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Case No: C4/2008/1737; C4/2008/1809; C4/2008/3091

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION
HIS HONOUR JUDGE MACKIE QC CBE
MR JUSTICE BLAKE
C0/585/2007 for ZO, CO/9493 for MM and C0/10249/06 for DT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/05/2009

Before:

Lord Justice Laws
Lord Justice Keene
and
Lord Justice Hooper

- -

Between:

The Queen on the Applications of ZO (Somalia) and MM (Burma)	**Appellants**
- and -	
Secretary of State for the Home Department	**Respondent**

And

The Queen on the application of DT (Eritrea)	Respondent
-and-	
Secretary of State for the Home Department	Appellant

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Richard Wilson QC and Philip Nathan (instructed by Messrs Duncan Lewis) for ZO
Richard Wilson QC and Philip Nathan (instructed by Scudamores) for MM
Michael Fordham QC and Adam Tear (Solicitor Advocate) (instructed by Messrs Duncan Lewis) for DT
Robin Tam QC and Daniel Beard (instructed by the Treasury Solicitor) for Secretary of State for the Home Department

Hearing date: 1 April 2009

- -

Judgment

LORD JUSTICE HOOPER:

The issue

1. The issue in this case is:

> "Does a person whose asylum claim has been finally determined in country A against him or her and who makes a subsequent claim for asylum in country A come within the ambit of the European Union "Reception Directive" and thus is able to enjoy the benefits of Article 11(2) of the Directive?"

2. Article 11(2) provides:

> "If a decision at first instance has not been taken within one year of the presentation of an application for asylum and this delay cannot be attributed to the applicant, Member States shall decide the conditions for granting access to the labour market for the applicant."

3. I shall call a second or subsequent application for asylum "a subsequent application".

4. At the conclusion of the hearing we announced our decision that a person making a subsequent application for asylum does fall within the Reception Directive.

5. It is agreed that there is no jurisprudence of the European Court of Justice ("ECJ") on the issue and we have not been shown how, if at all, other Member States have dealt with the issue.

6. It is agreed that this Court cannot make a reference to the ECJ about the interpretation of the Reception Directive. See Title IV of the European Community Treaty which governs visas, asylum, immigration and other policies related to the free movement of persons and article 68 of the Treaty. Article 68 modifies Article 234 EC (under which national courts can make a reference to the ECJ) by providing that a reference to the ECJ may only be made by a court against whose decisions there is no judicial remedy under national law.

7. Mr Tam QC for the respondent submits that the Reception Directive does not apply to subsequent asylum seekers. Counsel for ZO, MM and DT submit that it does.

8. If, contrary to the respondent's submissions, subsequent asylum seekers do fall within the ambit of the Reception Directive, Mr Tam did not argue that the Reception Directive permitted a Member State to exclude a subsequent asylum seeker from the benefits of Article 11.

9. The respondent therefore does not dispute that if a person who has made a subsequent claim for asylum is within the ambit of the Reception Directive, then the Secretary of State for the Home Department ["SSHD"] is obliged to grant permission to work, in accordance with Rule 360 of the Immigration Rules ("IR") if a decision at first instance has not been taken within one year of the presentation of the subsequent application for asylum and this delay cannot be attributed to the applicant (see paragraph 2 of the Respondent's Skeleton Argument, dated 9 December 2008).

10. Rules 360 and 360A of the IR provide:

> "360. An asylum applicant may apply to the Secretary of State for permission to take up employment which shall not include permission to become self employed or to engage in a business or professional activity if a decision at first instance has not been taken on the Applicant's asylum application within one year of the date on which it was recorded. The Secretary of State shall only consider such an application if, in his opinion, any delay in reaching a decision at first instance cannot be attributed to the Applicant.
>
> 360A. If an asylum applicant is granted permission to take up employment under Rule 360 this shall only be until such time as his asylum application has been finally determined."

11. Rules 360 and 360A were laid before Parliament on 11 January 2005 by HC 194. They were intended to implement the Reception Directive (see paragraph 23.10 of the SSHD's Operations Enforcement Manual (OEM)). An "asylum applicant" is a person who either makes a request to be recognised as a refugee under the Geneva Convention or otherwise makes a request for international protection (see Rule 327).

12. Parts 11 and 11B of the IR make detailed provisions about asylum applications. Subsequent claims for asylum are dealt with in Part 12 of the IR headed "Procedure and rights of appeal". Rules 353 and 353A in Part 12 provide:

> "Fresh Claims
>
> 353. When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
>
> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.
>
> This paragraph does not apply to claims made overseas.
>
> 353A. Consideration of further submissions shall be subject to the procedures set out in these Rules. An applicant who has made further submissions shall not be removed before the Secretary of State has considered the submissions under paragraph 353 or otherwise.

This paragraph does not apply to submissions made overseas."

13. It seems clear that in the view of the SSHD a person who has made a "fresh claim" is not an "asylum seeker" for the purposes of Parts 11 and 11B, unless and until the SSHD accepts the subsequent application as a fresh claim. If the SSHD accepts a subsequent application as a fresh claim then Parts 11 and 11B apply to him with the same rights of appeal as those given to a person whose first claim for asylum in this country has been rejected by the SSHD.

14. The SSHD's OEM makes provision for permission to work (PTW) to be given in certain circumstances to subsequent asylum seekers:

15. Paragraph 23.10.4. provides:

> "Permission to work - Fresh claims
>
> If a failed asylum seeker makes a fresh asylum claim then provided it is accepted as a fresh claim the procedures set out above should be followed, i.e. the claimant will be entitled to apply for PTW provided he satisfies the criteria in Paragraph 360 of the Rules, otherwise any request for PTW would be a mandatory refusal. If the new asylum claim is not accepted as a fresh claim the person will have no entitlement to apply for PTW."

16. We were not told when paragraph 23.10.4 was inserted.

17. In practice the SSHD does not make a preliminary decision whether a "fresh claim" has been made and, if so, a later decision accepting or rejecting the fresh claim. Both decisions are made at the same time. Thus paragraph 23.10.4 is unlikely to benefit a subsequent asylum seeker.

18. Mr Tam submits that the mere fact that paragraph 23.10.4 of the OEM gives the potential benefit of Article 11 to a subsequent asylum seeker whose claim has been accepted as a "fresh claim" does not assist in the interpretation of the Reception Directive. I agree.

19. On behalf of ZO, MM and DT it is submitted that paragraph 23.10.4 is not in accordance with Article 11 of the Directive. They submit that a person may apply for PTW one year after making a subsequent application for asylum and not one year after the SSHD has decided that the subsequent application constitutes a fresh claim. In the present cases, decisions as to whether the claims are fresh claims have not been made and four to five years have now elapsed since the subsequent applications were made.

The facts and procedural history

ZO

20. ZO, a Somali national, arrived in the UK in 2003. In May 2004 the SSHD refused her asylum claim. Her appeal to the AIT was dismissed, as also in October 2004 was her application for statutory review.

21. On 9 May 2005, ZO put forward put forward a subsequent application for asylum which she contended was a fresh claim based on new evidence contained in the decision of the IAT in *NM & Others (Lone Women- Ashraf) (Somalia) CG* [2005] UKIAT 00076. The SSHD, nearly four years later, has yet to determine whether or not ZO's claim is a fresh claim (and, if so, whether to accept or reject it). ZO applied for PTW in the UK. That was refused on 31 August 2007. In January 2007 she started judicial review proceedings to challenge the delay. The claim for judicial review was conceded. In November 2007 she was granted leave by way of amendment to challenge the decision to refuse to allow her work. Stanley Burnton J, as he then was, refused permission. Permission was then granted by the Court of Appeal and her claim for judicial review of the decision to refuse her work was joined with a similar claim being made by MM. The two claims were dismissed by HHJ Mackie QC CBE, who relied heavily on the reasoning of Stanley Burnton J.

MM

22. MM, a Burmese national, arrived in the UK in 2004 and applied for asylum. The application was rejected and MM's attempts to challenge that rejection had failed by March 2005.

23. By letter of 9 May 2005, MM put forward a subsequent application for asylum which he contended was a fresh claim. The SSHD, nearly four years later, has yet to consider whether that application is a fresh claim.

24. On 27 July 2007 MM applied for PTW. The application was refused on 26 September 2007. On 25 October 2007, MM brought a claim for judicial review challenging the SSHD's delay in considering the subsequent application and the refusal of the application for permission to work. On 10 March 2008 Cranston J refused MM permission to bring a claim for judicial review in relation to delay but permitted MM to challenge the Secretary of State's decision to refuse him permission to work. As I have said MM's claim was joined with that of ZO and dismissed by HHJ Mackie.

DT

25. DT, an Eritrean national with an Ethiopian mother, arrived in the UK in November 2001 on false travel documents and applied for asylum. His application was dismissed and certified because of his failure to disclose the existence of a false travel document. On 31 May 2002, an Immigration Judge dismissed his appeal.

26. In April 2004, DT put forward a subsequent application for asylum which he contended was a fresh claim. Five years later that application has not been determined.

27. In 2007, DT brought a claim for judicial review challenging the delay in determining the subsequent application. On 23 May 2007, DT's claim for judicial review was stayed pending the decision of Collins J in *R (FH) v SSHD* [2007] EWHC 1571 (Admin). On 7 August 2007, DT requested PTW. The SSHD refused that application on 8 October 2007. On 14 November 2007, Sullivan J on paper refused the claim for judicial review. On 15 May 2008, on a renewed claim for judicial review Collins J refused the claim for judicial review on grounds of delay but granted permission to challenge the refusal and granted permission to amend the grounds for Judicial Review.

28. Before Blake J a number of submissions were made about the refusal to grant PTW, the principal argument being that a refusal to do so in the light of the delay was a breach of Article 8. Blake J accepted that argument and gave a declaration accordingly. The SSHD was given permission to appeal and DT's case was linked for hearing with ZO and MM. DT lodged a respondent's notice seeking to uphold the decision of Blake J on the grounds that DT fell within the ambit of the Reception Directive. An extension of time is needed for that notice and I would grant that extension. Mr Fordham QC adopted and enlarged on the arguments put forward on behalf of ZO and MM to the effect that DT did fall within the ambit of the Reception Directive.

29. Having announced our decision that a person making a subsequent asylum application falls within the ambit of the Reception Directive and can enjoy the benefits of Article 11, we decided it was an unnecessary and disproportionate use of the Court's time to hear argument about Article 8. We made it clear that the SSHD's appeal was clearly arguable and that we expressed no view one way or the other on the correctness of Blake J's conclusion.

30. We were provided with evidence about the delay. There has been and there remains a significant delay in dealing with "the large backlog of case records which were initially created by reference to an asylum application but which have not been definitively concluded" (paragraph 24 of the witness statement of Emily Miles). It is not expected that the backlog will be eliminated until mid 2011. The backlog includes persons in the position of ZO, MM and DT. Priority was given to dealing with initial applications more quickly.

The Reception Directive

31. On 27 January 2003 the Council of the European Union adopted Directive 2003/9/EC, "laying down minimum standards for the reception of asylum seekers". The Directive is known as the Reception Directive. Two countries, Ireland and Denmark, are "not participating in the adoption of the Directive" (see paragraphs 20 and 21 of the Preamble), whereas the United Kingdom gave notice in 2001 "of its wish to take part in the adoption and application" of the Directive (see paragraph 19 of the Preamble). Article 26 provides that Member States shall bring into force the necessary laws etc to comply with the Directive by 6 February 2005. As I have already said, Rules 360 and 360A of the IR (paragraph 10 above) were laid before Parliament on 11 January 2005.

32. The Reception Directive is one of three Directives creating a "Common European Asylum System". The other two Directives are Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals

or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted, known as the Qualification Directive, and Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withholding refugee status, known as the Procedures Directive. There is additionally the Dublin Regulation (343/2003/EC) adopted on 18 February 2003 by the EU Council of Ministers establishing a series of criteria which, in general, allocate responsibility for examining an asylum application to the Member State that permitted the applicant to enter or to reside in the territories of the Member States of the European Union. That Member State is responsible for examining the application according to its national law and is obliged to take back its applicants who are irregularly in another Member State.

33. The Preamble of the Reception Directive states in part:

> "Whereas
>
> (1) A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of progressively establishing an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the Community.
>
> (2) At its special meeting in Tampere on 15 and 16 October 1999, the European Council agreed to work towards establishing a Common European Asylum System, based on the full and inclusive application of the Geneva Convention of 28 July 1951 relating to the Status of Refugees ...
>
> ...
>
> (4) The establishment of minimum standards for the reception of asylum seekers is a further step towards a European asylum policy.
>
> (5) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the said Charter.
>
> …
>
> (7) Minimum standards for the reception of asylum seekers that will normally suffice to ensure them a dignified standard of living and comparable living conditions in all Member States should be laid down.
>
> …

> (12) The possibility of abuse of the reception system should be restricted by laying down cases for the reduction or withdrawal of reception conditions for asylum seekers.
>
> ..."

34. Article 2 provides:

> "(b) 'application for asylum' shall mean the application made by a third-country national or a stateless person which can be understood as a request for international protection from a Member State, under the Geneva Convention [relating to the status of refugees]. Any application for international protection is presumed to be an application for asylum unless a third-country national or a stateless person explicitly requests another kind of protection that can be applied for separately;
>
> (c) 'applicant' or 'asylum seeker' shall mean a third country national or a stateless person who has made an application for asylum in respect of which a final decision has not yet been taken;
>
> …
>
> (i) 'reception conditions' shall mean the full set of measures that Member States grant to asylum seekers in accordance with this Directive;
>
> (j) 'material reception conditions' shall mean the reception conditions that include housing, food and clothing, provided in kind, or as financial allowances or in vouchers, and a daily expenses allowance;
>
> ..."

35. The words "asylum seeker" and "applicant" tend to be used interchangeably in the Directive, see e.g. Articles 5, 6 and 7.

36. Article 3 sets out the scope of the Reception Directive:

> "1. This Directive shall apply to all third country nationals and stateless persons who make an application for asylum at the border or in the territory of a Member State as long as they are allowed to remain on the territory as asylum seekers, as well as to family members, if they are covered by such application for asylum according to the national law.
>
> ..."

37. Article 5 imposes an obligation on member states to provide certain information to asylum seekers:

> "1. Member States shall inform asylum seekers, within a reasonable time not exceeding fifteen days after they have lodged their application for asylum with the competent authority, of at least any established benefits and of the obligations with which they must comply relating to reception conditions.
>
> Member States shall ensure that applicants are provided with information on organisations or groups of persons that provide specific legal assistance and organisations that might be able to help or inform them concerning the available reception conditions, including health care.
>
> 2. Member States shall ensure that the information referred to in paragraph 1 is in writing and, as far as possible, in a language that the applicants may reasonably be supposed to understand. Where appropriate, this information may also be supplied orally."

38. Article 6 of the Directive imposes an obligation on Member States to provide asylum seekers with a document certifying their status as such:

> "1. Member States shall ensure that, within three days after an application is lodged with the competent authority, the applicant is provided with a document issued in his or her own name certifying his or her status as an asylum seeker or testifying that he or she is allowed to stay in the territory of the Member State while his or her application is pending or being examined.
>
> ...
>
> 4. Member States shall adopt the necessary measures to provide asylum seekers with the document referred to in paragraph 1, which must be valid for as long as they are authorised to remain in the territory of the Member State concerned or at the border thereof.
>
> 5. Member States may provide asylum seekers with a travel document when serious humanitarian reasons arise that require their presence in another State."

39. Rules 357A-358A and 359-359C of the IR respectively implement Articles 5 and 6 in so far as a first time asylum seeker is concerned and, in so far as a subsequent asylum seeker is concerned, once the SSHD has decided that a "fresh claim" has been made.

40. Article 7 of the Directive makes provision for the place of residence of asylum seekers, freedom of movement of asylum seekers and restrictions thereon and provides that Member States may make provision for the material reception conditions for applicants. Article 8 makes provision for families. Article 10 provides that:

> "1. Member States shall grant to minor children of asylum seekers and to asylum seekers who are minors access to the education system ... "

41. Article 11 provides for entitlement to seek employment:

> "1. Member States shall determine a period of time, starting from the date on which an application for asylum was lodged, during which an applicant shall not have access to the labour market.
>
> 2. If a decision at first instance has not been taken within one year of the presentation of an application for asylum and this delay cannot be attributed to the applicant, Member States shall decide the conditions for granting access to the labour market for the applicant.
>
> 3. Access to the labour market shall not be withdrawn during appeals procedures, where an appeal against a negative decision in a regular procedure has suspensive effect, until such time as a negative decision on the appeal is notified.
>
> 4. For reasons of labour market policies, Member States may give priority to EU citizens and nationals of States parties to the Agreement on the European Economic Area and also to legally resident third-country nationals."

42. The UK has not opted to choose a period of less than one year.

43. Article 14 deals with the "Modalities for material reception conditions" and Article 15 deals with health care. Article 15(1) provides:

> "Member States shall ensure that applicants receive the necessary health care which shall include, at least, emergency care and essential treatment of illness."

44. Article 16 provides for the reduction or withdrawal of reception conditions in certain cases:

> "1. Member States may reduce or withdraw reception conditions in the following cases:
>
> (a) where an asylum seeker:
>
> - abandons the place of residence determined by the competent authority without informing it or, if requested, without permission, or
>
> - does not comply with reporting duties or with requests to provide information or to appear for personal interviews concerning the asylum procedure during a reasonable period laid down in national law, or

- has already lodged an application in the same Member State.

When the applicant is traced or voluntarily reports to the competent authority, a duly motivated decision, based on the reasons for the disappearance, shall be taken on the reinstallation of the grant of some or all of the reception conditions;

(b) where an applicant has concealed financial resources and has therefore unduly benefited from material reception conditions.

If it transpires that an applicant had sufficient means to cover material reception conditions and health care at the time when these basic needs were being covered, Member States may ask the asylum seeker for a refund.

2. Member States may refuse conditions in cases where an asylum seeker has failed to demonstrate that the asylum claim was made as soon as reasonably practicable after arrival in that Member State.

3. Member States may determine sanctions applicable to serious breaching of the rules of the accommodation centres as well as to seriously violent behaviour.

4. Decisions for reduction, withdrawal or refusal of reception conditions or sanctions referred to in paragraphs 1, 2 and 3 shall be taken individually, objectively and impartially and reasons shall be given. Decisions shall be based on the particular situation of the person concerned, especially with regard to persons covered by Article 17, taking into account the principle of proportionality. Member States shall under all circumstances ensure access to emergency health care.

5. Member States shall ensure that material reception conditions are not withdrawn or reduced before a negative decision is taken."

45. Arguments were addressed to us as how EU legislation should be interpreted. I for my part did not find these arguments helpful and I reject one such argument put forward by ZO, MM and DT. They submit that paragraph (5) of the Preamble which states that this "Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union" may be prayed in aid so as to interpret Article 11 in such a way as to give a right to PTW to subsequent asylum seekers after the one year has elapsed. They point to Article 15(1) of the Charter which provides: "Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation". Article 15(1) is subject to Article 52 which provides that any limitation on the exercise of the rights and freedoms recognised in the Charter: "must be provided for by law and respect the

essence of those rights and freedoms" and that "subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet the objectives of general interest recognised by the Union". Mr Tam submits, and I agree, that such is the breadth and general nature of the exception in Article 52, Article 15(1) does not help. ZO, MM and DT also relied on Article 8 of the ECHR. For similar reasons Article 8, in my view, does not help as an aid to interpretation of Article 11.

The competing submissions

46. Mr Tam relies heavily on the use of the word "reception" in the title of the Directive and in the body of the Directive. He drew our attention to how the word "reception" appears in other language versions, eg "accueil" in the French version.

47. However, as was pointed out by counsel on behalf of ZO, MM and DT, the respondent accepts that the Directive applies to a first time asylum seeker whose application is made long after he has arrived. Article 3 provides that the Directive applies to all third country nationals and stateless persons who make an application for asylum at the border or <u>in the territory of a Member State</u>.

48. Mr Tam relies on the wording of Article 2(c):

> "'applicant' or 'asylum seeker' shall mean a third country national or a stateless person who has made an application for asylum in respect of which a final decision has not yet been taken".

He submits that a subsequent asylum seeker is a person in respect of whom a final decision has been made. Counsel for ZO, MM and DT submit that a subsequent asylum seeker, pending a decision on the subsequent application, is a person in respect of whose application a final decision has not yet been taken. The definition refers to an application "in respect of which a final decision has not yet been taken", not to a person "in respect of whom a final decision has not yet been taken". They point to article 2(b) which provides that: "Any application for international protection is presumed to be an application for asylum ... ."

49. Mr Tam submitted that Articles 5 and 6 (information and documentation) show that the Directive does not apply to subsequent asylum seekers. Why, he asks, would it be necessary to give subsequent asylum seekers such information and documentation given that they have already made an unsuccessful application? Counsel for ZO, MM and DT point out that a period of time may have lapsed between the rejection of the first application and the second application such that the subsequent asylum seeker could well benefit from the Articles. It was also pointed out that the requirements of those Articles are not particularly arduous and could be met by the kind of "from letter" sent to first applicants.

50. Mr Tam relied heavily on the argument of "abuse". Persons whose applications for asylum have been rejected can easily trigger the provisions of Reception Directive by making fresh submissions which would need to be analysed to see whether they are "fresh claims", to use the language of our domestic legislation. It followed from the

fact that subsequent asylum seekers could so easily abuse the system that the Reception Directive does not include them within its ambit.

51. Counsel for ZO, MM and DT pointed to the twelfth paragraph of the Preamble:

> "The possibility of abuse of the reception system should be restricted by laying down cases for the reduction or withdrawal of reception conditions for asylum seekers."

They submitted that Article 16 (1)(a), third sub-paragraph does exactly that (paragraph 44 above). It makes provision for the reduction or withdrawal of reception conditions when, amongst other things, the asylum seeker "has already lodged an application in the same Member State".

52. They submitted that abusive subsequent applications could be dealt with by a speedy rejection. The fact, they submitted, that the SSHD has "chosen" to prioritise the examination of initial applications to the detriment of the backlog cannot be used as an argument in favour of one interpretation of the Directive rather than another.

53. It was also submitted by counsel for ZO, MM and DT that the inclusion of the third sub-paragraph of Article 16(1)(a) showed that the Reception Directive applied to subsequent asylum applications. In seeking to meet that argument, Mr Tam submitted that this provision should be interpreted narrowly as referring only to persons making multiple unresolved applications who have "disappeared". He referred us to the proviso which states:

> "When the applicant is traced or voluntarily reports to the competent authority, a duly motivated decision, based on the reasons for the disappearance, shall be taken on the reinstallation of the grant of some or all of the reception conditions."

54. I should add that, on the assumption that the Reception Directive did apply, Mr Tam specifically rejected the proposition put to him in the course of argument that Article 16(1)(a), third sub-paragraph, would permit the SSHD to exclude a subsequent asylum seeker from the benefits of Article 11. Article 16, as I have shown, is headed "Reduction or withdrawal of reception conditions". The phrase "reception conditions" is defined to mean "the full set of measures that Member Sates grant to asylum seekers in accordance with this Directive", see Article 2(i). There is also a definition in Article 2(j) of the more narrowly defined phrase: "material reception conditions". That phrase, used, for example, in Article 14 and Article 16(1) (b) is defined as "the reception conditions that include housing, food and clothing ... ." However even if Mr Tam had accepted the proposition that Article 16(1)(a), third sub-paragraph, would permit the SSHD to exclude a subsequent asylum seeker from the benefits of Article 11, Article 16 (4), set out above at paragraph 44, would restrict the power of the SSHD to exclude subsequent asylum seekers from the benefits of Article 11.

55. Counsel for ZO, MM and DT relied upon the provisions of the Procedures Directive of 1 December 2004. On 24 January 2001 the UK notified its wish to take part in the adoption and application of the Directive. Ireland, but not Denmark, has taken the same position as the UK (see Preamble, paragraphs 32-34).

56. The Preamble is in similar terms to much of the Preamble of the Reception Directive. Paragraph (15), which does not appear in the Reception Directive, provides:

> "Where an applicant makes a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige Member States to carry out a new full examination procedure. In these cases, Member States should have a choice of procedure involving exceptions to the guarantees normally enjoyed by the applicant."

57. Article 1 provides that:

> "The purpose of this Directive is to establish minimum standards on procedures in Member States for granting and withdrawing refugee status."

58. Article 2(b) defines "application for asylum" in substantially the same terms as Article 2(b) of the Reception Directive. Article 2(c) defines the words "applicant" and "asylum seeker":

> "(c) 'applicant' or 'applicant for asylum' means a third country national or stateless person who has made an application for asylum in respect of which a final decision has not yet been taken".

59. This is in almost identical terms to Article 2(c) of the Reception Directive. Whereas Mr Tam argued that the definition of "applicant" or "asylum seeker" in Article 2(c) of the Reception Directive excluded a subsequent asylum seeker because he is not a person who has made an application "in respect of which a final decision has not yet been taken", he had to concede that the Procedures Directive applied to subsequent asylum seekers. Indeed they are mentioned in the Preamble.

60. Article 3(1) provides:

> "This Directive shall apply to all applications for asylum made in the territory, including at the border or in the transit zones of the Member States, and to the withdrawal of refugee status."

61. Article 23(4) in Chapter III entitled "Procedures at First Instance" provides that:

> "Member States may also provide that an examination procedure in accordance with the basic principles and guarantees of Chapter II [entitled "Basic principles and Guarantees] be prioritised or accelerated if:
>
> ...
>
> (h) the applicant has submitted a subsequent application which does not raise any relevant new elements with respect to his/her particular circumstances or to the situation in his/her country of origin".

62. Article 25 provides that Member States may consider an application for asylum as inadmissible if the applicant has lodged an identical application after a final decision. Article 32, entitled "Subsequent Applications" provides:

> "1. Where a person who has applied for asylum in a Member State makes further representations or a subsequent application in the same Member State, that Member State may examine these further representations or the elements of the subsequent application in the framework of the examination of the previous application or in the framework of the examination of the decision under review or appeal, insofar as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent application within this framework.
>
> 2. Moreover, Member States may apply a specific procedure as referred to in paragraph 3, where a person makes a subsequent application for asylum:
>
> (a) after his/her previous application has been withdrawn or abandoned by virtue of Articles 19 or 20;
>
> (b) after a decision has been taken on the previous application. Member States may also decide to apply this procedure only after a final decision has been taken.
>
> 3. A subsequent application for asylum shall be subject first to a preliminary examination as to whether, after the withdrawal of the previous application or after the decision referred to in paragraph 2(b) of this Article on this application has been reached, new elements or findings relating to the examination of whether he/she qualifies as a refugee by virtue of Directive 2004/83/EC [the Qualifications Directive] have arisen or have been presented by the applicant.
>
> 4. If, following the preliminary examination referred to in paragraph 3 of this Article, new elements or findings arise or are presented by the applicant which significantly add to the likelihood of the applicant qualifying as a refugee by virtue of Directive 2004/83/EC, the application shall be further examined in conformity with Chapter II.
>
> ..."

63. Article 34 entitled "Procedural Rules" provides:

> "1. Member States shall ensure that applicants for asylum whose application is subject to a preliminary examination pursuant to Article 32 enjoy the guarantees provided for in Article 10(1)."

64. Article 10(1) sets out various guarantees for applicants for asylum. They include the provision of information in a language which the asylum seeker understands and of the services of an interpreter as well as access to the UNCHR.

65. Mr Tam submits that the Procedures Directive has only limited value in interpreting the Reception Directive, given that the latter came into force some two years before the former.

66. We were not referred to the 2003 Dublin Regulation in argument. The first part of the Preamble to the Regulation is in similar terms to the Preambles in the three asylum Directives (Reception, Qualification and Procedures). The words "applicant" or "asylum seeker" are defined in the same way as they are in the Reception and Procedures Directives, i.e. “a third country national who has made an application for asylum in respect of which a final decision has not yet been taken”. It seems to me (but without the benefit of argument) that a person who has made a subsequent asylum application in country A in respect of which a final decision has not yet been taken is a person “who has made an application for asylum in respect of which a final decision has not yet been taken” and is thus likely to fall within the ambit of the Dublin Regulation if he went to country B and claimed asylum there.

The judgment of HHJ Mackie

67. HHJ Mackie decided the cases of ZO and MM very much on the basis of the reasoning given by Stanley Burnton J, as he then was, dismissing the renewed application for judicial review in ZO’s case (permission was subsequently granted by the Court of Appeal). HHJ Mackie said:

> “ 38. ... , it is highly pertinent to have regard to observations made by Stanley Burnton J (as he then was) in the judgment he gave in January, which went to the Court of Appeal but resulted, I recognise, in permission then being granted. The judge said this in relation to the issue with which I am concerned:
>
> > ‘1.6... It is the experience in this court that there are many, many applications for asylum in cases where there has been a comprehensive, cogent and lawful rejection of an asylum application on bases which are alleged to constitute a fresh claim and which do not in fact constitute a fresh claim when critically examined, either by the Home Secretary or bought the court. A fresh claim must put forward material which creates a realistic prospect of success before an Immigration Judge, having regard to the decision which has already been taken. I do not say [that] this is such a case, but it is the case that the decision already taken in this case, as I have already indicated, was adverse to the claimant.’
>
> He then goes on to deal with other matters at paragraph 1.7, and at 1.8, 1.9 and 1.10 sets out a series of considerations:

‘1.8. In my judgment, in interpreting the Council Directive I should bear in mind that background fact. Of course, when someone applies for asylum at first instance (that is to say where a claim has not previously been considered), that person is an asylum seeker but, in my judgment, it would defeat any proper system of dealing with asylum applications if the mere fact that some wholly unverified alleged fresh claim were put forward resulted in someone being an asylum seeker for the purpose of the Directive and the Immigration Rules. Different considerations arise if, on proper examination, the fresh claim is indeed a fresh claim, but I would be loath to interpret either the English legislation or the European legislation as conferring rights on someone whose asylum claim has been rejected and is therefore relying on some supplemental and frequently illusory grounds in order to obtain a different decision from that which was originally made.

1.9. It is more convenient in this case to begin by reference to the Directive itself. Article 2 contains a definition of an application for asylum, which does not call for consideration. But 'applicant' or 'asylum seeker' is defined to mean a 'third country national and stateless person who has made an application for asylum in respect of which a final decision has not yet been taken'. That cannot be said of the claimant. She is a person who has made an application for asylum in respect of which a final decision has indeed been taken. It seems to me that therefore she is not an asylum seeker or applicant within the meaning of the Directive. I do not find that conclusion surprising, notwithstanding her current and outstanding contention that she has a fresh claim, for reasons I have already indicated.

1.10. That approach to the interpretation of the Directive is supported by Article 3 which defines a scope as being applicable:

> '... to all third country nationals and stateless persons who make an application for asylum at the border or in the territory of the member state as long as they are allowed to remain on the territory as asylum seekers... if they are covered by such an application for asylum according to the national law.'

I emphasise the words 'if they are covered by such application for asylum according to national law'. There is no pending application for asylum according to national law. It may be that that only applies to the family members referred to in Article 3, but again the claimant is someone who has made an application for asylum. It having been rejected, she at the moment is not allowed to remain on the

> territory as an asylum seeker because her claim has been rejected and therefore she is not lawfully within this country."

68. The judge recognised that this last observation made by Stanley Burnton J "may be incorrect" in the light of Rule 353A (paragraph 12 above). In my view it was clearly incorrect in the light of that Rule.

Conclusion

69. There is in my view nothing in the wording of the Reception Directive to exclude subsequent asylum applications. The strongest argument that the respondent has is the use of the word "Reception", but the arguments of ZO, MM and DT set out in paragraph 47 above are more persuasive. The arguments put forward by Mr Tam and accepted by HHJ Mackie on Article 2(c) seem to me to be met by the arguments set out in paragraph 48 above. In particular Article 2(c) refers to an application "in respect of which a final decision has not yet been taken", not to a person "in respect of whom a final decision has not yet been taken". It is clear from Article 16 that the Directive applies to a person who has made more than one application, albeit I agree that Article 16 is not decisive of the issue because it could be referring to multiple applications in respect of which no final decision has been taken.

70. I do not accept the abuse argument put forward by Mr Tam and accepted by HHJ Mackie relying on the passages from the judgment of Stanley Burnton J. The possibility of abuse is recognised in the twelfth paragraph of the Reception Directive and Article 16(1)(a) makes provision for abusive applications including multiple applications. I would also be loath to interpret the Reception Directive restrictively because of the administrative problems which this country faces dealing with the backlog.

71. What also persuades me that the Reception Directive does apply to subsequent applications is that the Reception Directive and the Procedures Directive, albeit enacted later in time, are designed to implement a common asylum policy and it would be strange if a definition in the Reception Directive was given a different meaning to the very similar wording in the Procedures Directive. As I have said, it is clear that the Procedures Directive applies to subsequent applications.

72. For these reasons I would allow the appeals in the cases of ZO and MM and dismiss the SSHD's appeal in DT but not for the reasons given by Blake J.

LORD JUSTICE KEENE

73. I agree

LORD JUSTICE LAWS

74. I also agree