

BRIEFING NOTE: R(FTH) v SSHD, JR/1256/2018

In a judgment promulgated 11 June 2018, the Upper Tribunal (UT) (Judges Finch and Allen), held that FTH, who was at the time of the decisions in issue an unaccompanied asylum seeking child living in France seeking admission to join his brother YH in the UK, was subjected to decisions that were unfair at common law and breached his procedural rights under article 8 ECHR. In a further judgment promulgated 20 November 2018 the UT awarded FTH £12,000 damages by way of just satisfaction for the breaches of his article 8 ECHR rights.

The UT refused the Secretary of State for the Home Department (SSHD) permission to appeal to the Court of Appeal; however, the SSHD has now sought permission to appeal directly from the Court of Appeal in relation to the article 8 declaration and award of damages.

FTH was admitted to the UK on 27 July 2018 following negotiations and a compromise put forward by the SSHD late on in the proceedings, under which the SSHD agreed to consider a take charge request made by the French authorities pursuant to Dublin III on the basis that he accepted that FTH was related to his brother YH as claimed and that FTH would be transferred subject only to security and safeguarding checks.

FTH is an asylum seeker from Eritrea, born 10 August 1999. He left Eritrea in 2015, travelling through Sudan and on to Libya, where he was held by traffickers and forced to work before he was released after a relative paid a ransom. He made a dangerous and traumatic journey by boat across the Mediterranean Sea to Italy; he then travelled on to France and arrived in Calais in July 2016. It was his and his family's intention when he left Eritrea to join his brother in the UK.

FTH lived in appalling conditions in a makeshift migrant camp in Calais. The camp was demolished on 24-26 October 2016 and FTH, like other unaccompanied minors, was placed into French social services accommodation. A streamlined, expedited process for considering applications for family reunification from unaccompanied minors who qualified for admission under article 8 Dublin III was established jointly by the UK and French authorities. This process has since been found to be systemically unfair at common law: see *Citizens UK v SSHD* [2018] EWCA Civ 1812.

The expedited process as it applied to FTH included the following aspects of unfairness:

- FTH was interviewed by telephone with an interpreter speaking his second language, rather than his preferred mother tongue, whom he struggled to understand.
- Similarly, YH was interviewed by telephone without an interpreter.
- Neither FTH nor YH had their interview records read back to them in order to afford them an opportunity to make corrections to the information recorded.
- The official who made the decision to reject FTH's application was based in London and was not the official who interviewed him. The official relied on minor discrepancies in the details provided by FTH and YH about extended family members, without taking into account the circumstances in which FTH was interviewed.
- FTH had no opportunity to address discrepancies arising between the interviews prior to refusal.
- When FTH was refused he was provided with no reasons for the decision.

Further, YH had been interviewed for his own asylum claim in the UK not long before his interview and had provided FTH's name as his brother. Despite this evidence being available to the Home Office, which strongly supported their claim to be related, no checks of YH's Home Office file were undertaken prior to the refusal.

The decision to refuse FTH's application was taken on 30 November 2016 and this was communicated to the French authorities in a spreadsheet sent 14 December 2016. The decision was communicated to him towards the end of December 2016. Subsequently, he communicated his wish for the decision to be reviewed. However, having heard nothing further, he left the children's accommodation he was staying in on 16 April 2017, believing he was not going to be transferred to the UK.

FTH lived rough, initially in Paris and then in northern France, where he resumed clandestine attempts to cross the Channel. In August 2017 he was referred to Safe Passage, who helped him to find legal representation (initially, pro bono representation by Ashursts, then Bhatt Murphy).

It was only after judicial review proceedings were launched in the UK that the reasons for refusing FTH's case and the interview records were disclosed, and that the Home Office disclosed documents that revealed communications between the UK and French authorities after the initial refusal of FTH's case, and others, in the expedited process. This included highly relevant documents that were not provided to the Administrative Court in *Citizens UK* which contradicted the SSHD's position that the way in which the decisions were communicated to the minors and the time-frame for the expedited process were requirements of the French authorities. The documents disclosed in FTH's case in fact showed that the French authorities were pressing the UK for more detailed reasons for the refusals, and to continue transfers under the expedited process. However, the UK refused to provide more detailed reasons citing legal advice that to do so could lead to legal challenge, and they also refused to continue making transfers under the expedited process. The documents showed there had been communications about FTH's case in what came to be known as the "filtration process" and that his case was considered as late as 7 April 2017, with the original refusal maintained. At no point in the filtration process were the reasons for the original refusal communicated to FTH and FTH was not given an opportunity to address the reasons for the refusal.

In its judgment dated 11 June 2018 the UT held that the expedited process and the subsequent filtration process were unfair at common law. The particular features of unfairness relied upon by the Tribunal are set out above (telephone interviews with inadequate interpretation, no read back with the opportunity to correct mistakes, no reasons for refusal communicated). Furthermore, for the same reasons the UT held that there had been a breach of FTH's article 8 ECHR procedural rights and made a declaration to that effect.

In its damages judgment, the UT observed that FTH had been wrongly deprived of the opportunity to join his brother YH in the UK from the date he was refused admission in the expedited process, 30 November 2016, until he was transferred to the UK on 27 July 2018 (a period of one year and seven months, eight months of which he was a child). During that period, according to the expert psychiatric evidence submitted in the judicial review, his mental health had deteriorated consequent to the delay in reunification and uncertainty surrounding his application. The UT made a basic award of £8,000 in respect of the period of separation but increased this to £12,000 in view of the particular circumstances FTH lived in

during the period of separation (he had been street homeless, including at a time when he was still a child, and had been assaulted by French police) and the SSHD's conduct (including that the relationship between FTH and YH was disputed until very late on; that it was the SSHD who imposed constraints on the decision making process; and the SSHD's disclosure failures).

As stated, the SSHD was refused permission to appeal to the UT but has now applied directly to the Court of Appeal. The SSHD does not dispute the UT's factual findings, or its findings on common law fairness. His application only challenges the article 8 ECHR declaration and consequent damages, citing *Secretary of State for the Home Department v R(AM & Others)* [2018] EWCA Civ 1815 as authority for the position that article 8 ECHR simply had no application in FTH's case.

FTH was represented by barristers Charlotte Kilroy and Michelle Knorr instructed by Jed Pennington at Bhatt Murphy Solicitors.