Upper Tribunal
Immigration and Asylum Chamber

Judicial Review Decision Notice

The Queen on the application of

FTH

Applicant

V

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

FURTHER ORDER

UPON Upper Tribunal Judge King having refused the Respondent's application for a stay of proceedings on 1 March 2018

AND UPON Upper Tribunal Judge Finch having refused to grant the Respondent a stay of the oral permission hearing at the start of that hearing on 26 March 2018

AND UPON Upper Tribunal Judge Finch providing detailed written reasons for refusing the Respondent a stay of proceedings on 29 March 2018

AND UPON the Respondent lodging an application notice, dated 4 May 2018, requesting that the Tribunal urgently considers his application for permission to appeal the refusal of a stay to the Court of Appeal

AND UPON THE Applicant filing a written response to this application on 4

May 2018

AND UPON the Upper Tribunal refusing the Respondent permission to appeal to the Court of Appeal on 14 May 2018 in relation to the application for a stay on the basis that:

(1) The Applicant's application was primarily concerned with how procedures were applied in the context of his individual case, as opposed to any procedural and generic irregularities in the system itself. Therefore, it was not necessary to await the outcome of the hearing in the Court of Appeal in *The Queen (on the application of Citizens UK) v Secretary of State for the Home Department* and *Secretary of State for the Home Department v The Queen (on the application of AM & Others)*, which were set down for 12 – 14 June 2018.

(2) The remedy sought by the Applicant is different to one that would be sought by a child.

(3) Counsel for the Respondent indicated at the start of the substantive hearing of the Applicant's claim on 9 May 2018 that he was no longer seeking to pursue his application for permission to appeal to the Court of Appeal against the decision by Upper Tribunal Judge Finch to refuse to grant the Respondent a stay

AND UPON the Upper Tribunal's order, dated 12 June 2018, stating;

"<u>Permission to appeal to the Court of Appeal</u>

Permission to appeal will be considered after judgment is handed down and if an appropriate application for permission is made"

UPON the Applicant having filed and served his submissions on costs and damages on 13 September 2018

AND UPON the Respondent having filed and served his submissions on disposal on 2 October 2018

AND UPON the Upper Tribunal having reminded itself of the decisions previously given in this claim and considered the case law referred to by both counsel.

IT IS ORDERED THAT:

PERMISSION TO APPEAL TO THE COURT OF APPEAL

1. (a) The Upper Tribunal's order, dated 12 June 2018, provided the appropriate party with an opportunity to seek permission to appeal to the Court of Appeal after the written decision was handed down.

   (b) The Upper Tribunal indicated that permission would be considered only if an appropriate application for permission was made.

   (c) Paragraph 44(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 states that "subject to paragraphs (4A) and (4B), a person seeking permission to appeal must make a written application to the Upper Tribunal for permission to appeal".

   (d) The Respondent made a written application to appeal within his Submissions on Disposal, dated 4 July 2018.

   (e) On 19 October 2018, the Applicant's solicitors confirmed that they relied on the arguments contained in paragraphs 19 – 20 of their Submissions on Costs and Damages in relation to the matter of whether the Respondent should be granted permission to appeal to the Court of Appeal.

2. Permission to appeal to the Court of Appeal against the decision to grant the Applicant's substantive claim for judicial review is refused on the basis that:

(a) In paragraph 19 of the Respondent's Submissions on Disposal, dated 29 September 2018, the Respondent submitted that, in light of the findings of the Court of Appeal in **AM and Ors**, the Tribunal was wrong to declare that the Respondent's refusal to admit the Applicant gave rise to a breach of the procedural dimensions of Article 8 ECHR.

(b) In paragraph 95 of *R (ZT (Syria) and others) v Secretary of State of the Home Department* [2016] I WLR 4894, Beatson LJ found that the cases concerning children who had been in the Calais camps were intensely fact-specific. At paragraph 88 of *Secretary of State for the Home Department v The Queen on the application of AM & Others* [2018] EWCA Civ 1815 Singh LJ relied on the fact that the Upper Tribunal in *AM* had reached a view that was inconsistent with the decision of the Court of Appeal in *ZT (Syria)*. However, as can be seen from paragraph 95 of Beatson LJ's judgment in *ZT (Syria)* his decision had been made in the context of applications made under Article 8 of the EHCR and outside of the Dublin III process. It was in that context that the Court of Appeal found that applications of this kind should only be made in very exceptional circumstances.

(c) The circumstances of the current Applicant's case were very different. He had not applied to enter the United Kingdom, relying on his Article 8 rights. Instead he had been part of Operation Purina Phase 2, which was established many months after *ZT* had been living in the "jungle" in Calais. The present Applicant had brought a challenge to the manner in which he was treated in the expedited and filtration process operating in in 2016/2017. It was these processes, not any application made by him under Article 8 of the ECHR, which would have determined whether he was entitled to enter the United Kingdom.

(d) Furthermore, in *FTH*, the Upper Tribunal made no mandatory order requiring him to be granted leave to enter. It restricted itself to making a declaration that the manner in which the expedited and filtration processes had been applied to the Applicant amounted to a breach of Article 8 of the ECHR, in so far as one of the essential objects of Article 8

is to protect an individual against arbitrary actions taken by a public authority; as confirmed in *Tuquabo-Tekle v The Netherlands* (Application No. 60665/00.

(e) The Secretary of State was exercising his discretion when operating the expedited and filtration processes. In paragraph 85 of *ZT (Syria)* Beatson LJ found that "the exercise by the Secretary of State of her discretion is subject to the ordinary public law principles of propriety of purpose, relevancy of considerations and the longstop *Wednesbury* unreasonableness category".

(f) The Applicant would not be able to apply for damages in a French court for actions taken by the Secretary of State for the Home Department.

(g) The manner in which the Respondent applied the expedited and filtration processes give rise to the basis for damages on the basis of the need for just satisfaction of the Applicant's Article 8 rights.

DAMAGES

UPON the Upper Tribunal exercising its powers under section 16(6) of the Tribunals, Courts and Enforcement Act 2007

AND UPON the Applicant having made a claim for damages for the breach of his rights under Article 8 of the European Convention on Human Rights at paragraph (5) of Section 6 of his Claim Form, lodged on 16 February 2018

AND UPON the Upper Tribunal being satisfied that such an award would have been made by the High Court if the claim had been made in an action begun in the High Court by the Applicant at the time of making the application

AND UPON the Upper Tribunal finding, for the purposes of section (2A) of the Senior Courts Act 1981, that it was not highly likely that the outcome for the Applicant would

not have been substantially different if the conduct complained of had not occurred, as the damages he is entitled to arose from his individual treatment within the expedited and filtration processes

AND UPON the Upper Tribunal taking into account section 8 of the Human Rights Act 1998 and

AND UPON the declaration made by the Upper Tribunal in its order, dated 12 June 2018, that the Respondent's decision to reject the Applicant's application for transfer to the United Kingdom under the expedited process and his decision in the filtration process that the Applicant was not related to YH, as claimed, amounted to an unlawful breach of the procedural dimensions of Article 8 of the European Convention on Human Rights.

AND UPON the Applicant submitting that an award of damages of between £15,000 and £18,000 would be appropriate

AND UPON the Respondent submitting that in the light of the decision in *AM and Ors v Secretary of State for the Home Department* [2018] EWCA Civ 1815 it would not be lawful or just and appropriate to make an award of damages or that, if damages were appropriate, they should amount to no more than £2,000.

1. As found in paragraph 114 of the Upper Tribunal's decision, dated 12 June 2018, family life existed, and exists, between the Applicant and his brother, YH. In addition, as found in paragraph 124 of the Upper Tribunal's decision, the Applicant had wrongly been deprived of the opportunity to join YH in the United Kingdom from 30 November 2016 until 27 July 2018 when he was transferred to the United Kingdom to be reunited with YH. Therefore, the period of separation amounted to 1 year and seven months and for eight months and ten days of that period he was still a child.

2. In paragraph 93 of *AM & Ors* Singh LJ found that Article 8 had no applicability in the cases before him. This was based on his finding in paragraph 88 that "as this Court made clear in *ZT (Syria)*, Article 8 will only have a role to play in very

exceptional circumstances. In particular, it must be shown that the French legal system had systematic deficiencies in it, which rendered it incapable of providing an effective remedy to the Respondent children".

3. However, as found above in relation to the Respondent's application for permission to appeal to the Court of Appeal against the substance of our decision, in paragraph 95 of *R (ZT (Syria) and others) v Secretary of State of the Home Department* [2016] I WLR 4894, Beatson LJ found that the cases concerning children who had been in the Calais camps were intensely fact-specific. At paragraph 88 of *Secretary of State for the Home Department v The Queen on the application of AM & Others* [2018] EWCA Civ 1815 Singh LJ relied on the fact that the Upper Tribunal in *AM* had reached a view that was inconsistent with the decision of the Court of Appeal in *ZT (Syria)*. However, as can be seen from paragraph 95 of Beatson LJ's judgment in *ZT (Syria)* his decision had been made in the context of applications made under Article 8 of the EHCR and outside of the Dublin III process. It was in that context that the Court of Appeal found that applications of this kind should only be made in very exceptional circumstances.

4. The circumstances of the current Applicant's case were very different. He had not applied to enter the United Kingdom, relying on his Article 8 rights. Instead he had been part of Operation Purina Phase 2, which was established many months after *ZT* had been living in the "jungle" in Calais. The present Applicant had brought a challenge to the manner in which he was treated in the expedited and filtration process operating in in 2016/2017. It was these processes, not any free-standing application made by him under Article 8 of the ECHR, which would have determined whether he was entitled to enter the United Kingdom.

5. In paragraph 66 of *AM & Ors* Singh LJ noted that the Respondent relied on the fact that the Upper Tribunal, when giving judgment in that case, had given no consideration to the fact that France bore primary responsibility for processing [the children's] claims in the context of the application of Dublin III; that France itself was bound to ensure no breach of Article 8 of the ECHR occurred. However, the evidence which was gradually disclosed over the course of the current claim, indicated that it was the Respondent, and not the French

authorities, who had taken the decisions which were primarily responsible for the Applicant not being reunited with YH in a timely manner. In addition, the Applicant was not under the jurisdiction of the French care system for much of the period for which damages are claimed. The Applicant left the CAOMI in Le Havre on 16 April 2017 and then became 18 on 10 August 2017.

6. Furthermore, in paragraph 85 of ZT (Syria) Beatson LJ held that "the exercise by the Secretary of State of her discretion is subject to the ordinary public law principles of propriety of purpose, relevancy of considerations, and the longstop Wednesbury unreasonableness category and, because of the engagement of ECHR Article 8, the intensity of review which is appropriate in the assessment of the proportionality of any interference with Article 8 rights".

7. In addition, the Applicant is not able to claim damages under the Human Rights Act 1998 in the French courts for a breach by the Respondent of his Article 8 rights

8. In relation to the quantum of any damages to be awarded to the Applicant, the Supreme Court indicated in its guidance in *R (Sturnham) v Parole Board (No 2)* [2013] 2 AC 254, that courts should be guided primarily by any clear and consistent practice of the European Court.

9. In *W v United Kingdom* (Application No. 9749/82) the European Court of Human Rights held, in paragraph 62 of its decision, that:

"It is true that Article 8 (art. 8) contains no explicit procedural requirements, but this is not conclusive of the matter. The local authority's decision-making process clearly cannot be devoid of influence on the substance of the decision, notably by ensuring that it is based on the relevant considerations and is not one-sided and, hence, neither is nor appears to be arbitrary. Accordingly, the Court is entitled to have regard to that process to determine whether it has been conducted in a manner that, in all the circumstances, is fair and affords due respect to the interests protected by Article 8 (art. 8). Moreover, the Court observes that the English courts can examine, on an application for judicial

review of a decision of a local authority, the question whether it has acted fairly…".

9. In *D v Commissioner or Police for the Metropolis* [2015] 1 WLR 1833 the Court of Appeal distilled certain relevant general principles. The first was that awards for non-pecuniary harm should be equitable. The second is that where a declaration has also been made, as in this case, there needs to be a causal link between the breach of Article 8 and the harm caused. The Court of Appeal did acknowledge the importance of the remedy of declaratory relief but did not find that it may not also be appropriate to award damages.

10. In relation to the need for damages to be equitable we remind ourselves of paragraph 114 of *Al-Jedda v United Kingdom* (2011) 53 EHRR 789 where it was held that "The court recalls that it is not its role under article 41 to function akin to a domestic tort mechanism court in apportioning fault and compensatory damages between civil parties. Its guiding principle is what is just, fair and reasonable in all the circumstances of the case, including not only the position of the applicant but the overall context in which the breach occurred".

11. Therefore, we have taken into account the following features:

    (a) Due to the expedited and filtration processes not being applied to the Applicant in a proper manner, he was separated from YH for 1 year and 7 months and for 8 months and ten days of this period he was an unaccompanied migrant child.

    (b) On 1 June 2018 the Respondent agreed to transfer the Applicant to the United Kingdom but his transfer did not occur until 27 July 2018 due to the delay on the part of the Respondent in giving approval to his travel arrangements.

    (c) The evidence provided by Helen Cusack O'Keefe indicates that the Applicant was suffering from moderate to severe post-traumatic stress disorder throughout this period of time.

    (d) He was also at times street homeless and he became street homeless when he was a child and could not be expected to make an informed choice

about the options open to him.

(e) Whilst he was homeless, the Applicant was also assaulted by the French authorities, who took no steps to assist him to apply for asylum, and the assault led to him being hospitalised.

(f) The disclosure finally made in this claim indicate that the Respondent imposed time constraints on himself and that these were not supported by the French authorities.

(g) There is no evidence to suggest that, when the Applicant was told that his application within the expedited process had been refused, he was aware that there was a separate Dublin III process, which he could have entered.

(h) Throughout the proceedings the Respondent continued to deny that the Applicant was related to YH, as claimed, and applied for a stay on a number of occasions in order to delay a final hearing of his claim.

(i) The Respondent failed to provide full disclosure in relation to the manner in which the Applicant was treated during the expedited and filtration processes and most significant disclosure was only provided during the substantive hearing.

(j) Section 8(1) of the Human Rights Act 1998 states that the appropriate court or tribunal may grant any remedy which it finds to be just and appropriate.

12. In relation to the causal link between the breach of Article 8 and the harm caused. In her Mental Health Assessment Update, dated 29 April 2018, Helen Cusack O'Keefe confirmed that it was still her opinion that the most likely initial cause of the Applicant's PTSD symptoms were the traumatic events that occurred when he was very young in Eritrea, followed by the violence and traumatic hardships that occurred during his journey from Eritrea to Europe, and then in France. She then added that the hostile and unsafe environment he experienced in France and the delay in joining his UK-based brother were both precipitating and perpetuating symptoms of the Applicant's PTSD symptoms.

13. When considering the quantum of damages which would represent just satisfaction, we have reminded ourselves that it would not be possible to put the Applicant back into the position in which he was on 30 November 2016 or for

the Respondent to simply re-make his decisions.

14. We have considered the cases referred to by the Applicant in his Submissions on Costs and Damages and note that in none of those cases was there psychiatric evidence to confirm a diagnosis of moderate to severe post-traumatic stress disorder and that non-pecuniary damages were being awarded for distress and unspecified medical problems or anxiety. The difference that this can make to an award is exemplified by the different sums awarded in the JC Guidelines (14th Edition) for moderate as opposed to less severe psychiatric damage.

15. The delay in family reunion was longer in these cases but the damage suffered was far less and we find that the appropriate range for damages begins at around £10,000. However, it was then necessary to make a discount of around £2,000 to take into account the fact that it was likely that he was suffering from post-traumatic stress disorder prior to 30 November 2016.

16. However, we also remind ourselves that the case law referred to above recognises the need for equity and the making of an award which is just, fair and reasonable in all the circumstances of the Applicant's individual case. We find that he was an unaccompanied foreign national child, and latterly a young person, whose application was not adjudicated in a proper manner, who became street homeless, suffered a serious assault and whose post-traumatic stress disorder was exacerbated by the failure to apply appropriate procedures to his individual case in the expedited and filtration processes. Having taken these factors into account, we find that it would be just and equitable to increase the total damages to be awarded to the Applicant by £4,000 to take into account the particular individual circumstances in which he had to live due to the failure by the Respondent to apply appropriate procedural safeguards to his case in the expedited and filtration processes.

Having taken into account the law and the facts referred to above, we find that it would be just and appropriate to make an award of £12,000 in damages to the Applicant.

COSTS

IT IS ORDERED THAT:

1. The Respondent do pay the Applicant's reasonable costs in relation to the applications and hearings, other than the Applicant's costs arising from the Respondent's application to Upper Tribunal Judge Finch for a stay of proceedings at the hearing on 26 March 2018, the Respondent's application for permission to appeal the refusal of the stay to the Court of Appeal, dated 4 May 2018, and the Respondent's reliance up until the first day of the substantive judicial review hearing on his continuing application for permission to appeal to the Court of Appeal in relation to the decision to refuse him a stay.

2. The Respondent do pay the Applicant costs on an indemnity basis in relation to his costs arising from his application to Upper Tribunal Judge Finch for a stay of proceedings at the hearing on 26 March 2018, his application for permission to appeal the refusal of the stay to the Court of Appeal, dated 4 May 2018, and his reliance up until the first day of the substantive judicial review hearing on his continuing application for permission to appeal to the Court of Appeal in relation to the decision to refuse him a stay.

3. An order that costs are paid on an indemnity basis in relation to these parts of the overall case is reasonble. As May LJ found at paragraph 28 in *Reid Minty (a firm) v Taylor* [2001] EWCA Civ 1723: "What is, however, relevant to the present appeal is that litigation can readily be conducted in a way which is unreasonable and which justifies an award of costs on an indemnity basis, where the conduct could not properly be regarded as lacking moral probity or deserving moral condemnation".

4. The Respondent's action was unreasonable as he continued to apply for a stay when the Upper Tribunal had made it very clear that it believed that the case of FTH could be distinguished on its facts from those being appealed to the Court of Appeal. The medical evidence also indicated that the adverse effect of any

further delay on the Applicant's poor mental health would not be proportionate. The Respondent was already well aware of the evidence relating to the Applicant's claim and was relying on this evidence in other similar cases before the courts. The further evidence disclosed by the Respondent in the course of this case would also not have emerged if such a stay had been granted.

5. The Respondent also failed to take into account the decision in *R (AM & AO) v Secretary of State for the Home Department (stay of proceedings – principles)* [2017] UKUT 168.

6. In addition, no new and/or significant reasons were given for the renewed applications for a stay.

7. At the same time, when stays were refused new and unseen material and evidence emerged which brought into question the Respondent's proper compliance with his duty of candour and co-operation in judicial review proceedings.

8. Such costs to be subject to a detailed assessment on the standard basis, if not agreed.

9. There be a detailed assessment of the Appellant's legally aided costs.

10. Pursuant to rule 10(10) of the Tribunal Procedure (Upper Tribunal) Rules 2006, within 21 days of service of this Order, the Respondent shall pay a reasonable sum of costs on account pending detailed assessment.

11. Liberty to both parties to apply.

<u>Non-compliance</u>

Any failure to comply with any of the above directions may result in:

(a) an order for costs under rule 10 of the Tribunal Procedure (Upper Tribunal) Rules 2008 against a party or that party's representative; and/or

(b) the striking out of the proceedings or any part thereof under rule 8.

Nadine Finch

Signed: ______________________________

Upper Tribunal Judge Finch

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Upper Tribunal Judge Allen

Dated: October 2018

20 NOV 2018

For completion by the Upper Tribunal Immigration and Asylum Chamber

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

Solicitors:
Ref No.
Home Office Ref: