Neutral Citation Number: [2014] EWCA Civ 188

Case No: C4/2013/1324 &C4/2013/2687

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM High Court QBD. Adminstrative Court
His Honour Judge Thornton QC in C1 and Ors
CO87552012 (for C1 and Ors)
Mr James Dingemans QC sitting as a Deputy Judge of the High Court
CO35102012 (for ST and ET)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/02/2014

Before :

LORD JUSTICE MOORE-BICK
LORD JUSTICE TOMLINSON
and
LORD JUSTICE McCOMBE

- -

Between:

ST and ET	**Appellants**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

And Between:

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Appellant**

And

(1) C1 and	
(2) C2	**Respondents**

- -

Mr Eric Fripp (instructed by **Wilson Solicitors LLP**) for the **Appellant in ST and ET.**
Ms Deok Joo Rhee (instructed by the **Treasury Solicitors**) for the **Respondent in ST and ET.**
Ms Deok Joo Rhee (instructed by the **Treasury Solicitors**) for the **Appellant in C1 and Ors**
Mr Duran Seddon (instructed by **Sookias & Sookias**) for the **Respondent in C1 and Ors**

Hearing dates: 15 & 16 January and 5 February 2014

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Approved Judgment

Lord Justice McCombe:

(A) Introduction

1. There are before the Court two appeals relating to applications for resettlement of "Mandate Refugees" in the United Kingdom. "Mandate Refugees" ("MRs"), for present purposes, are persons for the time being resident outside this country who have been recognised as refugees by the United Nations High Commissioner for Refugees ("UNHCR"), after examination of their personal circumstances.

2. The present cases concern four women (identified in the two separate sets of proceedings by letters only): (1) ST and ET; and (2) C1 and C2. In each case application was made by the UNHCR to the Secretary of State for the Home Department ("SSHD") for resettlement of the persons in question in this country. In each case the applications were refused. The decisions to refuse the applications were challenged by the individual refugees in their own names in these judicial review proceedings.

3. In the cases of ST and ET, the applications for judicial review were dismissed by a judgment and order dated 22 April 2013 of Mr James Dingemans QC (as he then was) (sitting as a Deputy Judge of the High Court). The applications for review brought by C1 and C2 were granted by a judgment and order of His Honour Judge Thornton QC (sitting as a Judge of the High Court) of 7 August 2013. Permission to appeal against Mr Dingemans' order was granted to ST and ET by Beatson LJ on an oral renewed application on 21 August 2013. Permission to appeal was granted by Beatson LJ on 11 October 2013 to the SSHD to appeal against Judge Thornton's order on an application dealt with on the papers. By his October order Beatson LJ directed that the two appeals were to be listed before the same constitution of the court. They came before us for hearing together on 15 and 16 January and 5 February 2014.

(B) Facts

4. The underlying facts of the applications for resettlement in each case are uncontroversial and I take them largely from the judgments below.

*(1) **ST and ET***

5. These ladies are sisters and are both Iraqi nationals, at all material times living in Syria. They were recognised as refugees by UNHCR on 19 November 2007.

6. ST was born in 1970 and is now aged just over 40; ET was born in 1960 and is now aged just over 50. They have a mother and sister (aged 71 and 51 respectively) living in the UK. They were accepted as refugees by the UNHCR in the particular categories of refugee identified by him as cases of "Women at Risk" and of "Legal and Physical Protection Needs". The basis of that decision appears in section 5 of their UNHCR Refugee Registration Form in the following terms (where ST is referred to as the primary resettlement applicant or "PRA"):

> "**Resettlement Needs and Prioritization:**
>
> Resettlement to a third country is the best durable solution for the PRA, as the PRA meets the following resettlement criteria:

Woman at Risk

- The PRA and her sister are single women without an accompanying adult family member. The PRA and her sister are depending emotionally and financially on her aunt.

- While the PRA and her sister have not been subjected to harassment, her poor living conditions and lack of family and community support render her vulnerable to abuse and sexual and gender based violence.

- At the present time, the PRA and her sister live with their aunt and shares the house with her. She receives food assistance and 8,000 S.P. from UNHCR. The PRA and her sister receive money from her mother and sister in London for very special occasions only.

- The PRA has no relatives in Iraq who can support her.

Legal and Physical Needs:

- The PRA has managed to obtain a temporary residence permit in Syria. The permit is subject to the ongoing approval of the government of the Syrian Arab Republic and requires that the PRA periodically report to have it stamped. The permit can be revoked at any time and may not be renewed. The PRA's legal status in Syria is therefore uncertain, and without a permit, the PRA could face incarceration and summary deportation amounting to refoulement.

- Additionally, the permit does not carry the right to work. Engaging in work is a breach of the permit conditions and could result in incarceration and summary deportation. By working illegally in Syria, the PRA would be at risk of exploitation, abuse, arrest, and deportation.

The PRA has no prospects for local reintegration in Syria or possible to voluntarily repatriate to Iraq. Therefore in light of the PRA's need for resettlement, UNHCR is submitting the PRA's case for resettlement considerations under **normal priority.**"

7. The basis of the UNHCR's conclusions in this respect was explained in section 4 of the Form. The parents of ST and ET had left Iraq (in fact for the UK) in the 1970s because of political problems and had never returned. The father died in the UK in 1998 and the mother remained. ST and ET are Sunni Muslims and were persistently harassed by the Shia majority in Iraq, in ways more fully set out in the form. They then fled to Syria in 2006 or 2007. They have maintained contact with their mother

and sister in the UK throughout. Their presence in Syria is under temporary residence permission and is precarious. (Subsequent to the initial application by UNHCR and after the commencement of these proceedings, a further argument was presented on the basis that they have become further prejudiced as foreigners in the current civil unrest in Syria. Their solicitors presented these further arguments to the SSHD. By letter dated 26 March 2013, they were told that the SSHD was not prepared to change her decision on the basis of this additional material.)

8. Enquiries about resettlement of ST and ET in the UK were first directed to the British Embassy in Damascus in November 2009. An application was subsequently made for resettlement under the SSHD's mandate policy (see below) but was rejected on 9 January 2012. A pre-action protocol letter was sent on 14 February 2012, making further representations. These representations were rejected by letter sent by fax on 6 March 2012 (the letter being misdated "6 March 2011"). Separate sets of proceedings were launched on behalf of ST and ET on 3 April 2012. Permission to apply for judicial review was granted in ET's case by Judge Pelling QC on 13 June 2012. Permission was refused in ST's case by Judge Oliver-Jones QC on 18 June 2012 but was granted on 24 October 2012, on an oral renewed application made to Mr Stephen Phillips QC (as he then was).

(2) ***C1 and C2***

9. C1 and C2 are Iranian nationals who have been living in Turkey at all times material to their resettlement applications. C1 was born on 2 September 1963 (now aged 50) and is the mother of C2, who was born on 22 August 1986 and is now aged 27. C1 has a further son (and C2 a brother) called in the proceedings C3, who was born on 20 August 1983 and is now aged 30. C3's application for resettlement in the UK was granted, in circumstances to which I will return.

10. C1, C2 and C3 had been recognised as refugees by the UNHCR on 16 May 2011, on the grounds of their fear of persecution in Iran because of their Christian religion and apostasy from Islam. Their family history is rather more complex than that of ST and ET. Again, I take the facts as stated by Judge Thornton in his judgment below.

11. C1's father and mother had three sons and five daughters. The father and mother came to the UK with five of their children: the three sons and two of their daughters (C1 and one other); the three other (older) daughters remained in Iran. The father and mother obtained the right to live here permanently in about 1975. The family lived in Basildon in Essex. C1 attended school in Basildon between 1975 and 1977. C1's mother (now aged 86), C1's three brothers and a sister are living and settled in this country as are the paternal grandmother and two aunts of C2 and C3. The relationships are helpfully set out in two family trees, annexed to the skeleton argument of Mr Seddon of counsel who appears for C1 and C2 on the appeal (as he did before Judge Thornton below). There is no doubt that C1 and C2 have a number of relatives living in this country.

12. As found by Judge Thornton, in the winter of 1977 the mother (by then a British citizen) went, with C1 and the other immigrant daughter, from the UK for an intended short visit to Iran, to visit the three elder daughters and to obtain Iranian passports for C1 and the sister. The daughters became stranded in Iran owing to the revolution and the change of regime there, having been unable to obtain the passports for which they

had intended to apply. In 1979, the mother felt compelled to return to the UK (and was able to do so because of her British nationality) to be with her husband and to look after one of her sons who had been diagnosed with cancer. C1 and her sister were left in the care of the elder daughters who had remained in Iran. There C1 remained until 2005. She married in Iran in 1982. Her son C3 was born in Iran in 1983. C2 was born in London in 1986 while C1 was on a visit to her family here.

13. In 1984, one of the elder daughters who had been living in Iran, came to the UK, became a British citizen, married and gave birth here to three children. She and two of the children still live in this country. C1's husband's parents also moved from Iran to the UK in about 1993. The father died, but C1's mother-in-law, is still in the UK.

14. In about 2004, C1 converted to Christianity, and was later followed into the Christian faith by her children C2 and C3. They left for the UK in July 2005, entering on visitors' visas, although it seems clear that their real purpose was to claim asylum here, which they did in September of that year.

15. Judge Thornton sets out in his judgment a lengthy account of their stay in this country between July 2005 and December 2008. This account can be summarised by saying that C1, C2 and C3 all became active in various ways in the Iranian Christian community in the UK and at Christian churches in London, Liverpool and Darwen in Lancashire.

16. The asylum claims of C1, C2 and C3 were based upon fear of religious persecution if they were returned to Iran. These claims were refused by the SSHD. An appeal was dismissed on 10 January 2006; it was dismissed again on reconsideration by the Asylum and Immigration Tribunal on 13 September 2007. In its final judgment the AIT decided that all three asylum applicants were anxious to be perceived as Christians for the sole purpose of succeeding in the asylum claims. It was held that on their return to Iran they were not likely to be persecuted by any activity related to the profession of their religion.

17. On 4 June 2008 an application for permission to appeal to this court was refused and an application to the European Court of Human Rights, under Rule 39 of that court's rules, to restrain removal from the United Kingdom was refused on 17 December 2008. On 23 December 2008 a "fresh" asylum claim was lodged with the SSHD, based upon the passage into law in Iran, in September of that year, of a more draconian apostasy law. That further claim was rejected by the SSHD on 28 December 2008 and C1, C2 and C3 were compulsorily removed to Iran on that day. They returned to live with C1's husband, who is of course C2 and C3's father.

18. Between their return to Iran in December 2008, C1 and her children continued to practise their faith, but were faced with increasing hostility from the husband/father. They understood that they were also under surveillance by the Iranian authorities by reason of their religious activity. They moved to Turkey in April 2009. In 2009 and 2010 they submitted refugee applications to the UNHCR representatives in Turkey. These applications were accepted by the UNHCR in May 2011.

19. In September 2011 both C2 and C3 were married in Turkey. C3's wife was a person to whom indefinite leave to remain in the UK had been granted on 8 September 2010. She returned to the UK in February 2012. C2's husband did not have the same UK

immigration status, although he had worked as a "Tier 5" charity worker in the UK between June 2010 and May 2011.[1]

20. The three separate applications for resettlement of C1, C2 and C3 in the UK were submitted by the UNHCR in October 2011 and included Resettlement Registration Forms which had been completed by the UNHCR in June 2011. The applications, as originally submitted by UNHCR, specified in C1's case four relatives who were resident in the UK, namely her mother and three siblings. In the cases of C2, seven such relatives were specified: C1's mother, her paternal grandmother, two aunts and three uncles and her husband, then a temporary resident. C3's application specified five UK resident relatives: his wife, his two grandmothers, but only one uncle and one aunt. On 13 October 2011 solicitors for the three applicants wrote a long letter (with 42 enclosures) to UNHCR in Ankara, setting out substantial further details relating the family circumstances and identifying a number of further relatives resident in this country as relevant to their cases. These documents, however, were not forwarded immediately by UNHCR to SSHD at that time and were only sent to her by the applicants' solicitors six months later on 4 April 2012. On 17 May 2012, C3's application was granted and the applications of C1 and C2 were refused.

21. On 16 August 2012, the present proceedings were launched. Partial permission to apply was granted by Judge Keyser QC (sitting as a Judge of the High Court) on 5 February 2013. Directions were given on 19 April 2013 and the substantive application was heard by Judge Thornton on 28 June 2013. We are informed that Mr Dingemans' decision in the SSHD's favour (raising a number of issues similar to those before Judge Thornton), delivered on 22 April 2013, was referred to Judge Thornton, both in written and oral submissions, but was not referred to by the judge in his own judgment of 7 August 2013.

22. It is now necessary to turn to the resettlement applications and the SSHD's policy relating to mandate refugees.

(C) Mandate Refugees and the SSHD's Policy

23. At the forefront of the argument on the part of C1 and C2 are the provisions of Article 35 of the 1951 Convention and Protocol Relating to the Status of Refugees. These are as follows:

> "**CO-OPERATION OF THE NATIONAL AUTHORITIES WITH THE UNITED NATIONS.**
>
> 1. The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, or any other agency of the United Nations which may succeed it, in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention.

[1] We were informed during the hearing that C2's husband has since returned once more to this country to work as a Tier 5 worker and his leave to remain has been extended to September 2015.

> 2. In order to enable the Office of the High Commissioner or any other agency of the United Nations which may succeed it, to make reports to the competent organs of the United Nations, the Contracting States undertake to provide them in the appropriate form with information and statistical data requested concerning:
>
> (a) The condition of refugees,
>
> (b) The implementation of this Convention, and;
>
> (c) Laws, regulations and decrees which are, or may hereafter be, in force relating to refugees."

For C1 and C2 it is argued that the rejection of their resettlement claims amounts to a simple failure on the part of the SSHD to meet the UK's obligations of co-operation under this Article.

24. It is, however, common ground that a state cannot be required to accept any particular refugee for resettlement. As it is put in the UNHCR's own Resettlement Handbook, ("the Handbook") at paragraph 7.7,

> "While UNHCR submits cases for resettlement, it cannot guarantee that the case will be accepted by a resettlement country.
>
> Resettlement depends on the willingness of the resettlement country to accept a refugee for legal stay in its territory, in accordance with its laws and regulations. Each resettlement country has its own regulations and procedures in respect to the resettlement of refugees, as detailed in the Country Chapters of this Resettlement Handbook …."

The Handbook refers UNHCR field officers to relevant "Country Chapters" of the book "for information on a particular State's resettlement programme": see paragraph 7.6.1. In the case of the UK that programme identifies two schemes, "The Gateway Protection Programme" ("GPP") and "The Mandate Refugee Scheme" ("MRS").

25. The GPP is a group referral scheme under which refugee "caseloads" and resettlement missions are agreed by UK Ministers for a relevant period for bringing a limited number of individuals from camps and urban areas. Under this scheme an annual quota of 750 persons was operative at the time with which we are concerned. This scheme is not directly relevant to the present cases, save to the extent that UNHCR has not sought to have any of the present refugees admitted under it.

26. MRS is a scheme permitting individual resettlement applications based upon ties with this country, perhaps with most emphasis upon "close family ties" with persons already in the UK. It is this scheme or policy which is engaged in both of the cases before us.

27. The criteria for the application of the policy appear in two relevant places. First, they are to be found in the Country Chapter of the Handbook, and secondly, in the

instructions given to caseworkers charged with the operation of the policy, as operative at the dates of the decisions in these cases. As Judge Thornton pointed out in his judgment, the wording of the two statements is not identical.

28. The Handbook Chapter states the policy as follows:

> "….those applying for resettlement under the MRS must have been recognised as refugees within the 1951 Refugee Convention and its 1967 Protocol. They must also have close ties with the UK through family or possibly also historical links to the UK (e.g. periods spent here as a student). Close ties are usually taken to mean spouse, minor child or parents/grandparents over the age of 65. In exceptional circumstances other relationships will be considered; parent/grandparent (in the singular) under 65, family members aged 18 or over; son, daughter, sister, brother, uncle, aunt. No other categories of family relationship will meet the close ties requirement. The family members in the UK do not need to have been accepted as refugees but must be settled here or have limited leave in a category leading to settlement and this includes family members here under the Humanitarian Protection or Discretionary Leave provisions. Those who are here in a temporary capacity (e.g. visitors, students, for medical treatment etc) would not normally provide the mandate refugee with a close tie with the UK. The relative in the UK must confirm that they are willing to provide initial accommodation and help with the integration of the resettled refugee(s)."

29. The caseworkers instruction document puts it this way:

> "Assessing the Claim of Those Mandate Refugees Referred by the BRC, or Who Claim in Person at a Post Abroad.
>
> Caseworkers should not need to assess the refugee status of a mandate refugee whose application is made abroad via UNHCR/BRC (for in-country applications see below). However, if the case has not been referred via UNHCR/British Red Cross, but has instead been referred by a British Post abroad as a result of an entry clearance application, caseworkers should confirm with UNHCR in London that the applicant has been recognised as a mandate refugee as claimed.
>
> Consideration of the case should usually be limited to an assessment of:
>
> - the applicant's circumstances in the present country of refuge;
>
> **and**

- whether the UK is the most appropriate country for resettlement.

It may be that there is a case to be made for applicants to remain where they are or, alternatively, that there is a case for resettlement outside the present country of refuge to another safe third country.

The applicant must have close ties with the UK-usually close family, but also possible history (e.g. periods spent here as a student). The family members in the United Kingdom do not need to have been accepted as refugees but must be settled here or have limited leave in a category leading to settlement and this includes family members here under the Humanitarian Protection or Discretionary Leave provisions. Those who are here in a temporary capacity (e.g. visitors, students, for medical treatment etc) would not normally provide the mandate refugee with a close tie with the UK.

For the purposes of clarifying what constitutes close family the categories are:

- spouse
- children (minor's)[sic]
- parents/grandparents over 65

Exceptional Circumstances

The following family members will only meet the close ties requirement in exceptional circumstances:

- parent/grandparent (in the singular) under 65
- family members aged 18 or over: son, daughter, sister, brother, uncle, aunt.

No other categories of family relationship will meet the close ties requirement."

30. The short point taken by the SSHD in rejecting the resettlement applications was, and is, that none of the subjects of the resettlement applications in these cases comes within the policy wording. Her case is that the criteria set out in the policy (in either of its formulations) had to be satisfied *by the applicant*. That is, *the applicant* had to be the "spouse, children (minor's) [sic: "minors"], parents/grandparents over 65" of a person present here. A case was not within the policy if it was *the person present in the UK* who fell within one of those descriptions of relationship to the applicant. Here, for example, the primary relationship relied upon by C1, ST and ET was their relationship with their respective mothers (over 65) in the UK; none of the applicants

was herself within any of the categories. In none of the cases, did the SSHD consider that there were "exceptional circumstances".

31. Mr Dingemans accepted the SSHD's submission as to the proper reading of her policy in the cases of ST and ET. Judge Thornton rejected it in the cases of C1 and C2.

32. Mr Dingemans' reasons were these:

> "27. First the five separate categories of family member read as if they are alternatives to each other. For example the third category is "parents/grandparents over 65" and the fourth category is "parent/grandparent (in the singular) under 65" which suggests that a person is unlikely to be in both categories. It would also be unusual to have a person who could be both in the "close ties" category (meaning that entry would be granted) and also in the "exceptional circumstances" category (meaning that there would be not entry without exceptional circumstances). This would be the effect of the Claimants' interpretation. This is because, for example, a minor child with parents in the United Kingdom would be in the second category (with leave to enter) but probably (depending on ages of parents) also in the fourth category, meaning that exceptional circumstances needed to be shown.
>
> 28. Secondly the relevant part of the policy begins noting that "the applicant must have close ties with the UK". Just after the reference to "exceptional circumstances" it is stated that "the following family members will only meet the close ties requirement..". This suggests that the categories of family members then set out below are applicants, because it is the applicant who must satisfy the close ties requirement. If the last two categories of family members relate to applicants, it strongly suggests that the first three categories relate to applicants as well. This suggestion is supported by the fact that in the United Kingdom Country Chapter of the UNHCR Resettlement Handbook it is recorded at page 4, paragraph 3.1 under Mandate, that "the relative in the UK must confirm that they are willing to provide initial accommodation and help with the integration of the resettled refugee(s). Given that one of the categories of family members is "children" if, as the Claimants contend, this category applies to both applicant and family members in the UK, it would be unusual to expect children to be able to provide initial accommodation and help with the integration of the resettled refugee.
>
> 29. In these circumstances it seems to me that the Defendant's construction of the policy is the correct one, and that the categories of family member set out in the policy apply to the applicant. This means that the Claimants are in the fifth category, namely "family members aged 18 or over…daughter,

> sister", and will need to show "exceptional circumstances" to be granted leave to enter."

33. The judgment of Judge Thornton on the meaning of the policy ranged much more widely. He considered that the SSHD had failed to give sufficient regard to the question of whether this country was the most appropriate country for the resettlement of C1 and C2 and the UNHCR's decision to refer them to this country for that purpose. He also considered that their close ties to this country could be derived from their wider connection, derived from earlier presence here, as summarised above.

34. The judge dealt with the construction issues at a number of different places in his judgment. In paragraph 78 of his judgment he said this as to the approach to construction.

> "78. **The correct approach to construction**. It is important for the decision–maker to bear in mind when ascertaining the meaning to be given to the Mandate Policy that it is the objective meaning that is to be ascertained. Moreover, the policy is not enshrined in legislation so that any ambiguity or lack of clarity should be resolved by adopting a meaning which best gives effect to the overall UNHCR policy that seeks to find a durable solution to a mandate refugee's problems by the use of resettlement in a way that unites families but subject to the UK's implementation policy that only those who can demonstrate close ties with the UK should be permitted to resettle in the UK. Thus, the interpretative method adopted should be purposive and flexible rather than being strict and rigid. This approach is particularly apposite to the construction of the UKBA's version of the Mandate Policy which is drafted in an unsatisfactorily unclear manner."

A little later, he said (at paragraphs 82 and 83)

> "82. **The close family categories or relationship**. Neither the UK Country Chapter document nor the UKBA Policy document defines what is meant by a family category or relationship. The SSHD asserts, without any explanation as to why this is asserted, that the categories or relationships described in the documents are referring to the applicant in question. Thus, by way of example, the SSHD contends that C1 does not fall into the category of a parent in (4)(iii)(c) above since she is not seeking to be reunited with her children nor is she over 65. The difficulty is that in the UK Country Chapter, it states that the applicant must also have close ties through family and it describes those close ties as being a relationship whereas the Policy document states that the applicant must have a close family category. The Country Chapter therefore appears to be describing a family relationship in the abstract whereas the Policy document is describing the individual applicant's side of the relationship. C1's relationship with her mother can readily be described as a parental relationship even

> though C1 is not, in that relationship, a parent or a grandparent. There is therefore an ambiguity in this policy which is best approached by asking which meaning better gives effect to the need to provide for family reunion. Clearly, that is best provided for by adopting a relationship rather than a category definition.
>
> 83. It follows that the meaning that should be applied must be ascertained on a case by case basis. The decision maker should ascertain what best describes the relationship between the applicant seeking resettlement and the family member who the applicant would be joining if permitted to resettle. C1 is seeking to create or recreate many different relationships: with her mother over 65, with her son, with her sister and brothers, with her nephews and nieces and with her great-nieces. C1, in joining her mother, is seeking to reconstitute a close family relationship of "mother" in the policy as set out in the UK Country Guidance section of the Resettlement handbook but is not constituting herself as falling into the "parents/grandparents" category as set out in the UKBA published policy. The policy as expressed in the UK Country guidance should prevail since that is the document which was drafted and submitted by the SSHD which the UNHCR is committed to attempt to give effect to and, moreover, the UKBA policy document has now been withdrawn and has not yet replaced."

At paragraph 95, he said:

> "95. C1, in being resettled in England, would be reunited with her mother who is over 65 in age and with whom she has a very strong family tie. There is therefore a very close family tie based on the relationship of "parents over 65" and it is apparently accepted by the SSHD that in that context "parents" can mean "parent". Even if that is not accepted, it is the natural meaning of the word in its context in the policy, particularly as the policy expressly provides, by way of difference, for "parent (in the singular)" in stage (7) of the decision-making process. Therefore, C1 can be shown to come within the close ties requirement and the decision as to ground (a) is erroneous."

The reference to "ground (a)" is to the judge's formulation of the SSHD's decision on this point, as the Judge put it, in these terms:

> "Neither qualify as a spouse, minor or parent or grandparent over 65 of any family relatives in the UK. In particular, C1's spouse is living in Iran and not the UK whereas to qualify he would have to be settled in the UK. Furthermore, C1 is not a parent of a person settled in the UK."
>
> (See paragraph 73(1) of the judgment.)

35. Somewhat surprisingly, as already noted, Judge Thornton's judgment does not refer at all to Mr Dingemans's judgment to which (we are told) he had been referred in both the written and oral arguments. Although a first instance judge is not bound by the decisions of judges of the same level, one would have expected to see some explanation of why Judge Thornton declined to follow the earlier decision on the construction issue. His judgment is to that extent less helpful to this court than it might have been.

(D) The Appeals and my Conclusions.

36. The argument as to the true meaning of the SSHD's published policy has continued before us. For C1 and C2, in particular, the wider issue of the application of that policy in the context of article 35 and the UNHCR's identification of the UK as a proper location for resettlement in each case is also pursued. The gist of this argument appears in paragraphs 63 and 64 of Mr Seddon's skeleton argument for C1 and C2 in these terms:

> "63…..The Judge correctly set out the scheme at §§60-68, identifying at §64 that a state (of proposed re-settlement) is "not required to accept a refugee".
>
> 64 The duty is one of 'co-operation', not slavish acceptance. Co-operation denotes give and take and being prepared to listen to a case made by a party with whom one is 'operating'. It cannot denote a pre-determined position whereby the UK is entitled simply to shut its ears to a UNHCR submission, whatever the merits, unless and until the application satisfies the UK's own pre-figured criteria. If that were the case, then notwithstanding the article 35 obligation, the SSHD would be entitled to shut her ears to a UNHCR submission, whatever the urgency, however dire the need, however unlikely the refugee was to obtain re-settlement elsewhere, simply on the basis that her own 'close ties' criteria were not met even though there were very strong links to the UK (which, on the SSHD's case, is the position in this case)."

37. In my judgment, that wider argument is incorrect. There is, of course, an international obligation on the part of the UK to co-operate with the office of the UNHCR in the discharge of the latter's important responsibilities towards refugees. However, as the UNHCR recognises, and states expressly in his Handbook on resettlement, he is unable to guarantee the resettlement of any individual in a particular country. He refers his field workers (and inferentially all those interested) to the relevant country chapters for information on each country's programmes and recognises that each such country has its own "regulations and procedures". The UK's programme, regulations and procedures are there identified and are expressed in essentially similar, although not identical, terms to those set out in the domestic caseworker instructions. The statements there found are not drafted with the precision of a statute or indeed of a contract prepared by lawyers. Nor are they required to be. They are statements of policy, adopted in exercise of a broad discretion, a point material to their interpretation to which I shall return below. Unlike Judge Thornton, I consider the

court's task is to construe the SSHD's policy not to construe it by response to a perceived policy of the UNHCR.

38. It seems to me, therefore, that it is open to the individual state (as a matter of international law) to apply its policy in the consideration of any application for resettlement put to it by the UNHCR. The argument advanced by Mr Seddon here seems to imply that, even where an applicant does not fall within the domestic policy (or "programme", as the UNHCR puts it), the proposed receiving state must give overriding significance to the submission of an application by the UNHCR as dictating a requirement to accept it. To my mind, this runs counter to the express statements to the contrary in the Handbook.

39. These cases have proceeded, no doubt in accordance with the correctly accepted common ground, on the basis that the SSHD will consider and determine resettlement applications in accordance with the published policy and that it would normally be unlawful to reject an application presented on behalf of an applicant who did fall within the terms of the policy itself.

40. It seems to me, therefore, that Mr Dingemans, in his judgment below, correctly confined himself to deciding what the published policy meant. Indeed, he seems to have been asked to do no more.

41. It is common ground, and was accepted by both judges below, that the meaning of the policy is to be ascertained by objective criteria. The law is settled on this point and it is not necessary to expand upon it. It suffices, I think, to refer to one passage in the judgment of Lord Reed in *Tesco Stores Limited v Dundee City Council* [2012] UKSC 13 in considering the approach to be taken to the construction of a rather different sort of "policy document", namely a local development plan, promulgated as an expression of town and country planning policy. His Lordship said this:

> "[18]……The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision-making unless there is good reason to depart from it. It is intended to guide the behaviour of developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others (as discussed, for example, in *R (Raissi) v Secretary of State for the Home Department)*, policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context.
>
> [19] That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a

> development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v Secretary of State for the Environment and ors,* per Lord Hoffmann, p 780). Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean."[2]

42. No one could say that the policy documents in this case were "carefully drafted and considered". The contrary seems to be the case, but the approach to construction must, I think, be the same.

43. I do not accept the approach to construction adopted by Judge Thornton in paragraph 78 of his judgment, quoted above. The task is to see what the published policy means as a matter of language. Each country has been left to its own devices to decide how it wishes to assist with the resettlement of refugees. We were told in argument that the approaches of different resettlement states manifest different programmes and policies. Some states do not afford resettlement facilities at all, including some member States of the European Union. I can see no reason why the obligation of a State signatory to the Convention should be taken to have assumed a wider obligation to assist the UNHCR by volunteering a resettlement programme than a State that does nothing to assist at all.

44. There is no doubt that the published policies of the United Kingdom indicate a willingness to provide assistance to the UNHCR and that, in accordance with those policies, it endeavours to do so. It appears to me, however, that there is no need to resolve any imprecision of wording (as may be perceived by lawyers, but perhaps not by policy makers) by any *a priori* inclination to decide any particular resettlement application made by UNHCR in favour of either granting or refusing it. The presentation of an application by the UNHCR appears to me to be no more than an invitation to the proposed receiving state to consider whether the particular refugee should be received in accordance with that state's own refugee programme. It remains, however, for the receiving state to decide whether he should be so received or not. We have not been shown any material to suggest that UNHCR thinks otherwise, whether in these particular cases or more generally.

45. As I have said, the policy statements are not legal documents and they must, no doubt, be interpreted fairly and without the sort of rigidity, afforded by the common law in particular, to the process of statutory or contractual construction. For that reason, I consider that the meaning of the policy in the present case is to be derived from both

[2] A similar statement of that approach is to be found in the judgment of Lawton LJ in this court almost 28 years ago in *R v Criminal Injuries Compensation Board, ex p. Webb* [1987] QB 74 at 77H – 78B.

the caseworker instruction and the Country Chapter of the Handbook, read as a whole without giving precedence to one document over the other. Both are expressions of what is intended to be the same policy. The differences in wording between the two documents do not seem to me to be of any great significance in policy documents of this type. The task is to try to understand the broad sense of the words used in their context, without undue rigidity.

46. As my Lord, Tomlinson LJ, pointed out in argument, the Handbook does not include the first three paragraphs that appear in the UK caseworkers document. The Handbook is dealing with cases of resettlement once the individual has been determined by UNHCR to be a refugee. As the domestic document states, therefore, "Caseworkers should not need to assess the refugee status of a mandate refugee whose application is made abroad via UNHCR/BRC…". This is because the UNHCR has already so determined in a case submitted through his office. However, if an application has been presented to a British post abroad, through the immigration system, then the supposed refugee's status as such will have to be checked. There is no means of independent verification of an applicant's status in such a case as a UN recognised refugee, without further checks. On the other hand, questions of the circumstances of the subject in his or her present country of refuge will already have been taken into account if the case is presented by UNHCR and, by definition, the UK will have been selected as at least *an* appropriate country for resettlement in accordance with the Handbook criteria for choosing a potential resettlement country, as follows:

> "7.6.1 Determining the country of submission.
>
> After determining that a particular case should be submitted for resettlement, the next step is to identify a suitable resettlement country if this is not already confirmed. Major considerations include:
>
> - family links, particularly those in resettlement States;
> - resettlement submission priority, vulnerability, and the resettlement country's average processing time and capacity for urgent processing;
> - selection criteria and admission priorities of resettlement countries;
> - allocation of annual quotas of resettlement States;
> - health requirements/availability of treatment;
> - language abilities;
> - cultural aspects;
> - nationality;
> - family configuration; and, if possible:

> - the refugee's expressed preference for a resettlement country.
>
> Considering the options
>
> Most resettlement cases are submitted to an established resettlement State, and field offices should consult the Country Chapters of this Handbook (available at http://www.unhcr.org/resettlementhandbook) for information on a particular State's resettlement programme."

47. The focus then turns to the policy criteria themselves.

48. It can be seen that the SSHD has decided that the policy should be to admit refugees with "close ties with the UK". Such ties are usually "close family", but past history may play a role. Family ties are specified within identified categories. It is expressly stated that, "No other categories of family relationship will meet the close ties requirement". Thus, it is necessary to consider carefully what the bounds of the relevant categories are.

49. The point can certainly be made, as Mr Fripp does for ST and ET, that the documents can be read as follows:

> "The applicant must have close ties with the UK – usually close family… For the purposes of clarifying what constitutes close family the categories are:
>
> - spouse
> - children…
> - parents/grandparents over 65…"

This language might be taken to suggest that it is the applicant refugee that must have a relative of the relevant degree present in the UK, rather than that the applicant must be within that description relative to the person in the UK. However, that use of language in the documents must be considered carefully in the context of the document overall.

50. In my judgment, taken together, although I accept that the language is not of the clearest, the documents indicate that the categories being identified are those of the applicant for settlement, not of the family members already present in the United Kingdom. I reach this view essentially for the reasons expressed by Mr Dingemans which I have set out above and will not repeat.

51. It seems to me that the touchstone of identifying the close family connection is to be found in the expectation that the family members in this country will provide initial accommodation and assistance with integration, i.e. will be in a position to support the arriving refugee. That seems hardly likely to be the ability of (say) a minor child receiving his parent or of an elderly parent or grandparent receiving an adult child or

grandchild. The idea is that the person being received might be thought to have some natural dependence upon the persons already present in this country.

52. In our society it may no longer be true that a member of one of the primary categories, namely a spouse, would usually be treated in this country as "dependent" upon another simply by virtue of that status. However, it is well known that that is not the same in all societies, perhaps in particular those from which many refugees may come.

53. It is also envisaged that wider categories of family member may be treated as meeting "the close ties requirement in exceptional circumstances". No attempt is made in the policy documents to identify what may constitute exceptional circumstances. In my judgment, in the context of this loosely drawn document, the phrase can mean no more than that the SSHD envisages that circumstances may arise that will persuade her that she should make an exception and admit persons who do not fit the primary categories of relationship. She has not seen fit to give examples or to define comparators by which to determine "exceptionality". This may well have been deliberate, so as to preserve absolute flexibility. I can see nothing irrational or unlawful in that. In the circumstances, therefore, I do not think that it is possible, as a matter of construction of the documents, to pin the concept down more firmly than that. In this field, above all perhaps, the range of the "exceptional" is likely to be infinitely varied. The SSHD is simply saying that the wider categories of relative may qualify under the policy in a case which she considers at the relevant time to be exceptional.

54. Illustrations of the approach to the idea of "exceptional circumstances" actually taken in individual cases, are given by way of example in evidence given by Mr Dave Atkinson, Resettlement Operations Manager in the Refugee Team of the SSHD's Asylum Casework Directorate. In his witness statement at paragraphs 8 to 12, Mr Atkinson says this:

> "8. Below I have set out some examples of cases which the UK has accepted as having "exceptional" circumstances for the purposes of the Mandate policy. In each case, the exceptional/compassionate circumstances were exclusive to the applicants themselves;
>
> Case example one:
>
> 9. A 62 year old principal applicant living in Syria with his 63 year old wife requested entry to the UK to join his son. The applicants did not meet the normal criteria for acceptance because of their ages but the principle applicant had heart failure and needed surgery. Failing health left them both vulnerable to abuse as elderly refugees and their adult son in the UK was willing to care for them.
>
> Case example two:
>
> 10. A 43 year old single woman in Iraq suffering from cancer requested entry to join her mother and sister in the UK. She did

> not fulfil the first criteria. However, she was accepted under exceptional circumstances because she was a single woman, suffering with secondary cancer, no treatment was available in Iraq and her mother in the UK had also been diagnosed with terminal cancer.
>
> Case example three:
>
> 11. An 80 year old single woman with no children in Jordan asked to join her sister, niece and nephew in the UK. Due to her age, she was a very vulnerable woman at risk with no effective male protection (having never been married). With deteriorating health, she was struggling to care for herself and her only relatives were her sister and niece and nephew in the UK who were willing to accommodate and support her.
>
> Case example four:
>
> 12. A 27 year old single woman in Malawi requested entry to join her mother in the UK. Due to epilepsy and having suffered sexual abuse in a Malawi refugee camp, the applicant was very vulnerable. She had no effective male protection and her mother and siblings were settled in the UK and willing to accommodate her."

This is not to say that the operation of the policy controls its objective meaning, but is merely illustrative of the concept of "exceptional circumstances".

55. In fact, the SSHD appears to have taken the view that there was nothing exceptional in the situations of the persons considered here when compared with others in such situations in Turkey and in Syria respectively, in the latter case noting expressly that "UNHCR continue to submit Iraqi "woman at risk" cases under normal priority…[and] that their predicament is not compelling insomuch as demonstrating exceptional circumstances for the purposes of the Mandate policy". In that latter case, it was also noted that the case was not submitted under the GPP: see the UK Border Agency letter to the solicitors of 26 March 2013 in that case.

56. From the letters quoted, the particular circumstance adopted by the SSHD in considering whether the case was exceptional appears to have been the categorisation of the submission made under the UNHCR's own policies as "emergency", "urgent" and "normal" [3]: see paragraph 6.1.1 of the Handbook. "Normal priority", in UNHCR terms, means cases in which the office "expects decisions and *departure within 12 months of submission*" (italics in the original), Handbook Loc. Cit. Mr Dingemans noted this categorisation in dealing with "exceptional circumstances" in his judgment and did not find the SSHD's decision irrational or unlawful: see paragraph 33.

57. It seems, therefore, that, in considering the question of exceptional circumstances, the SSHD has looked at the relative circumstances of urgency in the individuals' present

[3] We were told that under present policies the UK does not accept submissions made within the "emergency" category, necessitating removal from the threatening conditions within a few days or even within hours.

countries of refuge, as assessed by UNHCR. The applications were submitted in each case with "normal" priority and were not, therefore, treated as exceptional.

58. In the cases of ST and ET, the applications were boosted, after the UNHCR submission, by the circumstances of the civil unrest in Syria and in the cases of C1 and C2 submissions were advanced as to the wider family contacts, with further details of specific historic activities on their part while in this country.

59. Judge Thornton reached the conclusion that the "exceptional circumstances" had to be derived from a wider consideration of all the facts of the case and that the SSHD had not given full and sufficient consideration to all the circumstances of the individuals involved as set out in the factual account in his judgment (which I have summarised): see paragraph 101.

60. I do not accept that conclusion. In the case of ST and ET, after consideration of the further submissions, the SSHD's officials wrote as follows (I anonymise the names in the passage quoted):

> "…I have given further consideration to whether [ST] and [ET]'s present circumstances are exceptional so that we should consider whether there is room for exercising discretion to conclude that they meet the secondary criteria of a close family tie of a daughter aged over 18/sibling as provided under the Mandate scheme.
>
> 6. It is not disputed that the instability, and associated hostility, in Syria has escalated since the application was submitted by UNHCR in August 2011. And it is acknowledged that UNHCR have categorised the sisters as women-at-risk being without accompanying adult male family members. We note that, at the time of the application, UNHCR stated that [ST] and [ET] lived with an Aunt. Your representations do not mention this point specifically but confirm that the sisters are living with fellow Iraqi refugees. In considering whether [ST]'s and [ET]'s circumstances are exceptional for the purposes of the Mandate policy I note that the environment they are living in is the same for other residents. I note also that, although the situation for women in Syria, generally, may have deteriorated, these circumstances are not exclusive to [ST] and [ET]. Finally, I note the stated medical condition of [family members] in the UK but, consistent with all considerations under the Mandate resettlement scheme policy, it is the factors appertaining to the applicants that apply, not those of relatives in the UK.
>
> 7. Without underestimating the seriousness of the situation that they experience each day, and having fully considered the updated facts of the case, and noting that UNHCR continue to submit Iraqi "women-at-risk" cases in Syria under normal priority, I must therefore conclude that, compared to other Iraqi women in Syria, their predicament is not compelling insomuch as demonstrating exceptional circumstances for the purposes of

> the Mandate policy. And in view of this conclusion, ST and ET are not entitled to be considered against the wider close ties definition of daughter aged 18; and/or sibling. I therefore see no reason to change the decision made on 9 January 2012."

In the C1/C2 case, the answer was:

> "The applications have also been reconsidered in the light of the claimed exceptional circumstances. We are satisfied that your clients' circumstances are not exceptional when compared to other refugees in Turkey in the same situation whose only durable solution is resettlement. In the absence of any exceptional circumstances, there is no necessity to consider the wider family members criteria."

61. In the ST and ET case, the SSHD did give consideration to the submissions advanced and noted that notwithstanding the extreme conditions in Syria, the UNHCR was still submitting "women at risk" cases from Syria under "normal priority". I do not consider, therefore, that Mr Dingemans was in any way wrong in finding as he did on this part of the case before him.

62. In the C1 and C2 case, the SSHD looked again at the situation of these ladies in comparison with the situation of other refugees in Turkey and found no special hardship to bring the cases within the wider family criteria.

63. As it seems to me, the SSHD did not act unlawfully in approaching the question of "exceptional circumstances" in these cases in the way she did. She was, I think, entitled to compare the situation of the applicants for resettlement against others in the particular countries for whom also the only durable solution was resettlement and in the light of the UNHCR's own categorisation of priority. It is not to say that she was tying her hands to that comparison for all time or for all cases. In other circumstances, the SSHD might see fit to assess "exceptional circumstances" as they appear to her in a different way. The examples given by Mr Atkinson in evidence seem to me to show a clear willingness on the SSHD's part to be flexible in cases that are, in her view, truly exceptional.

64. It seems to me that the policy is framed to provide for those with close ties to the UK for family reasons (within the identified categories) or because of other historic links. It seems to me to fit squarely within the proper approach to a discretionary policy to admit in specified circumstances that a government might decide that the door is not closed to exceptions, but without making any promises as to what will or will not be treated as exceptional in an individual case at any particular time. The preservation of absolute flexibility at will seems to me to be a perfectly rational and lawful way in which to express policy, in circumstances where there is no legal obligation to admit any refugees from outside the UK at all.

65. I would wish to add a few words about Judge Thornton's approach to the construction of the policy of this case. In paragraph 81 of his judgment, the judge said that,

> "….the policy is clearly intended to be applied by means of a structured decision making process notwithstanding the unstructured language used to identify it…"

He then set out a series of eight sequential questions.

66. I think that, by the end of the hearing, members of the court were concerned that this approach by the judge may have resulted in an over rigid approach to the construction of the documents as a whole, contrary to the principles enunciated by Lord Reed in the *Tesco Stores* case (supra) (in particular those to be found in paragraph 19 of the judgment from which I have quoted above). A structured approach to the construction of a statute has much to commend it, but a similar approach to the construction of a broad and very loosely draft policy document such as this is liable to mislead. In the present case, I think that the judge's approach resulted in his identifying some questions which do not properly fall for decision and failing to focus clearly enough on those that do.

67. For example, the judge posed, in his question 3, the question whether the UK was the most appropriate country for resettlement, giving rise to a hypothetical worldwide enquiry by the decision maker in all cases. In his question 4, he asked whether the applicant's family members were settled in the UK and the category of temporary presence of any of them; if the presence was temporary was the case "an exceptional one" allowing the applicant to qualify for resettlement, followed by the question whether any of the specified close family categories arose. This led away from a focus upon the categories of relationship relevant to the policy. Then, in question 8, he placed an overriding significance upon the perceived obligation to give effect to the UNHCR's "recommendation". In my judgment, this approach led the judge to depart from an overall view of the objective application of the policy and the decisions taken in these individual cases in the light of that policy.

68. For the reasons already given, I do not consider that any of the applicants for resettlement in these cases fell within the family ties criteria, whether normal or exceptional, of the MRS. In those circumstances, it seems to me that the appeals of ST and ET must be dismissed.

(E) Additional Points

69. There remain certain further points advanced on behalf of C1 and C2 that still need consideration. There are three of them, the latter two arising under a respondent's notice: a) historic ties; b) the reliance by SSHD in part, in rejecting C2's claim, on the fact that she was at the time of the decision living with her husband in Turkey; and c) the argument that the SSHD should properly have considered, but did not consider, the impact of Article 8 of the European Convention on Human Rights in these cases, in the light of the broader family connections in the UK of these applicants and in particular in the light of the decision to admit C3 to the country. I take these additional points in turn.

(1) "Close ties with the UK…possible history (e.g. periods spent here as a student)"

70. The circumstances relied on are those set out in Judge Thornton's statement of the facts. In C1's case, she lived here with her parents and some siblings as a child,

between 1975 and 1977. She returned to Iran in 1977 but became stranded there. C2 was born in the UK in 1986. C1 returned here in July 2005, this time with her children C2 and C3, and was (with them) an applicant for asylum between then and 4 June 2008, on which date the application for permission to appeal from the decision of the AIT of September 2007 was dismissed. All were compulsorily removed in December 2008. During the latter period while awaiting resolution of the asylum claims, each of these applicants was active in a number of Iranian Christian communities in England and had pursued courses of education, as summarised in paragraph 32 of Judge Thornton's judgment.

71. In the letter of 27 July 2012 the SSHD rejected C1's childhood presence in the 1970s and the period of presence of all during the asylum claims as constituting sufficient historic ties. This was what was said:

> "Periods previously spent in the UK have also been considered, but it was decided that neither the two years [C1] spent here at school in the 1970's, nor their three years here between 2005 and 2008 as asylum seekers fulfilled this requirement."

72. Judge Thornton's conclusion on this part of the case was this:

> "99. The decision-makers appear to have made a fundamental error in considering stage (5). This was that the "possible history" was limited to "periods spent here as a student". However, stage (5) envisages a consideration of an applicant's entire history of actual and potential close ties of all kinds, the periods spent in the UK as a student are merely put forward as one example of the many that could qualify as close ties. Such ties could include members of an extended family and might include many if not all of the factors giving rise to exceptional circumstances considered at Stage (6) of the inquiry.
>
> 100. The entire history of both C1 and C2 that is set out in this judgment can give rise, both in each of its several parts and in its whole, to establishing that C1 and C2 can each show, under this stage (5) that their historic links with the UK give rise to the kind of exceptionally close ties that bring them within the resettlement provisions of the mandate policy."

73. For my part, I do not see that the decision makers worked on the basis that "possible history" was confined to periods spent as a student. It is quite clear that they had before them lengthy documentation sent originally under cover of the solicitors' letters of 13 October 2011 to UNHCR (referred to above, and received by SSHD in April 2012) and of 14 June 2012 to a Member of Parliament (apparently forwarded to the Border Agency). The letter in answer, while short on this aspect of the case, is on its face not confined to periods of education.

74. While I understand and sympathise with the submission that the two periods of presence on C1's part, punctuated by a period which began in 1978 by becoming involuntarily stranded in Iran, might be considered by some as showing a close historic tie with this country, equally there was the period of precarious presence of

all three C applicants as asylum seekers. They formed close contacts with religious groups and were active within them. They also had extended family here. Some people faced with these features of the case may have given more emphasis to such factors than to the length of the periods of presence or to the fact that one period of presence was merely precarious. The assessment of the quality of the ties, because of past historic links, was, however, a matter for the SSHD. Her decision makers took one view; others may have made a different assessment on the same facts. I find it impossible to say, however, that the decision made amounted to a failure by her to adhere to her own very loosely phrased policy as published or was otherwise irrational or unlawful in the application of that absolutely discretionary policy.

(1) *C2's marital circumstances; husband's presence with her in Turkey*

75. On this part of the case, reference is made to the SSHD's decision letter of 17 May 2012. After considering the positions of C1 and C2 in the light of the SSHD's construction of her own policy and rejecting accordingly the contention that these applicants fell within the close family criteria, this was said,

> "…furthermore, [C1] lives with and is able to receive emotional support from her daughter [C2]; and [C2] is married to her husband who also lives in Turkey."

In a later letter of 15 August 2012, the SSHD also referred to the fact that C2 was an adult and had formed her own family unit.

76. In paragraph 97 of the judgment (with cross reference to paragraph 73), Judge Thornton thought that C1's qualification under the policy as the daughter of her mother (aged over 65) should have been taken into account in deciding whether C2 qualified without having to show exceptional circumstances and that the fact of the family members mutually supportive presence together in Turkey was irrelevant.

77. For reasons already given, I take a different view from the judge as to C1's qualification and hence of C2's position. It seems to me that the SSHD, having decided that neither C1 nor C2 qualified under the primary head of relationships, was entitled to consider the circumstances of the unitary family, including the presence of C2's husband in Turkey as a relevant factor overall. The judge thought, however, that the move of the husband to the UK as a temporary worker, subsequent to the relevant decisions under challenge was somehow relevant. He said,

> "[C2's]… husband, C2H, has now moved to England and is here in a temporary capacity as a Tier 5 charity worker. The SSHD would, if reaching its decision now, have to consider whether exceptionally C2 would qualify as the spouse of C2H at this stage of the decision-making process. *No such consideration was given.* " (Italics added)

78. For my part, I am quite unable to see how the decision of the SSHD can conceivably be faulted by events that occurred after the decision was made. The italicised sentence in the immediately preceding paragraph, in my view, simply does not make sense.

79. The position of C2's husband and his situation is put rather differently by Mr Seddon in his argument. He says that the SSHD was in error in relying on the husband's presence in Turkey, because of the precarious nature of his position in that country at the time of the decision. It was said that he was merely a visitor in the country with temporary permission to be there. There could, therefore, be no significance in considering the position of C1 and C2 in Turkey in taking into account the equally temporary nature of the husband's presence, which was as precarious as theirs.

80. In my judgment, the decision of the SSHD cannot be faulted on this ground either. It had been decided that C1 and C2 did not fall squarely within the terms of the policy. A number of circumstances bearing on "exceptionality" had been advanced and it was not to my mind unlawful for the decision makers to have in mind that, at least at the relevant time, both applicants for resettlement were not being presented by the UNHCR as priority cases and did at least have the mutual support for the time being of each other and of C2's husband. If the situation changed, no doubt a further application could be made.

81. For my part, therefore, I would not uphold the judge's decision in this case on the basis of the matters raised in this part of the respondent's notice.

(2) *Article 8*

82. Under this head Mr Seddon argues that the decisions are flawed because the SSHD failed to give independent consideration to the circumstances of this family in the light of this Article of the Human Rights Convention, aside from the MRS policy criteria.

83. Judge Keyser, on first considering this aspect of the case, refused permission to apply on the basis that the point was, in his view unarguable. Judge Thornton granted permission but found it unnecessary to decide the point: see paragraphs 104-5 of the judgment.

84. It is right that the decision letters make no reference to this Article. However, as I see it, no reference was made to the Article in either of the two principal and lengthy letters of representation (the first, to UNHCR and the second to the MP) dated 13 October 2011 and 14 June 2012, which both found their way in the end to the SSHD, before the decisions were made.[4] It is perhaps not surprising that the point was not expressly addressed in the decision letters.

85. In the Summary Grounds of Defence and in the skeleton argument before Judge Thornton, the SSHD made the point that the essential features of the Article were nevertheless addressed by the MRS policy document itself: paragraph 34 of the grounds and paragraph 4.2 of the argument.

86. Before us, in his argument in support of the respondent's notice, Mr Seddon submitted that there is no difference in conceptual approach between a case involving a proposed reunion of a family and a case involving an initial separation. Still, the SSHD is obliged to consider the engagement of Article 8, the potential infringement,

[4] The point was eventually raised on the eleventh page of the pre-action protocol letter of 1 August 2012: Supplemental Bundle for the Appeal/7/295.

the legitimacy of the aim pursued by the interference and the justification for such inference in pursuit of the aim. He relied upon *R (otao Quila & anor) v SSHD* [2011] UKSC 45; [2012] 1 AC 621 and, of course, *R (Razgar) v SSHD* [2004] UKHL 27; [2004] 2 AC 368. He also submitted, in oral argument, that there was also an interference with the private life of C1 and C2 in disruption of their contacts with the religious organisation (known as ELAM, based in this country, but active outside it) which has been the mainstay of their social relations for a number of years.

87. It seems to me that the question for us is whether by applying the MRS policy, the SSHD adequately met any potential engagement and/or breach of Article 8, given that the point was not expressly dealt with in the decision letters. I would not be inclined to refer the cases back to the SSHD for further express decision on this point, not raised at all before the decisions were taken, unless there were clear indications that a different result might follow.

88. It seems to me that the SSHD's MRS policy does afford precisely that respect for family and private life which Article 8 is designed to protect. The policy was made in a context in which the UK was not obliged to put in place any policy at all and was under no obligation to admit any refugees. A significant number of EU states have decided not to afford any resettlement facilities. No doubt they too are parties to the ECHR. It seems odd that it should be argued that the adoption of a voluntary policy should enhance or perhaps even create rights under Article 8 which would not otherwise exist.

89. In such circumstances, it is difficult to see how Article 8 is engaged at all.

90. If the Article is engaged the UK has sought to promote reunification of families within the terms of its policy. I do not see that the rejection of a particular candidate for resettlement on the basis that he or she is outside the policy criteria would amount to a breach of this provision. If it is, it is clearly designed to promote the legitimate aims of immigration control and is proportionate in not excluding those persons with close ties to persons entitled to reside here. There is no doubt that even now State signatories to the ECHR enjoy a "wide margin of appreciation" in this area which must, to my mind, be at its widest when formulating and applying voluntary policies of the present kind.

91. For these reasons, I find no flaw in the absence of a statement of independent consideration of Article 8, over and above an application of the MRS policy.

(F)Final Disposal

92. I would propose, therefore, that the appeal by ST and ET from Mr Dingemans' order be dismissed and the appeal of SSHD against Judge Thornton's order be allowed, with the consequence that the judicial review claim by C1 and C2 be dismissed.

Lord Justice Tomlinson:

93. I agree

Lord Justice Moore-Bick:

94. I also agree.