Neutral Citation Number: [2016] EWCA Civ 810

Case No: C2/2016/0712

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/08/2016

Before:
LORD JUSTICE MOORE-BICK
LORD JUSTICE LONGMORE
and
LORD JUSTICE BEATSON

- -

Between:

Secretary of State for the Home Department	**Appellant**
- and -	
(1) ZAT	**Respondents**
(2) IAJ	
(3) KAM	
(4) AAM	
(5) MAT	
(6) MAJ	
(7) LAM	
- and -	
(1) United Nations High Commissioner for Refugees	**Interveners**
(2) AIRE Centre	

James Eadie QC and David Manknell (instructed by **Government Legal Department**) for the **Appellant**

Michael Fordham QC, Charlotte Kilroy, Michelle Knorr and Jelia Sane (instructed by **Bhatt Murphy Solicitors for the 1st, 2nd, 5th and 6th Respondents** and **The Migrants' Law Project, Islington Law Centre for the 3rd, 4th and 7th Respondents**) for the **Respondents**

Marie Demetriou QC and Andrew McIntyre (instructed by **Baker and Mackenzie LLP)** for the **UNHCR**

Raza Husain QC, Laura Dubinsky, Catherine Meredith and Jason Pobjoy (instructed by **Linklaters LLP**) for the **AIRE Centre** (written submissions only)

Hearing dates: 27 and 28 June 2016

Approved Judgment

Lord Justice Beatson:

I. Introduction

1. This is an expedited appeal by the Secretary of State for the Home Department against the order of the Upper Tribunal (McCloskey P and Ockelton V-P) dated 20 January 2016 and with its permission. The Upper Tribunal granted the seven respondents permission to apply for judicial review. It also ordered the Secretary of State to admit to the United Kingdom ZAT, IAJ, KAM, and AAM, three unaccompanied minors and a disabled adult who at that time were in a makeshift camp on approximately 18 hectares of land near Calais colloquially known as "the jungle". They are the first four respondents to the appeal. The other three respondents, MAT, MAJ, and LAM, are adults with refugee status in the United Kingdom who are or claim to be the siblings of the first four respondents. MAT is ZAT's brother and LAM is KAM and AAM's brother. MAJ claims to be IAJ's brother, but the Secretary of State has not admitted or denied this.

2. The order required the Secretary of State to admit the first four respondents with a view to determining their applications for refugee status under Regulation (EU) 604/2013 of the European Parliament and of the Council of the European Union, the "Dublin III" regulation. It did so provided they sent a letter to the French authorities claiming asylum. The tribunal's reasons are in its full judgment, *R (ZAT and others) v Secretary of State for the Home Department (Article 8 ECHR – Dublin Regulation – interface – proportionality)* IJR [2016] UKUT 00061 (IAC), and are summarised at [32] – [39] below. The first four respondents were admitted to the United Kingdom on 21 January 2016.

3. In the present case, none of the first four respondents applied for asylum in France, where they were at the material time. The respondents maintain that the United Kingdom is the Member State responsible for examining their application. However, before their arrival in the United Kingdom on 21 January pursuant to the order of the Upper Tribunal, the first four respondents had made no formal application to the United Kingdom authorities for asylum or leave to enter. Their requests were contained in letters before claim dated 11 November and 4 December 2015. These proceedings were issued on 15 December 2015.

4. The Dublin III Regulation is one of the components of the Common European Asylum Policy ("CEAS"). The question before this court concerns the relationship of its procedures and processes (summarised at [12] – [16] below) with the right to respect for private and family life enshrined in Article 8 of the European Convention on Human Rights ("ECHR"). In what circumstances can the processes and procedures of the Dublin III Regulation for determining the Member State responsible for processing an application for asylum be bypassed because of rights under the ECHR, in particular the right to family life under Article 8? When, if at all, can an individual who is not in the United Kingdom decide not to apply for asylum in the first Member State he or she enters and ask another Member State directly that it "take charge" of his asylum application, and, either directly or through a family member, require that other Member State to consider an application, or to admit him or her?

5. Mr Eadie QC, on behalf of the Secretary of State, accepted that, in principle, ECHR Article 8 co-exists with the Dublin III processes and procedures. But he argued that,

since the Dublin procedures are premised on the importance of children's rights, it should not be possible to bypass the procedural mechanism at the initial stage for determining which Member State is responsible. He accepted that despite the principle of mutual confidence between Member States that fundamental rights will be observed in all Member States, there is an exception. The exception is where an applicant can show that the legal system of the Member State in which the individual is present will not react to the claim and cannot be expected to act in accordance with the Dublin processes, including their reflection of the importance of family life. The respondents' position is that the Dublin process in France failed to vindicate and protect the rights under the ECHR of the three unaccompanied minors and the fourth respondent. They also maintain that, in any event, they have a freestanding right to assert the right to family life under ECHR Article 8 and to claim that as a result the United Kingdom was under a positive substantive obligation to admit the first four respondents to the United Kingdom.

6. Since the decision of the Upper Tribunal and the arrival of the first four respondents in the United Kingdom, the Secretary of State has accepted that the United Kingdom is the correct place for their asylum claims to be determined substantively. She does not seek their return to France. Indeed, in May 2016 she granted refugee status to IAJ, the second respondent, and, after the hearing, on 5 July 2016, to KAM, the third respondent. She has, as yet, made no decision on the applications by ZAT and AAM, the first and fourth respondents. In the light of the developments since the decision of the Upper Tribunal and the position of the Secretary of State at the hearing, the court inquired as to the purpose of the appeal. Mr Eadie QC, on behalf of the Secretary of State, submitted that the appeal was necessary because the approach of the Upper Tribunal has potentially far-reaching and serious consequences for the ability of the United Kingdom to control its borders and for the integrity of the Dublin III system. The Secretary of State's case is that the Upper Tribunal erred in granting relief to individuals who had refused to claim asylum in France and to make use of the Dublin III mechanism and also had made no application in the United Kingdom for asylum or for leave to enter, and had, for example, provided no biometric data before their arrival. A decision by this court would clarify the position.

7. Permission was given to the Office of the United Nations High Commissioner for Refugees ("UNHCR") to intervene by way of written and oral submissions, and to the AIRE Centre to intervene by way of written submissions. The court is grateful for the written submissions of Ms Demetriou QC and Mr McIntyre, on behalf of the UNHCR, and those of Mr Husain QC, Ms Dubinsky, Ms Meredith and Mr Pobjoy on behalf of the AIRE Centre, and for Ms Demetriou's oral submissions. The court also has before it a copy of a study by the UNHCR on the Dublin III Regulation, which is currently in draft form.

8. For the reasons given at [81], [82] and [87] – [95], I have concluded that, notwithstanding statements by the tribunal about the importance and potency of the Dublin Regulation, it erred in its approach to the test required to permit the processes and procedures of the Dublin III Regulation to be bypassed because of the right to family life under ECHR Article 8 at the initial procedural stages in the determination of which Member State is responsible for processing an application for asylum. An application for entry by an unaccompanied minor, without first invoking the

appropriate Dublin III procedures in the relevant Member State, can only be justified in an especially compelling case.

9. In the light of the psychiatric evidence before the Upper Tribunal about the first four respondents and the evidence of the French lawyers and the NGOs adduced by the respondents suggesting that there would be a delay of just under one year in the French system and that there was no possibility of expedition, the result the tribunal reached may have been justifiable: see [90] and [91]. I am, however, not entirely persuaded that, had the tribunal applied the correct test, it must inevitably have reached the same conclusion. In those circumstances, the appropriate course would normally have been to remit the matter to the tribunal for reconsideration. However, in the current circumstances and in the light of the position of the Secretary of State set out at [6] above, I have concluded that it would be inappropriate to take that course. I would therefore simply allow the appeal and make no further order.

II. The evidence

10. Before the Upper Tribunal, the only evidence was that adduced on behalf of the respondents. The tribunal accepted (see [26]) that, because of the urgency and the manner in which the cases came before it, with proceedings instituted on 15 December 2015, ten days before Christmas, and a hearing on 18 and 20 January 2016, there was little or no opportunity for the Secretary of State to investigate the claims of relationships, prior associations, mental disorder and kindred issues. Those who provided witness statements that were before the Upper Tribunal are listed in Appendix I to this judgment.

11. In applications filed on 14 March and 8 June 2016, the Secretary of State sought to adduce evidence and the respondents sought to adduce evidence in reply. Those who have provided statements are listed in Appendix II. In a witness statement filed on 8 March 2016, Jessica Da Costa, a senior lawyer in the Government Legal Department, stated that it had not been possible for the Secretary of State to adduce this evidence before the tribunal. The reasons were: the expedited timetable, the fact that proceedings were started shortly before Christmas, difficulties in obtaining information from the French authorities who were under considerable pressure due to the migrant crisis, and because a decision was made to give priority to filing detailed grounds. At the hearing, we admitted the additional evidence. I summarise its import and that of the UNHCR Report at [40] – [56] below. The new material is primarily of relevance to the position since the determination of the Upper Tribunal. I comment on this at [98] – [100] below.

III. The legislative framework

12. The United Kingdom is bound by the Dublin III Regulation but has opted out of three other components of the CEAS. They are the Recast Reception Directive (2003/33/EU), laying down minimum standards for the reception of applicants for international protection, the Recast Qualification Directive (2011/95/EU), on standards for the qualification of persons as beneficiaries of international protection and a uniform status for refugees and those eligible for subsidiary protection, and the Recast Procedures Directive (2013/32/EU), on common procedures for granting and withdrawing international protection. The United Kingdom is, however, a party to and

governed by earlier versions of those provisions: Directive 2003/9/EC (Reception), and Directive 2004/83/EC (Qualification).

13. The Dublin III Regulation restricts examination of an asylum application to a single EU Member State and provides for transfer of the asylum seeker to the Member State responsible for processing an asylum application if asylum is sought elsewhere in the European Union. The first sentence of Article 3(1) provides that "Member States shall examine any application for international protection" by any person who applies on their territory or at the border. The second sentence provides that the application shall be examined by a single Member State which "shall be the one which the criteria set out in Chapter III indicate is responsible". Chapter III contains both the criteria for determining the Member State responsible and a hierarchy of those criteria. In a passage not criticised before us, the Upper Tribunal stated:

> "Reduced to its bare essentials, the process established by the Dublin Regulation entails an initial application by the person concerned to the competent authority of the EU Member State where that person is present, the consideration of such application and an ensuing decision. One of the central pillars of the Dublin Regulation is the discrete regime devised for allocating the responsibility among Member States for the examination of international protection applications. "Examination", in this context, denotes determining such applications on their merits. It may be preceded by an initial, more limited decision by a host Member State to transmit to a second Member State a request to "take charge" of the person applying." ([2016] UKUT 00061 at [30])

14. The recitals to the Dublin III Regulation acknowledge that it sits alongside the Qualification, Reception and Procedure Directives: see Recitals 10 – 12. Recital 13 states that "the best interests of the child should be a primary consideration" and, in addition, "specific procedural guarantees for unaccompanied minors should be laid down on account of their particular vulnerability". Article 1 of the Dublin III Regulation states that it "lays down the criteria and mechanism for determining the Member State responsible for examining an application for international protection lodged in one of the Member States … ". Its procedures and mechanisms depend on a person making an application for international protection: see Article 2(c).

15. The other provisions of the Dublin III Regulation which are material for the purposes of this appeal are Articles 6, 8, 17, 20 – 22 and 27:

> "*Article 6*
>
> **Guarantees for minors**
>
> 1. The best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation.
>
> …

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

   (a) family reunification possibilities;

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

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

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

…

CHAPTER III

CRITERIA FOR DETERMINING THE MEMBER STATE RESPONSIBLE

Article 7

Hierarchy of criteria

1. The criteria for determining the Member State responsible shall be applied in the order in which they are set out in this Chapter.

…

Article 8

Minors

1. Where the applicant is an unaccompanied minor, the Member State responsible shall be that where a family member or a sibling of the unaccompanied minor is legally present, provided that it is in the best interests of the minor.

…

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

3. Where family members, siblings or relatives as referred to in paragraphs 1 and 2, stay in more than one Member State, the Member State responsible shall be decided on the basis of what is in the best interests of the unaccompanied minor.

4. In the absence of a family member, a sibling or a relative as referred to in paragraphs 1 and 2, the Member State responsible shall be that where the unaccompanied minor has lodged his or her application for international protection, provided that it is in the best interests of the minor.

…

Article 17

Discretionary clauses

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

…

CHAPTER VI

PROCEDURES FOR TAKING CHARGE AND TAKING BACK

SECTION I

Start of the procedure

Article 20

Start of the procedure

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

…

SECTION II

Procedure for take charge requests

Article 21

Submitting a take charge request

1. Where a Member State with which an application for international protection has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible

> and in any event within three months of the date on which the application was lodged within the meaning of Article 20(2), request that other Member State to take charge of the applicant.
>
> Notwithstanding the first subparagraph, in the case of a Eurodac hit with data recorded pursuant to Article 14 of Regulation (EU) No 603/2013, the request shall be sent within two months of receiving that hit pursuant to Article 15(2) of that Regulation.
>
> Where the request to take charge of an applicant is not made within the periods laid down in the first and second subparagraphs, responsibility for examining the application for international protection shall lie with the Member State in which the application was lodged.
>
> …
>
> *Article 22*
>
> **Replying to a take charge request**
>
> 1. The requested Member State shall make the necessary checks, and shall give a decision on the request to take charge of an applicant within two months of receipt of the request.
>
> …
>
> *Article 27*
>
> **Remedies**
>
> 1. The applicant or another person as referred to in Article 18(1)(c) or (d) shall have the right to an effective remedy, in the form of an appeal or a review, in fact and in law, against a transfer decision, before a court or tribunal.
>
> …"

16. The obligations of the Member State responsible are set out in Article 18. They are (Article 18(1)(a)) to "take charge" of an applicant who has applied in a different Member State, and (Article 18(1)(b)(c) and (d)) to "take back" applicants who made an application in another Member State or who are on its territory without a residence document, and those whose application in another Member State has been withdrawn or rejected. The procedures and time limits for "take charge" and "take back" requests are in Articles 21 – 25. Article 21(1) provides that a "take charge request" should be made "as quickly as possible and in any event within three months of the date on which the application was lodged", and Article 22(1) that the requested state shall reply within two months of receipt of the request. Article 29 states that transfers should happen "as soon as practically possible, and at the latest within six months of the acceptance of the request". Adding up these periods produces a total of eleven

months, but that is a maximum because Member States are required to act as "quickly" and as "practically" as possible.

17. Article 8 of the ECHR provides:

> "**Article 8 – Right to respect for private and family life**
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 7 of the EU Charter of Fundamental Rights ("the EU Charter") also provides for the right to respect for private and family life.

18. The other international instrument of importance in the context of these proceedings is the 1989 United Nations Convention on the Rights of the Child. It, like the Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights, attaches great importance to family relationships in general and to the unity of the family. Article 3(1) of the Convention on the Rights of the Child provides that "in all actions concerning children, whether taken 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". See also Article 24 of the EU Charter. Article 10 the Convention on the Rights of the Child requires applications for family reunification to be dealt with "in a positive, humane and expeditious manner" and Article 22(2) requires states to co-operate "to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family".

IV. The factual background to these proceedings

19. The basic biographical facts relied on by the seven respondents in support of their claims and the limited extent to which the Secretary of State has agreed them are contained in the document which is Appendix III to this judgment. It was produced by the parties at the request of the Court after the hearing. The claims are supported by psychiatric evidence about the first four respondents which is summarised in Appendix IV to this judgment.

20. The first four respondents, ZAT, IAJ, KAM and AAM, are Syrian citizens who made their way across Europe to northern France. Between October 2015 and 21 January 2016 they had been in the makeshift camp near Calais occupied by some 6,000 others, which is colloquially known as "the jungle". They had all attempted to enter the United Kingdom illegally from that area. At the material time, ZAT, IAJ, and KAM were unaccompanied minors said to be aged about 16 at the material time. AAM is an adult with mental health problems and the older brother of KAM who, when they

were in France, was AAM's carer. The psychiatric reports state that ZAT, IAJ and KAM suffer from recognised stress disorders and AAM suffers from psychiatric disorder and post-traumatic stress disorder.

21. The first four respondents claim to come from or near Dara'a in Syria, to have suffered extreme trauma as a result of the war in Syria, and to have fled from that country. ZAT and IAJ claim to have experienced regular bombing. ZAT claims that after a bomb landed on his family home and seriously injured one of his brothers, A, he witnessed the amputation of A's leg. IAJ claims to have witnessed the death of a cousin and a neighbour and injuries to others, including his cousin's child, in the airstrike, and the death of some of those who attended his cousin's funeral. KAM claims to have seen school-friends shot dead by snipers and the deaths of two of his cousins after a bomb exploded. He also claims to have been detained, during which time he was physically and emotionally abused. It is said on behalf of AAM that he saw people being killed, including his neighbours, and that he was detained on five occasions and severely beaten. It is stated that, after his release, the family became very concerned about his mental health and that his parents, he and KAM left Syria for Jordan. Although AAM received some medical treatment in Jordan, his parents decided that he and KAM should join their siblings in this country, where they would be safe and AAM could obtain appropriate treatment.

22. ZAT states that he has experienced physical violence in the camp. IAJ states that he was attacked by a group of older men, whom he believed were people traffickers, but with assistance he escaped. KAM has acted as AAM's carer in the camp. AAM's medical needs were unmet in the camp.

23. As to general conditions in the camp near Calais, the evidence was that, prior to a decision of the *Tribunal Administratif de Lille* on 2 November 2015:

> "As a result of manifestly inadequate access to water and toilets and the lack of refuse collection operations, the population at the camp are living in conditions which do not meet their basic needs in terms of hygiene and access to drinking water and which expose them to health risks; As a result, there is a serious and manifestly unlawful breach of their right not to be subjected to inhuman and degrading treatment … ".

In its decision, the Upper Tribunal referred (at [5]) to the statement in early January 2016 by what it described as "a concerned English public representative" stating that the conditions in the camp are so bad that describing them ... cannot capture the squalor. You have to smell conditions like these and feel the squelch of mud mixed with urine and much else through your boots to appreciate the horror."

24. It is stated on behalf of the first four respondents that they did not apply for refugee status in France because they wished to join the fifth, sixth and seventh respondents who are their older siblings and are adult refugees in this country. Before launching these proceedings none of the respondents applied for leave for the first four respondents to enter the United Kingdom. Their solicitors, however, wrote letters before claim dated 11 November and 4 December 2015, setting out the respondents' case and requesting the Secretary of State to take a number of steps. The letters stated that the first four respondents resided in the area known as "the jungle", that none had

been offered accommodation at the Jules Ferry Day Centre for migrants at Calais, that they have family members in the United Kingdom with whom they wish to be reunited, and that as far as their solicitors were aware they had received no advice on the Dublin III process by the French authorities and had not been identified as unaccompanied minors or provided with representation, care or suitable accommodation.

25. The letters stated that it was clear that under the Dublin III Regulation the UK is responsible for determining the asylum claims of the four respondents in France. They requested the Secretary of State to co-operate with the French authorities to ensure that they were provided with adequate accommodation, care and information to enable them to access French legal representation, and to provide them with the information which the solicitors had provided to the Secretary of State. They requested her to make a decision accepting the United Kingdom's responsibility for determining the claims to asylum within two weeks, and arrange for the four respondents to be admitted into the United Kingdom within three weeks. They expressly asked the UK authority to decide the question of UK responsibility without awaiting a "take charge" request by the French authorities. They pointed to the power given under Article 17 of the Dublin III Regulation to a Member State to accept responsibility for an application for asylum even where that responsibility belongs to another Member State. This, it was stated, included the power to accept responsibility where that responsibility does belong to it under the Regulation without awaiting a formal request from the Member State upon whose territory an unaccompanied minor is situated.

26. The Secretary of State's responses, in letters dated 20 November and 16 December 2015, stated *inter alia* that, as none of the respondents had made an asylum application in France, the United Kingdom had no responsibility under the Dublin III Regulation in respect of them. It was also stated that there are procedures and a timetable for another Member State, here France, to make a request of the United Kingdom if it believes it to be responsible, and that there was no legal obligation to admit the first four respondents to the United Kingdom absent such applications and a "take charge" request.

V. These proceedings

27. Two sets of proceedings and applications for urgent consideration were issued on 15 December 2015. One was by ZAT and MAT, the first and fifth respondents, and IAJ and MAJ, the second and sixth respondents. The other was by KAM, AAM and LAM, the third, fourth and seventh respondents. On the same day, Collins J ordered the Secretary of State to serve any detailed grounds of defence by 5 January and for both sets of proceedings to be listed as a "rolled-up" hearing before the Upper Tribunal in the exercise of the judicial review jurisdiction transferred to it on 1 November 2013.

28. I have explained that before the tribunal there was only evidence on behalf of the respondents. Apart from the psychiatric evidence to which I have referred, it consisted of evidence by the respondents themselves, their English solicitors, a French immigration lawyer, the Head of Mission at the Calais Médecins Sans Frontières, a Middle East specialist, a freelance photojournalist, and volunteers working for two organisations. The evidence dealt with the conditions prevailing in the camp, the respondents' background and histories, mental states and fears, and sibling

relationships, the authenticity of ZAT and IAT's Syrian documents, the laws, practices and arrangements prevailing in France regarding the formulation, processing and determination of applications for asylum, and the prevailing conditions in France for the reception and treatment of applicants for asylum.

29. The material before the tribunal included the joint Ministerial Declaration signed on 20 August 2015 ("the Anglo-French accord") and reports by certain agencies and organisations. One of these, dated September 2014, was by the Council of Europe Commissioner for Human Rights. It stated that France was experiencing "major difficulties in terms of the reception of asylum seekers". A 2012 report by the European Network for Technical Co-operation *inter alia* stated that unaccompanied foreign minors who lodged an asylum application in France and who fell within the responsibility of another Member State were not in practice transferred there. The evidence of Mark Scott, ZAT and IAJ's solicitor, and of Maître Lou-Salome Sorlin, a French lawyer specialising in immigration and asylum law, was that there was a lack of information about the rights under the French legal system, including the Dublin III Regulation, and no access to funded French legal advice and representation until after an adverse decision had been taken on an asylum application or the application of the Dublin III Regulation. Their evidence was also that there were delays of three months before asylum claims could be registered because it was perceived by some to be necessary for unaccompanied minors to be entered into the French care system first. They stated that, according to France Terre d'Aisle ("FTDA"), a State funded organisation to help refugees and migrants, the predicted timescale under the Dublin III procedure was ordinarily 11 months and there was no system of expediting it. Mr Scott and Ms Sonal Ghelani, KAM, AAM and LAM's solicitor, and Michel Janssen of Médecins Sans Frontiéres, stated that the children mistrusted the authorities and that there were difficulties in providing advice to them in these circumstances.

30. Maître Sorlin also stated that it is very rare for children to make asylum claims in France. Because "under French law, a foreign unaccompanied minor is entitled to stay on the territory without any kind of authorisation or residence permit, … child protection services/FTDA do not particularly encourage children to make applications". She stated that "[t]he view is that there is no need, because once they enter the care system, they are adequately protected until their 18th birthday in any event" and that "[u]pon turning 18, those who entered the care system before their 15th birthday, receive a French residence permit and those who did not must apply for asylum". She understood from FTDA and Secours Catholique that France has transmitted two "take charge" requests to the United Kingdom, only one of which concerned an unaccompanied minor. In its determination, the tribunal stated (at [23]) that the evidence of practising French lawyers before it was that in 2015 France transmitted four "take charge" requests to the United Kingdom none of which concerned an unaccompanied minor, and that it is French Government policy to discourage the making of asylum claims by children on its territory.

31. The hearing took place on 18 and 20 January 2016. The tribunal gave its decision on the second day of the hearing with reasons to follow. A written version of the decision and order then given, dated 21 January 2016, is contained in an Appendix to the full judgment, which was handed down on 29 January. There is also before us a signed transcript of what appears to be and is described as "an oral judgment" on 29 January

2016 (edited, approved and signed on 18 March 2016) but which in fact contains the reasons given orally for the order.

VI. The decision of the Upper Tribunal

32. In its full judgment, the tribunal stated (at [49] – [50]) that the Dublin Regulation operates alongside the ECHR and the Human Rights Act 1998, that the two regimes "may sometimes tug in different directions" and that, where they do, "some … compromise must be found". It considered that the "fundamental question for a court is whether to give precedence to, or confer exclusivity on, the EU regime [if it] operates to infringe" a person's rights under the ECHR: [51]. In a case concerned with one of the qualified rights under the ECHR such as Article 8, the question for the court "is whether a disproportionate interference with the Article 8 rights of [that person] is demonstrated": [51].

33. The Tribunal had set out the matters relevant to the assessment of proportionality at [8] – [23] of its determination. These included the factual basis of the claims, the absence of evidence by the Secretary of State and that, given the expedited timetable, it had not been realistically possible for her to investigate fully the evidence on which the respondents relied before the hearing, and the limits of judicial review proceedings in the determination of facts. Although the tribunal had given its decision at the conclusion of the hearing, its full judgment stated (at [9]) that in view of the urgent need for a decision it was inappropriate to attempt a comprehensive resume of the evidence but, at [13], identified four main factual issues.

34. The first concerned the conditions prevailing in "the jungle". The tribunal referred *inter alia* to a judgment of the *Tribunal Adminstratif de Lille:* see [23] above. The second concerned the applicants' background and histories, mental states and fears, sibling relationships and the prospects of reuniting the first four applicants with their respective siblings if entry to the United Kingdom can be achieved. The tribunal's summary is in substance the same as the summary I have given at [20] – [23] above. The third and the fourth issues concerned the laws, practices and arrangements prevailing in France regarding the formulation, processing and determination of applications for asylum, and the prevailing conditions in France for the reception and treatment of applicants for asylum. The tribunal referred to the reports of agencies and organisations and practising French lawyers, as to which see [28] – [30] above. It stated (at [25]) that although, in the Anglo-French accord, the two Governments committed themselves to the provision of adequate information, advice and support, coupled with "protected accommodation" to assist the vulnerable in removal to places of safety and making asylum claims, the evidence, viewed as a whole, suggested that any measures of this kind implemented subsequently have been acutely inadequate.

35. The tribunal stated (at [52]) that the Dublin Regulation has the status of "a material consideration of undeniable potency in the proportionality balancing exercise" and that:-

> "It follows that vindication of an Article 8 human rights challenge will require a strong and persuasive case on its merits. Judges will not lightly find that, in a given context, Article 8 operates in a manner which permits circumvention of

> the Dublin Regulation procedures and mechanisms, whether in whole or in part" and such cases "are likely to be rare."

36. It regarded (see [53]) the cases before it as intensely fact sensitive cases, and "particularly strong on their unique facts, especially as regards [KAM and AAM]". It was "alert to [its] duty to conduct a penetrating scrutiny of the voluminous evidence applying the heightened standard required": [53]. It stated (see [54]) that the test to be applied is:

> "[H]ave the Applicants demonstrated a disproportionate interference with their rights to respect for family life under Article 8 ECHR consequent upon the Secretary of State's refusal to admit Applicants (1) - (4) swiftly to the United Kingdom outwith the full rigour of the Dublin Regulation procedures and mechanisms? The answer to this question involves a balance of the public interest engaged, namely the maintenance of immigration control which, in this instance, involves primarily insistence upon the uncompromising application of the Dublin Regulation process (on the one hand) and the family life rights of all seven Applicants (on the other). … This is a family reunion case, pure and simple."

37. The factors which were said to tip the balance in favour of all or some of the first four Applicants were summarised at [55] as:- age; mental disability; accrued psychological damage; a clear likelihood of further psychological turmoil and disturbance, a best case scenario involving a delay of almost one year; the previous family life in their country of origin enjoyed by all seven Applicants; the pressing and urgent need for family reunification on the very special facts of these cases; the wholly inadequate substitute for family reunification which pursuit of the Dublin Regulation avenue would entail in the short to medium term; the absence of any parent or parental figure in the lives of the first four Applicants; the potential that family life would be re-established very quickly if the first four Applicants were permitted to enter the United Kingdom; the availability, willingness and capacity of the last three Applicants to provide meaningful care and support to the first four; and the avoidance of the mentally painful and debilitating fear, anxiety and uncertainty which the first four Applicants will, predictably, suffer if swift entry to the United Kingdom cannot be achieved.

38. The factors which favoured the Secretary of State's position were summarised at [56] and [57]. The tribunal reiterated that strict and full adherence to the Dublin Regulation regime forms a major component of the State's entitlement to impose effective controls on the admission of aliens to the territory of the United Kingdom and qualified as a potent factor in the proportionality balancing exercise. It, however, stated that the Secretary of State's decisions that were challenged were not ones imbued with any "special sources of knowledge and advice", and that her insistence upon full adherence to the Dublin Regulation embodied a generalised broad-brush assessment rather than a specific, considered response and decision on a case by case basis related to the individual circumstances of the seven Applicants.

39. The tribunal concluded at [58] that the Secretary of State's

> " … refusal to permit the swift admission to the United Kingdom of the first four Applicants *would* interfere disproportionately with the right to respect to family life under Article 8 ECHR enjoyed by all seven Applicants *if* the first four Applicants could properly be seen as claimants to refugee status who, because of the operation of the Dublin Regulation, [were entitled] to have their claims determined in the United Kingdom where their siblings are." (emphasis in original)

It stated that the sole difficulty was that because they had made no claim for asylum, the first four Applicants' present status was as family members *simpliciter* and not that of persons seeking asylum, and that could be addressed if the Applicants were prepared to set in motion their asylum claims processes in France.

VII. Developments since the Upper Tribunal's decision

(a) The additional evidence

40. The evidence on behalf of the Secretary of State consists of two statements of Robert Jones, the Head of the Asylum and Family Policy Unit within the Home Office's Immigration and Border Policy Directorate, dated 29 February and 27 May 2016, a statement of Michael Gallagher who has responsibility for policy and processes relating to asylum seeking children, dated 1 March 2016, and an Official Note dated 26 February 2016, of M. Raphael Sodini, who became the Director of the Asylum Division of the French Ministry of the Interior in January 2016.

41. Mr Jones stated that the contact group established by the 20 August 2015 Joint Ministerial Statement to ensure that the provisions of the Dublin III Regulation are used effectively meets every three months and discusses individual cases and complexities in case management with a view to ensuring transfers are able to take place as swiftly as possible. He visited the camps in Calais and Dunkirk with an official of the French Asylum Service ("OFPRA"). His assessment is that the French authorities are doing their utmost to explain to migrants how to claim asylum in France and to facilitate that process. However, despite the advice given, many migrants choose to remain in the camps because they fear that applying for asylum in France will prevent them from being able to claim asylum or secure residence in the United Kingdom. He stated that, according to the French Interior Ministry, new cases entering the French system can expect a decision within three months and those that apply via a reception centre are prioritised and can expect a decision within two months.

42. In his first statement Mr Jones stated that, between the first and second meetings of the contact group, at least three Calais cases were accepted for transfer to the United Kingdom and a number of other cases are in train and that both governments are committed to prioritising cases in which an asylum claim is lodged by a minor with close family connections in the United Kingdom. He referred to a case of a minor in Greece who was recently transferred to the United Kingdom in a matter of weeks. In his second statement, Mr Jones stated that since February the United Kingdom has received 43 "take charge" requests from the French government, of which it has accepted 35, and that 32 children have been transferred, including two babies. He stated that this shows that the joint work has paid dividends, and repeated his view

that the reluctance of individuals in Calais to claim asylum in France has always been the biggest barrier to identifying and transferring those with a valid family reunification case.

43. Mr Jones also stated that the French authorities have not accepted that the first four respondents' letters seeking asylum from the French authorities written pursuant to the order of the Upper Tribunal were valid asylum claims in France because the French system, like that of the United Kingdom, requires asylum claims to be made in person.

44. M. Raphael Sodini's Official Note stated that certain aspects of law and of fact upon which the decision of the Upper Tribunal was based are inaccurate and erroneous. In 2015, France referred 131 applications to the United Kingdom under the Dublin Regulation, of which 109 were agreed. There were 11 requests for taking responsibility as opposed to the four referred to by the tribunal. Five were based on the discretionary clauses in Article 17(2), three on family reunification and three on the first entry criteria. France undertook ten transfers to the United Kingdom. He stated that the provisions of the Dublin III Regulation are clearly applied in France and specific provisions have been made to favour the implementation of transfer procedures for the reunification of families, that unaccompanied minors are guaranteed access to the asylum procedure with appropriate support, in particular at Calais, and that there are mechanisms available to take charge and cater for them.

45. M. Sodini stated that, when potentially isolated (i.e. unaccompanied) children are reported to the Council of a Département, it must immediately cater for them in a special unit and within a five-day period assess their age and whether they are isolated. He referred to a process of finalising the assessment and referring the children to a judge in eight days, and stated that the care required is undertaken by Social Assistance Mission for Children ("ASE"), which becomes the child's guardian but not legal representative. It is necessary to obtain the authorisation of a juvenile judge to take certain steps, such as applying for asylum, but the guardian can apply to a family court and become the legal representative. At that stage, there is a person empowered to undertake measures in the name of the child and to access the procedure.

46. M. Sodini's Note refers to a circular adopted on 25 January 2016, which set out the procedures applicable to unaccompanied minors who wish to make an application for asylum. That circular refers to a Code for Entry and Stay of Foreigners and Asylum Rights ("CESEDA") introduced on 1 November 2015. M. Sodini stated that where unaccompanied minors make an application for asylum, the matter is referred to OFPRA within 21 days. He stated that "if the application concerns another Member State, in application of the Dublin III Regulation, there is referral without delay in view of the need to organise the transfer". He also stated that, as at the end of 2014, there were 6,158 unaccompanied minors being monitored by ASE, and 273 applications for asylum from unaccompanied minors were registered with OFPRA. The period of investigation varied from three to six months, and the period for designating an *ad hoc* administrator under the asylum procedure was generally less than one week. Where the minor has a legal representative, he or she may access the asylum procedures within a period of three days.

47. As to the position of unaccompanied minors in Calais, M. Sodini stated that a special mechanism has been put in place for taking charge of such persons who, if over 15 years old, are taken into a centre, and that an increase in such provision is being planned. He stated that the dossiers are prepared in approximately five days and the availability of this mechanism ensures the more rapid taking up of responsibility for these minors and makes it possible, when this is chosen, to implement measures for family reunification as soon as possible.

48. As to co-operation, M. Sodini stated that there is almost daily contact between the Dublin units of the two countries on the matter of the management of the position at Calais. This and the liaison committee which meets quarterly have made it possible to undertake transfers in average periods of two months after registration of the applications. He stated that the objective is to implement an even more rapid procedure for isolated minors for whom returning to the family grouping becomes urgent.

49. Mr Gallagher stated that the most appropriate way to deal with cases such as those of the first four respondents is to apply the relevant procedure under the Dublin III Regulation. But his statement refers to two alternatives. The first is paragraph 319X of the Immigration Rules. This allows a child to seek leave to join a relative with limited leave to remain as a refugee or a beneficiary of humanitarian protection where the relative is not the parent of the child and the child is under the age of 18. The relative must be able to care for the child suitably and without recourse to public funds, and there must be "serious or compelling family or other considerations which make exclusion of the child undesirable". In order to make an application under this provision, an application form must be completed online and the individual must attend a visa application centre to provide biometric data and pay a fee. The second is the refugee family reunion route set out in paragraphs 352A – 352FJ of the Immigration Rules. This allows the immediate family members of a person in the United Kingdom as a refugee or with humanitarian protection to reunite with an immediate family member, i.e. a spouse, a partner, or a child under the age of 18. For these applications there are no charges, and those who apply do not have to meet the financial or language requirements of other provisions in the rules. Mr Gallagher stated that the first four respondents would not have met the requirement of the family reunion rules because they wished to enter the United Kingdom based on their sibling relationships. He also stated that applications submitted in Paris, either under paragraph 319X or paragraphs 352A – 352FJ, "should be resolved within the 60 day service standard".

50. The evidence on behalf of the respondents in response consists of the fourth statements of Mr Scott and the second statement of Maître Sorlin. Mr Scott referred to a decision of the French Defender of Rights dated April 2016, which stated that "until recently, the separated minors in the Calais shanty town faced bureaucratic obstacles preventing them from making an asylum application". He stated that no evidence had been adduced by the Secretary of State which contests the overall 10 – 11 month timeframe for the Dublin III process which was in evidence before the Upper Tribunal. He also referred to the report of the Children's Commissioner for England, who visited the camp in April 2016 and stated that there are cases of children who live there alone for up to nine months while waiting for their cases to be reviewed by the French authorities.

51. Mr Scott accepted that, since the judgment of Upper Tribunal and the subsequent improvements, levels of confidence have been growing and children his firm represents have been more willing to engage in the French process. But he stated that there remains a real fear and reluctance among the children about entering the French childcare system and losing their ties with the Syrian community in the camp. His statement and M Sorlin's also deal with a number of specific cases. I refer to one concerning a Syrian baby at [95] below, but I do not consider that the details of those cases are of assistance for the purposes of this appeal.

52. Mr Scott also questioned whether there are now noticeboards and leaflets with relevant information in the camp, as opposed to the Jules Ferry Centre and Maître Sorlin stated that she had never seen any camp notice advising those with a family connection to the United Kingdom that claiming asylum in France can provide a safe route to family reunion.

53. Maître Sorlin also stated that M. Sodini's statement that the period for designating an *ad hoc* administrator was generally less than one week gave no source and was inconsistent with the period of one month suggested by FTDA and those in other reports. As to M. Sodini's statement that any non-nationals who presented themselves to make an asylum claim had to be registered within three days, Maître Sorlin stated that in a case in which her firm acted for two unaccompanied minors relying on the provisions referred to by M. Sodini, on 21 January 2016 the Prefecture had refused to register their asylum claims on the ground that they were not in child care and they were not given advice about Dublin III applications.

54. Maître Sorlin and Mr Scott accepted that there had been significant improvements, but stated that this all post-dated the judgment of the Upper Tribunal in these proceedings and was the result of that litigation and litigation in France, as well as a political commitment to speed up the processes. They, however, stated that the approach of the authorities remained entirely reactive and was not proactive. The new "system" depended on the initiatives of a handful of English and French lawyers in identifying unaccompanied minors and their family members, often without remuneration.

(b) The UNHCR study

55. The study was conducted between October 2015 and February 2016 in nine countries, including France and the United Kingdom, examining how the Dublin III Regulation is applied in those countries. The draft report considered the files of 17 cases of unaccompanied minors and other reports and information (including the decision of the Upper Tribunal in this case). It assesses whether applicants are benefitting to the full extent possible from the criteria in the Regulation that relate to minors and family members and the extent to which procedural guarantees are applied in practice.

56. The UNHCR concluded that the procedure for assigning Member State responsibility is lengthy and protracted, and that such applications are not prioritised in practice: see pp.49 – 50 and 53 – 54. The average time taken is stated to be 202 days, which is less than the 11 months in the Regulation. France is stated to be one of the countries in which the delays lead to unaccompanied minors disappearing and no longer pursuing an application for international protection and (see pp.75 – 76) to be one of the countries with significant delays in reuniting unaccompanied minors with family

members. It is stated that in only 10 of the 17 examined files did the family reunion procedure last less than six months. The reasons it gives are: lengthy family tracing procedures, delays in conducting age assessments, different documentary and evidential requirements for establishing family links among Member States, including the conduct of DNA tests, assessments linked to the ability of the relative or family member to take care of the minor, insufficient documentation attached to a "take charge" request, and the late disclosure of information from the unaccompanied minor about family members present in another Member State.

VIII. The grounds of appeal

57. The central ground of appeal has two limbs. The first is that the tribunal erred in failing to recognise that the appropriate mechanism for a young, would-be asylum seeker in France, who claims to have family in the United Kingdom and wishes to claim asylum and to join his family is to seek asylum in France and have the claim dealt with by the operation of the Dublin III Regulation. The second limb is that there is nothing in the requirements of ECHR Article 8 that requires the United Kingdom to admit such individuals in the absence of the operation of the Dublin III Regulation, and in the absence of an application for entry clearance.

58. The Secretary of State also submitted that the Upper Tribunal made a number of other errors. They are:

    a. Concluding that the operation of the Dublin Regulation would not be frustrated by making an order which required the first four respondents to send an application for asylum to the French authorities but did not require it to be accepted by them. In requiring the United Kingdom to admit them in order to consider their claims under the Dublin Regulation, the order "flagrantly bypassed" the operation of the Regulation and disregarded the assessment that would have needed to be made by the French, including consideration of the veracity of their claims and the procedural requirements of the French system.

    b. Concluding that the maintenance of effective immigration control was not a significantly important factor in the proportionality balance and failing to consider the consequence of ordering the United Kingdom to admit these applicants when they had deliberately circumvented the Dublin procedure and had made no application for entry and the Secretary of State had made no immigration decision.

    c. Relying on the point (determination at [57]) that the Secretary of State had not made an individualised assessment of the respondents' circumstances when the reason for this was the lack of any immigration application.

    d. Conflating the conditions experienced by the first four respondents in the camp with the actual interference with ECHR Article 8, which is the separation from their alleged siblings, and taking into account the legally irrelevant issue of the circumstances in the camp in Calais.

    e. Failing to consider the obligations imposed on France as a result of ECHR Article 8 and the access to redress available to those in France for any breach

by France of those obligations. The tribunal appeared to accept that the respondents would have their Article 8 rights breached while in France due to delay in processing their application without considering that France and its courts was itself bound to ensure that no such breach occurred.

IX. The submissions

59. Mr Eadie accepted that in principle ECHR Article 8 co-exists with the Dublin III processes and procedures but submitted that it is only in an exceptionally compelling case that ECHR Article 8 can prevail. This, he argued, is because the Dublin Regulation itself strikes the proportionate balance for the purposes of ECHR Article 8 by putting family reunification in appropriate circumstances at the top of the hierarchy of the applicable state: see Recitals 13 – 15 and Articles 6 and 8 of Dublin III. The various Regulations and Directives of the CEAS provide that they comply with the fundamental rights and principles in the EU Charter, which of course includes the right in Article 7, the equivalent of ECHR Article 8, to respect for private and family life and there is a strong principle of mutual confidence and an assumption that all states participating in the Dublin process observe fundamental rights, including those based on the ECHR. The Regulation allows for the orderly and proper consideration of family life by a process and a system that, if followed, will be compliant with Article 8. Following those processes inevitably takes some time to complete and will thus inevitably delay family reunion, but there is nothing in the case law to indicate that that is or is likely to be incompatible with Article 8.

60. The submission at the heart of the Secretary of State's case relied on a contrast between what might be described as the substantive aspect of Article 8 and the role of Article 8 at what might be described as the anterior procedural stage. The substantive aspect arises where, after the Dublin processes have been completed, it is argued on the basis of Article 8 that an individual should not be removed from one Member State to the Member State responsible under the Dublin Regulation for considering the claim for asylum. The anterior procedural stage involves the process of determining which Member State is responsible. In cases concerned with the substantive aspect, a strict approach has been taken, and (see [70] – [74] below) only the risk of ill-treatment in violation of Article 3 of the ECHR will suffice. Mr Eadie's submission was that, if anything, a stricter approach should be taken in a case such as this which did not involve the question whether the first four respondents should be permitted to live with their siblings but the anterior procedural stage and the role of Article 8 in it. It concerned only the period of time needed for the Dublin processes to be properly completed, including assessment of the alleged family relationships, consideration of biodata, age assessments, and verification of identities and considerations of medical evidence. There is, he argued, every good reason for the processes to be followed in order to ensure that cases such as these are dealt with in an orderly manner. The proper way to deal with any non-compliance with the provisions of the Regulation or with ECHR Article 8 was to issue legal proceedings in France.

61. On behalf of the respondents, Mr Fordham QC accepted that adherence to the Dublin processes and procedures had a high value, but submitted that the Upper Tribunal carefully analysed them and the relevant authorities and did not put a foot wrong on the law. As to the balance between the Dublin process and ECHR Article 8, there are two limbs to the respondents' case. The first is that, in their special circumstances, the

operation of the Dublin process in France failed to vindicate and protect their rights under the ECHR. His submissions, like those of Ms Demetriou on behalf of the UNHCR, were that an individual's vulnerability will generally inform a court's assessment of proportionality. Unaccompanied minors form a category of particularly vulnerable persons, as do those with physical or mental health problems, and it is important not to prolong more than is strictly necessary the procedure for determining the Member State responsible for the claims of such persons. It is, they argue, not possible to ignore conditions in the camp because, together with delay in bringing about reunification, they go to the severity of any breach and that is a relevant factor in considering the proportionality of an interference with a right protected by ECHR Article 8.

62. The second limb of the respondents' case is that they have a freestanding right to assert the right under ECHR Article 8 irrespective of the adequacy and efficacy of the operation of the Dublin III Regulation in France. The United Kingdom was under a substantive obligation to admit the first four respondents to the United Kingdom to make asylum claims because they have siblings legally present in the United Kingdom.

63. The Secretary of State submitted that the Upper Tribunal accepted both of these limbs because it considered whether it would be a proportionate interference with ECHR Article 8 rights to insist on the Dublin III procedures and concluded that it would not be. In principle that is correct. But, as a practical matter, the tribunal's decision is based on its view that, in the circumstances of the first four respondents, the operation of the Dublin Regulation in France did not adequately protect their rights and that the conditions in "the jungle" were so bad that it would be a disproportionate interference with their rights under ECHR Article 8 to insist on compliance with the Dublin procedures.

X. Discussion

64. I start with *Sen v The Netherlands* (2003) 36 EHRR 7, *Tuquabo-Tekle v The Netherlands* application 60665/00 [2006] 1 FLR 798, and *Mayeka v Belgium* (2008) 46 EHRR 23. Those decisions show that a state can owe a positive duty under Article 8 of the ECHR to admit persons to its territory for family reunification. They also show that the extent of that obligation varies according to the particular circumstances of the persons involved and the general interest, and that in cases involving children the best interests of the child are a primary consideration in the proportionality exercise. In *Sen* and *Tuquabo-Tekle*, the Netherlands was held to be under a positive obligation under Article 8 to admit children who were respectively in Turkey and Eritrea to re-establish family life with individuals settled in the Netherlands. In *Mayeka*'s case, the positive duty to facilitate family reunification was held to apply even where the parent was in a third state (Canada) and it was stated that the best interests of the child are a primary consideration in the proportionality exercise. Those cases did not, however, involve the relationship between the Dublin processes and procedures and Article 8 of the ECHR. That relationship does not appear to have previously come before the courts in this "positive obligation" scenario.

65. Although, as the tribunal stated, the Dublin and ECHR regimes "may sometimes tug in different directions", it is clear that the Dublin regime does not operate to the exclusion of the human rights regime but exists side by side with it. The issue is the

relative weight of the two regimes and the strength of the human rights case needed to override the processes and procedures of the Dublin system. In a case where an individual is in one Member State ("the first Member State"), in what circumstances, if any, will Article 8 of the ECHR (Article 7 of the EU Charter) impose a positive duty on another Member State ("the second Member State") to admit the individual, here an unaccompanied minor or a vulnerable adult, where the individual has not used the Dublin processes and procedures in the first Member State?

66. The circumstances of this case are thus different from the scenarios in which questions about the relationship between the processes and procedures under the Dublin Regulations and the rights under the ECHR have most commonly come before the courts. The questions have generally arisen in "take back" scenarios, which arise where a person was formerly in the territory of the first Member State, and either applies or does not apply for asylum there, but then travels to the second Member State and makes an application in that state. In many cases the application of the criteria in the Dublin III Regulation will mean that the first Member State is responsible for considering an application for international protection: see Articles 13 – 15.

67. In such cases, where the second Member State wishes to return the individual to the first Member State, the individual may resist on one of two grounds. The first is that, if returned to the first Member State, he or she will face a real risk of ill-treatment in violation of Article 3 or another provision of the ECHR. The decisions of the Grand Chamber of the CJEU in Joined Cases C-411/10 and C-493/10 *R (NS (Afghanistan)) v Secretary of State for the Home Department* [2013] QB 102 and Case 3-394/12 *Abdullahi v Bundesasylamt* [2014] 1 WLR 1895, that of the European Court of Human Rights in *Tarakhel v Switzerland* (2015) 60 EHRR 28, and that of the Supreme Court in *R (EM (Eritrea)) v Secretary of State for the Home Department* [2014] UKSC 12, [2014] AC 1321 discussed at [70] – [74] below are examples of this situation.

68. The second ground on which a person may challenge a decision to return him or her to the first Member State which is responsible under the Dublin Regulation is that he or she has family in the second Member State or has established a private life in it. The recent decision of this court in *R (CK) v Secretary of State for the Home Department* [2016] EWCA Civ 166 discussed at [78] – [80] below is an example of this situation.

69. These decisions all concern the Dublin II Regulation, Council Regulation 343/2003, which does not contain a provision similar to Article 27 of the Dublin III Regulation. They show that, although the ECHR and the Dublin II regimes co-exist, where the Dublin II processes and procedures have been operated, to date it is only where there is a "systemic" deficiency or a real risk of ill-treatment contrary to ECHR Article 3 in the first Member State that the provisions of the ECHR have been accepted as overriding them.

70. It is convenient to start with the first situation and the decision in *Abdullahi v Bundesasylamt*. The decision was handed down about two months before the decision in *EM (Eritrea)'s* case, but after the hearing in that case. It is no doubt for that reason that in *EM (Eritrea)'s* case the Supreme Court did not refer to it. *Abdullahi*'s case concerned a Somali national, A, who appealed against Austria's decision to transfer

him to Hungary, which had agreed to Austria's request to take charge of his application for asylum. A's case was that, under the Regulation, the Member State responsible for considering his application was not Hungary, but Greece, and that since Greece did not observe human rights in certain respects the responsibility fell on Austria. The Austrian court sought a preliminary ruling from the CJEU as to whether an applicant for asylum was entitled to request a review of the determination of responsibility by the first Member State on the ground that the criteria laid down in Chapter III of the Regulation had been misapplied.

71. The Grand Chamber held that the only way in which an applicant for asylum could call into question the agreement of a Member State to take charge of the application was by pleading systemic deficiencies in the asylum procedure and the conditions for the reception of applicants in that Member State, which provided substantial grounds for believing that the applicant would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the EU Charter, i.e. Article 3 of the ECHR: see [2014] 1 WLR 1895 at [60].

72. The Grand Chamber stated (at [52]) that the CEAS was conceived in a context making it possible to assume that all participating states observed fundamental rights and that states could have confidence in each other in that regard. It also stated (at [53]) that it was because of that principle of mutual confidence that the regulations were adopted in order to rationalise the treatment of applicants for asylum, to avoid blockages in the system, and to increase legal certainty with regard to the determination of the state responsible for examining the asylum application and thus to avoid forum shopping. It also described Article 3(2) of the Dublin II Regulation, the sovereignty clause, the equivalent of Article 17 of the Dublin III Regulation, as an optional provision which granted a wide discretionary power to Member States.

73. The earlier decision of the Grand Chamber in *R (NS (Afghanistan)) v Secretary of State for the Home Department*, where Greece was deemed to have accepted a "take charge" request under the Dublin II Regulation, is to the same effect. The Grand Chamber stated (at [78]) that the principle of mutual confidence made it possible to assume that all participating states observed fundamental rights, including those in the ECHR. What the court stated (at [81] – [82]) about the fact that at times major operational problems in a given Member State might mean there is a substantial risk that a person might be treated in a manner incompatible with his or her fundamental rights is of significance in the present context. The Grand Chamber stated that risk did not affect the obligations of the other Member States to comply with the provisions of the Regulation, unless (see [86]) there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions resulting in inhuman or degrading treatment, that is treatment contrary to Article 4 of the EU Charter and Article 3 of the ECHR.

74. I turn to *R (EM (Eritrea)) v Secretary of State for the Home Department*. For present purposes, it suffices to state that the Supreme Court held that the recognition of a presumption that Member States of the EU would comply with their international obligations in relation to asylum procedures and reception conditions did not extinguish the need to examine the evidence in a given case as to whether those obligations would in fact be fulfilled. This was because the presumption could be rebutted. It was stated that the critical test is whether substantial grounds are shown for believing that the removal of an applicant from a Member State to another country

would result in that person facing a real risk of being subjected to treatment in violation of Article 3 of the ECHR. It did not need to be shown that the source of the risk was a systemic deficiency in asylum procedures and reception conditions. Lord Kerr, with whom the other members of the court agreed, stated (at [63]) that the ultimate question is whether there is a real risk of breach of Article 3 in the other Member State. While he accepted that evidence of unsatisfactory living conditions in that state is more likely to partake of systemic failings, he stated that the search for such failings is a route to establish that there is a real risk of breach of Article 3 rather than a hurdle to be surmounted.

75. In *Tarakhel v Switzerland*, where the applicants had five children, the issue arose because of reception conditions in Italy, which was responsible for examining their application under the Dublin system. The Strasbourg court found that, given the circumstances, if the Swiss authorities returned the applicants to Italy without having first obtained individual guarantees that they would be taken charge of in a manner adapted to the age of their children and that the family would be kept together, there would be a violation of ECHR Article 3. There was thus no need to discuss whether a violation of the qualified right in Article 8 would justify not returning them to Italy. In the context of this case it is relevant to note that the court stated (at [119]) that the requirement of "special protection" of asylum seekers is particularly important when the persons concerned are children in view of their specific needs and vulnerability. This is so even when the children are accompanied by their parents as they were in that case.

76. The last two cases dealing with the situation in the first Member State are the very recent decisions of the Grand Chamber of the CJEU in C-63/15 *Ghezelbash v Staatssecretaris van Veiligheid en Justitie* [2016] All ER (D) 58 and C-155/15 *Karim v Migrationsverket* [2016] All ER (D) 55. Those cases involved challenges to transfer decisions made after "take back" requests had been accepted. The proceedings were thus brought by persons who had made applications for asylum in a Member State. The Grand Chamber considered the scope of appeals under Article 27 of the Dublin III Regulation. It held that a person is permitted to appeal under Article 27 against a decision to transfer him on the ground that the criteria for determining responsibility in the Dublin III Regulation had been applied incorrectly. It stated that the right under EU law to an effective remedy is not limited to a remedy where there are systemic deficiencies in the asylum procedure or reception conditions which provide grounds for believing that an applicant would face a real risk of being subjected to inhuman and degrading treatment. The Grand Chamber thus took a different approach to that taken by *Abdullahi* in relation to the Dublin II Regulation.

77. The respondents in the present case relied on the fact that *Abdullahi* and *NS (Afghanistan)* were cases under the Dublin III Regulation. The written submissions on behalf of the AIRE Centre argue that *Ghezelbash* and *Karim* show that the threshold under Dublin II is lower than stated in *Abdullahi*'s case and indicate that case might be incorrect even as far as Dublin II is concerned. Although what was said in those cases about *Abdullahi* provides some support for this, I consider that it is of limited assistance to the respondents. This is because Article 27 of the Dublin III Regulation only deals with the position where a person has made an application for asylum and the first Member State, alone or together with the second Member State, has determined which state is to be responsible for determining the application.

Ghezelbash and *Karim* thus concern the scope of an appeal within the Dublin system. They are of limited guidance where no application for asylum has been made to either state, and thus there has been no allocation of responsibility within the Dublin processes which have been bypassed.

78. I turn to the second situation, where the court of the second Member State is concerned not with conditions in the first Member State but with an individual's family and private life in the second Member State. This was considered in *R (CK (Afghanistan)) v Secretary of State for the Home Department* [2016] EWCA Civ 166. The appellants were a married couple and one of their daughters who had first entered the EU in France. The husband entered the United Kingdom illegally in September 2012 and claimed asylum when his presence was discovered. His wife and daughter entered the country in October 2012 and immediately claimed asylum. A second child was born to the couple in 2013. Under the Dublin II Regulation, France was responsible for examining their asylum claims and it accepted its responsibility. The appellants challenged the decision to return them to France, relying on Article 8 of the ECHR and section 55 of the Borders, Citizenship and Immigration Act 2009.

79. The issue of principle in the case, which Laws LJ described (at [9]) as a recurrent theme, was:

> "ECHR Article 3 aside, what if any is the scope for challenge to the removal of the affected individual to another Member State following a decision under Dublin II that the other State is responsible for the examination of his asylum claim?"

Laws LJ stated that "the issue is one of principle because its resolution requires the court to find an accommodation between two competing legal imperatives: (i) the vindication of Dublin II as a regime for the distribution at an inter-State level between the Member States of responsibility for the determination of asylum claims, and (ii) the vindication of individual claims of right which might be denied by a rigorous enforcement of the inter-State regime." After reviewing the authorities (including the decision of the Upper Tribunal in this case) Laws LJ stated that they "unfortunately [swim] between the two" imperatives.

80. Laws LJ concluded (see [30]) that even under the Dublin II Regulation, which had no provisions such as that in Article 27(1) of the Dublin III Regulation giving an "applicant" an appeal to a court or tribunal against a transfer decision, an individual had a right under the ECHR to challenge a removal direction. This was because it was not the intention of those enacting the Dublin legislation to prohibit the autonomous application of ECHR Article 8 to decisions to remove. He, however, considered (see [31]) that the existence of the Dublin II regime had a profound impact on the application of Article 8 to a case where the applicant is to be removed to another Member State following a decision that the other state is responsible for the determination of his asylum claim. He expressed himself in stronger terms than the tribunal did at [52] of its determination in this case. He stated that, if the Dublin system "was seen as establishing little more than a presumption as to which state should deal with which claim, its purpose would be critically undermined" and that "an especially compelling case under Article 8 would have to be demonstrated" to deny removal of the affected person following a Dublin II decision.

81. There is considerable force in Mr Eadie's emphasis on the importance of an orderly process at what I described as the anterior procedural stage and the need for biometric data, verification of identity, and assessments of age and the family relationships claimed. There is a loose analogy with the triage stage of a visit to a hospital's Accident and Emergency Department. Although there will be some cases where the patient arrives in such a serious state that it is obvious he or she must go to the front of the queue, it is not up to a patient or his or her family to decide on the priority to be given to him or her.

82. In this case, moreover, the emergency largely arose because of the appalling conditions in which the first four respondents found themselves as a result of their decision not to seek assistance from the French authorities. Notwithstanding their difficult histories and trauma, I do not consider that their subjective fear about the French process can, in itself, justify bypassing the Dublin process and the French courts. I consider that Mr Fordham puts the matter too high when he states (skeleton argument, paragraph 4.29) that "human rights law meets children where they are; it does not condemn them for the so-called wisdom of how they have got there". In my judgment, what has to be demonstrated by those who seek to bypass the Dublin processes and the legal procedures of the first Member State are objective reasons which justify that decision.

83. In my judgment, Mr Eadie also puts the matter too high when he argues that the Dublin Regulation itself strikes the proportionate ECHR Article 8 balance because it places family reunification at the top of the hierarchy in ascertaining the responsible state and allows for orderly and proper consideration of family life. There was tension between what can be described as this absolutist strand of his submissions and his acceptance that in an exceptionally compelling case ECHR Article 8 can prevail over the Dublin process and procedures. Moreover, the authorities do not suggest that, even in what Mr Eadie described as the "initial procedural stages", there is an absolute rule that the determination of the responsible Member State must be by the operation of the Dublin process and procedures in the Member State in which the individual is present.

84. The need for expedition in cases involving particularly vulnerable persons such as unaccompanied children is recognised in the Regulation and authorities such as Case C-648/11 *R (MA (Eritrea)) v Secretary of State for the Home Department* [2013] 1 WLR 2961 and *Manchester City Council v Pinnock* [2010] UKSC 45, [2011] 2 AC 104 at [64]. Delay to family reunification may in itself be an interference with rights under ECHR Article 8: see *Tanda-Muzinga v France* (Application No. 2260/10) 10 July 2014, although it should be noted that in that case the delay was of three years. Mr Eadie accepted that the decisions in *R (Chikwamba) v Secretary of State for the Home Department* [2008] UKHL 40, [2008] 1 WLR 1420 and *Mayeka v Belgium*, to which I referred at [64] above, show that the operation of a procedural rule may be disproportionate. I accept Ms Demetriou's submission that the urgency of particular circumstances may require a shorter period than the periods specified as longstops in the Regulation. It is therefore material to consider not only what provisions are made in the procedural rules but how they operate in practice.

85. A further reason for rejecting Mr Eadie's submission in its absolutist form is Article 17 of the Dublin III Regulation. Since the relevant officials in the second Member State have power to assume responsibility in a case in which the Regulation assigns it

to another Member State, it cannot be said that it is never open to an individual to request that state to do that. Mr Eadie suggested, or came close to suggesting, during the course of the hearing that a refusal to exercise the power under Article 17 was not justiciable. That, in my judgment, is unsound in principle and also finds no support in the authorities. *Abdullahi v Bundesasylamt* recognised only that the second Member State has a wide margin of discretion in deciding whether to assume responsibility pursuant to the provision in the Dublin II Regulation that is the equivalent of Article 17. In a context in which the exercise of power relates to relations between two Member States as to the operation of a treaty arranging for the allocation of responsibility for examining applications for asylum between Member States, this is clearly correct. There will be a wide range of relevant considerations for the decision-maker to take into account: see all the factors that the Upper Tribunal stated were relevant to the assessment of proportionality. But subject to the effective scope of judicial review being narrower for this reason, the exercise by the Secretary of State of her discretion is subject to the ordinary public law principles of propriety of purpose, relevancy of considerations, and the longstop *Wednesbury* unreasonableness category and, because of the engagement of ECHR Article 8, the intensity of review which is appropriate in the assessment of the proportionality of any interference with Article 8 rights.

86. The fact that ECHR Article 8 can be engaged by delay and that the operation of a procedural rule may be disproportionate, together with the existence of Article 17, brings one back to the question of the balance between what Laws LJ in *CK's* case (see [79] above) referred to as the two competing legal imperatives and the height of the hurdle required to permit the Dublin process to be "trumped" by ECHR Article 8. The AIRE Centre criticise Laws LJ's statement in *CK*'s case that what is needed is "an especially compelling case" but the respondents maintained that, in any event, they fall within Laws LJ's formulation. It was argued by the AIRE Centre that all that has to be shown is a manifest deficiency in the protection of ECHR rights in the first Member State, because that will defeat the presumption that Member States will comply with their international obligations, including those in the ECHR: see the discussion of the principle of equivalent protection in *Bosphorus v Ireland* (2006) 42 EHRR 1, reaffirmed in *Avotins v Latvia* (Application No.17502/07) 23 May 2016. It is not contended that there is a general manifest deficiency by France in protecting rights under the ECHR and the EU Charter. The criticisms relate only to the specific circumstances of family reunion of unaccompanied minors.

87. There will be a need for expedition in many cases involving unaccompanied minors. The circumstances of the first four respondents' cases, especially the psychiatric evidence, suggested in their cases there was a particular need for urgency. But 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. I do not accept that the "especially compelling case" hurdle articulated by Laws LJ in *CK's* case is too high for the "initial procedural stages". In *R (Elayathamby) v Secretary of State for the Home Department* [2011] EWHC 2182 (Admin) at [42(i)] Sales J described the principle of mutual confidence as creating "a significant evidential presumption". In *EM (Eritrea)* (at [64]) Lord Kerr approved of this description. He had stated earlier in his judgment (at [40] – [41]) that the presumption reflected not only principle but pragmatic considerations. This is because a system which required a Member State to conduct an

intense examination of avowed failings of another Member State would lead to disarray.

88. The material deployed in the present case is a vivid example of the problems a court faces in conducting such an examination about the legal system of another EU state. The pressure of cases, particularly given the scale of the flow of migrants at the present time, resource considerations, and the need to have a fair system of prioritising work can lead to difficulties in all legal systems, including ours. It is difficult for a court in one jurisdiction to assess whether perceived difficulties in another jurisdiction reflect the reality without a careful examination and the ability to test the evidence deployed by those who wish not to use the procedures and courts of that jurisdiction. In the present case the tribunal's examination of the alleged failings of the French system was conducted without evidence from the Secretary of State. If one takes account of the additional evidence adduced for the hearing before this court, it is clear that the court is being asked to resolve disputed factual and legal issues about the operation of the French system in judicial review proceedings rather than in the traditional way foreign law and practice is ascertained. As the Upper Tribunal recognised (see [9] referred to at [33] above), judicial review proceedings are not really suited to this.

89. The tribunal was alive to the problem that the circumstances meant that there was no evidence from the Secretary of State and the reasons for this. But it stated (at [53]) that much of the evidence was uncontested without distinguishing between evidence as to the conditions in the camp or the mental health of the first four respondents and evidence about the alleged deficiencies of the French system. It also relied (at [57]) on the fact that the Secretary of State's decisions were not made with any "special sources of knowledge and advice" and were not "a specific, considered response and decision on a case by case basis" when the reason the Secretary of State had not made an individualised assessment of the respondents' circumstances was the lack of any immigration application by them or on their behalf.

90. Cases such as these are intensely fact-sensitive. The psychiatric evidence before the Upper Tribunal showed that there was urgency because of the physical and mental condition of the first four respondents. The evidence of the French lawyers and the NGOs suggested that there would be a delay of just under one year in the French system and there was no possibility of expedition. The tribunal was very concerned because of the strength of the psychiatric evidence about the mental health of the first four respondents, the absence of any parent or parental figure, and the conditions in the camp. Moreover, the events which gave rise to these proceedings occurred shortly after the United Kingdom and French governments put in place arrangements to facilitate the operation of the Dublin processes. It appears from the recent evidence that, at the time of the hearing, the new arrangements reflected in the joint Ministerial Declaration signed on 20 August 2015 were not fully in effect. It also appears that the Code for Entry and Stay of Foreigners and Asylum Rights introduced on 1 November 2015 providing for registration of asylum applications within three to ten days had not yet led to a change in the treatment of unaccompanied minors. In those circumstances, it is understandable that the Upper Tribunal concluded that to refuse to allow entry to the United Kingdom would be a disproportionate interference with the respondents' Article 8 rights.

91. My summary of the tribunal's decision refers at [35] – [36] above to the way the tribunal sought to reflect the importance of the Dublin Regulation. It stated (at [52]) that the Regulation has the status of a "material consideration of undeniable potency", that vindication of an Article 8 human rights challenge "will require a strong and persuasive case", that judges will not lightly find that Article 8 "operates in a manner which permits circumvention of the Dublin procedures and mechanisms". In the light of the circumstances to which I referred in the last paragraph and on the evidence before the tribunal, the result it reached may have been justifiable. I have, however, concluded that, notwithstanding these statements about the importance and potency of the Dublin Regulation, perhaps because of the general terms in which the judgment is phrased, it erred in its approach to the test to be applied at the "initial procedural stage" of the Dublin process.

92. I consider that the tribunal set too low a hurdle for permitting that process to be displaced by Article 8 considerations. For example, while stating (at [54]) that in this context "the maintenance of immigration control … involves primarily insistence upon the uncompromising application of the Dublin Regulation process (on the one hand) and the family life rights of all seven applicants (on the other)". If anything, this gives the two equal weight. Again, at [52] it stated that what is required is "a strong and persuasive case on its merits". These are lower thresholds than the demonstration of an "especially compelling case under Article 8" required by Laws LJ in *CK's* case. Laws LJ (at [31]) expressly stated that the "force of the Regulation" should be expressed in stronger terms than was done by the tribunal in this case. This was because he considered that the existence of the Dublin II regime had a profound impact on the application of Article 8 and, "if it were seen as establishing little more than a presumption as to which State should deal with which claim, its purpose would be critically undermined". The operation of the tribunal's approach would in many cases also involve the intense examination of the claimed failings of another Member State which Lord Kerr stated (see [87] above) would lead to disarray.

93. I also consider that the tribunal took too broad brush an approach to the relevance of the appalling conditions in the camp. Those conditions are not central to the Article 8 claim the focus of which must be family life rather than conditions. They are, however, relevant to the assessment of proportionality for the particular reason given by Ms Demitriou. That is, together with delay in bringing about reunification, the conditions go to the severity of any breach which is a relevant factor in considering the proportionality of an interference with the respondents' Article 8 rights. This is not explained in the judgment.

94. The tribunal (at [42]) summarised Mr Manknell's submissions on behalf of the Secretary of State about the fact that the condition of the respondents in the camp was the consequence of their own choice and that they also chose not to make any applications to the French courts or to the Secretary of State for entry clearance to the United Kingdom. But it failed to grapple with those submissions, or with the need for an orderly process, particularly at the initial procedural stage in circumstances where large numbers of migrants have to be considered by the authorities in Member States. Those factors are also material in assessing proportionality. On using the French courts, as Mr Eadie stated, the two decisions of the French courts on these matters have been favourable to the respondents' claims.

95. I consider that applications such as the ones made by these respondents should only be made in very exceptional circumstances where they can show that the system of the Member State that they do not wish to use, in this case the French system, is not capable of responding adequately to their needs. It will, in my judgment, generally be necessary for minors to institute the process in the country in which they are in order to find out and be able to show that the system there is not working in their case. This is subject to the point that, as I have stated, these cases are intensely fact-specific. There will be cases of such urgency or of such a compelling nature because of the situation of the unaccompanied minor that it can clearly be shown that the Dublin system in the other country does not work fast enough. The case of the Syrian baby left behind in France when the door of a lorry bound for England closed after his mother got onto the lorry referred to in Mr Scott's fourth statement is an example. But save in such cases, I consider that those representing persons in the position of the respondents should first seek recourse from the authorities and the courts of the Member State in which the minor is. Only after it is demonstrated that there is no effective way of proceeding in that jurisdiction should they to turn to the authorities and the courts in the United Kingdom.

96. In the present case, as well as deciding to bypass the French administrative and court system, the lawyers advising the respondents did not pursue the formal procedures for making an application on their behalf to the United Kingdom. It was argued on their behalf that no arrangement known or communicated to their lawyers identified a mechanism which they were able to pursue to allow the Secretary of State to consider the ECHR Article 8 compatibility of refusing prompt entry to the United Kingdom. It is stated that the point did not feature in the pre-action correspondence or the Secretary of State's acknowledgment of service and summary grounds and that the Secretary of State's position was that she would only consider a Dublin "take charge" request by the French authorities. There is force in these submissions. It was only in March 2016 that Mr Gallagher's evidence on behalf of the Secretary of State identified alternative possibilities. Moreover, his evidence suggests that the first four respondents' applications could not have met the requirements of the provisions of the Immigration Rules to which he referred.

97. That is not to say that in a case where legal representatives contend that the Secretary of State ought to consider a person outside the jurisdiction on the ground that she is under a positive duty to admit that person to the United Kingdom for family reunification they are entitled entirely to rely on her. In the present case, the respondents' representatives had been in communication with the Secretary of State. They furnished some of the material which they would have had to have furnished if they had applied for entry clearance in France or for asylum in the United Kingdom. They did not furnish all of what would have been required and did not make the first four respondents available for interview. I consider that it is incumbent on those representing the individual or individuals to furnish the authorities with all the information that would be needed in a formal application, including biometric data, as if they were seeking Entry Clearance. It cannot be right to shift the initial assessment from the country in which a minor physically is to another country or to justify seeking to do so by asserting that the first country is unable to act but to leave the Secretary of State without the information she will need to assess the application in the way she would have done had the person had reached the United Kingdom and made an application.

98. Before leaving this case, I observe that the position has changed significantly since the decision of the Upper Tribunal. The events which gave rise to these proceedings occurred shortly after the United Kingdom and French governments put in place arrangements to facilitate the operation of the Dublin processes. The evidence recently filed explaining the French system and about the improvements to it (summarised at [40] – [54] above) shows that if in the future an application such as the ones made by the respondents is made, the factual, regulatory and legal background will be very different.

99. It appears from M. Sodini's Notice that on 25 January 2016 the Code for Entry and Stay of Foreigners and Asylum Rights introduced on 1 November 2015 providing for registration of asylum applications within three to ten days was supplemented by a circular setting out the procedures applicable to unaccompanied minors who wished to make an application for asylum. The recent evidence filed by Maître Sorlin and Mr Scott (see [51] and [54] above) accepted that since the judgment of the Upper Tribunal in these proceedings there have been significant improvements to the operation of the Dublin process for unaccompanied minors in France who seek family reunification and that minors have been more willing to engage in the French process. They, however, stated that there is still some way to go before there is a properly functioning system and that the approach of the French authorities remains reactive rather than proactive.

100. Any future application will be considered against that different evidential background and in the light of the particular circumstances of the individuals involved. But the general import of the recent evidence suggests that, save in a case such as that of the Syrian baby, a claim completely bypassing the "initial procedural stage" of the Dublin process on Article 8 grounds in the way that occurred in these proceedings is unlikely to meet the required threshold of "an especially compelling case".

XI. Conclusion:

101. It follows that in my view the tribunal failed to apply the correct test, and I am not entirely persuaded that if it had done so it must inevitably have reached the same conclusion. In those circumstances, the appropriate course would normally have been to remit the matter to the tribunal for reconsideration. The Secretary of State does not, however, seek the return of the first four respondents to France. She accepts that the United Kingdom is the correct place for their asylum claims to be substantively determined, and has granted refugee status to two of them. It would therefore be inappropriate to take that course. I would therefore simply allow the appeal and make no further order.

Lord Justice Longmore:

102. I agree.

Lord Justice Moore-Bick:

103. I also agree.

APPENDIX I

Evidence before the Upper Tribunal

(i) Evidence by and in support of the respondents

Name of witness	Status	Date of evidence
MAT	Fifth Respondent. The first respondent, ZAT, is his brother	24 November 2015
MAJ	Sixth Respondent. States that the second respondent, IAJ, is his brother	24 November 2015
LAM	Seventh Respondent. States that he is the brother of the third and fourth respondents, KAM and AAM	7 December 2015
LAAM	States that she is the sister of the third and fourth respondents, KAM and AAM	1 December 2015
Lou-Salome Sorlin	Lawyer at Spinosi and Sureau, Paris, specialising in immigration and asylum law	11 December 2015
Sonal Ghelani	Solicitor at the Migrants' Law Project at Islington Law Centre, representing KAM, AAM and LAM	14 December 2015, 13 January 2016
Mark Scott	Partner in Bhatt Murphy Solicitors, representing ZAT and IAJ	14 December 2015 x 2, 13 January 2016 x 1
Laura Griffiths	Works for Citizens UK, a charity whose representatives have visited the camp in Calais on several occasions. Ms Griffiths moved to Calais in late September or early October 2015.	10 December 2015, 13 January 2016
Michel Janssen	Head of Mission of the Calais Project at Medecins Sans Frontieres	12 January 2016
Hermione Bosanquet	Volunteer for Aidbox Convoy, a UK-based organisation providing assistance to refugees in Dunkirk	12 January 2016
John McHugh	Freelance photojournalist, who visited a camp in Dunkirk on 3 December 2015	12 January 2016
Dr Rebwar Fatah	Middle Eastern Specialist who reported on the authenticity of the Syrian ID and passport and interviewed ZAT.	1 December 2015
Dr Rebwar Fatah	Middle Eastern Specialist who reported on the authenticity of the Syrian ID and passport and interviewed IAJ.	1 December 2015

(ii) Psychiatric evidence

The report-writers are all at the Tavistock Immigration Legal Service of the Tavistock Centre, which is part of the Tavistock and Portman NHS Foundation Trust.

Name of witness	Status	Date of evidence	Subject matter
Dr Susannah Fairweather and Dr Bryony Corbyn	Consultant Child and Adolescent Psychiatrist (Dr Fairweather) and Specialist Registrar in Child and Adolescent Psychiatry (Dr Corbyn)	26 November 2015	ZAT
Dr Susannah Fairweather	Consultant Child and Adolescent Psychiatrist	27 November 2015	IAJ
Dr Thomas Hillen	Consultant Child and Adolescent Psychiatrist	12 November 2015, addendum report dated 7 December 2015	KAM
Dr David Lawrence Bell	Consultant Psychiatrist in the Adult Department of the Tavistock Clinic and Director of the Fitzjohns Unit specialising in the management of severe psychological problems/personality disorders.	2 December 2015, undated addendum report	AAM

APPENDIX II

Additional evidence before the Court of Appeal

(iii) Evidence by the appellant

Name of witness	Status	Date of evidence
Robert Jones	Head of the Asylum and Family and Policy Unit in the Immigration and Border Policy Directorate	29 February and 27 May 2016
Raphael Sodini	Director of the Asylum Division of the French Ministry of the Interior	26 February 2016
Michael Gallagher	Officer in the UK Home Office Asylum and Family Policy Unit with responsibility for policy and processes relating to unaccompanied asylum-seeking children.	1 March 2016

(iv) Evidence by the respondent

Name of witness	Status	Date of evidence
Mark Scott	Partner in Bhatt Murphy Solicitors, representing ZAT and IAJ	27 May 2016
Lou-Salome Sorlin	Lawyer at Spinosi and Sureau, Paris, specialising in immigration and asylum law	30 May 2016

APPENDIX III

Statement of facts claimed

ZT (Syria) & Others v SSHD C2/2016/0712

Note by the Appellant: *This table is produced at the request of the Court, and is in response to the Court's request that it have a table setting out the basic biographical facts claimed in respect of each Respondent, and the extent to which the Appellant is able to agree those facts. As the table below shows, the position is that at the time of the Tribunal's hearing, the SSHD considered that she had no independent knowledge of any of the details alleged of Respondents 1-4, and was largely unable to do more than note the facts as alleged on their behalf (although it was accepted that R1-R4 were Syrian). Subsequent to the decision of the Tribunal, and the arrival in the UK of Respondents 1-4, the SSHD has been able to confirm certain limited facts in respect of the Respondents, and these are admitted to the extent set out below.*

Note by the Respondents: *The Respondents remind the Court that the Upper Tribunal considered the evidence generally as of 'notable pedigree' 'reliability' and 'objectivity' (Judgment §10) and the documentary evidence produced by them on their identities, age and relationships as 'clear', 'positive and persuasive' (Judgment §26), and sufficient to conclude that it was 'highly probable' that they would have established an entitlement to a 'take charge' request and subsequent transfer to the UK under Dublin III (Judgment §12). The Tribunal made this assessment having acknowledged that although the Appellant had not denied any of these facts, she had as described below, pleaded that some of them were not admitted (Judgment §8), and also took into account that, due to the speed at which the litigation progressed, it had not been realistically possible for the Appellant to fully investigate the Respondents' evidence (Judgment §9).*

Respondents' Case Summaries	**Appellant's position on the evidence at the time of the Tribunal hearing (see Detailed Grounds of Defence §5-8, D1-17)**	**Appellant's current position on the evidence (including knowledge obtained since the Respondents' arrival into the UK)**
RESPONDENTS 1 (ZAT) ***(Calais based minor)*** **AND 5 (MAT)** ***(UK based adult sibling)*** **(ANNEX 3 CASE SUMMARY- B1, 72-5)**		
ZAT is a 16 year old Syrian national, born in Dara'a on 01.01.1999.	The Appellant accepted that ZAT was a Syrian national but did not admit his age and considers that she did not have information that would enable her to do so.	The SSHD neither admits nor denies ZAT's age. Passport submitted has not been verified as of yet.
		Asylum status – yet to be determined. Asylum interview completed on 16 June 2016 and decision is pending.
Details of ZAT's parents *ZAT's* father, MAT (DOB: 05.05.1953), and mother, NAA (DOB: 8.5.58), remain in Dara'a, Syria.	The SSHD did not admit or deny this. She considers that she was not in a position to do so.	The SSHD neither admits nor denies this, and considers that she is presently unable to do so.

Details of ZAT's family ties in the UK Two siblings are lawfully resident in the United Kingdom and have been granted refugee protection: ▪ NAT[1] (DOB 1.1.1979) is ZAT's brother who lives in England and was granted leave to remain as a refugee on 9.6.2014 (date on residence permit). He is not a party to this claim. ▪ MAT (R5) (DOB 26.7.1990) is ZAT's brother who lives in England and was granted leave to remain as a refugee on 15.7.2014 (date on residence permit). His wife, N and daughter R, have joined him in the UK under family reunion provisions.	The SSHD did not admit or deny the existence of any family ties for ZAT in the UK, and considers that she was not in a position to do so. MAT's identity was admitted, but it was neither admitted nor denied that he had any relationship to ZAT. It was admitted that MAT had refugee status, but no other facts about MAT were admitted or denied.	The SSHD agrees that NAT and MAT are brothers to ZAT. Both NAT and MAT have refugee status and are lawfully resident in the UK.
Details of ZAT's other siblings and/or relatives *ZAT* has 13 siblings in total. His other siblings are: ▪ YA born around 1975 - in Syria ▪ A born around 1976 - in Germany ▪ AD born around 1982 - in Syria ▪ YO born around 1984 - in Syria ▪ YOU1 DOB 1.7.92 – in Syria ▪ MAT3 DOB 1.7.97 –	The SSHD did not admit or deny the existence of any other siblings for ZAT. She considers that she was not in a position to do so.	The SSHD neither admits nor denies which of these if any are ZAT's other siblings/ relatives. The SSHD considers that she is unable to confirm if A has been injured as alleged, and this is neither admitted nor denied.

[1] The name is spelled slightly differently in the identity documents which we understand is as a result of translation from Arabic script to Latin/English.

in Syria ▪ YOU2 born around 1985 – in UAE ▪ AM born around 1989 – in UAE ▪ IT DOB 20.9.1985 – in Syria ▪ RE 21.4.1987 – in Lebanon ▪ NAW DOB 20.1.95 – in Syria A recently arrived in Germany. He has applied for asylum and is awaiting a decision. A has had a leg amputated following barrel bomb attack. ZAT's uncle (father's brother) AAT lives in Sweden where he has refugee status. He is trying to bring his wife and 12 children from Turkey to Sweden through family reunion. ZAT has no other relatives (aunts, uncles or grandparents) in the European Union.		
RESPONDENTS 2 (IAJ) (*Calais based minor)* AND 6 (MAJ) *(UK based adult sibling)* **(ANNEX 4 CASE SUMMARY-B1, 205-8)**		
IAJ is a 16 year old Syrian national, born in Dara'a on 01.04.1999.	The Appellant accepted that IAJ was a Syrian national but did not admit his age and considers that she did not have information that would enable her to do so.	The SSHD accepts IAJ's name, nationality and DOB. Passport verified by National Document Forgery Unit
		Asylum status – asylum granted on 15 May 2016. Leave to remain granted until 16 May 2021.
Details of IAJ's parents IAJ's father, FAJ (born 10.07.1967), and mother, NM (born 10.09.1973), remain in	The SSHD did not admit or deny this. She considers that she was not in a position to do so.	The SSHD neither admits nor denies these details.

Dara'a in Syria.		
Details of IAJ's family ties in the UK IAJ has a brother, MAJ (R6) (born 02.03.1994), who is lawfully resident in the United Kingdom, having been granted leave to remain as a refugee for five years in April 2015. MAJ lives in Glasgow. He is currently unemployed. MAJ is married with no children. He is in the process of applying for his wife to join him through family reunion.	The SSHD did not admit or deny the existence of any family ties for IAJ in the UK, and considers that she was not in a position to do so. MAJ's identity was admitted, but it was neither admitted nor denied that he had any relationship to IAJ. It was admitted that MAJ had refugee status, but no other facts about MAJ were admitted.	SSHD accepts that MAJ is lawfully resident in the United Kingdom, having been granted leave to remain as a refugee for five years in April 2015.
Details of IAJ's other siblings and/or relatives IAJ has three other brothers (YY, AA and II) and two sisters (RR and NN) who, together with his parents, remain in Daraa'a, Syria. IAJ has no other relatives (aunts, uncles, grandparents) in the European Union.	The SSHD did not admit or deny the existence of any other family of IAJ. She considers that she was not in a position to do so.	The SSHD neither admits nor denies the details claimed.
RESPONDENTS 3 (KAM) *(Calais based minor)* 4 (AAM) *(Calais based vulnerable adult)* AND 7 (LAM) (*UK based adult sibling)* **(ANNEX 3 CASE SUMMARY, C, 53-57)**		
KAM is a 16 year old Syrian national, born in Dara'a on 01.01.1999 who was in Calais. AAM is a vulnerable 26 year old Syrian national born in Dara'a on 25.09.89 who is KAM's brother and was in Calais with KAM.	The Appellant accepted that KAM and AAM were Syrian nationals but neither admitted nor denied their age or AAM's mental health condition. She considers that she was not in a position to do so.	The SSHD accepts KAM's name, nationality and age. Passport verified by National Document Forgery Unit. The SSHD neither admits nor denies the name and age of AAM. AAM's asylum interview could not go ahead due to mental illness. Awaiting witness statement and further docs from legal representatives.

		Current asylum status - no decision has been made. KAM has been interviewed but AAM has been unable to be interviewed due to health issues.
Details of KAM and AAM's parents Father: AALM (born 1964) originally from Dara'a and currently residing in Jordan. Mother: UYYHA (born 1968) from Dara'a Syria but currently residing in Jordan.	The SSHD did not admit or deny this. She considers that she was not in a position to do so.	SSHD neither confirms nor denies the details claimed.
Details of KAM and AAM's family ties in the UK The applicants' sister and brother are lawfully resident in the United Kingdom: ▪ LAAM (DOB 24/8/84) is KAM's sister. She is currently living in Harrow, Middlesex. She has leave to remain until 03 November 2017 as the spouse of a refugee. She is not a party to this claim, but has provided a witness statement. ▪ LAM (DOB 28/3/88). He has lived in the UK since 03 September 2014. He has refugee status and residence card dated 30/12/14	The SSHD did not admit or deny the existence of any family ties for KAM and AAM in the UK, and considers that she was not in a position to do so. LAM's identity and status was admitted, but the claimed relationship with KAM and AAM was neither admitted nor denied.	The SSHD accepts that LAAM is the sister of KAM and AAM and LAM is their brother. The SSHD acknowledges both LAAM and LAM have refugee status in the UK and are lawfully resident here.
Details of KAM and AAM's other siblings and/or relatives Other Brothers: 1. BAM (DOB 1991)) (in Austria); and 2. AALM (DOB 1997) (in Jordan with parents). Sisters: 3. GAM (DOB 1986)) (in Syria)	The SSHD did not admit or deny the existence of any other family for KAM and AAM. She considers that she was not in a position to do so.	The SSHD neither admits nor denies this information.

APPENDIX IV

Psychiatric evidence
(the posts held by the report-writers are listed in Appendix I)

1. ZAT was assessed by Dr Fairweather and Dr Corbyn on 7 November 2015. Their report states that he is suffering from Post-Traumatic Stress Disorder caused by his experiences in Syria, his journey to Calais, the conditions in the "jungle", and his failure to get to the United Kingdom. They state that the conditions in the "jungle" are "re-traumatising" him and that it is a harmful environment. They consider that a perpetuating factor in his mental illness is continued separation from his brother and state that the longer he remains in the "jungle", the further his mental health will deteriorate, and that this has the potential to impact on his daily functioning, where he can no longer care adequately for himself, or cause a suicidal crisis. They state that ZAT needs to be reunited with an adult member of his family as soon as possible in a safe environment so he can regain a sense of security. They also state that they are aware that he may be recommended to claim asylum in France and through this be considered for reunification with his brothers, and state they are very concerned about the potential impact of this process on him because of the further delay in the reunification process and the continued uncertainty for him, which would serve as a potent daily stressor and significantly increase the risk of his mental health deteriorating further.

2. IAJ was assessed by Dr Fairweather on 7 November 2015. Her report states that he is suffering from symptoms of Post-Traumatic Stress Disorder and depression, while not meeting a full diagnosis. She believed it was likely that he under-reported his symptoms due to his dissociated state and need to survive in the circumstances he was in at the time of the assessment. She states that his symptoms were most likely caused by his experiences in Syria, separation from his family, persistent fears for their safety, his journey to Calais, the conditions in the "jungle", and his repeated failure to get to the United Kingdom to be with his brother. She believes that he is being re-traumatised by the conditions in the "jungle" and being so close but out of reach of his family, and that these conditions are preventing psychological recovery. She is of the view that IAJ needs to be reunited with his family as soon as possible to provide him with a sense of safety so that he can start to recover from the multiple traumas he has suffered. She also expressed significant concerns about IAJ claiming asylum in France and through this being considered for reunification because of the potential impact of the process on him, the delay, and continued uncertainty associated with the fear that it could lead to a long-term separation from his UK-based family member and thus serve as a potent daily stressor and significantly increase the risk of his mental health deteriorating further.

3. KAM, who was at the material time acting as AAM's carer, was assessed by Dr Thomas Hillen on 7 November 2015. The report assessed him as suffering from Post-Traumatic Stress Disorder and an Acute Stress Reaction. It stated that he had been repeatedly exposed to severe trauma while in Syria and on his journey to Europe. He had significant additional levels of burden and distress because of his responsibility for his brother's welfare. The report described KAM as showing mild signs of personal neglect, psycho-motor activation, and Dr Hillen stated that he was in no

doubt that living in the "jungle" is harmful to KAM, worsening his mental health, and carries a high risk of "lifelong harm". He stated that KAM needed to reunified with his family, who can provide him with emotional support, and that, since his transition into adulthood was severely compromised by his traumatic experiences, it would be paramount to provide him now with some normality and support from trusted adult members of his family.

4. AAM was assessed by Dr David Lawrence Bell on 15 November 2015. He concluded that AAM suffers from a psychiatric disorder and displays typical symptoms of Post-Traumatic Stress Disorder. Dr Bell believes that the conditions in the "jungle" were "highly prejudicial" to AAM's psychiatric disorder, which was consistent with his description of the trauma he suffered in Syria although a number of the features of his condition are untypical and it is possible that they are evidence of a neurological disorder. Dr Bell states that, because of his psychiatric disorders, AAM has a limited capacity to recall events with any reliability and that he (Dr Bell) had to rely on AAM's brother, KAM, as regards details of the history. Dr Bell states that AAM is completely dependent on KAM, which is inappropriate due to their ages, and that it would be a major therapeutic factor for him to be reunited with his family, who are more appropriate carers and would provide an appropriate context for psychiatric care.