Case No: (1): C4/2008/1475; (2): C4/2008/0290; C4/2008/0290A; (3): C4/2008/1424

Neutral Citation Number: [2008] EWCA Civ 985
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(1): MR JUSTICE LLOYD
(2): MR JUSTICE UNDERHILL
(3): MR JUSTICE IRWIN

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Wednesday, 6th August 2008

Before:

LORD JUSTICE RICHARDS
and
LORD JUSTICE STANLEY BURNTON

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Between:

AH (IRAN)	**1st Applicant**
ZEGO (ERITREA)	**2nd Applicant**
KADIR (IRAQ)	**3rd Applicant**

- and -

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

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Mr R Scannell and **Mr J Walsh** (instructed by Popkin & Co) appeared on behalf of the **1st Applicant**.
Mr A Briddock (instructed by Duncan Lewis & Co) appeared on behalf of the **2nd Applicant**.
Ms A Smith (instructed by Elder Rahimi) appeared on behalf of the **2nd Applicant**.
Mr J Beer (instructed by the Treasury Solicitors) appeared on behalf of the **Respondent**.

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Judgment
(As Approved)

Lord Justice Stanley Burnton:

1. Each of the applicants before us is an asylum seeker whom the Secretary of State proposes to return to Greece under the provisions of the Dublin II Regulation, Council Regulation (EC) 343/2003 of 18 February 2003, establishing the criteria and mechanisms for determining the member state responsible for examining an asylum application lodged in one of the member states by a third county national.

2. Each of the applicants objects to his return to Greece on the ground that his rights under Article 3 of the European Convention on Human Rights will be infringed, either by ill treatment in Greece or by his being refouled to his country of nationality without proper consideration of his asylum claim, as a result of which he will suffer ill treatment or worse contrary to his rights under Articles 2 and/or 3 of the Convention. I am grateful to counsel for their skeleton arguments and submissions today. I have considered all of the skeleton arguments that are before us. I am particularly appreciative of Mr Beer's skeleton argument because it was provided under considerable pressure of time.

3. The first of these three cases to come before the Administrative Court was that of Mr Zego. He is a national of Eritrea. He entered the United Kingdom illegally using a forged British passport on 23 October 2007 and claimed asylum. His fingerprints were taken and showed that he had previously entered Greece illegally and had been fingerprinted as an illegal entrant there on 14 August 2007. On that basis the Home Office asked the Greek authorities to accept responsibility for his asylum application under the Dublin Regulation. Initially they refused but on 22 November 2007 they accepted responsibility.

4. The Secretary of State then refused his application for asylum in this country. She did not consider his case substantively but sought to implement the machinery of the Dublin II Regulation, under which an asylum claim is to be considered by the first country party to the regulation into which a claimant for asylum enters; in this case, Greece. The Secretary of State, therefore, certified his claim as a Greece, safe third country claim and set removal directions for Greece. Her certificate and decision to remove him were made pursuant to the provisions of Part 2 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. The certificate is a certificate that the conditions mentioned in paragraphs 4 and 5 of Part 2 of Schedule 3 to the Act were satisfied, namely that it was proposed to move him to Greece and he was not a national of Greece. The effect of that certificate was to deprive the claimant of a right of appeal against the decision of the Secretary of State. The third countries to which those paragraphs apply are set out under paragraph 2 of the Schedule, and include Greece.

5. Paragraph 3 of the Schedule, on one view, requires the Secretary of State and the Court to treat Greece as a safe third country in which an asylum seeker's rights under the Refugee Convention and his rights under the European Convention on Human Rights will not be infringed, at least in relation to the

risks to which paragraph 3(2) relates. Having so certified, the Secretary of State decided to remove Mr Zego from the United Kingdom to Greece.

6. Mr Zego contends that he has reasonable grounds to fear that he will be refouled by Greece to Eritrea without proper consideration of his asylum claim, and that in Eritrea he will suffer ill treatment contrary to Article 3 of the European Convention. He sought judicial review of the Secretary of State's certificates and the decision to remove him to Greece. His application for permission to apply for judicial review came before Underhill J on 5 February 2008. At that date, McCombe J had decided in Nasseri v SSHD [2007] EWHC 1548 (Admin) that paragraph 3(2) of the Third Schedule to the 2004 Act was incompatible with the European Convention on Human Rights. Nonetheless, the judge refused permission to apply for judicial review on the ground that there was no evidence that, if returned under the Dublin II Regulation, Mr Zego would be mistreated in Greece. He did not, in terms, address the risk of refoulment after a defective consideration of the claim for asylum, other than to note that Greece was not currently removing Eritreans, a fact that he said was not central to his decision. However, the judge granted a stay pending an application to the Court of Appeal for permission to appeal.

7. On behalf of Mr Zego, Mr Briddock seeks a stay of his removal until the position of the deeming provisions of Part 2 of the Third Schedule to the Asylum and Immigration (Treatment of Claimants, Etc) Act 2004, deeming Greece to be a safe third country, have been resolved. I set out the present position so far as that is concerned later in my judgment. He accepts, however, that a declaration of incompatibility will not of itself justify judicial review.

8. Azad Kadir is an Iraqi Kurd. He applied for asylum in this country in February 2008. His fingerprints showed that he had previously entered Greece as an illegal entrant there. The Secretary of State certified his case also as a safe third country case in the same way she had that of Mr Zego, and she also certified the human rights claim as clearly unfounded, pursuant to paragraph 5(4) of the Third Schedule. She decided to return him to Greece. Mr Kadir issued an application for judicial review of the certificates and the decision of the Secretary of State. His application for permission came before Underhill J, on the papers. By then there had been an UNHCR paper, dated 15 April 2008, critical of Greece's treatment of asylum seekers and their asylum claims. The UNHCR advised governments to refrain from returning asylum seekers to Greece under the Dublin Regulation until further notice. Underhill J directed that the application for permission be considered at an *inter partes* hearing.

9. On 14 May 2008 the Court of Appeal handed down judgment, reported under neutral citation [2008] EWCA Civ 464, on the Secretary of State's appeal against the judgment of McCombe J in Nasseri. As at first instance, it seems not to have been argued before the Court of Appeal that the Greek authorities would themselves ill-treat Mr Nasseri. His appeal was limited to the contention that there was a real risk of his being returned to Iran, where he

would be so treated without proper consideration being given to his asylum claim.

10. The Court of Appeal allowed the appeal and discharged the declaration made by McCombe J. The Court held that the safe third country list was not in principle incompatible with the Convention, and, since Greece was not then removing claimants to Iran, it was not unlawful for the Secretary of State to include it in the list of safe third countries. The Court of Appeal refused leave to appeal to the House of Lords. However, with the agreement of the Secretary of State it granted a stay of the respondent's removal pending the decision of the House of Lords on Mr Nasseri's petition for leave to appeal. The House of Lords has not yet decided whether or not to grant permission.

11. Mr Kadir's application for permission to apply for judicial review then came before Irwin J on 10 June 2008. He refused permission, giving brief reasons, in effect adopting the reasons of Underhill J in R (Zego) v SSHD [2008] EWHC 302 (Admin). He stated there was no persuasive evidence that Mr Kadir would face injustice or breach of his Article 3 rights if returned to Greece.

12. On 24 June 2008, I ordered a short stay on Mr Kadir's removal until 2 July 2008. I did so on the briefest of papers, which did not include the bundle of papers that had been before Irwin J at first instance. On the same date the European Court of Human Rights granted Mr Kadir interim relief under Rule 39 of the Rules of Court, and Her Majesty's Government was informed that he should not be deported to Greece until further notice. The European Court of Human Rights was not informed that, when the application was made to it, there was a pending application to this Court for a stay of the removal directions. As at the date of the application to the European Court Mr Kadir's domestic remedies had not been exhausted: there was a pending application for a stay. The application that was made to the European Court of Human Rights implied that the domestic remedies had been exhausted by the application to the Administrative Court, which had refused relief. By the date that the stay granted by me had expired, the European Court had granted its Rule 39 relief, and an order of this court of a stay of Mr Kadir's removal was considered, apparently, by Mr Kadir's solicitors no longer to be required.

13. The result is that there are now concurrent proceedings before the European Court and this Court. That should not have occurred. In my judgment the European Court were misled as to the state of proceedings in this country when the application was made to it. It may be mitigation, but no more than mitigation, for it to be asserted, as it is on behalf of Mr Kadir's solicitors, that it was expected that the application for a stay would be rejected. The proper course for his solicitors, in circumstances in which removal was feared and there was a degree of urgency in the situation, was to have contacted the Court of Appeal office and to have asked for the papers to go before a judge before removal could be effected. That in fact did happen and, had the court office been so contacted, Mr Kadir's solicitors would have been informed that a judge would look at the papers within a very short period, as indeed I did.

14. I turn to consider the case of AH. He is Iranian. He arrived in this country in October 2007 when he made his asylum claim. He had been fingerprinted in Greece in March 2007. He sought to avoid return under the Dublin Regulation by asserting that he had returned to Iran from Greece for a period of more than three months before coming to this country. Whether that is consistent with his claim for asylum is something we do not have to consider. In his case, too, the Secretary of State has not considered his asylum claim on the merits but instead issued a safe third country certificate.

15. AH sought judicial review of the Secretary of State's certificate and an order quashing the Secretary of State's decision to remove him to Greece. His application for permission to apply for judicial review came before Lloyd-Jones J on 16 June 2008. Lloyd-Jones J refused permission to apply for judicial review. He held that AH's claim that he had been ill-treated in Greece was so vague that it could be discounted. In relation to the claim that he would be unlawfully refouled by Greece and on the application for a stay pending the decision of the House of Lords in Nasseri, he distinguished AH's case from Nasseri on the ground that Nasseri had claimed asylum in Greece whereas AH had not. In the language of asylum applications, Nasseri was a take-back case, whereas AH was a take-charge case. He followed the decision of Irwin J in Kadir v SSHD [2008] EWHC 1629 (Admin) and refused a stay. However, on 8 July 2008 Laws LJ himself granted a stay pending the application for permission to appeal.

16. Thus, these three cases raise an issue in common as to the order to be made by this Court in circumstances in which they raise a point of law which has been determined against the applicants by the Court of Appeal in another case but permission to appeal has been sought from the House of Lords and a stay of removal ordered in that case by consent.

17. A number of matters need to be addressed. The first is as to the effect of paragraph 3(2) of the Third Schedule to the 2004 Act. That provision is binding and binds this court and will do so irrespective of any declaration of incompatibility unless and until it is amended or repealed. As I have stated, on one view it requires this court, for the purposes of the present cases, to treat Greece as a safe third country. If the House of Lords grants permission to appeal it will consider how that paragraph is to be interpreted and applied. In fact, however, all of the judges of the Administrative Court who considered these cases and whose decisions are under appeal considered the actual position under Article 3 rather than any deemed position under the statute. I propose therefore to leave the effect of the statute aside while considering those other matters.

18. The second and more important matter which falls for consideration is whether the judges who consider these cases in the Administrative Court wrongly concluded that there was no real risk to the individual claimant in question of a breach of his rights under the European Convention on Human Rights or the Refugee Convention if he was returned to Greece. So far as objective evidence is concerned, the position now is in substance as it was before the Court of Appeal in Nasseri, which

had the UNHCR report of 15 April 2008. Indeed, to some extent, the position has worsened from the point of view of the applicants, since Norway, which had previously ceased to return asylum seekers to Greece, has now resumed returning asylum seekers to Greece. Reliance has been placed on the decision of a Swedish court in March 2008, which refused to permit removal of an asylum seeker to Greece. In my judgment, that is of no assistance in the present cases. It concerned a handicapped person who argued that conditions in Greece were particularly difficulty for handicapped persons. That decision related to the risk of ill-treatment in Greece, rather than that of unjustified refoulement to Iraq. I shall comment on the effect of the Rule 39 directions given by the European Court of Human Rights later in my judgment.

19. Mr Zego alleged he had mistreated by the Greek authorities. He had arrived in Greece by boat. After some limited mistreatment, he and the other male asylum seekers were placed back in their boat and it was towed out to sea. The judge concluded that if that happened it threw no light on what would happen if Mr Zego were returned to Greece under the Dublin Regulation by specific arrangement with this country. I agree.

20. Mr Zego also says that he fears refoulement by Greece to Eritrea; but Greece is not returning asylum seekers to Eritrea, among other countries, and, like the Court of Appeal in Nasseri, I consider that this is critical.

21. Before us, on behalf of the applicants, it has been argued that the risk of treatment under Article 3 needs to be considered comprehensively on a basis that, as I understand it, each possible breach should be considered as accumulating with others and that the risk of an inadequate and defective examination of an asylum claim itself is relevant to the question whether an asylum seeker, if returned to Greece, will there suffer treatment contrary to Article 3. In my judgment that argument seeks to avoid the necessary analysis of the factual position. In my judgment it is right to distinguish between ill treatment in Greece and the risk of return to a country by Greece to another country in which an applicant will be mistreated. I certainly accept that, if there were a risk of return of an asylum seeker from Greece to his country of origin without proper consideration of his asylum claim, that would be a matter which, apart from 2004 Act, would engage consideration by the Secretary of State and this Court. Equally, if there were a real risk of ill treatment of a returned asylum seeker within Greece by Greek authorities, that again would engage the responsibilities of the Secretary of State and of this Court. However, a defective examination of an asylum claim, in my judgement, only becomes relevant if there is a real risk of return contrary to Article 3: that is to say a return of an applicant without examination complying with international standards of his asylum claim to a state in which he is liable to be mistreated. If there is no risk of return, the fact that there is no proper examination of the asylum claim cannot of itself either constitute a breach of Article 3 or supplement what otherwise would not amount to a breach of Article 3 within what is alleged to be a safe third country, here Greece. I therefore reject that way of putting the case for the applicants, a case which, in any event, was not foreshadowed either before the judges at first instance or in the applications for permission to appeal or the grounds,

and indeed a case which was not foreshadowed in the applicant's skeleton arguments before us. Having considered it, in my judgment it does not add to the case that was put before the judges at first instance.

22. In these circumstances I see no arguable basis of interfering with the decision of Underhill J in the case of Mr Zego. Quite apart from the decision in Nasseri as to the compatibility of paragraph 3 of part 2 of the Third Schedule to the 2004 Act, the material before us shows no risk of his being unfairly refouled by Greece to his country of origin and is insufficient to show a real risk of treatment contrary to Article 3 within Greece.

23. Mr Kadir does not allege that he fears mistreatment in Greece. He says he fears refoulement to Iraq where he will be ill treated and his rights under Article 3 infringed. Greece is not returning asylum seekers to Iraq. I therefore see no basis for interfering with the decision of Irwin J.

24. The direction given by the European Court of Human Rights in Mr Kadir's case is, in my judgment, immaterial to the order to be made by this Court. Having seen the material provided to the European Court by Mr Kadir's solicitors, it is clear that it was provided with the scantiest of evidence. In any event, the direction is addressed to Her Majesty's Government, and it is for the Secretary of State to comply with it or to seek to set it aside. It does not justify the grant of a stay. To the contrary, it is a reason why no stay would be required even if permission to appeal were to be granted or the application for permission stayed, pending the decision of the House of Lords in Nasseri, although in those circumstances it would be apparent that Mr Kadir had not exhausted his domestic remedies and it would be difficult to see the basis for the continuation of the proceedings before the Court in Strasbourg.

25. The European Court has also granted Rule 39 relief in the case of Gutale v SSHD [2008] ECHR Application No 21919/08 and that of an asylum seeker in Finland but, without information as to the evidence put before the Court in those cases, that is not a matter, I believe, I can sensibly take into account. The implication of the Finnish case, of course, is that Finland, which has a good reputation in relation to asylum, did not consider the removal of its asylum seeker to Greece to be in breach of his Convention rights.

26. AH did allege that he had been mistreated in Greece and feared further ill treatment if returned there. This claim was dismissed by Lloyd Jones J because of the lack of information from AH as to what that ill treatment consisted of. That was a finding that the judge was entitled to make. Indeed there is no basis for questioning it. Greece is not returning asylum seekers to Iran. Again, having considered the objective evidence and arrived at a decision consistent with that of the Court of Appeal in Nasseri, I see no basis for interfering with the decision of the judge or for a grant of a stay pending the decision of the House of Lords in Nasseri.

27. There remains the question of consistency: the principle that like cases should be treated alike. The Secretary of State has agreed to and this court has granted a stay of removal in the case of Nasseri, and it is said that the

principle of consistency requires this court to treat the cases before us, which are indistinguishable from Nasseri, similarly. In my judgment, the short answer is that given by Mr Beer in his skeleton argument. These cases are distinguishable from Nasseri. In that case, the Secretary of State agreed to a stay pursuant to a policy to do so where there is a petition for leave to appeal pending before the House of Lords in order not to appear to stultify the appeal by making it academic. The Court of Appeal granted as stay because of the Secretary of State's agreement to it. Those considerations do not apply in the present cases.

28. I would, therefore, in each of the cases before us, refuse permission to appeal and therefore refuse a stay of removal.

29. I understand there are a number of cases in which a stay has been sought on grounds similar to the present. I would expect cases on all fours with those before us to be decided similarly. The pendency of the petition for leave to appeal to the House of Lords in Nasseri does not of itself justify a stay of proceedings to remove the asylum seeker to Greece under the Dublin Regulation, at least where the asylum seeker is a national of a country to which the evidence is that Greece is not returning failed asylum seekers.

Lord Justice Richards:

30. I agree.

Order: Applications refused