

**Witten Evidence submitted by
Michelle Knorr, barrister, Doughty Street Chambers (CHA0062)**

The meaning of coming directly in Article 31 Refugee Convention

1. In my oral evidence I referred the case of *R v Uxbridge Magistrates' Court, ex p Adimi* [1999] EWHC 765. The case report is available at the link in the footnote¹ and the key paragraphs are §§17-20. *Adimi* is the lead case on the meaning of 'coming directly' for the purposes of Article 31(1) Refugee Convention which results in refugees being afforded a defence to illegal entry and other similar offences committed in the course of fleeing to seek asylum. Even if a refugee has not 'come directly' this does not impact on their status as a refugee (exclusion from refugee protection is far more limited – see Article 1F Refugee Convention). It does, however, mean that they may be prosecuted for offences related to their illegal entry.

The Immigration Rules as an alternative to the family reunion provisions of Dublin III for unaccompanied asylum seeking children

2. The Immigration Rules (“**the Rules**”) are not a comparable ‘alternative route’ to Dublin III for family reunification for unaccompanied asylum seeking children (“**UASC**”)² both because of the criteria that apply and the difference in the respective processes.
3. At the outset it is important to recognise that the Rules are designed to serve a different purpose to Dublin III. Satisfying the Rules gives rise to a right to remain in the UK and often on a route to settlement. The Rules are not designed to facilitate transfers in order to seek asylum and indeed there are no Rules specifically applicable to those who wish to come to the UK to seek asylum. Transfer to the UK under the Dublin III criteria, on the other hand, does not give rise to any right to remain in the UK. Dublin III defines the appropriate country for an asylum claim to be processed and when a UASC arrives in the UK through Dublin III they do not have ‘entry clearance’ or ‘leave to remain’. Rather, they are allowed to remain temporarily while their asylum claim is considered. UASCs transferred to the UK under Dublin III still have to satisfy the Rules or other immigration policies in order to be able to remain lawfully beyond consideration of their asylum claim.
4. With respect to the Rules, I was asked specifically about paragraphs 297 and 319X which are key paragraphs that might allow for a child to join family members in the UK. If a child qualifies for entry clearance under paragraph 297 they are granted Indefinite Leave to Enter (immediate settlement) and if a child satisfies 319X they are granted a 5 year visa on a route to settlement. These are strong and long-term entitlements to remain in the UK. The cost of these applications, which are £1523 under paragraph 297 and £388 under paragraph 319X³, and the strict criteria reflect the entitlements granted.

¹ <https://www.bailii.org/ew/cases/EWHC/Admin/1999/765.html>

² Similar matters arise in relation to adult family members who qualify under Dublin III, but I have focused on UASC since these were the Rules I was asked to comment on by the Committee.

³ Having considered the relevant Regulations it is unclear whether the child would also be required to pay an immigration health surcharge of £2350 in addition to this fee. They would be exempt if they are a “dependent” of a family member granted humanitarian protection, but I am unclear whether they would be classed as a

Dublin III UASC criteria

5. Article 8 Dublin III allows for a UASC to join a **parent** or **sibling** in the UK if:
 - (1) the parent or sibling is in the UK lawfully (meaning they can have any immigration status or can be an asylum seeker allowed to remain temporarily while their claim is under consideration),
 - (2) they are related, and
 - (3) it is in the child's best interests to join them in the UK (in practice there is a presumption that it is in a UASC's best interests to join family unless there is evidence that they present a risk to the child).
6. For UASCs to join extended family members - relatives under Dublin III - which are defined as **adult uncles, aunts and grandparents**, the criteria are:
 - (1) the relative is in the UK lawfully,
 - (2) they are related,
 - (3) the relative can "care for" the child, and
 - (4) it is in the child's best interests to join the relative in the UK.

Immigration Rules criteria

7. To compare, under paragraph 297 of the Rules the criteria are as follows:
 - (1) the parent or relative is in the UK and has Indefinite Leave to Remain or British Citizenship;
 - (2) they are related;
 - (3) for parents, either both parents are in the UK, **or** one parent is in the UK and the other is dead, **or** if there is only one parent in the UK and they have 'sole responsibility' for the child **or** one parent is in the UK and there are "*serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care*"⁴;
 - (4) for relatives (including siblings, aunts, uncles and grandparents) there must be "*serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care*";
 - (5) the child must not be leading an independent life;

dependent. I will update the committee if I am able to find out; but since this provision is so rarely used and the application form / payment information cannot be accessed before an application is made, it is not straightforward to work this out.

⁴ This is a high and complex threshold explored in case law such as Mundeba (s.55 and para 297(i)(f)) [2013] UKUT 00088(IAC) (available here: https://moj-tribunals-documents-prod.s3.amazonaws.com/decision/pdf_file/37424/00088_ukut_iac_2013_lm_drcongo.pdf) and requires compelling evidence.

- (6) the parent or relative will maintain and accommodate the child without recourse to public funds.
8. Paragraph 319X applies where a child seeks to join a relative (not a parent). The criteria are the same as those for relatives under paragraph 279 except the relative must have leave to remain as a refugee or humanitarian protection, rather than settled status.
 9. Parents who are refugees or have humanitarian protection have separate paragraphs of the Rules under which a child who was part of their family unit prior to them fleeing their country of origin can join the parent(s) without meeting a maintenance and accommodation requirement (see paragraph 352D). A child or a parent recognised as a refugee who was conceived **after** the parent fled their country of origin must satisfy a maintenance and accommodation requirement (see paragraph 319R).
 10. Thus, under the Rules, there are only routes for children to join family members who are settled and have international protection, there is often a high threshold of “serious and compelling” considerations to meet, and there are usually stringent requirements to evidence an ability to maintain and accommodate the child without recourse to public funds. That is very different to Dublin III where often all that is needed is evidence of the relationship and welfare checks. Even where the UASC wishes to join an extended family member under Dublin who must show they can “care for” the child; the definition of ‘care for’ is broad and does not require specific proof of ability to maintain and accommodate without recourse to public funds.

The Dublin III process compared with that under the Immigration Rules

11. Apart from the criteria being different, the process of applying for transfer through Dublin III is completely different to the process of applying for entry clearance under the Rules.
12. Under Dublin the authorities must pro-actively provide the UASC with information about the criteria and family reunion possibilities, and they must be allocated a representative to support them through the process. In addition, the UASC does not make an ‘application’. Rather, Member States are required to use information received from the UASC when they are interviewed and other investigations to establish whether the criteria are met and make a request on the child’s behalf. There is an investigatory duty on the requested state to take reasonable steps to investigate family links and other aspects of the criteria. For example, in order to work out if a family member can care for a child, the Home Office has a process of asking the Local Authority to visit the family home and do an assessment. Under Dublin there is a reconsideration process and also a right to an effective remedy before a Court (together with access to legal advice) in order to determine if the criteria were correctly applied. There are also strict time limits for making and deciding requests, and effecting transfer which are very important for keeping children engaged in the process⁵. The UASC does not have to pay for a Dublin III application, nor do they have to pay for the transfer.

⁵ Some Member States, including for example the UK and France, have introduced targets which drastically shortened these time limits in UASC cases which can ensure these safe legal routes are accessed and meet the

13. Under the Rules the UASC must make their own application and there is no process for provision of information about the complex web of Immigration Rules and policies that might apply. In the UK provision of immigration advice is a regulated activity and it is unlawful for those not regulated to provide advice. A UASC would inevitably need a UK based lawyer in order to make an application, which from a practical perspective is difficult, if not impossible, particularly when the child is in another country⁶. Since the legal aid cuts in 2012 it is often difficult, even for children in the UK, to find lawyers able and willing to assist with this type of complex family reunion application.
14. The application process requires completion of the correct online form (and thus access to and an understanding of the internet, and an ability to read and write in English) at which point any specified fee must be paid in order to proceed. Subsequently, attendance at an Embassy or Visa Application Centre (“VAC”) is required to complete submission of the application and also at the point when a visa is issued, which can be impossible and / or dangerous and may result in long delays. For example, a UASC in a Greek Island hot-spot would not physically be able to attend the VAC in Athens (since they are generally not permitted to leave the island). To give another example, I represented a child in a UNHCR refugee camp in Ethiopia who needed to travel across the country to a VAC in Addis Ababa to lodge their entry clearance application. His highly experienced specialist UK solicitor spent months trying to obtain permission for him to leave the camp and make a safe arrangement for him to attend the VAC. Once that was finally achieved, the child ended up staying in an unsafe situation for many months in the Addis Ababa waiting for the decision and then for the outcome of an appeal because he was required to attend again to collect their visa. A recent Red Cross report published in November 2020, ‘*Long Road to Reunion: Making Family Reunion Safer*’⁷ focuses on the practical problems with the application process and highlights that attendance at embassies or VACs, even for adults, require several potentially dangerous and expensive journeys, and can seriously inhibit ability to access this process.
15. To qualify under the Rules it is necessary to provide specified documents, for example identity documents, and complexities arise where these are not available, as may be the case for UASC. The criteria are complex, the evidential thresholds are high and the evidential requirements strict (additional guidance in lengthy Policy documents and case law must be understood and followed). The evidential burden is on the UASC to provide all relevant evidence and to demonstrate that the criteria are met. Unlike Dublin III there is no requirement to provide information, to assign a representative, or an investigatory duty on the authorities. If they do not succeed, the UASC forfeits the fee and can only appeal on Article 8 ECHR grounds, thus the right of appeal is limited. The process is also long, particularly when, as is common with this sort of complex application, an appeal is

welfare needs of UASC.

⁶ Children who have been able to access lawyers to challenge Dublin III decisions have generally only been able to do so through referrals by NGOs such as Safe Passage, the demand already outstrips the supply, and UAMs rarely have UK legal representatives until the point when a Dublin III request is refused and they need to go to Court to challenge that decision.

⁷ Available to download here: <https://www.redcross.org.uk/about-us/what-we-do/we-speak-up-for-change/improving-the-lives-of-refugees/refugee-family-reunion>

necessary. It is normal for it to take years from the point of deciding to make an application to arrival.

16. The criteria and processes under the Rules are thus very different and are not comparable to those under Dublin III. Indeed the vast majority, if not all of children I have represented over the past 5 years who satisfied the Article 8 Dublin III criteria would not qualify for entry clearance under the Rules. A stark example are the Syrian children in *ZT(Syria) v SSHD* [2016] 1 WLR 4894⁸ who had identity documents and sought to join siblings in the UK, thus evidenced that they satisfied the Article 8 Dublin III criteria. The SSHD put in a witness statement setting out the paragraphs of the Rules under which the children might apply but accepted they would not in practice meet those criteria (see §96 of the Judgment).
17. In my Dublin caseload I have also come across a number of examples of family cases (for example refugee spouses) where the Rules route was in principle available, but where due to barriers accessing the process such as those described above, or lack of access to legal advice about eligibility under the Rules, the families made perilous journeys and went through the Dublin III process to achieve reunification, unaware or unable to access family reunification through the Rules.

A precedent for an ad hoc family reunification process

18. In oral evidence, I mentioned that there is the possibility of the Government setting up an ad hoc process that mirrors Dublin III for UASCs, including in the interim to avoid placing children at risk after 31 December 2020. A precedent for this is the ad hoc expedited process set up by the UK and France in a matter of days when the Calais camp was due to be demolished in October 2016. While that expedited process was found to be procedurally unfair⁹, it would be possible and very desirable to quickly set up a similar but procedurally fair process where UK officials investigate UASC's claimed family links (in that case mainly through interviews and local authority assessments) and provide a swift process for UASC¹⁰ to continue to reunify with family members while their asylum claims are processed.

Asylum applications made in UK territorial waters and / or on UK ships

19. A final matter that I did not have the opportunity to address orally, is that my understanding is that if a person arriving on a small boat makes an asylum claims to UK officials while in UK waters or when on a UK flagged boat (for example during a rescue), then under the European Convention on Human Rights and domestic processes implementing the Refugee Convention, the UK cannot lawfully simply send them back to France (even if intercepted on a small boat), but must process their asylum claim individually as they would if they had arrived at a UK port or airport (including giving

⁸ <https://www.bailii.org/ew/cases/EWCA/Civ/2016/810.html>

⁹ See Judgment in *Citizens UK v SSHD* [2018] EWCA Civ 1812 at <https://www.judiciary.uk/wp-content/uploads/2018/07/citizens-uk-judgment-final-31.7.18.pdf> in which the process is described.

¹⁰ While I have focused on UASC this would need to be extended to adults who would otherwise satisfy the Dublin III criteria, i.e. spouses or those with dependency on family members in the UK, if the aim is to prevent irregular and dangerous journeys by those who are no longer able to access Dublin III.

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consideration of whether to return them under Dublin III or any similar arrangement while affording them procedural protections).

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