Upper Tribunal
Immigration and Asylum Chamber

Judicial Review
Notice of Decision/Order/Directions

Before

Mr Justice McCloskey, President

In the matter of applications for permission to apply for judicial review

The Queen on the applications of Leila Simaei and Mehmet Arap

Applicants

v

Secretary of State for the Home Department

Respondent

Upon the applications of the above named Applicants for permission to apply for judicial review and having heard the parties' respective Counsel, Mr D O'Callahan (instructed by Duncan Lewis Solicitors) and Mr R Harland (instructed by the Treasury Solicitor) at a hearing on 05 January 2015.

In light of the considerable body of relevant background country information considered by the Respondent, it was open to her to find that there was neither systemic deficiency nor were there substantial operational problems in the conditions in Hungary for the reception, processing and treatment of asylum seekers.

JUDGMENT

McCloskey J:

Introduction

1. These two Dublin Regulation cases were heard together as they raise common issues and I consider it appropriate to provide a composite judgment. They were

the subject of an earlier order adjourning them for an oral hearing.

2. The first case, that of Leila Simaei (hereinafter "*the first Applicant*"), is a renewed application for permission to apply for judicial review, the initial application having been refused by Order of the Upper Tribunal dated 25 April 2014. The second case, that of Mehmet Arap (hereinafter "*the second Applicant*") was the subject of an oral permission hearing order and conjoinder with the first case. Both Applicants are challenging decisions of the Respondent that they should be removed to Hungary for the purpose of processing and determining their respective asylum applications under the Dublin Regulation.

The First Applicant

3. The first Applicant challenges the Respondent's decision dated 20 February 2014. By this decision this Applicant's asylum claim was certified under paragraph 5(4) of Part 2 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants) Act 2004.

4. This Applicant is a national of Iran, aged 26 years. The voluminous papers contain three witness statements made by her. Within these, the most salient claims and allegations are that she was raped by her cousin when aged 24; she attempted suicide soon afterwards; she could not confide in her family as she feared they would kill her; she became severely depressed; sometime later she rejected a marriage proposal from a security guard who, subsequently, subjected her to multiple threats of kidnap and maiming; later, having brought herself to confide in her mother about the rape, she left Iran, in early August 2013; she travelled through Turkey and onwards to Hungary, where she was detained for 8 days; then she was conveyed to a male refugee camp where she suffered conditions of cold and starvation and was the subject of unwanted attention from the male inmates; she left the camp having spent about 1 ½ months there; and she entered the United Kingdom on 26 January 2014.

5. In her first witness statement the Applicant describes her sojourn in the Hungarian detention centre as an "*ordeal*". This was only scantly particularised. There was no suggestion of any physical abuse or ill treatment. In [13] of her second witness statement, she says:

> "*Even when I was in the detention centre in Hungary I begged the Afghan men not to rape me as I at the time was a Muslim like them. However, that did not stop them from raping me.*"

This claim of rape was not made in her first witness statement, made nine months previously. In an intermediate witness statement, made some three months after the first, this Applicant described a rape ordeal involving three male inmates. She complained of a lack of protection from the centre staff and a previous unsuccessful attempt to secure medical attention. She acknowledged that when detained in the United Kingdom she received excellent medical and counselling services and asserts that, in this context, she complained of "*abuse*" (unspecified) and not "*rape*". She further asserted that she alleged rape in a letter to UKBA. When examined by Dr Mounty, Consultant Psychiatrist, on 17 March 2014, at which stage she had made the first of her three statements, this Applicant reported "*verbal abuse and perceived threats of further sexual violence whilst in detention in Hungary*", making no allegation of rape.

6. Dr Mounty diagnosed PTSD:

> "*Overall, the clinical picture is one of severe PTSD symptoms and major depression, with associated anxiety and symptoms of complex PTSD.*"

She considered this Applicant to be a reliable and genuine historian. Dr Mounty continues:

> "*If Ms Simaei were returned to Hungary she would, in my view, be almost certain to experience this as retraumatising, since her reported memories of the country are of neglect, lack of safety and sexual harassment. A forced return to Hungary would therefore be likely to precipitate an abrupt deterioration in her mental health, with an increase in her PTSD symptoms and in her level of suicidal ideation.*"

While this Applicant's evidence has the inconsistencies noted above, it was incumbent on the Respondent to take it at its reasonable zenith: EM (Eritrea) [2014] UKSC 12, at [8]. In this application for judicial review, the court must do likewise.

7. The certification decision is dated 20 February 2014, following on from Hungary's acceptance of responsibility on 11 February 2014. In response to the PAP letter, the Respondent wrote again, by letter dated 26 March 2014. This letter identified the Applicant's case as having the twofold foundation of (a) the UNCHR report "Hungary: A Country of Asylum", dated April 2012 and (b) a decision of the Administrative Court of Stuttgart, dated 02 April 2012. It notes that there is no evidence from any source establishing systemic flaws or failures in the asylum reception and processing arrangements and procedures prevailing in Hungary, sufficient to displace the significant presumption that Hungary complies with its international obligations, particularly those under the ECHR, the Refugee Convention and the EU Charter. I interpose here the observation that there is no indication of any misdirection in law by the Respondent in this significant passage.

8. The first Applicant's challenge has evolved somewhat since its initiation, the grounds of challenge having been amended. In her pleaded case**,** two reports in particular are identified, namely the UNCHR report "Hungary: A Country of Asylum", dated April 2012 and the Jesuit Refugee Service Europe report entitled "Protection Interrupted" (June 2013). There has been still further very recent evolution: *infra*.

The Second Applicant

9. The material facts of this Applicant's case are uncontroversial. He is an ethnic Kurd, now aged 20 years, who left Turkey in May 2013. He travelled to Hungary, where he claimed asylum and was detained. He absconded within a few days and travelled to the United Kingdom in May 2013. In June 2013 he was returned to Hungary, where he was accommodated in an open facility. He preferred to sleep rough in a park and returned to the United Kingdom, where he was apprehended again, in April 2014. His case, in a nutshell, is that in the event of being transferred to Hungary again it is highly probable that he will be detained and that the detention conditions will infringe his rights under Article 3 ECHR.

General

10. This litigation highlights the potential for rapid fluctuation, both evidential and jurisprudential, one of the now established phenomena of "Dublin" cases. There

are two comparatively recent decisions of the European Court of Human Rights. The second is Mohammed v Austria (Application No 2283/12), wherein judgment was given on 03 July 2014. The Applicant challenged his proposed removal to Hungary by the Austrian authorities. His complaints were that this would expose him to inhuman and degrading treatment, that he would face imprisonment under deplorable detention conditions and that he would be at risk of *refoulement* to Serbia. The evidence considered by the ECTHR included a statement provided by the Hungarian Helsinki Committee (the "*HHC*") dated April 2013, a Hungary "country" report, dated April 2014, published on the Asylum Information Database ("*AIDA*") and a statement prepared by the UN Working Group on Arbitrary Detention following a visit to Hungary in September/October 2013. The Court decided thus, in [75]:

> "*The Court therefore concludes that the Applicant would currently not be at a real, individual risk of being subject to treatment contrary to Article 3 of the Convention if expelled to Hungary.*"

The following passage is of particular significance:

> "*[66] The Court therefore takes note of the various reports on Hungary ……*
>
> *It also notes, however, that the Hungarian asylum legislation and practice has significantly changed since the Applicant lodged the instant application* [in November 2012] *and the parties made their submissions on the merits of the case. The Court therefore will only take into consideration the most recent reports and respective arguments by the parties …….*
>
> *[68] The country reports showed that there is still a practice of detaining asylum seekers …….. and there is no legal remedy against asylum detention. However, the reports also showed that there is no systematic detention of asylum seekers any more and that alternatives to detention are now provided for by law. The maximum period of detention has been limited to six months. Turning to the conditions of detention, it is noted that while there are still reports of shortcomings in the detention system, from an overall view there seem to have been improvements …..*
>
> *[69] Moreover, the Court notes that the UNHCR never issued a position paper requesting EU Member States to refrain from transferring asylum seekers to Hungary ……*"

The date when this judgment was promulgated, 03 July 2014, is of obvious significance. This followed the Court's earlier decision in Mohammadi v Austria (Application No 71932/12), promulgated on 06 June 2013, in which a similar challenge was also dismissed.

11. In considering the evolution of reception and assessment conditions for asylum applicants in Hungary, it is necessary to be cognisant of certain changes in its asylum laws. These came into operation first in January 2013 and, later, in July 2013 when the Asylum Act was amended again. The ECTHR gave judgment in Mohammadi one year later and, in doing so, gave consideration to reports postdating the July 2013 reforms: see [33] – [45]. Notably, the Court considered the AIDA report of 30 April 2014 *in extenso*: see [36] – [43]. Throughout these passages, the Court refers to the HHC. I consider the likely explanation of this

to be that the AIDA Report was written by members of the HHC and edited by the European Council on Refugees and Exiles ("ECRE"). Thus HHC was, at the very least, the main source of the substantive content of the AIDA Report. Notably, the further free standing HHC report was published more or less simultaneously, in the form of its "Information Note" of May 2014.

12. The landscape has continued to evolve since judgment was given in Mohammed. In November 2014, in HK (Sudan) v SSHD [2014] EWCA Civ 1481, a single Judge of the Court of Appeal decided a renewed application for permission to appeal against a decision of the Administrative Court whereby permission was refused to the Appellant to challenge his proposed removal to Hungary under the Dublin Regulation. As the *ex tempore* judgment records, the Court had at its disposal "*a considerable body of evidence*" relating to relevant conditions in Hungary. The Judge considered, firstly, that the issues of the frequency of access to sanitary facilities and the use of leashes and hand cuffs on detainees during transfers did not attain the minimum level of severity threshold under Article 3 ECHR. Attention was then focused on the issue of the fear of violence on the part of detaining officers. Consideration was given in particular to a statement of the HHC "*which has been obtained recently*". This asserted that the treatment of asylum applicants in detention centres is "*appalling*" and that physical violence is "*common*". The Judge reasoned that allegations of this kind were not novel and had not succeeded in establishing a breach of Article 3 in Mohammed and Mohammadi. Furthermore, the evidence indicated that there had been improvement in detention conditions in Hungary. Finally, the Judge characterised the HHC evidence as "*generalised and vague*". He concluded that it was not sufficient to overcome the threshold for challenging the Respondent's certification decision and refused permission accordingly.

13. The Court of Appeal gave judgment in HK (Sudan) on 03 November 2014. A further "statement" was then commissioned from the HHC by the Appellant's solicitors who also represent each of the Applicants in these proceedings. It is dated 12 November 2014. It is evidently designed to supplement and clarify earlier HHC evidence, in particular a statement dated 27 October 2014 which was deployed in the Court of Appeal proceedings. It repeats its earlier critique of the treatment of detained asylum seekers. Once again, there are no details of the nature of the alleged ill treatment or any injuries sustained. The particulars of this assertion are limited to an unspecified number of complaints by detainees of "*verbal abuse and occasions of physical abuse by the armed security guards*". This simply repeats the earlier statement considered by the Court of Appeal. A specific instance of two detainees allegedly injured as a result of the use of paprika spray by guards, evidently as a species of crowd control measure at a sporting activity, is instanced. While this is novel, it lacks particulars and mentions no injuries. Three further specific examples, none of them novel (*infra*), are provided. The continued use of hand cuffs and leashes in escorting/transfer contexts is noted.

14. To summarise, there is a considerable volume of evidence relating to reception and detention conditions in Hungary generated during the past year. This includes in particular the AIDA Report of April 2014, the HHC Information Note of May 2014, the witness statements of the HHC Legal Officer of October and November 2014, the witness statements on behalf of the three Hungarian migrant and refugee organisations, all dated 27 October 2014 and the other related statements generated for the purpose of the Court of Appeal hearing in HK (Sudan). I note that the two UNCHR employees who were interviewed by the Applicants' solicitors in Budapest in October 2014 have declined to sign any witness statement or to confirm the accuracy of any account of their interview.

While I have noted the reasons proffered, this does not alter this fact.

15. All of the evidence must be evaluated in the round. Thus it is appropriate to highlight the positive and favourable terms in which conditions in reception facilities are described in the AIDA/HHC Report of April 2014 (at pages 39 – 41 especially). This includes a description of the psychological and psychotherapy services provided to traumatised asylum applicants by the Cordelia Foundation, an NGO. As regards vulnerable persons, there is specific provision in the Hungarian Asylum Act, in the context of a broad definition (see pages 42 – 43) and a requirement that due consideration be given to the specific needs of such persons, which may include additional free health care services. The report continues:

> "*It is the duty of the Office of Immigration and Nationality (OIN) to ascertain whether the rules applying to vulnerable asylum seekers are applicable to the individual circumstances of the asylum seeker. In case of doubt, the OIN can request expert assistance by a doctor or a psychologist. There is no protocol however to identify vulnerable asylum seekers upon reception in a facility and therefore it depends very much on the actual asylum officer whether the special needs of a particular asylum seeker are identified at the beginning or through the procedure ……..*"

This section of the report also notes the limitations on the Cordelia Foundation voluntary psychological services and the *ad hoc* nature of referrals to this agency. For completeness, I add that the HHC Report of May 2014 does not specifically consider this discrete issue.

Conclusions

16. I have the benefit of a comprehensive skeleton argument prepared by Mr O'Callaghan (of Counsel) on behalf of the Applicants, supplemented by an admirably concise and focused submission. He indicated that the Applicants were relying "*heavily*" on the further HHC witness statement of November 2014. As argued, this was very much the centrepiece of the Applicants' case. Mr O'Callaghan acknowledged, realistically, that there is no evidential foundation for suggesting that the first Applicant is likely to be detained if transferred to Hungary, given the unequivocal statement in the HHC Report of May 2014 that single female asylum applicants "*are hardly ever detained*". Rather, the likelihood in this Applicant's case is accommodation in a reception centre. Characterising this Applicant as a "*vulnerable*" person, he submitted that she is at risk of inhuman and degrading treatment upon return, having regard to her previous experience and her mental condition. He emphasised the absence of any "*triage*" mechanism in the relevant centres.

17. On behalf of the Respondent, Mr Harland (of Counsel), in summary, drew attention to the clear graph of progressive improvement in reception conditions in Hungary, confirmed by an analysis of the various reports compiled from time to time during the past two years; the relevant provisions of the new Hungarian laws (noted above); the enhanced duty which will be owed to this Applicant under Article 32 of the Dublin III Regulation; the clear indication in the decision letter that the Respondent will provide relevant information to the appropriate Hungarian authorities upon this Applicant's transfer to their jurisdiction; and the evidence of her previous behaviour in proactively seeking medical attention and treatment.

18. Having subjected all of the evidence to appropriate scrutiny, I find the Respondent's argument compelling. In short, the available evidence does not, in my judgment, traverse the threshold of establishing, even arguably, that the Article 3 ECHR baseline is overcome, that is to say that there are substantial grounds for believing that this Applicant will be exposed to a real risk of inhuman or degrading treatment, in the discrete and narrow respect advanced, in the event of being removed to Hungary under the Dublin Regulation. The evidence as a whole establishes that the relevant services and facilities which will be at her disposal, while not notionally gold standard viewed through the lens of the world of the most advanced western nations, should, in conjunction with her own likely behaviour, which can be reasonably predicted by reference to her past behaviour in seeking attention and assistance, ensure that her treatment will not fall below the Article 3 ECHR threshold.

19. In the case of the second Applicant, Mr Arap, I accept Mr O'Callaghan's submission that, being a returned asylum applicant who absconded previously, he is likely to be detained. The evidential foundation for this submission is sufficient. There is no suggestion that the mere fact of detention, in the abstract, would engage the Article 3 ECHR threshold. Rather, there is heavy reliance on the evidence, particularly the most recent HHC statement, relating to the possibility of violent conduct on the part of officers employed at the Hungarian detention centres. In common with the Court of Appeal in HK (Sudan), I find this evidence diffuse, unparticularised and vague. It has barely evolved at all, as the exercise of juxtaposing the HHC Report of May 2014 and the HHC statement of November 2014 confirms. It is strikingly devoid of detail and substance. I consider that it falls measurably short of attaining the requisite threshold. I make the same conclusion in respect of the secondary aspect of this Applicant's case, which relates to the use of leashes and handcuffs in certain limited circumstances. On this issue I concur with the assessment of the Court of Appeal in HK (Sudan).

20. I conclude that evidentially neither Applicant's case is, arguably, sufficient to displace the strong presumption, which is one of the pillars of the Dublin regime, that Hungary will comply with its relevant international obligations. Furthermore, in strict EU law terms, the evidence fails to establish an arguable relevant systemic shortcoming or substantial operational problems in the conditions for the reception, processing and treatment of asylum applicants in Hungary. It follows that I dismiss both applications.

21. I emphasise that I have decided these challenges on their merits and have not considered this court bound by the decision in HK (Sudan) since, being an *ex tempore* judgment of a single judge of the Court of Appeal in a judicial review permission appeal, it does not rank as a binding precedent. Finally, I commend both Counsel for the clarity and economy of their arguments.

Order

22. The applications for permission are dismissed.

23. I shall provide a separate ruling on costs, given the issues of principle which have been raised on behalf of the Applicants and the consequential directions requiring further submissions. I have also been alerted to the linkage with another UTIAC in which similar issues of principle have been raised.

24. When judgment was handed down initially in these cases, in draft, I refused an application for permission to appeal to the Court of Appeal on the ground that

these are intensely fact sensitive cases raising no issue of general principle and there is no sustainable suggestion that incorrect principles have been applied.

Signed:

The Honourable Mr Justice McCloskey
President of the Upper Tribunal, Immigration and Asylum Chamber

Dated: 29 January 2015

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on:

Notification of appeal rights

A refusal by the Upper Tribunal of permission to bring judicial review proceedings, following a hearing is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a question of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was given (Civil Procedure Rules Practice Direction 52D 3.3(2)).