OUTER HOUSE, COURT OF SESSION

[2009] CSOH 172

P1179/09

OPINION OF LORD BONOMY

in the petition of

M S

Petitioner;

for

Judicial Review of decisions of the Secretary of State for the Home Department

and Answers for

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent;

Petitioner: Forrest; Drummond Miller LLP
Respondent: Lindsay; Office of the Solicitor to the Advocate General

16 December 2009

[1] The route by which the petitioner, who is apparently Ethiopian, ended up in Glasgow on 3 July 2009 is far from clear. He applied for asylum and later that day underwent a short Screening Interview by a representative of the UK Border Agency at which he gave personal details, information about his journey to the United Kingdom and brief particulars of his asylum claim, as requested. In accordance with

the normal procedure for such applications for asylum, a second more detailed interview was fixed for 30 July. The respondent submitted the petitioner's personal details to the EURODAC database on which it was recorded that the petitioner had previously applied for asylum in Italy on 22 September 2007. That information was available to the respondent on 3 July. However, it was not matched up with the records relating to his application and thus inadvertently overlooked.

[2] As a result, the detailed interview appointed for 30 July took place. Mr Lindsay for the respondent frankly acknowledged that, had the EURODAC hit been matched to the respondent's file for the petitioner, then steps would have been initiated immediately to request that Italy take back the petitioner as the EU Member State to which he first made application for asylum in terms of the Dublin II Regulation to which I shall refer in more detail later. As it was, shortly after the detailed interview the respondent's office did link the EURODAC details with the petitioner's application, and on 4 August made a request to Italy to take over responsibility for the consideration of the application and so notified the petitioner. In terms of Article 20(b) of the Dublin II Regulation, Italy was obliged to make the necessary checks and reply to the request within two weeks. There was no response from Italy. Accordingly, in terms of Article 20(c) it was deemed to have agreed to take back the applicant and arrangements were made to remove him to Italy. These arrangements were notified to the petitioner in a letter dated 27 August.

[3] The petitioner challenges the decision of the respondent to remove him to Italy, as set out in the letter of 27 August, as unlawful and irrational and seeks reduction thereof. Mr Forrest for the petitioner submitted that the respondent had in fact accepted responsibility for determining the asylum application since, following the initial screening process, no further preliminary investigation of the possibility that

the matter fell to be dealt with by another EU Member State took place and the respondent proceeded to a detailed interview of the petitioner as part of the process of examining and determining the asylum application. For support for this submission he relied upon certain provisions of the Dublin II Regulation and the judgment of the Court of Appeal in England in *AA (Somalia)* v *Secretary of State for the Home Department* (2006) EWCA Civ. 1560, in which the court expressed the view that determining whether the United Kingdom or another EU Member State was responsible for examining the application on its merits should be a single stage decision-making process which should be undertaken rapidly following the initial presentation of the application. He acknowledged that some initial enquiries would have to be made before the decision to examine the application could be made, but argued that that stage had been exhausted in the present case by 30 July. Mr Lindsay in reply submitted that it was clear that the detailed interview was a part of both the process of determining responsibility for the substantive examination of the application and, in the event that the United Kingdom was the responsible State, the process of examining and deciding it, and that no decision as to responsibility had been made.

[4] The relevant parts of the Dublin II Regulation, more properly Council Regulation (EC) No 343/2003 of 18 February 2003, establishing the criteria and mechanisms for determining the Member State of the European Union responsible for examining an asylum application lodged in one of the Member States by a third-country national are these:

> "CHAPTER I
>
> SUBJECT - MATTER AND DEFINITIONS
>
> ...

Article 2

For the purposes of this Regulation:

.....

(e) 'examination of an asylum application' means any examination of, or decision or ruling concerning, an application for asylum by the competent authorities in accordance with national law except for procedures for determining the Member State responsible in accordance with this Regulation.

...

CHAPTER II

GENERAL PRINCIPLES

Article 3

1. Member States shall examine the application of any third-country national who applies at the border or in their territory to any one of them for asylum. The application shall be examined by a single Member State, which shall be the one which the criteria set out in Chapter III indicate is responsible.

2. By way of derogation from paragraph 1, each Member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in this Regulation.

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Article 4

1. The process of determining the Member State responsible under this Regulation shall start as soon as an application for asylum is first lodged with a Member State.

....

CHAPTER III

HIERARCHY OF CRITERIA

Article 5

1. The criteria for determining the Member State responsible shall be applied in the order in which they are set out in this chapter.

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Article 13

2. Where no Member State responsible for examining the application for asylum can be designated on the basis of the criteria listed in this Regulation, the first Member State with which the application for asylum was lodged shall be responsible for examining it.

....

Article 16

1. The Member State responsible for examining an application for asylum under this Regulation shall be obliged to:

...

(c) take back, under the conditions laid down in Article 20, an applicant whose application is under examination and who is in the territory of another Member State without permission;

.....

Article 17

1. Where a Member State with which an application for asylum has been lodged considers that another Member State is responsible for examining the application, it may, as quickly as possible and in any case within three months

of the date on which the application was lodged within the meaning of Article 4(2), call upon the other Member State to take charge of the applicant. Where the request to take charge of an applicant is not made within the period of three months, responsibility for examining the application for asylum shall lie with the Member State in which the application was lodged.

.....

Article 20

1. An asylum seeker shall be taken back in accordance with Article 4(5) and Article 16(1)(c), (d) and (e) as follows:

(a) the request for the applicant to be taken back must contain information enabling the requested Member State to check that it is responsible,

(b) the Member State called upon to take back the applicant shall be obliged to make the necessary checks and reply to the request addressed to it as quickly as possible and under no circumstances exceeding a period of one month from the referral. When the request is based on data obtained from the Eurodac system, this time limit is reduced to two weeks;

(c) where the requested Member State does not communicate its decision within the one month period or the two weeks period mentioned in subparagraph (b), it shall be considered to have agreed to take back the asylum seeker;

...

Article 21

1. Each Member State shall communicate to any Member State that so requests such personal data concerning the asylum seeker as is appropriate, relevant and non-excessive for:

(a) the determination of the Member State responsible for examining the application for asylum;

(b) examining the application for asylum;

(c) implementing any obligation arising under this Regulation.

2. The information referred to in paragraph 1 may only cover:

(a) personal details of the applicant, and, where appropriate, the members of his family (full name and where appropriate, former name; nicknames or pseudonyms; nationality, present and former; date and place of birth);

(b) identity and travel papers (references, validity), date of issue, issuing authority, place of issue, etc,);

(c) other information necessary for establishing the identity of the applicant, including fingerprints processed in accordance with Regulation (EC) No 2725/2000;

(d) places of residence and routes travelled;

(e) residence documents or visas issued by a Member State;

(f) the place where the application was lodged;

(g) the date any previous application for asylum was lodged, the date the present application was lodged, the stage reached in the proceedings and the decision taken, if any."

[5] These provisions are translated into United Kingdom domestic legislation by the Asylum and Immigration (Treatment of Claimants Etc) Act 2004, in particular Schedule 3, Part II, paragraphs 3, 4 and 5.

[6] As Mr Lindsay pointed out, Article 13 fixes Italy with responsibility for examining and determining the petitioner's application unless the respondent has assumed responsibility in terms of Article 3.2.

[7] The crux of this dispute is whether the unfortunate failure to relate the EURODAC hit to the petitioner's application and the subsequent actings of the respondent's department have resulted in the respondent accepting responsibility for determining the application. Mr Lindsay acknowledged that the respondent could by his actions demonstrate that the process of determining the Member State responsible for examining and determining the application had been completed and had resulted in acceptance of that responsibility by the respondent. There are parts of the introductory explanatory passages of the Statement of Evidence Form used for the 30 July interview that tend to indicate that that had happened. The explanation read out to the petitioner was in these terms:

> "You are being interviewed in connection with your asylum application in the UK. This is your opportunity to explain the reasons why you are claiming asylum and an opportunity for us to obtain all the information necessary to make a decision on your application. A decision will be made shortly but I cannot tell you what the decision will be at this stage."

However, the initial explanation of the procedures to be followed clearly demonstrates that the interview was for the purpose of both determining whether to accept responsibility for deciding the application and, if appropriate, actually deciding the application. The petitioner was plainly told:

> "Information may also be disclosed in confidence to the asylum authorities of other countries which may have responsibility for considering your claim."

The interview on 30 July was also the first occasion on which it was possible for the respondent to give any consideration to the application beyond the brief screening interview undertaken on 3 July.

[8] In addition, in spite of the oversight in relation to the EURODAC information, the letter requesting that the application be taken back by Italy was issued well within the timescale envisaged for completion of the determination of the Member State with responsibility for deciding the application. In terms of Article 17, where the Member State where the application has been lodged considers another Member State is responsible for examining it, it must call upon that Member State to take charge of the application "as quickly as possible and in any case within three months of the date in which the application is lodged. ..." Article 21 clearly envisages the possibility of the application state making investigations before deciding which State it considers to be responsible for examining the application.

[9] All that happened in this case is therefore consistent with the respondent following through a routine which involved obtaining information necessary to determine both whether to accept responsibility for examining the application and carrying out the examination thereof. There is no indication in the record of the screening interview or the detailed interview or elsewhere that the respondent had made a decision to accept responsibility for examining the application. That issue was thus an open question when the EURODAC details were linked to the application. I do not consider that to be inconsistent with what was said in *AA (Somalia)* v *Secretary of State for the Home Department*.

[10] In these circumstances the respondent was entitled to make the formal request to Italy to take back the petitioner on 4 August and, when no response was received thereto within the two weeks period referred to in Article 20(1)(b) and (c), to decline to examine the asylum application substantively and to remove the petitioner to Italy. In order to give effect to that decision, he was also entitled to issue the letter and third-country certificate of 27 August. Thus the respondent neither erred in law nor

acted irrationally in issuing said letter and certificate. I shall accordingly sustain the second plea-in-law for the respondent and refuse the prayer of the petition.