Neutral Citation Number: [2011] EWCA Civ 1446

Case No: C4/2011/0094; /0097 and /0095

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
MR JUSTICE DAVIS
REF NO: CO19952009

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/12/2011

Before :

LORD JUSTICE MAURICE KAY, Vice President of the Court of Appeal (Civil Division)
LORD JUSTICE MOSES
and
MRS JUSTICE BARON

- -

Between :

THE QUEEN ON THE APPLICATION OF MA, BT, DA	**Appellants**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**
- and -	
The AIRE Centre	**Intervener**

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Mr Stephen Knafler QC and **Ms Kathryn Cronin** (instructed by **Bindmans**) for the **first and second Appellants (MA** and **BT)**
Mr Stephen Knafler QC and **Ms Bryony Poynor (**instructed by **Paragon Law)** for the **third Appellant (DA)**
Mr Steven Kovats QC (instructed by **Treasury Solicitor),**) for the **Respondent**
Written submissions by **Catherine Meredith (**instructed by **Freshfields Bruckhaus Deringer LLP**) for **The AIRE Centre, Intervener**

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Judgment

Lord Justice Maurice Kay :

This is the judgment of the Court

1. Each of these unconnected appellants arrived in the United Kingdom as an unaccompanied minor and claimed asylum, having previously claimed asylum in another Member State of the European Union. None has a relevant family member legally present in any part of the European Union. The primary issue arising on their conjoined appeals was succinctly expressed by Davis J (as he then was) in the first paragraph of his judgment in the Administrative Court [2010] EWHC 3572 (Admin):

> "… is the unaccompanied minor liable to be so removed under Article 6 of Council Regulation EC343/2003 (Dublin II) to the Member State where [he or she] first lodged his or her application? The position of the … Secretary of State is that unaccompanied minors in such a situation are liable to be removed. The position of the [appellants] is that they are not and that the Member State responsible for determining their applications for asylum is the one where the unaccompanied minors have most recently lodged their applications: that is to say, in the present cases, the United Kingdom."

2. In the event, even before the hearing in the Administrative Court, the Secretary of State had agreed to determine substantively the asylum claims of MA and BT, so they no longer faced removal to Italy, and although DA still faced removal to the Netherlands, he was considered to be over 18 and no longer an unaccompanied minor. Since the judgment in the Administrative Court, the question of DA's age has been reconsidered by the Secretary of State following an age assessment carried out by Nottingham City Council. She resolved to treat him as an unaccompanied minor. She later discovered that the Dutch authorities are of the view that he is an adult. Nevertheless, the Secretary of State has agreed to deal with his asylum application substantively.

3. Davis J was persuaded, as are we, that the parties are correct to invite continued consideration of this case, notwithstanding that it has become academic in respect of the three appellants, save in respect of a claim for damages by BT. The point is an important one and several other cases in this jurisdiction remain stayed in anticipation of clarification of the law. We are told that the point has not been considered by the CJEU. We are in no doubt that it is appropriate for us to hear the appeals in accordance with the principles expounded in *R v Secretary of State for the Home Department, ex parte Salem* [1999] 1 AC 450, 456G – 457B, per Lord Slynn of Hadley.

4. We have also received submissions on a second issue, which would not arise if the appellants were correct on the primary issue. It is this: if the appellants are potentially liable to removal pursuant to Dublin II, is the Secretary of State under an obligation to consult the receiving Member State about the individual post-handover reception arrangements, in order to take into account the best interests of the unaccompanied minor as a primary consideration before deciding upon return to that Member State? Davis J agreed to deal with this issue, notwithstanding the absence of an agreed or established factual matrix in the three cases.

The judgment of Davis J

5. On the primary issue, Davis J construed Article 6 of Dublin II in accordance with the submissions on behalf of the Secretary of State and held that the appellants were liable to removal to the Member States in which they had first made asylum applications. He granted permission to appeal on this issue because of its general importance. He also rejected the appellants' case on the second issue. He said (at paragraph 82):

> "In a Dublin II context the Secretary of State is not, in the case of unaccompanied minors, … invariably required first to take into account, before seeking to transfer, concrete transitional planning with regard to such minors in the proposed receiving Member State. Such requirement, in my view, only arises in circumstances where cogent grounds are adduced so as to call for such matters to be taken into account before such removal is to be effected."

He refused permission to appeal on this issue but permission was subsequently granted by Sullivan LJ in the light of the supervening Supreme Court decision in *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, which had led Mr Stephen Knafler QC, on behalf of the appellants, to reformulate their case to take account of what Baroness Hale said in that case (at paragraphs 26-29).

Issue 1 : construction of Article 6 of Dublin II

6. Dublin II was preceded by the Dublin Convention which was signed by the Member States on 15 June 1990. Dublin II is concerned to establish "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-country national". Recital (5) states that

> "it is appropriate at this stage, while making the necessary improvements in the light of experience, to confirm the principles underlying the [Dublin] Convention."

Dublin II was anticipated by the conclusions of the Council at a meeting in Tampere in October 1999, when it was agreed to work towards a Common European Asylum System. Recitals (3) and (4) state:

> "(3) The Tampere conclusions also stated that this system should include, in the short term, a clear and workable method for determining the Member State responsible for the examination of an asylum application.
>
> (4) Such a method should be based on objective, fair criteria both for the Member States and for the persons concerned. It should, in particular, make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for determining refugee status and not to compromise the

> objective of the rapid processing of the asylum applications."

7. The central substantive provisions of Dublin II for present purposes are as follows:

> "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 …"

The Secretary of State maintains that she has now agreed to examine the applications of the appellants by reference to this derogation.

8. Chapter III, headed "Hierarchy of Criteria", begins as follows:

> "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.
>
> 2. The Member State responsible in accordance with the criteria shall be determined on the basis of the situation obtaining when the asylum seeker first lodged his application with a Member State.
>
> Article 6
>
> When the applicant for asylum is an unaccompanied minor, the Member State responsible for examining the application shall be that where a member of his or her family is legally present, provided that this is in the best interests of the minor.
>
> In the absence of a family member, the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum."

9. In the present case, there are no relevant family members, so the second paragraph (which we have emphasised) applies. The original draft of Article 6 did not contain the second paragraph. It was added at a late stage – too late to have been explained in

the explanatory memorandum which accompanied the draft. We are told that there is no recorded public debate or comment to assist us in the construction of the second paragraph.

10. Article 6 places unaccompanied minors first in the hierarchy of criteria. Articles 7 to 12 inclusive proceed down the hierarchy. Article 13 then provides that where none of the express criteria applies, "the first Member State with which the application for asylum was lodged shall be responsible for examining it".

The case for the appellants

11. Mr Knafler frankly acknowledges that, in submitting that "has lodged" in the second paragraph of Article 6 should be construed as meaning "has most recently lodged", he is taking a point which is at variance with what appears to be a common understanding among Member States and which is unsupported by any previous judicial decision. Nor has he been able to refer us to any textbook which espouses it. In this jurisdiction, the only final decision of the Administrative Court which referred to the point prior to the judgment in the present case was that in *R(Mosari) v Secretary of State for the Home Department* [2005] EWHC 1343 where Lightman J was "clear" that the second paragraph of Article 6 requires that examination of the application is a matter for "the Member State where the claimant made his first application for asylum and where he was when that application was made" (paragraphs 6 and 9). However, there does not appear to have been adversarial argument on the point. In 2007, as Davis J pointed out in paragraph 52 of his judgment, the European Council on Refugees and Exiles produced a written submission which contended for an amendment to Article 6 which would rewrite it so as to produce the effect which Mr Knafler says it already has. The only scintilla of support that Mr Knafler can pray in aid is that, on their way to a substantive hearing before Davis J, the cases of BT and MA were described by Collins J, when granting permission to apply for judicial review, as "clearly arguable".

12. The principal arguments advanced by Mr Knafler are as follows:

    i) In Article 5.2, and also in Article 4.1, the draftsman used the words "first lodged". If it had been intended to refer to the first application in the second paragraph of Article 6, the same wording would have been used.

    ii) Although this novel construction would mean that unaccompanied minors were being treated in a wholly different way from other applicants, there are good reasons why that should be so. Unaccompanied minors are particularly vulnerable and it is appropriate that they should have their applications considered as soon as possible and without further unwanted travel. By definition, they have no family anywhere in the EU and they may have had bad experiences in the first Member State which prompted their further flight. Indeed, if her factual case is correct (as to which there is as yet no determination), BT's history is a graphic illustration of such a background. Unaccompanied minors are placed first in the hierarchy of criteria set out in Articles 6-12 and it is not surprising if there is something exceptional about their treatment.

iii) It is not a point against this approach that Article 5.2 refers to "the basis of the situation obtaining when the asylum-seeker first lodged his application with a Member State". That deals with the point in time in relation to which the application is to be judged, not the venue for its determination.

iv) Although there are parts of Dublin II which plainly contemplate the removal of accompanied minors with their asylum-seeking families to the country of first lodging (Article 4) or of unaccompanied minors in order that they may join or rejoin family members in another Member State, none of these provisions contemplates the removal of unaccompanied minors without family members in the EU.

v) Anti-abuse provisions (such as those in Article 4) should not be assumed to resonate with the position of unaccompanied minors without family members in the EU. Whilst some such unaccompanied minors are no doubt acting abusively, most or many are not.

13. The essential submissions of Mr Steven Kovats QC on behalf of the Secretary of State can be summarised as follows:

i) It is important to construe the second paragraph of Article 6 in the context of Dublin II as a whole. In particular, the words "has lodged" have to be read in conjunction with Article 5.2.

ii) The construction contended for by the Secretary of State is also consistent with the general principles set out in Article 4.

iii) The appellants are seeking to read words into Article 6 so that "has lodged" is read as "has most recently lodged". The Secretary of State's construction requires no such addition and is closer to the natural meaning of the words used.

iv) The appellants' construction was rejected by Lightman J in *Mosari* (paragraph 12 above) and by Davis J in the present case and is inconsistent with the Proposal of the Commission which preceded Dublin II, which stated at paragraph 2.2:

> "the general principle is that responsibility for examining an asylum application lies with the Member State which played the greatest part in the applicant's entry into or residence in the territories of the Member States, subject to exemptions designed to protect family unity."

The Proposal did not exempt unaccompanied minors without family from the general principles of the Dublin convention.

v) Any departure from the basic approach should be pursuant to a derogation under Article 3.2 rather than by an excessively strained construction of the second paragraph of Article 6.

vi) Although there is an absence of direct and binding authority on the point, the Secretary of State's construction is consistent with the recent jurisprudence of

the CJEU (Case C-411/10), *(NS v Home Secretary and others*, in which Advocate General Trstenjak delivered her Opinion on 22 September 2011), the Supreme Court (*In re E (Children) (Abduction: Custody Appeal*) [2011] 2 WLR 1326) and the ECtHR (*MSS v (1) Belgium (2) Greece* (2011) 53 EHRR 28 (Grand Chamber).

Discussion

14. We have to say that we do not find the authorities to which we have been referred to be of great assistance. Although *Mosari* was a case in the present context, it is apparent that the construction point had not been the subject of argument. As regards the recent cases referred to in paragraph 14(vi) above, *NS* is concerned with adults, not unaccompanied minors, as was *MSS*. *E* is concerned with children but in the context of a Hague Convention abduction. Whilst that too is concerned with determining the jurisdiction in which an issue is to be resolved, the issue is a private one between parents in conflict, not one of international protection from persecution in a third country. The similarity with the present case is no more than superficial.

15. It was common ground before Davis J and it remains so before us that, in Dublin II, Article 6 is a comprehensive provision in relation to unaccompanied minors so far as the hierarchy of criteria is concerned in the sense that Articles 7 – 14 do not apply to them. Accordingly, if a child comes within Article 6, he is not subject to the provision that "the first Member State with which the application for asylum was lodged shall be responsible for examining it" (Article 13).

16. The centrepiece of the rival submissions about the contextual construction of the second paragraph of Article 6 is Article 5.2. The linguistic point stressed by Mr Knafler is that there is significance in the use of the wording "first lodged" in Article 5.2 not being repeated in the second paragraph of Article 6 where the wording is simply "has lodged". If the intention had been to refer to the Member State in which the minor had first lodged an asylum application, it would have said so in terms. There are attractions in this submission. Moreover, if the intention had simply been to put the unaccompanied minor without family members in the same position as an adult, there would have been no need to add the second paragraph to Article 6.

17. Article 5.2 is a difficult provision with or without reference to the second paragraph of Article 6. It is not part of the hierarchy of criteria which begins at Article 6. It seems to us that its purpose is temporal. Wherever there is a determination of "the Member State responsible", it will be on the basis of the situation, *viz* the factual matrix, which obtained at the time when the asylum seeker first lodged his application with a Member State. In the present case, if Mr Knafler is right, that would require the Secretary of State to approach the determination on the basis of the situation which obtained when the appellants made their applications in Italy and the Netherlands.

18. When one considers the purpose underlying Article 6, two points are obvious. The first is that in the hierarchy of criteria unaccompanied minors have first place. The second is that, as originally drafted, the single paragraph accorded protection to unaccompanied minors with family in another Member State by express reference to their best interests. If an unaccompanied minor with family is treated by reference to his best interests regardless of how many asylum applications he has made, it is

difficult to see why one without family, who may be equally vulnerable, should not have the criteria modified to meet his presumed best interests. It may be thought his interest is in an early decision which would usually be facilitated by consideration of the most recent application in the State where the minor now is. The submission on behalf of the Secretary of State treats the unaccompanied minor without family in the same way as an adult with the effect that his only prospect of having his application considered in his current State is if that State chooses to derogate under Article 3.2. We say "chooses" because derogation is a matter of discretion.

19. It is beyond dispute that Dublin II and the Proposal which preceded it, in common with the earlier Dublin Convention, proceeded from the default position that the responsible State for the determination of asylum will be the one in which the application was first made, subject to exceptions, and that one of the main objectives is to counter the abuse of serial applications. In Dublin II, Article 4 serves this purpose. However, it is not axiomatic that this purpose should be applied equally to adults and to unaccompanied minors who have no family members within the EU. The latter group is not particularly large. In the six years up to 2009, minors removed from the United Kingdom by reference to Article 6 numbered between 25 and 80 in five of the years and 103 in 2005. If anything, the more recent trend was downwards. The figures (which come from a Ministerial answer in Parliament on 5 March 2010) do not distinguish between minors with and without family members elsewhere in the EU, nor do they say how often the Secretary of State has used the power to derogate pursuant to Article 3.2. It can be safely inferred that, for geographical and other reasons, the United Kingdom will more often be the final rather than the first place of application. It seems to us that, in relation to this relatively small cohort, it is at least as likely (to put it no higher) that the late introduction of the second paragraph in Article 6, following on from a "best interests" test in the first paragraph, was intended to have a protective element. After all, Article 6 always placed the unaccompanied minor within its scope as first in the hierarchy of criteria.

20. In his submissions, Mr Kovats places reliance on the general principles set out in Articles 3 and 4 and he refers to a number of the recitals. However, the general principles cannot override specific provisions, properly construed, and, for our part, we do not find that the recitals point inexorably to the Secretary of State's construction. The references to "a clear and workable method" (recital (3)) and "the objective of the rapid processing of asylum applications" (recital (4)) do not necessarily support his case.

21. It seems to us that the first question we must confront is whether the Secretary of State's construction, which was supported by Davis J, is one which we can accept "with complete confidence" (the words of Sir Thomas Bingham MR in *R v International Stock Exchange of the United Kingdom and the Republic of Ireland, ex parte Else (1982) Limited* [1993] QB 534, 545D) such that it is *acte clair*, obviating the need for a reference pursuant to Article 267 of the Treaty on the Functioning of the European Union. This is a question upon which we have sought and received further written submissions since the hearing of the appeal. Mr Kovats rightly reminds us that the test under Article 267 is whether we consider that a decision on the question "is necessary to enable [the Court] to give judgment". We are also mindful of the injunction not to refer questions that are merely hypothetical or which lack the necessary factual foundation: Case C-355/97, *Landesgrundverkehrsreferent*

der Tiroler Landesregierung v Beck, [1999] ECH I-4977, at paragraphs 18-27. Although it is the case that these appellants are now to have their applications for asylum considered substantively in this country, it is common ground and we have accepted that we should proceed to judgment. The issue is one of hard-edged law. The necessary factual foundation is no more and no less than that the appellants were at the material time unaccompanied minors without family members anywhere in the EU. Moreover, there is still a live issue between the parties in the form of a claim for damages in the case of BT. In our view, the construction issue at the centre of this litigation cries out for resolution because, if the appellants are correct in their construction, there would need to be an EU-wide change of State practice. Notwithstanding the volume of contrary argument and practice stacked against them, we tend to the view that their construction may well be correct. In any event, we do not regard the contrary view to be *acte clair*. This is a serious issue in relation to which administrative simplicity and the welfare of unaccompanied minors who lack family support pull in opposite directions.

22. For these reasons, we shall refer a question to the CJEU pursuant to Article 267. This is a course supported by the Intervener. We are content to pose the question in the form suggested by Mr Kovats:

> "In Regulation 343/2003/EC 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-country national (OJ L50 25 February 2003, pl), where an applicant for asylum who is an unaccompanied minor with no member of his or her family legally present in another Member State has lodged claims for asylum in more than one Member State, which Member State does the second paragraph of Article 6 make responsible for determining the application for asylum?"

23. Very helpfully, Mr Kovats has also furnished a draft Reference. It will need to be refined in the light of our judgments and with input from Mr Knafler and his team. We invite counsel to try to agree a draft Reference, leaving it to the Court to resolve any areas of disagreement.

Issue 2: consultation with the receiving Member State

24. In reality, this issue only arises if the appellants are ultimately unsuccessful on the first issue. Moreover, Davis J expressed misgivings about dealing with it at all in the absence of a proper factual foundation, although he was eventually persuaded to do so. As we consider it to be at least possible that the appellants will ultimately prevail on the first issue, we are all the more disinclined to deal with the second issue at this stage. In truth, the parties are not so very far apart. The case for the appellants is that prior to any removal of an unaccompanied minor pursuant to Dublin II, the Secretary of State is under a duty in each and every case to consider whether the minor's welfare would be promoted by the proposed removal and, in particular, to consult with the proposed receiving State about the specific reception arrangements. Mr Knafler submits that such a duty arises under both EU law and in domestic law.

25. In this Court, Mr Knafler played down his case in EU law on this issue. We are quite satisfied that it raises no question necessitating a reference to the CJEU. The real dispute is about the position in domestic law. In its narrowed down form, the question becomes whether section 55 of the Borders, Citizenship and Immigration Act 2009 imposes a duty as wide as that contended for by Mr Knafler or whether, by reference to *R (Nasseri) v Home Secretary* [2010] 1 AC 1, the Secretary of State can start from the assumption that, in relation to removal to an EU Member State, that Member State will have arrangements that are at least ECHR-compliant, unless and until she is provided with evidence to the contrary.

26. Section 55 states:

> "(1) The Secretary of State must make arrangements for ensuring that –
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom …
>
> (2) The functions referred to in subsection (1) are –
>
> (a) any function of the Secretary of State in relation to immigration, asylum or nationality;
>
> (b) any function conferred by or by virtue of the Immigration Acts or an immigration officer …
>
> (3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State …"

The Secretary of State has given such guidance in the form of *Every Child Matters: Change for Children (*November 2009).

27. It is common ground that section 55 is in play when the Secretary of State is engaged in a decision about the removal of a child under Dublin II – for example when considering whether to remove or to exercise the power to derogate under Article 3.2. In *Nasseri* (above), Lord Hoffmann said (at paragraph 41):

> "Other member states are entitled to assume – not conclusively presume, but to start with the assumption – that other member states will adhere to their treaty obligations. And this includes their obligations under the European Convention to apply Article 3."

28. He also said (at paragraph 39):

> "…if the complaint is not about refoulement but about the conditions under which a returned asylum seeker would be held in Greece, that should be taken up with the Greek authorities and, if unsuccessful, before the European court by way of

> complaint against Greece. It was not a basis for proceedings against the United Kingdom."

Mr Nasseri was not a child and section 55 did not fall to be considered. It was a case about Article 3 of the ECHR and Part 2 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants etc) Act 2004.

29. Since this case was before Davis J, the Supreme Court has handed down judgments in *ZH (Tanzania) v Home Secretary* [2011] 2 WLR 148, which was concerned with the proposed removal of a mother to Tanzania in circumstances in which her two children, who were British citizens, would reasonably be expected to follow her. The issue fell to be considered in the context of Article 8 of the ECHR. It was conceded on behalf of the Secretary of State (see paragraph 24 of the judgment of Baroness Hale) that the section 55 duty applies

> "not only to how children are looked after in this country while decisions about immigration, asylum, deportation or removal are being made, but also to the decisions themselves. This means that any decision which is taken without having regard to the need to safeguard and promote the welfare of any children will not be 'in accordance with the law' for the purposes of Article 8.2."

30. It is difficult to read *ZH (Tanzania)* other than as meaning that a statutory duty to have regard to "the need to safeguard and promote the welfare" of a child requires the decision-maker to treat the best interests of a child as "a primary consideration", albeit not as "the primary consideration", still less as "the paramount consideration" (per Baroness Hale, at paragraph 25).

31. It seems to us that this gives some support to the approach to a Dublin II removal of a child contended for by Mr Knafler. It makes it more difficult to limit the active duty under section 55 to EU cases in which "cogent grounds" are placed before the Secretary of State so as to prompt the need to consider conditions in the receiving State (Davis J, at paragraph 82). However, like Davis J (at paragraph 83), we suspect that, in practice, it will often make no difference which is the correct approach. If there is cause for concern, the competently represented child should have the opportunity to prompt consideration on the basis of identified grounds.

32. In the absence of established relevant facts in these cases and in circumstances in which the issue no longer arises in relation to the three appellants (whose cases are now receiving substantive consideration in this country) and in which it may become of reduced significance in future cases if the CJEU rules in favour of the appellants on the referred question, we have come to the conclusion that it is not appropriate to say more about Issue 2 at this stage.

Conclusion

33. It follows that, so far as the construction of the second paragraph of Article 6 is concerned, we shall make the Article 267 reference to which we have referred, subject to further assistance from counsel as to its precise terms. On the second issue, we say no more and make no order at this stage.