28 July 2010

PRESS SUMMARY

R (on the application of ZO (Somalia) and others) (Respondents) v Secretary of State for the Home Department (Appellant) [2010] UKSC 36
On appeal from: 2009 EWCA Civ 442

JUSTICES: Lord Hope (Deputy President), Lord Walker, Lord Brown, Lord Kerr, Sir John Dyson SCJ

BACKGROUND TO THE APPLICATION

Council Directive 2003/9/EC (the Reception Directive) lays down minimum standards for the reception of asylum seekers in EU Member States. Benefits conferred by the Reception Directive include (in Article 11) certain provisions in relation to entitlement to work while awaiting the outcome of an asylum application. The Secretary of State, the appellant in these cases, argues that where an asylum seeker makes a second application for asylum after his first application has been finally rejected, he is not entitled to the benefits that are conferred by the Reception Directive.

ZO is a Somali national who applied for asylum following her arrival in the United Kingdom in 2003. That application was refused on 17 February 2004 and all subsequent attempts to challenge the refusal had failed by the end of 2004. Following the Immigration Appeal Tribunal's decision in *NM and others (Lone Women – Ashraf) (Somalia) CG* [2005] UKIAT 00076 31 March 2005, ZO made further submissions to the Secretary of State. It was contended that this amounted to a fresh claim for asylum. The Secretary of State has yet to decide whether to grant ZO's asylum claim or whether the further submissions made on her behalf constitute a fresh claim. On 5 June 2007, ZO wrote to the Secretary of State asking for permission to work. On 31 August 2007, permission to work was refused. ZO brought judicial review proceedings challenging this refusal.

MM, a Burmese national, made a first application for asylum after his arrival in the United Kingdom in 2004. That application was refused and all attempts to challenge the refusal had failed by March 2005. On 9 May 2005 he made further submissions which, he said, amounted to a fresh claim. Again in his case the Secretary of State has not yet decided whether to grant MM leave to enter the United Kingdom or whether he has made a fresh claim for asylum. As in the case of ZO, MM's application for permission to work was refused by the Secretary of State. On 25 October 2007, MM applied for judicial review to challenge, among other things, the refusal of permission to work.

ZO and MM's applications for judicial review were dismissed by HHJ Mackie in the High Court. On 20 May 2009, their appeals against those dismissals were allowed by the Court of Appeal. The Secretary of State appealed to the Supreme Court, arguing that the clear purpose of the Reception Directive was to devise minimum standards for those who were 'received' by Member States for the first time as asylum seekers and that the provisions of the Directive do not therefore extend to subsequent applications for asylum.

JUDGMENT

The Supreme Court unanimously dismisses the Secretary of State's Appeal holding that the Reception Directive can apply to second and subsequent applications for asylum. Lord Kerr delivered the judgment of the Court.

REASONS FOR THE JUDGMENT

The Supreme Court identified two principal issues in the appeal: (1) whether Article 11 of the Reception Directive applies to a person who has had an application for asylum in the United Kingdom finally determined against him when he makes a further application for asylum, and (2) whether the Court should apply for a reference to the European Court of Justice for a preliminary ruling on the proper interpretation of the Reception Directive, in particular whether it is intended to cover only the first application for asylum made by an individual to a Member State (paras [**8**]–[**9**]).

In relation to the first issue, considering the context in which the Reception Directive was made, it is clear that it was part of a comprehensive charter dealing with the various aspects of asylum applications. The Procedures Directive, which was adopted ten months after the Reception Directive was required to be transposed into national law and sets out minimum standards on procedures in Member States for granting and withdrawing refugee status, is part of that charter. Article 2 of both Directives contain virtually identical definitions for the terms 'application for asylum' and 'applicant or asylum seeker'. There can be no doubt that subsequent applications for asylum come within the definitions contained in Article 2 of the Procedures Directive. For the Secretary of State to be correct therefore, the expression 'application for asylum' must be given a different meaning in each of two Directives. Whilst as a matter of general principle, later legislation should not operate to change the established meaning of an earlier enactment, the later legislation may give an insight into the proper interpretation of the earlier instrument. In any event, in this case the matter is put beyond doubt by an examination of the legislative history of the two measures (paras [**14**]–[**15**], [**22**]–[**28**]).

The proposal for the Reception Directive makes it clear that it had always been intended not only that the definitions of 'applicant for asylum' in both Directives should be the same but also that an application should not be regarded as having been subject to a final decision until all possible remedies had been pursued and determined. This can only mean that subsequent applications would fall within the definitions of 'application for asylum' and 'asylum seeker' in the Reception Directive. Accordingly, 'an application for asylum' in the Reception Directive must be interpreted to include a subsequent application made after an original application has been determined and 'asylum seeker' should be construed accordingly to include a person who makes such a subsequent application (paras [**29**]–[**30**]).

Having decided to dismiss the appeals for the reasons set out above, the Court then considered the Secretary of State's arguments that numerous anomalies would arise if the Reception Directive was held to apply to subsequent asylum claims. The Court concludes that none of the claimed anomalies leads to the view that it was intended that the Reception Directive should not apply to subsequent asylum applications. On the contrary, curious consequences would follow if the Reception were held *not* to apply to such applications (paras [**33**]–[**42**]).

The Secretary of State further argued that if the Reception Directive is held to apply to subsequent applications for asylum, the potential for abuse of the system would be greatly increased. The Secretary of State's concern was that applicants would bring wholly unmeritorious claims with the aim of delaying their removal and gaining access to the benefits that the Reception Directive confers. Whilst there was some force in the Secretary of State's arguments in this context, the Court considers that the problem of unmeritorious applications should be dealt with not by disapplying the Reception Directive to all repeat applications but by identifying and disposing promptly of those which have no merit and ensuring that genuine applicants are not deprived of the minimum conditions that the Reception Directive provides for (paras [**43**]–[**49**]).

On the second issue, the Court concluded, particularly in light of the legislative history of the Reception Directive and the Procedures Directive, that a reference to the ECJ was not required (paras [**50**]–[**51**]).

NOTE