

UK - R (on the application of RSM and Another) v Secretary of State for the Home Department [2017] UKUT 124 (IAC), 12 April 2017

Country of Decision:

United Kingdom

Country of Applicant:

Eritrea

Date of Decision:

12-04-2017

Citation:

[2017] UKUT 124 (IAC)

Court Name:

Upper Tribunal (Immigration and Asylum Chamber)

Keywords:

Best interest of the child
Child Specific Considerations
Delay
Dublin Transfer
Effective access to procedures
Procedural guarantees
Responsibility for examining application
Unaccompanied minor
Vulnerable person

Relevant Legislative Provisions:

Council of Europe Instruments > [EN - Convention for the Protection of Human Rights and Fundamental Freedoms](#) [1] > [Article 8](#) [2]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [3] > [Article 8](#) [4]

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [3] > [Article 17](#) [5]

Headnote:

Article 17 forms an integral part of the Dublin Regulation and should be applied in a manner which furthers the aims and objectives of the Regulation in general. Article 17 is a justiciable right and should be particularly relied upon in circumstances where one of the overarching values of the Dublin Regulation, namely *expedition*, is not being fulfilled in the procedures of the host Member State. Article 17 is not subject to a prior assessment of non-satisfaction of Article 8 (family reunification) of that same Regulation.

Applicants who engaged with Dublin authorities should be subjected to less onerous standards when assessing the success of an Article 8 ECHR claim.

The UK Upper Tribunal held that there had been a failure of the Secretary of State to lawfully exercise the discretion conferred by Article 17 of the Dublin Regulation and ordered the Secretary of State to admit the applicant to the UK, based on: (1) the deficiencies of the Italian asylum system in the present case, namely the lack of sufficient expedition to register the asylum application and initiate Dublin proceedings; (2) the deficiencies and delay in the guardianship system in Italy; (3) the expected lengthy procedures for a 'take charge' request and subsequent Dublin transfer; (4) the need to take into account the best interests of children.

Facts:

RSM, an Eritrean unaccompanied minor, crossed from Egypt to Italy in April 2016. He was later informed that his mother and brother had died in the crossing. He was not recognised as an unaccompanied minor initially, having been transferred to a dedicated accommodation facility in September 2016. He was diagnosed with post-traumatic stress disorder and his mental health was deteriorated further by the delay in resolving his immigration status. Since RSM has an aunt living in the UK, the applicant's solicitors sent a letter in September 2016 to the UK Home Office arguing that the UK had a duty to admit RSM under Article 8 ECHR by means of using the discretionary power set forth by Article 17 of the Dublin III Regulation. The solicitors received no response from the Home Office.

In mid-November 2016 the applicant's asylum process was initiated and an interview scheduled for early January 2017. The Dublin procedure was initiated and a 'take charge' request accepted by the UK authorities. On November 2016, the applicant's solicitors initiated proceedings pleading the Home Office to either admit the applicant by means of Article 17 or to put forward a declaration to refuse to do so. The Home Office argued in defence, inter alia, that Article 17 is only relied upon where the applicant falls outside the scope of Article 8 (family reunification), which was not true in the present case and that, rather, the SSHD was encouraging the Italian authorities to effectively proceed under Article 8.

Thus, the Upper Tribunal was to decide whether the Secretary of State had a duty to admit the applicant to the UK by using its discretion powers under Article 17 of the Dublin Regulation to give voice to its obligations under Article 8 ECHR.

Decision & Reasoning:

The Upper Tribunal reached its decision by analysing the challenge regarding the SSHD's obligations under the Dublin Regulation on the one hand, and its obligations under Article 8 ECHR on the other hand.

First, regarding Article 17 of the Dublin Regulation, the Upper Tribunal understood that the Home Office had impliedly reached a negative conclusion regarding the applicant's request for the Home Office to exercise its discretionary powers to admit the applicant. Article 17 forms an integral part of the Dublin Regulation and should be understood and applied in a manner which furthers the aims and objectives of the Regulation in general. In other words, Article 17 does not undermine, but rather enhances the objectives of the Dublin Regulation.

Moreover, the Upper Tribunal held that the Secretary of State was wrong to assume that Article 17 only applies where the family reunification criteria in Article 8 is not satisfied. Article 17 is a justiciable right and should be particularly relied upon in circumstances where one of the overarching values of the Dublin Regulation, name expedition, is not being fulfilled in the procedures of the host Member State, such as that of the present case.

For the purpose of this judicial assessment, courts should rely, inter alia, on governmental policy statements available that could corroborate the legitimate aim in play (in casu, policy statements from the UK government on the intention to prioritise and speed up reunification of unaccompanied minors, despite not being fully put into practice by the Secretary of State).

Second, with regards to Article 8 ECHR, the Upper Tribunal made a distinction between the case in question and the Court of Appeal's decision in [ZAT](#) [6]. Namely, that a distinction should be made between those immigrants who are engaged and those who did not engage with the national Dublin system when assessing the success of an Article 8 ECHR claim. As stated in [ZAT](#) [6] (para. 95), when an applicant has not engaged with a Dublin system, "very compelling circumstances" must be demonstrated for an Article 8 claim to succeed. Yet, as in the present case, applicants who engaged with Dublin authorities should be subjected to less onerous standards, and the question should be of whether there are effective ways of proceeding in the country in question.

The judicial assessment of efficacy should (1) be fact sensitive, (2) be measured against the overarching objectives of the Dublin Regulation (including the principles of solidarity and mutual trust between Member States), (3) give due consideration to the aim of expedition, especially in the case of unaccompanied children.

Based on the facts of the case, namely the delays and deficiencies of the Italian asylum and guardianship system, the lengthy procedures that should be expected for a Dublin transfer to be concluded, the lack of assurances that RSM's case would be dealt with enhanced expedition, the obligation under section 6 of the Human Rights Act 1998 (Article 8 ECHR) to take the best interests of the child as a primary consideration, - the applicant's case "belongs towards the upper end of the notional highly compelling spectrum", for which judicial intervention is appropriate.

Therefore, the Upper Tribunal declares that the Secretary of State failed to lawfully exercise the discretion conferred by Article 17 of the Dublin Regulation and must admit RSM to the United Kingdom, so as to be immediately reunited with this family.

Outcome:

On 22 December 2016, the Upper Tribunal ordered the Secretary of State to admit RSM to the UK for his family reunification. Yet, his admission was only carried out after further mandatory orders of the Tribunal to admit the applicant by a specified date.

The applicant was ultimately admitted on 16 February 2017.

Subsequent Proceedings :

The Upper Tribunal granted permission to appeal to the Court of Appeal on account of, inter alia, the novelty and importance of the application of and issues related to Article 17 of the Dublin Regulation. On 18 January 2018, [the Court of Appeal](#) [7] handed down its judgment in RSM. The judgment focuses upon the definition of "lodged" in Article 17(1) of the Dublin Regulation III and whether the Secretary of State, as per the Upper Tribunal's judgment, was required to proactively bring an unaccompanied child to the UK before a take charge request had been lodged by the "host state" and without the child having entered into the UK's jurisdiction. Conversely to the Upper Tribunal's decision, the Court found that lodging for the purposes of Article 17(1) requires the applicant to be in the jurisdiction of the UK and to have lodged the application there. Therefore, the Upper Tribunal's conclusions and ultimate order was incorrect. In addition, the Court of Appeal held that the Upper Tribunal had incorrectly applied the Article 8 threshold, as laid out in ZT (Syria), and that on the facts of the case neither the Italian processes nor the vulnerability of RSM were sufficient to meet the threshold of an "especially compelling case".

Following RSM the Upper Tribunal provided a decision on the interpretation of Article 17 and 27 of the Dublin Regulation beyond considerations of family life and human rights breaches. In R (on the application of Salah Ali Eisa) v Secretary of State for the Home Department (Dublin; Articles 27 and 17) [2017] UKUT 261 (IAC), Collins J held that it would be very difficult to imagine a case other than a failure to correctly apply the hierarchical criteria, or a breach of human rights, or non-respect for family life that the non-exercise of Article 17 would be seen as reviewable. In other words, according to Collins J, whilst there is jurisdiction to entertain a claim for a failure to apply Article 17 (as per ZAT and Others) it would be unlikely and even inappropriate for such a failure to fall within the Article 27 review in cases where there is a lawful transfer decision in line with the relevant procedures and the applicant's human rights.

Observations/Comments:

This is a landmark decision insofar as the jurisprudence on the applicability and obligations under Article 17 of the Dublin Regulation is scarce.

For further commentary please see:

[A. Taylor, The formulation of the right to family life beyond ZAT & Others in recent UK jurisprudence, June 2016.](#) [8]

[P. Biondi, The ZAT case and the far-reaching consequences for the Dublin Regulation, February 2017](#) [9]

[P. Biondi, The Emergence of the Entry Human Rights Principle. Looking Beyond the X.X. Case, April 2017](#) [10]

Attachment(s):



[00124_ukut_iac_2017_rsm_ijr.doc](#)[11]

National / Other Legislative Provisions:

[UK - Human Rights Act 1998 \(Section 6\)](#) [12]

[UK - Immigration Act 2016 \(Section 67\)](#) [13]

Links:

- [1] <http://www.asylumlawdatabase.eu/en/content/en-european-convention-protection-human-rights-and-fundamental-freedoms-echr>
- [2] https://m.asylumlawdatabase.eu/node/195#toc_46
- [3] <https://m.asylumlawdatabase.eu/node/4037>
- [4] https://m.asylumlawdatabase.eu/node/4037#toc_135
- [5] https://m.asylumlawdatabase.eu/node/4037#toc_185
- [6] <http://www.asylumlawdatabase.eu/en/case-law/united-kingdom-queen-application-zat-iaj-kam-aam-mat-maj-and-lam-v-secretary-state-home>
- [7] <http://www.bailii.org/ew/cases/EWCA/Civ/2018/18.html>
- [8] <http://www.asylumlawdatabase.eu/en/journal/formulation-right-family-life-beyond-zat-others-recent-uk-jurisprudence>
- [9] <http://www.asylumlawdatabase.eu/en/journal/zat-case-and-far-reaching-consequences-dublin-regulation>
- [10] <http://www.asylumlawdatabase.eu/en/journal/emergence-entry-human-rights-principle-looking-beyond-xx-case>
- [11] https://m.asylumlawdatabase.eu/sites/default/files/aldfiles/00124_ukut_iac_2017_rsm_ijr.doc
- [12] <https://m.asylumlawdatabase.eu/en/national-and-other-legislation/uk-human-rights-act-1998-section-6>
- [13] <https://m.asylumlawdatabase.eu/en/national-and-other-legislation/uk-immigration-act-2016-section-67>