claims within 6 months. UKVI met the target of making an initial decision on 98% of asylum claims for 41 months consecutively. The altered approach to service standards is set out in my summary below (about the interim and new approaches to UASC claims).

67. The Defendant says that the Immigration Rules do not set out specific timeframes in which UASC cases must be concluded. UASC cases fell within the same service standard referred to above during the time that it was in place. However, the Defendant's evidence refers to the fact that UASC cases are often more complex and include additional safeguards which require additional effort and resource to complete within the same service standard.

68. Specifically, the progression of UASC claims involves a number of steps, many of which do not feature in asylum claims relating to adults, or for claims from accompanied children. These various elements are set out below under their relevant subheadings. In summary, the following steps and considerations are required in UASC cases:

- Statement of Evidence Form (SEF)
- Pre-interview actions
- National Transfer Scheme (NTS)
- Age Assessment
- Asylum Interview
- Post-interview – pre-decision actions
- UASC who turn 18 before a decision is made
- Family Tracing

69. The evidence addresses each of these stages in some detail and identifies that they are capable of (and often do) add substantial delays into the processing of UASC claims. I will return to this matter in more detail below.

70. As to the introduction of new service standards in relation to UASC cases, there is currently an interim policy. In November 2018, it was decided to move away from the six-month service standard. The six-month D182 service standard, introduced in 2014 was an important tool to monitor the handling of asylum claims following the disbandment of UKBA and the subsequent creation of UKVI in 2013.

71. However, the pressures placed on the asylum system following the migration crisis from 2015 meant that more cases were entering the asylum system than decisions made. In this context, the Defendant's evidence is that meeting the six-month service standard required the majority of the decision-making capacity within Asylum Operations. Consequently, those non-straightforward cases which could be met within the six-month service standard can sometimes take much longer to deal with for a variety of reasons. By virtue of them being non-straightforward, there will already be an identified reason for such classification. I was taken to tables which established, for some years at least, a large proportion of UASC claims were non-straightforward or delayed by reason of factors which were not the responsibility of the Defendant.

72. Concerns about the ability to meet the service standard and the decision-making capacity in the system had been raised prior to the decision in November 2018. In December 2017, it was agreed with Ministers to reduce the service standard to 90% of straightforward cases within six months. These measures were all designed and proposed to ensure that decision-making capacity was redirected to cases that had been in the system for extended periods.

73. The decision to move away from the six-month service standard was a recognition that it no longer provided an effective way to monitor the handling of asylum claims in the system and had led to an increasing number of older asylum cases in the system without an initial decision. Discussions about a new set of service standards and moving away from the D182 target were raised with Ministers from May 2018. Asylum Operations proposed ending the D182 target and engaging with NGOs about a new set of service standards. This was followed by meetings with the Immigration

Minister and the Home Secretary, after which the proposals were agreed by the Defendant in November 2018.

74. Since this decision was made, the Defendant has engaged with a large number of stakeholders in order to develop a new set of indicators that will give a more accurate and transparent measure of the "health of the system". Until a new set of service standards are agreed upon, she has been working in a different way for an interim period, with even more resource directed towards particular groups of cases, namely supported cases (i.e. those in receipt of asylum support), UASC cases and 'second outcome cases' (where the initial asylum decision has had to be withdrawn to be remade). This prioritisation is designed to improve the way that the SSHD safeguards vulnerable claimants, including children, and to reduce associated support costs.

75. In order to give effect to these priorities, case working teams have been directed to ensure that 70% of their decisions relate to cases in receipt of asylum support, 20% of decisions relate to UASC cases and 10% of decisions to second outcome cases. UASC cases typically account for a maximum of 10% of all asylum claims lodged. The proportionally higher resource allocated to these cases reflects the further priority that the Defendant says she is placing on concluding UASC claims.

76. Overall the thrust of the Defendant's evidence is that asylum claims from unaccompanied asylum-seeking children differ significantly from that of adult claimants. The steps outlined above add complexity and time to the UASC process to ensure that cases are considered in an appropriate way. Many of these additional measures can take significant time to complete and are not always in the control of the Home Office.

77. Importantly, the Defendant expressly recognises in her evidence that under the previous system in which UASC claims were determined, there was a proportion of UASC cases that were not being decided as quickly as they should have been. The Defendant tells the court that although work has made good progress it remains ongoing. At this stage it is too early to know the exact nature of a future service standard and how cases will be managed going forward. But the evidence of Mr. Wale is that the Defendant remains committed to delivering a system which produces timely and robust decision-making to those in the asylum system including children.

78. Having completed this summary of the evidence, I must begin by seeking to identify the shape of the challenge in relation to systemic issues. I need to do that because it was not always clear to me from the arguments which target certain aspects of the challenge were directed at; and what was argued to be the precise problem.

79. It was clear to me that the overriding complaint was delay. But I was not clear whether delay was said to be a problem because there is a structural fault in the system or was it being said that the system was on its face lawfully designed but was poorly put into practice? As a matter of legal principle, both types of challenge are available in public law proceedings. The latter type of challenge will for obvious reasons always be more difficult because aberrant decisions do not in themselves establish a systemic problem.

VI. The Systemic Challenge

80. In my judgment, the clearest way to identify what precisely is being challenged under this head is to look to the Claim Form and the nature of the relief being sought. The Claim Form directs one to para. [102] of the Grounds which seek the following declaratory relief (insofar as presently material):

> "A declaration that the Defendant has failed and is failing to ensure a fair and lawful system for the determination of asylum claims by UASC"; and
>
> A declaration that the Defendant's policy is unlawful, as failing to ensure that decisions in asylum claims by UASC are taken promptly, are prioritised and that particular account is taken of children's individual circumstances."

81. At my request, Leading Counsel for the Claimant very helpfully confirmed that the first declaration was not general but was confined to the issue of fairness and lawfulness arising out of the issue of delay. So one might reframe it as (in my words) "A declaration that the Defendant has failed and is failing to ensure a fair and lawful system for the determination of asylum claims by UASC [because the system fails to ensure decisions on claims are provided within a reasonable time]".

82. The second declaration seems to me to essentially overlap with the first but with the addition of the allegation of a failure to give priority and (and as I understood the submission) a failure to take into account best interests of UASCs as children.

83. Turning to the relevant legal principles which govern systemic challenges, they are to be found in general public law (not cases concerned with delay). The case law begins with the seminal judgment of Sedley LJ in R (Refugee Legal Centre) v Secretary of State for the Home Department [2004] EWCA Civ 1481; [2005] 1 WLR 2219 (CA).

84. In addition to that case, there were a large number of cases cited to me which I will not address specifically because I consider that the recent judgment of Hickinbottom LJ in R (Woolcock) v Secretary of State for Communities and Local Government and others [2018] EWHC 17 (Admin); [2018] 4 WLR 49 (DC) provides a very helpful and comprehensive summary at [49]-[68].

85. With my underlined emphasis and - in the interests of brevity - omission of parts which are not relevant, the material parts of Hickinbottom LJ's judgment are as follows:

> "51. Most cases of alleged procedural unfairness by a public body are brought by an individual who considers and asserts that, had that body acted fairly, a decision it had made affecting that individual would or might have been different. However, the courts have recognised that a scheme may be inherently unfair if the system it promotes itself gives rise to an unacceptable risk of procedural unfairness, such that the scheme (or, at least, the part that gives rise to that risk) is unlawful. Where such a public law challenge is made, it is often referred to, by way of shorthand, as a "systemic challenge". …

….

The first [case] in time was *R (Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481; [2005] 1 WLR 2219. The challenge was to the Secretary of State's decision to establish a fast track pilot scheme for the adjudication of asylum applications by single male applicants from countries where the Secretary of State considered there was no serious risk of persecution. The entire process was compressed into three days.

The court recognised that the responsibility for devising such a system was a matter for the executive (at [8]); but considered that, if the established system placed applicants at "an unacceptable risk of being processed unfairly", judicial review would be available "to obviate in advance a proven risk of injustice which goes beyond aberrant interviews or decisions and inheres in the system itself" (at [7] per Sedley LJ). The risk of injustice had to be inherent in the system itself. As Sedley LJ put it (at [5]): "There may of course be individual cases where an interview is said to have been so unfair as to have infected everything that followed, but such cases will decide nothing about the system itself". Consequently, the court refused to engage with individual complaints about the system – there were, as it happened, few – indicating that it was their task "to make an objective appraisal of the fairness of the... system". In the event, the court did not find the system inherently unfair or unlawful, because it had within it the flexibility to allow the more difficult cases to be taken out of the scheme and processed through the conventional scheme for processing asylum applications. The system could therefore operate without an unacceptable risk of unfairness (see [25]).

…..

In R (S) v Director of Legal Aid Casework [2016] EWCA Civ 464; [2016] 1 WLR 4733, the challenge was to a scheme for exceptional case funding operated by the Director of Legal Aid Casework pursuant to section 10 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012. It was said that there was a systemic failure in that the operation of the scheme frustrated the purpose of the Act by placing obstacles in the path of applicants resulting in an unacceptable risk that individuals would not be able to make an effective application.

In confirming the approach of the earlier cases to which I have referred, and dismissing the appeal on the basis that the scheme and its operation were not unlawful, Laws LJ (with whom Burnett LJ (as he then was) agreed) particularly considered the distinction between multiple instances of unfairness on the one hand, and an inherent failure of the system on the other. At [18], he said this:

"While addressing the applicable test, I should add that I think this area of the law is prone to a particular difficulty. The subject-matter is a system which has to cater for many individual cases : how then in principle does the law encapsulate the difference between an inherent failure in the

system itself, and the possibility – the reality – of individual instances of unfairness which do not, however, touch the system's integrity? The question points up the danger I have already outlined, that the judge may cross the line between adjudication and the determination of policy: he may (however unwittingly) be too ready to treat his individual criticisms as going to the scheme's legality. Even so the dividing line between multiple instances of unfairness and an inherent failure in the system is in considerable measure a matter of degree, and therefore of judgment. As the Master of the Rolls said at [29] of Detention Action, "the concepts of fairness and justice are not susceptible to hard-edged definition". The strength of the evidence supporting a challenge to the system as a whole will obviously be crucial. But as I have said, proof of a systematic failure is not to be equated with proof of a series of individual failures. There is an obvious but important difference between a scheme or system which is inherently bad and unlawful on that account, and one which is being badly operated. The difference is a real one even where individual failures may arise, or may be more numerous, because the scheme is difficult to operate."

Briggs LJ (as he then was), agreeing as to the approach, drew a distinction between "a system which, although blighted by multiple instances of unfairness, is inherently lawful, and a system rendered unlawful by inherent unfairness".

…

65. Finally, in *R (Howard League for Penal Reform) v Lord Chancellor* [2017] EWCA Civ 244; [2017] 4 WLR 92, the decision challenged was that of the Lord Chancellor to introduce the Criminal Legal Aid (General) (Amendment) Regulations 2013 (SI 2013 No 9)…

At the substantive hearing, Beatson LJ, giving the judgment of the court, once again approved and applied the approach in the earlier cases to which I have referred. At [53], he returned to the difficulty identified by Laws LJ in *S*:

"We bear in mind... the difficulty identified by Laws LJ in [S]... of encapsulating the difference between an inherent failure in the system itself and individual instances of unfairness which do not touch the system's integrity. It is, however, a distinction that the authorities require the court to draw. It would be impossible to undertake the research that would be needed to provide a full-blown statistical or socio- legal study as evidence within the time limit for judicial review proceedings. Since the claimants do not have access to prisons and prisoners, all they can do is to furnish publicly available material and evidence of examples of how the system has operated in the five areas since legal aid became unavailable and of difficulties that have arisen. One way of drawing the distinction between inherent failure and individual instances of unfairness which do not touch the system's integrity is to distinguish examples which signal a systemic problem from others which, however numerous, remain cases of individual operational failure."

…

68. I consider that these cases show a clear and consistent approach to what I have called systemic challenges. The following propositions can be derived from them.

i) Such a challenge concerns the fairness of the procedure used by a public body.

ii) Whether the procedure used is fair is a matter for the court.

iii) An administrative scheme will be open to a systemic challenge if there is something inherent in the scheme that gives rise to an unacceptable risk of procedural unfairness.

iv) Although Laws LJ said in *S* that "the dividing line between multiple instances of unfairness and an inherent failure in the system is in considerable measure a matter of degree, and therefore of judgment", there is a conceptual difference between something inherent in a system that gives rise to an unacceptable risk of procedural unfairness, and even a large number of decisions that are simply individually aberrant. The former requires, at some stage, consideration and analysis of the scheme itself, and the identification of what, within the scheme, gives rise to the unacceptable risk. As Garnham J properly emphasised recently in *R (Liverpool City Council, Nottinghamshire County Council, London Borough of Richmond upon Thames and Shropshire Council) v Secretary of State for Health* [2017] EWHC 986 (Admin) at [57] and following, the risk identified must be of, not simply some form of illegality, but of procedural unfairness. Despite the difficulties of distinguishing an inherent failure in the system and individual instances of unfairness which do not touch upon the system's integrity, that is a distinction which the court is required to draw, e.g. by distinguishing examples which signal a systemic problem from others which, no matter how numerous, remain cases of individual failure.

v) That does not mean that consideration of individual cases is necessarily irrelevant. Although some of the cases to which I have referred did not refer to specific cases at all, many systemic challenges will in practice be founded upon individual instances of unfairness; and, of course, the larger the number or proportion of aberrant decisions, the more compelling the evidence they may provide of an inherent systemic problem. In an appropriate case, it may even be sufficient to create an inference that there is such a problem. Nevertheless, in many cases, the number or proportion of aberrant decisions alone will not in itself satisfy the burden of showing that they result from something inherent in the system.

vi) Again, because the focus is upon the system, in assessing that risk, consideration has to be given to "the full run of cases that go through the system", i.e. not merely consideration of a particular case or cases, or a hypothetical "typical" case.

> vii) Although a systemic challenge differs from most judicial reviews in that it does not focus upon the consequences of unlawfulness for a particular individual or group of individuals – but rather upon the administrative system itself, and the risk of procedural unfairness arising from that system – the basic requirements of a judicial review are still in place...
>
> viii) Whilst there is a distinction between aberrant decisions which result from individual operational failure and those which signal a systemic problem, in considering systemic failure, there is no hard line between written regulations, policies etc, and their implementation. For example, in S, the challenge was based upon a systemic failure in the operation of the scheme, e.g. by the forms that were used being impracticable for those without legal representation in circumstances in which such representation was (quite successfully) discouraged. In *Howard League for Penal Reform*, the removal of funding was held to be unlawful because of a failure to replace the legal assistance which that funding had provided with any other form of assistance that would enable a prisoner to participate effectively. These could each be categorised as "operational", in the sense that they were failings in the implementation of policy – but the challenge was, properly, made to the executive policy (in the form of regulations or written policy) itself. An inherent risk of procedural unfairness may arise out of either the terms of an executive policy (in whatever form that might take) or its implementation.
>
> ix) The threshold of showing unfairness is high; but that is tempered by the fact that the common law demands the highest standards of procedural fairness when the life or liberty of the subject is involved.
>
> …".

86. In approaching the systemic challenges, I will apply the principles and schema set out by Hickinbottom LJ (identified immediately above at para [68] of the Woolcock case).

87. Using that schema, it seems to me that Ground 1 (which is summarised in the Claimant's Skeleton at para. [55] as being an evidence-based challenge where it is argued the material "…demonstrates widespread, significant and persistent delay in determining asylum claims by unaccompanied children…") is not principally a structural challenge in the sense of a complaint that the system/policy is itself structured defectively but more a complaint that in practice the system must be failing (as a matter of inference) because of the evidence of widespread delay. In public law terms, I interpret this as a complaint of multiple aberrant decisions (here, non-decisions by way of delay) which result from individual *operational* failures and which thereby signal a systemic problem. That is a perfectly legally cognisable form of systems challenge. The Claimant says that I should draw an inference that the system is failing to ensure the duties (priority and best interests) owed to UASCs are being satisfied because the evidence establishes serious delays.

88. By contrast Ground 2 (legality of the Defendant's policy) is more of a conventional structural challenge. It is argued (Claimant's Skeleton para. [96]) that (although this

ground overlaps with the systemic unlawfulness in Ground 1), the Defendant's 2017 policy identifies a policy intention to ensure that protection is granted "swiftly to those who need it" but does not give any guidance as to what a swift decision is in this context or how this policy intention is to be implemented. The policy, it is said, fails to ensure that the section 55 duty is taken properly into account, and/or that UASC claims are prioritised where appropriate. So that challenge requires one to look to the terms of the policy itself on a structural basis.

89. Ground 3 (Article 14 ECHR) is also a conventional structural challenge under which it is argued that the policy discriminates against children in the application of Article 8, taken together with Article 14 ECHR. It is said to be a general policy or measure which has disproportionately prejudicial effects on a particular group and which cannot be objectively or reasonably justified and which may be discriminatory notwithstanding that a prejudicial effect was not intended (Claimant's Skeleton, para. [98]).

90. I turn then to Ground 1 which is principally an "evidence-based" systemic challenge.

VII. Ground 1

91. I will begin by summarising (and not repeating at length) the essential submissions of the Claimant and the Defendant before proceeding to my conclusions. I have already set out a summary of the evidence before me in Section III above and will make such references to it as are necessary for my reasons to be understood.

92. Leading Counsel for the Claimant forcefully argues that the evidence before the court demonstrates widespread, significant and persistent delay in determining asylum claims by unaccompanied children. He says that this goes "far beyond" aberrant individual decisions and enables me to draw the inference that the system adopted leads to unlawful delay. Particular reliance is placed on the fact that claims are routinely delayed for significantly longer than 12 months. The Claimant fairly accepts that this does not, in itself, demonstrate unlawfulness, but he argues that the Defendant was until November 2018 operating its own internal six month service standard, and it previously accepted the ICI recommendation of a 12 month service standard for 'non-straightforward' cases. This is argued to suggest an indicative timescale for adult cases. Overall, the Claimant says that the Defendant's argument that there are complicating features of UASC cases does not come close to showing that there is any reasonable basis for routinely delaying decisions in children's cases for so long.

93. The Claimant also argues that the scale and extent of the delay also leads to an inference that the Defendant has breached the section 55 duty by failing to have regard to the need to safeguard and promote the welfare of relevant children (since the delays that have taken place are, on the face of it, incompatible with the best interests of the affected children). The Claimant argues that the section 55 duty requires (in this context) that the system for the determination of UASC cases is designed with due regard to the need to safeguard children's welfare by minimising delay and consequent harm to children's welfare.

94. The Claimant further submits that the Defendant's explanations not only fail to rebut the inference which he invites to me to draw, but actually support it because they demonstrate the following: no adequate arrangements have been put in place capable of dealing sufficiently promptly with applications from UASC or to effectively monitor and react to such delays; the Defendant has failed to implement a system that complies with her own published policies and guidance which require her to determine UASC cases promptly and to prioritise claims by children; despite long-standing concerns about delay, the Defendant has not pointed to any assessment that has been carried out to evaluate the actual impact of delay in decision-making on children (including unaccompanied children), or any steps taken to ensure that effect is given to the best interests principle by minimising such delay. Instead, argues the Claimant, the Defendant's explanations in evidence focus on what are said to be additional safeguards in UASC cases without considering the harmful impact of delay in its own right. This is said to be a breach of its duty under section 55.

95. The Defendant's opening submission was that there is a problem with the Claimant's starting point that there is "widespread, significant and persistent delay" in determining asylum claims by UASCs. She submits that the Claimant nowhere defines what is meant by "delay" in this context. The Defendant agrees that administrative decisions should be made within a reasonable time. But she argues that if, by asserting that there are widespread delays, the Claimant means that UASC decisions generally are not made within a reasonable time, and are thus unlawful, the argument simply asserts that which it sets out to prove. Particular reliance is placed on the submission that the Claimant fails to identify the yardstick by which a lawful/reasonable time can properly be measured, in a context where (as here) there is no provision specifying a time within which an asylum claim should be determined, whether made by an adult, a family or an unaccompanied child.

96. In her powerful oral submissions, Leading Counsel for the Defendant placed particular emphasis on the fact that the process for considering UASC claims differs in several important ways to adult asylum claims, owing to the safeguarding duties towards children. It was argued that these duties underpin the Defendant's approach to the determination of UASC claims and the safeguards therein. I was also referred to the fact that a major exercise is underway to develop and agree a new service standard for the entirety of the asylum system, and there is agreement that whatever the new service standard, UASC and other potentially vulnerable cases should be prioritised for action. The Defendant points to the fact that whilst this work is on-going, she has put interim measures in place to drive up the numbers of decisions made on specific cohorts, including UASC.

97. Having summarised these submissions at a high level, I turn to my conclusions on Ground 1 (having regard to the high hurdle identified in the case-law I have cited above concerning inferences from multiple aberrant operational decisions). For the reasons set out below, Ground 1 fails. Those reasons are essentially based on a failure of the evidence to establish what the Claimant seeks to prove.

98. In my judgment, the fact that an administrative system is not operating as well or efficiently as the Government, the public, or the Courts might wish, does not in and of itself amount to unlawfulness as alleged. That might be the case if the public body in question refused to recognise the problems or to consider whether steps could be taken to institute improvements. But here not only has the Defendant acknowledged

that decisions have taken longer than is desirable, she has taken action to institute a comprehensive review and consultation exercise with a view to reforming the system of decision making in asylum cases. In the meantime, the Defendant has introduced an interim system of prioritisation. Both in the short and longer term, she is taking action to address the problems that have arisen (largely due to the fluctuating demands on the system from year to year, with the overall trend demonstrating a steady increase in the number of claims from UASCs – as I describe below when I address the evidence in more detail).

99. In my judgment it would be wrong in principle for the court to impose impossible or impracticable standards, or hold that the Defendant is acting unlawfully, when she is taking reasonable steps to improve the efficiency of a complex operational system in the face of increasing demand.

100. Further, with particular reference to UASC cases, whilst measures are being taken to improve the decision-making processes, I do not accept the Claimant's core submission that such cases should in general, be decided within a shorter timescale than asylum claims by adults or families.

101. That is because striking the appropriate balance between speed and safeguards, in an area where best interests considerations as well as specific procedural protections are in play, may require that more time is allowed for various stages of the decision-making process. There is a careful balance to be struck between speed and safeguarding, and this is an area in which views may reasonably and legitimately differ. Indeed, the Defendant has been consulting stakeholders on this very question. Certain of those representing claimants would wish to see extended timetables for particular processes for UASCs.

102. I have summarised the factual evidence above but need to address the statistical material. The Claimant's Skeleton very helpfully refers to application numbers going back to 2008, before the creation of UKVI and the introduction of service standards in 2013. I have replicated this material in Annexe A and taken it into account.

103. The Defendant has also recently provided updated statistics up to June 2019 which can be tabulated as follows (with some modification of titles for clarity made by me):

Year	**All Applications (total)**	**Decisions (total)**	**Applications (UASC)**	**Decisions (UASC)**	**UASC claims percentage decisions made**
2013	23,584	17,665	1,265	**1,112**	**6.31%**
2014	25,033	19,783	1,945	**1,270**	**6.43%**
2015	32,733	28,623	3,254	**1,930**	**6.75%**
2016	30,747	24,895	3,290	**1,951**	**7.83%**
2017	26,547	21,269	2,401	**2,040**	**9.59%**
2018	29,504	21,084	3,063	**2,151**	**10.17%**

2019	32,693	20,366	3,496	**2,755**	**13.58%**

104. The Defendant has had difficulty in keeping pace with the dramatic increase in asylum claims by UASCs (which can be seen to have more than doubled in the 6 years from 2013-2019). The following two points appear to me to be clear on the basis of the statistics: (a) the number of UASC cases decided has increased significantly from 2013 to 2019: 1,112 decisions in 2013 to 2,755 decisions in the current year (2019); and (b) the proportion of decisions being made that are UASC cases has also risen year-on-year, from 6.31% in 2013 to 13.58% of decisions made in 2019 being in UASC cases. In an area where, as I have stated above, statistics can be misleading these two conclusions appear to me to be incontrovertible.

105. In my judgment, the statistics and evidence show that real priority and significantly increasing resources have been, and are being, devoted to deciding UASC cases. The Claimant seeks to analyse these figures in terms of percentages as against applications, but such a metric is in my judgment highly questionable. It depends upon the highly variable number of applications, which is outside the control of the Defendant. All that the Defendant can control is the resourcing and prioritisation that is given to UASC claims at any particular time.

106. The statistics do not in my judgment demonstrate a failure of systemic proportions which would justify intervention on public law principles. The statistics and evidence of Mr. Wale show rising numbers of claims, serious attempts to deal with these claims and delay which is highly regrettable. The statistics and evidence do not support the submission that the delays are because of the failures of the system or the lack of priority being given to UASC claims.

107. As I have identified above, the other evidence of delay relied on by the Claimant consists principally of third-party evidence from various organisations assisting UASC with their asylum claims, and matters raised by the Chief Inspector of Borders and Immigration, and in particular the concerns raised about delays in the determination of asylum claims by UASC. I accept the broader nature of the points made in that evidence but it is not disputed that there can be lengthy delays in waiting for a decision, nor that it would be desirable for the length of time to be reduced. The key point is that the Defendant has not ignored those problems, but rather has taken, and is taking, rational steps to address them.

108. On a separate issue, in my judgment, the special protections for UASC are important in this case for several reasons which directly relate to delay. First, to the extent that the discrepancy between the length of time taken, on average, to decide adult asylum claims as against asylum claims by UASC calls for explanation, it provides that explanation. Many of those procedural protections will have an impact on the time taken to make final decisions in individual cases. Second, it demonstrates how the Defendant has (in accordance with the section 55 duty) had regard to the need to safeguard and promote the welfare of UASC, and given effect to the provisions in the Procedures Directive designed to give effect to the best interests principle. Third, it evidences, together with the resourcing devoted to UASC cases, the priority given to UASC cases, as required by the Immigration Rules.

109. The special protections are identified in the witness statement of Nick Wale. That evidence is important and in my judgment it answers a substantial part of the claim. The protections concern, in summary:

(a) Training and expertise: UASC claims are considered only by staff that have special training and expertise. This is required by Immigration Rule 352ZB, and gives effect to Article 17 of the Procedures Directive. Guidance specifies the training that such staff need to complete, and ensures that the decision-maker takes account of the applicant's maturity, and gives greater weight to objective indications of risk than to the child's state of mind and understanding of their situation. It also ensures that all "child-specific considerations" are taken into account, as well as differences in how the credibility of a child claimant should be assessed against that of an adult claimant. Significant amounts of time are required for staff to complete this training: the initial foundation training programme (applicable to all decision makers and not only to those dealing with UASCs) lasts for 5 weeks, and there are then 3 separate courses that must then be completed before a decision-maker can deal with a claim from an unaccompanied child. The need for special training, coupled with the high turnover of asylum-decision staff, gives rise to significant challenges in ensuring that there are a sufficient number of suitably trained and qualified staff to consider UASC claims. This reduced pool of specially trained staff means, inevitably, that the Defendant has less flexibility in interviewing and deciding UASC claims as opposed to adult claims.

(b) Statement of Evidence Form: The initial mandatory stage of completing and returning the SEF, which is unique to UASC claims, may take a substantial period of time (potentially well over 2 months) and must be done before the interview can proceed. Indeed, in the evidence put before me as regards other JR claimants (see para. [58] above), I was taken to two chronologies which identified very substantial periods of delay due to a claimant's delay in the SEF completion. In the Claimant's own case at least 6 months of delay was because of extra time he or his representatives sought.

(c) Input from social worker: There are additional processes to be undertaken prior to the substantive interview in UASC cases, over and above, or different from the adult process. The processes are designed to ensure that input is gathered from the child's social worker before a decision is taken on their asylum claim. One step in this process is the 'UASC case review', usually a telephone meeting between the Home Office decision-making team and the child's social worker. This meeting is specifically provided for in the Children's Asylum claims guidance. The Home Office also seeks the input of the child's social worker through the completion of the Current Circumstances Form ("CCF") Part 1. The CCF Part 1 asks the local authority to provide a range of information about the child. Its purpose is to ensure that the Home Office has the opportunity to consider any information which may not be known by the Home Office but which the child's social worker believes to be relevant to the child's circumstances and which should be considered as part of the Home Office's decision on the child's asylum claim.

(d) National Transfer Scheme: The situation is made more complex as a result of the NTS, which may result in the child's representative and/or social worker changing part way through the process, causing additional delay. In 2017, there were 827 UASC referred into the NTS and in 2018, 486 UASC were referred, so a significant number of claims by UASC were vulnerable to such delays.

(e) Age assessment: Another factor that can contribute to a more prolonged and complicated asylum process for UASC is doubt about an individual's claimed age. Most asylum claimants who claim to be children do not have any satisfactory documentary or other evidence to support their claimed age. Many are clearly children, but in cases where there is doubt about whether a claimant is a child, they will be referred to a local authority for a *Merton* compliant age assessment. Where there is an age dispute, the interview and/or decision will sometimes have to be deferred until the matter is resolved.

(f) The asylum interview: Paragraph 352 of the Immigration Rules states that a UASC over the age of 12 shall be interviewed about the substance of their claim unless the child is unfit or unable to be interviewed, and expressly provides that such an interview must be conducted in the presence of a parent, guardian, representative or another adult independent of the Secretary of State who has responsibility for the child. When a legal representative is not available, or the child has not been able to secure legal representation, the asylum interview cannot go ahead and must be re-scheduled. This is not the case for interviews with adults, which can, and often do, proceed without legal representation. The Defendant could only resolve this problem by dispensing with the safeguards.

(g) Family Tracing: Regulation 6 of the Asylum Seekers (Reception Conditions) Regulations 2005 requires that, '(1) So as to protect an unaccompanied minor's best interests, the Secretary of State shall endeavour to trace the members of the minor's family as soon as possible after the minor makes his claim for asylum.' There is no equivalent family tracing duty in respect of adult asylum seekers or accompanied children. The process of carrying out family tracing will, in some UASC cases, add further time to the asylum process.

110. The Claimant does not seek to challenge the point that these processes add time and complication to claims for asylum by UASCs but Leading Counsel argued that Mr. Wale's statement was deficient because he did not quantify with evidence how (in terms of timing) these processes added to delay. I consider that a wholly unrealistic submission for three reasons.

111. First, no quantification is possible with any degree of certainty: it is case specific. Second, the point being made by the Defendant was a broad one, namely that additional features of UASC cases may require more time than adult cases - that is an obvious and modest proposition and does not require arithmetical proof. Third, in any event, the court is not concerned with an auditing exercise. It is simply concerned with testing whether the inference which the Claimant asks the court to draw (that

delays equate to unlawfulness) is sound. The fact that substantial delays may occur (because the best interests of the applicant are being protected) demonstrates that the Claimant's case based on just an assertion of delay is not a safe basis to find systemic failings.

112. In writing but not orally, the Claimant advanced an argument to the effect that the D182 target (that is, a goal of deciding straight-forward claims within 182 days) was also unlawful as it was unpublished, and inherently discriminated against UASCs. Assuming it is still pursued, I reject that argument for the following reasons.

113. First, the policy was legitimately intended to ensure that decision making is as prompt as possible, having regard to the need for good quality decision making and a procedure that properly recognises and accommodates the specific vulnerabilities of UASCs; second, the relevant service standard was universal, and required an initial decision on 98% of straightforward claims within 6 months (182 days). As Mr. Wale explained in his evidence the same target applied in respect of UASC claims, notwithstanding the additional complexities that relate to such claims. That statement also explains how to designate whether a claim is or is not "straightforward" for these purposes, and that a claim cannot be classified as non-straightforward simply by virtue of being a UASC claim, nor because the 182 day target will not be met.

114. As to the argument (paragraph [85] of the Claimant's Skeleton) that the D182 standard was unlawfully "neither published nor transparently applied", I do not accept this argument. It is not identified why there was an obligation to publish, and still less, publicise the D182 standard. The standard was an internal document to help decision makers prioritise work appropriately and efficiently. As I interpret the evidence, it was not a "policy", and did not affect the rights or obligations of those applying for asylum in any way, nor did the standard itself indicate the length of time within which the law requires an asylum application to be determined. In any event, the standard was not secret or unknown. It was, for example, referred to in the Chief Inspector's Report in 2017. Further, as set out in the Defendant's evidence, she has now consulted widely on its replacement. Finally, I remain unclear what this adds to the Claimant's claim: he now knows of the standard, it has been superseded, and there has been consultation on its replacement.

115. Although I could stop here in relation to Ground 1 (because the claim attacked the system as at November 2018), I should for completeness refer to the fact that the Defendant has also provided evidence that she is in the process of developing new service standards which will govern the determination of UASC claims.

116. Although this does not equate to an acceptance that the previous system was unlawful, it does reflect (i) an acknowledgement that decisions have, regrettably, been taking longer than would be desirable, and (ii) a commitment to improving the system. I understand that discussions with Ministers about developing a new set of service standards have been ongoing since May 2018 and in August 2018, Asylum Operations proposed ending the D182 target and engaging with NGOs about a new set of standards.

117. In November 2018, the proposal to end the D182 target was agreed by Ministers. In order to effect some improvements in the shorter term, while a new set of service standards are being developed, the Defendant has implemented an interim policy

which is intended to ensure that resources are directed to the most appropriate areas of decision making, having regard to both individual need and the effective use of resources/public funds. I understand that priority has been given to three particular groups of cases, namely UASC cases, supported cases (i.e. those in receipt of asylum support), and 'second outcome cases' (where the initial asylum decision has had to be withdrawn to be remade). This prioritisation is designed to improve the way that the Defendant safeguards vulnerable claimants, including children, and to reduce associated support costs.

118. In order to effect this prioritisation, from January 2019 the Defendant set each regional decision-making unit specific monthly targets to decide a certain proportion of each type of case, with the projected effect that each month 20% of all cases decided nationally will be UASC claims. As explained by Counsel for the Defendant revised forecasting has meant that the percentage split for UASC cases is in fact approximately 15%, although casework teams remain tasked with meeting the 20% target.

119. Counsel for the Claimant criticised the 20% target as not genuinely reflecting prioritisation, but given the proportion of UASC claims as set out in the table above (with UASC applications in 2019 being 10.69% of applications overall), such criticism is not in my judgment well founded.

120. In conclusion, I find that the evidence before me as to the serious delays in the making of asylum decisions in UASC cases does <u>not</u> enable me to infer that the system is unlawful. The evidence base relied upon by the Claimant does not identify any safe average for the processing of such cases, and they are in themselves cases which may be more complex than adult cases. Indeed, the best interests of children in fact mandate the need for more complex procedures. I also reject the submission that I should proceed on the basis that something like a 6 month period should be a standard cross-check for delay. The evidence before me shows that UASCs claims can easily be delayed beyond 6 months from time of application for reasons which are nothing to do with culpable delay by the Defendant.

121. Further, I find on the facts that the Defendant had rational procedures and policies in place to respect her obligations in domestic and international law to UASCs; and that she devoted resources which appropriately recognised those obligations. The fact that one would hope to process UASC applications more rapidly for obvious humanitarian reasons and the fact there are clear delays does not mean that the past and current systems were unlawful in public law.

122. I make it clear however that the evidence before me does demonstrate very substantial delays in the processing of UASC applications and that such delay has very distressing consequences (I refer here in particular to the ER Report). Even allowing for the fact that some of these delays arise from matters concerning the inherently more complex nature of such applications (and the safeguards built into the system to deal with complexity) an argument can be made that more resources should be devoted to such applications.

123. That however is not an argument of law but of policy. The courts are neither institutionally competent, nor endowed with appropriate expertise, to enable them to prescribe a judicially invented standard long-stop for all UASC claims or to decree

how much in terms of resources should be deployed by Government. It always remains open to any individual claimant to seek relief from the courts on the basis that his or her claim has not been resolved within a reasonable time and with appropriate priority, as required by domestic law.

124. However, what the courts cannot do is embark upon a macro-economic and social policy designing exercise. At its core that is the real basis of the Claimant's systemic attack, albeit finely and persuasively dressed in the clothes of a public law challenge.

VIII. Ground 2

125. The Claimant submitted that this ground overlaps with the systemic unlawfulness ground I have considered above. He argues that the Defendant's 2017 Policy identifies a policy intention to ensure that protection is granted "swiftly to those who need it" but does not give any guidance as to what a swift decision is in this context or how this policy intention is to be implemented. So, it is argued, the policy fails to ensure that the section 55 duty is taken properly into account, and/or that UASC claims are prioritised.

126. I reject this ground. Aside from the reasons given above in relation to Ground 1, there are in my judgment numerous features of the way in which UASC claims are decided which show the extent to which such claims are the beneficiaries of special attention and prioritisation. I have found that the Defendant's approach does seek to balance the need for priority, accommodation of the special needs of UASCs, while also taking into account resource allocation issues.

IX. Ground 3

127. The Claimant argues that claims by UASCs are subject to the same indicative standard as those brought by adults, and that the Defendant thus 'treats unlike cases alike', and/or fails to address the disparate impact of such procedures on UASCs as compared with adults, contrary to Article 14 ECHR. I note that the Claimant does not allege that this causes a breach of Article 8 ECHR itself, but that it breaches Article 14 in a context where it is within the ambit of the right to respect for private life under Article 8 ECHR.

128. The principle upon which the Claimant relies derives from the decision of the ECtHR in Thlimmenos v Greece (2001) 31 EHHR 15, in which the Grand Chamber said [44]:

> "The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification … However, the Court considers that this is not the only facet of the prohibition of discrimination. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."

129. I reject this ground. As submitted by the Defendant this complaint is amenable (mutatis mutandis) to the same "short answer" that the Court of Appeal gave to the Article 14 claim in R (A) v CICA [2018] 1 W.L.R. 5361: "Namely, in so far as their situations are significantly different, [UASCs] are treated differently from others" (see paragraphs [94] – [95]).

130. As I have explained above, the usual processes for considering and determining asylum claims have been substantially modified in respect of children, in order to reflect their particular vulnerability and need for support and assistance in advancing such a claim, as well as the fact that they may be less able to provide clear and consistent explanations of the matters giving rise to the claim. Moreover, despite the special safeguards and procedures applicable in children's cases, the same overall indicative time frame was applied: everything was still expected to be accomplished within 6 months (at the time material to this claim).

X. The Claimant's Specific Claim

131. There was a clearly a substantial delay between the Claimant making his asylum application on 23 October 2016 and its eventual resolution in a decision dated 8 November 2018. I will address the detailed chronology below, but I first need to identify the nature of the legal complaints made on behalf of the Claimant.

132. The claim was issued at a time when he was still waiting for his asylum claim to be determined but (he now having been granted asylum) the claim is not academic since the Claimant may legitimately still proceed with his complaint about the unlawfulness of the delay in itself. As to the delay in his individual case, the Claimant argues it is unlawful at common law, in breach of the section 55 duty, contrary to the relevant Directives, and in breach of his right to private life under Article 8 ECHR. I will put to one side the complaint about a breach of the Directives since they essentially reflect domestic law.

133. It is important to note at the outset that at an earlier stage in these proceedings, the Defendant had in fact conceded unlawfulness at common law. So, the following was said by Counsel in his skeleton argument for the Defendant opposing permission in the hearing before Lewis J on 12 December 2018:

> "In two recent cases, the Upper Tribunal has considered similar delays in respect of minors who arrived in the UK via Operation Purnia:
>
> In *TM v SSHD* [2018] UKUT 00299 (IAC) (Upper Tribunal) the Applicant was also transferred to the UK under Operation Purnia on the basis of a claimed family link. He arrived in the UK and made an asylum claim on 28 October 2016. He attended an asylum interview on 31 May 2017, after the intervention of his lawyers, and following attendance at an interview that had been ineffective on 17 March 2017. No decision had been taken on the Applicant's application by the

> time of the substantive hearing on 8 August 2018. The Court made reference to some evidence in respect of a "hold" that had been placed on Operation Purnia/Calais asylum claims in April 2017, but found the evidence unsatisfactory on this point. The Upper Tribunal found that the delay had been unjustified and unlawful.
>
> In *WA, IJ, NH v SSHD* [2018] (unreported) the Upper Tribunal considered claim by three Applicants challenging the failure to make a decision on their asylum claims. All three were originally in the camp in Calais and were brought to the UK from France as a result of Operation Purnia. All three in this case arrived under s.67 (the Dubs Amendment) rather than the expedited process. All three made asylum claims on 5 December 2016 which had not been decided at the time of the hearing on 12 September 2018. The UT ruled that in the facts, the delay in those cases was unlawful.
>
> In light of the delay in the Claimant's case, and consistently with the reasoning of the UT in *TM* and in *WA, IJ and NH* the SSHD accepts that the delay in deciding the Claimant's case was unjustified and unlawful."

134. The Defendant seeks to resile from this concession before me. As I understand the Defendant's position, it is said that the TM and WA cases were decided without the benefit of the witness statements which are before me concerning, in particular, the Purnia Hold. The Claimant (somewhat to my surprise) does not seek to hold the Defendant to her concession on the basis that this claim was intended to test the lawfulness of the Operation Purnia hold and it was therefore not appropriate to shut out arguments in relation to it.

135. Accordingly, I will proceed to consider the challenge on the merits by beginning with the chronology (which I base on a combination of the evidence of both parties and my supplementing of the agreed chronology). The chronology of events is important because it will allow one to isolate which delays are the responsibility of the Defendant to account for (in contrast to those delays which are normal parts of the asylum process).

136. The Claimant was one of a large number of individuals living in the Calais camp at the time of its closure in October 2016 who were screened by the UK authorities as part of the Anglo-French operation known as Operation Purnia. This process involved UK officials operating on French territory in order to identify two groups of children: (a) those who had qualifying family links as defined in Article 8 of the Dublin III regulation by what was known as the "expedited process", and (b) those who were eligible under the criteria devised under section 67 of the Immigration Act 2016 (the 'Dubs Amendment').

137. As a result of the expedited process, the UK was satisfied that the Claimant was a minor and had a qualifying relative in the UK, and he was transferred to the UK through this process. I understand that he was one of approximately 550 children to be so transferred at this time.

138. The Claimant claimed asylum on the day of his arrival in the UK, 23 October 2016. He was aged 17 years and just over 9 months at this time. His asylum claim was registered on the General Cases Information Database ("GCID") and his case was allocated to the Cardiff Asylum Intake Team.

139. On 30 November 2016 the Claimant's assigned social worker contacted the Case Management Team to advise that his statement of evidence ("SEF") form would be completed in January 2017 when his representative was able to meet with him, and requested an extension of time to provide the necessary documentation in support of his claim. This was approved on 23 December 2016. A further extension was requested on 19 January 2017 due to a delay in accessing legal support.

140. The Claimant turned 18 on 1 January 2017, just over two months after arrival. He submitted a statement in support of his application dated 20 February 2017. His completed SEF was received on 3 March 2017 and his interview requirements were noted. His Home Office file was created on 4 March 2017. Arrangements were made for his interview and the assigned Interviewing Officer contacted his social worker to request any preliminary information in relation to whether his family could be traced, and to explain the process

141. On 13 March 2017 an Instruction was issued to Home Office staff not to serve any decisions refusing asylum to any UASC applicant who had arrived during Operation Purnia until further notice. The reasons for this hold are explained in the Defendant's evidence which I summarise as follows. It had become apparent that a considerable number of the children who had arrived under Operation Purnia were likely to have their asylum claims refused, and consideration was being given to the possibility of making special provision for such claimants, who would otherwise be liable to removal once they reached adulthood.

142. The Claimant's substantive asylum interview took place on 7 April 2017.

143. On 21 April 2017, a hold was placed on interviewing, deciding and serving all Operation Purnia cases, regardless of the anticipated outcome**.** The reason given in the Defendant's evidence is that the hold was only anticipated to last for a relatively limited period, and there was a concern not to devote limited resources to making decisions that could not be served.

144. On 27 July 2017 a further Instruction was issued in respect of Operation Purnia cases, which provided that outstanding interviews were to be completed by 15 September 2017, that decisions could be written (although only during overtime so as not to divert resources), but that the only decisions to be served could be on those who were claiming to be adults and who were to be granted asylum.

145. I understand that from early August 2017, decisions to grant asylum also began to be served in Operation Purnia cases.

146. The written decision in the Claimant's case was completed on 6 November 2017. I have considered that decision and the refusal is based essentially on credibility grounds. A record of the decision was entered onto the GCID and a refusal letter was drafted on 6 November 2017. However, due to the hold, the decision was not released to the Claimant or his representatives, but was simply kept on file.

147. The evidence suggests that at this point decisions were being drafted but only grants of asylum would be served as all Asylum Operation teams were still awaiting policy guidance on how to proceed with any case where asylum was to be refused. The decision in respect of the Claimant was not checked at this stage. The hold remained in place in respect of refusals.

148. The Defendant's evidence is that in the event, it took substantially longer than anticipated to reach a final policy decision, which was made on 12 July 2018 and agreed by Ministers.

149. On 6 September 2018 a decision was taken that all Calais Leave cases would be decided by the Leeds Asylum Teams. The process that was adopted was that once a decision was made, the Senior Caseworker ("SCW") and her Technical Specialists would perform a "Second Pair of Eyes" ("SPOE") check on the case. This involved reading all of the documents on the applicant's file and all the notes made on the Defendant's database, then assessing whether the correct decision had been reached and whether any standard wording used was correct. Only in cases where the SCW had been made aware of the material facts of the claim and was happy that a grant of asylum was appropriate would she allow a decision to be served without SPOE. All cases where there was a refusal of asylum were SPOE checked.

150. The Claimant's file was accordingly forwarded from Cardiff to Leeds on 10 September 2018 for a decision. Because all of the decisions drafted had been made some time before, the Leeds office decided locally that all decisions would be made afresh. This approach ensured that the most recent country information was used. The decision-makers were considering eligibility for what became 'Calais Leave' (see below), should the decision be to refuse asylum and Humanitarian Protection.

151. On 13 September 2018, the Government announced the introduction of 'Calais Leave', which was to be implemented by new Immigration Rules, 352I-352X, laid before Parliament on 11 October 2018 and to come into effect on 5 November 2018.

152. In the meantime, on 8 October 2018, the Home Office had received an unsealed Judicial Review claim form and bundle in respect of the present claim. On 26 October 2018, the Home Office filed an Acknowledgement of Service, along with a Consent Order agreeing to make a decision on MK's claim within 28 days of that order being sealed.

153. The Claimant's case was reviewed by a caseworker in Leeds on 21 October 2018 and 22 October 2018, a grant of asylum was drafted without reference to the previous decision. The decision-maker made that consideration based on the evidence on file, the merits of the claim and the policy on Sudanese cases. Again, as is noted in the decision letter, the lack of detail was taken into account, however the decision-maker considered that the fact the claimant was a minor at the time the events took place meant that the SSHD could accept his account. On 25 October 2018, a Technical Specialist completed SPOE check. The Technical Specialist agreed that the correct decision had been reached and permission was given by Ms Summerill to serve the decision on 8 November 2018. The decision was served on 9 November 2018.

154. The chronology above exposes that the legality of the delay in the Claimant's case essentially collapses into the issue of the legitimacy in public law terms of the Purnia

Hold as applied to the Claimant (in a context where there were twin duties to make a decision on the asylum claim within a reasonable time and having regard to the section 55 duty).

155. But for the Purnia Hold, the entire decision-making process would, in the Claimant's case, have been accomplished in just over 12 months. That is not say that 12 months should be the timescale (if possible, applications should be resolved earlier than that). In this case, the chronology shows that at least between October 2016 – March 2017 (a period of some 6 months) no steps were taken to progress the Claimant's claim at the request of those acting on his behalf, who sought successive extensions of time for the submission of his SEF.

156. As with most issues in this claim, the parties could not be more divided as to the governing legal principles when the legality (in public law terms) of delay is in issue. The Claimant's essential argument was that delay in and of itself can be held to be unlawful. The Defendant argued that in each of the cases cited to me the common theme (where a delay resulted in a remedy) was an independent form of public law error by the public authority.

157. This case is not the appropriate vehicle for the resolution of this interesting debate. I consider matters can be approached in a more straightforward manner. I begin with the context in which the decision-maker was acting. Here, it is common ground that the Defendant owed the following duties in public law to the Claimant:

    i) to have regard to the section 55 or "best interests" duty in the processing of his application; and

    ii) to make a decision on his claim within a reasonable time.

158. In terms of reviewing the legality of the delay in this case, my view is that I have to consider whether (bearing in mind the reasons for given for the delay) these duties were fulfilled. However, it is not for me to make my own assessment of whether the Claimant's best interests were furthered or harmed by the application of the Purnia Hold. In the first instance, it was for the Defendant to show that she had considered those interests and my role is to test that assessment against a rationality test. As was exposed by the argument before me, reasonable people can disagree as to whether a particular step is or is not in a child's best interests.

159. That being the question, in my judgment, it was reasonable for the Defendant to apply the Purnia Hold and delay the decision. On the basis of the law and policy as it stood at that time, those whose claims were refused would be told that they could only remain in the UK until they reached the age of 18 years. Some (such as the Claimant) would already have reached that age, and would be liable to removal. However, by April 2017, Ministers had decided to review the position, and wanted to consider the possibility of adopting a more generous approach to young people brought to the UK under Operation Purnia who did not qualify for asylum. Thus, the purpose and effect of the hold was (on one reasonable view) essentially benevolent: there was no prospect of claimants "missing out" on a form of status because of the delay – rather, decisions were held back to ensure claimants could benefit, if a more generous policy was, indeed, adopted.

160. Further, once the decision was taken to hold back service of refusal letters, it was also lawful to place a hold on all decision making in Operation Purnia cases in order to make the most effective use of resources, particularly given the demands that the system was facing at the time (see the evidence in respect of Ground 1 above). I have not lost sight of the fact that the Claimant's MP and his solicitors were sent inaccurate letters by the Defendant during the Hold but I accept that these were sent in error and an appropriate apology has been provided in the evidence.

161. Insofar as one needs authority for my approach above, I consider R (S) v SSHD [2007] EWCA Civ 546 to be supportive. In that case the Court of Appeal considered the position where an indefinite hold had been placed on determining older asylum claims so as to meet performance targets in more recent cases. The delay in deciding Mr. S's claim meant that he was unable to benefit from a discretionary policy that had been withdrawn during the period of the delay. Moore-Bick LJ explained:

> "The striking feature of this case is the decision by the Secretary of State in late 2001 or early 2002 to defer for an indefinite period consideration of outstanding applications for asylum made prior to 1st January 2001 in order to meet PSA targets agreed with the Treasury for the processing of applications made after that date. A decision to defer some applications in order to give priority to others might have been lawful if it had some rational basis, but the explanation provided by Dr. McLean provides no grounds for thinking that there was any reason for deferring consideration of the earlier applications other than the desire to meet the new performance targets. I entirely agree with Carnwath L.J. that that was unfair."

162. Applying this approach, in my judgment there was a rational basis for the Purnia Hold, which was introduced in order to both safeguard the position of those who would benefit from what became "Calais leave", and in order to make the most effective use of resources – i.e. decision-makers' time – in circumstances where the system was under considerable pressure.

163. This rationality approach is also consistent with the decision of Garnham J in R (O & Anor) v SSHD [2019] EWHC 148 (Admin); [2019] All ER (D) 164. Garnham J reviewed the case-law, including R v SSHD ex parte Phansopkar [1976] QB 606; [1975] 3 All ER 487, R v SSHD ex parte Mersin [2000] INLR 511R, FH v SSHD [2007] EWHC 1571 (Admin); [2007] All ER (D) 69 and R (Arbab) v SSHD [2002] EWHC 1249 (Admin).

164. I respectfully agree with and adopt what he said at paragraph [89] of his judgment as a summary of the case law:

> "89. From those cases I draw the following principles which seem to me relevant to the present case:"
>
> (a) Delay may be unlawful when the right in question arises as a matter of established status and the delay causes hardship (*Phansopkar*).

(b) An authority acts unlawfully if it fails to have regard to the fact that what is in issue is an established right rather than the claim to a right (*Mersin*).

(c) Delay is also unlawful if it is shown to result from actions or inactions which can be regarded as irrational. However, a failure merely to reach the best standards is not unlawful (*FH*).

(d) The court will not generally involve itself in questions concerning the internal management of a government department (*Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* and *Arbab*)

(e) The provision of inadequate resources by Government may be relevant to a charge of systematically unlawful delay, but the Courts will be wary of deciding questions that turn on the allocation of scarce resources *(Arbab)*."

165. It will be apparent from my conclusions above, I consider the legality of the delay resulting from the Purnia Hold falls to be assessed under principle (c) in Garnham J's helpful list. It meets the rationality test because of the evidence presented before me.

166. For completeness, I should add that I respectfully consider that the decisions of the Upper Tribunal in TM and WA (where a different conclusion was reached to my own above) were clearly correct on the basis of the absence of evidence from the Secretary of State explaining the Purnia Hold. I have had the benefit of evidence and argument which Judge Plimmer (in TM) and Judge Reeds (in WA) did not enjoy.

167. Turning to the Article 8 complaint, the Claimant seeks financial relief for non-pecuniary losses namely: being relocated and losing contact with friends, his education being disrupted, a lack of key worker support leading to reduced access to GP services and similar, delayed integration and settlement, and stress and anxiety.

168. In oral submissions, the Claimant alleged a breach of his Article 8 rights both as regards his right to respect for his family life and his private life. In principle, even if the delay was lawful at common law that would not preclude an Article 8 claim.

169. In my judgment however, the consequences of the Operation Purnia hold did not manifest a "lack of respect", so as to constitute a breach of Article 8 ECHR. I refer here to the reasoning of Richards J in Mambakasa [2003] EWHC 319 (Admin); [2003] 3 WLUK 8; as approved by the Court of Appeal in Anufrijeva v Southwark LBC [2004] Q.B. 1124.

170. Mambakasa is particularly instructive. The case concerned an Angolan refugee where there was a delay of six months in the grant of refugee status and indefinite leave to enter following his successful appeal to the IAT. The delay was unreasonable and amounted to a breach of duty by the Secretary of State. The Court recognised the administrative burden on the Secretary of State in processing such claims and held that delays attributable to the normal operation of the system during the relevant

period did not constitute a breach of Article 8 or a lack of respect for M's private life. In that regard, it is relevant to bear in mind that Claimant in the present case was an adult for all but the first two months of the period when his asylum claim was awaiting determination (and there was plainly no unlawful delay during that short period).

171. Further, I have accepted that the reasons for the delay were a good faith belief on the part of the Defendant that it was appropriate (in fairness terms) to hold back decisions to await a positive benefit by way of a new policy. Although not knowing the position on an asylum claim is clearly causative of distress, here the reasons for the delay were not such as to show a lack of respect for Article 8 rights even though the period of the Purnia Hold was much longer than the civil servants anticipated.

172. I accordingly reject the Claimant's individual complaint at common law and under Article 8 ECHR.

XI. Conclusion

173. The claim is dismissed.

ANNEXE A
SUMMARY OF STATISTICS

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1. NUMBER OF UASC APPLICATIONS AND DECISIONS, YEAR ON YEAR (2008-2018)

Year	Applications	UASC as % of all applications	Decisions	UASC claims as percentage of decisions made	Initial grant of asylum/HP or other leave to remain	Initial refusal
2008	3,976		2,718			
2009	2,857		2,800			
2010	1,515	8%	1,836		1,399 (76%)	453 (24%)
2011	1,248	6%	1,098		832 (77%)	245 (23%)
2012	1,125	5%	881		538 (79%)	147 (21%)
2013	1,265	5%	1,112	6.31%	813 (73%)	302 (27%)
2014	1,945	8%	1,270	6.43%	906 (71%)	366 (29%)
2015	3,253	10%	1,930	6.75%	1,289 (67%)	643 (33%)
2016	3,290	11%	1,951	7.83%	1,524 (78%)	427 (22%)
2017	2,399	9%	2,040	9.59%	1,564 (77%)	476 (23%)
2018	2,872	10%	2,151	10.17%	1,471 (69%)	674 (31%)
Year end June 2019	3,496	11%	2,755	13.58%	2,058 (75%)	697 (25%)
Year-end Sept 2019	3,546	10%	2,914	14.22%	2,278 (78%)	636 (22%)

2. UNDECIDED UASC ASYLUM CLAIMS AND WAIT TIMES

Date	Total Pending UASC Claims	<6 months	6 months +	12 months +	18 months +	24 months +
April 2018	3,467	1,214 (35%)	2,253 (65%)	1,649 (48%)	963 (28%)	503 (14%)
30 June 2018	3,394	1,086 (32%)	2,308 (68%)	1,527 (45%)	1,120 (33%)	509 (15%)
31 December 2018	3,969	1,548 (39%)	2,421 (61%)	1,667 (42%)	1,072 (27%)	714 (18%)
30 June 2019	3,884	1,515 (39%)	2,369 (61%)	1,204 (31%)	738 (19%)	388 (10%)

3. UASC ASLYUM CLAIMS: TIME TO DECISION (BY YEAR LODGED)

Time Period	Total UASC Claims Lodged	<6 months	6-12 months	12 months +	No decision
Applications lodged in 2017	2399	925 (39%)	335 (14%)	197 (8%)	937 (39%)
Applications lodged in 2018	2872	535 (18%)	219 (7%)	12 (0.4%)	2237 (74%)

4. DECIDED UASC ASLYUM CLAIMS: TIME TO DECISION (AT DATE OF DECISION)

Time Period	Total Decided UASC Claims	<6 months	6-12 months	12-18 months	18-24 months	24 months +
Applications decided in 2018	2431	792 (33%)	389 (16%)	295 (12%)	395 (16%)	560 (23%)
Applications decided in Q1 2019	971	118 (12%)	213 (22%)	157 (16%)	353 (36%)	130 (13%)

5. DECIDED UASC ASYLUM CLAIMS: AVERAGE ASYLUM CLAIM DETERMINATION DURATION (IN DAYS)

Time Period	Average asylum claim determination duration (in days)
2016-June 2017	458 ('non-straightforward' cases)
2017	350
2018	476
Jan – March 2019	586