Neutral Citation Number: [2010] EWCA Civ 115

Case No: C4/2009/0663

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE,
QUEEN'S BENCH DIVISION, ADMINISTRATIVE COURT
MR JUSTICE CRANSTON
CO/8588/2007

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/02/2010

Before :

LORD JUSTICE SEDLEY
LORD JUSTICE CARNWATH
and
LADY JUSTICE SMITH

- -

Between :

THE QUEEN ON THE APPLICATION OF MK (IRAN)	**Appellant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Becket Bedford & Mark Kelly (instructed by Sultan Lloyd Solicitors) for the Appellant
Jeremy Johnson (instructed by **Treasury Solicitor**) for the Respondent

Hearing dates : Weds 20th & Thurs 21st January, 2010

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Judgment

Lord Justice Carnwath:

1. In this appeal from Cranston J, the appellant claims damages arising from the delay in the processing his asylum application. Following the grant of indefinite permission to remain shortly before the hearing of this appeal, his right to remain in this country is no longer in issue. However, he alleges that the delay caused two types of damage: first, it aggravated his existing psychiatric condition; secondly, he lost the opportunity of presenting his case during a period (a so-called "window of lucidity" from January 2006 to July 2007), when, it is said, his mental condition was such that he could still have supported it by coherent evidence. The claim raises novel issues of both European Union law and Convention law.

Factual background

2. The appellant ("K") entered the country in September 2004, and claimed asylum. The basis of this claim was noted in a manuscript statement taken by his solicitors in December 2004, which the judge transcribed as follows:

> "…he said that seven years previously the Iranian security forces had raided his home looking for his older brother, who was involved with a political group. The claimant had tried to stop them from coming in and was beaten. His nose and hand had been injured and his brother had been taken by the security forces but the claimant did not know where. The claimant's mother had died of a heart attack and his father had died four months later of cancer. The claimant said that he had spent some time working for the political group, under duress. He told his solicitor that another of the claimant's elder brothers was also involved with the same political group. That brother had forced the claimant to assist him at demonstrations in setting fire to photographs of Khatami and Khamenei. The claimant said that the night the claimant left his house, three officers had raided it. The claimant's brother was at home. The claimant panicked, grabbed a knife and tried to threaten the officers but they would not stop and he stabbed one of them and fled the house."

This has remained the fullest available account of his claim, save that a short file-note in January 2006 records that he had heard that his brother had been "shot by the authorities" the previous year (without any further details).

3. Following his asylum claim, it was discovered that he had come to this country from another EU country, namely Greece. Accordingly, under the Dublin Regulation EC 343/2003 ("Dublin II"), the Secretary of State asked the Greek authorities to take responsibility for determining his claim, which they agreed to do. He was detained in early 2005 for removal to Greece. In March 2005 he harmed himself while in detention. The removal directions were then cancelled and he was sent for psychiatric assessment. On 5th April 2005, the Secretary of State wrote accepting responsibility under Dublin II for determining his claim. An internal note of the 4th April recorded that he was to be released because –

> "… he is a minor and this has been accepted by social services. He is therefore not removable to Greece as he is a 10.1 to Greece, the UK was the first place he claimed asylum. Case should now be considered in UK."

(The reference is to Article 10.1, which places responsibility for examination on the member state whose border has been "irregularly crossed" on the way to the final destination. That does not apply in the case of a minor, in relation to whom, in the absence of a family member, responsibility rests with the state where the minor applied for asylum: art 6.)

The notes include a reply, dated 13th April, stating that the applicant was "a disputed minor".

4. Before new removal directions were set, there was an age assessment by Birmingham Social Services that he was a minor, and they agreed to take responsibility for him. It seems to have been accepted by them (although a question later arose before an immigration judge – see below) that he had been born in March 1988, and therefore would reach majority in March 2006. As an unaccompanied minor, he could not be removed under Dublin II, and he was released.

5. In December 2004 the Department had been given notice of solicitors acting for him. Following their acceptance of responsibility for the case in April 2005, the Department appears to have done nothing of substance to progress the claim for the remainder of that year. In January 2006 the solicitors wrote asking for the claim to be expedited because the delay was affecting K's mental health. By a letter of 2nd February 2006, the Department noted that a decision not to pursue "third country grounds" had been made in April 2005, and continued:

> "It is not clear why his case has not been progressed since this date and I apologise for the problems this inaction has caused. I will now pass your client's case to our interviewing team to arrange for your client to be called in for a screening interview so that he can obtain an ARC card (Application Registration Card). As your client lives in Birmingham, he is likely to be screened in Liverpool."

Before us Mr Bedford relies on this letter as showing, first that there was no attempt to justify or explain the delay, for example by reference to pressure of work, nor any suggestion that there was any obstacle to completing the process in a reasonable time.

6. The subsequent sequence of events is explained in a witness statement by Mr Nelson, a senior official in the Home Office. The files show that K "reported" on several occasions, but failed to report on others. However, it remains unclear from the records which if any of these occasions were related to substantive steps in the process (as opposed to simply compliance with the reporting conditions of his temporary admission).

7. In a letter written immediately before the Court of Appeal hearing, the Treasury Solicitor has sought to "clarify" a suggestion by Mr Nelson that a screening interview had been arranged on 5th March, 2006. It is accepted that on 1st March K did attend and obtain a registration card, but it seems that there was no screening interview planned on that date or the 5th. The letter asserts that the "intention" was to conduct the screening interview on 20th March, but that K failed to attend on that occasion. However, as Mr Bedford points out, there is no reference to any documentary support for this assertion, nor any record of notice to K's solicitors. I would not draw any adverse inference against K on the basis of this inconclusive evidence.

8. Mr Nelson's statement indicates that according to the records arrangements were made for a screening interview on 5th July 2006, but that the case was then put into "Work in Progress Storage" (WIPS). He is refreshingly candid about what that implied:

> "This is a bit like an in-tray. A caseworker will have a number of current files ongoing at any particular time and a number of

> other files which are work in progress which will be dealt with at a later date.
>
> It is not clear why (K's) case was put into WIPS at this time. However, the Court may wish to note that this date coincides more or less with the announcement of a new system for dealing with the backlog of asylum cases within IND as it then was…"

A Case Resolution Directorate (CRD) had been set up to handle the 400-500,000 cases in the system. Although the intention was to give priority to "initial asylum claims" such as that of K –

> "it would not be clear to CRD caseworkers without review of the file that a case was an initial asylum claim."

9. In other words, K's claim, having been identified in February 2006 as one which needed to be dealt with expeditiously, got lost in the system. There it remained until January 2007, when K's solicitors wrote complaining of the unacceptable delay and threatening judicial review proceedings. The response (dated 19th March 2007) confirmed that the case was covered by the July 2006 policy statement relating to the legacy cases, and that accordingly –

> "…I cannot give any indication at this stage when your case will be processed."

10. It is unnecessary to review the subsequent events in detail. Suffice to say that no further progress had been made by the time the present proceedings were commenced in October 2007. Eventually K was interviewed for his asylum claim on 4th April 2008, following which a refusal notice was issued. His appeal to the AIT was dismissed on 5th August, following a hearing in July; an application for reconsideration was refused by the High Court on 27th October 2008. Finally, as already noted, on 19th January 2010 the Secretary of State gave notice of the decision to grant indefinite leave to remain (ILR) on compassionate grounds, taking account of the length of time that he had been in the UK, the fact that he was in receipt of support, and his "serious mental health issues".

K's Mental Health

11. As already noted, K's mental condition is relevant in two respects: first, the claim that the condition itself was caused or aggravated by the delay in determining his case; secondly, that the delay deprived him of the opportunity to present his case during the "window of lucidity". It is therefore necessary to look with some care at the sequence of the evidence relating to his mental condition, with particular attention to the period between January 2006 and June 2007.

The evidence

12. Following a reference by Social Services in June 2005 for psychiatric assessment, K was detained under the Mental Health Act in October 2005, at Ardenleigh Forensic

Children's and Adolescents' Mental Health Service ("Ardenleigh"). He was allowed out on extended leave in December.

13. He was discharged from Ardenleigh at the end of February 2006. There is a letter dated 27th March 2006, from Dr Julie Withecombe, a consultant psychiatrist at Ardenleigh. This is relied on in Mr Bedford's chronology (and noted by the judge) as showing that K was "extremely well and mentally stable" at the time of discharge. This is of some significance because it is at an early stage in the alleged period of lucidity.

14. Having re-read the correspondence since the hearing, I am not satisfied that Mr Bedford's interpretation is correct. The letter was written to Dr White, a GP with the Asylum Seeker and Refugee Centre for Health, in response to her letter of 10th March, which seems to have contained some criticism of K's treatment by Ardenleigh. Dr Withecombe explained that during his period of leave (that is, from December to the end of February) he was being seen regularly by members of her team, although not resident in the Centre. She had not been entirely happy with this arrangement, which had arisen from the difficulty of finding a community psychiatric team willing to accept him. She commented that his presentation was "complex" and "his mental state difficult to assess", and that she had been concerned about being put in a position where she was unable to manage his medication in the way she would have liked. She said:

> "At the point where we allowed him to go on leave into a placement in the community he was extremely well and mentally stable. His mental state then began to deteriorate, and it was my view that he required an overhaul of his mental state, possibly as an inpatient. At that time, though, his status was informal and he refused to stay at Ardenleigh even overnight."

Thus the comment noted by the judge related to his state in December, rather than at the end of February, and it seems that by that time it had deteriorated, partly in her view because of the difficulty of maintaining control of his medication.

15. In June 2006 K came under the care of Dr Lister, a consultant psychiatrist with the Birmingham and Solihull Mental Health NHS Trust. The fullest account of the development of K's condition both before and after she became involved is in her report written in June 2007. It contains a detailed review of the history based on her own direct knowledge since June 2006, and on her review of previous GP's and psychiatrists' notes, and discussion with his social workers.

16. The report notes that he was brought up in Iran, but "is unable or unwilling to give further information about his time in Iran". She records that until the end of 2004 he had been "a social person who functioned well" and had held down a college course, but that from the end of 2004 "he became withdrawn, lost his appetite lost weight, started to self neglect and became involved in some offending behaviour". There followed a charge of assault and his admission to Ardenleigh for assessment under the Mental Health Act. The Ardenleigh case-notes showed that while in custody in September 2005 he "began to complain of hearing voices, made threats of self harm and started to behave in an increasingly bizarre way". He was prescribed anti-psychotic medication which led to some improvement. After the charges against him

had been dropped he was placed on long-term leave "to assess his ability to cope in the community". During this time -

> "... there was deterioration in (K's) mental state. He presented for reviews at the hospital in a self neglected state, anxiety levels were elevated and again he started to complain about bizarre somatic sensations and perceptual abnormalities".

17. The report ended with a summary, which noted the difficulty of making a firm diagnosis, due to a variety of factors including language and cultural barriers, and "unusual and atypical clinical presentation". She concluded:

> "1. (K) has a severe and enduring mental illness namely atypical psychosis, complicated by a personality disorder and post traumatic stress disorder.
>
> 2. He has been receiving specialist mental care for these conditions for the last 2 years. He will continue to require intensive input from his local mental health team. There is some suggestion that his mental state may have deteriorated significantly recently, according to the primary care CPN….
>
> 4. Even with the assistance of an interpreter communication with (K) in a clinical area is extremely problematic. He is not able to give an account of himself or to answer questions properly by virtue of his disability and other factors. He would not perform well in court or in a formal interview situation. This is unlikely to change in the immediate future.
>
> 5. In view of the chronicity of his disability along with his poor prognosis, I do not feel that it is in his best interests to defer the decision making process regarding his status in the UK any further. Indeed, the prolonged nature of the proceedings may be contributing to and perpetuating his illness."

18. Some further insight into K's condition during 2006 is given by the notes of Dr Lister's regular meetings with him, to which the judge referred. For example, a letter dated 7th September 2006 followed a meeting the previous day, the last meeting having been three months before. She described the interview as unsatisfactory, because K arrived late after the interpreter had left, and he had become angry with the reception staff because there was no interpreter. Dr Lister commented in relation to his mental state that she "was not able to detect any evidence of deterioration or relapse". However, I take this to be a comparison with his state at the previous interview, rather than to an earlier stage.

19. Dr Lister next had a "lengthy and difficult" consultation with K on 29th November, which was recorded in a letter of 4th December 2006. She said that, despite the assistance of an interpreter, she continued to have "great difficulty in communicating in a meaningful way with him". She commented:

> "Objectively I could see little evidence of a change in his mental state from his previous presentations at clinic. He seems to have a fairly chaotic lifestyle and once again arrived late…. He does not seem to have too much trouble expressing himself to the interpreter. He looks physically well and there is no evidence to suggest weight loss. There is little evidence of self neglect. Once again, as on previous occasions, the appointment was terminated by angry pacing and suicidal threats which I think relate to his disappointment that his demands have not been met."

20. There is a letter dated 24th January 2007 to K's solicitors from a social worker with Birmingham Council (written "in support of (K's) asylum application"). It reports on a visit of K to the office on 4th January, following two burglaries at his home. It emerged that he was anxious about his accommodation and his own state of mental and physical health. The letter refers to a previous violent incident in August 2005 involving a housemate; K had "little recollection of the event" but was "constantly fearful that he may repeat this behaviour if placed in shared accommodation again". It had been agreed to bring forward his next appointment with Dr Lister, "considering his recent display of mental ill health". The letter continued:

> "The claimant had recently been prescribed new antipsychotic medication which seemed to be having detrimental effects on the claimant's ability to concentrate and remember where he was going. Consequently he has been missing significant appointments with the Home Office. There are concerns for (K's) ability to explain his case history when screened by the Home Office, especially after being in the UK for so long without a screening appointment, and being under the influence of anti-psychotics for the length of time he has been…
>
> The final factor in the claimant's case is causing undue distress in his immigration status…"

21. K's condition was reviewed by a Dr Bower with Dr Lister on 25th January 2007. According to their letter he reported that he had been "low over the last few months", had "increased confusion", nightmares, and "voices from inside his head". He requested and was given some extra medication.

22. The only other significant evidence relating to the alleged window of lucidity, is that of a Farsi speaking psychiatrist, Dr Abassi, who saw him first on 26th January 2006. Dr Abassi's clinical notes showed that, although "a bit guarded and anxious", the "rapport was reasonably good". Although he was able to give some account of his previous life in Iran, Dr Abassi recorded that in answer to questions about his immigration status and family background, he answered "I can't remember" or "don't know"; but he attributed this to reluctance to talk about those issues rather than inability to do so. Dr Abassi saw him again in October 2007 and noted that there had been a deterioration since he had seen K two years before, and that he had become "less animated" and had "aged considerably". This evidence of course tells us nothing about the timing or the rate of deterioration between the two dates. The relatively favourably impression gained by Dr Abassi in January 2006 is consistent with the

view of others that his condition had improved during his time as an inpatient. However, on his account, it seems that even at that improved condition there must have been serious doubts as to his ability to give useful evidence to a tribunal about his experiences in Iran.

23. On 8th August 2008, Immigration Judge Forrester gave his decision on the asylum appeal. He noted that "due to (his) mental state" K was "unable to give evidence" before him. He had before him reports from Dr Lister and Dr Dale. In his conclusions, he described the evidence as "scant in the extreme", being based solely on the "briefest of file notes" made by the solicitors in 2004. He did not accept that K was as young as he claimed, judging him to have been about 23 in 2006 (para 11,15). As to his mental state, he said:

> "It was urged upon me that delay in the processing of the appellant's claim for asylum has either caused his mental illness or exacerbated it. What appears clear from the medical reports is that the appellant's condition was manifesting itself in early 2005 and may have worsened by his detention in March 2005 as a possible deportee. Insofar as his suicide risk is concerned that was the only occasion when he evidenced any attempt to self harm to a significant degree. But the onset of that medical condition was clearly not triggered by delay...." (para 15)

24. Finally, there is a letter of 26th November 2008 from Dr McGovern, another consultant psychiatrist at the Mental Health Trust. His view was based on the case notes and a detailed report from Dr Dale, a specialist registrar. In response to a question about K's deterioration, he said:

> From the history it seems that he was probably well when he first came to the country but that he started to deteriorate in early 2005. Since this time fluctuations have occurred. At times this fluctuation has been in response to treatment. For instance, he seems to have been particularly unwell in June 2005. In December 2005, after treatment in Ardenleigh, his mental state had improved. Compared to this point he has deteriorated again although his course over the subsequent three years has continued to fluctuate."

25. He referred to K's loss of memory of personal events in the past, particularly his life in Iran, which contrasted with his memory of more recent events. The amnesia appeared to have coincided with the onset of mental symptoms, and to have never improved over the subsequent period. He said that it might be due to psychogenic amnesia –

> "... an unconscious process, not under voluntary control, occurring in stressful situations whereby unpleasant past memories are repressed and apparently forgotten."

26. Dr McGovern concluded –

> "I agree with previous psychiatrists that he is suffering from a psychosis, and he meets the diagnostic criteria for one particular type of psychosis, i.e. schizophrenia. The severity of his psychosis could be described as moderate but unusually it has persisted over several years despite treatment. Factors responsible for the persistence of his illness include social isolation, his stressful situation (including the delay in the asylum application) and cultural and language difficulties. I am afraid that like Dr Dale I find it hard to understand the explanation for his amnesia for events prior to coming to the UK. The most likely explanatory factors are his psychotic illness or some form of psychogenic amnesia."

Conclusions on mental state

27. I have reviewed the medical evidence in some detail, because I think it leads to conclusions which differ at least in emphasis from those reached by the judge (para 31). He accepted that the medical evidence demonstrated that "in 2006 the claimant was reasonably competent", although there was "a subsequent deterioration." However, he continued:

> "But the fact is that in 2005 the claimant had been sectioned under the Mental Health Act. So even if the matter had been handled more expeditiously, so that he had his asylum interview and hearing before the end of 2006, there is no guarantee that the account which he was able to give to his solicitor in December 2004 would have been capable of being advanced by him at that point. The medical evidence seems to me to indicate that the claimant has fluctuated over the period since he arrived in the UK in terms of his mental condition."

28. He added that the claimant "had not been helped" by what he found to be a failure on his part to report when required to do so. He concluded:

> "Given the claimant's mental condition in 2005, and the finding of the Immigration Judge that his mental condition was not caused by the delay, it seems to me that the claim for damages for any lost opportunity or otherwise does not arise on the facts of this case."

29. My conclusion would be somewhat different. It is important to distinguish between the two parts of the claim. On the one hand, in my view, Dr Lister's report does give some weight to the contention that the delay in handling his asylum case was aggravating his illness (see para 17 above). This may be supported by Dr McGovern's observation that it had persisted "unusually" for several years in spite of treatment. As I have already noted, the evidence does not justify any inferences against K based on his failure to "report" on some occasions.

30. As to his ability to give useful evidence, I think the judge was too generous in accepting that "in 2006" the claimant was "reasonably competent", if this means throughout 2006. In my view the evidence gives no support to the proposition that there was a significant period of lucidity after January 2006. I observe that if there had been such a period of lucidity, at a time when the Department was talking of arranging a screening interview, it is surprising that the solicitors did not take steps to improve on the somewhat sketchy account given in the statement of 2004.

31. However, the overall impression of the evidence is reasonably clear. There was a serious deterioration of his condition from the end of 2004, a brief period of improvement while he was a resident inpatient at the end of 2005, followed by renewed deterioration during his period of leave until the end of February 2006. Thereafter the same problems continued with some fluctuation but without significant change until Dr Lister reported in June 2007, and thereafter. To that extent I agree with the judge that there is no realistic basis for the claim that K would have been able, at any time between January 2006 and June 2007, to present a more convincing case to the tribunal than the case which was rejected in August 2008.

The claimant's case

32. Mr Bedford's case can be divided into four propositions:

    i) The delay in dealing with K's case was so unreasonable as to be unlawful;

    ii) The unlawful delay caused loss in two respects:

        a) Damage to K's mental health;

        b) Loss of a better-than-even (or at a least realistic) chance of success in his asylum claim;

    iii) His claim to asylum was a "civil right" for the purposes of Article 6 of the European Convention, for which he had a right to a hearing within a reasonable time, breach of which gave him a claim for compensation (or "just satisfaction") under the Human Rights Act 1998;

    iv) Alternatively, he had an equivalent right under EU law, under the Dublin II regulation, taken with the Qualification Directive.

33. I need say no more about (ii) at this stage. For the reasons given, I am content to proceed on the assumption that there is evidence to support at least the first part of the claim. The matter can be considered further if necessary if liability is established.

Illegality

34. It was not in dispute that, at least under domestic law, the Secretary of State was under a public law duty to decide the asylum application within a reasonable time. Both parties, as I understood them, accepted what I said in *Home Secretary v S* [2007] EWCA Civ 546 para 51:

> "The Act does not lay down specific time-limits for the handling of asylum applications. Delay may work in different

> ways for different groups: advantageous for some, disadvantageous for others. No doubt it is implicit in the statute that applications should be dealt with within 'a reasonable time'. That says little in itself. It is a flexible concept, allowing scope for variation depending not only on the volume of applications and available resources to deal with them, but also on differences in the circumstances and needs of different groups of asylum seekers. But (as was recognised by the White Paper) in resolving such competing demands fairness and consistency are also vital considerations."

35. Although the concept is flexible, and the dividing line may often not be easy to define, in this case the position seems to me reasonably clear, in spite of Mr Johnson's strenuous arguments to the contrary. In April 2005, the Department accepted responsibility for the case. By February 2006, after some nine months inaction, they were or should have been fully aware of the circumstances, including the fact that K had been accepted as a minor, and was mentally ill. Everything therefore pointed to the need for an early decision. Their letter of 2nd February was appropriately apologetic, and mentioned no administrative or other obstacle to impede future progress.

36. Progress was in the event halted, not because of any defect in the case, nor any considered decision related to it, but simply because in July 2006 it was consigned to WIPS, which in this context meant indefinite delay. Fairly, Mr Nelson did not attempt to excuse that position. Had an application for judicial review come before an administrative judge on those facts, I have little doubt that the case for a mandatory order, if necessary, would have been accepted (even if in practice an undertaking would probably have been offered). That to my mind is a sufficient indication that by 11th July 2006, at the latest, the dividing line between reasonable and unreasonable delay had been crossed, and I would so hold.

Liability under EU law

37. The so-called Qualification Directive 2004/83/EC for the first time recognised the right to asylum as part of EU law, rather than simply as an obligation under the Refugee Convention. Article 13 of the Qualification Directive provides:

> "Member states shall grant refugee status to a third country national or a stateless person who qualifies as a refugee in accordance with chapters 2 and 3."

38. I will need to come back to this Directive in connection with Mr Bedford's argument in relation to Convention rights under the HRA. However, in the present context, as I understand his argument, he does not rely on it as more than background to his claim to damages under EU law for delay in handling his case.

39. For this purpose he relies rather on a breach of Dublin II, taken with the principles laid down by the ECJ governing liability in damages for breach of community law (see Case C479/93 *Francovich* [1991] ECRI-5357; Case C46/93 *Brasserie du Pecheur* [1991] QB 404). Dublin II contains rules to allocate responsibility between member states for handling an asylum application lodged on their territory. The state

which has responsibility under these rules is obliged, among other things, to "complete the examination of the application for asylum" (article 16(1)(b)).

40. For good measure he also prays in aid article 47 of the Charter on Fundamental Rights (as applied by the Lisbon treaty), under which there is conferred a right to "a fair hearing within a reasonable time" to alleged violations of EU law. However, as I understand him he does not rely on that as sufficient in itself to establish his claim to damages.

41. I take Mr Bedford's case under Dublin II as in his skeleton:

> "R (the Secretary of State) took responsibility for A's asylum application on 5 April 2005. As such R was bound by article 16(1)(b) Dublin II Regulation to complete the examination of A's asylum application.
>
> R's obligation derives from a Regulation of the Council of the European Union, which in the hierarchy of EU secondary legislation ranks highest because it is binding in its entirety and directly applicable in the Member States as soon as it enters force.
>
> On 5 April 2005 A derived an unconditional right to the completion of the examination of his asylum application by R. Throughout 2006 A called on R to complete the examination of his asylum application because he risked becoming more unwell. R procrastinated and thereby A lost the chance he would have had of making good his asylum application had he been well."

The judge rejected this claim on the grounds that, even if there were liability in principle, no such loss had been caused.

42. In my view, even if causation were established, there is no legal basis for the claim. The regulation is concerned with the allocation of responsibility as between states, not the creation of personal rights. It may be, as Mr Bedford submits, that a claimant, threatened with removal from the country which has responsibility under the Regulation, has an enforceable right to prevent his removal to another country before his claim is determined. However, there is nothing in the Regulation in my view which can be said to create a personal right to have the claim determined within any particular time. That is not its purpose. As the judge said:

> "The system is designed to prevent asylum shopping and at the same time to ensure that each asylum applicant's case is processed by only one member state".

43. It is also significant in my view that there is now separate European legislation governing the timing of the consideration. That is to be found in Council Directive 2005/85/EC ("the Procedures Directive"), which sets minimum standards for procedures for granting refugee status. Article 6(2) says that member states shall ensure that each adult having legal capacity has the right to make an application for

asylum on his or her own behalf. Article 23 ("Examination Procedure") requires member states to handle applications for asylum in accordance with the principles set out in the Directive, and to ensure that the procedure is concluded "as soon as possible without prejudice to an adequate and complete examination". Where a decision cannot be taken within six months, the applicant concerned must be informed of the time by which the decision is expected to be given, but:

> "Such information shall not constitute an obligation for the Member State towards the applicant concerned to take a decision within that time frame."

44. Mr Johnson submits that the latter words are a sufficient indication that the article is not intended to give rise to liability in damages for failure to determine an application within any particular time. It is unnecessary to determine that question, since the Directive was not in force at the time when the present application was considered. However, the existence of this specific provision, within the new EU Code governing the handing of claims to refugee status, tends to weaken the argument that such an obligation was already implicit in Dublin II.

Remedy under the HRA

45. Mr Bedford's alternative argument raises questions of more difficulty. In short he claims that by virtue of the Qualification Directive K's claim to refugee status relates to a "civil right" for the purposes of the Convention; that under article 6 of the Convention, he is entitled to determination of that right by a fair hearing within a reasonable time; and that under section 8 of the HRA he is entitled to a compensatory remedy, by way of "just satisfaction" for loss caused by breach of that right. He accepts that this argument goes against the grain of traditional Strasbourg jurisprudence, under which decisions relating to the entry or expulsion of aliens have not been regarded as within article 6. However, he says that, since 2006, the Qualification Directive has brought about a fundamental change in the legal status of the claim to refugee status, in Convention law, as well as EU law.

The judgment below

46. The judge rejected this argument. He said:

> "The difficulty I have with this argument is that it flies in the face of the two decisions of the Grand Chamber of the European Court of Human Rights. One of those decisions post dated the Qualification Directive, although I accept that the Directive was not drawn to the attention of the Grand Chamber. It would be a very brave judge sitting in the Administrative Court who diverges from the jurisprudence expounded in two decisions of the Grand Chamber of the European Court of Human Rights. But even taking on board Mr Bedford's arguments, I cannot see that the Qualification Directive changes for the United Kingdom the nature of the rights of someone seeking asylum. It does not alter the nature of the right to claim asylum itself. Nor does it change the obligation to determine asylum claims. Those rights were already in our

> law. For more than half a century the UK has been under a mandatory duty to consider a claimant's asylum claim." (para 26)

47. The two Grand Chamber decisions to which he referred were *Maaouia v France* (2000) 33 EHRR 1037, and *Eskelinen v Finland* (2007) 45EHRR 43. From the former the judge cited the following passage:

> "The court concludes that decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6(1) of the Convention." (para 40)

He recognised that *Maaouia* did not relate directly to a claim for asylum, but noted that it had been treated, in *Eskelinen*, as authority that "matters of asylum, nationality and residence in a country" were examples of –

> "… cases which due to the claims being made are regarded as falling outside the civil and criminal heads of article 6(1)" (para 58 n 43)

The argument

48. Mr Bedford's argument starts from the concept of a "civil right" under the Human Rights Convention, and relates that to a comparison of the attributes of refugee status before and after October 2006.

49. As to the first, he accepts that the term "civil rights" in article 6 has an "autonomous" Convention meaning, depending on substance rather than form. As the Strasbourg court explained in an early case (*König v Germany* (1978) 2 EHRR 170 para 89):

> "Whilst the Court thus concludes that the concept of "civil rights and obligations" is autonomous, it nevertheless does not consider that, in this context, the legislation of the State concerned is without importance. Whether or not a right is to be regarded as civil within the meaning of this expression in the Convention must be determined by reference to the substantive content and effects of the right – and not its legal classification – under the domestic law of the State concerned. In the exercise of its supervisory functions, the Court must also take account of the object and purpose of the Convention and of the national legal systems of the other Contracting States…"

50. However, he relies on more recent authorities as showing the potentially wide scope of the concept, and the significance of economic aspects. In *R(A) v Croydon LBC* [2009] UKSC 8, Lady Hale commented on recent case-law:

> "The question whether the claim concerned the determination of the applicant's civil rights was not disputed. This was not surprising, as the case fell within the mainstream of cases

> where the issue was one as to the entitlement to an amount of benefit that was not in the discretion of the public authority…. [Recent cases]… indicate that article 6(1) is likely to be engaged when the applicant has *public law rights which are of a personal and economic nature and do not involve any large measure of official discretion*. As the court put in *Salesi v Italy*, para 19, the applicant was claiming an individual, economic right flowing from specific rules laid down in a statute. In *Mennitto v Italy*, para 23, the court said that the outcome of the proceedings must be directly decisive for the right in question." (para 59, emphasis added)

51. Relating this concept to refugee status, Mr Bedford submits that a significant change took place in 2006, so that the traditional approach of the Strasbourg court, reflected in *Maaouia*, is no longer applicable.

52. For the previous position, he cites Gummow J in the High Court of Australia in *Minister for Immigration and Multicultural Affairs v Ibrahim* [2000] HCA 55:

> "It has long been recognised that, according to customary international law, the right of asylum is a right of States, not of the individual; no individual, including those seeking asylum, may assert a right to enter the territory of a State of which that individual is not a national"

53. Similarly, in the UK recent authority at the highest level establishes that the recognition of refugee status under the Geneva Convention was not before 2006 based on formal incorporation of the Convention (as has been done for example with the Human Rights Convention). The authorities were reviewed recently by Burnton LJ in this court in *EN(Serbia) v Secretary of State* [2009] EWCA Civ 630 para 52-60. He concluded:

> "I fully accept that the Convention has been incorporated into our law for some purposes. It defines a claim for asylum under our law. It has been given a status superior to the Immigration Rules, but they are not law of the status of a statutory instrument but something rather less…
>
> So far as the Convention as a whole is concerned, Parliament has legislated in section 2 of the Asylum and Immigration Act 1993, but it did not do so in terms that would give the Convention the force of statute for all purposes…."

54. Burnton LJ accepts that the recognition of refugee status under the Geneva Convention carried with it guarantees of economic and social rights. For example, Chapter II of the Convention, requires contracting states to accord to refugees the same treatment as foreign nationals "as regards the right to engage in wage-earning employment" (art 17); chapter IV makes similar provision for housing, public education, and social security. However, these rights had no greater status in law than the right to claim refugee status itself.

55. Mr Bedford submits that the Qualification Directive has made a radical change. Refugee status and subsidiary protection have now become part of EU law, and therefore of domestic law. Article 13 provides in mandatory terms that member states "shall grant refugee status" to someone who qualifies as a refugee under the preceding chapters. Furthermore such protection is not solely concerned with the right to stay in this country. Determination of refugee status, he submits, is decisive of personal and economic rights. Thus article 26 requires member states to authorise recognised refugees "to engage in employed or self-employed activities" subject to the rules generally applying; article 28 requires them "to ensure" that they receive "the necessary social assistance as provided to nationals…"

Discussion

56. Mr Bedford's argument raises a novel and important question of principle, as Sullivan LJ recognised when granting permission in this case ([2009] EWCA Civ 1409; citing comments to similar effect by Longmore LJ in *HH (Iran) v Secretary of State* [2008] EWCA 504). To answer it, it is necessary to examine with some care the Strasbourg case-law, both before and since the Qualification Directive, to understand the principles behind the *Maaouia* doctrine, and to see how, if at all, they have been affected by the change in EU law.

57. For a review of the earlier case-law I can refer gratefully to a decision of the Immigration Appeal Tribunal, presided over by Collins J (*MNM v Secretary of State* [2000] UKIAT 00005), handed down shortly after the Grand Chamber decision in *Maaouia*. Having set out the relevant part of article 6(1), the tribunal said:

> "10… The key phrase for our purposes is 'in the determination of his civil rights and obligations'. This expression means something different to a continental as opposed to an English lawyer. The jurisprudence of the European Court and Commission has approached the application of Article 6 on the basis that the word 'civil' incorporates the distinction between private and public law. Thus in *Uppal v U.K.* (1979) 3 EHRR 391 the Commission concluded that decisions to deport were of an administrative order, were made in the exercise of discretion by immigration authorities and so were not covered by Article 6(1). In *P v U.K.* (1987) 54 D.R. 211, the Commission stated that it had 'constantly held that the procedures followed by public authorities to determine whether an alien should be allowed to stay in a country or should be expelled are of a discretionary administrative nature, and do not involve the determination of civil rights within the meaning of Article 6(1)'.
>
> 11. The reference to discretion as a reason for the non-application of Article 6(1) seems to us a little curious. It is because it is an administrative act and so any rights found in public law that the Article does not apply. In asylum cases, discretion is not a relevant consideration. If the claim falls within the Geneva Convention, asylum must be granted. But the Commission has more recently revisited the issue in *Adams*

& Benn v U.K. (11.1.97). One of the arguments raised in that case was that Article 8A(1) of the EC Treaty conferred on European citizens and so on the applicant Adams a right to work and reside within the territory of member states. Thus there was no question of exercising discretion. The Commission stated (Transcript p 8):

> 'While it appears subject to argument in the English Court as to whether this provision (sc: Article 8A(1)) is declaratory or confers directly applicable rights in domestic law, the Commission in any event is of the opinion that any right involved is of a public law nature, having regard to the origin and general nature of the provision, which lacks the personal, economic or individual aspects which are characteristic to the private law options ..... Consequently, the matter falls outside the scope of the concept of 'civil rights and obligations'.'

Accordingly, the application on this ground was declared inadmissible.

This approach has been raised before the Court in a decision on admissibility, *J.E.D. v U.K.* (2.2.99). This was an asylum case and the application was based on the lack of any proper appeal against a renewed application for asylum following the dismissal of the applicant's first claim. The Court did not deal with the question since it regarded judicial review, which the applicant could and did take, as an adequate remedy. But in a more recent decision, *Maaouia v France* (22.3.2000) the Court has decided that the issue should be argued before the Full Court.

The full Court has now determined the issue in a decision dated 5 October 2000… The Court has upheld the existing jurisprudence and decided that the distinction between public and private law rights reflected by the use of the word 'civil' means that administrative decisions concerning entry into or removal from a state are not within Article 6(1)…

The Strasbourg jurisprudence thus establishes that the correct approach is to distinguish between private law rights, which are covered by Article 6(1), and public law rights, which are not. There may be some overlap so that, for example, social security issues are within Article 6(1): see *Salesi v Italy* (1993) 26 EHRR 187. Other decisions suggest that where there may be a pecuniary benefit involved or the deprivation or prevention of economic use of property (e.g. planning laws), Article 6 will apply. Mr. Williams pointed out that decisions in relation to immigration may affect the right to work or to obtain benefit and so have, at least indirectly, a pecuniary impact."

58. I agree that a criterion based on the "discretionary administrative nature" of a decision, as suggested in the first case, is not readily applicable to claims to asylum. Furthermore, the distinction between private law and public law rights, as noted in the last paragraph, has become increasingly blurred in later cases, as is apparent from the judgment of Lady Hale quoted above. However, the tribunal, rightly in my view, identified a consistent line of authority culminating in the Grand Chamber decision in *Maaouia*, which has been treated as applying to refugee status.

59. The judgments in *Maaouia* itself show some differences at least of emphasis among members of the court. The case was not about refugee status, but concerned an exclusion order following conviction for a criminal offence. The majority judgment dealt with the issue shortly:

> "35 The Court has not previously examined the issue of the applicability of Article 6 § 1 to procedures for the expulsion of aliens. The Commission has been called upon to do so, however, and has consistently expressed the opinion that the decision whether or not to authorise an alien to stay in a country of which he is not a national does not entail any determination of his civil rights or obligations or of any criminal charge against him within the meaning of Article 6 § 1 of the Convention…"

60. The court confirmed the Commission's position, relying in particular on the inference to be drawn from Protocol No 7, adopted in 1984, which contained procedural guarantees applicable to the expulsion of aliens:

> "37 The Court therefore considers that by adopting Article 1 of Protocol No. 7 containing guarantees specifically concerning proceedings for the expulsion of aliens the States clearly intimated their intention not to include such proceedings within the scope of Article 6 § 1 of the Convention"

61. In a concurring judgment, Sir Nicholas Bratza expressed the matter rather differently, in terms which echoed the emphasis on discretion in the earlier case-law:

> "In general, I can agree that proceedings which exclusively concern decisions of administrative authorities to refuse leave to an alien to enter, to impose conditions on an alien's leave to stay or to deport or expel an alien, do not involve the determination of the "civil rights and obligations" of the alien. In this regard, I see no reason to depart from the constant case-law of the Commission that, because of *the substantial discretionary and public-order element* in such decisions, proceedings relating to them are not to be seen as determining the civil rights of the person concerned, even if they inevitably but incidentally have major repercussions on his private and family life, prospects of employment, financial position and the like…." (para O-112, emphasis added)

It is noteworthy, in the context of Mr Bedford's argument, that he did not regard personal and economic implications as determinative.

62. As is apparent from those references, *Maaouia* itself did not deal directly with claims to refugee status. However, as the judge noted, it was accepted by the court as confirming the previous case-law on that issue. Also significant, in my view, is a much more recent admissibility decision, *IN v Sweden* Application no 1334/09, 15th September 2009 (decided since Cranston J's judgment). That concerned a complaint under Article 6 that an asylum seeker had not been heard before the migration courts. The Court "noted" (citing *Maaouia*) that Article 6 –

> "… does not apply to asylum proceedings as they do not concern the determination of either civil rights and obligations or of any criminal charge."

63. It is true that there was no reference in the judgment to any argument based on the Qualification Directive. But it would be surprising if at least some members of the court would not have had it in mind, and referred to it if they thought it relevant. However, it is important to remember that the scope of the Human Rights Convention, and the jurisdiction of the Strasbourg court, extend to countries outside the scope of EU law, including the Directive. We do not have much information about the treatment of such issues in other countries to which the Convention applies. However, it would be surprising if the "autonomous" meaning of an expression in Convention law were to be materially affected by new laws which did not extend to all the areas covered by the Convention itself. In other words, applying the *Konig* approach (see above) in this wider context, and looking at substance rather than legal form, it has not been shown that 2006 brought about any significant change in the area to which the Convention applies, taken as a whole, as opposed to the area to which the Qualification Directive applies.

64. In any event, against the background of this consistent line of Strasbourg authority, I do not think it would be appropriate for a domestic court, even at Court of Appeal level, to develop a distinct jurisprudence.

65. In *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153, Lord Brown cited Lord Bingham's comments in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, 350 (para 20), as to the proper approach to domestic courts to the Strasbourg court, when he said:

> "The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."

Lord Brown commented:

> "I would respectfully suggest that last sentence could as well have ended: 'no less, but certainly no more.' There seems to me, indeed, a greater danger in the national court construing the Convention too generously in favour of an applicant than in construing it too narrowly. In the former event the mistake will necessarily stand: the member state cannot itself go to

> Strasbourg to have it corrected; in the latter event, however, where Convention rights have been denied by too narrow a construction, the aggrieved individual can have the decision corrected in Strasbourg…." (paras 105-6)

66. In my view, we should follow this guidance in a case such as the present, where a departure from the established jurisprudence would have wide-ranging implications, not confined to this country.

Conclusions

67. For these reasons, I consider that even if it were shown that the delay by the Secretary of State in handling the case caused or aggravated his mental condition, there would be no liability in damages under either EU or Convention law. I would therefore dismiss the appeal and uphold the judgment.

Lady Justice Smith:

68. I have read the judgments of Sedley and Carnwath LJJ. I agree that, for the reasons given by Carnwath LJ, the appeal must be dismissed.

69. Sedley LJ agrees with that result with reluctance. I share his reluctance to hold that, for the reasons he gives, on the present state of the law, an asylum seeker whose application is subject to unlawful delay and who suffers provable loss as a result should have no financial remedy. However, on the particular facts of this case, my reluctance is tempered by my strong suspicion that there is no provable loss in this case. For the reasons given by Carnwath LJ, the contention that the delay had prevented K from presenting his asylum claim during a window of lucidity is unsustainable. His claim that the delay had exacerbated his mental illness could not, on the evidence presently available, be described as wholly unsustainable. But the medical evidence in support is very slender and comprises no more than the suggestion that the delay might have made matters worse. In my view, it is highly likely that if and when that medical evidence were subject to scrutiny and the correct standard of proof applied, it would be held that the delay had not, on the balance of probabilities, had any effect on K's condition.

Lord Justice Sedley:

70. I agree that we have to dismiss this appeal, but I do so with considerable reluctance. Mr Bedford has advanced a formidable argument that article 13 of the Qualification Directive has introduced into EU law, and hence into the law of all EU member states, an affirmative right to asylum. The obligation which the article spells out may be a public law duty, but it is an obligation which arguably generates a correlative individual right. In the domestic law of the United Kingdom and, I suspect, in civil law systems likewise, it is not easy to see how such a right, if it exists, can be anything but a civil right.

71. The Strasbourg court has made it clear that the expression "civil rights" has an autonomous meaning in article 6 of the Convention. In *Maaouia v France*, as Carnwath LJ has shown by citation, this was held to put proceedings for the removal of unauthorised aliens outside the protection of the article; but that does not answer

the present issue. What appears to place the present class of case equally outside article 6 is the assumption (I use the word advisedly, for the proposition is not reasoned out) in *Eskilainen v Finland* and *IN v Sweden* that the effect of *Maaouia* is to assimilate asylum claims to deportation and removal proceedings.

72. Even if this were the effect of *Maaouia*, it would require reconsideration in the light of the Qualification Directive, something which the Strasbourg court has so far not apparently been invited to do. What it has done – and this is another string to Mr Bedford's bow - is demonstrate, for example in relation to social security rights, that the autonomous meaning of civil rights has no very clear boundary.

73. So long as, in the UK's dualist constitution, asylum was no more than a treaty obligation, no right at all could be said to exist. So long as its application was an administrative function, its grant could be categorised as discretionary; though with the introduction of a judicial appeal system this has long since ceased to be a sufficient description. But it remained at least arguable that, while there might be a procedural right to a fair hearing, there was still no substantive right to asylum. It is distinctly possible that the Qualification Directive has changed all that.

74. Can we then take the step ourselves? If Strasbourg jurisprudence were formally binding we would be prohibited from doing so; but our obligation under s.2(1) of the Human Rights Act is to do no more than take the jurisprudence into account in reaching our own decisions. We have been told, however, by the House of Lords that this does not ordinarily make it appropriate to depart from the ECtHR's rulings, and Lord Bingham's admonition in *Ullah*, cited by Carnwath LJ, has constituted a strong (and to some commentators surprising) imperative not to move ahead of Strasbourg's jurisprudence.

75. While, therefore, I agree that Mr Bedford's argument on Dublin II is misconceived (so misconceived, in fact, as to risk weakening his good argument), his argument on the Qualification Directive seems to me a powerful one which is capable of changing the decided or assumed relationship of article 6 to asylum claims. But, with reluctance, I agree with Carnwath LJ that the step is not one which this court can properly take. We are required to continue to treat asylum claims as outside the scope of the civil rights protected by article 6.

76. If we (or another court) were to accept the argument and to find a breach of article 6, the harmful effect of the Home Office's inexcusable delay on the claimant's mental health might well sound in damages; but on the medical evidence which Carnwath LJ has analysed in detail, as well as because of the lack of satisfactory evidence that an appeal in 2006 would have succeeded, I do not consider that the failure to secure asylum can form part of the claimant's recoverable loss.