Neutral Citation Number: [2017] EWHC 2727 (Admin)

Case No: CO/5312/2016

IN THE HIGH COURT OF JUSTICE
DIVISIONAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/11/2017

Before :

LORD JUSTICE TREACY
MR JUSTICE OUSELEY

- -

Between :

The Queen on the Application of Help Refugees Limited	**Claimant**
- and -	
The Secretary of State for the Home Department	**Defendant**
- and -	
The AIRE Centre	**Intervener**

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Ms Laura Dubinsky, Mr Edward Craven and Ms Rowena Moffatt (instructed by **Leigh Day**) for the **Claimant**
Mr David Manknell and Ms Amelia Walker (instructed by **GLD**) for the **Defendant**
Ms Caoilfhionn Gallagher QC, Ms Katie O'Byrne and Ms Jennifer Robinson (instructed by **Freshfields Bruckhaus Deringer**) for the **Intervener**

Hearing dates: 20, 21 & 22 June 2017

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Approved Judgment

Lord Justice Treacy:

1. This is the judgment of the court to which we have both contributed in equal measure.

Introduction

2. This is a claim for judicial review brought by Help Refugees Limited, a charity concerned with meeting the humanitarian needs of refugees and other displaced people. Its claim has been supported by the intervener, the Aire Centre, a charity with particular interest in human rights law and the rights of separated and unaccompanied children.

3. The case is concerned with issues arising from the passing of s.67 of the Immigration Act 2016 (the Act), a provision designed to address the impact of the refugee crisis in Europe upon unaccompanied asylum-seeking children (UASC), and in particular to make arrangements for the relocation of such children from other European States to the United Kingdom.

4. Section 67 of the Act provides as follows:

> *"Unaccompanied Refugee Children: Relocation and Support*
>
> *(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 (1) shall be determined by the Government in consultation with local authorities.*
>
> *(3) The relocation of children under subsection (1) shall be in addition to the resettlement of children under the Vulnerable Person's Relocation Scheme."*

5. Although s.67(1) uses the term "refugee children", it was common ground that the children would be relocated before undergoing refugee status determinations.

6. Section 67 represents a further route by which UASC come to the UK. There are a number of other schemes and the s.67 scheme operates in addition and without prejudice to those other schemes or other routes of entry. Those other schemes are:

> (i) The Syrian Vulnerable Persons Resettlement Scheme (VPRS), which is a scheme to resettle up to 20,000 refugees fleeing the Syrian conflict by 2020. This is not solely concerned with unaccompanied children. It is referred to in s.67(3);
>
> (ii) The Vulnerable Children Resettlement Scheme (VCRS), also known as the MENA scheme, which proposes to resettle up to 3,000 vulnerable children and their families from the Middle East and North Africa by 2020. This scheme includes unaccompanied children where it would be in their best interests;

(iii) The Mandate Resettlement Scheme which resettles individuals, assessed to be refugees by UNHCR, with their families who have refugee status in UK. This may apply to UASC.

7. In addition, by reason of Article 8 of the Regulation 604/2013 of the European Parliament and of the Council of 26 June 2013 (the Dublin III Regulation), an unlimited number of UASC elsewhere in Europe who have qualifying family in UK have the right to be transferred to the UK so that they can have their claim for asylum assessed there. If, after arrival, their family relationship breaks down, they may fall under the care of the local authority in whose area they are present.

8. There will also be UASC who arrive spontaneously in the UK. The local authority at their place of arrival will have responsibility for them. The 2016 Act created a mechanism, the National Transfer Scheme (NTS), whereby local authorities could more easily transfer responsibility for UASC from one local authority to another, thus sharing more evenly the resource burden which caring for such children creates. Local authorities are required under the Children Act 1989 to support all children in need requiring support in their area and to accommodate children without accommodation in their area. The NTS operates a 0.07% threshold whereby no local authority is expected to care for more than 0.07% UASC expressed as a percentage of its total child population.

9. The NTS scheme is intended to operate voluntarily between local authorities, although there are powers for Ministers to intervene over transfers. This scheme only operates in England (see s.69), and does not apply to local authorities in Scotland, Wales or Northern Ireland since s.73 is not yet in force.

10. Section 67 applies to the UK as a whole; see s.95. It came into force on 31 May 2016.

11. The upsurge in numbers of UASC entering Europe was a matter of concern in the UK by 2015, and had been the subject of some consideration both at Government and local authority level since local authorities at points of entry into this country were receiving and having to care for large numbers of UASC. There are about 700 cases in the UK of UASC above the 0.07% local authority threshold.

12. Section 67 represented a government response to an amendment to the 2016 Act proposed by Lord Dubs. In May 2016, the then Prime Minister announced that the Government would accept Lord Dubs' amendment, so that the UK would resettle UASC from within Europe, specifically from Greece, Italy and France, who had been registered in Europe before 20 March 2016, and where it was in their best interests to be resettled in this country. The date of 20 March 2016 was fixed with the aim of deterring children from undertaking dangerous journeys to Europe attracted by the news of the s.67 route of entry after that date. This has been referred to as the "pull factor", a matter about which authorities in this country and in Europe were concerned. The date itself seems to have been selected by reference to the entry into force of the EU/Turkey Statement of 18 March 2016.

13. Reference to s.67 shows that the Secretary of State was required to identify a "specified number" of UASC already in Europe for resettlement in the UK. Section 67(2) required that number to be determined by the Government "in consultation with local authorities". A very large part of the dispute in this case relates to the issue of

consultation: a) whether there was a consultation; b) whether it was fair; c) whether the defendant properly considered local authority responses; d) whether the defendant arrived at a determination of the specified number in a lawful manner; and e) whether the defendant carried out her responsibilities under s.67 "as soon as possible" as set out in s.67(1).

14. In addition to those matters which focus on the way in which consultation with local authorities was carried out and then dealt with, the claimant has also pursued an issue asserting that the process by which UASC in France were assessed and refused relocation to the UK under policy guidance, lacked the minimum procedural safeguards necessary for a lawful exercise of those decision-making powers.

15. Royal Assent to the Act was given on 12 May 2016. On the following day the Immigration Minister wrote to local authorities referring to s.67 and stating that, before specifying the number of children the Government would seek to resettle from within Europe, it would consult with local authorities "taking account of the wider picture of support for unaccompanied asylum-seeking children, asylum-seekers, refugees and resettled persons in each area". The letter indicated that there would be a further communication with more details shortly. An identical letter went to the Northern Ireland Executive, a week later.

16. Instead of writing a further letter, a national event was held on 7 June 2016 at which the Minister stated:

> "Today formally starts the sign up and consultation process for not only the UASC Transfer Scheme, but also the Children at Risk Scheme and the support we will provide to unaccompanied refugee children who are currently in Europe…"

17. An accompanying briefing note referred to follow-up events in each region, after which local authorities would be asked to consider how many unaccompanied refugee children in Europe could be cared for in their area.

18. In June and July 2016 10 regional events took place in England, Scotland and Wales. No such event was held in Northern Ireland. Officials were also in contact with local authorities or their representative bodies (Strategic Migration Partnerships (SMPs)) on a regular basis. There were indications from a number of regions that it would take until September 2016 for areas to consider and secure agreement to participate.

19. On 8 September 2016 the Immigration Minister wrote to all local authorities in England, Scotland and Wales. He asked each council via their SMP to respond to three formal requests set out in the letter. Firstly, local authorities who had not already done so were asked to register for the NTS (which had launched at the beginning of July 2016), so that the Government could use the NTS to ensure a fair distribution of unaccompanied children between local authorities. Secondly, there was a request to confirm the total number of unaccompanied children that could be placed with a local authority for the remainder of the financial year, 2016/17, "noting the 0.07% threshold operating under the NTS". That threshold is not a target, nor is it an estimate of capacity. It is used as an indication that a local authority has reached

the point at which they would not be expected to receive any more UASC. It is at that point that the NTS transfer mechanism can take effect.

20. The third request was for local authorities to consider taking children and their families under the VCRS. Those would be children identified by UNHCR as the most vulnerable and at risk of various forms of abuse and exploitation.

21. Local authorities were asked to confirm by 21 September 2016 through their SMPs their responses to each of those three requests. In relation to UASC under s.67, the letter made reference to the fact that the Act required consultation with local authorities before arriving at a total number for the scheme. It recognised that the commitment placed additional pressure on local authorities, which was why it was vital that there was agreement on a number that worked in the best interests of local authorities, recognising that there were children already in their care and that UASC also arrived spontaneously as well as being brought to the UK through formal schemes.

22. The letter stated that it would be unfair to prioritise the placement of unaccompanied children based on arrival methods. Accordingly, all UASC who were brought to the UK under a formal scheme would be placed into local authority care through the NTS. There was an annex setting out eligibility criteria under each of the three schemes, namely, UASC transferred through the NTS, UASC in Europe (s.67), and children falling within the VCRS. SMP leads for regions were identified as well as Home Office contact officers, with e-mail addresses also provided.

23. Although a response date of 21 September was set out in the letter of 8 September, the date for responses was later put back to 14 October after one region had indicated that it could not respond by 21 September. The new date was not publicised; the Home Office treated the consultation as closed on the day when it received that region's response. It also accepted other late responses which had been made in the interim up to that point. Accordingly, offers made up to 14 October were treated as offers relating to the s.67 scheme.

24. On 24 October 2016 demolition of the Calais refugee camp began. It was only shortly before this that French authorities had agreed to British officials engaging with children in France, for the purpose of assessment, registration and relocation of children eligible under s.67. The demolition of the Calais camp attracted much media attention and created pressure for this country to receive affected children. Relocations to this country began at about that time, and local authorities in England, Scotland and Wales came forward with offers to take children. Thereafter British officials interviewed children at places in France to which they had been dispersed, in order to assess their eligibility. In mid-November, guidance on the implementation of s.67 was issued, which set out criteria applicable only to children formerly resident in the Calais camp.

25. In early December the defendant made clear that no further offers were needed at that stage. On 13 December a submission to the Minister recommended that the specified number be set at 350, and with no re-adjustment to take into account offers made after 14 October. On 20 December a Ministerial decision was taken internally to specify the number under s.67 at 350.

26. On 8 February 2017 the Immigration Minister announced to Parliament that the defendant had decided to set the specified number of UASC to be resettled in the UK under s.67 at 350. In March 2017, a new policy was published concerning s.67 transfers from Greece, Italy and France. It maintained the date of 20 March 2016 as the eligibility cut-off date by which children had to have arrived in Europe in order to fall within s.67.

27. At the end of April 2017, the defendant announced that due to an administrative error one region had pledged 130 places prior to 14 October 2016 which had not been accounted for in setting the specified number. Accordingly, the specified number was increased to 480. By this point, between 200 and 250 children had been relocated under s.67. It is understood that at the date of the hearing in this case there have been no further relocations. The defendant has said that the next phase of s.67 is under discussion with the other involved countries with a view to agreeing processes for transfer.

28. The foregoing paragraphs set out a broad framework within which the various submissions can be considered, although, as will become apparent, much flesh will need to be put on those bones in order to resolve the issues raised.

29. The claimant has made a series of challenges arising from the outlined history. There are challenges to the way in which the consultation process was set up and handled, as well as specific criticisms relating to the way in which the defendant treated responses from Scotland, Wales, Northern Ireland and some English local authorities. At the heart of the claimant's case is the submission that the process of consultation was seriously flawed and unfair, and was thus unlawful. Such purported consultation as took place was confused and inadequate and resulted in an irrationally low figure of 480 being adopted as the specified number under s.67.

30. In relation to Northern Ireland it is said that the defendant started but then abandoned a consultation. As to Scotland, it is said that there was no effective consultation in Scotland during the stated consultation period, since the intermediary in Scotland, the Convention of Scottish Local Authorities, (COSLA), was confused by the defendant's communications and told Scottish local authorities not to respond, and then revoked that instruction, but only after the end of the consultation period. As a result only six Scottish places were offered during the consultation period. Offers of 64 places for UASC made after the end of the consultation period were not counted in the specified number.

31. In Wales, only six places were counted in the consultation; a further 44 places pledged after the end of the consultation period were not counted. In England it was said that a large number of places were discounted either because they did not meet the defendant's criteria for responses, being expressed as percentages, or because they were made after 14 October 2016. Additionally other responses were erroneously missed from the defendant's collation of consultation responses. All of those matters were the subject of criticism.

32. Allied to those submissions it was argued that the defendant's consultation process fell far short of minimum requirements of fairness. In particular there was insufficient material to show that consultees had been properly informed that they were being consulted or for what purpose, or within what timeframe responses should be made.

In addition, consultees were not properly informed as to the form in which responses should be made in order to be counted toward the specified number.

33. Ms Dubinsky, on behalf of the claimant, supported by Ms Gallagher QC for the intervener, urged that a heightened standard of fairness and scrutiny of the consultation was required since its context was one closely affecting the interests of very vulnerable children who were at serious risk of harm, hardship or serious abuse. We have borne in mind those submissions in coming to our conclusion.

The Consultation Generally

34. Ms Dubinsky submitted that the process of consultation was badly flawed so that it was not a fair consultation. In particular she submitted that the evidence showed that; a) it was unclear that local authorities were being consulted; b) there was a lack of clarity as to what the subject of the consultation was and the reasons behind it; c) there was insufficient indication as to how responses would be used, including the consequences of failure to respond; d) there was no clarity as to the format for responses; e) there was no clarity as to the deadline or cut-off point for the consultation beyond which further responses would be discounted; f) there was no information as to alternatives to what was being proposed for decision.

Ms Dubinsky began by emphasising that it is axiomatic that there must be a fair consultation and that it is for the court rather than the defendant to decide what is fair.

35. As to the court's approach, we were taken to *R (Moseley) v Haringey LBC* [2014] 1 WLR 3947 where, at [23], Lord Wilson JSC stated:

> *"*… irrespective of how the duty to consult has been generated, the common law duty of procedural fairness will inform the manner in which the consultation should be conducted".

36. At [24] he observed that the requirements of fairness must be linked to the purposes of a consultation. At [25] he endorsed the Sedley criteria first propounded by Mr Stephen Sedley QC in *R v Brent LBC ex parte Gunning* [1985] 84 LGR 168.

37. Those criteria are:

i) the consultation must be at a time when proposals are still at a formative stage;

ii) the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response;

iii) adequate time must be given for consideration and response;

iv) the product of consultation must be conscientiously taken into account in finalising any decision.

38. For the defendant, Mr Manknell did not take issue with the need to consider fairness in accordance with *Moseley*, but emphasised that the question of fairness must be linked to the purposes of the consultation and that in assessing the Sedley criteria close attention needed to be given to the context in relation to s.67. He drew attention to the speech of Lord Reed JSC at [36] where he said:

> "This case…is concerned with a statutory duty of consultation. Such duties vary greatly depending on the particular provision in question, the particular context, and the purpose for which the consultation is to be carried out. The duty may, for example, arise before or after a proposal has been decided upon; it may be obligatory or it may be at the discretion of the public authority; it may be restricted to particular consultees or may involve the general public; the identity of the consultees may be prescribed or left to the discretion of the public authority; the consultation may take the form of seeking view in writing, or holding public meetings; and so on and so forth. The content of a duty to consult can therefore vary greatly from one statutory context to another… A mechanistic approach to the requirements of consultation should therefore be avoided."

39. As to the test which governs whether this court should intervene, Ms Dubinsky relied on *R (Baird) v Environment Agency and Arun District Council* [2011] EWHC 939 (Admin). At [52] Sullivan LJ stated that the test was whether the process was so unfair as to be unlawful. He continued:

> "In *Greenpeace* I was not seeking to put forward a different test, but merely indicating that in reality a conclusion that a consultation process has been so unfair as to be unlawful is likely to be based on a factual finding that something has gone clearly and radically wrong."

40. Mr Manknell adopted that approach and referred also to *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* [2012] EWCA Civ 472 where at [13] the court stated:

> "If it is alleged that a consultation process is unfair, clear unfairness must be shown."

41. In this case we are content to adopt the approach of Sullivan LJ in *Baird.*

42. The purpose of the exercise was to enable the defendant to reach a decision about a specified number for the purposes of s.67. It was not an exercise in ascertaining objections to or support for or preferences as to a course of action. It was an exercise which required gathering information in whatever form the defendant rationally thought appropriate for the purpose of reaching her judgment on the figure to be specified.

43. We first consider whether it was made clear that there was a consultation. It seems to us that it was. There was a background of contacts by the defendant with local authorities in all parts of the United Kingdom in general terms about UASC and their settlement in this country prior to the passing of s.67, a provision which itself generated debate and publicity. The letter of 13 May 2016 after Royal Assent alerted them to a forthcoming consultation, but it cannot have come out of the blue. There was a well-publicised national event on 7 June which was followed by regional events save in Northern Ireland (as to which see below). The evidence then shows contacts with local authorities through their SMPs between June and the Ministerial letter of 8

September. That letter did in our judgment sufficiently make clear that the Government was seeking a specific number in relation to the UASC in the context of other local authorities' child care resources, in addition to seeking responses to matters pertaining to the NTS scheme and the VCRS scheme at the same time. It was clear that it was seeking this information in order to determine the specified number for the purposes of s.67. There has been no challenge to the fact that that letter sought responses in relation to three schemes.

44. In that respect, the defendant had permissible choices as to how she proceeded. As Ms Samedi, the defendant's Head of Domestic Asylum Policy, explains, the defendant was anxious to avoid the risk of local authorities being confused by a number of different schemes relating to UASC, and felt that local authorities could not properly consider how many children they could support under one scheme without understanding their full range of commitments, including the requirement to support UASC who had arrived spontaneously, and those who potentially fell within the NTS scheme.

45. There was also concern that unless various schemes were dealt with together, local authorities might, as had happened in the past, seek to prioritise a politically attractive group of children over a less politically attractive group. For this reason it made sense for the defendant to consult both on s.67, in the context of other demands on resources including participation in the NTS, and on participation in the NTS at the same time, as they went hand in hand in determining how much capacity each local authority had to take more UASC (whether they were already in the UK but in the care of a different local authority, or were to be brought over specifically from Europe).

46. We consider that such reasoning was sound, and that it was appropriate for a single form of consultation to inform the defendant's conclusion relating to s.67 UASC, which had to recognise the no less important needs of other UASC which impact upon local authority responsibilities and resources.

47. We next consider the subject matter of the consultation. Consultations will vary very widely in their breadth and scope. This consultation was clearly defined and was for a very specific purpose, namely that of the Secretary of State or the Government identifying a specific number of UASC to be resettled from Europe, after consultation with local authorities. This was not a case where alternative proposals had to be consulted upon and properly examined and explained in a consultation process. For the purpose of s.67, this was a narrow exercise for determining, from information supplied by local authorities, a figure of capacity to take Europe-based UASC into the care of UK local authorities. In simple terms the question asked of local authorities was "how many can you manage in the light of other commitments?".

48. The target audience of the consultation, namely local authorities in the UK, was a relatively knowledgeable and sophisticated one, which had, prior to the passage of the Act, been familiar with the problems and issues raised by the arrival of refugees, including UASC, and had been in contact with the defendant about that, either directly or through the mechanism of the SMPs.

49. None of this was new territory for them. What was new was the need to respond to an additional potential call upon their limited resources in relation to s.67 children. What was done in the 8 September letter was to seek responses which would enable the

Government to fix the specified number as required but in the context of a broader consideration of local authority responsibilities in this area. That was done by the steps taken both before the letter of 8 September and by the letter itself. Both focused on a broader picture than the s.67 requirement. That letter, together with the background events, let a group of experienced professionals who were familiar with the territory know, in sufficient terms, what they were being asked to do, why they were being asked to do it, and what the defendant intended to do with their responses, namely, fix the specified number under s.67.

50. The next issue for consideration is whether consultees knew how their responses would be used. In the letter of 13 May 2016, the Immigration Minister had referred to the NTS scheme as a mechanism for under-pinning the UASC transfers from one over-loaded local authority to another. It recognised that it would not be reasonable to expect an authority or region to exceed 0.07% of UASC as a portion of their total child population. It referred also to the VCRS scheme before dealing with s.67. In that context it referred to the need to specify a number of children to be resettled and said that before doing so the Government would consult with local authorities taking account of "the wider picture of support for UASC, asylum seekers, refugees and resettled persons in each area".

51. This clearly indicated a consultation whereby the specified number would be based on a broad assessment of capacity taking account of local authority commitments by reason of other schemes. Both the national and regional events which took place from June 2016 onwards formed part of the consultation process and not only related to the s.67 scheme, but involved the NTS transfer scheme and the VCRS scheme with a view to informing a decision as to the s.67 specified number.

52. The letter of 8 September again made clear that, before specifying a number under s.67, the Government wished to agree a number that worked in the best interests of local authorities whilst recognising that there were children already in local authority care, spontaneous arrivals of UASC, and those being brought into the UK through formal schemes. It is clear from the evidence that consultees were being asked to make an offer which would be used by the Government in deciding what figure to specify under s.67, but it wanted any offers to take account of capacity, already used or anticipated to be used, in relation to UASC under other schemes. It seems clear to us that what was being required was an indication of spare capacity for a specific purpose and that responses would be taken into account by the Government in fixing the required specified number.

53. One of the points which was raised was that it was not clear what the consequences would be of responding or not, and in particular that non-responding local authorities would be treated as making no offer. But those who made no specific numerical offer, or no offer at all, were not precluded from participation. There was no reason why, as the location and extent of capacity changed, those who had made no offer could not then offer accommodation. Places were not allocated to the authorities who made offers, who had had to keep them open for that purpose. In this case all that was being sought was a specified number and the consultees will have, or should have, understood from the terms of the consultation letter and the previous history that offers of places made by them would contribute to the setting of the specified number, and that failure to make an offer would not.

54. That leads to a consideration of whether information needed to be provided concerning any viable alternatives. Of course in some consultations, particularly where there are possible alternatives to a course proposed, it will be important that the alternatives are spelt out and explained so that consultees can make a fully informed response on a range of options. However, much depends on the nature of the consultation. Because the exercise was that of specifying a number, we do not consider that this question realistically arises. Allied to this are criticisms that the Secretary of State, given the constantly fluctuating basis of availability of places for children with local authorities, should have asked for offers on a rolling basis, rather than on a snapshot basis of availability at the date of response. Given that the Secretary of State was required by s.67 to act as soon as possible, we consider that she was fully entitled to decide to proceed as she did in an exercise which could only ever provide a broad assessment of capacity. The perfection of precision would have prevented a number ever being specified.

55. Similarly we are unpersuaded that she should have consulted on the best period by reference to which the ascertainment of numbers should be made. There is no need to consult on the question to be asked. The fact that the exercise asked for an indication of places available up to the end the current financial year was criticised. At the time of the consultation it had been anticipated that by the end of that period all children would have been identified. Hindsight has shown that that anticipation was incorrect. We consider that it was a reasonable assumption to have made at the time, and that it was rational and therefore lawful for the defendant to have proceeded on that basis. In the context of an exercise aimed at the fixing of a specified number, we consider that the defendant was justified in setting the end of the financial year as a parameter, and that there was no necessity for consultation on that point. It provided a reasonable basis upon which local authorities could assess their capacity.

56. It is important that a consultation document contains sufficient information to enable an intelligent response, and for a consultee to be able to express its views in a way that enables them to be properly considered. The question posed in the letter of 8 September as to how many unaccompanied children could be placed by a local authority for the remainder of the financial year, not including those who would be reunited with family members, was a straightforward question which will or should have been understood as such in the context of the obligation on the defendant to specify a number under s.67. This is all information which would have been in the hands of local authorities. We do not see a basis for criticising the question posed in terms of clarity. However, we note that in this context an issue is raised as to the manner in which the defendant subsequently treated responses (for example those which failed to cite an integer but made reference to a commitment to the 0.07% threshold). This is considered later in this judgment in a section dealing with the defendant's handling of the responses.

57. There is also criticism in relation to the final deadline for the consultation period after which further responses would be discounted. There can be no criticism of the clarity of deadline date of 21 September 2016, which is set out in the letter of 8 September. However, the claimant was critical of the fact that after receiving representations from the South East region that it could not provide a response until after that date, the defendant decided to extend the deadline until it received that region's response. That response was received on 14 October, and the defendant thereafter proceeded to treat

that as the qualifying date for consideration of responses. It does not appear that the extension of time to that date was publicised at the time, but the defendant counted responses from other authorities which made offers and which were received between 21 September and 14 October. The criticism made is that taking the date of 14 October was dictated by a random event, namely the receipt of the South East region's response, and was unfair to those who subsequently submitted offers which were discounted. It is not that there was an extension of time, albeit uncommunicated.

58. It would plainly have been preferable for the defendant to have publicised its decision to accept responses received after 21 September, pending receipt of that region's response. However, the defendant did accept other responses received prior to 14 October, so that in that sense there was no unfair discrimination. Those who responded after 14 October, unaware of the decision to extend time, had failed to observe the deadline imposed by the 8 September letter, which had sufficiently made clear what the deadline was. Had they made responses shortly thereafter, they would have received the same indulgence as those who in fact responded before 14 October. It was clear that the Government required prompt responses in order to comply with its duty under s.67. A date had been set, and those who did not adhere to it cannot have had any reasonable expectation that belated responses would be taken into account. The criticism of unfairness is very odd in this context. No local authority has been deprived of anything, and can still take s.67 children or NTS transfers. This was not an exercise in allocating children to places. In theory, the number of offers could have been greater but there is no evidence of any local authority saying that, as it had missed the September 21 deadline, it made no offer, but would have had an offer ready by 14 October, had it known that it had that extra time. It is perhaps significant that no local authority or SMP has brought judicial review proceedings in respect of this or any other aspect of the consultation.

59. It was pointed out that at an early stage of these proceedings before matters had developed into their present form, Mr Manknell had in oral submissions to the court and a subsequent document filed on 2 November 2016 failed to appreciate that the consultation had expired on 14 October. Unfortunate as this was, we do not think it materially affects the question of fairness. The question for us is not whether the consultation process was free from all blemish, it is a question of whether it reached an appropriate level of fairness judged in the light of the Sedley criteria. The fact that this error was made does not undermine our overall conclusion as to fairness.

60. Again, in relation to timing, a complaint is made that there was insufficient time allowed for the response to the letter of 8 September. We are unpersuaded that such a criticism is justified since the process relating to s.67 had, to the knowledge of the consultees, been in place from May 2016 onwards. We are satisfied that local authorities had sufficient notice prior to 8 September of what was to be required of them, and that the period for responses was reasonably set.

61. Overall, having considered the criticisms made as to the requirements for a fair consultation we are not persuaded that the claimant's case is made out. In so concluding we have focused beyond the terms of the letter of 8 September since that only forms part of the consultation process which had begun three months earlier, and which itself had been preceded by relevant contacts between the defendant and potential consultees. Moreover, the relatively narrow focus of the consultation,

namely, the provision of information in the hands of local authorities for the purpose of the Government fixing a specified number, is important in assessing what fairness requires. The fixing of that number had to be set against the fact that there was a need for action to be taken swiftly in a field where precise ascertainment of numbers would not be possible because of the fluctuating nature of places available to local authorities. The result was of necessity a quick broad-brush exercise, with the assistance of local authorities who chose to respond, so as to enable the government to fix the specified number after due consideration.

62. In the circumstances the overall challenge to the nature of the consultation fails, but we now move on to consider specific matters raised by individual countries or local authorities.

Northern Ireland

63. As previously stated, the Immigration Minister wrote to the Northern Ireland Executive on 20 May 2016, indicating that there would be a consultation process. That letter has to be seen against a background of previous contact between Home Office officials and the Northern Ireland Executive on matters relating to asylum and resettlement, including the obtaining of an earlier commitment from Northern Ireland to resettle Syrian refugees under the VPRS Scheme. On 9 August 2016 the then First Minister and the then Deputy First Minister of Northern Ireland responded to the letter of 20 May acknowledging pressures on local authorities with large numbers of UASC. The letter then stated:

> "Any decision regarding the relocation of unaccompanied asylum seeking children would have to be balanced with our ongoing and future commitments to helping refugees and asylum seekers. In particular the Syrian vulnerable persons relocation scheme [VPRS] and any future scheme to relocate children from Europe and children at risk, draw from the same resources, and our capacity to delivery effective relocation that offers the same quality of life, must be balanced with our ability to help people through these schemes."

64. It continued:

> "We therefore await further details on the initiative to relocate children from Europe, and will consider relocation of accompanied child asylum seekers in this context along with the fact that we are in the very early stages of forging a multi-cultural society."

65. On 24 August, Ms Samedi held a conference call with officials from the Northern Ireland Executive to discuss UASC and the possibility of holding a consultation event in Northern Ireland. It was agreed that they would not hold an event at that stage in Northern Ireland. An e-mail sent by Ms Samedi two days later noted that

> "It is clear we are a long way from being able to transfer any unaccompanied asylum seeking and refugee children to Northern Ireland"

although she felt that they had started on a positive engagement. She recorded that no consultation event would be arranged at that stage as Northern Ireland officials wanted to advise their Ministers and do more work with all authorities and agencies with an interest in the issues. The matter was to be reserved for a later date. As a result no consultation meetings took place in Northern Ireland, nor was the letter of 8 September 2016 sent to Northern Ireland.

66. Ms Samedi states that as a result of contact with Northern Ireland officials the defendant took the decision not to press engagement too quickly. The defendant also took account of the fact that Northern Ireland was not an existing dispersal area for adult asylum seekers and that, prior to involvement in the VPRS scheme, it had not participated in any other government resettlement scheme. The defendant was anxious not to undermine or jeopardise Northern Ireland's participation in that scheme.

67. On 1 December 2016 the Immigration Minister wrote to the Northern Ireland Ministers again referring to contacts with Northern Ireland Executive officials and providing information in response to queries. The letter set out the three schemes, whose details had been set out in the letter of 8 September 2016 to other local authorities in the UK, and stated that the defendant looked forward to further detailed discussion between officials on taking forward those various initiatives in Northern Ireland. To date no offer has been forthcoming from Northern Ireland in relation to UASC.

68. The claimant is critical of the defendant's approach to consultation with Northern Ireland. Ms Dubinsky submits that the defendant prematurely abandoned any attempt at a consultation and should have proceeded further by giving more information and seeking to obtain an informed response. On behalf of the defendant Mr Manknell submitted that in the light of the reaction from Northern Ireland in the letter of 9 August, and as a result of ensuing discussions with officials, Ms Samedi was justified in taking the view she did. It would have been clear to her that the situation in Northern Ireland, which had limited experience of taking in refugees, was different from the rest of the United Kingdom, and that the pace of any progress would be much slower.

69. We do not consider that the claimant's criticisms are made out. It is clear from the materials that the situation in Northern Ireland was different and that that there was marked hesitation of the part of the Northern Ireland authorities to make any further commitment. In the light of the requirement under s.67 for the Secretary of State to make arrangements to relocate UASC as soon as possible, a decision not to force ahead the consultation process was a reasonable one. The reaction to initial contacts was calculated to lead to that conclusion, and the lack of any subsequent offers may, as Mr Manknell submitted, prove the wisdom of Ms Samedi's stance in hindsight. Matters have been complicated by the collapse of the power-sharing agreement in recent months. There is no evidence that further pursuit of Northern Ireland would have produced any specific offer in the circumstances.

Scotland

70. On 13 May 2016 the Ministerial letter, which amongst other things referred to s.67 and an intention to consult with local authorities about resettling UASC from Europe,

was sent to COSLA, the Scottish SMP, for sharing with local authorities in Scotland. That was followed by the national event of 7 June to which local authorities were invited.

71. In early June, Home Office officials met COSLA representatives to discuss the possibility of hosting an event to discuss NTS transfer, the VCRS scheme and transfers of UASC from Europe under s.67. On 15 June COSLA responded to a draft protocol concerning the NTS scheme raising a number of concerns, including the fact that the NTS scheme did not yet apply to Scotland, and questioning whether the 0.07% threshold would represent a disproportionately high share for Scotland. A further response to a later draft of the protocol on 23 June again raised problems, speaking of "significant issues at the macro level". It expressed concerns about the 0.07% threshold and a potentially massive burden on any local authority joining the NTS scheme if a significant number of other local authorities failed to sign up for it. The letter also states that

> "… the central team must consider other factors when allocating to a region beyond breaching the cap, and other recent UASC arrivals via the transfer scheme, for example, UASC arrivals the LA may have outwith the scheme, the number of other pressures the LA may be under from the Syrian resettlement scheme and the adult asylum seekers or refugees along with the other demands they may have on their care system locally." (*sic*)

72. An event subsequently took place in Edinburgh in July 2016 attended by twenty-six local authorities after which COSLA agreed to convene a working group to discuss NTS issues. It is clear that a working group of twenty-five local authorities had met in relation to UASC dispersal on seven occasions since May 2016, and that papers about UASC had been submitted to local authority leaders on four occasions between May 2016 and February 2017. Those meetings and the working group had established certain barriers in relation to Scotland's participation in the UASC scheme. They included a lack of spare capacity in the Scottish care system, which, if at all possible, would take time to build. There were also concerns about the legality of transfers to Scotland. It was stated that until that was resolved Scottish local authorities could not participate in the NTS scheme. On 27 July 2016 Renfrewshire Council made contact with the Home Office and a process of engagement took place which resulted in an offer by the end of September to support six UASC. These were the only six places allocated towards the specific s.67 number. No other offers at all were made in relation to s.67.

73. On 8 September, as already stated, the Minister wrote to local authorities seeking replies in relation to the three matters identified. On 12 September Mirren Kelly, a policy manager at COSLA, wrote to all Scottish local authorities. She referred to the letter of 8 September and stated that given ongoing work and outstanding questions on the detail of the schemes "We do not recommend that local authorities respond individually at this time". She raised concerns that responding might commit a local authority to the NTS and that the 0.07% cap might represent a very large increase for some authorities in the number of looked after and accommodated children. She therefore recommended "a holding position which would allow negotiations with the

Home Office to ensure that the schemes were suitable and working in a Scottish context."

74. In April 2017, in the course of this litigation, Derek Mitchell, the senior responsible officer at COSLA on these issues, provided a statement in which he said:

> "At the time the consultation closed in October, after months of engagement with ourselves and local authorities, we had been clear that Scotland had no spare capacity in the care system, did not feel that the transfer protocol was suitable for Scotland given the devolved legislative systems, and had concluded that until the transfer scheme was extended to cover Scotland through secondary legislation, Scottish local authorities could not participate."

He continued:

> "It was not until mid-late October during the closure of the Calais camps that we identified s.67 applied UK wide and outwith the NTS, at which point I put out a call for any placements on 28/10/16 as you've seen from the evidence. Offers were made in response to an emergency humanitarian situation and did not imply any ongoing capacity in the care system in Scotland."

75. Ms Dubinsky was highly critical of the consultation process in Scotland. She submitted that the defendant's communications with COSLA, and thus Scottish local authorities, did not supply the minimum information necessary for fair consultation. It had led to confusion over the inter-relationship between NTS and s.67, so that COSLA itself had not understood that s.67 could operate outside the NTS until after the ultimate cut-off date of 14 October 2016.

76. Moreover, Ms Kelly's e-mail of 12 September 2016 had effectively halted the consultation by recommending that local authorities did not respond individually to the letter of 8 September. Once COSLA had made a request to Scottish local authorities at the end of October to offer places in the light of the Calais camp crisis a large number of places were offered. This demonstrated that there was a significant amount of capacity in the system and a failure of effective communication in the consultation process. Ms Dubinsky argued that it was no answer if the defendant was unaware of what COSLA was telling Scottish local authorities. The question was not whether the defendant reasonably believed the process to be fair; it was for the court to resolve the question of fairness for itself. In any event it was for the defendant properly to inform COSLA and to take reasonable steps to ensure that there were reliable communications with local authorities.

77. On behalf of the defendant it was pointed out that from February 2016, the defendant had had contact with COSLA about plans for a national dispersal system for UASC. COSLA had repeatedly stated that there was little or no capacity. An e-mail of 16 February states:

> "I have to warn you that there are significant pressures on the arrangements for looked after children in Scotland already, and unfortunately that there is not spare capacity sitting ready to accommodate young people who may need to be resettled from elsewhere in the UK."

78. Ms Samedi has commented that that position did not change significantly over the next 12 months, with Scottish local authorities regularly raising concerns about foster care capacity and the cost of residential placements being much greater than funding provided. Events or contacts in 2016 had stressed limited capacity in the Scottish care system. It was submitted that Scotland's position until the onset of the Calais camp crisis at the end of October 2016 was one whereby very few offers were likely to be forthcoming.

79. The offer of places after the Calais crisis was, as Mr Mitchell had stated, a response to a particular emergency humanitarian situation and did not imply any ongoing capacity in the Scottish care system. Mr Manknell argued that post-Calais offers did not represent more than a response to a particularly acute crisis so that it should not be inferred that the absence of offers before then was based on an inadequate consultation process.

80. The claimant holds the defendant responsible for the position adopted by COSLA and points to the offers made after closure of the Calais camp as evidence of capacity which could have been made available had the consultation been fair and effective. The defendant's position is that COSLA was a representative for Scottish Local Authorities and that it had consistently both before and after the coming into effect of s.67 made plain that there was very limited spare capacity in Scotland for UASC, so that it was unsurprising that only a small number of places were offered during the consultation period.

81. We consider that the materials referred to support the defendant's analysis as to limited capacity. Further, the offers which came forward in the dramatic circumstances created by the break up of the camp represent a one-off response to an extreme position. It is clear that the offers were made in the crisis on what was called a "snapshot" basis, rather than on the basis that such places would continue to remain open for UASC. Moreover, those post-Calais camp offers had come in after the closure date adopted for the consultation (14 October 2016), which we have already considered. If that decision was sustainable, then in our judgment the defendant was justified in not allocating those places to the specified number. These later offers were expressly made on the basis that they did not represent ongoing capacity in the system which could be held open. Indeed, at the same time as COSLA made plain that in response to the crisis offers of places could be made, it was indicating that it would not be until the end of November 2016 that consideration would be given to indications of capacity. In those circumstances, it was not unreasonable of the defendant to proceed to formulate the specified number without adding in the later Scottish offers. This is, of course, not to say that child care places in Scotland will not be taken up by s.67 children, if newly asserted capacity actually exists.

82. The letter of 8 September 2016 had consulted simultaneously on the NTS, s.67 and the VCRS as routes by which a child might arrive within the area of a local authority. When offers expressed as a specific number were provided prior to 14 October, those

responses were all treated as s.67 responses for the purpose of calculating the specific number, even though in reality offers made would not have been limited to s.67 cases. Places offered later would be allocated to the NTS and VCRS schemes. Given that local authority capacity is not subdivided into different schemes but is driven by the statutory requirement to care for children who arrive in a local authority area by a variety of means, we consider that the adoption of this broad brush approach to the assessment and apportionment of capacity was a reasonable one to adopt, especially as spaces were not to be held open, and capacity and its location changed from day to day.

83. As to the advice given by COSLA to Scottish local authorities not to respond individually to the defendant, COSLA had been the representative body for Scottish local authorities and was in regular contact with them, reflecting their attitudes both before and after the passage of s.67. In those circumstances we were not persuaded that the claimant was right in effectively seeking to treat COSLA as an arm of the defendant for the purposes of the consultation process. The defendant was entitled to consult on this issue with local authorities via the SMPs, as convenient informed bodies, and ones which understood the problems and attitudes of local authorities. The defendant was entitled to rely on the responses given via that channel of communication. It can scarcely be a matter of complaint against the defendant that COSLA seemingly did not know that s.67 applied nationwide, though the NTS provisions did not yet do so. In any event, confusion about s.67 and the NTS or not, the constant picture from COSLA was of very limited resources for UASC, and the response to the closure of the Calais camp was a humanitarian response to a crisis and not an indication of generally spare capacity in the Scottish care system. Any complaint about the Scottish response cannot be fairly laid at the door of the consultation process; besides, no Scottish local authority has complained that, absent COSLA's advice from Ms Kelly, it would have made an offer.

Wales

84. In relation to Wales a similar situation arises in that only six offers were made during the consultation period, whereas a number of later offers from Wales were not counted for the purposes of the specified number.

85. There had been contact between the defendant and relevant Welsh stake-holders prior to the passage of s.67, which had included discussion on UASC issues. Key Welsh officials attended the national event on 7 June and thereafter telephone contacts took place with a view to arranging the main Welsh consultation event on 12 July. An e-mail of 10 June sent to the Welsh SMP confirmed that there was no specific figure attached to the Dubs amendment, s.67. It continued:

> "We (HMG) need to consult with LAs across the UK to understand capacity and willingness to support his scheme before going back to Parliament with an updated position."

86. On 15 and 16 June a two-day event was held in Wales where senior Home Office officials travelled across Wales to liaise with the SMP and representatives from Welsh local authorities and to discuss asylum and refugee issues. On 12 July 2016, the main Welsh consultation event was held and was well attended. Senior Home Office officials noted:

> "Although we have been working closely with local government partners prior to this event, the launch marked the start of the formal consultations with local authorities on two key issues being secure buy in for the NTS scheme and agree the number of unaccompanied refugee children from Europe that will be resettled to the UK (over and above the number of spontaneous UASC arrivals local authorities might expect to receive under the transport scheme)." (*sic*)

87. Following a number of meetings in July and August, the Welsh SMP lead, Ms Hubbard, suggested to the defendant that a response could be expected towards the end of September by which time the proposal would have gone out to local government leaders.

88. On 8 September 2016 the letter seeking responses by 21 September was sent out. On 26 September 2016 Ms Hubbard wrote to Welsh local authorities inviting them to specify a timescale for their responses without mentioning any cut-off date. Ms Dubinsky points to this as evidence that the Welsh SMP and Welsh local authorities were unaware of a cut-off date, after which no places offered would be counted. There is then a complaint that a number of places offered in early October, together with post-Calais camp offers made in November 2016, were not counted. We will return to those matters later.

89. The defendant asserts that the claimant's case confuses a lack of offers of places with deficiency in the consultation. There had been significant engagement with Wales both in discussions and at events and it is noteworthy that on 28 October 2016, the Welsh SMP had indicated in relation to the Calais crisis that Welsh local authorities fell into three groups. Two of the groups could offer no assistance. One of the groups could offer places for "small numbers" of UASC but were raising conditions such as funding issues, or in relation to age, gender and religion. Ms Samedi's witness statement referred to subsequent contacts which supported the proposition that it had been clear that there was no substantial capacity in Wales to take large numbers of s.67 children. Overall, it was submitted that the fact that no places were offered in the consultation period did not reflect a deficiency in that process but rather the realities of the position of Welsh local authorities.

90. We agree with Mr Manknell's submissions. In our judgment, there had been a significant degree of interaction with the Welsh local authorities or their representatives in dealing with the issue of UASC, including s.67 children. The letter of 8 September 2016 had made sufficiently clear that responses were required by 21 September, and indeed contact before that had shown that the Welsh local authorities expected to be in a position to provide numbers by the end of September. The fact that about a week after that Ms Hubbard was writing to Welsh local authorities apparently unaware that that cut-off date had passed, does not affect the fact that in our view it was sufficiently clearly expressed. The 8 September letter made clear that councils should confirm by 21 September the number of UASC that could be placed in an authority for the remainder of the financial year, as part of the process of arriving at the specific number under s.67. In our judgment, the letter did sufficient to convey that numbers were required by the cut-off date for that purpose.

91. Further, we consider that a picture emerges from Wales of a consistent theme at the time of the consultation that there were very few places available. That there was a willingness to bring forward offers which emerged at the time of the Calais camp crisis does not in our judgment alter that position.

England

92. In relation to England the claimant relied on statements from officials or councillors in four local authorities in support of the proposition that local authorities had not understood that they were being approached as part of a consultation process and that they would have responded differently, and by the required date, with offers had they appreciated the position.

93. From the London Borough of Hammersmith and Fulham, both the council leader and the Director of Family Services made witness statements. The latter states that he received the letter of 8 September and did not understand it to be a consultation document, but rather a request for information. Had it been appreciated, other steps would have been taken. We comment that that was exactly what the consultation was: a request for information. Similar false distinctions were drawn in comments made by the leader of Ealing Council, the leader of Lambeth Council, and a member of Brighton and Hove City Council.

94. In relation to Lambeth there was in fact a response dated 23 September 2016 from the Chief Executive which appears to be a direct response to the consultation, responding to each of the three questions posed in the 8 September letter relating to participation in the NTS, UASC under s.67, and participation in the VCRS scheme. In relation to UASC, whilst references were made to the need to proceed cautiously in a situation where the council was very hard pressed financially, an offer of four places was made. It therefore appears that as far as Lambeth was concerned the letter of 8 September had been understood as a consultation and had been directly responded to.

95. Again in relation to Brighton, there is a response from the leader of the council dated 20 September. After pointing out that Brighton's current UASC population was at the level of the 0.07% cap, it offers to receive "a few more young people if there are no other options for them". Again, this letter appears to show a meaningful response to the letter of September. We note that Ms Daniel, the claimant's witness from Brighton, does not feature in a list of key figures within Brighton to whom this letter was copied.

96. In relation to Ealing, Councillor Bell states that he visited the Calais camp in August 2016 and made a statement in the media that Ealing was committed to resettling 10 children from the camp under s.67. It is not suggested the defendant should have taken cognisance of any such statement. The letter of 8 September was undoubtedly received by Mr Bell, but no action was taken upon it as far as the defendant was concerned until London Councils (the SMP for London) wrote to the defendant in October 2016 in the context of the imminent closure of the Calais camps stating that a very provisional view of capacity within London Boroughs could be in the order of 100 placements. That of course was a generalised response and not specific to Ealing, although Mr Bell states that Ealing had notified London Councils that it was willing to accommodate 10 UASC. A Freedom of Information Act disclosure reveals that Ealing did not itself respond to the defendant.

97. As to Hammersmith and Fulham, it had indicated a willingness to participate in the NTS scheme as early as July 2016, and had made an offer in the media in August 2016 to resettle 10 UASC under s.67.

98. This was of course prior to the letter of 8 September and a Home Office official contacted Hammersmith and Fulham indicating that instead of allocating that figure to s.67, the Home Office would increase the quota of children who could be transferred to Hammersmith and Fulham from other local authorities under the NTS. In the light of the Calais camp crisis in October an offer was made to accept fifteen children, of which thirteen have so far been accommodated.

99. These are of course only four instances out of over 200 local authorities. Ms Dubinsky does not claim that they are representative responses, but invites the court to treat them as supportive of her case in relation to the inadequacy of the consultation. We do not consider that examination of the detail bears this out. In two cases, the evidence is contradicted by the fact that the local authority in question responded to the consultation letter of 8 September in terms which do not show any misunderstanding of the position. In relation to Ealing, statements to the media were insufficient, and a subsequent communication of an offer through its SMP formed part of an imprecise non-specific general offer for the region. In the case of Hammersmith, an offer was made through the media, which was noted and acted upon by the defendant as described above. A later offer after the end of the consultation was dealt with in common with other late offers. The opinions of the various witnesses are in some instances contradicted by other evidence and in any event are not binding on the court. We do not consider that these specific instances add materially to our general consideration of consultation issues.

100. We note additionally that the witness statements do not focus in any detail on the national and local consultation events or the contacts between defendants and officials both before and after the passing of s.67. Instead, the focus was largely on the letter of 8 September.

101. For these reasons we are not persuaded that points raised in relation to particular countries or areas considered above operate to invalidate the consultation process by reason of unfairness.

Consideration of the responses and the rationality of the conclusions

102. We next consider complaints which were made about the way in which offers were or were not recorded: either by error, or by form of offer, or timing or by deduction from the offer. These can be pigeon-holed either as failures to make clear what was required of the consultee to whom the response had to be presented, or as failures to consider the responses conscientiously. But they are conveniently considered together.

103. We start however with a few observations, some reiterated. First, to the extent that, very much as a secondary line and without going into any jurisprudence on it, it is said that the process was unfair to those who might benefit from a higher specified number under s.67, it is important to remember that the same fairness required the defendant, in the consultation, to consider the position of UASC who arrived by other

routes and to whom the same duty was owed by local authorities. The finite resources of local authorities to look after UASC mean that a higher s.67 number reduces their capacity to take UASC from routes other than s.67. In this context, the defendant makes the point well that there are over 700 children being looked after by authorities where the 0.07% threshold is exceeded, with Kent County Council the most severely affected, and the difficulties behind transfer to other authorities, and their slow, limited and contradictory responses show the reality of the limitations within which the s.67 number had to be considered. A willingness to take s.67 UASC, which would mean that others could not be transferred in to relieve more hard pressed areas, or had to be transferred out, could not be considered in isolation from the overall position in relation to UASC, and indeed all the other looked-after children.

104. Second, as we have already concluded, it was rational for the defendant to undertake the consultation by seeking information as to the overall capacity for UASC and then reaching a judgment as to the number to be specified. Her consideration of the results of the consultation is necessarily affected by the form in which it was undertaken. Third, the changing availability of spaces and the unknown demands on them from other sources, including transfers under the NTS, and spontaneous arrivals, meant that any figure of capacity for one group was always going to be a rather rough and ready assessment, giving a rather spurious sense of accuracy precisely because a number had to be specified. There is nothing objectionably arbitrary about that; it is inherent in the task set by Parliament. Rather, it is the criticisms urged by Ms Dubinsky which fail to set the task in its context.

(a) Deduction

105. The defendant totalled the number of places specifically offered, which, after allowing for the missing 126, rounded up to 130, from the South West, amounted to 530 places. But she deducted 50 from that figure, as she had from the earlier figure, to allow for those who were to come in under Article 8 of Dublin III, usually expecting to be accommodated with their families, but whose family arrangements then broke down. There was evidence that this had happened, and the children then had to be placed in local authority care. The evidence was that this in fact happened at a greater rate than that allowance implied.

106. It does not matter what heading this point is raised under; there is nothing in it as a matter of legal complaint. It continues the fallacious thinking which underlies the claimant's case. The consultation was not intended to produce a specific local authority by local authority or region by region set of specific places for s.67 children, to which s.67 children would then be allocated. The consultation was intended to provide the defendant with information from which she could arrive at a nationally specified number of places for s.67 children. Any specific offers were to be given in the context of the other demands on local authority child care places and resources. The accumulation of the specific offers would give a reasonable snapshot of s.67 capacity in the system, though its precise location would vary over time. It could arise where none had been offered and could be lost where it had been offered. She was entitled to conclude that some of the specified capacity needed to be held back for those who came in under Dublin III and still needed local authority care. This was a judgment for her to make and shows no failure to consider the results of consultation, or misunderstanding of the results, or any irrationality in her approach.

107. This point did not need to be signalled in advance. It is a problem that those who had the greatest knowledge of Dublin II/III children would have been aware of, but not all authorities had received many such children, hence the NTS. Ms Dubinsky merely speculates that local authorities might have made a deduction already for this problem in such figures as they produced. There is no evidence of that at all. A global deduction was a rational way of recognising it. Any double-counting would have to exceed the shortfall in the deduction compared to reality for even a small discrepancy to arise. This cohort, notionally of 50, might have come in, but for the Dublin III family arrangement, as s.67 children.

(b) Overlooking offers made before 14 October 2016

108. We have already mentioned the 126 places offered before 14 October 2016 by the South West but overlooked until the end of March 2017, and then investigated and resolved before the end of April. This figure was then rounded up to 130, and the specified number was adjusted accordingly to 480. Ms Samedi explained that this was human error by an official, not in her team, which was investigated very fully. A full check on other responses and apparent non-responses was then carried out to see if there had been any similar omissions. Moreover, the error was rectified, and has had no effect on the availability of places for s.67 children. This does not justify any suggestion that the process of considering the responses was unlawful.

109. The claimant, by dint of using information disclosed by the SSHD and Freedom of Information Act requests, produced a table which Ms Dubinsky said did not purport to be a comprehensive list of those who made specific offers by 14 October 2016, but was at least sufficient in quantity to show that something had gone seriously and radically wrong with the consideration of the consultation responses, quite apart from the 126 from the South West.

110. This table, table 1, showed on the claimant's analysis that there were at least 59-69 places offered by 14 October 2016, but not recorded. The defendant agreed that 10 had not been recorded, six from the Isle of Wight and four from Blackburn. But these are figures, which are insignificant when the roundings, all else apart, are taken into account: 397 +126+10-50= 483, (480); 400 + 130-50=480. We are not persuaded that this sort of exercise shows any failure to take the results conscientiously into consideration. Still less does it matter in the context of the considerable imprecision necessarily inherent in the figures anyway. These are no more than the sort of minor errors to which any consultation is prey without its lawfulness being affected one whit.

111. We have already dealt with the 10 places attributed by Ms Dubinsky to the London Borough of Ealing as a result of an announcement to the press in August 2016, not a consultation response, by the leader of the Council on a trip to Calais accompanied by a journalist. This was reasonably ignored, if it was noticed. Ealing LBC made no response to the SSHD to the 8 September 2016 letter, but said that it was "aware of" and "supportive of" the response from London Councils dated 21 October 2016. This contained no reference to Ealing LBC having made a specific offer; it said that London Councils had "a very provisional view of the potential capacity within London boroughs [which] could be of the order of over 100 placements." Five qualifications were then placed on that provisional estimate of capacity: others playing their part, funding; phasing over time to avoid peaks; rapid improvements to

the process of sharing information; the provisional estimate itself having made a number of assumptions; and authorities had to manage and respond to other pressing demands, including those which arose from other resettlement schemes. This item in the claimant's table rather supports the overall approach to the responses adopted by the defendant; it does not advance the claimant at all. Indeed, such was Ealing's true UASC capacity that during 2016, it arranged for a transfer of one child out of the borough.

112. Fifteen specific offers were said wrongly to have been ignored from three West Midlands councils: Sandwell, Wolverhampton and Shropshire. That is wrong. Consistently with her approach, the defendant took her figures from those supplied by the West Midlands SMP in October 2016. Ms Dubinsky's table refers to figures of March 2017, (although the specific offers said to have been ignored were pledged on 1 October 2016) where the SMP says that some of the authorities are building up experience of taking UASC and engaging with the NTS process. However, the SMP's table would show only an increase of four in the number specified because other authorities reduced their figure. It simply serves to illustrate how the capacity figure is only a snapshot, which gives a sense of what the capacity is, but which does not represent committed spaces kept available by specific authorities. There is nothing in this point.

113. Next, Ms Dubinsky submitted that 15-20 offers, rounded to 20, had been omitted from the Yorkshire and Humber SMP because the defendant had not appreciated that there were in fact two offers of 15-20 places, and not just the one allowed for; 40 had in fact been resettled there. However, it seems to us that the SMP's position was as follows. In June 2016, the local authorities had agreed to take 15-20 NTS cases, who had already started arriving by September, in addition to some taken from Kent in the previous 12 months. The SMP's letter of 21 September 2016, responding to the defendant's letter of 8 September, referred to the numbers of spontaneous UASC arrivals, the challenges posed, including the lack of resources, and the intention of all but one authority to participate (as we read it, in the NTS), but they could not all participate immediately. The e-mail of 7 October 2016 says that they will continue to take "as many as possible at this stage, which should mean a further 15-20 on top of the previous agreed numbers by December". Only one set of 15-20 was counted: we are not sure about the defendant's reasoning but it seems to us that only one set of 15-20 represented future capacity; one set was already committed and being used up in taking children under NTS, (and Hull needed support in view of the problems it faced as a port); the later e-mail offer may not have been seen as sufficiently firm and specific to authorities. But we do not read this as two lots of 15/20 spaces which fitted the test applied in the consultation process.

114. Leaving aside for the moment the correctness of that analysis, or the reasonableness of the appraisal by the defendant as to what the SMP was actually putting forward, an error of that sort in an exercise which is inherently imprecise, albeit culminating in a particular figure, cannot possibly show that the results of the consultation were not conscientiously taken into account or ignored in a way which made the consultation unlawful or its outcome irrational. The defendant was well aware of the sort of problems faced by the SMP, illustrated by its e-mail of 9 March 2017. This point applies equally to many of the tabulated criticisms made by Ms Dubinsky.

115. Finally, Ms Dubinsky said that by the beginning of October 2016, five unidentified Welsh authorities had made firm commitments of 20 places, according to a document sent to the defendant in November 2016. These had not been included. First, it is not clear whether any such "commitments" were communicated to the defendant before that document was sent; its purpose was to seek funding for support for the functioning of the NTS in Wales. More importantly, it does not identify the authorities, and in the context of what Ms Samedi says in her second witness statement, [162] and [ff], about the difficulties Welsh authorities faced in making specific offers, and the e-mail of 5 February 2017 from the SMP, it is clear that the defendant did not miss out any offer which she should have included. This funding business case was not pursued.

116. Ms Dubinsky rightly pointed out that this was not a comprehensive analysis of what she might have been able to say with all the information to hand; she said that it illustrated the failings, which could be assumed to exist elsewhere as well, as yet unearthed. But we are not persuaded of that point by these instances, which either show no error or none of any significance to the claim that the results were not conscientiously considered or that the outcome was irrational.

(c) The role of the 0.07% threshold

117. From Ms Dubinsky's researches, she has calculated that offers amounting to 95 places were made but expressed as a willingness to take children up to the 0.07% threshold. If expressed as a number, that would have added 95 to the total. Again, she says that there may be other authorities who expressed themselves similarly. This is not a sound point in our judgment.

118. We have already explained the justification for considering the capacity for UASC as a whole rather than seeking a separate figure for s.67 children alone. It follows that a judgment had to be made about the treatment of consultation responses which would overall contain a mixture of specific capacity figures, and expressions of willingness to take UASC up to the 0.07% threshold, including through the NTS, but without a specific figure. If the percentage had been converted to a specific figure and then allocated, with the other specific figures, to s.67 children, all the identified capacity would have been taken up for that one source of UASC. In view of the other sources of UASC, notably spontaneous arrivals and transfers under the NTS, that would have been irrational, and not what s.67 intended. It would also have ignored the fluctuations in capacity over time. Some other means of apportioning the capacity thus identified between the various sources of UASC would still have been required. Ms Dubinsky's approach ignores that.

119. There was nothing irrational about using a fairly crude tool to apportion capacity; the specific figures were summed for the purposes of s.67, and the percentages were available to meet other demands on capacity. The percentage figure was a particular feature of the NTS, and the percentage figures were therefore reasonably treated as reflecting a commitment to participate in that scheme, and not as relating to s.67.

120. Second, it is important to remember that the figures were not treated as representing specific places from specific authorities, let alone ones which would be kept available for s.67 children. The capacity figure would always be changing, yet a decision on a specific number was required. Where the offer was expressed by reference to the

0.07% figure, that represented a willingness to take UASC up to the threshold percentage. That capacity could still be available to meet those s.67 children, under the NTS, where the specific places were not available at the point of need. Some of the letters quoted by Ms Dubinsky in her tabulation suggest that some spaces might be used for s.67 children, but that the authorities were unwilling to specify a separate figure for them. No doubt other approaches to this issue were possible, but we see nothing irrational about this method of apportioning statements as to capacity so as to reach the s.67 figure.

121. It could not sensibly be suggested that the true capacity figure was an overall 0.07% in England; that percentage was merely the point at which an authority could expect not to have to take more under the NTS. Such spaces were not always immediately available in any event and for some without experience of UASC, it would take time to develop. For some it would have represented a very large increase in UASC, and indeed a disproportionately large increase compared to other authorities in the same region. It was also reasonably not the defendant's intention to impose such a threshold on authorities, but to obtain their voluntary engagement in the NTS, to relieve those which had already reached the point at which they should not have to take more. Nor was there an obligation on authorities to provide spaces up to that threshold.

122. Ms Dubinsky also submitted that it was unfair that consultees were not told that offers expressed as a percentage rather than as a specific figure would not count towards the s.67 figure. We disagree. First, the language of the letter of 8 September 2016 clearly seeks a specific figure for UASC capacity for the purposes of the defendant's decision on the number to be specified under s 67. So the form in which the number was sought was clear enough. There was no reason for an authority to suppose that the defendant would, or would necessarily be in a position to, derive a specific number from the percentage. Second, as the letters quoted by Ms Dubinsky from local authorities demonstrate, they used the percentage to reflect commitment to the NTS, while declining to give a specific figure or commitment for the purposes of s.67. So, while the consultation process did not spell out the way the percentage/numbers would be approached, there was nothing unfair about that. Third, the submission appears to make a quite unrealistic assumption about the true attitude and capacity of the authorities. There was no evidence of spare capacity ready and available for willing authorities to offer for the purposes of s.67, had they only but known of how to express its existence. There were over 700 UASC in authorities already over the 0.07% threshold. Ms Samedi's evidence demonstrated how cautiously and with what qualifications and limitations authorities approached the use of their children in care resources when specifically asked to take transfers, even after offers had been made, or after agreement to taking UASC up to the 0.07% threshold. As she made plain on a number of occasions, there was a "disconnect" between what some political leaders offered in public and reality and between expression of willingness in principle and actual placement when the time for it came. The defendant could not ignore the risk that one group of UASC, s.67, might attract offers of spaces which would remove spaces or require transfers for those who were already here in over-burdened authorities or who were yet to arrive spontaneously.

123. Ms Dubinsky also suggested that a further 89 places had been offered by East of England SMP since, in a letter dated 24 March 2017, it referred to a commitment in

November 2016, signed by all its local authorities, initially to reach 0.05% as a region. However, as Ms Samedi pointed out, this was an offer expressed as a percentage, and clearly related to the NTS. There is no evidence of a local authority specific number, and the commitment was expressed to be regional. Besides, it came in after the consultation closure date. It was not a s.67 offer; indeed the letter of 24 March 2017, far from complaining that the offer and resources had not been taken up with s.67 children, emphasised that it was already the region with the third highest percentage of UASC, three or four of its 11 constituent authorities already exceeded the 0.07% threshold - which is not a capacity figure anyway. The whole tone of the letter is cautious in the light of the challenges experienced, perhaps in reality highlighting the problem of apportioning limited resources between transfers, spontaneous arrivals or other sources of demand, and s.67 relocations.

(d) Specific offers made between 14 October and 20 December 2016

124. Ms Dubinsky identified what she said were at least 87 offers which came in during that period which the defendant had not counted. These were from Scotland (64-65), Wales (12 or 38) and London Borough of Hammersmith and Fulham (5). First, we observe that these offers, such as they may be when examined, came in after the closure of the consultation process. It matters not for these purposes whether consultees should have been told that the period had in reality been extended up to 14 October 2016, because they came in after that date anyway. Local authorities should have been anticipating that any offers were to be in by 21 September 2016. There is, incidentally, no suggestion of offers made between 21 September 2016 and 14 October 2016 being discounted because of their date of arrival. Second, a cut-off date was necessary for the purposes of reaching a decision on the number to be specified under s.67, whether or not the duty to make arrangements as soon as possible applied to the taking of that particular decision. As the capacity figure would fluctuate over time, there were bound to be authorities who might have more to offer at any particular future date and but there were bound to be authorities who would have less to offer. The exercise could not be done rationally as a rolling, never-ending exercise. Accordingly, before turning to the detail with which we were favoured, there is nothing in principle to suggest that if there were offers after the cut-off date that were not taken into account in the setting of the specified number, the defendant had failed to act conscientiously in her consideration of the responses or irrationally in some other way.

125. Third, these particular offers need to be seen in context. On 24 October 2016, the French authorities, with little notice, commenced the evacuation of the Calais camp.

<u>*Scotland*</u>

126. We have already set out the very limited offer which came from just one Scottish local authority, and the attitude adopted towards the letter of 8 September by the Scottish SMP, COSLA. What happened was made clear by COSLA in their letter of 7 April 2017 to Ms Samedi: on 17 and 28 October 2016, COSLA had contacted all 32 local authorities about the closure of the Calais camp. The authorities responded with offers of places which were forwarded to the defendant by 3 November 2016, and in December children started to arrive in Scotland; not all of the 50 or so places offered, (but these appear to be the ones referred to with a slightly different figure by Ms Dubinsky), in this way were filled because of limitations placed on who could use

them. But as the letter of 7 April 2016 and Mr Mitchell, of COSLA, made clear in his statement, this was an emergency response. There was no implication that capacity continued, or that the places could be kept available. He added that COSLA had been clear that when the consultation "closed in October" Scotland "had no spare capacity in the care system". All else apart, Ms Samedi said that there was no point in amending the defendant's spreadsheet of offers because those spaces not taken up were not still available.

Wales

127. There are two figures for Wales to be addressed: 12 and 44. Both relate to the emergency created by the closure of the Calais camp. The 12 represent the total of offers made by a group of four experienced authorities in Wales in response to the emergency. These were hedged about with qualifications. The other two groups made no offers: either because their rural isolation made them inappropriate in their eyes for UASC, which they would seek to place out of area if they took any, and others which lacked capacity, infrastructure, experience or were taken up with the VPRS. Some offers may have been taken up, but on any view, they were not a significant number at all, such as to create any possible unlawfulness in the consideration of the position in Wales. This is entirely in line with the clear position in Wales that the authorities had no significant capacity.

128. It was not clear to the defendant by whom or to whom the offer of 44 places had been made; no authorities were identified for this purpose. Neither the 23 November 2016 position statement of ADSS Cymru, a body which represents all local authorities and Heads of Children's Services in Wales, which Ms Dubinsky said contained the offer of 44 spaces, nor the evidence of Professor Holland, the Children's Commissioner for Wales, provided such information. We accept Mr Manknell's submission that it does not purport to reflect actual offers from Welsh local authorities. Instead, it contains an approach in which, as Wales represents 6% of the UK population, 6% of those coming into the UK as a result of the closure of the Calais camp should go to Wales, which is calculated as 44 children. It was not an estimate of capacity at all. It proposed commitments from authorities but that required feedback from the authorities in the first place. It could not direct individual authorities. Even had that been offered within the consultation timeframe, it could not have been taken into account as it represented neither offer nor even capacity. There is no evidence that any such capacity has been accepted by the Welsh authorities; rather, there has been a consistent theme that there is no significant capacity in Wales and only 12 of 22 authorities had indicated that they could participate in NTS transfers.

Hammersmith and Fulham

129. This offer of 15 places (5 extra) was not the only offer from London in response to the emergency in Calais; some of those were from boroughs already over the 0.07% threshold which could have led to requests for transfer to other boroughs of those arriving by a different route. In reality, this borough's capacity in January 2017, seemingly responding to the 8 September 2016 letter, was such that it was seeking to transfer one child out of the borough to keep it at the 0.07% threshold. Thirteen of the fifteen places had been taken up.

130. This picture gives rise to no error of law or unlawful unfairness.

(e) Incomplete or equivocal offers: 75 plus places

131. These are said to be relevant because they show that the consultation was unlawful because it led to equivocation and hence offers which could not be counted. The point relates largely to London, and may involve double counting of specific offers which were taken up by s.67 children with a general offer of 100 plus placements made on 21 October, after the closure of the consultation period, by Councillor Kober from London Councils. No authorities were specified. It was written in the light of the imminent closure of the Calais camp. It says that they "have a very provisional view of the potential capacity within London boroughs. This capacity could be of the order of over 100 placements". There then followed a number of qualifying points: it was important that all UK authorities did the same; it hoped that reasonable assumptions as to government support had been made; support would need to be phased in over a reasonable period; this capacity estimate was based on a number of operational assumptions; and authorities would also need to deal with other pressing demands.

132. This plainly is incomplete and equivocal and it is not suggested that it should have been taken into account. It is difficult to see how the equivocation in the offer made as a matter of urgency can be laid at the defendant's door so as to show that the consultation process, which closed before the closure of the Calais camp became imminent, was unlawful.

133. A number of lesser points were made in relation to two other English authorities in which 16 places had been filled by s.67 children. There is nothing in this contention.

(f) Local authorities which took children under s.67 but which had made no recorded offer, totalling 106.

134. There is nothing in this which can show that the consultation process or the consideration of the results was unlawful. All it shows is that, particularly when the Calais camp closed, offers were made by those who previously had not made offers. There is nothing surprising or untoward about that; there will be, over time, offers which contribute to the specified number which will not come forward because of changed circumstances, acceptance of transfers, or arrival of UASC from other sources. No deductions have been made for that. The specified number would become a rolling, changing figure. Parliament required a single number to be specified, not a rolling assessment.

(g) Potential future increases in capacity

135. Ms Dubinsky suggested that the defendant had ignored indications of potential future increases in capacity to accommodate UASC. Ms Samedi's response reflected what she had described as the "disconnect" between places publicly offered and "the reality in accessing those places at an operational level", as Mr Manknell put it. Ms Samedi provided a number of examples which bear out that difference. The defendant had followed up a number of media stories with local authorities or the SMP to confirm what the reality was. In March 2017, the defendant sought by e-mail reconfirmation of pledges previously made; the picture varied: 20 or so were not confirmed and some of the remaining places represented new offers. Offers were qualified or conditional, for example, by age or nationality. Further issues were raised. We accept her contention that it was essential for capacity not to be overestimated, risking that

children who arrived could not be cared for. This illustrates no unlawfulness in the consideration of the consultation response or an irrational approach.

(*h) The defendant's response to consultees' questions raised during the consultation*

136. This point was pursued briefly in argument. The claimant's amended grounds stated that some local authorities' responses to the 8 September 2016 letter raised questions about the relocated children's needs, funding, and whether other local authorities were participating to ensure an equitable distribution of UASC. Ms Dubinsky submitted that the defendant had not shown that these concerns had been considered or addressed. We are quite satisfied from the second witness statement of Ms Samedi that these issues were considered; funding in particular was considered. The defendant was not seeking information about capacity dependent on the willingness of other authorities to participate as well; she sought information about the individual authority's capacity whether for the NTS or for s.67 purposes. The purpose of the NTS was to achieve a more equitable distribution of UASC. We are also satisfied that local authorities were provided with sufficient information about such issues, in particular funding, to enable them to make a judgment as to their consultation response. Ms Samedi explained the funding information available to local authorities; no particular information could be given about needs beyond likely age range and nationalities; the purpose of the NTS was obvious to local authorities. There is nothing in this point. We have already dealt with the position of Northern Ireland, in respect of which a related submission had been made.

The implementation issues

137. Ms Dubinsky submitted that the defendant had failed to comply with her duty in s.67 in two respects. First, she had not specified the number required by s.67 (2) "as soon as possible"; second, she had failed to "make arrangements to relocate" the specified number of UASC "as soon as possible" after s.67 came into force. We deal first with the contention of Mr Manknell that, on its true construction, s.67 did not require the relevant number to be specified "as soon as possible" but simply that the relocation arrangements had to be made as soon as possible.

138. We cannot accept that contention. The parties did not dispute, and we agree, that the absence of a specified number does not mean that it is unlawful or premature to make arrangements to relocate s.67 UASC. That is in fact what happened in relation to relocations under s.67 from the Calais camp in November and December 2016, before the decision on the specified number had been made, or published. Obviously, the defendant had a picture of the likely range within which the specified number would fall, and that it would be in the hundreds and not in the thousands, against which she was able to measure how much capacity she could use, which became an issue when the number of potentially eligible children in the Calais camp was first realised to be somewhat greater than had been anticipated. This is shown by the evidence of Ms Samedi and of Mr Cook, Head of EU and International Asylum Policy in the Home Office. So we do not accept the full force of Ms Dubinsky's submission that the specification of the number is "logically anterior" to making arrangements for transfer and is therefore subject to the same obligation to act as soon as possible. Nonetheless, we agree that the injunction to make arrangements for relocation as soon as possible after the Act came into force also applies to the specification of the number for which

the arrangements are to be made. The fact that arrangements can be made for some relocations in advance of the number being specified does not mean that the specification can be left unresolved at the defendant's convenience, and that it is only when resolved that the duty to make relocation arrangments as soon as possible comes into play. It would be neither a sensible or purposive approach.

139. In our judgment, the defendant acted as soon as possible in relation to the specification of the number in the period leading up to and taken up by the consultation period. Although Ms Dubinsky disparages the calculation as rudimentary, the assessment of the firmness of offers in the consultation responses, and the judgment on how to apportion the responses or offers between s.67 and the other sources of demand for local authority childcare, were not rudimentary. We do not accept that the period between the effective date of closure of the consultation period on 14 October 2016 and the decision on the specified number on 20 December 2016, following the ministerial submission on 13 December 2016, showed that the defendant was failing to act as soon as possible. It needs to be remembered that during this period the defendant was faced at short notice with the considerable problems of the closure of the Calais camp, the dispersal of the children, and the need to relocate at least some who were eligible.

140. Ms Dubinsky also complained about the period between the decision being taken and its announcement on 8 February 2017. Mr Cook explained that this time was taken in order "to develop a comprehensive communications plan to inform parliamentarians and partners of the decision, and to gain approval within government to make the announcement". The defendant also wanted to announce the remaining number of available places at the same time as announcing the specified number, and in January 2017 it did not have that full information. We do not doubt the correctness of what Mr Cook said. If the duty in s.67 applied to the announcement of the decision, we would have had considerable doubts as to whether it had been announced as soon as possible after it had been taken. But the duty is to decide on a number, and having decided on it, the defendant could make relocation arrangements in accordance with it. We do not read Mr Cook's evidence as suggesting that the defendant was simply making a recommendation for Government to consider. Were that so, the decision would not have been made as soon as possible.

141. However, even if the s.67 duty extended to the announcement of the decision, or even if the decision had in fact been delayed until 8 February 2017, with the effect that it was not taken as soon as possible, we would refuse relief. A declaration would serve no purpose in the light of the judgment. It would be absurd to provide a remedy for a failure to act as soon as possible, where the required action had already been taken, and which had the effect of requiring a repetition of the decision-making process. This all rather indicates the very comprehensive nature of the challenge, but not its value.

142. Ms Dubinsky submitted that the defendant had failed to make arrangements for relocation as soon as possible because, although some 200 children were relocated during November and December 2016, and more early in 2017, making a total of about 245 relocated, there have been no relocations other than as a result of the Calais camp closure and so none from the rest of France, Calais dispersal centres apart, and none from Greece or Italy, which are the two additional countries from which the defendant is looking for UASC. Thus only about a half of the specified number has

been transferred, there is no timeframe for the commencement of further relocations, and the criteria are said to be unclear notwithstanding the March 2017 policy statement, updated in April. She said that arrangements had to include at a minimum the adoption of eligibility criteria, guidance as to how they would be implemented, and registration and assessment of potentially eligible children in the taking of concrete steps to relocate those found to be eligible.

143. Mr Cook's witness statements provided the defendant's response. The defendant did not receive permission from the French authorities to operate in the Calais camp before 17 October 2016. By the end of November 2016, the defendant was working with the Italian government on how it could operate in Italy to give effect to s.67; in Greece, the defendant had engaged a full-time project manager responsible for implementing s.67. As Mr Cook explained, putting in place a process agreed with relevant NGOs and other partners to assess and relocate eligible children, "required careful handling of the relationship with Greece, who are working to both support the efforts of the UK government but to also ensure unaccompanied children are relocated through the EU Relocation Scheme".

144. The March 2017 policy statement had indeed provided the eligibility criteria. The policy reflects the limitations on the UK government acting within the territories of other sovereign countries, in respect of children for whom those other countries are legally responsible. It had experienced difficulties in obtaining permission from France to interview children in the Calais camp, not least because such actions were seen as creating an unwanted "pull" factor. Mr Cook explained that the policy now placed

> "responsibility on the sending Member States to identify and refer children who meet the criteria, rather than the UK identifying or interviewing any or all unaccompanied children located in France, Greece or Italy. In addition although the SSHD intends to move quickly to transfer the remaining children, she recognises that the UK authorities are not under the same operational constraints as Calais in having to interview over 2,000 individuals claiming to be children, for whom no prior information was on record with either the UK or French authorities, in a matter of weeks. Rather, it will be entirely the responsibility of the referring Member State, based on the information already available to them about unaccompanied children present on their territory, to refer unaccompanied children who meet the criteria."

The defendant has also asked those countries to prioritise those children likely to qualify for refugee status and the most vulnerable without specific reference to age or nationality. Accordingly, the Government had broadened the eligibility criteria, also asking the French, Italian and Greek authorities to prioritise the most vulnerable children and those most likely to qualify as refugees. The Governments would take the decisions as to which children, meeting the UK eligibility criteria, should be referred for relocation.

145. 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 s.67, it is impossible to conclude that such an approach is inconsistent with its s.67 duties. Nor, in view of the UASC problems faced by Greece and Italy up to March 2016, can it be said that their problems should have been ignored and only those resourceful enough to enter France and to reach Calais should have been the beneficiaries of s.67. Greece in particular faced severe difficulties before such relief as the EU/Turkey agreement afforded took effect.

146. Mr Cook explained the further history of the UK Government's engagement with the French, Italian and Greek Governments in his second witness statement: these included written communications and visits by his officials in March 2017, seeking formal agreements to enable "rapid progress" to be made to complete the specified numbers. There had been a "temporary pause" in the progress with Greece while arrangements were being made for the relocation of children from or dispersed from the Calais camp. The defendant "was struggling" to make available spaces for Calais children in a short time frame, and was entitled to judge that further placement for relocations from Greece were not readily available.

147. We accept that the range of issues to be reviewed with those Governments is broad, complex, and not to be underestimated. We are not prepared to hold that arrangements have not been made as soon as possible, for this is not something within the control of the UK Government. The relationships require some care. We see nothing to suggest that the UK Government is not doing all that sensibly it can. This ground of challenge must fail.

The procedural issues

148. Although the decision as to the number to be specified under s.67 was not taken until 20 December 2016, and not announced until 8 February 2017, transfers pursuant to s.67 were made as a result of the closure of the Calais camp in November and December 2016. Some 200 children were transferred and a total of about 245 have now been transferred. Rather more were transferred on the basis of meeting the family criteria set out in Article 8 of Dublin III. The process of deciding which children should be transferred was subject to guidance issued by the Home Office. For the purposes of this ground of challenge, we can focus on the second version of the guidance issued on 8 November 2016.

149. It contained eligibility criteria for children in Calais: a child had to be either aged 12 or under, or referred directly by the French authorities or a body on their behalf as being at a high risk of sexual exploitation, or aged 15 or under and of Sudanese or Syrian nationality (because of the comparatively high rate of successful asylum claims); in addition, transfer would only take place if it was determined to be in the child's best interests, and the child was present in the Calais camp on or before 24 October 2016, and had arrived in Europe before 20 March 2016. In brief, the process involved two stages: a decision on the first three alternative criteria; if one of those was met, a determination of best interests, and on the two dates would then follow.

150. There was guidance as to how a best interests determination was to be made. There was also guidance as to how an age assessment should be made. If the assessor was of the initial view that the physical appearance and demeanour of the individual very strongly suggested that they were significantly over 18 years of age, the case had to be referred to another more senior officer to validate the assessment. If that were

confirmed, the assessor had immediately to inform the individual verbally that the claimed age was not accepted and they were not eligible for consideration for transfer to the UK. The decision was to be reviewed if relevant new evidence was received.

151. All others had to be afforded the benefit of the doubt and to be treated as children with their claimed age accepted until further assessment had been completed. Even if the claimed age was in doubt it had to be accepted nonetheless if there was no dispute but that the individual was under 18 and there was no definitive documentary evidence of age and the child had not previously been treated as of a different age by the Home Office. The evidence of Mr Cook, in his second witness statement, was that nationality was to be taken as claimed unless there was clear evidence to suggest the contrary. Those to be transferred would be taken to the control zone and granted temporary admission to the UK.

152. The guidance contained no specific provision about how a positive or adverse decision was to be conveyed to the individual; it contained no requirement for written or oral reasons and no formal or informal means of redress was identified.

153. Although the claimant produced evidence from a number of people who had been involved in the interview process in a number of locations, and who had witnessed the way in which decisions were conveyed to those who were unsuccessful, and although the claimant made criticisms of a number of aspects of the interview process and of the way in which decisions were conveyed, which Ms Dubinsky persisted in, the grounds of challenge in relation to the procedure were in the end confined to the absence of a written and reasoned decision, coupled with the absence of what she described as a "formal" mechanism for challenging an adverse decision. There was merely what Mr Cook described as an informal dialogue and review process between the UK operational teams and the French officials, whereby administrative errors were sometimes identified and corrected. None of the evidence referred to the way in which the decisions on any age assessment were conveyed.

154. This ground of challenge was pursued even though the guidance has been withdrawn. The deficiencies alleged are not remedied in the March 2017 policy statement; the defendant has not suggested that she intends the procedure to be different in decisions to be made under later guidance yet to be issued; the challenges were said not to be academic, at least in these proceedings, essentially because the outcome could affect the future decision-making process.

155. Ms Dubinsky submitted that the absence of a written and reasoned decision was procedurally unfair. The adverse decisions were simply conveyed orally, without reasons, and after the closure of the Calais camp, were conveyed by French officials at the 73 CAOMIs (Reception and Orientation Centres for Unaccompanied Minors) throughout France to which some 2,000 individuals claiming to be children from the camp at Calais had been dispersed. The absence of means of challenge, short of judicial review, was also procedurally unfair. The individual interests at stake were important for the children, who were unaccompanied and particularly vulnerable. The refusals had led to many children absconding from the CAOMIs, some returning to Calais, or to rough sleeping. She suggested that those found to meet the Calais guidance criteria were *entitled* to relocation to the UK. Decisions had to be taken in accordance with the published policy, and procedural safeguards were important to

ensure that that happened. There was an imbalance of power between decision-maker and subject, whose interests could be substantially affected.

156. Mr Manknell pointed to the unusual nature of s.67, which created no rights, had no application process, and was subject to a finite limit on the number who could be transferred under it, however many might satisfy the eligibility criterion, and in respect of whom there was no realistic mechanism for judging the comparative merit or vulnerability of those who did. The defendant was also entitled to hold back spaces for use by potential transferees other than from the Calais camp, and who were eligible for transfer from Greece and Italy. The process of deciding who should be transferred was not one to which normal considerations of procedural fairness could realistically apply. The claimant was seeking detailed written reasons, not just for a sense of fairness or transparency, but in order that the merits of a challenge could be assessed. It would be impractical to provide such detailed reasons for all those interviewed as potential transferees without making what was intended to be a speedy process, and which in Calais had to be operated quickly, pointlessly cumbersome. Fewer than five individuals had been found ineligible for transfer because transfer was not in their best interests. A short statement that an eligibility criteria had not been met would not really add anything of value to the simple decision that there was to be no transfer. A successful challenge to an erroneous eligibility decision could not mean that the individual would necessarily be transferred. There was no provision for a formal challenge in the 2016 Act.

157. In our judgment, the process adopted involved no procedural unfairness essentially for the reasons given by Mr Manknell. First, although the transfers take place pursuant to a statutory authorisation, the Act contains no provision for a written decision, reasons or formal challenge. The Act contains no link to any statutory immigration provisions for those purposes. Yet it must have been evident to Parliament that decisions on vulnerable individuals were a necessary part of the operation of the Act. It must have been evident that not all those who are eligible would be transferred because their number was capped to that specified. It was also the clear purpose of the Act that it should be operated swiftly, or at least should be capable of being operated swiftly, and without the bureaucratic or legal processes that attend so much else in the immigration field. The defendant has a policy, but there is no evidence that she has failed to apply the policy; it says nothing about the form of decision, or procedural challenge. The decision is made under a statutory duty for the performance of which the defendant has a policy. That may create a duty to apply the policy; but that is not to say that a decision taken in line with the policy, as judged by the decision-maker, has to be challengeable by some formal means other than judicial review.

158. Mr Manknell accepted that a decision could be challenged by judicial review; that is not a wholly unrealistic suggestion in view of the number of individuals who are bringing just such proceedings, stayed in part, pending the outcome of this case. The decisions would not have been "immigration decisions" for the purposes of s.82 of the pre-amendment Nationality Immigration and Asylum Act 2002, as Ms Dubinsky tentatively suggested; the individuals do not receive a decision on leave to enter or remain, but receive temporary admission. A denial of eligibility is not a refusal of leave to enter. Section 67 operates outside the normal statutory immigration framework, rather than as an aspect of it.

159. It would be contrary to the intention of Parliament in enacting s.67 to treat decisions made in respect of individuals as involving the exercise of the defendant's statutory discretion under s.3 of the Immigration Act 1971; the specified number cannot be exceeded; one person, because represented or challenging a decision cannot take a place which the defendant allocated, or wished to allocate, or had kept back for children who might be in greater need or to relieve countries which might be in greater need than France of assistance in sharing the UASC burden.

160. Second, we accept that s.67 is an unusual provision for the reasons Mr Manknell gave. There is no application process; there is no right to transfer if eligible; there is no mechanism for comparing the relative merits of those who are eligible and it is obvious that not all who may be eligible can be transferred. We reject with some emphasis the contention that those who are found eligible for transfer are entitled to be transferred. A successful challenge to an erroneous decision on eligibility would not assist if spaces were not available, whether because they had been filled up or held back for other potential transferees. There is also no formal appeal process. We find it difficult to say that a conventional approach to procedural fairness is required [at common law] in this case.

161. Third, the claimant does not envisage that the satisfactory written reasoned decision would be met by a simple decision that the individual was ineligible by reason of age or nationality or date of arrival in Europe or in the Calais camp, as the case may be. This simple decision is discernible from the record sheets given to the French authorities who conveyed the decision to the individual, with that much information. This appears from the statements of Ms Avenard, a French Children's Ombudsman and Ms Dujardin, a French solicitor acting for 26 girls at a CAOMI, that the oral notification of the decision did state that, for example, the individual was ineligible because he or she was over 18. For our part, such a short form decision, conveyed orally or in writing, conveys plainly sufficient reason in the circumstances. But although this is desirable, it is legally sufficient for the interviewer to be told that he or she is not eligible for transfer or is not going to be transferred. We accept that the delivery of the decision was properly left to the French authorities, not just because of language, given where the decision was being conveyed, or acquaintance with the individuals, but because if the decision were adverse, the children remained the responsibility of the French authorities who were in a position to advise them as to what they should do, including claiming asylum in France.

162. However, as we understand Ms Dubinsky's arguments, such short form reasoning as was given, did not suffice; something more elaborate by way of reasoning as to the assessment of age or nationality or dates was required. But that, in our judgment, would have imposed an entirely unwarranted and unnecessary burden on the defendant without improving the decision-making process, or fairness. There were rather more children to be screened in or from the Calais camp than had been anticipated, and in a matter of weeks over 2000 individuals claiming to be children, and on whom the UK and French authorities had no prior information, had to be screened. The terms of the guidance give the benefit of the doubt to the individual on age and nationality anyway, which reduces the scope for significant error. The French authorities were responsible for referring those at risk of sexual exploitation, and so that could not be the subject of challenge to UK authorities. Hardly any have been refused on the best interests determination. Eligibility is not a guarantee of

transfer, as spaces may have become filled or kept back for others. Success on the challenge would also have to lead to substantive success on the merits of the eligibility issue and to actual transfer for the process to have advanced the interests of the individual at all.

163. Although the claimant produced evidence that some of those refused transfer had absconded from the CAOMI upon receipt of an adverse decision, it is far from clear how they would have reacted to a more fully reasoned written decision with the prospect of some appeal or review process, given the way in which the benefit of the doubt was given to them. But it is not to be forgotten that, disappointed though they may be, it is still open to them to claim asylum in France and to receive the protection and care which France provides to UASC, and to seek transfer to the UK under Dublin III, should their family circumstances warrant it. They are choosing not to make an asylum claim in France; France has not rejected their asylum claims, nor is it compelling them to live in conditions such as those described in the Calais camp. That risks being forgotten in some of the submissions and evidence from the claimant.

164. Ms Dubinsky understandably prayed in aid of her submissions as to procedural unfairness the decision of UTIAC, (McCloskey J President and UTJ Allen) in *AM (a Child) v SSHD* 19 May 2017 [2017] UKUT 262 (IAC). The claimants in this UTIAC judicial review were UASC who claimed an entitlement to be transferred to the UK in accordance with Dublin III and, it appears, as a separate rather than merely supportive source of entitlement, Article 8 ECHR on family life grounds. For the former, the cases were said to be within the exceptionally compelling circumstances which permitted a UASC in a EU member state to turn directly to UK courts and authorities: *R (ZT) (Syria) v SSHD* [2016] EWCA Civ 810. UTIAC considered what obligations of procedural fairness arose either under Dublin III or procedural protections inherent in Article 8, or at common law; the latter, as UTIAC put it, the "unseen companions" of the SSHD's officials as they crossed the Channel.

165. Without going into detail, UTIAC concluded that the expedited process conducted by the SSHD was unfair. UTIAC were particularly critical of the interview process: the short and limited pro-forma questions, the lack of elaborating or eliminating questions, the difficulties of comprehension and verification of answers; the decision was not made by the interviewer. It found that children were inadequately informed about the process and criteria at issue, and adverse decisions in the expedited process prejudiced their prospects and later Dublin III transfer, at least as we understand the point.

166. Ms Dubinsky submitted that UTIAC's strictures and findings of unfairness should at least be persuasive here.

167. We disagree for two reasons. We do not need to consider whether UTIAC went too far or was wrong. Nor do we need to consider to what extent the expedited process mirrored that for s.67, although it appears that both went hand in hand and without differentiation. But not all the individual complaints would necessarily have applied to all interviewees. First, however, *AM* does not explicitly deal with the aspects of procedural unfairness upon which Ms Dubinsky relied: the absence of a written reasoned decision and a formal means of challenge as offered to the information and interview process. The means of challenge points were made in submission, but if they formed part of the judgment, it was not separate or explicit. Second, and more

importantly, *AM* deals with what UTIAC treats as rights to enter the UK, either under Dublin III or Article 8 ECHR. The procedural protections which UTIAC found were required arose from such rights. Section 67 confers no rights to enter the UK; not even a favourable eligibility decision does so because of the cap on numbers. *AM* therefore has no application here. It certainly does not persuade us that the procedural aspects upon which Ms Dubinsky relied were such as to make s.67 eligibility decisions unfair if not in place.

168. On 18 September 2017, Soole J dismissed the claim for judicial review in *R (Citizens UK) v SSHD* [2017] EWHC 2301 (Admin). He granted permission to appeal. Ms Dubinsky made written submissions on 26 September 2017, distinguishing that decision, and to the extent that it conflicted with *AM* urging us to apply *AM* and not to apply *Citizens UK*. The defendant simply drew our attention to certain paragraphs. Some of the defendant's evidence in this case has been drawn from the evidence in *Citizens UK*.

169. Ms Dubinsky emphasised that *Citizens UK* was not concerned with s.67 children; it dealt with much the same issues as *AM*: procedural fairness for those seeking entry under an expedited process that was either pursuant to Dublin III or was outside it, but closely allied to it or Article 8. Soole J's judgment plainly conflicts with *AM*. It is not for us to resolve that difference. This case does not require us to do so. We remain of the view that the decision-making process under s.67 does not require a written eligibility decision, or a decision with more elaborate explanation. It does not contain or require the institution of a "formal" challenge procedure. It was not concerned with extensive processes in mind.

The continuation of the 20 March 2016 date of arrival in Europe in the March 2017 policy statement

170. No issue was taken with the lawfulness of the requirement in the two earlier versions of the guidance to the use of 20 March 2016 as a date before which an individual had to have arrived in Europe to be eligible for transfer under s.67. That date however featured still in the March 2017 policy statement which was concerned with France, Italy and Greece rather than with the Calais camp alone. The claimant contended that it was irrational not to use a later date, but one which still preceded the issue of the guidance so as to avoid a "pull" factor. It was arbitrary, at least by now and in relation to countries other than Greece, as it was related to the date of entry into force of the EU/Turkey statement, and could lead to less vulnerable children who had arrived before that date being given priority over more vulnerable children who arrived later.

171. Although some other criteria have changed, this date has not. The issue is not addressed in any detail in the evidence of Mr Cook, but he simply implies that it was retained because it was already part of the guidance and there was no need to change it.

172. There was unfortunately an issue over whether this contention had ever formed a permitted ground of challenge. In paragraph 49 of the grounds as amended in February 2017, the claimant states that it "highlights now" that the maintenance of the March 2016 date in further versions of the guidance would be unlawful. That particular issue is not addressed in the detailed grounds of defence. During the course

of a directions hearing on 10 February 2017 at which permission to amend the grounds of claim was granted on a number of points, Holman J stated, though it does not appear in the Order, that he could not give the claimant permission to challenge something which had not yet happened; once a further policy had been published the claimant "can make a freestanding application" to amend the grounds to address that policy. In our judgment, it is plain that there is no ground of challenge yet permitted to the current version of the guidance, or to retention of that date within it. The claimant had plenty of time after its publication in April to seek permission to make the amendment. It is not enough for the claimant to say that the challenge flows from the other grounds raised. We do consider that permission to amend is needed. In those circumstances, the claimant sought permission to amend the grounds in its skeleton argument of 26 May 2016 just under four weeks before the hearing. Incidentally, such applications should be made in proper form, with a fee, and not in a skeleton argument.

173. We refuse permission to amend the grounds. The claimant has had plenty of time to apply to make the amendment earlier. This is a complicated case, with a very large number of facets, pursued in considerable detail, and further issues should be raised well in advance and with clarity. Threatening the possibility of doing so does not show to the other side that there is an issue they need to address. It is scarcely considered in Mr Cook's evidence; it may be that no great thought was given to it or it may be that rather more could be said. But we do not consider that the defendant has had fair notice that this was an issue that her evidence had to cover. In those circumstances, we would be reluctant to reach any conclusion adverse to her, and so there is little point in the amendment anyway. The guidance does not appear to us to contain so obvious or serious a flaw that there is a greater public interest in allowing the amendment and time for the issue to be addressed.

174. We regret the delay between hearing and delivery of judgment in this case. Both parties completely ignored clear directions given by Holman J limiting the volume of papers to be lodged and the length of skeleton arguments. Multiples of both were filed. The position was compounded by the parties' collusion in giving and maintaining an unrealistically short estimate for the hearing, (three days), when a more realistic estimate was up to five days. This was done so as to achieve an earlier hearing. This resulted in the court having to find much time post-hearing to read materials in detail, something not possible beforehand because of the failures identified. Were it not for the desirability of this matter being heard, we would have adjourned the hearing. We have also had to consider the recent decision in *Citizens UK*.

Conclusion

175. This application is dismissed.