

[Home](#) > UK - The Queen (on the application of Citizens UK) v Secretary of State for the Home Department, 31 July 2018

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Country of Decision:

United Kingdom

Date of Decision:

31-07-2018

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[2018] EWCA Civ 1812

Court Name:

England and Wales Court of Appeal

Keywords:

Dublin Transfer
Effective access to procedures
Effective remedy (right to)
Unaccompanied minor

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 2](#) [4]

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

European Union Law > [EN - Dublin III Regulation, Council Regulation \(EC\) No. 604/2013 of 26 June 2013 \(recast Dublin II Regulation\)](#) [3] > [Article 8](#) [6]

Headnote:

The Court of Appeal found the "one-off" expedited procedure in place from 2016-2017 in Calais for unaccompanied children with family members, siblings or relatives in the UK and operated by the British and French authorities to fall below the requirements of procedural fairness as a matter of common law.

Facts:

The appeal before the Court of Appeal originates from a High Court decision in respect of the 'expedited process' (known as Operation Purnia) established between the UK and French authorities in response to the proposed demolition of the camp in Calais. The expedited process was put in place by both States in order to assess the eligibility of unaccompanied asylum seeking children to be transferred to the UK under a form of accelerated Dublin III procedure using Article 8 of the Regulation as the criteria for transfer. The operation was split into two phases, the first being an interview, decision-making and transfer phase and the second being short interviews with children and their family members in the UK who had not been fully processed in the first phase. During these phases approximately 550 children were transferred but 500 children claiming to have family members in the UK were not transferred during the material time. Refusal decisions for these children were communicated to the French authorities (not the children or their family members directly) by means of a spreadsheet with a short word or phrase 'explaining' the reasons for refusal. These decisions were then communicated by the French authorities to the children. No opportunity was given to the children to correct errors in the decisions. Before the High Court, Mr Justice Soole held that:

- 1) The expedited process did not include the making of an application for international protection, neither to France nor to the UK. The making of an application is an essential requirement for the triggering of the application of Dublin III without which Dublin simply does not apply. Ultimately the reluctance of children to apply for international protection was a determinative factor for the High Court in its finding that no application for international protection had been made. In that vein, Article 6 DR III did not give rise to a freestanding obligation on the UK in the absence of an application.
- 2) As the above, the lodging of an application and a take charge request are also central parts of the Dublin mechanism. Since an application for international protection had not been made it followed that the lodging or a take charge request was not applicable. The justiciability of Article 17 was therefore purely academic, although the High Court highlighted that were it necessary to deal with the point the Court would have relied on the Court of Appeal judgment in ZAT (para 85).
- 3) Despite the shortcomings of the expedited procedure, including the absence of information, the scope of the process and the sparsity of reasons for the rejection, all leading to a great sense of confusion, the process was nonetheless fair, reasonable and with no systemic failure. However, the Court noted that no account should be taken of material obtained in the course of the expedited procedure in future applications.

As an additional comment the High Court noted that Article 5(1) of the Dublin Implementing Regulation did not require, in this context, the provision by the authorities of detailed reasons for negative responses. Moreover, the provision of representation or further review was not needed for the operation of a lawful system.

Decision & Reasoning:

The Court of Appeal structures its reasoning by first, considering EU law, second, common law fairness, third, Article 8 ECHR, and finally the duty of candour and co-operation. As such the Court notes that the expedited procedure adopted by both States did not amount to a procedure under Dublin III. Moreover, the adoption of such a procedure was not unlawful by virtue of the existence of Dublin III since a Member State may adopt a procedure in its own domestic law which requires an application for asylum to be made on its own territory and Member States may similarly agree upon a procedure alongside Dublin III. Justice Soole was therefore correct in his judgment in this

respect. As to common law fairness the Court underlines that the duty to act fairly or the requirements of procedural fairness will be implied into a statutory framework even when the legislation is itself silent. In reliance on various pieces of jurisprudence the Court extrapolates the following standards in respect of the duty to act fairly:

1. A system can be challenged as unfair;
2. Fairness may require that the purpose of an interview should be made clear to those who are being interviewed;
3. Interviewers should be given clear instructions about what they are to do;
4. One cannot substitute a proper and fair decision by stating that there is a will for the State to reconsider a decision;
5. Before a decision on the dishonesty of an applicant, the applicant must have the right to be heard against those allegations or at least be informed of the gist of the case against him;
6. In asylum procedures, there must be an irreducible minimum of due process.

The Court furthermore places heavy reliance on the reasons to be given in a decision and whilst it accepted that there was nothing unfair in the procedure established by the British and French authorities, insofar as the French would inform the children of the decision, the Court does underline that providing reasons for a decision is intertwined with the fairness of the procedure and, ultimately, the rule of law. As such, the Court rejects the State's argument that because the expedited process was discretionary there was no obligation on the State to implement procedural fairness when carrying out the procedures. According to the Court, the duty to act fairly in the expedited procedure applied as a matter of principle and, indeed, had this been an ordinary administrative decision-making process, the law would require procedural fairness, which, in light of the sparseness of the reasoning given in the State's decisions, had not been complied with. The effect of this was that the children had no idea of achieving a positive outcome under the procedure and they had no realistic prospect of challenging a negative decision. Argumentation by the State to the effect that the Dublin Regulation III (attracting a panoply of procedural safeguards) was still applicable regardless of the expedited procedure and that the State in the expedited procedure was not reaching any final decision was found to be flawed by the Court. Indeed, the expedited procedure did lead to a decision, the effect of which, inter alia, resulted in children potentially giving up a formal application under Dublin III because of the negative decision they had received under the expedited procedure. The Court also noted that it was not impossible for the State to elaborate upon the reasons for negative decisions as interview records showed. Thus, the Court found the expedited procedure to fall below the requirements of procedural fairness as a matter of common law.

In respect of Article 8 ECHR, the Court notes that the article does not give greater rights than the common law would in such a context. Furthermore, the Court questions whether Citizens UK can rely on the Human Rights Act since it is arguably not a victim of the alleged breach of Convention rights.

Last, the Court refers to the duty of candour and co-operation on public authorities, the aim of which is to assist the court with full and accurate explanations of all the facts relevant to the issues which the court must decide. As such, further evidence presented to the Court, evidence which was not disclosed to the High Court at the relevant time and was revealed 'by chance', showed that upon receiving the responses on the spreadsheet from the British authorities, the French authorities requested more detailed reasons to be given but this was refused by the British authorities, in part, because of the risk of legal challenge that this may give rise to. In addition, the evidence previously given to the High Court did not clearly explain that the second phase of the operation was, in fact, a reconsideration procedure. The Court of Appeal found that the absence of such information and clarity before the High Court amounted to a serious breach of the duty of

candour and co-operation. According to the Court, the most serious of such a breach was the reasons given by the State concerning the sparsity of reasons for a negative decision; not due to issues of urgency but because of the risk of legal challenge to the decisions. This breached the duty to act fairly, the rationale of which is to enable a person to know whether they have a basis of mounting a legal challenge and to enable a court to assess whether a decision is wrong.

Outcome:

The Court granted a declaration that the State had committed a breach of the duty of fairness under common law and further found:

1. A serious breach of the duty of candour and co-operation by the Secretary of State in this case;
 2. The expedited process was unfair and unlawful as a matter of common law;
 3. The grounds of appeal under EU law were rejected;
 4. The issue of Article 8 ECHR needed no further exploration.
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Subsequent Proceedings :

The case has not been appealed further and is now final.

Observations/Comments:

The judgment was accompanied by a concurring opinion from Lord Justice Hickinbottom who stated that where the Secretary of State embarks upon a process it is incumbent on the State to act lawfully in its implementation. In respect of reasons being given for decisions, Lord Justice Hickinbottom notes that fairness requires reasons to be given, not only to improve the quality of decisions and to instill public confidence in the decision making process but also because the supervisory function of the courts of decision makers requires it. Moreover, Lord Justice Hickinbottom notes the serious breach of the duty of candour and co-operation in this case and states that the facts before the Court serves "as a timely reminder to public bodies as to both the scope and importance of the duty of candour to the court when they are responding to a judicial review."

Attachment(s):



[Citizens UK Judgment Final.docx](#)[7]

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_59

[5] https://m.asylumlawdatabase.eu/node/4037#toc_85

[6] https://m.asylumlawdatabase.eu/node/4037#toc_135

[7]

<https://m.asylumlawdatabase.eu/sites/default/files/aldfiles/Citizens%20UK%20Judgment%20Final.docx>