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1. Introduction

In recent years, thousands of children in need of international protection have traversed the Mediterranean and entered Europe unauthorised and [unaccompanied by a parent or responsible adult](#) [1]. Many enter in the hope of reuniting with family members already residing in Europe, seeking both family reunification and international protection under the [1951 Geneva Convention](#) [2] or the [European Union Qualification Directive](#) [3].

In 2015 and 2016, over [one-thousand](#) [4] of these children made their way to Calais, France, wishing to reunite with family members living in the United Kingdom. Unable to safely reach the UK, they inhabited makeshift camps or [?jungles?](#) [5] in Calais, living in conditions ?so bad that... (y)ou have to smell conditions like these and feel the squelch of mud mixed with urine and much else through your boots to appreciate the horror? (*ZAT and Others* §5 [UT Judgement](#) [6] and §23 [CA Judgment](#) [7]). Most were [largely unable and afraid to seek asylum](#) [4] due to a lack of age and language-appropriate information about navigating the asylum system and a dearth of human resources available to register and process asylum claims. Without formally claiming asylum, unaccompanied children in Calais could not reunite with family members whilst awaiting refugee status determination? a right conferred on asylum seekers by the [Dublin Regulation](#) [8].

With the landmark 2016 UK Upper Tribunal (UT) and subsequent Court of Appeal (CA) ruling in *ZAT and Others*, prospects for speedy family reunification within and outside the Dublin system have improved (see EDAL summary [here](#) [6] and [here](#) [7]; see EDAL commentary on the rulings [potential impact](#) [9] and [impact thus far](#) [10]). Fundamental family unity rights are beginning to trump the rigid application of Dublin mechanisms. As the more recent UK UT [AM and OA](#) [11] ruling demonstrates, UK national courts support applying Dublin in a manner that upholds and safeguards children?s rights, even in the absence of formal asylum application filing. This blog post discusses the May 2017 UK UT [AM and OA](#) [11] decision and supports the substantive rights interpretive approach adopted by the UK UT.

2. Family unity for unaccompanied minors within the Dublin Regulation

Established as an inter-governmental agreement under the [1990 Schengen Convention](#) [12] and the [1990 Dublin Convention](#) [13], the [Dublin Regulation](#) [8] sets out a common mechanism for allocating responsibility for processing asylum applications lodged in Dublin Member States (the

28 EU member states and Norway, Iceland, Switzerland, and Liechtenstein). While its practical application is widely criticised, Dublin strives to be compatible with human rights precepts laid out in the [1950 European Convention on Human Rights \(ECHR\)](#) [14], [1951 Geneva Convention](#) [2], and the [Charter of Fundamental Rights of the European Union](#) [15]. Specifically, [Dublin III \(DR III\)](#) [8] mandates that ‘respect for family life’ and unaccompanied minors’ ‘best interests’ must be ‘a primary consideration’ when applying the regulation (Recital 13 and 14). Accordingly, if an unaccompanied child applies for asylum in one State, he ‘shall’ have his application examined in the Member State where a parent, responsible adult, sibling, adult aunt, uncle, or grandparent is legally present, provided this is in his ‘best interest’ (Article 8(1)(2)). Discretionary clauses also permit any Member State to assume responsibility to examine an application and request a transfer ‘to bring together any family relations’ on ‘humanitarian grounds’ (Article 17(1)(2)).

As written and applied, the [1951 Geneva Convention](#) [2] does not require one to have submitted a formal claim for refugee status to be considered a ‘refugee’ ([§28 UNHCR Handbook](#) [16]). However, one must be recognised as an ‘asylum seeker’ within the meaning of the [Common European Asylum System \(CEAS\)](#) [17] and [DR III](#) [8] to fully benefit from the rights and safeguards contained therein. This means that unaccompanied children seeking international protection must formally lodge applications for asylum where they are located before they can be transferred to a second Member State where they have family ties. According to Dublin procedure, the State in which a child resides must also determine and allocate asylum processing responsibility by initiating a take charge request to the second Member State before a family unity transfer can occur (DR III Articles 22 and 25). Prior to the [ZAT and Others UT Judgment](#), [6] Member States recognised a minors’ rights to family reunification only once these ‘initial procedural stages’ of Dublin were satisfied (phrase first used throughout the [CA Judgment](#) [7]).

Since [ZAT and Others](#), however, the possibility for recognizing family reunification in the absence of official asylum claims and take charge requests has become a reality for many unaccompanied children. [ZAT and Others](#) has established powerful precedent, requiring the UK to take action bypassing formal Dublin procedures to reunite family in ‘especially compelling cases’ where individuals can demonstrate that registration and take charge request procedures are objectively incapable of responding adequately to family unity needs ([CA Judgment](#) [7] § 92 and §95). Furthermore, as the [CA Judgment](#) [7] recognised, nothing in [DR III](#) [8] precludes the UK from taking action to reunite family members within the ambit of the Regulation itself (§85).

3. The UK’s expedited interview process

When France announced the impending demolition of the Calais ‘jungle’ in October 2016, roughly three months after the [ZAT and Others CA Judgment](#) [7], many unaccompanied children with family ties to the UK [remained in Calais](#) [18]. In response to mounting public pressure, Secretary of State Amber Rudd announced her ‘[absolute commitment to bring to the UK as many children as possible with close family links before the closure of the camp](#) [19]’. She initiated an expedited process bypassing formal Dublin procedures, wherein British Home Office officials interviewed unaccompanied children in France who had yet to lodge asylum claims. The Home Office then determined their eligibility for transfer to the UK under DR III and recent domestic legislation—namely [Section 67 of the Immigration Act](#) [20].

By February, [550 unaccompanied children](#) [21] with family ties had been transferred to the UK and reunited with family members through the expedited process. However, hundreds remained in France, receiving no stated grounds for rejection. After public pushback, [the government agreed to review rejected cases and consider new information substantiating family links](#) [22] for those denied transfer. British Home Office officials conducted a second round of ad-hoc interviews. They again rejected many unaccompanied children. In March, in coordination with [Citizen’s UK Safe Passage Project](#)

[23], British lawyers applied for judicial review in the UK UT on behalf of eight individuals twice rejected by the expedited process. While claimants in *ZAT and Others* fought to bypass Dublin altogether, these unaccompanied children sought recourse utilising the Dublin Regulation. They challenged the Secretary of State's continued refusal to transfer them to the UK in accordance with their substantive DR III rights—namely Article 6 protecting a child's "best interest" and Article 17 encouraging State discretion to unite family members ([§ 6 AM and OA](#) [24]).

4. Bypassing procedural formalities, but observing substantive safeguards

In the Calais cases before the UK UT, the UK Secretary of State maintained that the expedited system was "a one-off process". It was "based on the foundation of the Dublin framework but operated outside of it" ([HCWS467](#) [25]). As such, the Secretary of State believed she "could lawfully devise an alternative [Dublin] model which, at heart, borrowed, and purported to give effect to, only one of the Dublin "responsible Member State" provisions viz Article 8 while wilfully ignoring the others, in particular Article 17" (§97 [AM and OA](#) [24]).

In its decision, the UK UT drew authority from *K v Bundesasylamt [Case C245/11]* [26], which instructs that a Dublin Member state can legally bypass the making of a formal take charge request (§51 and §52), and *ZAT and Others* [7], which permits the bypassing of the "initial procedural stages" of Dublin (§84 CA Judgment). It held that the UK could, in certain circumstances, legally bypass unaccompanied children's lodging formal asylum claims and France's making a take charge request ([§ 72 AM and OA](#) [24]). Doing so was "laudable and pre-eminently reasonable" ([§ 106 AM and OA](#) [24]); and "compatible" with the aims and objectives of DR III, "in particular mutual confidence, inter-state cooperation, expedition, the enhanced protection of minors and the promotion of family reunification" ([§ 106 AM and OA](#) [24]). However, Dublin establishes minimum rules where "the duty of observance is unyielding" ([§ 107 AM and OA](#) [24]). The UK UT reasoned that, while a Member State may legally exceed the Dublin threshold, they cannot legitimately exclude key provisions and "airbrush" "substantial swathes" of EU law ([§ 108 AM and OA](#) [24]). In other words, while Dublin mechanisms may be relaxed to promote family reunification, substantive safeguards that defend children's rights cannot be disregarded.

Although this legal reasoning may be displaced by that of the UK Administrative Court in the pending [Citizens UK case for all children twice rejected](#) [27], it is laudable and ground-breaking. The UK UT decision in [AM and OA](#) [24] recognises the fluidity of the Regulation, whilst cementing its role as an implementing mechanism bound by and giving effect to the human rights of third country nationals. It advances the rights of *all* unaccompanied children in need of international protection based on their individual circumstances. Like *ZAT and Others*, the decision employs the Regulation to the advantage of those seeking protection. It also broadens legal precedent concerning the intersection of human rights law and the Regulation, which for the most part has been narrowly set around Dublin transfers that implicate non-derogable human rights (see for example *C-493/10 R (NS (Afghanistan)) v Secretary of State for the Home Department [2013] (CJEU)* [28] and *M.S.S. v. Belgium and Greece (Application No. 30969/09) (ECtHR)* [29]).

With migration to and throughout Dublin Member States continuing at a rapid rate, sidestepping Dublin procedural formalities while maintaining the same standard of protection is exceedingly important. The UK and other Dublin Member States should be encouraged to relax the "straightjacket of the Dublin Regulation regime" ([§ 114 AM and OA](#) [24]). They should adopt expedited procedures that more swiftly reunite unaccompanied children seeking international protection with their family members—and they must respect their substantive rights.

5. Conclusion

Today, several third-country national children are [returning to Calais](#) [30], ten months after the 'jungle's [official demolition](#) [31] in October. Recent reports indicate [abuse, inhuman and degrading treatment](#) [32] in Calais, and [conditions comparable](#) [33] to those in 2015. Despite landmark UK cases and the government's expedited procedure, much more must be done to adequately care for and protect the rights of unaccompanied children in France and elsewhere in Europe. Many children are unable and afraid to formally apply for asylum, and cannot afford to wade through rigid Dublin procedures. Dublin must be applied and interpreted as a living instrument, capable of responding to the current moment and the rights of those in dire circumstances—the UK UT decision in *AM and OA* takes a powerful step in this direction.

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(This journal entry is an expression of the authors' own views, and not those of EDAL or ECRE)

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Links:

- [1] https://publications.iom.int/system/files/gmdac_data_briefing_series_issue5.pdf
- [2] <http://www.unhcr.org/protect/PROTECTION/3b66c2aa10.pdf>
- [3] <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:en:HTML>
- [4] <https://www.redcross.org.uk/~media/BritishRedCross/Documents/What%20we%20do/Refugee%20support>
- [5] <http://www.bbc.com/news/uk-29074736>
- [6] <http://www.asylumlawdatabase.eu/en/case-law/united-kingdom-queen-application-zat-iaj-kam-aam-mat-maj-and-lam-v-secretary-state-home#content>
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- [17] https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/docs/ceas-fact-sheets/ceas_factsheet_en.pdf
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