JR/6014/2017

Upper Tribunal
Immigration and Asylum Chamber

Judicial Review

Notice of Decision/Order/Directions
Ruling and Directions

The Queen on the application of AR

Applicant

v

Secretary of State for the Home Department

Respondent

The Honourable Mr Justice McCloskey, President

Having considered all documents lodged by the parties and having heard the parties' respective representatives, Ms M Knorr, of counsel, instructed by Islington Law Centre on behalf of the Applicant and Ms H Masood, of counsel, instructed by the Government Legal Department on behalf of the Respondent, at a hearing at Field House, London on 26 July 2017

McCloskey J

Litigation Framework

(1) These proceedings were initiated on 13 July 2017. By its order dated 14 July 2017 the Tribunal acceded to the Applicant's request for expedition and gave a series of directions, fixing a timetable which would culminate in a substantive hearing on 07 September 2017. By its further order dated 20 July 2017, made in an *inter-partes* setting, the Tribunal granted permission to the Applicant to apply for judicial review. Anonymity was also ordered from the outset.

(2) The Tribunal has been seized from the outset of these proceedings of an application for interim relief. At the initial *inter partes* stage the Tribunal declined to determine the application for interim relief. Rather it adjourned such application. The purpose

of the adjournment was to enable to Secretary of State to file a supplementary response to the pre-action protocol ("PAP") letter. That course was taken because in the wake of the Secretary of State's initial responses to the pre-action protocol letter further evidence had been assembled on behalf of the Applicant and, moreover, the Applicant's case had progressed to the stage of a formal pleading. An extended, or supplementary, PAP phase had, *de facto*, materialised. While the Secretary of State had filed an acknowledgement of service on the eve of the initial *inter-partes* hearing (*supra*), this took the form of a relatively formulaic pleading and did not engage with the Applicant's further evidence. This adjournment was further designed to afford the Secretary of State a fair opportunity to consider, and respond to, the recently generated evidence. The Secretary of State duly responded via the mechanism of a supplementary PAP reply on the eve of the second *inter-partes* hearing convened today for the purpose of determining the Applicant's quest for interim relief.

(3) Taking into account the accelerated pace of these proceedings, dictated by the evidence lodged and the consequential grant of expedition, and notwithstanding the steps taken by the Tribunal to ensure that everything has been conducted *inter-partes* to date, I have been alert to the position of the Secretary of State and, simultaneously, the need to approach the Applicant's evidence judiciously. While the Secretary of State was alerted to this case via the PAP process some four months ago and, thus, has been on reasonable notice and has enjoyed investigative and evidence gathering opportunities, the evidence before the Tribunal is, at this juncture, one sided. Thus I have subjected it to particularly careful scrutiny. To this I add that through the medium of the PAP responses, collectively and Counsel's submissions, the evidence has not been challenged on behalf of the Secretary of State. I have also taken particular cognisance of the manner in which the evidence has been assembled, the obvious care and professionalism invested in its preparation and the time period devoted to this important exercise.

(4) Giving effect to the approach outlined above, I am satisfied that this application can be determined by acting upon the core elements of the Applicant's evidence. Considered in its totality I find this evidence balanced, credible and persuasive. This assessment is not, of course, a final one, given that it is made at an interlocutory stage of these proceedings. Furthermore, while my experience in this sphere of litigation has been that the Secretary of State's evidence, when ultimately filed, rarely casts any doubt on the key factual features of the claimant's case, this is a possibility which I of course leave open.

(5) Taking into account that this is an *ex tempore* judgment provided in an expedited interim relief context and bearing in mind the considerable extant jurisprudence on the subject of the so-called Dublin Regulation, including its interaction with Article 8 ECHR, a disquisition on the applicable legal rules, in particular the main provisions of the so-called Dublin regulation, is not required. I shall, however, in dealing with certain of counsels' submissions, consider some of the leading jurisprudence in this discrete field.

The Applicant's Case

(6) The Applicant is a third country national. There is much evidence that he is a national of Iran. He has survived on the Island of Lesvos since October 2016. I consider the language of "survival" apposite having regard to the Applicant's youth, background, mental frailty and the circumstances of his existence since fleeing Iran circa September 2016 and making the hazardous transit from there through Turkey and eventually to the Greek island concerned. I accept that he made an application for asylum immediately upon arrival viz some 10 months ago.

(7) The Applicant is one of the fortunate few who, as the experience of this Tribunal demonstrates, has had the incalculable benefit of support and advice, both professional and other, stimulated by the involvement of a small number of charities and volunteers committed to improving the lot of the many tens of thousands of non-EU nationals who have gathered at a number of "asylum hotspots" on the territory of certain EU countries. The Greek Island of Lesvos is one such place.

(8) Some months after the Applicant's advent to Lesvos and following the kind of charitable and voluntary intervention noted above, his legal representatives became involved in a quest to persuade the Secretary of State to admit him to the United Kingdom. This undertaking began when the Applicant had submitted a claim for asylum there. Almost ten months later the Greek authorities have not yet made any decision on who is the Member State responsible under the Dublin Regulation for the purpose of examining and determining the Applicant's application for asylum.

(9) In these circumstances the Applicant has sought to persuade the Secretary of State that notwithstanding the absence of any such decision and in particular notwithstanding the absence of a 'take charge' request of the United Kingdom by Greece the United Kingdom should nonetheless admit the Applicant to its territory and assume responsibility for examining and determining his claim for asylum. It is in that context that the PAP correspondence to which I have referred materialised. In the span of several responses the Secretary of State has taken a clear and unequivocal stance.

(10) The basic ingredients of the Applicant's case can be gleaned from the following extracts from his solicitor's PAP letter:

> "[AR] *is a 17 year old boy who is being unlawfully treated as an adult in circumstances where he has a wealth of evidence supporting his minority ….* [there is] *cogent evidence of* [his] *family links to various relatives in the UK. It is therefore clear that in his current circumstances as an unaccompanied child asylum seeker, he shares family life for the purposes of Article 8 ECHR with his relatives in the UK ….*
>
> *It is in* [his] *best interests to be transferred to the UK, and quickly. He continues to be treated as an adult by the Greek authorities and remains in precarious and potentially dangerous circumstances …. He has experienced highly traumatic experiences and has lived in wholly unsuitable conditions ….*"

The action requested of the Secretary of State was: "*…to urgently agree for* [AR] *to be transferred to the UK in order to pursue his asylum claim.*"

(11) This letter elicited a fairly cursory response, the central elements whereof were: the Applicant had been assessed as an adult by the Greek authorities; therefore the Secretary of State had no obligation to arrange for his admission to the United Kingdom; any challenge to the age assessment should be pursued in Greece; there was no obligation to transfer him under Article 8(2) of the Dublin Regulation; neither of the thresholds prescribed in R(ZT Syria) and Others v Secretary of State for the Home Department [2016] EWCA Civ 810 and [2016] 1 WLR 4894 was satisfied; and the "discretionary clause" mechanism contained in Article 17(2) of the Dublin Regulation was not engaged as no "take charge" request had been made. In a nutshell:

> "*You are invited to challenge the Greek authorities if you feel they have not acted* [lawfully] *with regards to your client's age or any other matter.*

(12) In short the Applicant's quest for admission to the United Kingdom in circumstances which I have summarised has been declined and is the subject of a continuing refusal. This may be viewed as an omission and, viewed through that lens, the pleading in the Applicant's judicial review claim draws attention to what is described as the failure of the Secretary of State to grant the facility sought. One might also legitimately view the Secretary of State's responses to the PAP correspondence, to include the most recent, as a composite decision. I consider that nothing of significance turns on this distinction in the present context and no argument to the contrary was presented. Furthermore, issues of substance are of greater concern to the Tribunal than issues of form, particularly at this stage.

The ZT (Syria) Decision

(13) The letters belonging to the PAP phase take their colour from, *inter alia*, the decision in ZT (Syria) noted above. In that case the applicants, none of whom had made an asylum claim in the other EU country concerned (France), sought to compel their admission to the United Kingdom invoking their rights and those of other family members under Article 8 ECHR. In its decision the Court of Appeal coined the phrase "Dublin bypass" cases. Beatson LJ stated at [95]:

> "*I consider that applications such as the ones made by these claimants, 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 judgement, 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.*"

Beatson J added at once:

> "*This is subject to the point that, as I have stated, these cases are intensely fact-specific.*"

He then gave the example of the "Syrian baby case", which had been considered by this Tribunal.

(14) Carefully analysed, [95] of ZT (Syria) postulates three different scenarios:

(i) In the first the claimant declines to participate in the Dublin process and procedures of the host Member State and launches judicial review proceedings in the United Kingdom as a first litigious port of call. The legal touchstone in such cases is whether it is demonstrated that the system of the state in question " … *is not capable of responding adequately to [the claimant's] needs.*" The expectation is that this test will be satisfied only very exceptionally.

(ii) In the second scenario, the claimant participates in the host country's Dublin system, but does not complete the exercise and, at a certain point, has recourse to judicial review proceedings in the United Kingdom. Here the legal test is that of demonstrating that this system "*is not working in their case*" or, alternatively phrased, that there is "*no effective way of proceeding in that jurisdiction*".

(iii) The third scenario, properly analysed in my view, operates as an illustration of the kind of "scenario 1" case which may be expected to succeed: it accommodates an acutely urgent or compelling case – illustrated by that of the Syrian baby – where, as in the first scenario, there is no engagement whatever with the host Member State's Dublin process and procedures. Here the legal touchstone is that "*…. it can clearly be shown that the Dublin system in the other country does not work fast enough.*"

In passing, I am satisfied that each of the linguistic formulae espoused by Beatson LJ in this lengthy passage is in substance the same.

(15) In all three scenarios, the focus is on the efficacy, efficiency and speed of the Dublin system in the host Member State. In my opinion careful study of the whole of [95] of ZT (Syria) identifies a clear judicial intention to eschew prescription of a rigid or absolute nature, harmonious with the common law tradition.

(16) One further reflection on ZT (Syria) is appropriate. In some of the cases which have

followed in its wake, I have noticed the argument that in a "scenario 3" case, the test to be applied is, adopting the language of the final sentence of [95], whether it has been demonstrated that "*… there is no effective way of proceeding in that* [other] *jurisdiction …*" Formulated in this way, this test contains no element of "*very exceptional circumstances*". For a variety of reasons, usually the imperative of expedition, the opportunity for detailed submissions on this issue has not yet arisen. While I look forward to receiving comprehensive argument on the point and acknowledge the possibility that it might warrant consideration by the Court of Appeal, I am cognisant of, firstly, the Court's unqualified espousal of the CK (Afghanistan) test of an "*especially compelling case under Article 8*", at [31]. Second, the correct analysis may well be that the criterion of "*very exceptional circumstances*" expressed in the first sentence of [95] of ZT (Syria) dominates and infuses all that follows in this critical passage. That said, there is scope for argument on this issue, having regard to [100] of the judgment. This particular passage makes crystal clear that in a "Dublin bypass" case an "*especially compelling case*" under Article 8 ECHR must be demonstrated. For the reason given, I do not consider it appropriate to attempt to resolve this issue in the present case. I shall, however, proceed on the footing that the Applicant must establish an especially compelling Article 8 ECHR case. Thus my decision will be made on the basis of the high water mark of the Secretary of State's defence.

(17) The competing legal imperatives in play in this type of case were identified in an earlier decision of this Tribunal. In R(SA and AA) v Secretary of State for the Home Department [2016] UKUT 00507 (IAC) this Tribunal noted, at [7]:

> "*There are, as was stated in CK (Afghanistan) at [9] two competing legal imperatives in play. The first is the vindication of the Dublin regime which at inter-state level distributes between the Member States of the European Union responsibility for the determination of the asylum claims of third country nationals. The second is the vindication of individual claims of right (in this instance under Article 8 ECHR) which might be denied by the rigorous enforcement of the Dublin regulation.*"

Thus, as this Tribunal observed at [8] of SA, it is:

> "*… essential to grapple with the need for urgent judicial and host state intervention (on the one hand) and the advantages, merits and imperatives of full adherence to the Dublin regulation regime (on the other).*

Next, having noted that the decision of the Court of Appeal in ZT confirms the correctness of this Tribunal's conclusion that Article 8 ECHR can in principle provide the basis of a remedy in this kind of case, this Tribunal acknowledged the "*elevated and challenging threshold*". This was noted in a context where the two unaccompanied children – unlike their ZT counterparts – had initiated the Dublin Regulation processes and engaged with the authorities in France.

(18) All of these cases entail an Article 8(2) ECHR proportionality balancing exercise. In ZT (Syria) the Court of Appeal noted, at [34], that this Tribunal, in conducting the balancing exercise, had identified the following three factors: the living conditions of the claimants; their backgrounds and histories; their mental states and fears; their sibling relationships and the prospects of reuniting them with family members in the United Kingdom; and the efficacy of the laws, practices and arrangements prevailing in the host country. The Court developed this at [37] of its decision:

> *"The factors which were said to tip the balance in favour of all or some fo 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 entiail 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".*

(19) It is notable that in [34] and [37] of its decision the Court of Appeal rehearsed the factors identified by the Tribunal as material without criticism. Furthermore, no such criticism is discernible in the operative passages of the Court's judgment at [88] – [101]. The Court of Appeal, in substance, differed from the Tribunal's judgment on the basis that the test applied by the latter, namely treating the Dublin Regulation as a "*material consideration of undeniable potency*", at [52], should have been phrased in the somewhat stronger terms of the later decision in CK (Afghanistan) [2016] EWCA Civ 166 at [31] viz the demonstration of an "*especially compelling case under Article 8*" sufficient to justify the outright circumvention of the Dublin process in the host Member State. While I note the "*broad brush*" comment in [93] of the Court's judgment, in the same passage the Court confirmed the correctness of the Tribunal considering the living conditions of the claimants as a factor properly bearing on proportionality.

(20) Another aspect of the guidance to be distilled from ZT (Syria) is the Court of Appeal's approval of this Tribunal's emphasis on the unavoidably fact sensitive nature of every case. We stated at [53]:

> "*It is trite to highlight that these are intensely fact sensitive cases.*"

The Court of Appeal repeated this at [90]. The corollary of this is that it is doctrinally

incorrect to suggest that, factually, decisions in any of these difficult and challenging cases are of precedent value. They are not. Rather they are, individually, simply illustrations of the application of the test of "*especially compelling case under Article 8*" as explained in [95] in ZT (Syria).

(21) A further, discrete aspect of the guidance to be derived from ZT (Syria) is the appellate court's pronouncement on the factor of expedition, at [87]:

> "*There will be a need for expedition in many cases involving unaccompanied minors. The circumstances of the first four claimant's 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.*"

Thus there is a balancing exercise to be carried out in cases where expedition and an orderly process do not sing from the same hymn sheet. I would add that, bearing in mind the age issue in the present case, I do not distil from this discrete passage any legal principle to the effect that the imperative of expedition is confined to the cases of those aged under 18 years. The more so in the present kind of case where the age issue is marginal: on all the evidence the Applicant was either aged 17 or 18 when he lodged his asylum claim in Greece in October 2016.

(22) The decisions in CK (Afghanistan) and ZT (Syria) also draw attention to one of the underpinnings of the Dublin Regulation, namely the principle of mutual trust and confidence among Member States. This, Beatson LJ noted at [87], has the status of "*a significant evidential presumption*" one dimension whereof is the undesirability of one Member State conducting an "*intense examination of the avowed failings of another Member State*": R (EM Eritrea) v Secretary of State for the Home Department [2014] AC 1321, at [40] – [41] and [64], per Lord Kerr.

Interim Relief: Governing Principles

(23) The arguments of the parties' respective counsel showed that, with one slight qualification, it is not in dispute that the determination of any application for interim relief involves the application of the twofold test of whether the Applicant has a real prospect of succeeding at the substantive hearing, namely a more than slender or fanciful prospect of success and whether interim relief is contra-indicated by the so-called "balance of convenience". A court will also consider any other material factors not falling within the embrace of the two overarching principles.

(24) The "slight qualification" which I have noted relates to Ms Masood's reliance upon the decision in Francis v Kensington and Chelsea Royal LBC [2003] EWCA CIV 443 and [2003] 1 WLR 2248. This was a homelessness case in which the housing

authority concerned had refused to exercise its statutory discretion to grant the claimant temporary accommodation pending his appeal against a decision refusing his housing application. The claimant exercised his statutory right to challenge the first of these refusals by appeal to the County Court which, in turn, declined to exercise its statutory power to make a mandatory order requiring the provision of interim accommodation. This gave rise to an appeal to the Court of Appeal, which noted that in cases involving an interim mandatory injunction against a public authority settled case law dictates that the standard to be applied is higher than that applicable to a prohibitory injunction, being that of *a strong prima facie case*. The rationale of this approach, per Simon Brown LJ at [18], is that the well known American Cyanamid test becomes "*…. more stringent still were the applicant to be seeking to enforce the exercise of a power, as opposed to a duty*".

(25) In the context of these proceedings (see [1] – [4] above), the luxury of detailed argument on this discrete issue was not available. While, pragmatically, I shall determine this application on the basis of the more exacting "*strong prima facie case*" test, I entertain substantial reservations about its applicability in a case where a centrepiece of the legal challenge is one of the protected Convention Rights (Article 8) and, correspondingly, a statutory duty on the part of the Secretary of State not to act incompatibly with the Article 8 rights of the Applicant and the family members involved, imposed by section 6 of the Human Rights Act 1998. The notion of discretion seems to me to have no place in such a case.

(26) As will become clear, I am satisfied in any event that the Applicant's case overcomes the threshold of strong (as opposed to mere) *prima facie* case. Alternatively phrased, he has satisfied me that he has a strong (as opposed to real) prospect of succeeding at the substantial hearing. I shall elaborate on this in what follows.

Consideration and Conclusions

(27) I shall address firstly the suggestion in Ms Masood's submissions that if the Tribunal were minded to grant interim relief, it should do so not in the terms pursued by the Applicant but in the form of a less intrusive order, mandatory in nature, requiring the Secretary of State to make a decision under Article 17 of the Dublin Regulation. It was submitted, in the further alternative, that the Tribunal might confine itself to a (mere) declaration that the Secretary of State's consideration and/or application of Articles 8 and 17 has been unlawful in the Applicant's case. The twofold riposte to this latter submission, in my judgement, is that a declaratory order of this kind would, if considered appropriate, almost invariably be made in the guise of a final, rather than intermediate, remedy. Furthermore, it would provide the Applicant with no practical or effective relief. As to the first submission, I accept Ms Knorr's argument that the Secretary of State has already had ample opportunity to take the course mooted via the three PAP response letters already compiled. Moreover, there is no indication whatsoever – in the aforementioned letters, the acknowledgement of service or counsel's submissions – of any possible alteration in the Secretary of

State's stance.

(28) I have, notwithstanding, nonetheless reflected on the context and terms in which this Tribunal made an interim relief order in a series of recent conjoined cases namely AO (and six others) v Secretary of State for the Home Department [unreported: JR/2535/2017]. By its order dated 12 April 2017 this Tribunal, in the guise of interim relief, ordered the Secretary of State to consider new evidence which had not been available at the PAP stage, together with any further written representations and to make a further, or supplementary decision, in response thereto. The present context is rather different, there being no dispute between the parties that all of the Applicant's evidence has been considered by the Secretary of State in the span of the aforementioned three PAP response letters. It follows that none of the concerns articulated in the Tribunal's interim relief order in AO and Others – see especially [5]/[6] - arises in the present context. In summary, the two contexts are quite different.

(29) For all of these reasons the question for this Tribunal is whether the Applicant should be granted the primary form of interim relief which is pursued, namely an order requiring the Secretary of State - with such qualifications as may be prescribed - to admit him to the United Kingdom. There is, realistically, no competing interim relief order in play.

(30) The first of the criteria to be applied focuses on the merits and strength of the Applicant's case. It asks the question of whether the Applicant has a strong *prima facie* case. That is the formulation which has been devised in the reported decisions. In a context where a mandatory order is sought at the interim relief stage it is not sufficient to pose the question in those bare terms. Rather the question for the Tribunal falls to be framed in somewhat more elaborate terms: has the Applicant demonstrated a strong *prima facie* case that, at the substantive hearing stage, he will secure by final relief what he currently pursues via interim relief, namely an "admission order" (in shorthand) on the ground that he has demonstrated an especially compelling case under Article 8 ECHR and in particular (but not exclusively) that the Dublin Regulation system in Greece is not functioning in his case? The Tribunal's response to this question will be formed by its application of the governing legal tests and principles to the fact sensitive matrix of the Applicant's case.

(31) Next, in applying this test, it is incumbent upon the Tribunal to form a series of evaluative assessments and predictive judgments. The Tribunal must make a careful assessment of the Applicant's prospects of success at trial and to rate those prospects as carefully and accurately as possible.

(32) I am satisfied that the Applicant has demonstrated to a high degree of probability that the Tribunal will ultimately conclude that this test is satisfied. This predictive, evaluative assessment is made, firstly, on the basis of all of the evidence pertaining to the manner in which the Greek system, processes and procedures have to date

operated in the Applicant's case and the evidence of relevant Greek law and how this operates in practice. I highlight in particular the following factors:

(a) The stark statistic of almost ten months' delay since the Applicant lodged his claim for asylum in Greece. That in the abstract is a very long period in the life of any teenager. It is an especially lengthy period in the case of this Applicant having regard to his history, his personal vulnerabilities, his mental state and the circumstances in which he has been endeavouring to survive since his arrival in Greece.

(b) The indications that the continued processing of the Applicant's asylum claim in Greece will entail further delay of unquantifiable and unpredictable proportions. The bare fact that there is no timetable, even provisional or indicative, for final decision making is telling.

(c) Next, there is clear evidence that the age assessment exercise carried out in respect of the Applicant was highly unsatisfactory to the extent that it was in breach not only of well recognised international norms but also Greek law itself. This latter assessment is made upon the basis of clear and compelling evidence of the laws of Greece from an experienced and respected Greek legal practitioner.

(d) There is clear evidence that the facility of reviewing the unsatisfactory age assessment exercise has also been inefficacious. That assessment would not have been appropriate if the review had given rise to a clear outcome one way or another. But the outcome of 'inconclusive' underpins the analysis that the process itself has provided no effective relief to the Applicant.

(e) Next there is the very clear evidence that recourse to the courts for the Applicant will not provide him with a practical or expeditious remedy. Such is the state of the Greek laws and legal system that the lawyer concerned would not advise any clients to engage in the process which theoretically is available.

(f) Finally, there is the evidence of the recent further delays occasioned by the cancellation of appointments with the relevant Greek authority. In short on the evidence before the Tribunal the Applicant's case has limped along in the Greek system for a very considerable period of time, has made no tangible progress, has no date, even provisional or indicative, for finality and is now in a state of stagnation.

All of these factors point to the assessment that there is a high degree of probability that the Applicant will satisfy the second of the ZT (Syria) tests.

(33) In reaching this conclusion I have been mindful of the importance of the principle of mutual confidence in the Dublin scheme and the significant evidential presumption which this entails: [23 *supra*]. The principle itself is not framed in rigid or absolute

terms. Moreover, being expressed in the guise of a presumption, it is susceptible to rebuttal in a given case.

(34) I consider that the practical operation and outworkings of this principle must depend upon the factual framework of the individual case. In the present case, the operation of the principle has not entailed the kind of "*intense examination*" which the Supreme Court feared (and see also [92] of ZT (Syria) in this context). Rather, this Tribunal has been engaged in an exercise of evaluating the basic facts relating to how the Applicant's asylum claim in Greece has progressed since its initiation and the witness statement, compact and cogent, of the Greek legal practitioner noted above. The Tribunal has also considered the (relatively brief) reports of certain respected international human rights organisations, in particular the Human Rights Watch report dated 19 July 2017. This has not given rise to an exercise of undue complexity or penetration. Rather, the exercise has been uncluttered and uncomplicated in this particular case.

(35) In addition to the above, the evidence satisfies me clearly that the evidential presumption has been rebutted in this case. It forms no part of this Tribunal's function to pass judgment on the Greek Dublin system generally and I decline to trespass on this prohibited domain. Rather, this Tribunal's intense focus is on how the system has been operating in this Applicant's case. In [32] above, I have identified a series of features which, in combination, impel to a diagnosis of inefficiency and unacceptable delay. This is a fact sensitive, case specific evaluative assessment.

(36) The first element of how the first of the interim relief criteria falls to be applied in the present case is set forth at [26] – [30] above. The second element relates to the evidence bearing on the Applicant himself. The Tribunal, bearing in mind that family life – as opposed to personal privations and plight – lies at the heart of what is protected by Article 8 ECHR - must pay particular attention to all of the facts and factors which are peculiar and personal to the Applicant. I have already adverted to some of these. They include inexhaustibly his living conditions, the section of the camp in which he is obliged to survive and the conditions prevailing at the camp - the fires, the fights, the general lawlessness. Next there is the factor of the Applicant's youth: whatever his exact age he is a teenager marooned in an unfamiliar foreign land and bereft of family company and support for the last ten months approximately. To these considerations one adds his total isolation which is the result of his recent separation from his three fellow countrymen. Then there is his mental state which was such that he was assessed as being in need of weekly psychological assistance and support and the recent withdrawal of that support with the result that he does not have the benefit of this or anything comparable, with no evident prospect of resumption.

(37) One juxtaposes all of the foregoing with the evidence bearing on the deprivation of family life which the perpetuation of the Applicant's current situation entails. This includes evidence emanating from the Applicant himself and that provided by the

various family members who are lawfully present in the United Kingdom. The Applicant's case is supported by an impressive entourage of relatives lawfully present in the United Kingdom many of whom (notably) went to the considerable trouble and expense of attending the successive hearings conducted before me. The Article 8 rights of everyone belonging to this circle are engaged. Furthermore, and bearing in mind that this judgment is prepared at the interlocutory, rather than final, stage of these proceedings, I consider at this stage that admission to the United Kingdom provides the only route whereby the Applicant can, realistically, hope to enjoy any form of family life in the short to medium term.

(38) In this context I take cognisance of the discrete submission on behalf of the Secretary of State that the Applicant is now aged either 18 or 19 years. On the facts of this case I consider that this does not make any material difference. The main factors (in inelegant summary) to be considered by this Tribunal at this interlocutory stage are the Applicant's deprivation of family life, his personal background and history, his mental state, his present and anticipated living conditions and the progressing and progress of his asylum claim in Greece. It has been repeatedly stated in various juridical contexts that the attainment of an 18th (or, for that matter, 19th) birthday does not impose some bright luminous line with magical insulating and curative powers. Furthermore and in any event, the "child's best interests" principle has not featured in the case presented to the Tribunal.

(39) I acknowledge that the evidence assembled on behalf of the Applicant does not include any expert psychological or psychiatric report (for the reasons explained in the witness statements). However, I unreservedly reject the suggestion, implicit in the submissions on behalf of the Secretary of State, that a report of this kind establishing a significantly compromised mental state is a pre-requisite to the grant of relief in cases of this *genre*. Any such suggestion is manifestly unsustainable. In the present case there is ample evidence of the Applicant's compromised mental state. Such evidence would, in all probability, be enhanced and fortified, rather than confounded, if expert psychological or psychiatric evidence were available. Having made this assessment I make no concluded finding on this discrete issue.

(40) I turn to the second of the governing criteria, namely the balance of convenience. This is a flexible, open-textured test capable of accommodating a broad range of considerations. As the foregoing demonstrates, the present application for interim relief has entailed a heavy emphasis on the first of the governing criteria. They are not, of course, mutually exclusive and frequently, as in the present case, have some degree of overlap. I have not detected in the submissions on behalf of the Secretary of State the identification of any specific factor under this rubric which has not already featured, expressly or by implication, in my consideration of the first criterion. I make this observation subject to what follows.

(41) I balance the notional scales in the following way. If interim relief is refused the Applicant will suffer in my judgement substantial prejudice. It is no answer to say, as Ms Masood, attempted to, that this will be remedied in approximately seven

weeks' time at the stage of substantive hearing. First, that is an unacceptable further layer of delay grafted onto a period of already excessive and unacceptable delay. Second, it is uncontroversial to assess as probable a deterioration in the Applicant's mental state, juxtaposed with the continued exposure to all of the risks, threats and dangers to his safety and well being which have been a feature of his circumstances for too long.

(42) So what is there on the other side of the scales? First of all the Secretary of State would have to expend resources in giving effect to any order of the Tribunal. However, there is no evidential indication that the steps required to comply with an interim relief order would be unduly onerous. I consider that this factor is effectively cancelled out by the Tribunal's application of the first of the governing criteria, namely that there is a high degree of probability that the Applicant will succeed at the substantive stage in any event. Furthermore compliance with the orders of courts and tribunals is a constitutional duty on the part of every litigant.

(43) To this I add that this Tribunal now has extensive experience of the "post-remedy" scenario in cases of this kind. This experience reinforces the aforementioned assessment. I make the further observation that if, in the wake of an interim relief order, persuasive reasons for catering for unforeseen or insurmountable difficulties for the Secretary of State are demonstrated, these will (as in other previous cases) be accommodated by the Tribunal under the rubric of liberty to apply.

(44) Second, there is the Tribunal's assessment of a modest possibility that the Secretary of State may ultimately succeed at trial. That, it seems to me, is counterbalanced *by inter alia* the consideration that the purpose of admitting the Applicant to the United Kingdom would not be to confer on him an indefinite right to reside and settle in this jurisdiction. Rather it would be to require the Secretary of State to examine and determine the Applicant's asylum application. That seems to me is not an unduly onerous requirement in all of the circumstances. Furthermore, the evidence is to the effect that, bolstered by substantial family support, the Applicant will not be a drain on the public purse.

(45) I then turn to ask whether there is any other factor, whether of a public interest species or otherwise, which contraindicates the grant of interim relief. It is argued *inter alia* that consideration must be given to effective immigration control and full adherence to the Dublin procedures. However it has been recognised at the second highest judicial level, namely the Court of Appeal in ZT, that in certain circumstances these considerations must yield to individual right. Furthermore, the public interest in the maintenance of firm immigration control cannot sensibly be said to be undermined in any case where the effect of section 6 of the Human Rights Act 1998 is to require the Secretary of State, as a matter of legal obligation, to take a certain course of action. It is difficult to conceive of a public interest more compelling than that of obedience to the rule of law.

(46) I take into account the submission that the Respondent has not yet had an

opportunity to submit her evidence. In the abstract that submission is well made but when one considers it in the light of all of the evidence which has been assembled, together with the kind of evidence which this Tribunal commonly receives from the Respondent in this kind of case, it seems quite unlikely that any evidence on behalf of the Respondent will have any bearing on the Tribunal's assessment of the key aspects of the extant evidence to which I have already referred. Furthermore, as indicated in [3] – [4] above, I have taken steps to enhance the Secretary of State's effective participation in these proceedings and the evidence has been subjected to careful scrutiny. Accordingly this factor qualifies for relatively little weight.

(47) For this combination of reasons, I consider that the balance of convenience tilts in the Applicant's favour. Both tests being satisfied and in the absence of any contra-indicating factor, I conclude that the application for interim relief succeeds.

(48) Finally, I have chosen to focus on the Article 8 ECHR dimension of the Applicant's challenge. This does not exclude the possibility that, at the substantive stage, the Applicant may succeed on other grounds, in particular his contention that the Secretary of State's failure, or refusal, to admit them to the United Kingdom may be in breach of Article 8(2) and/or Article 17 of the Dublin Regulation. On the other hand, these discrete challenges may be found to be without merit. Considerations of pragmatism, dictated by the exigencies of the Applicant's circumstances as I have assessed them, have dictated the prosaic desirability of determining this application on the Article 8 ground only.

Order

(49) I have given careful consideration to the terms in which interim relief should be ordered. In doing so I have reflected on the various formulae which have been employed in this Tribunal in cases of this kind previously. These have varied a little over the passage of time and have evolved somewhat. This Tribunal has repeatedly said that it will not intrude upon the rights and responsibilities of foreign agencies and authorities in compliance with their obligations under foreign legal systems. This Tribunal has also repeatedly acknowledged that the Respondent in these proceedings is the Secretary of State for the Home Department, namely a public authority in an EU Member State other than that of the Member State in which the litigant is currently residing. Having reflected on this issue I propose to make an order in terms similar to those employed in the case of AM [2017] UKUT 00262 (IAC) , at [134] (iii).

(50) The order will require the Secretary of State to forthwith make all necessary and immediate arrangements for the transfer of AR from Greece to the United Kingdom using best endeavours at all times. At this juncture I am disinclined to prescribe a time limit, bearing in mind the paucity of evidence on this discrete issue and taking into account that this is the first case of its kind involving Greece which the Tribunal has experienced. Furthermore, the inclusion of the standard liberty to apply provision will provide the Applicant with adequate protection if undue delay should

eventuate. I consider, however, that both parties should have the opportunity of addressing the Tribunal on this question. Accordingly I do not determine this issue definitely at this stage. This will enable Ms Knorr to take instructions and to respond and it will enable the Respondent's legal representatives to do likewise.

(51) I direct that the Applicant's legal representatives make their position known in writing to the Tribunal on the issue of the terms of the order by close of business tomorrow [27 July]. The Respondent will make its response by close of business on 31 July. In that way I will also honour the assurance that I gave repeatedly in open court to the Respondent's representatives that they would not be inconvenienced or discomfited in any way by the inability of their counsel to attend the pronouncement of this *ex tempore* judgment.

[Given *ex tempore* on 26 July 2017; edited and approved on 31 July 2017]

ADDENDUM [03 August 2017]

Order

(52) I have received, and considered, the parties' further written representations mooted above. On behalf of the Applicant, there is no challenge, at this stage, to the order being formulated in the terms provisionally indicated. The only issue of substance raised is that the order should include a specific clause requiring active communication and co-operation on the part of the Secretary of State with the Applicant's representatives. The purpose of this is expressed in the following terms:

> "… *to ensure that both parties have relevant information to assist with facilitating transfer and so that the vulnerable Applicable is kept informed of progress.*"

This is trenchantly opposed on behalf of the Secretary of State. This dogged resistance has become a feature of all cases belonging to this cohort. It is a further reflection of the way in which the defence of these cases has habitually been conducted by the Secretary of State. [This issue is addressed fully in the Tribunal's "liberty to apply" judgment in AM, *supra*.] Furthermore, it airbrushes provisions to this effect which I have included in 'liberty to apply' orders made in ease of the Secretary of State extending time limits for admission of the claimant concerned. I am frankly at a loss to understand why a provision of this kind is resisted so doggedly. The more so when experience of this litigation shows that the active involvement of, and reasonable communication with, the claimant's legal representatives and others, including charitable organisations and volunteers *sur place*, can positively enhance compliance with the Tribunal's orders. Furthermore, there is no evidence that mutual cooperation and communication of this kind can have a negative effect on compliance.

(53) I reject the submission that the inclusion of a provision of this species in the Tribunal's orders would impose an "*onerous*" burden on the Secretary of State. This submission is made in the terms of a bare assertion, without particularisation. Furthermore, it is confounded by what I have stated above. I also reject the submission that a provision of this kind would be "*unclear*". I consider that mature, adult litigants who have a keen sense of the rule of law should not require kindergarten-type elaboration. Good sense, good faith and reasonableness are the three stand out ingredients in complying with a provision of this kind. In the world of contemporary litigation, there should be no requirement for subsequent judicial monitoring. This is, however, available to cater for something unpredicted or unforeseeable. In the abstract, and given the Tribunal's experience of these cases, it would be highly surprising if the imposition of a requirement on the part of the Secretary of State's officials and legal representatives to engage in appropriate communication with the Applicant's legal representatives, in the interests of securing compliance with a judicial order, were to prove "*onerous*". However, should this expectation, for whatever reason, be unfulfilled, the mechanism of liberty to apply will accommodate any need for judicial re-examination.

(54) In short, I consider that the Secretary of State's resistance to the inclusion of a provision of this kind in the Tribunal's order is unsustainable.

(55) The Tribunal, therefore, orders as follows:

The Secretary of State shall forthwith make all necessary and immediate arrangements for the transfer of the Applicant from Greece to the United Kingdom using best endeavours at all times and liaising with the relevant Greek authorities and the Applicant's legal and other representatives both in the United Kingdom and in Greece.

Permission to Appeal

(56) An *ex tempore* judgment was delivered at the conclusion of the *inter-partes* hearing on 26 July 2017. I then indicated that a fuller, edited judgment in written form would be completed and distributed in early course. Having completed this exercise (on 31 July 2017), but before circulation of the written judgement, an application by the Secretary of State for permission to appeal to the Court of Appeal was received.

(57) By reason of the sequence of events just noted, this application has not been prepared by reference to the written judgment of the Tribunal. This prompts recollection of the cautionary exhortation in Farquar v Lafin [1975] 12 SASR 363:

> "*No lawyer should advise that an appeal be instituted from a judgment until he has read it, understood it and arrived at a bona fide conclusion that there are proper grounds for appealing from it. Anything less amounts to an abandonment of his duty as an officer of the court.*"

(58) I turn to the grounds of appeal *seriatim*:

(i) The first ground contends that the Tribunal, in conducting the proportionality balancing exercise under Article 8(2) ECHR, "*failed ….. to prepare the scales correctly in law, taking into account all relevant factors and/or took into account irrelevant factors*". In the paragraphs which follow, the suggestion that the Tribunal failed to take into account all relevant factors is not particularised in any coherent way. It resolves to bare assertion. As to taking into account irrelevant factors, there is one formulated complaint, namely a failure to appreciate or consider the impact of the fact that the Applicant is now an adult. As [31] of the judgment makes clear, this factor was indeed considered. While the remainder of this discrete passage in the grounds contains the statement that as an adult "*…. his best interests can no longer rank as a primary consideration in the proportionality balancing exercise …..*" – and leaving to one side the correctness in law of this contention in the present context – no "child's best interests" factor features in the proportionality exercise which the Tribunal has carried out. This ground of appeal has no merit accordingly.

(ii) The second identifiable complaint in the grounds is that the Tribunal "*…. placed undue weight on the general conditions prevailing at the camp (including fights, fires, demonstrations and so forth) ……*". First, weight is a matter lying within the preserve of every first instance judicial organ. It is well settled that an appellate court will find an error of law in a "weight" challenge only rarely since the question for that court is not what weight it would have accorded to the various factors in the equation. This ground engages the elevated hurdle of irrationality. Second, as [93] of ZT (Syria) confirms, the living conditions of one such as this Applicant are a legitimate consideration in the proportionality balancing exercise as they may sound on the severity of the asserted breach of Article 8(1). As [36] above demonstrates, the Tribunal took this factor into account. As [37] shows, this factor was weighed with other factors. Particular attention has been given family life. To summarise I am unable to identify any merit in this ground of appeal.

(iii) Third, it is contended that the Tribunal "…. *Failed, properly, to weight the public interest in the balance, including the impact of the Dublin III regime on the application of Article 8 ECHR ….*". This contention is formulated in bald terms, without particulars and is, I believe, confounded by the substantive judgment. There is no discernible merit in this ground.

(iv) The fourth, and final, ground of appeal is another "undue weight" complaint, linked with the suggestion that the Tribunal "*….drew an impermissible inference about the Applicant's mental state from the fact that he had been receiving some psychological assistance*". I consider that the passages in [39] of the judgment speak for themselves. The conclusion which follows is that this ground also is bereft of merit.

(59) The Secretary of State's application for permission to appeal to the Court of Appeal is refused accordingly. The application is further undermined by the well established principle entailing restrictive appellate review of the exercise of judicial discretion by the court of trial. See, for example, R v Secretary of State for the National Heritage, ex parte Continental Television BVIO [1993 3 CMLR 387 at [16] and Francis v Royal Borough of Kensington and Chelsea [2003]2 All ER 1052 at [30]. It suffices to say that the Secretary of State's application does not engage with these principles and is further undermined by them.

(60) Permission to appeal to the Court of Appeal having been refused, no question of exercising the Tribunal's power to suspend its order under rule 5(3)(l) of the Tribunals (Upper Tribunal) Rules of Procedure arises.

(61) Finally, I reserve costs and grant liberty to apply.

Signed: Edmund McCloskey.

The Honourable Mr Justice McCloskey
President of the Upper Tribunal
Immigration and Asylum Chamber

Dated: **03 August 2017**

Sent to the Applicant, Respondent and any interested party / the Applicant's, Respondent's and any interested party's solicitors on (date):
Home Office Ref: