R (on the application of TM (A Minor) by his litigation friend, The Official Solicitor) v Secretary of State for the Home Department (Minor – asylum – delay) [2018] UKUT 00299 (IAC)

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of TM (A Minor)
By his litigation friend, The Official Solicitor

Applicant

and

Secretary of State for the Home Department

Respondent

Upper Tribunal Judge Plimmer

In considering whether the delay in determining a person's ('P) asylum application is unlawful all the circumstances must be considered in the round including, inter alia: length of delay; whether P was a minor at the date of his application; whether P continues to be a minor; if a minor, P's best interests; the complexities of the claim; the explanation provided by the SSHD and resource allocation; compliance with timeframes provided; the impact of delay on P.

Application for judicial review: decision

Having considered all documents lodged and having heard from Mr Jacobs, Counsel on behalf of the Applicant and Mr Chapman, Counsel on behalf of the Respondent, at a hearing at Field House on 8 August 2018.

Decision: the application for judicial review is granted

Introduction

1. This is a judicial review application in which the Applicant has challenged the Respondent's ongoing delay in making a decision regarding his claim for asylum in the United Kingdom ('UK'), which was made on 28 October 2016 (over 21 months before the date of the hearing). The Respondent's position is

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that he has reasonably and lawfully placed a "hold" on all asylum claims made by asylum-seeking minors in the UK, who were transferred to the UK from France under an "expedited process" in October to December 2016, the Applicant being one of this cohort.

2. I have granted the Applicant an anonymity order because he is a minor and this decision refers to sensitive aspects of his claim for international protection.

Background

3. The Applicant is a citizen of Afghanistan. He is a minor aged 17. The Respondent accepts for the purposes of these proceedings that he was born in January 2001.

4. According to the Applicant, he left Afghanistan when he was 14 in 2015 – see his solicitors' representations dated 24 November 2016 and paragraphs 5 to 12 of his witness statement dated 22 November 2016. I merely summarise his claim for asylum, which is comprehensive and includes independent supporting evidence from Afghanistan. The Applicant's father was a pharmacist in Nangarhar province in Afghanistan and provided polio vaccinations on behalf of the Afghan authorities. He was captured and killed by the Taliban for doing so. The Taliban threatened to do the same to the Applicant unless he joined them. The Applicant refused to do so and two days later, the family home was attacked and his eight-year-old sister was killed. In addition, the doctor who was working with the Applicant's father was killed by the Taliban. The authorities considered the Applicant to be implicated in this and sought to pursue him on this basis. He therefore claims to have fled Afghanistan when he was 14 years old because he feared both the Taliban and the Afghan authorities.

5. The Applicant claims that his maternal uncle made arrangements for him to flee Afghanistan. He travelled overland over the course of a year before reaching France where he lived in the camp known as the "jungle", but which I shall refer to as the Calais camp. He lived in the Calais camp until he entered the UK on 28 October 2016 under "Operation Purnia". The Respondent accepted that the Applicant's paternal uncle was resident in the UK and it was appropriate for the Applicant to be transferred from France to the UK in what has become known as the "expedited process". The lawfulness of this process has recently been considered in R (on the application of Citizens UK) v SSHD [2018] EWCA Civ 1812. The court determined that the process adopted was procedurally unfair. However, this Applicant was successful in establishing that he should be transferred to the UK to be united with his uncle, with whom he continues to live. In his submissions before me Mr Chapman expressly accepted, for the purpose of these proceedings, that the Applicant is a minor and that he lives with his uncle in the UK. Nothing in this case therefore turns on the fairness of the "expedited process" generally or in relation to this Applicant.

6. The "expedited process" was established by the Respondent in conjunction with the French authorities in October 2016 in response to the impending demolition of the Calais camp. By this process the Respondent sought to assess the

eligibility of unaccompanied asylum-seeking children ('UASC'), who claimed to have a family member or relative in the UK, to be transferred to the UK.

7. A summarised history of the "expedited process" is set out in Citizens UK at [9] to [18] and the following description of it is taken from that judgment. Mr Chapman indicated that he was content for me to do so albeit he had no instructions as to the accuracy of the summary contained in the judgment. In short, demolition of the Calais camp was announced on 7 October 2016. This led to discussions between the Respondent and the French authorities on 12 October 2016 with a view to expanding and modifying a pilot process for an "accelerated" Dublin III procedure, which had been under consideration over the summer of 2016. The "expedited process" was established in the light of the impending demolition of the Calais camp and the Respondent's acceptance that there were likely to be at least 200 unaccompanied asylum-seeking children who had close family links in the UK living there and who therefore would be eligible for transfer to the UK under Dublin III.

8. The "expedited process" formed part of "Operation Purnia" and ultimately consisted of two phases. The first phase was an interview, decision-making and transfer phase, which took place at the camp itself in the last two weeks of October 2016. Approximately 200 children were transferred to the UK in the first phase. Given the timing of this Applicant's arrival in the UK it seems clear that he was subject to and successful under the first phase. Mr Chapman did not dispute this analysis.

9. On 28 October 2016 the French authorities asked the Respondent to cease interviewing at the camp. In early November children began to be dispersed across France. That dispersal gave rise to second phase of the "expedited process". The interview process under the second phase lasted from 7 November 2016 to 25 November 2016. As a result, transfers to the UK took place until 9 December 2016.

10. Following both phases a total of approximately 550 children were identified as being eligible for transfer and transferred to the UK between October and December 2016. I shall refer to this group of children as the "Purnia family children".

11. I now turn to the chronology of events after the Applicant made his asylum claim in the UK on 28 October 2016. By 23 November 2016 the Respondent was satisfied that the Applicant (then aged 15) was properly residing with his uncle in the UK. His solicitors submitted representations and a detailed statement setting out his asylum claim on 24 November 2016. I have already summarised this. The representations attached: letters from the Nangarhar police, letters from the Taliban, news reports and detailed country background evidence on Afghanistan.

12. The representations were returned because there was a failure to include photo identification and a letter of authority. They were resubmitted and received on 5 January 2017. Although received some six weeks after the time limit, they were

initially sent on time and both Counsel confirmed that little turned upon this particular period, given the length of the subsequent delay.

13. The Applicant attended an asylum interview on 17 March 2017, but this was cancelled as the Respondent did not accept that the responsible adult who attended with him was appropriate. His uncle was said to be away at the time. In a letter dated 25 April 2017, the Respondent notified the Applicant that his asylum claim would not be determined within six months of the date it was made (which would be on 27 April 2017) and that he was unable to advise when it would be able to be dealt with. In the case notes disclosed for the first time with the amended detailed grounds of defence served on 1 August 2018 ('the amended detailed grounds'), the following is stated in the entry for 24 April 2017:

> *"This is an OP Purnia case. Policy issued on 21/4/17 to say that all such cases should be flagged as NSF now pending further guidance. ASY Cat 4 – Blocked. Country Guidance Case.*
>
> *To be reviewed 1 month to see whether further policy guidance provided.*
>
> *Standard NSF delay letter issued."*

14. Mr Chapman explained that 'NSF' means 'not straightforward'. There was no explanation available to me as to why the Applicant's solicitors were not told at that time that his application for asylum was delayed because he was an "Operation Purnia case". The case notes clearly indicate that this information was available to the author of the 24 April 2017 letter.

15. On 15 May 2017 the Applicant's solicitors wrote a pre-action protocol ('PAP') letter pointing out that the Applicant had been in the UK for seven months and the continued delay in determining his claim was not in his best interests. They requested an interview date within 14 days and a decision on his asylum claim in 30 days. In a letter dated 31 May 2017, the Respondent addressed the former by giving an interview date of 31 May 2017 but there was no response to the latter request.

16. The interview took place on 31 May 2017. This was a detailed interview that lasted for two hours and 45 minutes and included 143 questions. At the end of the interview, the interviewing officer permitted the Applicant's solicitors to provide any clarification and further information within five working days. Shortly after this, the Applicant's solicitors made further detailed representations dated 7 June 2017. These clarified answers at the interview and provided updated country background evidence relevant to the asylum claim. Mr Jacobs was keen to stress that these representations did not start the clock again but were in keeping with the obligation to determine the asylum claim by reference to updated country conditions. It is well known that the situation in Afghanistan is fluid. Mr Chapman did not disagree with Mr Jacobs' analysis of the further representations.

17. On 14 July 2017 the Applicant's solicitors requested an update from the

Respondent. There was no response to this letter. There has been no explanation for this. The case notes are silent as to whether the case was reviewed in accordance with the 24 April 2017 entry.

18. In a second PAP letter dated 22 August 2017, the Applicant's solicitors pointed out that despite numerous chasers there had been no decision some three months since the asylum interview. Reference was again made to the delay adversely impacting the Applicant's best interests. The Applicant's solicitors expressly requested an explanation for the delay and a decision to be made within 30 days. In the PAP response dated 4 September 2017, the Respondent apologised for the delay in making a decision on the asylum application. No explanation was offered for the delay, but the following assurance was provided (my emphasis):

> "The points you raised were noted and enquiries were made with the relevant casework team. I have been advised by the team that they are aware of your client's case and they are actively seeking to progress it. Whilst the casework team are unable to provide a timescale for when a decision will be made at this time, they have confirmed that they remain committed into making a decision on your client's case promptly. Your client's continued patience in this matter is appreciated and we hope that he would avoid pursuing litigation at this time."

19. There has been no explanation as to why the Respondent indicated that they were "*actively seeking to progress*" the Applicant's case when, as Mr Chapman acknowledged, it was known that it had already been placed on "hold", consistent with the policy referred to in the 24 April 2017 case notes entry.

20. Mr Jacobs indicated that out of deference to the terms of the PAP response, the Applicant and his solicitors did not immediately lodge a claim for judicial review and hoped as promised that the case would be considered promptly. Their patience ran out and on 7 February 2018 they lodged the claim form challenging the delay in making a decision regarding the Applicant's outstanding asylum claim.

21. In the acknowledgment of service dated 23 March 2018, the Respondent invited the Applicant to agree to a stay of the proceedings and attached a draft consent order in which the following is recorded:

> "Upon the SSHD confirming that she is reviewing the position of individuals who have entered the United Kingdom pursuant to section 67 of the Immigration Act 2016 which included the applicant and that she will confirm her position by the end of June 2018"

22. On 14 May 2018 Upper Tribunal Judge Smith granted permission and refused the Respondent's application for a stay. At that point in time, the information available to the Tribunal from both parties supported the mistaken belief that the Applicant was a child who had been relocated to the UK pursuant to section 67 of the Immigration Act 2016 ('the 2016 Act'), known as the "Dubs amendment". I shall refer to the children relocated pursuant to section 67 of the 2016 Act as the "Dubs children" in this judgment. Mr Chapman emphasised that the "Dubs

children" are a discrete cohort, and distinct from the "Purnia family children". The Applicant is part of the latter cohort. Judge Smith's observations must therefore be read with this in mind:

> "The Dubs amendment was passed in May 2016, some two years ago. The Applicant is an unaccompanied asylum-seeking child who arrived in the UK over eighteen months ago. The fact that the Respondent has yet to formulate a policy regarding support for children in the category of the Applicant is arguably not a good reason for the delay and it is not appropriate to extend time for this issue to be resolved whilst the Respondent continues to consider her position."

23. The Respondent sought an extension of time to file his detailed grounds of defence. The Applicant objected to this. In a letter dated 29 June 2018, the Respondent clarified that "*the Applicant did not come to the UK pursuant to section 67 of the Immigration Act 2016 but rather under an expedited process whereby unaccompanied asylum-seeking children in Calais were brought to the UK if the Respondent was satisfied that they had family members…lawfully present in the UK*". The Respondent acknowledged that the position ought to have been clarified sooner but explained that at the time the claim was brought he was considering which form of leave to provide the "Dubs children" and it was on this mistaken basis that an application for a stay was made.

24. The Tribunal granted the Respondent an extension of time to file his detailed grounds. These were settled by Mr Chapman and are dated 11 July 2018. The detailed grounds make it clear that the Applicant did not enter pursuant to the Dubs amendment but in accordance with the "expedited process". Paragraph 5 of the detailed grounds is the first occasion that the Applicant was given any explanation for the delay in determining his case. It states as follows:

> "Following the assessment of their asylum claims, it became clear that not all of the children transferred to the UK under the expedited process to join family would qualify for asylum. Given the complex nature of this cohort, a review of these cases is on-going and as a result decisions in these cases have been placed on hold."

25. The Applicant then submitted amended grounds and sought permission to do so at the same time as lodging his skeleton argument on 22 July 2018. The Applicant's solicitors also sought permission to place reliance upon a witness statement from the Applicant dated 18 July 2018. The application to amend the grounds was not resisted by the Respondent and I granted permission to rely upon them at the hearing. I set out the amended grounds in full below:

    Ground 1 - Breach of Procedures Directive 2005/85/EC

    The conduct of the Respondent in delaying to reach a decision on the Applicant's asylum application is unlawful and contrary to the Respondent's obligations under the Procedures Directive and contrary to Immigration Rule 333A, which incorporates Article 23(2) of the Directive.

Ground 2 – section 55 of the Borders, Citizenship and Immigration Act 2009 (the '2009 Act')

The conduct of the Respondent in delaying to reach a decision on the Applicant's asylum application is unlawful and contrary to the statutory duty imposed upon her by section 55 of the 2009 Act. The Respondent has acted unreasonably and has failed to act in accordance with the best interests of the Applicant as a child.

Ground 3 – Wednesbury unreasonableness

The continuing delay of the Respondent to reach a decision on the asylum application of the Applicant, an unaccompanied asylum-seeking child, is unreasonable. In particular, the Respondent's conduct in seeking to delay consideration of the claim pending a policy decision in relation to section 67 cases (which the Respondent avers are not relevant to the Applicant) is unreasonable.

26. The Respondent then filed his amended detailed grounds on 1 August 2018. These repeat the assertion already made in the detailed grounds regarding the complex nature of the cohort transferred to the UK under the expedited process being such that decisions have been placed on hold – see paragraph 6 of the amended detailed grounds. The amended detailed grounds then deny that a period of reasonable time has been exceeded in the case and deny that the Respondent has failed to take proper account of the Applicant's best interests. The amended detailed grounds do not refer to but attach a print out of the GCID Case Record Sheet for the Applicant containing the Respondent's case notes for the period from his arrival date on 28 October 2016 to 25 June 2018 ('the case notes'). The majority of the entries from March 2018 have been wholly redacted.

Evidence

Policy

27. Apart from the case notes, the Respondent filed no evidence in this case. As a consequence, the Tribunal had not been provided with a copy of the policy referred to in the case notes entry dated 24 April 2017 or any explanation for or justification of the policy to place the determination of the asylum claims of the "Purnia family children" on "hold". During the course of the hearing I indicated that I would be assisted in seeing a copy of the relevant policy and Mr Chapman undertook to file and serve this within 24 hours. In compliance with this undertaking, the day after the hearing, I was provided with a copy of an email dated 21 April 2017, containing the instruction to place the relevant cases on hold. The subject matter of the email states "*URGENT: Operation Purnia Hold until further notice*". The body of the email states:

> *"All,*
>
> *As of immediately there will be a* ***hold on interviewing and deciding all Operation Purnia cases*** *regardless of the anticipated outcome until further notice. Please can you raise NSF flag "Block Country Guidance Case" type barrier on all of your outstanding Operation Purnia cases.*

It's anticipated the hold will last a couple of months. If you have cases which are booked in for an interview in the next week which you cannot replace with another key event or cancel in time please let me and Jen know and we will advise"

28. After I circulated a draft judgment and in 'comments' provided in relation to that judgment on 21 August 2018, Mr Chapman set out the Respondent's "*updated position concerning the Operation Purnia hold instruction*" and apologised for the late stage at which this was being brought to the Tribunal's attention. It is regrettable that the "updated position" was not made clear at the hearing or when the Respondent was provided with additional time to provide a copy of the relevant policy. It is inappropriate for updated instructions to be provided by way of comment to a draft judgment. However, for the sake of clarity I record that the Mr Chapman's instructions as they appear in the comments to paragraph 10 above: "*It is correct that all children brought to the UK under "Operation Purnia" who had asylum claims outstanding at the time of the instruction dated 21 April 2017 had their asylum claims placed on "hold". The Respondent confirms that the "hold" instruction has since been lifted for s 67/Dubs children and (sometime in summer 2017) to permit decisions to grant asylum to "expedited process children" in cases where a preliminary assessment indicated that they were likely to be entitled to a grant of asylum.*" Given that these instructions were provided after the draft judgment was circulated, I do not make any further reference to them in this judgment, save to observe that this "updated position" would not have changed my judgment in any material way.

Witness statement

29. Although Mr Chapman argued that the Respondent had not had a proper opportunity to address the Applicant's witness statement, he was content with my suggestion that it did no more than "typically represent" the anxiety and uncertainty likely to be caused by delay, upon an asylum-seeking child. He also accepted that the challenge in these proceedings is to a continuing failure to act i.e. a moving target, and that I must consider the lawfulness of the delay as at the date of hearing. In light of these matters I granted permission to rely upon the witness statement in so far as it confirmed that this Applicant was impacted by the delay in a manner that was unsurprising and acknowledged by the Respondent in a manner that is "typically representative".

Legal framework

Timeframe for determining asylum claims

30. There are no specific time limits within which the Respondent must reach a decision on an asylum case. His obligations about the time in which decisions must be made on asylum claims are to be found in Immigration Rule 333A, which provides:

> "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."

31. This reflects Article 23 of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status. Article 23 is entitled 'Examination procedure', and provides:

> "1. Member States shall process applications for asylum in an examination procedure in accordance with the basic principles and guarantees of Chapter II.
>
> 2. Member States shall ensure that such a procedure is concluded as soon as possible, without prejudice to an adequate and complete examination.
>
> Member States shall ensure that, where a decision cannot be taken within six months, the applicant concerned shall either:
> (a) be informed of the delay; or
> (b) receive, upon his/her request, information on the time-frame within which the decision on his/her application is to be expected. Such information shall not constitute an obligation for the Member State towards the applicant concerned to take a decision within that time-frame.
>
> 3. Member States may prioritise or accelerate any examination in accordance with the basic principles and guarantees of Chapter II, including where the application is likely to be well-founded or where the applicant has special needs."

32. Directive 2013/32/EU ('the 2013 Directive') provides at Article 31 that not only should Member States ensure that the examination procedure is concluded as soon as possible but this must be within six months of the lodging of the application – see Article 31(3). This is of limited relevance because as the parties agreed, the UK did not opt into the 2013 Directive and is not bound by its terms.

33. R (FH & Others) v SSHD [2007] EWHC 157 (Admin) involved 10 cases heard together. In each case it was alleged that the Respondent had failed to decide an application to be allowed to remain in this country within a reasonable time. Each of the cases brought by the claimants were described as incomplete asylum cases. That phrase was used to encompass the situation where an initial decision had been made on a claim for asylum and rejected and the application to be allowed to remain in this country was a subsequent application or fresh claim, albeit there was some variation from this basic case type. None of the cases considered by Collins J involved a claimant who had been an unaccompanied minor at the time of his application for asylum and whose initial claim for asylum had been over a year. The delays considered by Collins J were lengthy and covered a minimum of about two years and a maximum of about five. The

Respondent adduced substantial and detailed evidence to explain why the delays had occurred.

34. Collins J rejected each claim. He accepted that there was an obligation upon the Secretary of State to determine applications within a reasonable time but he held that a reasonable time had not elapsed in each case. Collins J set out the appropriate approach at [11].

> "As was emphasised by Lord Bingham, the question was whether delay produced a breach of Article 6(1). Here the question is whether the delay was unlawful. It can only be regarded as unlawful if it fails the *Wednesbury* test and is shown to result from actions or inactions which can be regarded as irrational. Accordingly, I do not think that the approach should be different from that indicated as appropriate in considering an alleged breach of the reasonable time requirement in Article 6(1). What may be regarded as undesirable or a failure to reach the best standards is not unlawful. Resources can be taken into account in considering whether a decision has been made within a reasonable time, but (assuming the threshold has been crossed) the defendant must produce some material to show that the manner in which he has decided to deal with the relevant claims and the resources put into the exercise are reasonable. That does not mean that the court should determine for itself whether a different and perhaps better approach might have existed. That is not the court's function. But the court can and must consider whether what has produced the delay has resulted from a rational system. If unacceptable delays have resulted, they cannot be excused by a claim that sufficient resources were not available. But in deciding whether the delays are unacceptable, the court must recognise that resources are not infinite and that it is for the defendant and not for the court to determine how those resources should be applied to fund the various matters for which he is responsible."

35. Collins J noted that the vast number of largely unmeritorious claims placed a burden on the Respondent and that some delay was therefore unsurprising – see [25]. He also observed at [28] that it might be possible to devise a better system but that does not mean that the existing one is unlawful, notwithstanding the unsatisfactory and undesirable delays, and concluded at [30]:

> "It follows from this judgment that claims such as these based on delay are unlikely, save in very exceptional circumstances, to succeed and are likely to be regarded as unarguable. It is only if the delay is so excessive as to be regarded as manifestly unreasonable and to fall outside any proper application of the policy or if the Claimant is suffering some particular detriment which the Home Office has failed to alleviate then the claim might be entertained by the court."

36. In <u>MK (Iran) v SSHD</u> [2010] EWCA Civ 115; [2010] WLR 2059, Carnwath LJ said at [34]:

> "It was not in dispute that, at least under domestic law, the Secretary of State was under a public law duty to decide the asylum application within a reasonable time. Both parties, as I understood them, accepted what I said in *Home Secretary v S* [2007] EWCA Civ 546 para 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."”

37. Carnwath LJ went on to observe at [35] that “*although the concept is flexible, and the dividing line may often not be easy to define*”, in MK’s case the position was “*reasonably clear*”. In short, in April 2005, the relevant department accepted responsibility for the case. By February 2006, after some nine months’ inaction, they were or should have been fully aware of the circumstances, including the fact that MK had been accepted as a minor, and was mentally ill. Everything therefore pointed to the need for an early decision yet progress was halted because the case was placed in storage and got ‘lost in the system’. The particular facts of that case were such that Carnwath LJ was prepared to observe at [36]:

> “Had an application for judicial review come before an administrative judge on those facts, I have little doubt that the case for a mandatory order, if necessary, would have been accepted (even if in practice an undertaking would probably have been offered). That to my mind is a sufficient indication that by 11th July 2006, at the latest, the dividing line between reasonable and unreasonable delay had been crossed, and I would so hold.”

The application did not come before the court until well after this because a decision to refuse asylum was taken in 2008 with a statutory appeal process that followed. The application made to the court was therefore not for a mandatory order for a decision to be made, but for damages arising from the period of delay, in relation to which MK was ultimately unsuccessful.

38. The court has been prepared to find that the delay in determining an outstanding application had become unlawful in MJ v SSHD [2010] EWHC 1800. That case involved an unaccompanied minor who made his asylum application when he was 15. By the time his claim for asylum was determined he was aged over 18. During the period of three years which followed the application for asylum and when he was a minor MJ was cared for by social services. During this three-year period solicitors acting on behalf of MJ issued regularly reminders that his asylum claim was outstanding. The Respondent adduced no evidence and did not seek to explain or excuse the period of delay.

39. However unlike in the instant case, there was a policy in existence relevant to MJ’s asylum application which envisaged that an application for asylum made by a child should be determined within 35 days of the application being made. Wyn Williams J concluded at [43] that this was not a case of “*mere delay*” but a delay in breach of published policy, wholly unexplained by any evidence on the part of the Secretary of State. In addition, at [44] Wyn Williams J found that the

delay had disadvantageous consequences upon MJ including the fact that had his asylum application been considered when he was a minor, and assuming it was refused, he would have been granted leave until his 18th birthday and it would have been open to him to apply for a variation of that leave. Wyn Williams J was therefore satisfied that MJ's claim for asylum was not determined within a reasonable time and summarised his reasons at [47]:

> "Had the Defendant complied with her own policy (even after March 2007) the application would have been dealt with much earlier. The consequence of the delay on the part of the Defendant was that the Claimant suffered conspicuous unfairness. I have no doubt that by the time these proceedings were commenced a judge of the Administrative Court would have granted a mandatory order to compel the determination of the asylum claim had not the Defendant removed the need for the making of such an order by reaching a decision on the Claimant's asylum claim. Further, I am satisfied that such a mandatory order would have been made, if sought, long before the issue of proceedings in this case. Doing the best I can my view is that such an order would have been made any time after 12 months had elapsed from the making of the application on the grounds that by then a reasonable time for the making of a decision had passed and the Claimant was suffering conspicuous unfairness."

40. Like MK, S (supra) turned entirely upon its own facts and involved a delay of over four years with particular consequences as a result of the applicable policies at that time. As observed by Moore-Bick LJ at [67] this was not a simple delay case.

41. There have been examples of cases in which notwithstanding a period of lengthy delay, the court found the Respondent not to have acted unlawfully. Mr Chapman placed reliance upon R (AO) v SSHD [2011] EWHC 110 (Admin), which again turned on its own facts - AO was only subjected to a delay period of some nine months.

Best interests of children

42. Section 55 of the 2009 Act provides:

> "(1) The Secretary of State must make arrangements for ensuring that –
>
> (a) the functions mentioned in sub-section (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom…
>
> (2) The functions referred to in sub-section (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 …

> (3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of sub-section (1)".

43. The genesis of section 55 is found in a provision of international law, Article 3(1) of the UN Convention on the Rights of the Child.

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

44. 'Every Child Matters' is relevant guidance issued by the Respondent under section 55(3) of the 2009 Act ('the statutory guidance'). This includes at 2.7: "*Children should have their applications dealt with in a timely way and that minimises the uncertainty that they may experience*"; and 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."

45. The approach in the statutory guidance is reflected in the Respondent's policy on children's asylum claims, published on 9 October 2017. This sets out the policy objectives for processing asylum claims for children who submit a claim in their own right as being to ensure that, inter alia: immigration, asylum, nationality and customs 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, and the welfare of the child is paramount at all times with the child being cared for by appropriate adults or agencies with safeguarding responsibilities being met; protection is granted swiftly to those who need it; 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.

46. It must generally be apparent from the terms of any immigration decision that the best interests of each affected child, as assessed, are ranked as a primary consideration and accorded primary importance - see ZH (Tanzania) v SSHD [2011] UKSC 4, at [24] to [33] especially.

47. There is a wide scale general recognition that delay in cases involving children is invariably inimical to the welfare of the subject children. The architects of the Children Act 1989 ('the 1989 Act') recognised this danger when, for the first time in any British statute, they imposed an obligation on the parties to avoid delay with the establishment of "the delay principle" - delay is statutorily recognised as inimical to the welfare of the child at section 1(2) of the 1989 Act. This principle has in effect been acknowledged and incorporated into the statutory guidance relevant to the exercise of immigration functions I have referred to above.

48. The need to act without unnecessary delay and with expedition in cases concerning children must however be balanced against the principle that it is also in the best interests of children that their claims are assessed within an orderly process. Although Beatson LJ acknowledged the need for expedition in the context of Dublin III in R (ZT (Syria) and Others) v SSHD [2016] EWCA Civ 810; [2016] 1 WLR 4894, he also observed at [87]:

> "An orderly process is also important in cases of unaccompanied minors. The need to examine their identity, age, and claimed relationships remains, and there is a particular need to guard against people trafficking."

Submissions

49. Mr Jacobs, on behalf of the Applicant, relied upon his skeleton argument which expanded on the three amended grounds I have set out above. Mr Jacobs' first submission regarding ground 1 was that when all the circumstances are considered, the Respondent failed to make a decision "as soon as possible" when he was in a position to conduct an "adequate and complete examination" from as long ago as June 2017 when the Applicant finalised his representations after the interview on 31 May 2017. Mr Jacobs acknowledged that the determination of whether a decision could be made "as soon as possible" could only be done by assessing all the circumstances of the case and therefore ground 1 was clearly linked to ground 3. He effectively asked me to find that delay had become Wednesbury unreasonable and the Respondent failed to comply with his obligations under the Procedures Directive to determine the application "as soon as possible" for the same reasons including inter alia: the length of the delay; the Applicant is a minor; the explanations for the delay have been in turn erroneous and then belatedly irrational.

50. Mr Jacobs invited me to find that six months is a useful benchmark from which to consider whether there was a breach of Article 23. He based this upon the text of Article 23 itself and by reference to Article 31(3) of the 2013 Directive. When I asked if there was any ECJU case relevant to Article 23, he indicated that he was unable to find any but relied upon [119] of Tarakhel v Switzerland (App. No. 29217/12) to support the submission that the specific needs and vulnerabilities of children asylum seekers must be taken into account when considering the reasonableness of delay and the additional stress and anxiety this may cause.

51. Mr Jacobs' additional submission was that there had been a discrete failing to provide a timetable by which the Applicant's application would be considered. He acknowledged that a specific request for this had not been made but reminded me that this is not necessary for the purposes of the Directive and that in any event it must have been very clear from the Applicant's solicitors' correspondence that a specific time-table was being sought.

52. As to ground 2, Mr Jacobs submitted that there was no indication whatsoever that the Respondent took the best interests of this Applicant into account at any stage of the process. He took me to each document drafted by the Respondent in relation to this Applicant and asked me to note the absence of any reference to

his best interests, section 55 of the 2009 Act or the statutory guidance. There was also no reference to these matters in the case notes.

53. Mr Jacobs invited me to make a declaration that the Respondent's delay in determining this Applicant's asylum claim is unlawful and in addition constitutes a breach of the Procedures Directive. Mr Jacobs also asked me to make a mandatory order requiring the Respondent to make a decision on the outstanding asylum claim forthwith.

54. Mr Chapman, on behalf of the Respondent, submitted that all three grounds are co-extensive and should be viewed together. In particular, whether the allegations within grounds 1 and 2 are made out, informs the assessment of ground 3 and the reasonableness of the delay. Mr Chapman invited me to find that whether the matter is viewed from the perspective of the Procedures Directive (ground 1) or domestic law (ground 3), the delay in determining the Applicant's asylum claim has not exceeded what is a reasonable time. He submitted that neither the Procedures Directive nor the Immigration Rules requires a particular timeframe or "indicative timetable" of six months. and the period of time that has elapsed of 21 months has not been unreasonable. In support of the latter submission he relied upon four broad matters (see paragraphs 12 and 13 of the Respondent's skeleton argument): (i) "*the particular and highly unusual circumstances of the closure of the Calais camp and transfer of large numbers of asylum applicants to the UK*"; (ii) "*the ordinary complications inherent in determining the asylum claims of those who are, or claim to come from Afghanistan, Syria and other comparatively unstable regions, especially children and especially unaccompanied children*"; (iii) the Respondent "*was lawfully entitled to take time to review his policies in light of these unprecedented circumstances*" and to determine the asylum claims in an orderly fashion, and ; (iv) although the Applicant is a child, he has not been a UASC in the UK.

55. Mr Chapman acknowledged that the Respondent has not sought to provide any witness statements to particularise these assertions and in particular, there was no evidence of the policy to place the cases of the "Purnia family children" on "hold", or the timing or justification for the policy. As I have set out above the copy of the policy referred to in the case notes was submitted the day after the hearing. Mr Chapman also accepted that there was no evidence to support the claim that the "Purnia family children" cases continued to be complex; after that process was completed and asylum claims were made in the UK. Mr Chapman however asserted that the cohort as a whole is "intrinsically complex" because of the manner in which the children were brought to the UK, and that this has resulted in the Respondent wishing to review how they are dealt with and for that reason decisions were placed on hold. Mr Chapman confirmed that he understood that part of the Applicant's case was predicated upon the overarching decision to place the relevant cohort on "hold" and he was not prejudiced in defending the wider decision to place the relevant "Purnia family children" on "hold" at the hearing.

56. Although Mr Chapman submitted in his skeleton argument (paragraph 24) that the Applicant's witness statement was irrelevant to these proceedings, during

the course of oral submissions he acknowledged that although the Respondent had not had an opportunity to consider its effect, the contents of the witness statement are unsurprising and typical for many asylum-seeking children, as recognised in the Respondent's statutory guidance.

57. Mr Chapman submitted that the Respondent was not under any obligation to provide an "indicative timeframe" where he genuinely and in good faith was unable to provide one, and in the circumstances, there was no breach of Article 23(2)(b) of the Procedures Directive or the Immigration Rules.

58. In relation to ground 2, Mr Chapman submitted that section 55 of the 2009 Act does not mandate determination of the asylum claim within any particular period and that it could not be said that there has been any departure from the policy to deal with the claims of the relevant children "in a timely way". His skeleton argument (paragraph 20) merely denied that the Respondent discharged his immigration functions without having regard to, the need to safeguard and promote the Applicant's best interests. During the course of his oral submissions, I invited Mr Chapman to point me to any indicator within the correspondence or evidence that in making the decision to place this Applicant's asylum claim on "hold" and therefore to delay its determination, the Respondent had regard to his best interests. Mr Chapman submitted that there was no requirement to state that best interests were taken into account and the burden fell upon the Applicant to establish they were not taken into account. He submitted that in any event best interests did not point in one direction, and in so far as there was any failure to take them into account, this could not amount to any material error.

59. I invited Mr Chapman to indicate, if I was minded to grant a mandatory order, a practical timescale in which the Respondent considered he could make a decision on the Applicant's outstanding asylum claim. I was told by way of email that if so ordered, the Respondent would realistically be able to make a decision within 56 days. No reasons were provided for this timeframe. By way of email response Mr Jacobs submitted a more appropriate timescale to be 14-21 days.

Discussion

60. I accept the submission made by both Counsel that the three amended grounds are interlinked. Grounds 1 and 2 inform ground 3, which is overarching. If ground 3 is made out, then it is difficult to see why grounds 1 and 2 are necessary. This is not a case in which the Applicant has pleaded or claimed damages (a mere breach of EU law is in any event not enough as the breach would have to be "sufficiently serious"), and as such any breach of EU law will not attract any additional remedy of any substance: the main remedy sought by the Applicant being a mandatory order to require the consideration of this Applicant's asylum claim forthwith.

Ground 3

61. I therefore consider ground 3 first. In my judgment, when all the facts of the case and the context in which the delay arises are considered in the round, it can properly be said that there has been an unlawful delay. I have assessed this by applying the high threshold required for Wednesbury unreasonableness. I am satisfied that the delay in determining this Applicant's asylum claim is unlawful in the sense that when all the circumstances are considered, both peculiar to this Applicant and the context within which the Respondent has been operating, the Respondent's actions and inaction can be regarded as irrational. In other words, the delay that has been produced has not resulted from a rational system.

62. In making this finding I have borne in mind the warning from Collins J in FH at [30] that claims such as the ones he was dealing with are unlikely, save in exceptional circumstances, to succeed. However, as observed by Wyn Williams J in MJ at [34], the judgment of Collins J is specific to the type of claims which he was considering. Collins J made it clear in his judgment that a distinction is to be drawn between incomplete asylum claims and initial claims. Further, none of the claims before Collins J obviously involved unaccompanied minors. In any event I am satisfied that the delay is so excessive as to be regarded as manifestly and Wednesbury unreasonable when the following are considered together: (i) there has been prima facie delay that can properly be described as lengthy or excessive; (ii) the Applicant has been as at the date of his application and continues to be a minor; (iii) his best interests ought to have been treated as a primary consideration when making the decision to place his case on "hold" and the Respondent has been unable to point to any evidence that this has been done at any stage; (iv) there is no evidence to support the submission that the Applicant's case gives rise to complexities and on the contrary it appears to me to be a straightforward asylum claim; (v) the explanations provided by the Respondent for the delay have been deficient and in so far as the Respondent relies upon resources and the large number of applicants to consider, he has failed to provide any evidence to show that the manner in which he has decided to deal with the asylum claims of the "Purnia family children" i.e. by placing them on "hold" and the resources put into the exercise, are reasonable; (vi) there is no evidence that the Respondent has made any meaningful attempt to act upon his own internal timeframes and / or communicate a timeframe for the determination of his asylum claim to the Applicant; (vii) the impact of delay on this Applicant. I now turn to address each of these in more detail.

(i) Length of delay

63. I do not accept Mr Jacobs' 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. There may well be many cases in relation to which a period in excess of six months would still be considered reasonable or "as soon as possible" and conversely, cases in which there will be a breach of the requirements of the Procedures Directive, where "as soon as possible" requires a decision to be made before six months. This underlines the general principle that what is "reasonable" or "as soon as possible" is fact and context specific, dependent upon the particular circumstances of the case. Time-limits under domestic law and the Procedures Directive should be seen as involving flexibility, allowing scope for variation dependent upon a variety of factors including volume of applications, available resources, particular needs and circumstances of individual and groups of asylum seekers – see S at [51].

64. I accept that it is not possible to say that a particular period of time should be the limit of what is reasonable – this will depend on all the circumstances and as submitted by Mr Chapman, is an "intrinsically flexible concept" – see again S at [51]. In FH at [8] Collins J did not think that 12 months should be regarded as any sort of benchmark but observed "*no doubt, delays of 12 months or more in dealing with an initial claim to asylum may well need an explanation, but provided the approach of the defendant was based on a policy which was fair and applied consistently, such delays could not be regarded as unlawful*". I note that reference has been made in other cases to the determination of asylum claims by minors taking longer to determine than adults – see AO at [38] and I bear in mind the particular requirements that need to be in place to fairly determine a child's claim may require additional time. For example, as in this case, the interview was deferred because an appropriate adult was not available.

65. Doing the best I can, a reasonable period of time to decide the Applicant's outstanding asylum application would have been 56 days after June 2017. By June 2017, the Applicant had been subjected to a detailed asylum interview and his solicitors had submitted all the information and evidence necessary for there to be an "adequate and complete examination" of the asylum application. Nothing was outstanding and as Mr Chapman conceded there was no complexity involved in the Applicant's case other than he was a member of the "Purnia family children" cohort. The Respondent has asserted that 56 days would be a sufficient period of time for him to realistically make a decision on the asylum claim. That takes the chronology to around September 2017, just under a year from the date of the asylum claim. The overall delay is over 21 months. The delay since the Respondent appears prima facie to have been in a position to determine the claim i.e. September 2017 is 11 months. That delay on any analysis is lengthy. However, for the reasons I have set out above and develop below that does not in itself render the delay unlawful. It is only when it is considered alongside all the relevant factors that it is possible to reach the conclusion that the delay has become unlawful.

(ii) Applicant has been a minor at all material times

66. Mr Chapman expressly accepted for the purposes of these proceedings that the Applicant is a national of Afghanistan who was born in January 2001 and who

therefore remains a minor. I do not accept Mr Chapman's submission that the Applicant has never been a UASC (as defined by 352ZD of the Immigration Rules) in the UK. He was clearly a UASC when he was in the Calais camp and treated as such by the Respondent under the "expedited process" and when he initially made his claim for asylum in the UK. I do however accept Mr Chapman's alternative submission that the Applicant was united with his paternal uncle shortly after arriving in the UK and has continued to live with and be cared for by him. Whilst the Applicant was a UASC for a short period whilst in the UK, on his case he was a UASC child from the time he fled Afghanistan, during the course of the overland journey to France and whilst at the Calais Camp. In any event, although the Applicant has benefitted from the care provided by his uncle in the UK and is therefore in a less vulnerable position than a UASC, he has remained a child throughout the process who has been separated from both his parents.

67. I now turn to consider how the Respondent was required to approach the decision-making process given that the Applicant remained a child throughout.

(iii) Best interests

68. Mr Chapman submitted that section 55 of the 2009 Act does not mandate determination of an asylum claim within any particular period. That is undoubtedly correct but fails to address the requirement in the cases of children asylum applicants to make "*every effort*" to deal with their applications in "*a timely way*" that "*minimises the uncertainty they may experience*"- see 2.7 and 3.20 of the statutory guidance.

69. Section 55 gives rise to a statutory duty. It is for the Respondent to establish that he has complied with that duty. Yet the Respondent has not been able to point to any evidence or correspondence that this Applicant's best interests or the best interests of the "Purnia family children" as a group were taken into account at any stage of the respective decision-making processes. As Mr Jacobs pointed out, the Applicant's solicitors drew specific attention to the impact upon the Applicant's best interests in the PAP letter but there has been no clear response to this. The case notes omit any reference to a consideration of the Applicant's best interests. The only evidence of the policy to place the relevant decisions on "hold" makes no reference to section 55, the statutory guidance or best interests.

70. I am satisfied that the Respondent was obliged to consider this Applicant's best interests and the need to safeguard and promote his welfare, when making the decision to place his asylum claim on "hold". There is a complete absence of any evidence or indeed the slightest indication anywhere that this was done. I reject the faintly made submission that this is not a material omission. I recognise that it is in a child's best interests for the determination of his or her asylum application to be done in an orderly manner. I therefore accept that the best interests principle does not point in one direction. However, the Respondent remained under a statutory duty to consider all relevant aspects of the best interests of the Applicant when making the decision to place his claim on "hold".

(iv) Absence of material complexities in the Applicant's particular case

71. Mr Chapman conceded that the Respondent has not identified anything complex about this Applicant's individual asylum claim. It was not disputed that as at June 2017 an "adequate and complete determination" had been completed, and the claim was in principle ready for determination by the Respondent.

(v) Respondent's explanations

72. I did not understand Mr Chapman to submit that there has been no delay. Indeed, the Respondent acknowledged there had been delay in his letter dated 23 March 2017 and apologised for the delay in the PAP response dated 4 September 2017. In my judgment the delay has become prima facie excessive given the Applicant's age, the recognition within the statutory guidance that delay is inimical to his best interests and the absence of any outstanding matters or complexities peculiar to his asylum claim. The periods of delay I have identified above (paragraph 65) cried out for explanations on the part of the Respondent.

73. It is clear that when the Respondent first acknowledged that there was delay in this case in the 25 April 2017 letter and then in his September 2017 PAP response, he was aware that the claim had been placed on "hold" – see relevant case notes entry of 24 April 2017 read together with the email dated 21 April 2017. There has been no explanation for the failure to communicate this. Had this been done, the matter might have been subject to judicial review proceedings at a much earlier stage. Mr Chapman emphasised that the Applicant was told that the Respondent was actively <u>seeking</u> to progress his case in the PAP response, but it is difficult to see how it could be properly said that the casework team remained "*committed into making a decision on [the Applicant's] case promptly*" when as the email states all "Operation Purnia children" cases had been placed on hold "*until further notice*". In addition, there has been no explanation as to why, contrary to the instruction in the email dated 21 April 2017, the Applicant's interview proceeded on 31 May 2017.

74. The first explanation provided for the delay did not come until March 2018 in the form of a draft consent order attached to the acknowledgment of service. It was wholly inaccurate. I appreciate that the Applicant's own solicitors were of the mistaken view that this was a "Dubs children" case. However, Mr Chapman explained that notwithstanding the acknowledgment of service, the Respondent always considered this to be a "Purnia family children" case and not a "Dubs children" case, and the acknowledgment of service was inaccurate in stating otherwise. He therefore made it clear that the Respondent was not asserting that delay was justified because of the process of creating a new form of leave for "Dubs children".

75. The decision to place all "Purnia family children" cases on "hold" was not communicated to the Applicant or his solicitors until the detailed grounds of

defence dated 11 July 2018, some 11 months after the solicitors' requested detailed reasons for the delay in the PAP letter.

76. I can conceive of no obvious reason why "*the particular and highly unusual circumstances of the closure of the Calais camp*" in October 2016 and the fact that this Applicant was part of a cohort initially transferred under the "expedited process" has the consequence of making the determination of his substantive asylum claim complex. As explained by Singh LJ at [16] and [50] of Citizens UK, the "expedited process" was a one-off process based upon the principles of Dublin III but which operated alongside it. Dublin III is the legislative measure allocating responsibility amongst Member States for examining asylum applications. As the Respondent's Counsel in Citizens UK submitted (see [36] of Citizens UK) Dublin III "*is simply a mechanism for determining where, when a person has lodged an asylum claim, that claim should be examined and determined*". As observed by Arden LJ in R (RSM) v SSHD [2018] EWCA Civ 18 at [122] the requirement in Dublin III for there to be an asylum claim followed by a take charge request is consistent with its aim to create an orderly process for determining which Member State should be responsible for the asylum claim. The orderly process of determining where the Applicant's asylum claim should be determined was finally resolved in October 2016. It follows that any "*unprecedented circumstances*" were limited to the "expedited process" itself. Once an asylum claim is made in the UK it falls to be determined in the usual manner and it matters little that an asylum applicant has a history of having been transferred from another Member State to the UK, either pursuant to Dublin III or otherwise.

77. In addition, the Respondent has entirely failed to explain which policies he needed to review and, in any event, why there has been such a delay in doing so. On the evidence available to me I reject the submission that the Applicant's past membership of the cohort of "Purnia family children" renders his case "intrinsically complex" because of the manner in which he was brought to the UK.

78. I recognise that the Respondent has undoubtedly faced and continues to face challenges posed by the large numbers of children asylum applicants transferred to the UK in late 2016. There may well be resource concerns. However, I simply do not have any evidence as to this or how the Respondent has sought to manage the process.

(vi) Absence of time frame

79. I accept that the Applicant's solicitors have not made a "specific" or clear written request for the Respondent to provide information on the timeframe within which the decision on the Applicant's application is to be expected for the purposes of Immigration Rule 333A or Article 23(b) of the Procedures Directive and there was therefore no clear breach of these provisions in this respect. Mr Jacobs submitted that although there was no specific request, in effect there was a request for a stipulated timeframe to be complied with. Irrespective of the requirements in 333A or Article 23, it remains relevant that the Applicant's

solicitors have made it clear that the decision should be taken within a particular timeframe given the delay, and this request has simply been ignored without any explanation.

80. I accept that in principle there may be occasions where the Respondent, even after a period of delay and in relation to a child, is not under any obligation to provide an "indicative timeframe" where he genuinely and in good faith is unable to provide one. In my judgment, where as in this case, there has already been significant delay and the Respondent is unable to give a specific timeframe, he is obliged to give reasons for this. In this case the Respondent has referred to no correspondence and provided no evidence to explain why a timeframe cannot be provided. This is to be contrasted with the approach to the "Dubs children". A clear timeframe for those cases was set out – see the draft consent order attached to the Acknowledgment of Service. That timescale appears to have been followed because as Mr Chapman accepted there is no longer any "hold" on asylum claims from "Dubs children". Mr Chapman confirmed that their claims are determined in accordance with policy guidance dated July 2018, which was finalised in accordance with a set timescale.

81. In addition, the Respondent has failed to comply with his own internal timescales. I have not been directed to any evidence to support the Applicant's case having been reviewed one month after 24 April 2017, in accordance with the relevant entry in the case notes. Similarly, I have not been directed to any evidence to explain why the "anticipation" that the "hold" would only last for two months in the 21 April 2017 email, did not materialise, in relation to this Applicant.

(vii) Impact of delay on this Applicant

82. I accept, as Mr Chapman submitted that the Respondent cannot be properly criticised for his failure to consider the witness statement given the timing of its disclosure. However, as Mr Chapman conceded the contents are not surprising in any way and "*do no more than typically represent the likely difficulties many asylum-seeking minors face, as acknowledged in the guidance*". Although the Applicant has the support of an uncle, he has had to endure the limbo of uncertainty regarding a very significant aspect of his life with far reaching consequences at a formative stage of his development (ages 15 to 17). As I indicated to Mr Chapman and as he fairly accepted, the anxieties he has described in his statement are unsurprising.

83. I also note that the Applicant's <u>claimed</u> difficulties in Afghanistan are at the more serious end of the spectrum of trauma even in the context of Afghanistan, a country in which civilians have been plagued by atrocities for many years. His claim is based upon the murder of his father and little sister by the Taliban within two days of each other for no reason other than his father was delivering polio vaccinations with the consequence that he was targeted by both the Taliban and the government when he was only 14 years old.

84. As I have already recorded above it is for this combination of reasons set out

above at (i) to (vii) that I regard the delay in this case as meeting the high threshold of irrationality or Wednesbury unreasonableness, and I find that ground 3 is made out.

Ground 1

85. Mr Chapman did not dispute that the Respondent has at all material times been under an obligation under European Union law in the form of the Procedures Directive, to determine the Applicant's asylum claim "as soon as possible". I enquired whether there was any CJEU determination of the meaning of "as soon as possible" in Article 23(2). Both Counsel confirmed that they were unable to find any.

86. The position adopted by the Respondent is that it cannot be said that a reasonable time has been exceeded, such as to lead to the conclusion that Article 23(2) had not been complied with or that the public law duty to decide the asylum application within a reasonable time was breached. I have already found against the Respondent under domestic law. The position under domestic law and under Article 23 seem to me to be no more than different sides of the same coin. Mr Chapman acknowledged the link between grounds 1 and 3. I find that there has been a breach of Article 23(2) of the Procedures Directive but that breach is limited to the Respondent having failed to ensure that the procedure to examine the Applicant's asylum claim was concluded "as soon as possible, without prejudice to an adequate and complete examination".

87. I do not accept that the Respondent has breached the part of Article 23 that requires information on the timeframe upon written request, for the reasons I have already set out above. In addition, it is noteworthy from the text of Article 23(2)(b) that any information given on the timeframe "shall not constitute an obligation for the Member State towards the applicant concerned to take a decision within that timeframe". In other words, any requirement to provide a timeframe does not attract an obligation to meet it. This dilutes the importance of giving a timeframe upon request.

Ground 2

88. I accept that there has been a failure to take into account the best interests of this Applicant. This is relevant in so far as it informs grounds 1 and 3. Mr Jacobs has not identified any remedy under the 2009 Act itself and I am not satisfied that there is a need for any separate remedy under this head.

Relief and other matters

89. It follows that I grant the application for judicial review.

90. I will hear from Counsel on the appropriate orders to make, costs and any application to appeal to the Court of Appeal when judgment is handed down.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the applicant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the applicant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed: ______________________________

Upper Tribunal Judge Plimmer

Dated: **21 August 2018**

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of TM (A Minor)
By his litigation friend The Official Solicitor

Applicant

v

Secretary of State for the Home Department

Respondent

Upper Tribunal Judge Plimmer

Application for judicial review: substantive decision

Having considered all documents lodged, together with the submissions of Mr Jacobs, Counsel on behalf of the Applicant and Mr Chapman, Counsel on behalf of the Respondent at a hearing at Field House, London on 8 August 2018 and a hearing after the handing down of judgment on 22 August 2018 with Mr Grandison appearing as Counsel in place of Mr Chapman.

Decision: the application for judicial review is granted

(1) The application for judicial review is granted.

(2) The Respondent shall issue a decision on the Applicant's outstanding asylum claim within 28 days, absent special circumstances, which if they arise must be set out in writing and issued to the Applicant within 28 days.

(3) It is declared that the delay in making a decision on the Applicant's asylum claim is unlawful.

(4) The Respondent shall pay the Applicant's costs, to be assessed if not agreed.

(5) There is an order for detailed assessment of the Applicant's publicly funded costs.

(6) Although no application was made, giving effect to the relevant procedural rule, I formally refuse permission to appeal to the Court of Appeal because any such application would have no arguable merit.

Signed: ____

Upper Tribunal Judge Plimmer

Dated: **22 August 2018**