Neutral Citation Number: [2019] EWHC 75 (Admin)

Case No: CO/6504/2016

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/01/2019

Before :

MR JUSTICE OUSELEY

- -

Between :

ZS	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

MISS SONALI NAIK QC, MISS BRYONY POYNOR & MISS MIRANDA BUTLER
(instructed by **DUNCAN LEWIS SOLICITORS** for the **Claimant**
MR DAVID MANKNELL
(instructed by **THE GOVERNMENT LEGAL DEPARTMENT**) for the **Defendant**

Hearing dates: 29 February 2018, 1 & 2 March 2018
(written submissions: 12 and 23 October and 2 November 2018)

Approved Judgment

MR JUSTICE OUSELEY :

Litigation under section 67 of the Immigration Act 2016

1. This litigation is a further round in the litigation which section 67 of the Immigration Act 2016 has engendered. That section provides:

> "(1) The Secretary of State must, as soon as possible after the passing of this Act, make arrangements to relocate to the United Kingdom and support a specified number of unaccompanied refugee children from other countries in Europe.
>
> (2) The number of children to be resettled under subsection shall be determined by the Government in consultation with local authorities."

2. The background to that provision, intended to provide assistance quickly to a number of unaccompanied asylum-seeking children, UASC, in Europe, has been fully rehearsed in *R (Help Refugees Ltd) v SSHD* [2017] EWHC 7272 (Admin), [2017] 4 WLR 203, Treacy LJ and Ouseley J, and on appeal, [2018] EWCA Civ 2098, [2018] 4 WLR 168 3 October 2018; *Help Refugees*. That case primarily concerned the lawfulness of the consultation process carried out by the SSHD for the purposes of the duty which s67 imposed on her in arriving at the number of UASC which would be specified for the purposes of transfer. This number was announced as 350 on 8 February 2017, following a decision to that effect on 20 December 2016. It was increased to 480 at the end of April 2017. *Help Refugees* also considered a submission about the fairness of the procedure adopted by the SSHD for informing children, whose eligibility for transfer to the UK had been considered, that they were not to be transferred.

3. *Help Refugees* is the primarily relevant part of a trilogy of cases which also includes *R (Citizens UK) v SSHD* [2018] EWCA Civ 1812, 31 July 2018, and *R(AM) v SSHD* [2018] EWCA Civ 1815, [2018] 4 WLR 123 also 31 July 2018. *Citizens UK* and *AM* were concerned with an accelerated procedure adopted by the UK for expediting consideration of children who might be transferred to the UK under the close family link provisions of the EU Dublin III Regulation. However, the judgment as to the fairness of the procedure adopted in that case was applied by the Court of Appeal, in disagreement with the Divisional Court on that point, in *Help Refugees*. These cases therefore, not surprisingly, generated a round of written submissions and further evidence, concluding on 2 November 2018. The fairness of the procedures which the Court of Appeal considered arose as part of the procedural fairness claim in this case.

4. After some initial uncertainty, the SSHD accepted, and it was incorporated by consent in a declaration of 16 December 2016, that children transferred under Dublin III, accelerated or otherwise, did not take up any of the spaces for transfer under s67.

5. Pending the decision in *Help Refugees* at first instance, cases were stayed in which individual children challenged the policies applied to them, the criteria adopted for deciding eligibility and transfer, and the procedures for informing them of the

outcome of the process in their cases. I subsequently made various orders removing the stay in this case, and deciding which issues were to be permitted to proceed and which were unarguable.

This particular case

6. The impetus behind both the accelerated Dublin III procedure and the passing of s67 was the number of children and the conditions in which they were living in the Calais camp, and also in locations in Greece and Italy. Policies and procedures were adopted by the SSHD to give effect to s67. Early on, children were considered for transfer under Dublin III and s67 in the same process. ZS is one such child. He was in the Calais camp; when the occupants were removed in October and November 2016, he was taken with other children to one of a number of CAOMIs, (Reception and Orientation Centres for Unaccompanied Minors), across France, where further interviews took place between 16 and 25 November 2016. He was interviewed in Luchon, in the south of France. He was found not to be eligible for transfer under s67. He was told of that decision by the French authorities at the CAOMI on 16 December 2016. He met the arrival dates criteria, but did not in fact meet any eligibility criteria, including the nationality criterion as he was neither Syrian or Sudanese; he had only ever claimed to be Afghan; he was also over 12. He has not claimed asylum in France, where he remains in the care of the French authorities. The arrival dates in Europe and in Calais related respectively to the EU/Turkey agreement, and to the desire of France that s67 should not become a "pull factor" towards France and Calais.

7. Duncan Lewis, solicitors who were already engaged on his behalf, brought proceedings on 23 December 2016, on a variety of grounds, including the unlawfulness of the nationality criterion for eligibility for transfer, the absence of other criteria, and the fact that the eligibility criterion enabling transfer on the grounds of being at a high risk of sexual exploitation could only operate upon a referral from the French authorities. ZS also challenged the fairness of the procedure adopted for deciding on and giving decisions on transfer. The SSHD agreed to consider the exercise of her residual discretion but on 3 March 2017 decided not to permit him to enter the UK. He challenges that decision as well. Further arrangements were later made with the French authorities in relation to children in France, and Detailed Process Guidance ("DPG"), was issued to cover this. The lawfulness of that DPG is challenged, by reference to the extent to which it was publicly known or known to those who needed to know of it to operate it. I shall have to return later to the nature of the grounds which I permitted to be argued in view of Ms Naik QC's skeleton argument for ZS.

8. At the time these proceedings began, there were two schedules of Interested Parties, who were other children represented at some stage by Duncan Lewis; those were children who either had, or had not, received notification of the SSHD's decisions that they were not to be transferred. I ruled at a hearing in December 2017 that they should cease to be Interested Parties because of uncertainty as to their whereabouts or their continuing interest in the litigation.

The facts

9. I need to start with the policies which the SSHD issued for the purpose of giving rapid effect to s67, because of the situation developing in the Calais camp. Draft Guidance

and criteria for processing cases from Calais under s67 was made available to caseworkers on 20 October 2016. This was updated on 24 October 2016, to deal with what Mr Cook, the Home Office Head of EU and International Asylum Policy, described in his first witness statement in *Help Refugees* at [91], as a "fluid and fast-moving situation on the ground at Calais". The Guidance was finalised on 13 October. These were evolutions of Version 1 of the "Guidance: Implementation of section 67 of the Immigration Act 2016 in Calais".

10. Version 2 was issued to caseworkers on 8 November 2016, and published on 14 November 2016. Although the stated focus of the Government in the operation of s67 was on children from France, Greece and Italy, this version called the Calais Guidance, applied to children who had arrived at the Calais camp before 24 October 2016. It was the version applicable and applied to the decisions in ZS's case. The general eligibility criteria for such children were as follows:

> "To be eligible a child must meet one of the following criteria:
>
> - be aged 12 or under, or be aged under 18 and the sibling of an eligible child aged 12 or under
>
> - be referred directly by the French authorities, or by an organisation working on behalf of the French authorities, to the Home Office as being at high risk of sexual exploitation
>
> - be aged under 18 and of Sudanese or Syrian nationality (these nationalities have at first instance asylum grant rate in the UK of 75% or higher, based on the asylum statistics for the period from July 2015 to June 2016)
>
> And they must meet all of the following criteria:
>
> - transfer to the UK must be determined to be in the best interests of the child
>
> - the child must have arrived at the Calais camp on or before 24 October 2016
>
> - the child must have arrived in Europe before 20 March 2016
>
> Decision criteria
>
> - A child should proceed to Stage 2 if one of the following applies to them:
>
> - they are aged 12 or under
>
> - they are aged under 18 and are a sibling of an eligible child aged 12 or under

- they are under the age of 18 and of Syrian or Sudanese nationality

Referrals

An individual can also proceed to Stage 2 if they have been referred to the Home Office by the French authorities, or an organisation working on behalf of the French authorities, on the basis that they are at high risk of sexual exploitation, provided they are under 18."

The child was to be given the benefit of the doubt in the age assessment.

11. Stage 2 included the "Best Interests Determination" for children who had not been screened out at the first stage. Its purpose was to establish whether it would be in the child's best interests to be accommodated as an unaccompanied asylum-seeking child in the UK or to enter the French system. The guidance set out the issues to be addressed and the practical arrangements for conducting the interviews which should be led by the social worker, whose tasks were also set out.

12. Stages 3, 4 and 5 were security checks, the granting of temporary admission to the UK, which would provide the legal basis for physical presence in the UK, and transport to the UK and reception there.

13. ZS is an unaccompanied child claiming Afghanistan nationality, and to have been born on 1 January 2002. He wants to come to the UK. He has no right at all to enter the UK under either domestic immigration statutory provision or Immigration Rules or under Dublin III. It had not been suggested until very shortly before the hearing, on surprising evidence which I declined to admit, that he had any relatives in the UK. *Help Refugees* in the Court of Appeal also confirms that ZS has no legitimate expectation of entry. That only applied to those who met the eligibility criteria, and who could satisfy the other requirements of having a favourable best interests determination and not having unfavourable security problems. The legitimate expectation arose because of the practical prospects of admission in the circumstances of the Calais camp clearance. ZS did not satisfy any eligibility criterion. Thereafter, there is no evidence of any practice equivalent to that which gave rise to this legitimate expectation. It may be a realistic assumption that those referred by the French authorities would in general be transferred, but ZS has not been referred by them.

14. ZS has not been recognised as a refugee. S67 has been recognised as covering unaccompanied asylum-seeking children. It has not been suggested that he is not an asylum-seeking child even though his case, and not his alone, is marked by an evident reluctance, and so far a refusal, to claim asylum in France, a safe European country, or in any other safe country he passed through en route to the Calais camp.

15. In October 2016, ZS had been living in the Calais camp for many months, perhaps as long as 14 months, trying to enter the UK illegally. On 7 October 2016, the French authorities announced that they would clear the camp starting on 17 October, later

starting on 24 October. Following discussions between Home Office officials and the Sous-Prefecture in Calais and others, Home Office officials were given permission to interview children with a view to their transfer to the UK under s67. This was part of a single process run together with the accelerated consideration of children considered likely to be eligible for transfer under Dublin III. The French authorities had not agreed to UK officials interviewing children in the Calais camp before 17 October, giving little time for the implementation there of s67. These interviews began on 17 and 18 October 2016 for respectively boys and girls, but were suspended on 23 October while the actual clearance took place, except for the CAP area, where boys were interviewed. Interviews resumed generally on 27 October, in the Calais camp area.

16. Duncan Lewis, in a letter of 1 November 2016 on behalf of 21 children including ZS, wrote to the Home Office saying that there were strong initial indications that they came within the scope of s67. Duncan Lewis were acting with Bhatt Murphy, another firm of solicitors, on behalf of Safe Passage, an asylum-seeker supporting NGO. The letter asked that three, including ZS, who were said to be "extremely vulnerable", be transferred "as a matter of urgency", with arrangements being made in 48 hours. The Calais Guidance had not been published at this stage.

17. The letter drew attention to the problems that each experienced: ZS had suffered from physical abuse during his journey and suffered from kidney pains. A qualified social worker from an NGO had provided a letter dated 27 October 2016 saying that she had met ZS on 22 October, and had assessed his needs in a voluntary capacity in order to inform a best interests decision. She concluded it was in his best interests to be relocated to the UK immediately. He had come to the attention of a group of men believed to be people traffickers. He had been robbed whilst living in the camp and had been unable to sleep because of his fear of these men.

18. On 2 November 2016, a form, devised by Duncan Lewis along with other solicitors, was submitted to the Secretary of State making what was described as an "urgent application under s67 Immigration Act 2016…on behalf of a child in Calais". It said that, in addition to other matters already covered, ZS suffered from suicidal ideations and depression. A letter in support from the Hummingbird Project in respect of his mental health, repeated the background saying that ZS's mental health seemed to be deteriorating; he had not slept for three days and was disturbed and worried by young people sleeping outside. He had been sending the Project worker messages during the night. (The Hummingbird Project based in Brighton, provides assistance to unaccompanied minors seeking asylum and provided aid to those in the Calais camp.) He was scared someone would rob him in the container he lived in. The police would not help him if gangs of thieves or traffickers entered his container. He had been beaten up several times by the police, while he was trying to board lorries or trains, without the operator's permission it appears, in order to come to the UK; he had been hit by cars during these attempts.

19. On 2 November 2016, the CAP area too was cleared; on 3 November, the Jules Ferry area, where girls were, was cleared. Transfers from Calais took place up to 28 October, were resumed on 12 November after a pause, and the majority of those who were to be transferred from the Calais camp to CAOMIs had been transferred by 9 December 2016. It had been a considerable operation by the Home Office with some 200 officials deployed to France to support the assessment process, and over 400 in

total in support of the operation. Some 240 UASC were in total eventually transferred to the UK, almost all coming from those who had been in the Calais camp.

20. The team to carry out the interviewing of those transferred from Calais to the CAOMIs across France was assembled in a short space of time. All officials had had appropriate minors, safeguarding and trafficking training with two members of staff trained to assess ages. Other on-call assistance was available. By the time the camp closed, the SSHD had interviewed over 800 individuals claiming to be children in a period of just seven days. Interview teams were formed between 2 and 6 November at short notice with over 90 staff, interpreters and social workers being organised to travel around France to visit each CAOMI. ZS had not been interviewed at the first stage in the camp.

21. An update of 7 November 2016 from the Hummingbird Project dealt with the position after ZS had been removed to Luchon in the south of France. The update said, as ZS also later said in his interview with the Home Office, that he had been hospitalised for a few days and that he had been dizzy or fainting. This medical examination found nothing abnormal. ZS had been caught up in a riot at Le Cap; he was being threatened by a gang of Eritrean boys and had sought safety standing beside police officers. Over the last few months his mental health had deteriorated: a positive, highly energised boy presented as "incredibly anxious, depressed and lost." He was highlighted by the Hummingbird Project as vulnerable and at a high risk of significant harm from others and potentially from himself. ZS was interviewed in the CAOMI at Luchon in the south of France, on 16 November 2016.

22. On 2 December 2016, Ms Ortiz of the Hummingbird Project wrote to Duncan Lewis about ZS. She expressed general concern about organised child sexual exploitation in the Calais camp. She said that ZS had made a disclosure to a volunteer interpreter on 13 September 2016, not linked to the Hummingbird Project, regarding sexual and physical abuse of him and others at the hands of traffickers. (This was on a recording in Urdu, and was not sent to the SSHD.) ZS was asked about it the next day by Ms Ortiz, but he had disclosed nothing to her about it. For two weeks before this disclosure and thereafter, ZS had become low in mood unlike his usual self, which Ms Ortiz regarded as a key indicator of abuse. He no longer had UK volunteers to turn to once he left the camp. Were he to leave his accommodation in the south of France to return to Calais where there were now no protective adults, he would be at a very high risk of harm. His mental health was deteriorating.

23. Ms Moynihan of the Refugee Youth Service, RYS, said, in a statement of 15 December 2016, that she had worked as a child protection officer for the RYS in the Calais camp, and referred to the sexual abuse concerns for ZS which came through the Hummingbird Project. Concerns were immediately referred to the Child Protection Team of the Pas de Calais Departement, to the UNHCR Calais and were discussed with Medicins Sans Frontieres. RYS had met with France Terre D'Asile, ("FTDA"), seeking support in relation to engaging the police, who said they would not get involved unless the child went to the police station. RYS was "extremely concerned" about these children for whom they thought immediate support was necessary, and to whose asylum claims to enter the UK, as it was put, immediate attention had to be given.

24. In her statement of 9 June 2017, Ms Moynihan referred to contacts she had had in Autumn 2016 with local French officials about the way in which young people in the Calais camp were being targeted by a group of masked Afghan men, who demanded money and robbed them. She had emailed the Pas de Calais officials for advice as to whom to contact about serious child abuse concerns, gang violence and missing children but she had received no reply or substantive assistance. There was, however, very little evidence in her statement about contact with a view to a specific s67 referral; her concern was more with trying to obtain protection for groups of children while they were in the Calais camp. The statement itself did not mention child sexual exploitation but the exhibited emails referred back to the recorded interview with ZS which I have already referred to and to more general sexual exploitation of boys at the camp.

25. It appears ZS's name was on a list sent to the Pas de Calais Sous Prefecture, FTDA and the Home Office. Ms Farman of the European Intake Unit, UK Visas and Immigration at the Home Office, explained in her witness statement of 30 October 2017, that on 2 November 2016, she had receive an email from RYS identifying ZS as a child with protection concerns, as it was put. She said that she had informed the RYS that they should direct referrals to the appropriate body in France.

26. Interviews of those who had been in the Calais camp but were removed to the CAOMIs took place in the CAOMIs. Interviews of former Calais camp UASC resumed again between 7 and 25 November 2016 at the CAOMIs, with a majority of transfers to the UK completed between 12 November and 9 December for those who had not been transferred from the camp at Calais itself. France requested the UK to complete the interview process within one month. It was largely completed by 9 December by which time the Home Office officials had left France.

27. The evidence placed before me by the SSHD included the evidence as to the interview procedure provided in *Citizens UK* by Mr Cook, Ms Farman and Mr Gallagher, a Grade 7 Policy Adviser in the Asylum and Family Policy Team of the Immigration and Border Policy Directorate in the Home Office, to explain this and other aspects of the interview process. Mr Gallagher explained that the Home Office teams would explain to the staff and representatives of the owners of the facility where the child was what the purpose of the interview was and the criteria which were to be used. The young people would then be gathered together so that the same information could be conveyed to all of them at the same time using interpreters. The interviews began with an initial stage in which the young person was photographed, and their name, nationality and date of birth were recorded, followed by the interview. An appropriate adult in the form of a social worker was present during the interviews, and sat in on the Part 1 interview and then did the Part 2 Best Interests determination, and was there to deal as well with welfare issues.

28. The interviewing officer would produce the record of the interview at which a social worker would also be present. The social worker would be able to hear the young person, see how they responded to the interviewer, be alert to any welfare needs and be in a good position where required, to conduct the best interests assessment. If a French official wished to sit in, as sometimes they did, they were enabled to do so. An interpreter was involved, but on the evidence as a whole, the interpreter may have been present or engaged over the telephone. The interviews lasted about 20 minutes for each individual. The individual could return later with additional information if

they wished to, so long as that happened before the visit ended. The interview records were checked for completeness.

29. The interviews for children at the CAOMIs for both accelerated Dublin III transfer and for s67 eligibility were conducted at the same time. Those not accepted under Dublin III would still automatically go through the s67 process, and would then have a best interests interview and determination conducted by a UK social worker. This would avoid somebody being passed from interview to interview only to have the same questions repeated. Ms Farman explained that it sometimes happened, in complex cases to avoid a succession of interviews, that a best interests determination was carried out, as in the case of ZS, though it would have been plain to the interviewer that he did not satisfy the s67 eligibility criteria. But, as Ms Farman explained, ZS was rejected for transfer because he did not qualify for transfer under s67, and not for any reason identified in the best interests determination.

30. A Kent County Council social worker was present as the appropriate adult at ZS's interview and assessment by Home Office staff in the CAOMI on 16 November. A senior social worker reviewed the information collected. ZS said that he was an Afghan, with no relatives in the UK. The interviewer noted that ZS said he was 14. He was not ineligible because of his dates of arrival in Europe and in Calais. He had not been referred by the French authorities on account of any vulnerability. ZS described his medical conditions, including his hospitalisation for a few days, after he had been hit by a rubber bullet fired by French police. He was noted as seemingly confident but anxious about the decisions being made. The interviewer found no evidence of ZS being trafficked or of his being at risk of exploitation. Although ZS failed all of the three alternative eligibility criteria, he received a "best interests" assessment. The evidence as to how the interview was conducted is in line with what Mr Gallagher said. It does not appear that any member of the CAOMI staff was present at the interview.

31. After assessment, the decision was not made by the interviewer but was made back in London. The decision to refuse ZS transfer was reached on 27 November. The decision in his case was checked by a Senior Case Worker who confirmed the decision. The decision was sent to the French authorities on 14 December. He was notified of the refusal orally on 16 December 2016 by the French staff at the CAOMI, in a group. No formal written decision was communicated to him. It is likely that he was told no more than that he was ineligible for transfer to the UK. If he were told more, it would not have been more than that he was ineligible as he did not meet the eligibility criteria. A social worker from Social Workers Without Borders then saw him on the afternoon of 16 December 2016, and she had told Mr Hossain that the children were notified at a group meeting and were very upset at the news. Some were still awaiting decisions as at 23 December 2016.

32. The Home Office evidence in *Citizens UK* as to how the decision were communicated is in line with the other evidence about how ZS was told that he would not be transferred. The agreed process for the communication of decisions was that the Home Office teams would not do it. The French authorities had real concerns that a CAOMI would become "unmanageable" if the decisions were communicated immediately after the interviews. Some people were definitely going to be transferred to the UK and some were not; it was feared that those not being transferred would leave the CAOMIs before other arrangements could be made for them. There was also

a concern that interviewers had been subject to intimidation and aggressive behaviour when saying to an individual that he was not eligible to come to the UK, based on their experience in Calais. Mr Gallagher said that the decisions were communicated to French Government officials first and then to the CAOMIs. How the decisions were then notified was not known to the Home Office officials on the ground, who would have moved on to other CAOMIs. The reason why the CAOMIs wanted to communicate the decisions was that unless they told the children, the CAOMIs would not themselves know what the decision was and what had been said to the children. It was left to the French authorities to decide whether the adverse decisions were given to individuals in groups or individually.

33. Mr Cook explained that the French authorities were best placed to communicate with the children who were in France whereas UK officials were moving around. The communication was best provided by them as they had formed a relationship with the children and built trust. It would have been detrimental for communications to have been received by a child from the UK authorities who made the decision in the UK, without the appropriate planning being put in place by the French authorities. It could potentially increase absconding. The children were the legal responsibility of the French authorities, and for those not being transferred for them to tell the children what their options were in remaining in France. This was also not an immigration process in which applications were made and individual decision letters required. It was instead an assessment process for determining whether eligibility criteria were met.

34. Duncan Lewis wrote again to the Home Office on 17 December 2016 saying that urgent decisions were required in respect of those whom they represented, because of the acute vulnerability of certain children including ZS. They said that they were concerned that if their clients received the decision without receiving proper advice and support they would flee their centres, putting themselves at risk of trafficking and other exploitation. The reply on 20 December said that the Dublin UASC Team were working through the list, had interviewed a large number of minors and asked for the dates of birth for 15 of the clients listed. ZS' representatives immediately sought written reasons for the refusal upon learning of the adverse eligibility decision, which appears to have been communicated to them between 17 and 20 December 2016.

35. On 20 December 2016, a detailed letter before claim was sent by Duncan Lewis to the Home Office in relation to ZS raising the general range of issues with which this case is concerned. They criticised the interview in both substance as to the information elicited, and in procedure, the unlawfulness of the criteria, which they clearly understood, the alleged absence of a best interests determination before the decision to refuse transfer was made, the unlawfulness of the decision and the failure to provide written reasons for the refusal. They clearly knew of the adverse decision.

36. Mr Cook replied on 21 December 2016. He pointed out that it was clear that there were likely to be many more children who wished to come to the UK than local authority capacity could support. The SSHD therefore had to consider carefully how to set criteria to identify those who would be transferred to the UK. He then identified the published policy guidance in relation to transfers from France. He added:

> "The SSHD retains her residual discretion to admit children falling outside of the criteria whether under s67 or under other routes of entry to the United Kingdom."

The criteria which inevitably excluded some children under s67 did not mean that she was rejecting their asylum claims, as that decision could only be made about an individual within the United Kingdom. The SSHD would review in due course all the material which Duncan Lewis had submitted on behalf of ZS, but Mr Cook pointed out that ZS had no entitlement to, and should not have any expectation that he would, be admitted to the UK. It was clearly not possible for Duncan Lewis to say that ZS was more vulnerable than any other refugee child in Europe. Nor could the SSHD interview all unaccompanied refugee children in Europe in order to decide which children's best interests would be best met by being brought to the UK. Hence, the policies had been formulated to offer the best chance of assessing which children it was appropriate for the UK to take. There was a finite number who could be accepted and taking one child would mean that another child, possibly also very vulnerable and anxious to come to the UK would not be admitted.

> "The SSHD cannot favour those children who happen to be legally represented and must take a holistic view of the situation as she is best able to do."

Mr Cook also noted that, although Duncan Lewis said ZS was very vulnerable and had suicidal tendencies, he was in the care of the French authorities. To the extent they were failing, as seemed to be implied, adequately to care for ZS, he had recourse to the French courts.

> "You have not provided sufficient reasons as to why your client would in fact be better off being in the care of the UK authorities….it would be clear from the foregoing that the SSHD does not accept that she is under any obligation to admit your client to the UK now and will not be taking any immediate steps to liaise with the French authorities over a transfer."

The letter also criticised the discussions which Duncan Lewis had been having with Brighton and Hove Council about whether they could accommodate ZS. It was for the Secretary of State to determine who would be transferred to the UK and where they would be placed. It was highly inappropriate for Duncan Lewis to have engaged in discussions with local authorities in relation to specific clients "given your limited awareness of the wider issues the SSHD is required to discuss and agree with local authorities. You should desist from doing this immediately."

37. On 21 December 2016, Duncan Lewis emailed Mr Cook seeking reconsideration of ZS's case under s67 and under the SSHD's residual discretion in the light of all the material to date submitted to her in support of his claim to relocation to the UK. Proceedings were begun on 23 December, and urgent interim relief was sought.

38. An order was made on 30 January 2017 that the SSHD provide, in so far as it had not already been provided, written reasons for the decision of which he had been informed on 16 December, disclosure of the "best interests" assessment, and all minutes of the decision-making in his case. On 3 February 2017, the SSHD confirmed

to Holman J that those items had already been supplied, as was then embodied in his order of that date.

39. On 3 February 2017, because Mr Cook had told Duncan Lewis in the email of 21 December 2016 that the SSHD will "consider the various evidence/submissions you send on behalf of your client", Holman J held that, having said that she would do so, the SSHD had to do so, and required a decision by 3 March 2017. He said in his judgment that, after the SSHD had made the decision given on 16 December 2016, she had made a commitment through her later comments that she would, in effect, reconsider that decision on the basis of further evidence and submissions supplied to her.

40. On 19 February 2017, Duncan Lewis submitted further representations for the purposes of this decision. This was 11 days after the announcement of 350 as the specified number under s67. These representations contained first a request for ZS's case to be reconsidered under s67. It referred to ZS as an unaccompanied 15-year-old Afghan who claimed to have experienced traumatic experiences there and on his journey to France where he had spent 14 months in the Calais camp. He had expressed fear of the French police and authorities after being shot with rubber bullets and tear gas there. ZS had disclosed that he might have been a victim of sexual abuse by traffickers in Calais. The letter set out the various medical reports which were by that time included in the judicial review bundles in the case.

41. It emphasised that, although ZS had not been referred by the French authorities, there was evidence that he had experienced sexual exploitation; the details were then set out again by reference to the papers in the judicial review proceedings which it was contended showed that he was "and is potentially at high risk of sexual exploitation. This is particularly so if he absconds or leaves the CAOMI as he has tried to do in the past." It referred to ZS's disclosure to a volunteer on 13 September 2016 and the comments of Ms O'Brien of the Hummingbird Project in 2 December 2016. Other people referred to the disclosures as well, and what Ms Moynihan of RYS had said was also repeated. The letter referred to a best interests assessment undertaken by a social worker instructed on behalf of ZS, highlighting concerns that he would be at risk of sexual exploitation if he left the centre and came into contact with traffickers. ZS had expressed a desire to abscond from the centre and had tried to do so in January, but was too ill to do so. He, with others, had done so a week later but they were picked up and returned to the CAOMI. Various other submissions were made about the law and the United Nations Convention on the Rights of the Child.

42. The letter elaborated the mental health evidence which had previously been sent with their letter of 1 November 2016. ZS had been assessed as suffering from suicidal ideations and depression. Ms Ortiz had expressed the view that his mental health in the Calais camp seemed to be deteriorating with sleeplessness and a fear that someone would come into the container again, but the police would provide no help. He had been beaten up by the police whilst trying to get into lorries or trains to come to the UK. This information, said the letter, had confirmed that at the time of his interview he had a suicidal ideation. Ms Ortiz had said that he was one to be highlighted "as vulnerable and high risk of significant harm from others and potentially from himself due to his low mood".

43. A social worker on behalf of the SSHD, who had details of his medical notes and to whom ZS had confirmed that he was "anxious", had carried out a best interests assessment on 16 November 2016. She had noted this was a complex case for the purposes of a best interests determination, but had observed that there was no evidence to suggest that he had any particular emotional or psychological needs. Ms O'Brien of the Humming Bird Project had referred to the disclosures of sexual and physical abuse which had affected his mood and given him an anxious attachment to volunteers who continued to support him from the UK. His health had generally been very poor. She said that ZS had experienced "multiple traumas and due to this, we are seeing his mental health deteriorate".

44. The letter referred to a suicide attempt on 9 December 2016 when ZS attempted to jump off the roof of the CAOMI which led to his being hospitalised for three days. He had told the Hummingbird Project that he had realised he had no right to a life in this world and no-one to help him in France. The Hummingbird Project volunteers were his family. He had been known to them as a fun-loving boy and the deterioration in his behaviour was extremely disturbing. Language difficulties were getting in the way of psychiatric follow-up. The medical notes stated that ZS was suffering from PTSD and experiencing auditory hallucinations. He was a traumatised and vulnerable boy who needed treatment. On 16 December 2016, after he had been informed that he would not be transferred to the UK, he attempted to lie down on the train tracks.

45. Michelle Freeman of Social Workers Without Borders carried out an assessment of him on 16 December 2016, with an appropriate adult present, Ms Ortiz from the Hummingbird Project. Translation was via telephone in Pashtu. He had previously made a disclosure to a third party regarding experience of sexual violence in the Calais camp. He was asked specifically about it by Ms Freeman but she could not draw firm conclusions as to whether he had experienced sexual harm or not; he would have found it extremely difficult to admit to it over the telephone to two females. There was no suggestion of any problem at the CAOMI in relation to sexual exploitation. ZS said that the nurse was pleasant. He added that "the people here are treating us like dogs." It later appeared that he was talking of France generally, rather than of the CAOMI.

46. Ms Freeman said that the risks were of his being hurt by others "in the community". She did not think that the staff could offer much safety to him without intervention from "UK staff who [ZS] trusts. They do not have the capacity to supervise him and told me that he cannot ring the police as it may prejudice his asylum claim". There was a concern that refusals of transfer would lead children to try and return to Calais in an endeavour to reach England, leading to risks of injury from vehicles and of being trafficked for sexual or other criminal exploitation. There was a lack of safe supervision which meant he could disappear overnight without a response from adults. The assessment referred to various basic needs which it said were not being met: he did not feel safe in his accommodation; he did not have access to food he enjoyed; he experienced ongoing physical symptoms which could relate to his deteriorating mental health, the impact of waiting for a decision, and the lack of a nurturing care in his home environment. He was suffering abuse by neglect as well as emotional harm, as he did not have a carer to meet his development needs. He now associated French authority figures with violence. He was not currently being offered

suitable psychiatric care, and psychiatric care in France would be unlikely to improve him as his home environment was not safe or nurturing and he would struggle to feel safe.

47. On 16 December 2016, Ms Freeman had carried out a best interests assessment on his behalf: she had reaffirmed her view that it was in ZS's best interests to be transferred to the UK, comparing the lack of support facilities in France, the communication difficulties, and that he would not feel safe unless he were in the UK. He did not trust the French authorities and was very unlikely to call the police if he were in danger.

48. Dr Byrne, a Consultant Child and Adolescent Psychiatrist examined ZS on 14 December 2016 at Luchon over three hours, and reported on 16 December 2016 that ZS was suffering from PTSD for which he urgently needed treatment. France, said Dr Byrne, should not be an option for him because, if he were forced to remain there, that would "further compound the losses and traumata he has endured and raise the risk of suicide to severe". Without treatment his mental state would deteriorate. Providing treatment for his PTSD in France was not an option; it had to be delivered in the UK, because treatment would fail unless he was living in an environment where he felt safe, and he did not feel safe in France, because he had been attacked by the French police. Consequently, said the letter**,** refugee status for ZS in France would not be a durable solution if it did not lead to his "physical and psycho-social recovery". ZS was currently at a high risk of suicide and if not admitted to the UK there would be a real risk of completed suicide, which "cannot be overstated".

49. On 10 January 2017, ZS had been admitted to hospital in a state of anxiety, experiencing anxiety and panic attacks. A doctor there said that he presented with major post-traumatic depressive syndrome and with suicidal tendencies, speaking all the time of his desire to re-join the members of his "family" in England. The letter indicated that "family" meant friends and the Hummingbird Project. He had repeated his suicidal ideation and a further suicide attempt had been made on 24 January 2017, through an overdose of paracetamol. Ms Prathepan, a solicitor with Duncan Lewis, said there had been a marked deterioration in his mental health recently, and social workers thought him to be at a high risk of significant self-harm.

50. The letter then turned to exceptional and compassionate circumstances saying that the SSHD retained a residual discretion which should be exercised in ZS favour in the exceptional circumstances presented in order to protect and preserve his life. He was extremely vulnerable because of historic physical and sexual abuse and felt a close connection to the UK as his "family" was there.

51. The SSHD decision in response was dated 3 March 2017. It said that ZS had never made any application for leave to enter the UK under an established route, and that there was no application process for entry to s67. He had been assessed on or around 27 November 2016 at Luchon "as a preliminary screening against the eligibility criteria that had been adopted by the UK Government…" The SSHD then set out the criteria; when ZS was assessed in the preliminary screening, her view had been that he did not meet those criteria. Duncan Lewis had said that that decision was communicated to him on 16 December 2016, verbally, by the French staff at Luchon. The 3 March 2017 letter then referred to the promise in the email of 21 December 2016:

> "Please note that this was an exceptional course taken in your case and that of one other minor only.
>
> In accordance with that letter, the further submissions and documents sent in on your behalf have been considered.
>
> Those documents do not however suggest that the Secretary of State was incorrect in concluding at the time that you did not meet the criteria for inclusion in the cohort of children that was being considered for transfer under the eligibility criteria. Nor do those documents suggest that this position has changed subsequently. Indeed, it is understood that you are in agreement that you did not meet the criteria.
>
> Rather, the documents that you have submitted, principally address your physical and mental state and vulnerability. Those are not factors which were included in the criteria. There were many more children who wished to be transferred to the United Kingdom under s.67 than could be transferred under that provision.
>
> You may be aware that the Secretary of State has announced that the total number of children who are to be transferred to the UK pursuant to s.67 is 350. The SSHD is currently considering eligibility criteria for the number of places up to the specified number of 350 and these will be published in due course.
>
> For those reasons, the Secretary of State's position has not changed in respect of your situation and she will not be taking any steps to transfer you to the United Kingdom now."

52. Ms Farman in her third witness statement in ZS of 1 February 2018 explained a little more about the letter of 3 March 2017. The Secretary of State, s67 notwithstanding, had maintained her residual discretion at all times to admit anyone to the UK. This is what she had agreed to consider. Ms Farman gave an example of the sort of person who might be admitted under that discretion. Where a child was being accepted who was the sole support for somebody impaired by blindness, for example, the blind child was accepted as well, either in the exercise of the residual discretion or using her discretion under s67. Ms Farman had, however, concluded, notwithstanding the evidence submitted in support of ZS focusing on his mental health, the risk of suicide and sexual abuse, that there was nothing to warrant transfer to the UK. The difficulties he said he suffered from "did not set him apart from many other children formerly resident in the camp and who would also like to come to the United Kingdom rather than stay in France and be supported there…" He had no particular links to the UK to persuade her that the discretion should be exercised. He had not been referred by the French.

53. After the clearance of the Calais camp, further guidance was published by the Home Office on 10 March 2017 in a Policy Statement, which was not materially changed in

a further version of April 2017, save that the specified number for the purposes of s67 had been increased from 350 to 480. Updated guidance was issued in February 2018.

54. The relevant parts of the March 2017 Statement are:

> "**Basis for further transfers under section 67**
>
> The Government will invite referrals of eligible children from France, Greece and Italy up to the specified number of 350. It will be the responsibility of France, Greece and Italy to decide which children to refer, with reference to the information set out below.
>
> **i. Who is eligible?**
>
> To be eligible for transfer to the UK under section 67:
>
> - unaccompanied children must have been present in Europe before 20 March 2016, the date the EU-Turkey deal came into force; and
>
> - it must be determined, following individual assessment, that it would be in the child's best interests to come to the UK, rather than to remain in their current host country, be transferred to another EU Member State, or to be reunited with family outside of Europe.
>
> In deciding which children to refer, France, Greece and Italy will be asked to prioritise unaccompanied children who are:
>
> - likely to be granted refugee status in the UK; and/or
>
> - the most vulnerable, due to factors which could include but are not limited to, the UN High Commissioner for Refugee's *Children at Risk* individual risk factors. These risk factors include child victims of trafficking and sexual abuse; survivors of torture; survivors of violence; and, children with mental or physical disabilities.
>
> The full list of individual risk factors can be found on page 186 of the following publication…:
>
> In addition, the Home Office must be able to match the child with a suitable local authority placement and have successfully passed security checks ahead of the transfer.
>
> **ii. What will the process be for identifying, assessing and transferring children?**
>
> The Government is committed to working closely with France, Greece and Italy to deliver our commitment under section 67,

> but we can only operate in ways agreed with those Member States and within their legal frameworks. The UK will provide support to Member States, working closely with partners and non-governmental organisations to facilitate the process, including through our secondees in the Member States."

55. On 2 May 2017, Duncan Lewis wrote to the Government Legal Department after the Government announced that the specified number for the purposes of s67 had been increased from 350 to 480, asking the SSHD again to reconsider the Claimant's position. It repeated what had been said about the sexual abuse of ZS in the Calais camp, and that a recording of ZS on video, speaking in Urdu and played over the telephone to Ms Moynihan, had referred to a rape of ZS and other boys who had been given pills and taken to rooms. The letter specifically asked, in the light of the 10 March 2017 Guidance about referrals by the French, Greek and Italian Governments, for confirmation that the French Government had agreed that they were able to refer children under the scheme, and if so, what procedure had been put in place by which the French Government was able to consider the referral of ZS and others whom Duncan Lewis had said were otherwise eligible for consideration for transfer. Similar information was sought from the Directorate General of Foreigners in France, ("DGEF"), within the French Ministry of the Interior. On 15 June 2017, in response to further pressure from Duncan Lewis, the GLD, confirming that the SSHD was not prepared to reconsider ZS's case, confirmed that it would be a matter for the French authorities whether ZS was referred, adding "arrangements are still being discussed with the French authorities, but clearly it is a possibility that your client may be referred under the scheme…."

56. The Home Office produced a "Detailed Process" document for its internal use, dated 5 October 2017. Paragraph 3.6 stated "Provided the children meet the eligibility criteria, the decision as to which children to refer lies with the French DGEF. The UK will only conduct security and identity checks and will not make an assessment of the child's vulnerability or their likelihood to qualify for refugee status in the UK." Under the heading "Identification", it said:

> "4.1 Provided the children meet the eligibility criteria as outlined above, the French DGEF will decide which children to refer. [These are set out in the March statement].
>
> 4.2 The DGEF will identify children likely to meet the eligibility criteria via two routes:
>
> (i) children who are already within the French child protection system but for whom transfer to the UK may be in their best interests; and
>
> (ii) children who are on the territory of France but who are not within the French child protection system.
>
> 4.3 The DGEF will identify children eligible under route (i) by liaising with French social services in charge of unaccompanied children.

> 4.4 UNHCR will assist the DGEF with identification of children under route (ii). The DGEF will liaise only with UNHCR. UNHCR may choose to liaise with other organisations acting on behalf of children.
>
> 4.5 The DGEF will decide which children will be referred to the UK for consideration under section 67. A referral to the DGEF does not guarantee a referral to the UK. Section 67 does not establish a right for any child present on French territory to be transferred to the UK."

57. Ms Farman, in her second witness statement of 18 December 2017, responded to my direction that the SSHD explain whether this process document had been disclosed to French social workers, NGOs and the UNHCR. She explained that it was an inter-state agreement between the UK and French officials, rather than a policy statement; it had not been publicly disclosed. The SSHD considered that there was no positive obligation for such a document to exist for the purposes of s67 nor for it to be made public, although it had been disclosed to ZS' representatives. Its purpose was to ensure that the UK and France had an agreed process for the operation of s67. Discussions had proceeded between UK and French officials to agree the process for transferring children under the criteria published in March 2017. There had been a meeting with UNHCR France and French officials from the DGEF on 28 March 2017 which enabled participants to become well aware of the process. There were also discussions with the International Organisation for Migration, IOM, to establish the mechanisms.

58. The process agreement was formally agreed with French officials on 5 October 2017. The French authorities that very day were provided with a copy, in English. Ms Farman said that the process document outlined two routes by which children could be identified in France for the purposes of s67:

> "Those who were under the legal protection of a French judge and those who may be identified and referred to the French authorities by the UNHCR. Both routes require the French authorities to decide which children they refer to the UK. It is therefore considered that responsibility for communication of the pertinent aspects of this process also vests with France, since they are required to manage relationships with third parties and referrals to the UK."

59. The fact that the document had not been made public did not mean that external organisations did not know how the process operated. Ms Farman had sought to clarify the extent to which the DGEF had disseminated the document. She understood that the contents of the document and information regarding the procedure, as opposed to the document itself had been shared with IOM, UNHCR, French judges and Prefectures. The agreement with the UNHCR placed no restrictions on the NGOs with whom they could work for the purposes of receiving referrals under the second route. The RYS had direct contact with their counterparts in UNHCR France. The document had not been shared with French social workers because responsibility for unaccompanied children in law belonged to French judges. They were responsible for the child's care, but with social workers to determine welfare issues. This contrasted

with the UK where the social worker had legal responsibility and there was no automatic judicial intervention. The judges in France held the relevant information about the child they were responsible for and could make the referral to the French authorities and were not dependant on a first instance referral from a social worker. Referrals had been received from France under both the UNHCR route and for children who are under legal protection of a French judge.

60. Ms Farman said, in her third witness statement of 1 February 2018, that in the light of the concerns expressed when I gave permission to raise a ground concerning the October 2017 DPG, that this would be published shortly. Further guidance was to be signed to reflect a recent treaty agreed with France in January 2018.

61. Mr Cook in his second witness statement of 1 February 2018 explained that of the spaces for the 480 specified under s67, 220 had been filled by children resident in the Calais camp upon its closure. The remaining places had been split between France, Greece and Italy. Since the publication of the updated policy statement in October 2017 and subsequent agreements between the UK, France and Greece, there had been a further 11 referrals from France and 15 from Greece. All but one from France had been or would be transferred under s67. The eleventh was entering under Dublin III.

62. In January 2018, following a UK/France summit on 18 January, the Government announced that the arrival eligibility date of 20 March 2016 would be varied so that those who arrived in Europe before 18 January 2018 would now be referable by the French, Greek and Italian Governments. Discussions about filling the remaining places as soon as possible were going on. However, subject to the outcome of those discussions, the SSHD had allocated all the remaining places. If discussions progressed as intended, 100 referrals would be received from France, 75 from Greece and 60 from Italy. ZS might be referred by the French authorities, but were this Court to order that he be given a place that would mean a place less for somebody who might be as vulnerable.

63. Ms. Ufferte, who was ZS' social worker and legal advocate employed by the Haute-Garonne Departement, said, in her witness statement of 19 February 2018, that she had never been issued with a policy guidance for s67 and had only become aware of it when she met with Duncan Lewis on 28 November 2017. She had not been aware that French Social Services could refer children for their transfer to the UK until that date. She had received no training on s67 or policy guidance from the French or UK authorities. The UK had indicated that the Guidance had been shared with French judges, IOM, NGOs Prefectures and the UNHCR. But none of those bodies had shared the policies with her or advised her about it. Nor was she aware of any other body in France that had applied to transfer children to the UK under s67 in Toulouse.

The grounds

64. I need now to identify more precisely the grounds on which permission to apply for judicial review has been granted. They were not contained in one single document and, on Friday 16 February with the hearing fixed for 28 February 2018, Ms Naik QC for the Claimant lodged a skeleton argument which I concluded, after hearing oral submissions, raised a number of arguments which were in substance new grounds of challenge.

65. I granted permission on paper on 15 September 2017, and additionally after a hearing on 12 December 2017, for the Claimant to argue that the SSHD's policies or procedures or decisions were unlawful in the following respects. First, the Calais Guidance of 8 November 2016 (the version operative when decisions affecting ZS were taken) was unlawful on the grounds that (i) the nationality criterion was unlawful because (a) it was too restrictive in relation to those countries from which successful asylum-seeking children were likely to come, for it to satisfy the intended purpose of s67, and (b) nationalities had been selected by reference to the asylum grant rates for adults and not children; and (ii) the sole vulnerability criterion was too narrowly drawn to be lawful because (a) it did not cover vulnerabilities caused by mental health problems, which it was said ZS had, and (b) the eligibility criterion of being at a high risk of sexual exploitation included the requirement that an individual had to be referred by the French authorities as vulnerable in that way, although it was said that ZS had disclosed physical and sexual abuse. These limitations frustrated the intention of Parliament. This ground, as best I can distil it, is taken from [85 – 103] of the Re-Amended Detailed Grounds of Challenge of 21 July 2017, "the RADGC". Those asserted deficiencies in the criteria were said to show why the SSHD should have considered the exercise of her discretion, whether "under the policy", meaning under s67, or outside s67 altogether, but had unlawfully failed to do so.

66. Second, I granted permission in relation to five procedural issues arising from the December 2016 decision: (i) that the SSHD had failed to carry out a proper "best interests" determination, failing to elicit relevant information [RADGC 109 – 117]; (ii) that the interview was unlawful for want of the presence of an appropriate adult, [RADGC 118 – 119]; (iii) that it was unlawful for the decision to have been delivered orally, without an appropriate adult present, [RADGC 120]; (iv) that ZS and his "legal representatives on record" ought to have been notified of the decision, [RADGC 121 – 128] and (v) that the SSHD should have provided written reasons for her decision, [RADGC 124 – 131].

67. Third, I granted permission for ZS to argue that the SSHD, in relation to her 3 March 2017 decision, had failed to consider the exercise of those discretions, or had failed lawfully to consider them; [RADGC 104 – 105].

68. Fourth, I also granted permission on paper in January 2018 for ZS to argue that the SSHD had unlawfully failed to publish and disseminate the Detailed Process Guidance agreed with the French government in October 2017, particularly to social workers in view of their role in the process. This ground was in the Claimant's Additional Grounds, [6A] dated 3 December 2017, and was the only one of the additional grounds there pleaded to be permitted to be argued.

69. I refused permission for any other grounds to be argued, notably that the SSHD had failed to reconsider the Claimant pursuant to later policies; [RADGC 106 – 107], and that the 26 April 2017 policy was unlawful; [RADGC 108].

70. Ms Naik's skeleton argument dated 15 February 2018 (filed 16 February 2018), ("NSA"), however, raised issues to which Mr Manknell for the SSHD objected in writing on the grounds that they went beyond the scope of the permitted grounds, and, if argued, would require an adjournment of the proceedings so that the SSHD could consider them and provide evidence in response. The Claimant objected in writing to this adjournment, contending that the points were no more than an elaboration of the

arguments on points already permitted for which the SSHD was or should been prepared. On 20 February 2018, the Claimant provided, two days late, what he regarded as his reply evidence, which included a number of witness statements. An amended statement of the various reliefs now sought was also provided.

71. Essentially, in my judgment, Mr Manknell's objections were well-founded. As the Claimant did not want an adjournment, and the claim on the permitted grounds merited resolution, I decided that there should be no adjournment and that I would decide whether in substance an amendment to the grounds of challenge was required, and if so, whether it was fair to require the SSHD to deal with it within the time frame of the hearing. If not, I would refuse to allow the point to be taken.

72. Accordingly, I refused permission for ZS to contend that the Ministerial Authorisation for discrimination on nationality grounds was unlawful, and to rely on data, produced without supporting material, of grant rates for certain nationalities and ages designed to support that contention; NSA [14-22]. This was a wholly different point in relation to the challenge to nationality as a criterion, as of itself too narrow and wrongly set by reference to adult grant rates. I also refused permission for ZS to argue that there was a breach of the Equality Act 2010, featuring as one of the declarations newly sought, and sought in the last two sentences of NSA [39] and [61-62]. I refused permission for ZS, as an Afghan national, to make submissions about Eritrea. Many who had been in the Schedules of Interested Persons and who were no longer involved were Eritreans; NSA [34-36].

73. I confined the scope of the challenge to the exercise of the residual discretion outside s67, made in [52 – 54] NSA, to the 3 March 2017 decision; this is what the permitted grounds related to. I refused permission for ZS to argue in [60], seemingly but not in fact related to the Equality Act, that operational requirements in Calais were no longer appropriate for application to children in CAOMIs. Significant evidence in response would have been required from the SSHD.

74. Mr Manknell contended that a number of other paragraphs in the NSA either fell outside the scope of permitted grounds or could require an evidential response for fairness but took the view, sensibly, that he might or might not be able adequately to deal with them in the light of the argument from Ms Naik as it developed, and in the light of what I could then consider was necessary for a fair response, if anything. These were the points in NSA, at [23 – 28 and 30]: data sources, their effect on the countries covered by the nationality criterion, and data relating to children; at [31-33] comparative successful asylum grant and appeal rates for Sudan, Syria and Afghanistan; at [37 – 38]: the prospect of ZS being successful in an asylum claim; and at [55 - 59]: the absence of other "obvious vulnerability" criteria in the Calais Guidance, and the need to alert decision-makers to the residual discretion. At [85 and 86], the NSA attempted to raise a ground that ZS should have been given the chance to make representations about his vulnerabilities, including risk of suicide and physical disability, and an opportunity to deal with any matter which might be relied on against him. This was a wholly new point, about procedure, not raised in the RADGC.

75. Some of Ms Naik's points seemed also to depend on the admissibility of her "reply" evidence. The problem with it was not so much that it was a little out of time, but that, with the exception of the short statement dated 19 February 2018 from Ms

Ufferte, it was not reply evidence at all, and was new evidence introduced too late for the SSHD to respond within the time frame set for the hearing. I refused to admit it, save for Ms Ufferte's statement, and the updating evidence from the Hummingbird Project, which I can deal with without a reply from the SSHD.

76. I refused therefore to admit a statement from ZS, dated 18 February 2018. This was the first statement he had provided at all in this litigation; it raised issues not previously raised; none of it was evidence in reply at all, and contained no satisfactory explanation as to why it could not have been provided much earlier. ZS's statement raises a clear problem as to his truthfulness. It also raises a question as to whether his refusal to claim asylum in France is maintained or encouraged by a belief, perhaps through this litigation, that he may be admitted to the UK if he makes no asylum claim in France; this may quicken his claimed fear of the French authorities, which he says prevents him feeling safe enough to claim asylum there.

77. The statement, dated 19 February 2018, from Ms Prathepan, a solicitor with Duncan Lewis, explaining why ZS's statement was late as reply evidence, rather demonstrated by its timetable, and the difficulty of assembling solicitor, social worker, psychologist, interpreter and others at times they all could make, that it was not reply evidence at all. That was an excuse for its lateness; it was primary evidence, if relevant at all. But her evidence, and an earlier statement from Mr Bell, another Duncan Lewis solicitor, provided for the December 2017 hearing, about the difficulties obtaining a statement from ZS, also demonstrated the sheer complexity and delay in decision-making if the sort of criteria, discretionary considerations and procedure for which Ms Naik contended were what the law required. I am prepared to admit Ms Prathepan's evidence only on that score, as that requires no reply from the SSHD. The rest of it would do, if admitted.

78. The "reply" evidence included a report from a clinical psychologist, Dr Falk, dated 19 February 2018, which concluded that ZS had various mental health problems including a diagnosis of severe PTSD and depression, and would be better off in the UK because he did not feel safe in France, and a place of safety as he saw it was necessary for his recovery. There was no reason why that should not have been provided much earlier; it is not reply evidence. A short statement dated 20 February 2018, from Ms Clayton, a Professor at Goldsmiths University, researching unaccompanied child refugees, described the Calais camp and meeting ZS there in January 2017, and again in February 2017, when she went for a Channel 4 news programme. She reported him speaking of suicide to her, and "was extremely vulnerable". None of this is reply evidence nor evidence obtainable only recently. I declined to admit it. Much would warrant a reply by the SSHD.

79. The further evidence also included a letter, dated 20 February 2018, from the Hummingbird Refugee Project. Its earlier letters of late 2016 and early 2017 were before the Court. This latest letter recounted its work with ZS, the mental health support for him now in place, his focus on going to England, the suicide plans revealed on 12 February 2018, and his plans to return to Calais, where he would be extremely vulnerable. He would however return there because he would have his support network around him there. Some of this could not have been available much earlier though none is reply evidence. I am prepared to admit it, and I shall deal with it in considering the issues.

80. The evidence also contained confirmation dated 20 February 2018 that Brighton Council remained prepared to care for ZS, as it had previously said in 2016. I accept that. But it needs to be read in the light of the judgments in *Help Refugees,* above.

81. I did not find it possible to resolve all this procedural mess without oral submissions, let alone in the reading day before the case began. The need to deal with these points delayed the start of the two-day case by well over half a day; the two-day estimate became three, in fact. It could otherwise have been concluded within two days. I shall have to consider the costs implications of this very unsatisfactory way of conducting proceedings, where, without being unduly rigid, the grounds were fixed, and the relevant evidence was in, in good time for the fixed date.

Ground 1: the nationality criterion

82. I refused permission to challenge the nationality criterion in the November Calais guidance on the grounds of alleged unlawful discrimination on the grounds of nationality. I deal later with the challenge to the lawfulness of the criteria in general as being too narrow. The challenges permitted under this ground are that the restriction to Syrian and Sudanese nationalities of those not under 12 or a sibling of one under 12, or directly referred by the French authorities as being at a high risk of sexual exploitation, was too narrow for the purpose of s67 in relation to those countries from which successful asylum seeing children were likely to come. The selection of nationalities should not have been made by reference to the success rates for adult asylum seekers, for the purposes of s67.

83. This ground of challenge as with the other challenges to the lawfulness of the criteria in the November 2016 guidance requires a little explanation of the background. Mr Manknell submitted, and I accept, that the s67 duty lay on the SSHD, but gave her a broad discretion as to how she fulfilled it, including by policy and, if so, by what policy. It would be impossible to achieve an objective fairness in prioritisation or selection because one could not identify or seek out the 350 or 480 most appropriate children for transfer. It was sensible therefore to adopt a transparent and readily operated policy for transferring those among the most vulnerable and the most likely to qualify for refugee status. I accept what Mr Cook said, in his first witness statement, that time constraints over the clearance of the Calais camp and operational challenges in conducting interviews in the camp and elsewhere in France, with the French authorities understandably keen on processing and transfer to happen quickly, required criteria suited for such a task.

84. As was found by the Divisional Court in *Help Refugees,* at paragraphs 143 – 146 notably, the SSHD did not receive permission from the French authorities to operate in the Calais camp before 17 October 2016 and, as Soole J pointed out in *Citizens UK,* the Director of the Asylum Division of the French Ministry of the Interior requested the British authorities to complete the interviews in the CAOMIs within one month of the dismantling of the Calais camp. By the end of November 2016 the SSHD was working with the Governments of Italy and Greece on the implementation of s67 in those countries. In *Help Refugees* at [145] the Divisional Court commented that in view of the need for the UK Government to have the consent and co-operation of the national governments for any of its endeavours within their territories to bear fruit under s67, it was impossible to conclude that such an approach was inconsistent with s67. That approach was placing the responsibility through the March 2017 statement

on the sending States to identify and refer the children who met the criteria. The Court added that in view of the problems faced by Greece and Italy, it could not be said that those problems had to be ignored and only those resourceful enough to enter France and to reach Calais should be the beneficiaries of s67. The Court of Appeal did not disagree.

85. The criteria themselves were derived with an eye to the capacity coming forward from the local authorities as Mr Cook's first witness statement in *Help Refugees* showed. S67 only required some rational means of identifying and transferring 480 children. The applicable criteria went through a number of changes, reflecting local authority capacity and information about the numbers who were present in the camp or who might become eligible. In October 2016 they estimated that there were over 2000 children in Calais at the time of the clearance or who had already been transferred from Calais which was almost twice the initial estimates of the numbers there. Some space also had to be left for UASC in Greece and Italy. The French had been concerned until October 2016 about the risk of UK Government and NGO presence in the Calais camp acting as a pull factor towards the camp.

86. By 8 November 2016 the SSHD estimated that the number of non-family cases who would meet the criteria would be around 550. The broad estimates showed around 380 Sudanese and Syrian UASC nationals, and around 60 UASC aged 12 or under across all nationalities, and 100 USAC from the Jules Ferry Centre who were expected to be assessed as at a high risk of sexual exploitation. Few of those were expected to become Dublin III cases as over 200 Dublin III cases had already been transferred.

87. On 8 November 2016 Ministers decided to refine the criteria. The age, nationality and high risk of sexual exploitation criteria were expected to yield up to 300 non-family cases of children to be transferred from France, including the 116 cases already transferred. They were aiming at about 300 from France, although no numbers were specified until February 2017. The Calais criteria were specific to a specific purpose for dealing with children from the Calais camp. The policy and criteria were revised in March 2017.

88. Mr Cook in his first witness statement in *Help Refugees* explained the basis for the nationality criterion. I accept his explanation of the SSHD's approach. Nationalities with an initial asylum grant rate of 75% or more enabled the UK to focus on those most likely to qualify for refugee status i.e. Syrians and Sudanese. The EU's emergency scheme for relocating asylum-seekers from Greece and Italy and other EU Member States also deployed such a 75% success recognition rate to identify nationalities to be relocated. The initial grant rates were for main applicants and dependants, for nationalities where more than 200 initial decisions had been made. That number of decisions was needed for a reasonable sample. Mr Cook however also produced figures which showed that if the 75% criteria were applied to the data available for unaccompanied children only and using that sample size, no nationalities would qualify. The overall success rate for those under 18, accompanied or unaccompanied, but without including parents, would have meant that only Syrians would qualify. No figures showed that the success rate for those from Afghanistan for the period exceeded 52.5%, taking the Claimant's figures overall for those from Afghanistan; the figures produced by Mr Cook for *Help Refugees* showed a success rate varying between 17% and 27%. The highest was the figure for main applicants

with dependants under 18, in which 1,335 applications had produced 218 grants of asylum. For UASC, there were only 68 grants of asylum from 401 initial decisions on 806 applications.

89. Ms Naik submitted that the rigid application to all nationalities of a 75% threshold based on the past year's figures for adults gave rise to arbitrary results, because it did not properly identify those children in Calais in need of protection. Nor did it mean those unlikely to qualify for asylum were not relocated. Reliance on a first instance grant rate did not allow for those whose appeals succeeded; 35 % of all appeals succeeded. So far as Afghanistan was concerned, Ms Naik criticised the absence of evidence that the SSHD had considered the guidance offered by *AA (Unattended Children) Afghanistan CG* [2012] UKUT 00016 (IAC) which referred to the range of problems which unaccompanied minors from Afghanistan had experienced. She submitted that, on the face of it, the Claimant would be likely to be granted refugee status in the UK having been targeted by the Taliban. He should have been given the benefit of doubt and he could not be returned as an unaccompanied child to Kabul. It was wrong for the guidance to exclude such children in the Calais camp from consideration for transfer under s67.

90. First, I am satisfied that a nationality criterion, based on the likelihood of someone of that nationality being successful in an asylum claim, was a lawful criterion. It is directed at the purpose of s67. The s67 numbers cap was lawfully seen as at least permitting the probability of success in their asylum claim to be a relevant basis upon which a distinction could be drawn between all those who could potentially come within the scope of s67. It was a criterion for which at least some comparative data was available on a comparable basis across nationalities. It was transparent and reasonably readily judged, with the benefit of the doubt being given to the claimed nationality. It was a reasonable criterion to adopt where speed of decision-making and practicality in operation were of the essence because of the clearance of the Calais camp. A nationality criterion had the advantage of avoiding the need for a careful examination of the prospects of success in an asylum claim first on an individual and then on a comparative basis, for all potential transferees.

91. The SSHD had considered the option of a "light touch refugee status determination" but the time constraints would not permit all relevant evidence to be collected in order to make a clear determination. Nor did the operational arrangements for interviews, which could change at short notice, permit such a step. On that basis, the criteria chosen were more practical because the SSHD did not consider she could establish whether one claim rather than others was likely to qualify for asylum, or whether an individual was vulnerable by reference to broader criterion, such as being at a general risk of trafficking or exploitation than others, without in depth interviewing and evidence gathering likely to take many weeks or more. Moreover, with individual assessments it would have been very difficult to respond to all claims and it would reasonably be anticipated that all children in the camp would make claims of vulnerability in relation to broader criteria. Age and nationality could, however, be established reasonably quickly and would be transparent. There would have been some 1,860 cases to look at.

92. Second, this ground is not so much about the selection of Sudan and Syria as about the justification for the exclusion of Afghanistan. I turn then to consider the rationality of the SSHD's policy based on the statistical material.

93. The more general rationality issues related to the selection of nationalities by reference to adult asylum grant rates. I accept the contention that a reasonable sample size was required, and that that required the use of adult and dependant grant rates. This was so especially given the pressure of time and other constraints with which the policy had to cope, not least the limits of the specified number and the three countries from whom it was hoped to transfer children in need, who could not receive comparative individualised assessments, nor be chosen by their fortune in having a solicitor to advance their cause. I see nothing to suggest that the UK should not have used UK grant rate data because it was concerned to identify those nationalities most likely to be granted asylum in the UK. It was also focused on asylum grants, and not on some other form of leave to remain as a UASC, because the latter includes cases where problems of return arise because of family circumstances or because reception facilities were at best uncertain, rather than meriting a grant of asylum.

94. Mr Manknell objected to the arguments put forward in paragraphs 30 to 39 of Ms Naik's Skeleton Argument in respect of nationality statistics because they were not in the RADGC, and the SSHD had had not time to consider them. Paragraphs 34-36 concern Eritrea, which I had already excluded. The others were in a "wait and see" category. I am not prepared to deal with the statistical based arguments in paragraphs 30-33 and 37-39 of the NSA further than I do now.

95. The overall appeal figures illustrate the problems created by the NSA. There was no evidence that appeals were allowed disproportionately in favour of Afghans with the effect that the overall percentages, if FTT appeals were brought in, would vary. Nor was it clear that the appeal figures were confined to FTT appeals, whereas UT appeals could be allowed with no change in ultimate outcome.

96. Ms Naik's use of figures, for the grant to UASC from various countries of some form of leave to remain, in order to show that Afghan minors should have been included among those likely to receive grants of asylum, seemed to me flawed at the outset. The overall asylum grant rates for Afghans in various categories varied between 17% and 27% excluding UASCs, with UASC's on 17%. By comparison, Syrian applicants excluding UASC's varied between 81% and 85%, with UASC's on 61%; Sudanese applicants excluding UASC's varied between 81% and 85%, with UASC's on 89%. The FTDA survey estimated that there were between 410 and 430 children of Syrian or Sudanese nationality in the Calais camp, and principally Sudanese.

97. I see no reason on the material before me to reject Mr Cook's point from his first witness statement in *Help Refugees* that, taking grant rates from UASC or from accompanied children under 18, would not have increased the number of qualifying countries above the 75% threshold, taken with the 200 application sample size. Even taking the case which Ms Naik sought to make from Mr Cook's Exhibit 43, for Syrian UASC the grant rate was 61%; the grant rate for UASC from Sudan was 89%. The grant rate for Afghan UASC was 17% from 806 applications. If those from Afghanistan who were granted leave to remain, and in consequence did not make or pursue asylum claims, which might have succeeded, there was no basis upon which the figure would increase from 17% to 75%. It would be an almost impossible task to decide what was potential success. The potential for distortion to take account of leave given UASC because they were not returnable without proper reception facilities, supports instead the use of an overall grant rate.

98. I disagree with Ms Naik's analysis of the Upper Tribunal decision in *AA(Unattended Children) Afghanistan CG* [2012]. It did not hold that most Afghan minors obtain a grant of asylum; it was dealing with international protection and the role of the family. But even then, not all children would qualify for international protection. It did not follow from either that decision or the statistics presented, that ZS had a prima facie case for asylum. To reach a conclusion that he should be transferred on that basis would involve an individual assessment by the Secretary of State of the merits of all potential transferees' asylum claims. That was not workable as Mr Cook had pointed out.

99. Ms Naik's submissions on the effect of the two Court of Appeal decisions over the summer took uninvited opportunity to raise two further issues. First, she referred to a new form of leave introduced into the Immigration Rules as paragraph 352 ZH, by Statement of Changes HC 1154. This was accompanied by a policy statement. The new form of leave is known as "Section 67 of the Immigration Act 2016 leave". A child, who has been transferred to the UK under s67 but who then does not qualify for asylum or humanitarian protection, will receive five years limited leave to remain, which will provide a route to settlement.

100. The policy statement referred to the obligation in s67 to "relocate and support" the specified number of UASC as the rationale for granting this bespoke form of leave, over others who arrive in the UK by other means, e.g. clandestinely, and who are found not to qualify for asylum or humanitarian protection.

101. This led Ms Naik to submit that the Calais Guidance of November 2016 could not have been lawfully restricted to children likely to receive asylum status, because it was now accepted that Parliament did not intend to exclude such children. The nationality criterion was therefore unlawful as it was based on relative prospects of success in an asylum claim. There should also have been greater flexibility in their vulnerability criteria.

102. Ms Naik has no permission to argue this point, whether it is an adjunct to another ground or not. The further submissions were to deal with the Court of Appeal decisions. It is based anyway on a complete misunderstanding of the Rule change. It is obvious that, whilst the nationality criterion was aimed at those with relatively high prospect of success in an asylum claim, some transferred UASC would fail for a variety of reasons. The SSHD then faced the issue of what to do with those in that "failed" cohort. Her answer was this Rule change. It says nothing to diminish the importance of the nationality criterion or purpose of the Act. It is also a surprising contention, given that s67 is about "refugee" children.

103. Accordingly, I am satisfied that there is no sound basis for quashing the Calais guidance or the decision in relation to ZS on the basis of the nationality criterion or its derivation.

Ground 2: the vulnerability criterion

104. I granted permission to argue that the sole vulnerability criterion, being at a high risk of sexual exploitation was too narrowly drawn to be lawful for the purposes of s67,

and vulnerability caused by mental or other health problems should also have been included. Related to this was a challenge to this criterion on the grounds that it was unlawful to require that an individual had to be referred to the SSHD by the French authorities as vulnerable in that way was unlawful. This unlawfully delegated a decision to them which it was for the SSHD to take, who had further unlawfully fettered her discretion whether under s67, contrary to its purpose, or her residual discretion. I deal further with the residual discretion when dealing with the challenge to the decision of 3 March 2017.

105. I need to set out the background to this criterion and the referral route a little further. Mr Cook's evidence for the *Help Refugee* case provided the evidential justification for its selection. Ms Farman's second witness statement identified the reliance of the Home Office on the French authorities to make referrals and the sense of their doing so.

106. The 20 October 2016 Home Office paper seeking ministerial authorisation for discrimination on the grounds of nationality to UASC from Syria and Sudan, estimated that there was a pool of around 460 potentially eligible cases in the Calais camp which would lead, after some attrition, to the number transferred being between 250 and 350, with some potential overlap with Dublin III cases. The letter from the Home Secretary to the French Minister of the Interior dated 2 October 2016 and a further letter dated 14 October 2016 highlighted the practical difficulties of the relationship between the French and British authorities over the Calais camp. Documents relating to the 20 0ctober 2016 ministerial authorisation referred to how best to facilitate the transfer of those at risk of sexual exploitation. In order to maintain control over numbers and avoid having to undertake casework in over a thousand potential s67 cases, the Home Office proposed to set tight criteria and to make it a condition only to accept those referred by the French authorities or an organisation working for them. A high risk of sexual exploitation would be required. The Home Office would also accept cases already identified by France as meeting this criteria and would not conduct their own additional assessment or accept one made by a third party. They would accept referrals from those working for the French authorities.

107. A Home Office paper dated 8 November 2016, supporting a new ministerial authorisation permitting continuing discrimination on the grounds of nationality, and age discrimination within those nationalities, now estimated that there were 550 non-Dublin UASC cases in CAOMIs in France, who would meet the original criteria. The number of Syrian and Sudanese below the age of 16, and the number of children of all nationalities aged 12 or below, together with maintaining the criterion of being at high risk of sexual exploitation, meant that there was not enough room for all children, because there were also 230 seventeen year olds.

108. It continued by recommending continued discrimination in favour of Syrian and Sudanese nationals but only where such children were aged 15 or under, of which it estimated there were around 30 between the ages of 13 and 15. It estimated there were a further 190 non-family cases made up of 60 who were 12 or under, and 100 who were at high risk of sexual exploitation. 116 non-family cases had already been transferred to the UK. In total this would mean that around 300 children had been transferred to the UK from France leaving some flexibility for additional transfers

from Greece or Italy, or for more from France if the number meeting the criteria was higher than anticipated.

109. The rationale for requiring referral by the French authorities was explained by Mr Cook in his first witness statement in *Help Refugees*. This was based on the need to understand the nature of the vulnerable groups present in the Calais camp before clearance. This category of vulnerability had been discussed with FTDA and La Vie Active in September and then with the French authorities. It would allow cases that the French authorities had already identified as being at a high risk of sexual exploitation to be included without requiring the UK to conduct individual assessments, and to refer cases which they considered met the criterion but who had not previously been brought to the attention of Home Office officials. UNHCR had a list of around 70 children referred on this basis and a further 190 names were provided on 28 October who could be eligible under this criterion. It was also a criterion more readily definable then other criteria being suggested for vulnerability. In Mr Cook's first witness statement for the ZS case, he accepted that the initial planning about the number of children was based on an estimate of the number of girls resident in the Jules Ferry Centre. However, the requirement that the French authorities only should refer the children, had the advantage of providing a consistent basis for referral and enabled the French to maintain oversight of children being referred at all points in the process before and during referral, and while the transfer was being arranged and for any children remaining in France. However, the Home Office ensured that the criterion in application was gender neutral and any individual referred by the French authorities was to be accepted subject to security and best interests, whatever their gender. This enabled children outside the Jules Ferry Centre identified as at a high risk of sexual exploitation to be referred by the French authorities or other organisations working on their behalf, such as UNHCR. Home Office caseworkers could not make individual assessments of relative vulnerability and prioritise them. Referral by the French authorities or an organisation working on behalf of them was a necessary mechanism for this particularly vulnerable cohort of children without exceeding local authority capacity.

110. Ms Farman explained in her first witness statement dated 30 October 2017 in ZS, that the Home Office was reliant on the French authorities to make referrals that usually originated from UNHCR or FTDA, a Government partner NGO. Other NGOs would make referrals to UNHCR or FTDA. If, as happened, Home Office officials received separate lists of children from independent NGOs such as RYS, these referrals were not accepted and those providing them were usually advised that the lists should be conveyed to the FTDA or UNHCR for them to liaise with the French Government. Ms Farman understood this process was generally followed. She produced an email of 1 November 2016 to RYS telling them of the referral process.

111. There were many strands to Ms Naik's submissions. First, I accept her contention that broader categories of vulnerability could have been used; they were widened in March 2017, after all. But I do not accept that makes it unlawful for there to be no mental health criterion or other more general vulnerability criteria. All children residing in Calais could be considered to be vulnerable in some way or other, and a way to determine the most vulnerable had to be devised. The criterion selected served the purposes of s67, even if broader criteria might also serve them.

112. Second, Ms Naik submitted that there was no formal limit to the number of children from the Calais camp who could be brought in under the s67. That again is correct. However, the October and November 2016 Home Office papers do not show that there was then thought to be spare capacity. There were to be clear capacity limits and the estimates, which the SSHD had, justified tight criteria. I am satisfied that there was nothing unlawful in the vulnerability criterion in the Calais guidance, whether judged by rationality or the purpose of s67. These circumstances in which the duty in s67 had to be performed rationally required clear criteria, which were relatively straightforward to apply, and would target the more vulnerable, and the most likely to succeed in an asylum claim, and in the context of the specified number. They had to be applied over quite a short period, in a foreign country which properly wished to retain control of those, and to make decisions in respect of those, for whom it was responsible. The criterion was rationally selected to enable clear and open decision-making to be undertaken relatively speedily. The SSHD knew of a significant number of UASC who had already been identified by the French authorities as at a high risk of sexual exploitation, who could be swiftly transferred. It is obvious too that such children are at risk of mental and physical health problems in consequence of their sexual exploitation. The SSHD did not have the resources in France or the time, in view of the clearance of the camp and the time limit imposed by France, to carry out full investigations into the personal circumstances, and the mental and physical health, of all the children who could come within the very general language of s67, and be in some way vulnerable, let alone the resources then to create a list, prioritised by some formula of prospects of success in an asylum claim, age, and needs. The SSHD was also entitled to allocate spaces within the specified number, to Greece and Italy, as well as to France, in view of the large UASC problem which they too faced.

113. Third, I reject Ms Naik's submission that the change in March 2017 to the criterion showed that in order for the November Calais Guidance to be lawful, (though devised for use in the particular circumstances then existing), it had to be in the form adopted in March 2017, when the immediate crisis of the camp closure and its dispersal aftermath had passed. The criterion was widened, but the referral route was kept. ZS would still not have been transferred without a referral by the French authorities, giving their judgment in effect as to the significance of his vulnerabilities. Wider criteria could have required also a view to be taken, not one obviously going to be favourable to ZS, about the likelihood of his being granted refugee status in the UK.

114. Fourth, I reject Ms Naik's submission that the requirement for referral from the French authorities was itself unlawful, was irrational or contrary to the purpose of s67 or a fetter on the SSHD's discretion. Ms Naik submitted that the evidence showed that ZS now fell within the category of being at a high risk of sexual exploitation; he should have been transferred; the referral requirement prevented it, and so was so unduly restrictive that it was unlawful. Ms Moynihan's evidence was that he was at risk, but no effective action was taken; a wider range of referrals, including a direct referral from ZS or UK NGOs should have sufficed.

115. The question is not whether the procedure was capable of identifying all those at risk, but whether the requirement for a referral by the French authorities was rational. The fact that ZS makes this contention supported by the evidence placed before this court and before the SSHD does not require this court to reach a view about this. The SSHD is not in a position to reach a view about the comparative merits of ZS, as someone

who may have experienced sexual exploitation, or have other vulnerabilities for that matter, and others. Others may be significantly worse placed than he is. To my mind, ZS' circumstances do not show that the referral route is irrational or otherwise unlawful; they confirm the wisdom of it. Nor do they begin to show that the referral route is not working. The issue here however is not whether ZS would reasonably have been regarded as such a person, or would reasonably have been rejected as such a person. The issue is whether the process was lawful and, in my judgment, its lawfulness is not to be judged by the possible outcomes of such an assessment by the SSHD.

116. On the basis of the Claimant's submissions, Mr Manknell submitted that the SSHD would have to assess each individual child based on the merits of representations by UK lawyers and NGOs. Over 1800 children had been dispersed around France in a short timeframe and UK officials could only act in the manner they were permitted to by the French authorities who had legal responsibility for the children. The rationale behind the adopted criteria, as a whole, was that they enabled relatively quick decision-making on a basis which did not involve a great deal of investigation by the UK authorities in the time available and in the circumstances prevailing. The referral route was integral to the selection of this criterion itself. The French authorities were already aware of children in the Calais camp, boys and girls, who were at such a risk. Whether all UASC would have had to be assessed in relation to this particular criterion may be unclear, but in the application of this particular criterion, the French authorities had had the opportunity to identify the UASC at risk, and to judge their comparative vulnerability so as to know whom best to refer. The UK authorities lacked the resources and time in France to undertake any such evaluation of the individuals who might put forward such a claim, or indeed be unable to put forward such a claim to the UK authorities without the adventitious interventions of NGOs and solicitors. So the referral process was both quicker and more likely to be reliable for the purpose of satisfying the criterion. The reasons given for the referral process are compelling. If not the only rational way to proceed with giving effect to such a vulnerability criterion, it was certainly not irrational, and undoubtedly enabled effect to be given to the duty in s67.

117. I cannot accept Ms Naik's description of this process as a delegation to the French authorities of decision-making which the Immigration Act 2016 imposed on the SSHD, which Ms Naik submitted would be unlawful. The SSHD retained control over the decision-making process, and of numerous components within it. It is difficult to see how any vulnerability criterion could operate without an evaluation, on a comparative basis, of the individual UASC. Parliament cannot have supposed that the operation of s67, inevitably outside the UK, would not have involved the co-operation of the state authorities, in ways large and small, to achieve its purpose. I cannot see that, if a sensible criterion requires a judgment by those responsible for the children, followed by a referral which leads to a decision on transfer by the SSHD, a delegation of decision-making to the French authorities has taken place, nor that it is unlawful to the extent that it has.

118. There was, in my judgment, no more of a fettering of the discretion under s67 through the referral route requirement, than through any other aspect of the policy, including the limitation of the vulnerability criterion to those at high risk of sexual exploitation.

Ms Naik is wrong, in my judgment, to describe her point as one of an unlawful fetter on the SSHD's discretion.

119. I do not accept Mr Manknell's submission that the SSHD decided that she would not exercise her discretion in those circumstances. I see no evidence to that effect, and indeed Ms Farman's discussion of the 3 March decision would suggest otherwise. There is no direct or explicit evidence about what the SSHD actually thought about any discretion under s67. That is because Ms Naik left the point to her Skeleton Argument submitted 11 days before the hearing, and then opposed the SSHD's application for an adjournment to deal with the new issues and evidence she raised. Ms Naik raised this point in [40-45] of her Skeleton Argument. Mr Manknell objected to her raising it, as it was not in her RADGC. I consider I have enough material to deal with it.

120. Mr Manknell referred me to what Kenneth Parker QC, sitting as a Deputy High Court Judge, said in *R(Nicholds) v Security Industry Authority* [2006] EWHC 1792 Admin, [2007] 1WLR 2007 at [61] to the effect that it was not always an unlawful fetter on a discretion for circumstances to mean that exceptions will not be considered. I respect that judgment, but I am unwilling to apply it here. There is no doubt but that the SSHD retained a discretion under s3 Immigration Act 1981 to admit someone who did not come within the scope of the policy. I can see no sound basis for saying that the terms of the Calais Guidance deprived the SSHD of her discretion under s67.

121. I do not accept either Mr Manknell's submission that the effect of the Calais Guidance was to remove any remaining discretion under s67, leaving only the residual discretion under s3. He relied on *R(Sayaniya) v Upper Tribunal* [2016] EWCA Civ 85 2016 4 WLR 58, in which the Court of Appeal considered the extent to which the Immigration Rules, if expressed in mandatory terms, fell foul of the non-fettering principle. It concluded that they did not; quite apart from their special status, the SSHD had a discretion outside the Rules which she could exercise in favour of those who did not qualify under them; see [36 – 41] in the judgment of Beatson LJ, in which Arden and Christopher Clarke LJJ concurred. S3 of the Immigration Act Rules recognised the residual discretion which would be exercised in respect of those who fell outside the Immigration Rules. The same in my judgment would apply to those who fell outside the policies for s67. And the s67 criteria, expressed as they were, do not have express statutory authority in quite the way the Immigration Rules have.

122. This does seem to me, though, something of an idle distinction here, because I cannot see a case succeeding under the one residual discretion, but failing under the other. The purpose of the Calais Guidance was to have a set of transparent, readily applicable criteria to deal with the particular circumstances arising from the clearance of the Calais camp. The residual s67 discretion is not conceptually broader than the residual s3 discretion. So far as ZS himself is concerned, the discretion under those provisions was considered in the 3 March 2017 decision. The exceptional basis, such as it was, upon which ZS sought the exercise of either residual discretion, was deployed in the representations made by Duncan Lewis for the purposes of that decision.

123. The true issue is over the extent to which the SSHD was bound to consider the exercise of her discretion in reaching a decision about a potential transferee under s67. Ms Naik submitted that although ZS could now be considered under the new DPG,

the evidence of his vulnerabilities showed that the SSHD should have been more flexible in her criterion in late 2016. At least, ZS ought to have been notified of the opportunity to make representations or of the availability of a residual discretion, once the SSHD had been notified, by the letters of 1 and 2 November 2017 from Duncan Lewis, that ZS was at a high risk sexual exploitation. The SSHD had however not recognised any flexibility in how the policy was to be implemented.

124. In my judgment, the SSHD was not obliged to consider the exercise of a discretion to make an exception outside the policy-based criteria in every instance. She was entitled to say that, in these particular circumstances, a person who fell outside the criteria would be ineligible for transfer. She was not obliged to identify the existence of a route whereby entry on an exceptional basis could be considered, or to invite representations about possible exceptional bases for entry. She was entitled to recognise the reasons for the tight criteria in the first place, the constraints upon her assessment and comparison of individuals, the numbers who could be assessed, and the way in which a detailed examination of personal circumstances, including any vulnerability which might be prayed in aid as an exception, would undermine the purpose of the criteria and indeed of s67. I accept Mr Manknell's submissions about the implications of Ms Naik's contentions on the operation of s67. When the case for an exception was placed before the SSHD, she considered it in her 3 March 2017 decision. She is entitled to adopt the approach that an exceptional case argument was not an open-ended invitation for an argument that the criteria were too narrow, but rather that the exception had to be truly exceptional, such as compelling humanitarian reasons, and had to be specifically raised with her.

125. I also consider that any other approach, allied to a requirement for written reasons so that a decision could be judicially reviewed, would have opened up an avenue for entry to the United Kingdom not sanctioned by Parliament, or Immigration Rules, and rather broader than the operation of the residual s3 discretion. ZS' case would have required an exception of a very broad and general nature and indeed, on Ms Naik's case, all those being considered for the purposes of s67, should have been invited to make representations along those lines, at least for parity with ZS. It is difficult to see what role the policy and criteria could usefully continue to play. This is not in reality a case about an exception to criteria, but about the lawfulness of the criteria themselves, which it is said, in substance, should be redrafted to permit ZS to be transferred.

126. The process, submitted Ms Naik, had been subject to delay which the SSHD could have avoided by keeping separate the processes for transferring UASC under Dublin III and under s67, and dealing rapidly with the latter. The involvement of Greece and Italy delayed matters and almost none had come from there either. This submission, in my judgment, does not bear upon the lawfulness of the criterion, nor upon the justification for the referral route. Nor does it warrant an exception being made to either criterion or route for ZS.

127. Finally, Ms Naik submitted that the sexual exploitation criterion together with the referral requirement had discriminated against boys; I did not give permission for this point to be argued. I touch upon it briefly here. Ms Naik criticised the absence of statistics specific to the high risk of sexual exploitation criteria, dividing the numbers into boys and girls, which should have informed the exercise of the SSHD's discretion. Ms Farman explained, in her witness statement of 30 October 2017, that

there was no restriction to girls alone being referred on the basis of a high risk of sexual exploitation. Males were referred under this category by the French and were transferred either under s67 or the accelerated process under Dublin III. Both UK and French officials were acutely aware that children at a high risk of sexual exploitation included boys. She had not seen any institutionalised discrimination by the French authorities in this respect. This was not an issue which seemed to me to have sufficient in it to warrant delay for what could be a large quantity of evidence. I accept the evidence of Ms Farman as to referrals in respect of both boys and girls. Boys were not treated as invulnerable to a high risk of sexual exploitation.

128. I do not accept the suggestion that Ms Moynihan's evidence shows that the referral process did not work. Ms Farman advised her as to the referral process. Ms Moynihan's evidence does not say that she referred ZS to the French authorities for onward referral under the Calais guidance, as opposed to seeking more general assistance. Nor on the evidence about his circumstances, does the fact that he was not referred to the UK authorities, show that the referral process did not work for someone at a high risk of sexual exploitation.

129. I reject the challenge based on ground 2.

Ground 3: The decision of 3 March 2017

130. Ms Naik submitted that the residual discretion under s3 of the Immigration Act had not been exercised lawfully. The SSHD had to acknowledge the existence of a discretion, and the scope for an exception for the policy itself to be lawful. S3 came into play outside s67 especially if there were a lack of discretion within s67 in relation to vulnerable children because eligibility for transfer on that basis was limited to those referred under the referral route. Ms Farman, in her witness statement elaborating the 3 March decision, had not identified whether the SSHD was exercising a discretion in the March decision under s67 or s3. This was important for the lawfulness of the exercise of the discretion. No reasons were given for the refusal to exercise the residual discretion beyond that ZS did not meet the criteria established under s67, which did not involve consideration of any discretion at all. ZS fitted the high risk of sexual exploitation criterion apart from the referral and that, rather than having to show some very exceptional case, that was the basis upon which the residual discretion should be exercised. There were still a large number of spaces not taken up as at March 2017.

131. Ms Naik also relied on the letter 14 November 2016 from SSHD to Bhatt Murphy. But I am satisfied that her comment there, that there was no application process under s67 and that the SSHD enjoyed a wide discretion under that provision, was not directed at a discretion which fell outside the scope of the policy but at the discretion in setting policy and criteria.

132. Mr Manknell, rightly, submitted that ZS had no entitlement under the Immigration Rules to a further decision, beyond that under s67. I accept that there was no need for the SSHD routinely to consider exercising her residual discretion in the s3 Immigration Act, or indeed under s67. The SSHD would otherwise be obliged to provide written responses to anybody writing to her with evidence saying that they wished to come to the United Kingdom and any response would be judicially reviewable or appealable. Nonetheless, the letter said that ZS' position under s67 had,

exceptionally, been reconsidered. Mr Cook had volunteered to provide a written response, but had not been obliged to do so, and this was acknowledged, I agree, in Holman J's judgment.

133. ZS gained no right to enter the UK of the sort considered in *Help Refugees* by the Court of Appeal at paragraphs 71-76, which appears to be a right based on a substantive legitimate expectation that an eligible child has a "reasonable expectation", and therefore a right to be transferred, subject to satisfying the other requirements.

134. I reject Ms Naik's contention that no reasons were given for the SSHD refusing to exercise her residual discretion. The major point in the letter of course is that ZS met none of the s67 criteria, itself an exceptional route for admission to the UK, and had never made any application for leave to enter under an established route. (None were open to him). ZS was clearly told that he did not meet the Calais criteria which were set out in the letter; he could see that he met none, as he had known since before these proceedings were commenced. The proceedings acknowledge he did not meet the criteria, which is why they took issue with the criteria including the referral route.

135. The letter was therefore establishing the nature of the exception required. The SSHD was entitled to point to the importance of the criteria, none of which were met. I accept Mr Manknell's submission that the combination of the specified number cap, the need for urgent action before, during and immediately after the clearance of the Calais camp, the estimates of the numbers of children, their prospects of making an asylum claim successfully and the need to operate with the co-operation of French authorities dictated that the criteria be treated as clear rules, and new or altered criteria should not be imposed on the SSHD under the guise of asking her to consider residual discretionary exceptions.

136. The fourth last paragraph, commencing "Rather", addresses briefly, the evidence in relation to ZS' mental and physical condition. Ms Farman's evidence makes it clear that the SSHD did consider all the voluminous evidence, contrary to Ms Naik's suggestion that the evidence had not been considered at all. She shows in that evidence that the shortly expressed conclusion in the fourth last paragraph of the letter meant that there was nothing sufficiently exceptional about ZS.

137. The SSHD considered the exercise of her discretion, in the light of all the material Duncan Lewis placed before her. Her conclusion that it did not amount to the nature or degree of exceptional circumstances which justified the making of an exception is plainly lawful.

138. I read its comment about many more children wishing to be transferred under s67 than could be transferred, as reflecting the fact that were he to be treated as an exception, he would be part of a very wide and numerous category of exceptions; and that there was nothing so exceptional as to warrant his being treated as an exception. The purpose behind s67, and the Calais Guidance, was to consider quickly and in a practical manner those most likely to succeed in an asylum claim, and those most vulnerable without elaborate individual consideration by the UK. This would be wholly undermined by so broad an exception as would be required for ZS to be eligible for transfer. The material provided by Duncan Lewis to urge a reconsideration and the further material provided on 19 February 2017, all served to demonstrate the

reality of the problems which would be created by wider criteria where judgments were left to the SSHD, or by the routine consideration of "applications" for exceptional consideration under s67 or s3. Indeed, as I have said, there was a risk of the creation of a new route of entry by those who sought informal consideration of exceptional "applications", and the more so were they to be accompanied by the procedural safeguards asserted, with written, reasoned, albeit shortly, judicially reviewable decisions. In my judgment, there was clearly nothing in Ms Freeman's report which demonstrated a lack of personal care, food, medical attention or people around with similar experiences, with some of whom he can socialise. It demonstrated that he wanted to come to the UK, and was prepared to undergo considerable risks to enter it illegally, if he were not permitted to enter it legally. Plainly there was nothing in Dr Byrne's analysis to demonstrate that ZS was in some exceptional category, which could be transferred, without in reality creating new and wide criteria.

139. The residual discretion was retained, but was still legitimately informed to a high degree by the nature and purpose of the criteria, and the implications of an exception being made on such a very broad basis as would be required for ZS to be transferred. This very broad basis would be a new criterion defined around ZS, sufficiently broad for him to be a potential beneficiary, but of inevitably wider application imposing a considerable prioritisation task on the SSHD.

140. It does not matter whether this was considered under s67 or outside s67. The SSHD was entitled to conclude that she saw no basis for treating him as an exception under either provision. The answer would be the same whichever provision he was considered under, although as I read it, he would be counted as a s67 transfer because of the way he would take up the capacity ascertained under s67 as available for those who did not come under recognised routes.

141. The letter pointed out that there would be changes to the criteria not yet published. The SSHD, in my judgment, was not legally obliged to wait to consider him under the new Guidance of 10 March 2017. He might or might not have met the enlarged vulnerability criteria, but they all required the agreement of France to a process for identifying them, which was not in place, it and it turned out, would not be in place for some time. When it was in place, it contained a referral mechanism which he never met, and still has not. The answer to the exercise of any discretion would still have been that there was nothing so exceptional as to admit someone relying on vulnerabilities who was not referred by the French authorities.

142. The position was explained to Duncan Lewis on 15 June 2017 when they were told of the new criteria and that arrangements for giving effect to the referral process were awaited. It was not for the Home Office system to permit ZS, because he was represented, to have his case prioritised above others by advance notice. The UK never exercised any evaluative judgment in relation to the criterion based on a high risk of sexual exploitation. If ZS were to be transferred without referral or his case to be considered without referral, it would prioritise him only because he happened to be represented by English solicitors and Hummingbird and their schedule of 36 names. If there were a failure to act sufficiently swiftly in relation to the transfer of the specified number of children, the lawfulness of the way in which the Secretary of State was implementing her duty under s67 could be challenged. But that did not mean that, in any hiatus, she had to take children from other sources or routes. If ZS were transferred, and there were an obligation to act consistently in relation to others,

the route would be open to all who claimed in a similar fashion. Moreover, the post-March 2017 policy conferred no expectation for ZS' transfer. It was not shown that he met the criteria "except for the referral route" because a case of a similar sort could probably be made for any UASC. Referral was vital. By its nature, s67 would lead to some prioritisation process which would advantage some and not others.

143. Ms Naik suggested that some had been transferred without a referral; but the evidence, as I see it, did not relate to those in a category for which a referral was required. "Compelling humanitarian reasons" is not the same, and they may have been exceptional cases. I agree with Mr Manknell that the real thrust of Ms Naik's submissions was that the criteria in the Calais Guidance were too narrow and should have included broader categories of vulnerability, and eliminated the referral route for those said to be at a high risk of sexual exploitation, contentions I have already dealt with under grounds 1 and 2.

144. Ms Nedelec, a caseworker at Duncan Lewis, provided an update as at 10 October 2018 of ZS' situation. She had spoken to him over the telephone on 6 September 2018. This was an uninvited submission, which had nothing to do with the issue on which ZS had sought permission to make further representations. But it showed nothing of significance anyway. ZS had been in state accommodation in Toulouse since February 2018 where he received the support of two social workers, who were Special Educational Teachers. So far as I can tell he has not applied for asylum in France. He said the delay was painful: if no decision came soon, he would kill himself or try to come to England illegally. He spends hours in bed "excluded" from his group. His mood and sleep disorder had deteriorated; he saw a psychiatrist regularly. His mood varied between euphoric and extreme lows. After a recent "animated" discussion with one of his friends, he started hitting everything in his room and was hospitalised for a couple of hours. This rather confirms that he is safe from exploitation and that he is being cared for properly in France where he could claim asylum.

145. Ms Ufferte would now have been aware of the referral route for some time. The evidential update from Ms Nedelec makes no reference to any action by her. His merits appear not to have commended themselves sufficiently to the French authorities for them to make a referral. The persistent description of ZS as "vulnerable" does not create any entitlement or expectation that he should be allowed to enter the UK or to do so because he threatens to repeat his attempt to do so illegally. He cannot be seen as different from many a UASC in Europe, and the implications of a discretionary exception being made in his case would be such as completely to undermine a criteria-based policy for the implementation of s67.

146. I reject the challenge based on ground 3.

Ground 4: Procedural challenges

147. I have set out the five bases for the procedural challenges. The ground changed to a degree with the two Court of Appeal decisions over the summer: it was unfair for the reasons for the refusal of transfer not to be provided, or not to be provided beyond a statement that the criteria were not met.

148. Ms Naik criticised the interview process because she said it failed to elicit evidence of particular needs ZS had as set out in the November 2016 correspondence. The presence of Duncan Lewis or someone from the Hummingbird Project would have enabled these points to be drawn to the interviewer's attention. Such a person would also have been able to act as an appropriate adult. Ms Naik submitted that in the absence of such an appropriate adult, the child could not reasonably understand the process. No notice was given to ZS' solicitors, and so they could not advise him on what he needed to say at the interview or on review or produce a letter or deal with the problems with referral. The English social worker engaged by the Home Office for these purposes would not necessarily know, for example, of ZS's vulnerability; the Home Office should have liaised with the French to provide social workers or NGO support for ZS and indeed others. This process was just as significant as an asylum claim because of the outcome for the child. The SSHD needed to acquaint herself with whether someone was particularly vulnerable. The situation was not so urgent that a system could not have been devised with such procedural safeguards.

149. Duncan Lewis had had to obtain the relevant form afterwards, including the interview record which ZS had, but it was not clear that it was complete. No written notice was given of the decision to the child. Oral delivery of the decision "left them at sea". ZS had no written reasons until 5 January 2017. He was rejected under both Dublin III and s67.

150. Ms Farman said that it would have been impossible in the circumstances and time frame in which the interview operation occurred for the SSHD to have ensured that legal representatives were present at the interviews. It would have taken time to establish whether they had a representative and then to arrange interviews so that those representatives could attend. It was difficult enough for the visits to be carried out, but warnings of the dates were would be difficult as well because they were not set far in advance.

151. I now deal with the individual procedural issues. First, the presence of an appropriate adult at the interview. It is clear in fact that an appropriate adult was present at the interview in the CAOMI. This was a qualified English social worker from Kent County Council. It is not suggested this person could not perform that role assisted by an interpreter. This social worker would have been able to intervene if there were distress, confusion, apparent cross-purposes or lack of understanding or hostility. There is no evidence that anything untoward happened at ZS' interview. No French social worker from the CAOMI was present, but could have been contacted if necessary.

152. I reject the suggestion that one of the social workers, perhaps from the Hummingbird Project, who had met ZS at the Calais camp or who had been instructed to carry out a "best interests" assessment should have been present, or even that a legal representative from Duncan Lewis should have been notified and present. I see no reason for concluding that the process was unfair in the absence of his "own" social worker or a lawyer. Neither were necessary for the role of the appropriate adult at such an interview properly to be undertaken. The delay to the interview and decision-making process of obtaining their attendance is illustrated by the sort of difficulties which Duncan Lewis refer to in obtaining a time when even some of ZS' "team" could manage to meet ZS in the CAOMI. The first purpose of the interview was to ascertain eligibility for transfer under s67, and eligibility under Dublin III. Very

limited information was required, none of it here was contentious for either purpose. ZS met none of the criteria for transfer under either, and never suggested that he did. It was not a broader analysis of vulnerability or a health assessment to be carried out by the interviewer. The manner in which the best interests determination was carried out is irrelevant. It was unnecessary, and whatever its outcome, it would not have made him eligible for transfer. Nor, in fact, as I understand it, was it concluded that, if eligible, it would not have been in his best interests for him to be transferred.

153. The nature and level of information which Ms Naik submits should have been obtained could only go to the admission of ZS, or his transfer, on some basis other than Dublin III or s67. I do not regard as remotely sound Ms Naik's contention that a fair process in the CAOMI required the SSHD to enable someone whose entry was only being considered for s67 purposes or under an accelerated Dublin III process, to put forward all the arguments he might have for entry outside those purposes as an exception to those routes, whether under s67 or the residual discretion. There was no need for the interview process to enable an exception to be explored if a claim were made of vulnerability outside the criteria. In my judgment, no common law duty of fairness required such a process. What fairness requires will vary from circumstance to circumstance. Here, the dominating circumstance was the need for an interview to ascertain swiftly and in an orderly process, across over 1800 UASC dispersed into CAOMIs in France, with limited time available for the whole process, whether an individual child was eligible for transfer under s67, through the application of criteria, designed for clarity, and simplicity in operation. If an individual sought the exercise of the SSHD's residual discretionary powers, whether under s67 or under s3, it is perfectly fair for the individual to have to do so outside the operation of this process, rather than as an adjunct to it, as ZS did here. ZS' case for an exceptional entry was considered and lawfully rejected.

154. The suggestion (which ZS had no permission to argue) that he had to be given an opportunity to make representations to deal with adverse points has no relevance here. ZS was not found ineligible on disputed grounds which were resolved against him; and I am not of the view that in this process any such further procedure was necessary. Here, he did not dispute the facts which went to eligibility. This was all part and parcel of the case that the criteria should have been broader, sufficiently so to encompass ZS, and the judgments about his meeting those other broader criteria would have required a more elaborate procedure. This only confirms the practical sense behind the selection of the criteria for what may be called the Calais camp stage of the implementation of s67.

155. In fact, the letter of 3 March 2017 dealt with all that Duncan Lewis could say, but it too illustrates the way in which the process would have been held up or prolonged if the sort of process which Ms Naik suggested had to take place. It would also have led to an undesirable difference in apparent consideration being given to those who had English legal representation, and the supportive interest of an English NGO, over those who had neither.

156. I have also dealt above with the contention that the SSHD failed to carry out a proper "best interests" determination, because, it is said, she failed to elicit relevant information. Were there any basis for it, it is irrelevant to the actual decision and all was fully considered in the 3 March 2017 decision.

157. Ms Naik drew my attention to *R(AN)(a child) and FA(a child) v SSHD* [2012] EWCA Civ 1636 which, at paragraphs 106 – 108 and 143 – 145 and 184, is very restrictive of the value of or admissibility of answers given by a child at an initial or screening asylum interview in the absence of a responsible adult or legal representative. In the absence of such independent support, there had to be restrictions on the reliance placed on asylum related material provided at such an interview, for example, if later relied on at a substantive asylum interview as showing inconsistencies relevant to credibility. I am not persuaded that *AN and FA* has anything to do with this case. First, what was at stake was not whether he would receive asylum, but in which country he would stay where he could make his asylum application. The scope of the interview and the type of information being elicited was quite different from an initial asylum interview. There were readily identifiable criteria. Indeed, an appropriate adult did not have to be present at all initial asylum or screening interviews. Second, here an appropriate adult was present. Third, with the possible exception, irrelevant in this case, of the way in which the interview records might have been used in the formal consideration of a Dublin III case following the making of an asylum claim, the issue which troubled the Court of Appeal in *AN and FA* did not arise. Although there is no true parallel here between a screening and a substantive asylum interview, the later use of earlier answers could only arise in the context of a formal asylum claim in France and only in relation to the operation of a Dublin III take charge request by the French authorities.

158. Second, the delivery of the decision. There are three aspects to this, first that it was delivered orally and not in writing; second, that there were no reasons given in writing, and third, that Duncan Lewis were not notified of the decision. Those first two issues are affected to varying degrees, and there is an element of overlap, by the decisions of the Court of Appeal in *Citizens UK* as applied in *Help Refugees*. The decision was conveyed by the French staff at the CAOMI, orally and not individually either. Here, no written decision was provided to the potential transferee children, at least not to those who were not to be transferred, which is the focus of this part of the claim. Nor did the oral information go beyond saying that someone was not eligible for transfer because the criteria were not met. How or why any particular criterion was not met was not stated. Indeed, no more may have been conveyed than that the child was not eligible for transfer. I am not sure that *Help Refugees* at [60] in the Court of Appeal holds that the spreadsheet information was necessarily conveyed and there is no specific evidence on that here. A decision was conveyed, for certain.

159. I accept the SSHD justification for leaving her communication of the decision to the CAOMI staff. It was then for the staff to decide how best to manage its communication in the interests of the individuals, so that they remained at the CAOMI rather than absconded perhaps back to Calais, and in the interests of the proper running of the CAOMI, where disappointed teenagers with a range of emotional responses, from depression to anger, needed to be dealt with. I see no complaints about that aspect being justified or sustained in any comment by the Court of Appeal in either case; see *Citizens UK* [76], and there is no suggestion of a disagreement with that in *Help Refugees*. I reject the notion that leaving the communication of the decision to the French authorities was somehow a breach of the common law duty of fairness.

160. In *Help Refugees*, the Court of Appeal, applied *Citizens UK* to the s67 process. I do not see its decision as turning on the fact that the decisions on s67 were also decisions on the accelerated Dublin III procedure. In [132], Hickinbottom LJ pointed out that a refusal based on the reasons "criteria not met" would not tell an individual child which criteria were not met. This provided no real basis upon which a child rejected for transfer could challenge the decision by the only available route, judicial review. This level of reason was insufficient to comply with the common law duty of fairness. The Court rejected the SSHD's contention that greater detail was not practical, without rejecting her contention that detailed written decisions were not practical; [130]. The required level of detail depends therefore on fairness, measured by the ability of the rejected transferee to know the basis of the rejection, so as to challenge it if it were unlawful.

161. Ms Naik accepted that a detailed letter such as was issued by the SSHD in asylum claims was not necessary; what was required was a "brief statement of the grounds on which an applicant had been found to be ineligible (or transfer had been found to be not in their best interests)…." I agree. The alternative to a detailed letter of reasons is not that no reasons at all are provided, but that brief ones are. Here, ZS was rejected because he was over 12, not Syrian or Sudanese, and had not been referred by the French authorities as being at a high risk of sexual exploitation. That, in this case is all that needed to be said for the purposes of s67. All that was needed in relation to Dublin III was that he had no family relatives in the UK, as he said in interview. The Court of Appeal in each case was very much influenced by the fact that the practicality issue had not prevented the SSHD forming and noting a view along the lines I have set out above, but which she had not communicated, to the disquiet of the French authorities, for fear of opening up legal challenges. However, neither Court appears to have been requiring much more, if anything, than a statement of what the SSHD would have inevitably have had to conclude. There was no requirement for reasons to be given about exceptional consideration.

162. There may be cases where age or nationality or date of arrival were disputed, but that was why the child was given the benefit of the doubt. No specific issue arose in ZS's case, which could possibly have called for more elaborate reasoning. Nor was this a case where credibility was at issue in relation to eligibility under the criteria, nor was the interview concerned with "a light touch" consideration of his prospects of a successful asylum claim.

163. Mr Manknell, in his written submissions on the two Court of Appeal decisions, accepted that his earlier submissions on the level of reasons could not be sustained. On 5 January 2017, all the notes sought by way of disclosure had been provided. This provided the totality of the reasoning about the 27 November 2016 decision. ZS was a national of Afghanistan. But he was also over 12 years old and had no referral from the French authorities. I accept Mr Manknell's submission that the procedural unfairness as at 16 December 2016 had been remedied, if not earlier, then by no later than 5 January 2017. The inadequacy of the reasons had no effect on the progress of the litigation save for the post-Court of Appeal decision submissions, which were far more elaborate than necessary.

164. Indeed, the letter before action, attacking the Calais Guidance criteria, acknowledges the age and nationality of ZS, and makes no suggestion of any referral by the French authorities. Duncan Lewis knew well by then, and indeed would have known from

the publication of the criteria, that ZS was not eligible for s67 transfer, and so too would ZS, in order to justify the start of proceedings on the basis they were commenced. By the time proceedings were issued, Duncan Lewis clearly knew that at least three criteria could not have been met, and none of those involved any evaluative or "grey areas". The SSHD emails of 21 December 2016 and of 5 January 2017 made clear that ZS did not meet the eligibility criteria. He had all the necessary reasons as I have concluded they needed to be. These were not "grey" areas where a doubt or dispute about those criteria existed either. And if ZS were still in doubt, after disclosure of the interview records, they and ZS can have been in no doubt after asking for or then receiving the letter of 3 March 2017. They have never sought to challenge the decisions of 16 December 2016 or of 3 March 2017 by reference to the application of the criteria, or on the basis that they did not know which ones ZS failed to meet.

165. Ms Naik, in her reply submissions in response to the two Court of Appeal decisions, accepted that ZS' case was "primarily" a challenge to the Calais Guidance, the criteria and the way that they had been applied to him. That is right. The claim, whether related to the requirement for referral or the claim of vulnerability on a basis wider than the asserted high risk of sexual exploitation, had always been about the criteria themselves. The procedural issues, given that ZS did not meet the criteria on any view, were subsidiary.

166. I should add that I do not accept one theme of Mr Manknell's submissions on this point. It is not right to characterise the claim as accepting the adequacy of what was stated on 16 December, but complaining about the absence of *written* reasons. The challenge was about both elements of "written" and "reasons." It is true that no specific or separate argument from Ms Naik addressed the question of whether the reasons had to be in writing to satisfy the common law duty of fairness. Nor is this an issue dealt with by the Court of Appeal. In my judgment, the reasons should be communicated in writing. ZS was treated as an unrepresented UASC. Such a person may not take in and recall accurately all that they are told, however brief it is. If reasons are necessary for fairness, a more permanent record would be required. This may not have to be simultaneous with their oral delivery.

167. Ms Naik also submitted that the decision should have been conveyed in the child's own language, here Pashtu. If the French staff spoke in French, this would not be surprising. I am prepared to assume that the decision was not conveyed immediately to ZS in Pashtu. But I am not prepared to assume that there were no interpreters, available shortly afterwards to interpret the decision. This however is a new point, raised shortly before the hearing, with inadequate evidence to deal with the language used or the availability of interpreters. I would require specific evidence that there were no interpreters to hand to convey the information to ZS shortly thereafter. After all, there are claims he was distressed by the decision on 16 December 2016, which means he must have found out about it on the date the decision was given.

168. Ms Naik also challenged the procedural fairness of the decision-making because the SSHD had not communicated the decision of 16 December 2016 separately to Duncan Lewis, whether in writing or not. I am not concerned with whether it would have been professionally courteous to do so, or practical to identify those with professional representatives during the decision-making and communication process. I am only concerned with whether it was procedurally unfair not to do so. In my judgment, it

was not. ZS had the decision. In less than a week, ZS through Duncan Lewis, had written confirmation that he had not met the eligibility criteria, as would have been obvious to them after the publication of the Guidance. If there had been unfairness, it was of short duration, corrected and it was of no significance.

169. Ms Naik submits that there was a breach of the duty of candour by the SSHD because of her breach of the duty as found in *Citizens UK*. The evidence in it about giving of reasons for the decisions in the CAOMI, was relied on here. It seems to me the same would apply here, but I see no reason to analyse it further, or to make further findings. It is difficult to see that it has had any real effect on these proceedings or their progress.

170. Ms Naik contended that relief had had to be sought in order to achieve disclosure of reasons and documents, without which she asserted they had been unable to assess the merits of a challenge. If so, albeit that proceedings were commenced on 23 December 2016 disclosure was achieved rapidly as the proceedings before Holman J on 3 February 2017 confirmed, and thereafter the procedural challenge was maintained on many fronts, and, save for a declaration on reasons which has no impact on any aspect of the case, they have all failed. Ms Naik's further submissions contained much about disclosure but I see no basis for complaint after 5 January 2017, or that any relevant documents were still being withheld. I see no need for any further analysis of disclosure in relation to the duty of candour in the light of *Citizens UK*.

171. The procedural unfairness creates no obligation on the SSHD to reconsider her decisions on ZS reached under the Calais Guidance. Her assessments have not been unlawful. There is no basis for quashing either the 16 December 2016 decision or the March 2017 decision. Each would inevitably be the same, if made under the Calais Guidance. The reasons would simply have explained to him that he did not meet the criteria on age, nationality or referral grounds. No quashing of either decision is necessary in order for him to seek a referral to the UK from the French authorities under the March 2017 criteria and the DPG. ZS can be considered if a referral is received under the October 2017 DPG. There is no evidence that all spaces allocated to France have been taken up under that process. The absence of reasons for the period ending no later than 5 January 2017 in the circumstances here, does not give rise to an historic injustice of the sort which amounts to a material consideration on any such further assessment, nor could the absence of reasons in December 2016 rationally alter the refusal in March 2017 to treat him as an exception under whichever sort of residual discretion. He challenged the criteria within a week of receiving the decision, for which purposes he knew what the effect of the application of the criteria to his case had been. Any injustice was very short lived and had no effect whatsoever on him.

172. Mr Cook's Witness Statement in ZS states that all the places up to the limit of the specified number have been filled or allocated to France, Greece and Italy to be taken up by those referred by the authorities. Mr Manknell therefore submits that no more than declaratory relief in relation to reasons would be appropriate on any view. Not all those places allocated for referral from France have as yet been filled, as I understand the evidence and Mr Manknell's submissions of 23 October 2018. However, there is no basis for quashing any of the decisions and the issue about spaces, reconsideration and alleged historical injustice simply does not arise.

173. I am prepared to grant a declaration in relation to the failure to give reasons in the light of the two Court of Appeal decisions, though the unfairness was of short duration, of no practical effect, and was resolved shortly after proceedings were commenced. There should be no more than a declaration that short reasons for the decision had to be given, and it was unfair that they were not given until 5 January 2017, although Duncan Lewis were well aware before 23 December 2016 that ZS failed the eligibility criteria on age, nationality and absence of referral, none of which points were at issue.

Ground 5 Dissemination of the DPG

174. The DPG set out the process for the referral of children by the French authorities. There were two routes by which the DGEF could decide whom to refer: (i) children already within the French child protection system and (ii) children in France, but not within that system. Paragraph 4.3 of the DPG stated the DGEF would identify children eligible under route (i) by liaising with French social services in charge of unaccompanied children. The UNHCR would assist the DGEF with the identification of children under route (ii).

175. Ms Naik said that, contrary to what Ms Farman had said in her second witness statement, the DPG set out no role for judges in making referrals but instead there was a significant role for social workers, who needed therefore to have been told what the referral process was. Other parts of the DPG, which dealt with the determination of the child's best interests and the final permission for the transfer of a child in the French child care system, did involve the judges but only after the initial DFEG referral. There was no reference in the DPG to the judges being the source of referrals in the first place to the DFEG. Therefore, social workers were the, or at least one of the, expected sources of initial referrals. However, according to Ms Farman's second witness statement of 18 December 2017, only the French judges could make the referrals to the DFEG for children in their care.

176. I granted permission to argue that the DPG ought to have been published to social workers because there appeared to me to be a discrepancy between Ms Farman's evidence as to the responsibility which French social workers had, or rather did not have in relation to UASC, and the provision in the DPG that the DFEG would liaise with French social services in charge of UASC.

177. Ms Naik pointed out that no referral could be progressed until the mechanism was in place, and it was not agreed until 5 October, and Duncan Lewis were not told of it until 30 October 2017. Ms Naik referred to a letter dated 2 May 2017 sent by Duncan Lewis to the GLD which sought confirmation that the French Government had agreed that it was able to refer children and if it had, what procedure had been put in place for that purpose. The GLD had replied on 15 June 2017 saying that arrangements were still being discussed with the French authorities. There had been no contact with UNHCR and they had not been aware of the UNHCR/NGO route because the DPG had not been agreed or published.

178. There was unlawfulness, submitted Ms Naik, in the SSHD's failure to publish the policy, which meant that it was ineffective as a means of implementing s67, and ZS had been unable to know what the procedure was for his case to be considered under it, and that he could be considered again for referral; *R (Lumba) v SSHD* [2012]

UKSC 12. The French social workers should have been made aware of the DPG for it lawfully to be part of the SSHD's discretionary operation of s67 in order for the duty to be effectively implemented. There was no evidence that the French authorities understood the DPG in the way in which Ms Farman did. Relevant French authorities were disabled from playing their part in implementing it. Delay had materially damaged ZS' prospect of transfer. Publication of the DPG did not render the claim academic.

179. Mr Manknell submitted that it was for the DGEF to do all of the referral process and give effect to it. He accepted that Ms Farman, in her witness statement at paragraph 11, and the DPG itself described the prior process differently. It was not for the SSHD to start writing to French judges, officials or social workers, because it was for the French authorities and for the French courts to manage the French asylum and childcare system. Duncan Lewis asked for it, were given it, and were passing it on.

180. Mr Manknell submitted that Ms Naik's contentions about the role of the French judiciary and its relationship to the DPG fell outside the scope of what she had been permitted to argue under this new ground of challenge. The scope of that permitted challenge was simply that the DPG was unlawful because it was neither published nor publicly available so that the need for referrals to be initiated by French social workers might not be appreciated at all. The SSHD had had no opportunity to reply. He told me on instructions that referrals had been made to the SSHD by the French Dublin Unit after that Unit had discussed the case with French judges. The publication issue was in any event academic because as at 1 February 2018, as Ms Farman explained in her third witness statement of that date, the DPG was to be published imminently.

181. I do not now consider it necessary to resolve any issue about this discrepancy. I have given no permission for it to be argued. Its resolution could require extensive evidence about the French child care system, and a dispute which, in reality, it is not for the UK Courts to resolve. Besides, I very much doubt that any difficulty arises from these differently expressed formulations of the referral process. Both versions ultimately require a referral from the DGEF to the UK authorities. The French authorities understand the various responsibilities of its component parts. I am not prepared to assume an absence of communication or co-operation between them. The real problem for ZS is that his case is not seen by French authorities as meriting referral.

182. I find it probable that at least some French social workers were not aware of their role in making referrals directly or indirectly under the DPG as at February 2018. I see no reason not to accept Ms Ufferte's evidence as at 19 February 2018. The DPG had not been published for French social workers to read. It was left for the French authorities to decide how the referral process should be publicised or communicated to those who had a role in its operation. The DPG gives a more central role to social workers than Ms Farman's evidence explains, whether or not it is a French judge who has to initiate the referral process to the DEFG. Ms Farman's account of how it was intended to operate may be correct, but it implies a more proactive role for the French judges in initiating referrals to the DEFG than does the DPG.

183. However, it was not unlawful at least in the first place to leave it to the French authorities to decide how the DPG should be disseminated, as it was a system which

they had to operate, whatever may have been the SSHD's understanding or misunderstanding of how a foreign system of childcare operated as between judicial and social service roles. The SSHD understood that a sufficiently broad spectrum of people knew of the DPG and of the referral system which means that it was not unlawful to leave the extent of dissemination to the French. I bear in mind the status of the agreement reached with the French Government and that it was the French authorities which had to operate the referral process. It is difficult to see how a Court could lawfully require the UK Government to publish abroad its understanding of how various French State bodies were anticipated to respond to UK legislation and the Government's endeavours to implement it, at least without the consent of the French authorities. There was no duty therefore on the SSHD to publish the DPG in France or to communicate it to French social workers, French judges, or to NGO's in France. Communication of the DPG to those bodies, and in particular the first two, was very much a matter for the French authorities.

184. However, whatever the limits affecting its publication abroad, I can see no reason why the DPG should not have been published in the UK generally or to interested persons, when it became available, at least in the absence of express objection by the French authorities, and especially where someone like ZS was pressing for information about the process as well as for transfer. I find it difficult to accept that it would be lawful for the UK to implement s67 pursuant to the DPG, without there being some publication of it in the UK. I have not heard argument about the extent of any legal obligation for it to be placed on a Home Office website, though I can see a public interest in its doing so. On any view, however, some potential transferees had UK legal representation or UK NGO support, and it does not seem to me fair that they should be left to pursue an individual's interests without knowing the rules, criteria or processes by which the process would be governed after the conclusion of the DPG. It would be of importance to would-be s67 transferees so that they could make progress with their case for consideration under this new DPG, with its broader criteria.

185. In my judgment, it should have been published earlier for the information of the UK more generally, and earlier to Duncan Lewis and those engaged in the transfer process. It was unlawful, in my view, for the procedures for the implementation of s67 not to have been published in the UK, at least to those already involved.

186. I agree with Mr Manknell that no order requiring publication is required. But I do not agree that publication makes relief entirely academic. I consider that some form of declaration is appropriate to reflect my conclusions. It should have been published earlier in the UK, but it is difficult to give a precise date, and precision on date is not the key point.

187. However, I see nothing of significance emerging from that because during the passage of time since the February/March hearing, by which time Duncan Lewis knew well of the referral requirement and process, no referral has been made by the French authorities.

Overall Conclusion

188. This action is dismissed save for declarations adumbrated above about the unfairness of the absence of short reasons for the decision communicated on 16 December 2016, and the unfairness of the absence of wider dissemination in the UK of the DPG. The

parties are invited to agree their terms, and to put forward short written submissions dealing with any points of difference.