Case No: CO/163/2009

Neutral Citation Number: [2012] EWHC 1799 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/07/2012

Before :

MR JUSTICE KENNETH PARKER

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Between :

THE QUEEN on the application of EFREM MEDHANYE	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

David Chirico (instructed by **Wilson Solicitors LLP**) for the **Claimant**
Mr A Payne (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing dates: 28 June 2012

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Judgment

Mr Justice Kenneth Parker :

Introduction

1. The Claimant is an Eritrean national who has sought asylum in the UK, having previously claimed asylum in Italy. By these judicial review proceedings, the Claimant challenges the decisions of the Secretary of State for the Home Department ("SSHD"):

    i) To certify, as "clearly unfounded", the Claimant's claim that removing him to Italy would breach his rights under the European Convention on Human Rights ("ECHR") ("the certification decision");

    ii) To remove the Claimant to Italy under the provisions of the Dublin II Regulation ("the removal decision").

2. The challenge to the removal decision was based on an argument that removal to Italy would contravene the Claimant's rights under EU law, specifically his rights under the Charter of Fundamental Rights.

3. On 18 November 2011, following a "rolled up" permission and substantive hearing in these judicial review proceedings, I delivered an interim judgment and made an order by which *inter alia* I:

    i) granted permission to claim judicial review;

    ii) dismissed the challenge to the "clearly unfounded certificate";

    iii) stayed the challenge based on EU law pending the judgment of the Court of Justice in Luxembourg ("CJEU") in Case C-411/10 *NS v Secretary of State for the Home Department* (Judgment of the Court, Grand Chamber).

4. That judgment was delivered on 21 December 2011. In accordance with the directions that I gave, supplementary skeleton arguments were filed addressing the EU issue in the light of the decision of the CJEU in *NS*, and oral argument was heard on 28 June 2012.

The Outstanding Issue

5. I have already determined that, on an application of the principles that emerge from the decision of the European Court of Human Rights ("ECrtHR") in *MSS v Belgium and Greece* [2011] ECHR 108 (GC), as applied by the domestic Courts in *R (Elayathamby) v SSHD* [2011] EWHC 2182 (Admin), the Secretary of State acted lawfully in concluding that the Claimant's removal to Italy did not raise any arguable breach of the ECHR. That ruling is under appeal and the appeal is to be heard in the near future.

6. The remaining issue is whether, in the light of *NS*, the Claimant's removal to Italy would contravene his rights under the Charter of Fundamental Rights.

NS

7. In *NS*, the CJEU held that in the light of the principle of mutual confidence, it must be assumed that the treatment of asylum seekers in other Member States complies with the Refugee Convention, the ECHR and the Charter of Fundamental Rights (*NS*, paragraphs 75-80). However, that assumption is not irrebuttable: it is "*not inconceivable*" that the system in a Member State may experience operational problems such that there is a substantial risk that asylum seekers transferred there may face treatment incompatible with their fundamental rights (*NS*, paragraph 81). In my view, that statement is entirely consistent with the test to be applied under the ECHR, for the purposes of which there is a "*significant evidential presumption*" that Italy would comply with its international obligations: *R (Elayathamby) v SSHD* [2011] EWHC 2182 (Admin), paragraph 42(i) applying *MSS v Belgium & Greece* [2011] ECHR 108 (GC).

8. In *NS* the CJEU made it clear that not every infringement of fundamental rights or of the relevant EU Directives is sufficient to preclude transfer (paragraphs 82-85). However,

> "if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision." (paragraph 86).

9. In my view, that test is also entirely consistent with the test under the ECHR. It was the systemic flaws in asylum procedure and reception conditions in Greece that led to the Court in *MSS* concluding that Belgium had acted in breach of the ECHR by returning the Applicant to Greece (*MSS*, paragraphs 324, 347, 366).

10. In *NS* the CJEU held that in the case of Greece, the Member States did have substantial grounds for believing that there were systemic flaws in asylum procedure and reception conditions in the light of the information cited by the ECHR in *MSS* (paragraph 91). That information consisted of

> "the regular and unanimous reports of international non-governmental organisations bearing witness to the practical difficulties in the implementation of the Common European Asylum System in Greece, the correspondence sent by the United Nations High Commissioner for Refugees (UNHCR) to the Belgian minister responsible, and also the commission reports on the evaluation of the Dublin system and the proposals for recasting Regulation No 343/2003 in order to improve the efficiency of the system and the effective protection of fundamental rights." (paragraph 90)

11. The CJEU adopted essentially the same position as that adopted by the ECrtHR in regard to the nature and extent of the evidence required to rebut the assumption (or in ECHR terms the presumption) of compliance with international obligations.

12. As to Articles 1, 18 and 47 of the Charter of Fundamental Rights, the CJEU considered that they "*do not lead to a different answer*" (paragraphs 109-115). That conclusion must be considered in the context of the CJEU's overall findings. The CJEU held that the assumption of compliance with international obligations was rebutted by the "*regular and unanimous*" reports from international NGOs recording systemic breaches resulting in inhuman and degrading treatment (paragraph 90). The CJEU expressly stated that not every infringement of fundamental rights was sufficient to preclude removal. Against that background, the Court's brief conclusion on Articles 1, 18 and 47 cannot be read as suggesting that some lower standard applies if those Articles are relied upon.

13. Mr Chirico, on behalf of the Claimant, submits that *NS* does not rule out the possibility that, in a case where the contemplated treatment by the receiving State does not on any view amount to a breach of Article 4 of the Charter, the transferring State must nonetheless satisfy itself that the treatment would not violate Article 1 of the Charter (right to dignity). In short, he argues that in *NS* the CJEU was faced with a scenario in which there was a plain violation by Greece of Article 4 of the Charter, and the Court did not need to consider expressly what the legal position might be if there were no such violation and the person to be putatively returned under Dublin II relied upon Article 1 of the Charter. In such circumstances the CJEU might hold that Article 1 still had a role to play, and the transferring State would need, in particular, to satisfy itself that the arrangements for receiving and treating asylum seekers complied with, *inter alia*, Article 1 of the Charter.

14. In my judgment, this submission rests upon a fundamental misreading of what *NS* has decided. In *NS* the constitutional issue was novel and, I would respectfully suggest, controversial. The European Union aspires to be a close union, if not a federal system: it is far more, especially at this stage of its development, than a collection of nation states bound together by treaty (as is the case under the ECHR, which of course does not purport to represent any system of political union). The central principle of such a union is that member states of the union have mutual trust and confidence in each other, particularly mutual trust and confidence that each state will faithfully comply with binding provisions of union law, including, most importantly, provisions of union law protecting fundamental human rights. In that context, it might be thought that it would be inconsistent with the principle of mutual trust and confidence to impose a legal duty on one member state in effect to monitor whether another member state was complying with its obligations under union law, including its obligation to respect fundamental human rights. The United States is often presented as the paradigm of a mature federal union: although I have not researched the question, I would be surprised indeed if constitutional or federal law in the United States does, or could legitimately, require one state of the Union, before, for example, extraditing a citizen to another State of the Union, to satisfy itself that the sister State would not treat the citizen inconsistently with his or her rights under the Constitution. It might be assumed that the public authorities, including the judicial branch, of the sister State would, compliant with a solemn and binding obligation under the Constitution, ensure that the fundamental rights of the citizen were respected in their

territory, and that it would run counter to the principle of mutual trust and confidence if other States were under any obligation, or even had a discretion, to investigate whether there was a systemic failure to discharge that duty.

15. The CJEU expressly recognises the principle of mutual trust and confidence as the "*raison d'être*" of the European Union. It might have been thought, therefore, that, under that principle, one Member State could not properly be obliged to determine whether another Member State was complying with its legal duties under EU law. However, the CJEU, having recognised both the importance of asylum law and practice and of respect for fundamental human rights, decided that in this context Member States did have such an obligation. Nonetheless, with due regard to the "*raison d'être*" of the EU, the CJEU very carefully and with great precision delineated precisely the nature and scope of the legal duty of the transferring Member State. The nature and scope of the duty is set out in paragraph 86 of the judgment of the CJEU. In my view, given in particular this important constitutional issue at stake in *NS*, that duty simply excludes the independent operation of Article 1 of the Charter. When read in the correct context, that is what the Court is saying at paragraphs 114-5 when it states that Articles 1, 18 and 47 of the Charter do not lead to a different answer, namely, that the only question that the transferring State need address and answer is the one identified at paragraph 86 of the judgment of the CJEU, which makes no allusion to Article 1 of the Charter.

16. The structure of the judgment of the CJEU is also inconsistent with the Claimant's submission.

17. The CJEU took questions (2) – (4) on the order for reference together (paragraph 74). Question 4 in terms asked:

> "Alternatively, is a Member State obliged by European Union law, and, if so, in what circumstances, to exercise the power under Article 3(2) of the Regulation to examine and take responsibility for a claim, where transfer to the responsible State would expose the [asylum] claimant to a risk of violation of his fundamental rights, in particular the rights set out in Articles 1, 4, 18, 19(2) and/or 47 of the Charter, and/or to a risk that the minimum standards set out in Directives [2003/9, 2004/83 and 2005/85] will not be applied to him?"

18. Question (4) specifically refers to Article 1 of the Charter.

19. At paragraph 82 the CJEU states:

> "Nevertheless, it cannot be concluded from the above that any infringement of a fundamental right by the Member State responsible will affect the obligations of the other Member States to comply with the provisions of Regulation No 343/2003."

20. Then, having considered the consequences of wider obligations on the transferring State, the CJEU states at paragraph 86:

> "By contrast, if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment, within the meaning of Article 4 of the Charter, of asylum seekers transferred to the territory of that Member State, the transfer would be incompatible with that provision."

21. The specific answer to questions (2) – (4) is given at paragraph 94:

> "It follows from the foregoing that in situations such as that at issue in the cases in the main proceedings, to ensure compliance by the European Union and its Member States with their obligations concerning the protection of the fundamental rights of asylum seekers, the Member States, including the national courts, may not transfer an asylum seeker to the 'Member State responsible' within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the Charter."

In my judgment, that answer in plain terms rules out any independent role for Article 1 in the present context.

22. If there were any doubt about the nature of the answer, it would in any event be removed by the CJEU's answer to question (5). That question asked, *inter alia*, whether the rights under Article 1 conferred wider protection than that conferred by Article 3 ECHR. Given that in paragraph 94 the CJEU had ruled out any independent role for Article 1 of the Charter in this context, the answer to question (5) at paragraph 114 was simply:

> "Articles 1, 18 and 47 of the Charter do not lead to a different answer than that given to the second to fourth questions and to the sixth question in Case C-411/10 and to the two questions in Case C-493/10."

23. In other words, the CJEU did not need to give any opinion about the ambit of Article 1 (compared to Article 3 ECHR), because *ex hypothesi* Article 1 had no independent role to play in the present context.

24. With the greatest respect, it seems to me that the CJEU has thus struck what it regards as a proper balance between the principle of mutual trust and the need to respect human rights in a humanitarian setting. Serious and substantial violations of dignity are likely in any event to amount to "degrading" treatment contrary to Article 4 (see, for the position under the ECHR, *MSS* at paragraph 220). Any affront to dignity, falling short of degrading treatment, that might arguably on a broad conception of that term violate Article 1 may be left to be addressed exclusively by the public authorities, including the judicial authorities, in the receiving State. The transferring

State is under no EU obligation to monitor whether there might be a systemic failure to respect the dignity of transferred asylum seekers under such a possibly broad conception of that term. On the other hand where there is proven systemic treatment in another State of asylum seekers that is truly inhuman or degrading, the transferring State may not exercise its EU discretionary power to transfer asylum seekers to such a State.

25. However, in any event in the present case there is something of an academic air about the argument concerning Article 1 of the Charter. The Claimant appears to accept that any difference in the scope of Articles 1 and 4 of the Charter would not be material to his claim, because the treatment that he alleges he would face in Italy would, if made out, fall within Article 4 of the Charter and Article 3 ECHR. The Claimant is not in this case arguing that, if the treatment he claims to fear in Italy was compatible with his rights under Article 4 of the Charter, it might nonetheless breach his rights under Article 1 of the Charter. The whole thrust of the claim is that the treatment infringes both Article 4 of the Charter and Article 3 ECHR. However, the claim failed before me because I took the view that the evidence was not sufficient to sustain it. That, of course, is the finding challenged in the Court of Appeal.

Further Submissions and Conclusions

26. Mr Chirico made further submissions about *NS*. For example, he submitted that *NS* did not seek to lay down any firm rule about the provenance or type of evidence which may rebut the assumption that a Member State complies with its EU obligations. Evidence such as that relied upon in *MSS* will clearly be sufficient, but it may not, depending upon the individual facts of the case, be necessary, because, he submitted, the core duty is to assess the functioning of the asylum system in the other Member State and to evaluate the relevant risk. Nor is there any prescriptive *a priori* rule as to the admissibility of, or weight to be attached to, expert evidence in this area.

27. Finally, Mr Chirico invited me to review some of the evidence in the present claim in the light of *NS*. He frankly and properly accepted that he was in some difficulty in doing so, given my findings made earlier. I believe that on this aspect it is sufficient to say that I found some of the points somewhat semantic and that, insofar as there were evidential matters raised, these appeared to be disguised criticisms of my earlier conclusions and, as such, were more appropriate for adjudication in the appeal to the Court of Appeal, as indeed Mr Chirico acknowledged.

28. For these reasons I do not find anything in *NS* to support the view that removal of the Claimant to Italy would violate his rights under EU law. I should therefore now dismiss this claim in its entirety.

29. I indicated at the hearing that I would grant to the Claimant permission to appeal this aspect of the judgment under EU law if I were against him, and I do grant such permission. For the avoidance of any doubt, I also grant, so far as it is necessary, permission to appeal the ruling made in the first part of this claim. That permission is in no way restricted and the Claimant is at liberty to advance any points that are believed to further his appeal.