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## **UK - R (on the application of AM (a child by his litigation friend OA and OA) v Secretary of State for the Home Department (Dublin ? Unaccompanied Children ? Procedural Safeguards))**

**Country of Decision:**

United Kingdom

**Country of Applicant:**

Eritrea

**Date of Decision:**

05-06-2017

**Citation:**

R (on the application of AM (a child by his litigation friend OA and OA) v Secretary of State for the Home Department (Dublin - Unaccompanied Children - Procedural Safeguards) [2017] UKUT 00262 (IAC)

**Court Name:**

United Kingdom Upper Tribunal Immigration and Asylum Chamber

**Keywords:**

Accelerated procedure  
Dublin Transfer  
Effective access to procedures  
Family member  
Family unity (right to)  
Unaccompanied minor  
Vulnerable person

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**Relevant Legislative Provisions:**

International Law > UN Convention on the Rights of the Child

European Union Law > [EN - Dublin II Regulation, Council Regulation \(EC\) No 343/2003 of 18 February 2003](#) [1]

Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [2] > [Article 6](#) [3]

Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [2] > [Article 8](#) [4]

European Union Law > [EN - Qualification Directive, Directive 2004/83/EC of 29 April 2004](#) [5]  
European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 2](#) [7]  
European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 6](#) [8]  
European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 8](#) [9]  
European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 17](#) [10]  
European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 18](#) [11]  
European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 20](#) [12]  
European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 21](#) [13]  
European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 22](#) [14]  
European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [6] > [Article 29](#) [15]

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#### **Headnote:**

The imposition of a "one-off" expedited procedure in France for unaccompanied children wishing to reunite with their family in the UK fell within the framework of the Dublin Regulation. The failure by the UK Secretary of State to give full effect to the Dublin Regulation (most notably Article 17) and the Commission's Implementing Regulation was unlawful and as a consequence the applicant was deprived of a series of procedural safeguards and protection.

In addition the applicant's procedural rights have been violated by virtue of the procedural deficiencies and shortcomings during the interview and review stage of the applicant's request for family union. The lack of adequate enquiry, sufficient evidence gathering and a rushed mechanical decision making procedure meant that the applicant was subject to a process which did not adequately meet his needs.

#### **Facts:**

The factual and procedural backcloth of the case relates to a previous Upper Tribunal (IAC) decision ruling against the Home Office's attempt to stay the proceedings of two unaccompanied minors (AM being one of them) who had been transferred from the 'Jungle' in Calais to reception centres across France ('CAOMIE') and had been rejected reunification with their family members in the UK under the family reunion criteria of the Dublin Regulation or the criteria set out in the Guidance on Implementation of section 67 of the Immigration Act 2016. AM had been rejected under these two instruments in what was an expedited procedure on grounds that there were inconsistencies between family details between the applicant and his uncle (OM), a recognised refugee in the UK. In the judicial review pleadings before the UT the applicant challenges the Secretary of State's refusal to transfer him to the UK and requests a mandatory order requiring the Secretary of State to admit him to the country.

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#### **Decision & Reasoning:**

## **ECHR**

The Upper Tribunal first assesses case law from the ECtHR (inter alia *Sen v Netherlands*; *Mayeka and Mitunga v Belgium*; *Tanda-Muzinga v France*) which all lay testament to the close association between substantive and procedural protections under Article 8 ECHR in respect of family reunification applications between children and family members.

Extracting the main substantive and procedural precepts from the ECtHR's case law the Tribunal notes the extreme vulnerability of children, the positive obligation to facilitate family reunification within a prompt time table, the active participation of children and their family within the decision-making process, the flexible stance towards applications, especially with regards to documentation, and the non-determinative factor of pre-existing family life which should not exclude the family life dimension of Article 8 ECHR. The Tribunal pays specific attention to the close association between protection afforded under Article 6 when procedures within the framework of Article 8 arise. Indeed, the active participation of individuals within the process must be to a degree sufficient to provide them with the requisite protection of their interests. Reference is made to analogous articles in Article 3 and 12 of the Convention on the Rights of the Child and the UN Committee on the Rights of the Child's General Comment 14.

### **Dublin Regulation**

In relying on *CK and Others v Slovenia*, *ZAT v SSHD, MK, IK and Others* and, lastly, *K v Bundesasylamt*, the Tribunal holds that Article 17(1) of the Dublin Regulation III is a justiciable right and that compliance with the formal requirements under the Regulation i.e. a formal take-charge request, will not be an essential prerequisite to the discharge by Member States of their substantive obligations under the Regulation.

Before moving onto AM's challenge the Upper Tribunal lastly refers to common law duties in respect of asylum applications, namely the duty to ensure a procedurally regular and fair decision making process and the duty to take into account all material facts and considerations, both of which rely on an adequate and fair interview procedure.

Turning to the challenge at hand the Upper Tribunal resolutely states that the Secretary of State had an obligation to review new evidence (in the form of a psychologist report and a detailed defence) and to consider issuing a new decision. The absence of any such ex nunc review meant that the State had erroneously disregarded duties under public law and the Dublin Regulation itself. The Tribunal additionally critiques the State's lack of candour; a duty which requires public authorities to disclose relevant facts and the reasoning behind the decision challenged in the judicial review. This case severely lacked the disclosure of evidence, namely training materials and instructions for interviewers and interpreters from the UK who undertook the expedited procedure in France at various reception centres.

### **Expedited Procedure**

To the question of whether the expedited process, to which the applicant was exposed to, fell within the remit of the Dublin Regulation the Tribunal held, conversely to the State, that indeed it did. The Tribunal found that the expedition of procedures for the allocation of responsibility is a core principle of the Regulation and if a Member State wished to waive or relax any formal requirements enshrined in the Regulation (i.e. dispensing with the requirement of registering an asylum claim or lodging a take-charge request) EU law would not, in general, be breached. However, the same cannot be said of a Member State exonerating itself from duties and requirements as laid out in the Regulation. Indeed, to solely apply Article 8 of the Dublin Regulation and to not consider Article 17 meant that the UK had undertaken an expedited process

which in EU terms was constitutionally impermissible. Indeed derogating from substantial swathes of the Dublin Regulation was not permissible when set against the legal rules or principles in the Regulation. The Tribunal therefore held that the State, by failing to give full effect to the Dublin Regulation, had acted unlawfully and as a consequence the applicant was deprived of a series of procedural safeguards and protections. Additionally the applicant's subsequent request to be admitted to the UK under Article 8 could not be defeated on the basis that he did not attempt to secure admission under the formal processes of the Dublin regime.

Lastly, and outside the question of the application of Dublin, the Tribunal found that there had been a failure on the part of the State to give sufficient information to children in respect of qualifying criteria for admission to the UK and those subject to the expedited procedure were in a limbo. Moreover, the applicant's procedural rights had been violated by virtue of the procedural deficiencies and shortcomings during the interview and review stage of the applicant's request for family union. The procedure the applicant had been subject fell well under the threshold of fairness, especially when set against the contextual factors such as the trauma of the applicant, isolation, an unfamiliar environment, communication difficulties and linguistic misunderstandings. This was further compounded by the lack of adequate enquiry, sufficient evidence gathering and a rushed, mechanical decision making procedure. Indeed, the Tribunal held that reliance on expedition or a humanitarian challenge does nothing to dilute the obligations of procedural fairness. Consequentially, the applicant was subject to a process which did not adequately meet his needs and failed to provide an effective way of proceeding.

The decision making process resulting in the refusal of the applicant to the UK was therefore irredeemably flawed under three separate legal regimes: EU law; the Human Rights Act; and common law.

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### **Outcome:**

1. An Order quashing the Secretary of State's initial decision whereby the transfer of AM from France to the United Kingdom in November/December 2016 was refused.
2. A declaration that the aforementioned decision and the Secretary of State's continuing refusal to admit AM to the United Kingdom are unlawful being in breach of the Dublin Regulation and its sister measure and/or the procedural dimension of Article 8 ECHR and/or the common law requirements of procedural fairness.
3. An Order requiring the Secretary of State to make all necessary and immediate arrangements for the transfer of AM from France to the United Kingdom, using best endeavours at all times and not later than midnight on 22 May 2017
4. To begin forthwith a fresh decision making process in AM's case, to be completed by the same deadline.

On the 22 May 2017, the Secretary of State requested permission to appeal in the four cases which the Upper Tribunal had decided upon (all similar to the judgment given in AM). On the 25 September 2017 the Secretary of State requested permission to appeal generally given the decision of Mr. Justice Soole of the High Court (Citizens UK v. Secretary of State for the Home Department (SSHD) [2017] EWHC 2301 (Admin)) which concerned similar aspects to AM and Others and whose judgment differed considerably to the Upper Tribunal's decision in AM and Others. Permission to appeal to the Court of Appeal in both AM and Others and Citizens UK was granted by the Upper Tribunal and the High Court respectively.

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### Subsequent Proceedings :

The Court of Appeal gave its judgment in AM and Others on 31 July 2018. Cross-referring to much of its [reasoning in Citizens UK](#) [16], handed down the same day, the Court found that the Secretary of State had, similar to the facts of [Citizens UK](#) [16], breached its duty of candour and co-operation in AM and Others. Moreover, the Court found that the expedited process was unfair at common law in these cases and that the State's submissions were framed at a generic level, without any submissions against the finding that there was unfairness on the individual facts of AM and Others. However, the Court did find that Article 17 Dublin III is a discretionary provision in the Regulation and, as per the Court of Appeal's finding in RSM, it had no application in the expedited procedure, not least since the applicants did not make an international protection application in France (thereby triggering the application of Dublin III). Additionally, the Court held that the expedited procedure operated outside Dublin III and thus the procedural requirements of the Regulation did not apply to the facts of the case. As to the application of Article 8 ECHR, the Court agreed with the State's submissions and found that the Upper Tribunal's ruling was inconsistent with the Court of Appeal's judgment in ZAT and Others, namely that Article 8 only applies in exceptional circumstances and that evidence must be put forward showing that the French legal system has systemic deficiencies in it incapable of providing an effective remedy. Last, the Court finds that the Upper Tribunal had committed a fundamental error on the question of remedies. Instead of ordering a mandatory order requiring the applicants to be brought to the UK, the Upper Tribunal should have quashed the decision of the State or given a declaration that there had been a breach of the duty to act fairly. Thus, whilst the question of remedies was now academic since the applicants had all been admitted to the UK and there was no question of them being sent back to France, the Court found that the mandatory orders given by the Upper Tribunal were wrongly made as a matter of law.

### Attachment(s):



[00262\\_ukut\\_iac\\_2017\\_am\\_ijr.pdf](#)[17]



[AM and others Judgment Final.docx](#)[18]

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### Other sources cited:

Commission Regulation (EC) 1560/2003 (the "implementing Regulation") as amended by Commission Implementing Regulation (EU) No 118/2014

### National / Other Legislative Provisions:

[UK - section 67 of the Immigration Act 2016](#) [19]

[UK - Human Rights Act 1998](#) [20]

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### Links:

[1] <https://m.asylumlawdatabase.eu/node/19>

[2] <http://www.asylumlawdatabase.eu/en/content/en-european-convention-protection-human-rights-and-fundamental-freedoms-echr>

[3] [https://m.asylumlawdatabase.eu/node/195#toc\\_34](https://m.asylumlawdatabase.eu/node/195#toc_34)

[4] [https://m.asylumlawdatabase.eu/node/195#toc\\_46](https://m.asylumlawdatabase.eu/node/195#toc_46)

[5] <http://www.asylumlawdatabase.eu/en/content/qualification-directive>

[6] <https://m.asylumlawdatabase.eu/node/4037>

[7] [https://m.asylumlawdatabase.eu/node/4037#toc\\_59](https://m.asylumlawdatabase.eu/node/4037#toc_59)

- [8] [https://m.asylumlawdatabase.eu/node/4037#toc\\_114](https://m.asylumlawdatabase.eu/node/4037#toc_114)
- [9] [https://m.asylumlawdatabase.eu/node/4037#toc\\_135](https://m.asylumlawdatabase.eu/node/4037#toc_135)
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- [15] [https://m.asylumlawdatabase.eu/node/4037#toc\\_314](https://m.asylumlawdatabase.eu/node/4037#toc_314)
- [16] <http://www.asylumlawdatabase.eu/en/case-law/uk-queen-application-citizens-uk-v-secretary-state-home-department-31-july-2017>
- [17] [https://m.asylumlawdatabase.eu/sites/default/files/aldfiles/00262\\_ukut\\_iac\\_2017\\_am\\_ijr.pdf](https://m.asylumlawdatabase.eu/sites/default/files/aldfiles/00262_ukut_iac_2017_am_ijr.pdf)
- [18] <https://m.asylumlawdatabase.eu/sites/default/files/aldfiles/AM%20and%20others%20Judgment%20Final.c>
- [19] <https://m.asylumlawdatabase.eu/en/national-and-other-legislation/uk-section-67-immigration-act-2016>
- [20] <https://m.asylumlawdatabase.eu/en/taxonomy/term/1721>