IN THE COURT OF APPEAL **Appeal No. C2/2016/0712**
CIVIL DIVISION

ON APPEAL FROM THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

BETWEEN:

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

- and -

ZAT (SYRIA) AND OTHERS
Respondents

- and -

UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES
Intervener

UNHCR'S INTERVENTION

Introduction

1. The Office of the United Nations High Commissioner for Refugees ("**UNHCR**") welcomes the opportunity to intervene in this Appeal pursuant to the order of Beatson LJ dated 26 April 2016.

2. UNHCR is a subsidiary organ of the UN General Assembly. Pursuant to its founding statute ("**the Statute**"), it has been entrusted with responsibility for providing international protection to refugees and, together with national governments, seeking

permanent solutions for the problem of refugees.[1] As set out in the Statute, UNHCR fulfils its mandate by, *inter alia*, promoting the conclusion and ratification of, and supervising the application of, international conventions for the protection of refugees; promoting the execution of measures calculated to improve the situation of refugees and reduce the number requiring protection; and obtaining information from national governments about the number and conditions of refugees in their territories, and the laws and regulations concerning them.

3. UNHCR has supervisory responsibility in respect of the 1951 Convention relating to the Status of Refugees ("**the 1951 Convention**") and its 1967 Protocol ("**the Protocol**"). Article 35 of the 1951 Convention and Article 2 of the Protocol oblige States Parties to co-operate with UNHCR in the exercise of its functions, and in particular to facilitate its duty of supervising the application of these instruments. UNHCR's supervisory responsibility is exercised in part by the issuance of interpretative guidelines and other materials.

4. In the UK, UNHCR has a statutory right to intervene in the First Tier and Upper Tribunals (Immigration and Asylum Chambers).[2] In other domestic and international courts, UNHCR seeks permission to intervene in appropriate cases in order to assist by making submissions on issues of law related to its mandate. In recent years, it has made written and/or oral submissions in a number of significant cases before this Court, as well as the UK Supreme Court, the European Court of Human Rights ("**ECtHR**") and the Court of Justice of the European Union ("**CJEU**"), including cases relating to the operation of the Common European Asylum System ("**CEAS**").[3]

5. In overview, UNHCR's position is as follows:

   (1) Family reunification is widely recognised in international law as a mechanism for securing the protection of the rights to family life and family unity and other fundamental human rights, including the rights of children.

[1] Statute of the Office of the United Nations High Commissioner for Refugees (Annex to General Assembly Resolution 428 (V) of 14 December 1950).
[2] The Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 (SI 2014/2604), rule 8(3); The Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698), rule 9(5).
[3] E.g. *EM (Eritrea) v Secretary of State for the Home Department* [2014] UKSC 12; *NS v Secretary of State for the Home Department* [2013] QB 102 (CJEU); *MSS v Belgium and Greece* (2011) 53 EHRR 2 (ECtHR).

(2) The operation of the CEAS is always subject to an EU Member State's duty to respect fundamental rights, including its duty to facilitate family reunification.

(3) Article 8 of the European Convention on Human Rights ("**ECHR**") and Article 7 of the EU Charter of Fundamental Rights ("**CFR**") may impose a positive duty on a Member State to admit to its territory an asylum seeker who is an unaccompanied child[4] or vulnerable adult[5] and who is seeking reunification with his or her settled family members in that State.

(4) This duty is not precluded by or inconsistent with the Dublin III Regulation, the clear object and purpose of which in fact supports the existence of such an obligation.

(5) Where the State insists on the application of a protracted procedure that would delay or hinder family reunification, there is a *prima facie* interference with that duty which must be justified.

(6) Factors relevant to the assessment of the proportionality of such an interference include the length of the delay; the particular vulnerability of the asylum seeker; the importance of the rights at stake; and the conditions in which the person seeking to be reunited with his or her relatives is living.

(7) In practice, UNHCR has observed significant delays in the reunion of unaccompanied children with their families pursuant to the Dublin III Regulation. These delays contribute to the protracted separation of families and have the consequence that many children simply abscond in an attempt to reach their families outside of CEAS mechanisms; in doing so they may be exposed to the particular risk of exploitation associated with such irregular means of travel.

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[4] UNHCR Guidelines on the 1951 Convention and the Protocol define unaccompanied children as those "*who have been separated from both parents and other relatives and are not being cared for by an adult who, by law or custom, is responsible for doing so*": UNHCR Guidelines on International Protection No. 8, paragraph 6.

[5] Under the CEAS, vulnerable persons include children, unaccompanied children, disabled people, elderly people, pregnant women, single parents with children, persons with mental disorders and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence (Directive 2004/83/EC, Article 20(3)), as well as victims of human trafficking (Directive 2011/95/EU, Article 20(3)).

Family reunification

The rights to family life and family unity

6. As expert participants in UNHCR's Global Consultations programme[6] have concluded, and as UNHCR has identified in submissions[7] to the European Commission, the family unit is a source of physical, emotional and economic support to its members, in particular to those (such as children) who are less able to care for themselves. In the specific context of refugees, the family plays an essential role in helping persons who have fled their homes to rebuild their lives, as the ECtHR pointed out in *Tanda-Muzinga v France* (application no. 2260/10) at para 75. The maintenance or restoration of the family unit can help to ease the sense of loss often experienced by refugees who have had to abandon their countries of origin, communities and previous ways of life. Family unity also promotes the more rapid integration of refugees into their host communities, not only because family members can support each other as they adapt to new circumstances, but also because concerns about the wellbeing of loved ones from whom they have been separated may distract refugees from tasks such as learning a new language. In the long term, family unity therefore enhances refugee self-sufficiency and lowers the social and economic costs of settlement to the host country. In *AT and another* [2016] UKUT 227 (IAC), the Upper Tribunal acknowledged this point, noting that the separation of families by circumstances rather than choice was "*antithetical to strong and stable societies*" (paras 35-36).

7. International human rights law therefore attaches great importance to family relationships in general (see e.g. *R (Bibi) v Secretary of State for the Home Department* [2015] UKSC 68 at para 31 per Lady Hale). Article 16(3) of the Universal Declaration of Human Rights ("**UDHR**") states:

> The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

[6] See e.g. UNHCR Global Consultations on International Protection, *Summary Conclusions on Family Unity: Geneva Expert Roundtable, 8-9 November 2001* (available at: http://www.unhcr.org/419dbfaf4.pdf). See further K. Jastram and K. Newland, *Family Unity and Refugee Protection*, in Feller *et al.* (eds.), *Refugee Protection In International Law* (2003) (available at http://www.unhcr.org/419dbf664.pdf).

[7] *UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification of Third Country Nationals Living in the European Union (Directive 2003/86/EC)*, pp. 3, 17.

8. This universal right is given binding effect by Article 23(1) of the International Covenant on Civil and Political Rights ("**ICCPR**"), to which the UK and all other EU Member States are States Parties.[8] It is also reinforced by Article 8 ECHR and Article 7 CFR, both of which protect the right to respect for a person's family life. Article 33(1) CFR goes further, providing that "*[t]he family shall enjoy legal, economic and social protection*".

9. The right to family unity, while not explicitly stated as a free-standing right in international treaties, is a necessary corollary of the recognition of the family as a "*group unit*" entitled to protection by the UDHR and the ICCPR. Consistently with this, the Final Act of the Conference of Plenipotentiaries that adopted the 1951 Convention stated that "*the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee*". The European Court of Human Rights has similarly held family unity to be "*an essential right of the refugee*": *Tanda-Muzinga v France* at para 75.

The rights of children

10. In addition to the rights described above, every child is entitled by virtue of Article 24(1) ICCPR to "*such measures of protection as are required by his status as a minor, on the part of his family, society and the State*", without discrimination as to (*inter alia*) race, national origin or birth.

11. Article 3(1) of the Convention on the Rights of the Child ("**CRC**") – to which, again, all EU Member States are parties – provides that "*in all actions concerning children, whether taken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration*". This is echoed by Article 24 CFR, which applies specifically within the sphere of application of EU law.

12. Article 3(2) CRC requires States Parties to "*ensure the child such protection and care as is necessary for his or her well-being*" and to take "*all appropriate legislative and administrative measures*" to this end. By virtue of Article 4 CRC, States Parties are

[8] See, to similar effect, Article 18(1) of the African Charter on Human and Peoples' Rights and Article 17(1) of the American Convention on Human Rights.

similarly obliged to "*take all appropriate legislative, administrative and other measures for the implementation*" of the specific additional rights of children enumerated in the CRC.

13. In addition to these obligations under international law, the Home Secretary is also required by section 55 of the Borders, Citizenship and Immigration Act 2009 ("**the 2009 Act**") to ensure that her functions in relation to immigration, asylum and nationality are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom. Statutory guidance issued under the 2009 Act ("**the Guidance**") clarifies that, while the Home Secretary's obligation only extends to children in the UK, UK Border Agency ("**UKBA**") staff working overseas must also *"adhere to the spirit of the duty*".[9]

14. The Guidance provides in particular that, in relation to children, the UKBA must fulfil the requirements of the CRC (as well as the ECHR, ICCPR and other international instruments) while exercising its functions as expressed in UK domestic legislation and policies. In *AT and another*, the Upper Tribunal held that the Guidance gave "*the clearest of assurances that, as a matter of policy, these several instruments of international law will be given effect when the Secretary of State and her various alter egos, which include UKBA, [UK Visas and Immigration] and [Entry Clearance Officers], are making immigration (and related) decisions which affect children*" (para 32). It also noted the absence of any territorial limitation in the Guidance in this respect.

Family reunification in international law

15. Family members fleeing persecution, war or violence may be separated by accident during a long or difficult journey. They may choose, or they may be forced, to take different routes, or to leave at different times, depending on available resources and opportunities.[10] Mechanisms for family reunification may be the only way to ensure respect for a refugee's rights to family life and family unity (paras 6-9 above) following such separation.

[9] Home Office/Department for Children, Schools and Families, *Statutory guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children*, November 2009, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257876/change-for-children.pdf.
[10] Refugee protection in international law: UNHCR's global consultations on international protection, p. 562 (available at: http://www.unhcr.org/419dbf664.pdf).

16. Similarly, when a child is separated from his or her family, reunification may be the only way to ensure that the child is given the protection and care necessary for his or her wellbeing (paras 10 and 12 above). The particular vulnerability of children is only amplified in circumstances where they are away from their homes, living in alien and potentially hostile environments, and separated from relatives, friends and members of their own communities (as the ECtHR acknowledged in *Mayeka and Mitunga v Belgium* [2008] 46 EHRR 23 at para 55). In such a scenario it is easy to see that family reunification will very often be in the child's best interests (para 11 above).

17. For all these reasons, family reunification in the refugee context is widely recognised in international law as a necessary facet of the fundamental human rights discussed above.[11] While neither the 1951 Convention nor the Protocol contains a provision on family reunification, the Final Act of the Conference of Plenipotentiaries made the following recommendation to national governments ("**the Recommendation**"):

> The Conference […]
>
> Considering that the unity of the family, the natural and fundamental group unit of society, is an essential right of the refugee, and that such unity is constantly threatened, and
>
> Noting with satisfaction that, according to the official commentary of the ad hoc Committee on Statelessness and Related Problems, the rights granted to a refugee are extended to members of his family,
>
> Recommends Governments to take the necessary measures for the protection of the refugee's family, especially with a view to:
>
> (1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country;
>
> (2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption.

18. The Recommendation is not part of the binding legal text of the 1951 Convention or the Protocol but, as UNHCR has stated in its Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status ("**the UNHCR Handbook**"), it is in fact

[11] A right to family reunification is also recognised in other areas of international law, including in international humanitarian law: see e.g. Additional Protocol I to the Geneva Conventions, Article 74, requiring States Parties to "*facilitate in every possible way the reunion of families dispersed as a result of armed conflicts*".

observed by the majority of States, whether or not they are parties to the treaties themselves.[12]

19. The UNHCR Executive Committee has also issued a number of Conclusions on International Protection emphasising the "*fundamental importance*" of family reunification;[13] acknowledging that reunification promotes integration of refugees in the country of settlement;[14] and recommending that "*every effort […] be made to ensure the reunification of separated refugee families*".[15] In relation to children, it has specifically urged States to "*take all possible measures to protect child and adolescent refugees*, including by "*promoting […] family reunification for unaccompanied minors*".[16] While not binding on States Parties, these Conclusions represent statements of opinion that are broadly representative of the views of the international community. The Executive Committee is an elected body consisting of representatives of States and members of specialised agencies, in each case with a demonstrated interest in refugee issues. It has specialist knowledge and it adopts its Conclusions by consensus. The Conclusions are therefore persuasive aids to the interpretation of the law on international protection.

20. The importance of family reunification as a means of ensuring respect for a person's rights to family life and family unity is also recognised by other international instruments. According to General Comment No. 19 of the UN Human Rights Committee – the body of independent experts that monitors implementation of the ICCPR – Article 23(1) ICCPR "*implies the adoption of appropriate measures, both at the internal level and, as the case may be, in cooperation with other States to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons*".[17] In General Comment No. 15, the Human Rights Committee confirms that the right to "*respect for family life*" under Article 23 ICCPR may in certain circumstances give an alien a right of entry to or residence in the territory of a State Party.[18]

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[12] UNHCR Handbook, December 2011, available at: http://www.unhcr.org/3d58e13b4.html.
[13] Conclusion No. 9. See further Conclusions Nos. 1, 15, 22, 24, 47, 74, 84, 85, 88, 91, 93, 100, 101, 103, 104, 105, 107 and 110.
[14] See e.g. Conclusions Nos. 24, 104.
[15] Conclusion No. 24.
[16] Conclusion No. 84
[17] UN HRC General Comment No. 19, para 5.
[18] UN HRC General Comment No. 15, para 5.

21. In relation to children, the CRC requires States Parties to ensure that children are not separated from their parents against their will, except when competent authorities lawfully determine that such separation is in the child's best interests (Article 9(1)). Article 10 elaborates on this as follows:

> In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

22. Article 22 CRC imposes specific obligations in relation to child refugees and asylum seekers. Article 22(1) provides:

> States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

23. Article 22(2) requires States Parties to co-operate, as they consider appropriate, with the UN and other organisations to "*protect and assist such a child*" and to trace his or her parents or family members "*in order to obtain information necessary for reunification with his or her family*".

24. These obligations are consistent with the child's general right under Article 7(1) CRC "*to know and be cared for by his or her parents*". General Comment No. 6 of the UN Committee on the Rights of the Child – which monitors the implementation of the CRC – states that full respect for a child's rights under the CRC, in particular Articles 9 and 10, requires that all efforts be made to return an unaccompanied or separated child to his or her parents; and that States "*take all necessary measures to identify children as being unaccompanied or separated at the earliest possible […] and, where possible and if in the child's best interest, to reunify separated and unaccompanied children with their families as soon as possible*".[19] More generally, UNHCR and UNICEF have highlighted the need for priority processing of claims involving children to ensure compliance with

[19] UN Committee on the Rights of the Child, General Comment No. 6, paras 13, 81 *et seq.*

the best interests principle. This is due to the time factor being particularly important for children given the relatively short trajectory of their development.[20]

Family reunification under Article 8 ECHR and Article 7 CFR

25. Under the ECHR, family reunification is an essential element of the right to respect for family life under Article 8. As the Committee of Ministers of the Council of Europe has acknowledged, "*members of separated families can only enjoy their right to respect for family life through the reunion of family members in a country where they can lead a normal family life together*".[21] The Committee recommended that States "*pay particular attention to applications for family reunion concerning persons who are in a vulnerable position*", including unaccompanied children.

26. The ECtHR has similarly acknowledged the importance of family reunification in the refugee context. For example, in *Tanda-Muzinga v France* (application no. 2260/10), it held as follows:

> 75. The Court recalls that the unity of the family is an essential right of the refugee and that family reunification is a fundamental element to permit persons who have fled persecution to resume a normal life (see UNHCR's mandate […]). It recalls as well that it has also recognised that obtaining such international protection is proof of the vulnerability of those involved (*Hirsi Jamaa and Others v. Italy*, no. 27765/09, §155). It notes in this regard that the need for refugees to benefit from a procedure for family reunification more favourable than that reserved for other foreigners is the subject of a consensus at an international and European level, as reflected in the mandate and activities of UNHCR and the standards contained in Directive 2003/86 EC of the European Union […]. In this context, the Court considers that it is essential that national authorities take into account the vulnerability and the particularly difficult personal history of the applicant, that they pay significant attention to his arguments relevant to the outcome of the case, that they make him aware of the reasons for which they have prevented the implementation of family reunification, and finally that they decide without delay on the visa applications [by his family members].[22]

27. Article 8 ECHR may impose a positive obligation on a State to facilitate the reunification of an unaccompanied foreign child with his or her family: see e.g. *Mayeka and Mitunga v Belgium* at para 85. In that case, the Belgian authorities had detained and

[20] UNHCR and Unicef, S*afe & Sound: what States can do to ensure respect for the best interests of unaccompanied and separated children in Europe*, October 2014, p. 21 http://www.refworld.org/docid/5423da264.html

[21] Recommendation No. R (99) 23 on family reunion for refugees and other persons in need of international protection.

[22] Informal translation from the French by UNHCR.

deported an initially accompanied but ultimately unaccompanied child, who was seeking to be reunited with her mother, a settled refugee in Canada. The ECtHR found that the actions of the authorities had delayed and hindered the reunification of the child with her mother; and that they had failed to make detailed enquiries of their Canadian counterparts in order "*to clarify the position and bring about the reunification of mother and daughter*" (para 85). It therefore found a violation of both the mother's and the daughter's rights to respect for family life.

28. In certain circumstances, the duty to facilitate family reunification under Article 8 ECHR may give rise to a positive obligation on a Member State "*to admit to its territory relatives of settled immigrants*", including refugees: see e.g. *Tuquabo-Tekle v Netherlands* (application no. 60665/00) at paras 42-43. The obligation is not absolute; its application will depend on "*the particular circumstances of the persons involved and the general interest*" (para 43). In *Tuquabo-Tekle* the Court found a violation of Article 8 ECHR in circumstances where the applicant (who had fled Eritrea before marrying a settled refugee in the Netherlands) had been denied a provisional residence permit for her daughter still living in Eritrea. In reaching its decision, the ECtHR took into account the fact that the applicant had always intended to be reunited with her daughter, and not to leave her in Eritrea permanently, in which regard it was relevant that the applicant had fled Eritrea because of civil war (paras 45-47). Other relevant factors included the extent to which it would have been possible for the family to have been reunited in Eritrea (paras 47-50). The ECtHR indicated that in determining the scope of a State's duty to admit children, it would also generally have regard to matters such as "*the age of the children concerned, their situation in their country of origin and the extent to which they are dependent on their parents*" (para 44).

29. In addition to those substantive obligations, Article 8 ECHR also imposes certain procedural obligations on Member States. In particular, the right to respect for family life requires that formal procedures for family reunification guarantee sufficient "*flexibility, speed and effectiveness*": *Tanda-Muzinga*, para 82. In this regard, "*the quality of the decision-making process depends especially on the speed with which the State acts*": *Tanda-Muzinga*, para 68. In both *Tanda-Muzinga* and the similar case of *Mugenzi v France* (application no. 52701/09), the ECtHR found violations of the rights of settled

refugees in circumstances where their applications for visas for their family members had encountered severe delays and procedural difficulties.

30. Finally, as the ECtHR noted in *Tanda-Muzinga* (above), the principle of family reunification is also recognised in the law of the EU. In particular, Directive 2003/86/EC of 22 September 2003 states in its recitals:

> (8) Special attention should be paid to the situation of refugees on account of the reasons which obliged them to flee their country and prevent them from leading a normal family life there. More favourable conditions should therefore be laid down for the exercise of their right to family reunification.

31. Within the sphere of EU law, Article 7 CFR confers on individuals seeking family reunification substantive and procedural rights at least as extensive as those under Article 8 ECHR. Article 52(3) of the CFR states:

> In so far as this Charter contains rights which correspond to rights guaranteed by the [ECHR], the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

The CEAS must operate in accordance with fundamental rights

32. The obligations of EU Member States to comply with fundamental rights (as laid down by the CFR, the ECHR and the other international instruments discussed above) are not in any way supplanted by the CEAS and, in particular, Regulation No. 604/2013 ("**the Dublin III Regulation**"). On the contrary, the CEAS must always be applied in a way that is compatible with fundamental rights.

33. This is clear from, *inter alia*, Article 78 of the Treaty on the Functioning of the European Union, empowering the EU to develop a common asylum policy which "*must be in accordance with the [1951 Convention] and the Protocol […], and other relevant treaties*". Recital 3 to the Dublin III Regulation confirms that the CEAS was intended to be "*based on the full and inclusive application*" of the 1951 Convention and the Protocol. Recital 13 provides that, in accordance with the CRC and the CFR, "*the best interests of the child should be a primary consideration of Member States when applying this Regulation*". Recital 14 further provides that "*respect for family life*" should be another such "*primary consideration*".

34. It is also important to recall that Article 6(1) of the Treaty on European Union gives the CFR the same legal value as the EU treaties, meaning that it takes priority over secondary legislation such as the Dublin III Regulation. As noted above, the scope of the rights under the CFR is at least as extensive as that of the equivalent rights under the ECHR.

35. The CJEU, the ECtHR and the Supreme Court have also affirmed the primary importance of fundamental rights in the context of the CEAS.

36. Thus, in *NS v Secretary of State for the Home Department* [2013] QB 102, the CJEU held that a Member State could not transfer an asylum seeker to another Member State pursuant to the provisions of Regulation No 343/2003 ("**the Dublin II Regulation**"), the predecessor to the current Dublin III Regulation, where this would result in the violation of the first State's "*obligations concerning the protection of the fundamental rights of asylum seekers*".[23]

37. In reaching this conclusion, the CJEU took account of the judgment of the ECtHR in *MSS v Belgium and Greece* (2011) 53 EHRR 2, which held that the transfer of an asylum seeker from Belgium to Greece pursuant to the Dublin II Regulation had resulted in the violation of his rights under Articles 3 and 13 ECHR.

38. Most recently, in *EM (Eritrea) v Secretary of State for the Home Department* [2014] UKSC 12, the Supreme Court confirmed that the transfer of applicants for asylum under the Dublin II Regulation would be unlawful if it could be shown that the conditions in the receiving country in which they would be required to live were such that there was a real risk that they would be subjected to inhuman or degrading treatment contrary to Article 3 ECHR.

39. The principle underlying these judgments was neatly foreshadowed by Hickinbottom J. in *R (EW) v Secretary of State for the Home Department* [2009] EWHC 2957 (Admin). Hickinbottom J. held (referring to the Dublin II Regulation) that "*[t]he Regulation is also subject to the overriding provisions of the ECHR, to which all signatories of the Dublin II Regulation are also signatories*" and therefore that "*notwithstanding the Regulation, member states are obliged to ensure that removal does not expose the*

[23] [2013] QB 102 at [94].

applicant to a real risk of torture or inhuman or degrading treatment, contrary to article 3".[24]

40. The key point of these decisions is that the CEAS must be interpreted and applied in accordance with the 1951 Convention, the Protocol and the international regime for the protection of refugees and asylum seekers described at paragraphs 6-28 above. In deciding whether to admit an applicant for refugee status to its territory, or to transfer such an applicant outside its territory, an EU Member State is always required to observe its obligations under the ECHR, the 1951 Convention and its Protocol, the ICCPR, the CRC and (where it applies) the CFR. It is not sufficient for a Member State simply to rely on the strict application of the provisions of the Dublin III Regulation as discharging those obligations.

Family reunification under the Dublin III Regulation

41. The Dublin III Regulation specifically recognises the importance of the rights to family life and family unity: recitals 14, 15 and 16. Recital 17 states:

> Any Member State should be able to derogate from the responsibility criteria, in particular on humanitarian and compassionate grounds, in order to bring together family members, relatives or any other family relations and examine an application for international protection lodged with it or with another Member State, even if such examination is not its responsibility under the binding criteria laid down in this Regulation.

42. Moreover, Article 6 specifies that "*the best interests of the child shall be a primary consideration for Member States with respect to all procedures provided for in this Regulation*", and that, in assessing the best interests of the child, Member States shall take due account of family reunification possibilities; the child's well-being and social development; safety and security considerations; and the views of the child.

43. In broad overview, the Dublin III Regulation works by designating a single Member State as the State responsible for examining an asylum application made in one of the Member States ("**the Responsible State**"). The Responsible State must generally 'take charge' of an individual who has applied for asylum in another Member State, upon receipt of a valid request from that other State: Article 18(1)(a).

[24] [2009] EWHC 2957 (Admin) at [15].

44. The Responsible State is identified by applying a hierarchy of factors set out in Articles 7 to 15 of the Dublin III Regulation. In practice, the Responsible State will very often be the first Member State through which the applicant entered the EU (whether regularly, e.g. following the issue of a visa, or irregularly).

45. However, where an application is made by an unaccompanied child, then the Responsible State will be the one in which a family member (i.e. parent or responsible adult, spouse or child) or sibling is present: Article 8(1).[25] Failing that, the Responsible State will be the one in which a relative (i.e. aunt, uncle or grandparent) is present: Article 8(2). In the absence of a family member, sibling or relative, the Responsible State will be the one in which the child is present after having lodged an application there: *MA v Secretary of State for the Home Department* [2013] 1 WLR 2961 and Article 8(4). In all cases, these rules are subject to the general obligation to have regard to the best interests of the child.

46. The Dublin III Regulation contains several other provisions aimed at ensuring family unity. Article 9 provides that, if an applicant has a family member who has been allowed to reside as a beneficiary of international protection in a Member State, that Member State shall be the Responsible State (provided that the applicant has expressed this desire in writing). Article 10 similarly provides that, if an applicant has a family member whose application for international protection in a Member State has not yet been the subject of a first decision, that Member State shall be the Responsible State (provided again that the desire has been expressed in writing). Article 11 makes provision for simultaneous or near-simultaneous asylum applications by family members or child unmarried siblings to be examined together.[26]

47. Any Member State with which an application for asylum is lodged may 'volunteer' to become the Responsible State, in derogation from the normal hierarchy of factors: Article 17(1). A Member State with which an application is lodged may alternatively request another Member State to take charge of an applicant "*in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural*

[25] See also recital (16).
[26] See also Article 16 which, while not part of the hierarchy of criteria for determining the Responsible State, lays down the general principle that an applicant who is dependent on the assistance of a child, sibling or parent on account of e.g. severe disability should normally be kept or brought together with that child, sibling or parent.

considerations", even where the second State is not the Responsible State and would not otherwise be required to examine the application: Article 17(2).

48. Nothing in the Dublin III Regulation precludes a Member State from admitting to its territory an applicant for asylum who has lodged an application in another Member State. Nor does the Regulation prevent a Member State from opting to examine an application made to it, regardless of its obligations under the Regulation: indeed, Article 17(1) makes specific provision for this possibility. Nothing in the Regulation therefore precludes the existence of a duty on Member States to facilitate family reunification by admitting particular individuals to their territories.

49. Indeed, the object and purpose of the Dublin III Regulation, which – as set out above – places a clear emphasis on the importance of the principle of family unity both in its recitals and in the provisions it makes for determining responsibility, positively supports the proposition that Member States should not fall back on the strict application of the Regulation in circumstances where that would in fact impede the reunification of asylum seekers with their family members.

Interference with Article 8 ECHR and Article 7 CFR where family reunification is delayed or hindered

50. As noted at paragraphs 27 - 28 above, the ECtHR has recognised the existence of a positive duty on States under Article 8 ECHR to facilitate family reunification, which in certain circumstances may require a State to admit to its territory the family members of settled refugees. While that obligation is not absolute, the factors applied by the ECtHR show that it is likely to apply where some or all of the individuals seeking reunification are children; where those individuals had always intended to be reunited, but had been separated because of e.g. a need to flee a dangerous situation such as a civil war; where there is a relationship of dependency between them; and where it is impossible for them to be reunited in their home country. The scope of the obligation under Article 8 ECHR (and, consequently, Article 7 CFR: see paragraph 31 above) must also be interpreted consistently with the fundamental rights in international law, set out above, and the concomitant duty on States to take all appropriate measures to bring about the reunification of refugee families, in particular in the case of unaccompanied child refugees.

51. For those reasons, UNHCR submits that the rights to respect for family life under Article 8 ECHR and Article 7 CFR are engaged whenever an asylum seeker who is an unaccompanied child or a vulnerable adult seeks entry to the territory of the State where his or her family members currently reside. In those circumstances, respect for the family lives of both the asylum seeker and his or her settled relatives in the host country requires, in principle, the admission of the child or individual to that State's territory.

52. Where the Member State insists on the strict application of a legal process that would severely delay or hinder the reunion of the asylum seeker with his or her relatives, there is a *prima facie* interference with Article 8 ECHR and Article 7 CFR: see e.g. *Mayeka and Mitunga v Belgium*, above, in which the Belgian authorities' actions had "*delayed*" and "*hindered*" the reunification of an unaccompanied child and her mother, a settled refugee (para 82).

53. Moreover, where a breach of Article 8 ECHR or Article 7 CFR arises from one Member State's failure to ensure the "*flexibility, speed and effectiveness*" of family reunification procedures (see e.g. *Tanda-Muzinga* above), including procedures under the Dublin III Regulation, another Member State may come under a positive duty to act in such a way as to avoid that breach. This follows from *NS v Secretary of State for the Home Department* and *EM (Eritrea*), in which the CJEU held, and the Supreme Court confirmed, that a Member State could not transfer an asylum seeker to the Responsible State pursuant to the Dublin II Regulation where that transfer would result in the breach of the individual's rights under Article 4 CFR or Article 3 ECHR by the Responsible State.

Proportionality

54. There being a *prima facie* interference with the Article 8 rights of the applicants, the key question in this case is whether that interference is proportionate to the legitimate public interest pursued by the CEAS and the Dublin III Regulation. UNHCR recognises the importance of dealing with the flow of asylum seekers and refugees in Europe on a "*co-operative, international basis*" (*EM (Eritrea)* at para 40 per Lord Kerr). However, in weighing the balance between this legitimate aim and the applicants' individual rights, the Court must also have regard to the following factors:

(1) First, the length of the delay in reuniting the applicants with their family members that is likely to result from the application of the Dublin III Regulation will be critical. The longer the delay, the longer the applicant is kept apart from his or her family. The severity of an interference with individual rights is always a relevant factor in the analysis of a measure's proportionality: see e.g. *Bank Mellat v HM Treasury* [2013] UKSC 39 at para 74 per Lord Reed.

(2) Second, the particular vulnerability of the individuals whose rights are affected will also generally inform the Court's assessment of proportionality: see e.g. *Manchester City Council v Pinnock* [2010] UKSC 45 at para 64 per Lord Neuberger. In that respect, it is important to note that the CJEU has held that unaccompanied children "*form a category of particularly vulnerable persons*": *MA v Secretary of State for the Home Department* (above) at para 55. Moreover, as the Grand Chamber of the ECtHR held in *Hirsi Jamaa v Italy* (2012) 55 EHRR 21 at para 155, the fact that an individual holds refugee status is itself evidence of his or her vulnerability. Thus, where the persons seeking to be reunited with their relatives are children and/or suffer from physical or mental illness or disability, a delay in such reunification is less likely to be a proportionate interference with their rights under Article 8.

(3) Third, the more important the right at stake, the narrower the margin of appreciation that will be afforded to a State in its assessment of the proportionality of a measure (see e.g. *Hirst v UK* (2006) 42 EHHR 41 at para 82), and the more likely it is that the interference will not be proportionate. In that regard, UNHCR reiterates that the wide recognition in international law of a right to family unity as a necessary corollary of the recognition of the family as a "group unit" and a corresponding duty on States to facilitate family reunification underscores their importance. In *Tanda-Muzinga*, the ECtHR described family unity as an "*essential right of the refugee*" and family reunification as a "*fundamental element to permit persons who have fled persecution to resume a normal life*" (see paragraph 26 above). As set out more fully above, the importance of family reunification has been emphasised not only by international courts but also by the Executive Committee of UNHCR, the UN Human Rights Committee and the Committee of Ministers of the Council of Europe.

(4) Finally, the conditions in which the persons seeking to be reunited with their relatives are living are likely to be relevant in two key respects. First, as with the length of the delay in bringing about reunification, the quality of the living conditions will go to the severity of the breach (sub-paragraph (1) above). Plainly, the fact that time waiting for reunion is spent in squalid or degrading conditions will only exacerbate the anguish of separation and intensify the emotional (and potentially physical) ill effects of the applicant's being apart from his or her family. Second, the living conditions may in certain circumstances amplify the vulnerability of an applicant. An unaccompanied child is already vulnerable; but an unaccompanied child living in a place where he or she has no basic physical security (e.g. in accommodation with no lock on the door, or potentially no door at all) will be left in an especially vulnerable position. Similarly, the vulnerability of an individual with physical or mental health problems will be exacerbated if he or she is unable to access appropriate support and/or medical care. The applicant's vulnerability *per se* is relevant to the proportionality assessment (sub-paragraph (2) above). Moreover, with increased vulnerability comes increased dependency on the support and assistance of family members, making the right to family unity all the more important for a vulnerable applicant (sub-paragraph 3 above) and potentially aggravating the impact of any interference with that right (sub-paragraph 1 above).

Family reunification procedures in practice

55. As noted at paragraph 45 above, Articles 8(1) and 8(2) of the Dublin III Regulation create a mechanism for family reunification by providing that, where an application for asylum is made by an unaccompanied child, the Responsible State will be the one in which a family member or relative is present.

56. UNHCR has conducted a study on the operation of the Dublin III Regulation in nine EEA Member States, including the UK and France.[27] The study, which relates to the operation of the Dublin III Regulation between October 2015 and February 2016, examines how it is applied in those States and has the aim, amongst other things, of assessing whether applicants for international protection are benefitting in practice from

[27] The nine Member States are Denmark, Germany, France, Greece, Italy, Malta, Norway, Poland and the United Kingdom.

the protection that ought to be afforded to children and family member members. The study has resulted in a report, still in draft form, which will be published in July 2016.

57. Through conducting this study, UNHCR has observed that there are, in practice, significant delays in reuniting unaccompanied children with relatives and family members under the Dublin III Regulation procedures. The Regulation itself permits that a maximum of 11 months can elapse between the date on which an application is lodged and the date on which the applicant is transferred to the Responsible State (3 months for the take charge request to be made under Article 21; 2 months for the requested Member State to make a decision, pursuant to Article 22; and 6 months to effect the transfer, pursuant to Article 29). In reality, family reunification procedures can take longer than this. As a result, many children simply abscond and make their own journey to unite with family outside of CEAS mechanisms; in doing so they may be exposed to a particular risk of exploitation associated with such irregular means of travel.

58. Upon analysing the length of time spent within the Dublin III Regulation procedure by unaccompanied children in 17 case files gathered as part of this study, it is clear that the procedure for assigning Member State responsibility for such children is lengthy and protracted, and that such applications are not prioritised in practice. The average time that elapsed between the lodging of the unaccompanied child's application for international protection and the effective transfer of the child was 202 days. In some Member States, longer delays were more common. In two of the cases studied, the entire process took more than 450 days. In 7 of the 17 examined case files, the family reunion procedure lasted for more than six months.

58. In this context, it is also important to note that significant delays may already have occurred before an unaccompanied child is even able to lodge an application (i.e. before time starts running for the purposes of the Dublin III Regulation). The average time periods indicated above may not take into account these prior delays. Various factors account for the delays, including lengthy and complicated procedures for the appointment of a representative (which may be necessary before an unaccompanied child can submit an application for international protection in certain Member States). Stakeholders surveyed by UNHCR, including domestic authorities and NGOs, considered that appointments of representatives were generally not made in a timely manner in some Member States. While practice varies across the EU, it appears that it

may take anything from several weeks to as many as 9 months to appoint a representative, with delays often being attributed to a lack of resources.

59. Many Member States also insist on the carrying out of age assessments as an initial step – not specifically provided for in the Dublin III Regulation, but commonly used nonetheless to determine an individual's eligibility for family reunification. In some States, the age assessment may be a precondition for the appointment of a representative and/or for the making of an application for protection. Again, while practice varies across Member States, typical times reported for age assessment procedures range from 1 day to a few weeks, and up to a year in some cases.

Conclusion

60. The importance of family reunification as a mechanism for ensuring respect for the fundamental human rights of refugees and asylum-seekers is widely recognised as a matter of both domestic and international law. It is well-established that States may come under a positive duty to admit individuals to their territories in order to facilitate such reunification. UNHCR submits that this obligation may be triggered where an unaccompanied child or other vulnerable person seeks entry to a State in order to be reunited with his or her settled family members there. Nothing about this obligation is inconsistent with the CEAS, the operation of which is always subject to the application of fundamental principles of human rights; and indeed it finds support in the Dublin III Regulation itself, which places a high priority on family reunification.

61. Where that State insists on the application of a protracted procedure that would hinder or delay family reunification, there is a *prima facie* breach of the State's duty which, under Article 8 ECHR and Article 7 CFR, must be shown to be proportionate. In this regard, it is highly relevant that, as UNHCR's research demonstrates, the operation of the family reunification procedures for unaccompanied children under the Dublin III Regulation is subject to serious and protracted delays. In the face of such delays, it may very well be disproportionate for a State to refuse to admit to its territory a vulnerable applicant seeking the physical, emotional and economic support that can only be provided by his or her family.

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