R (on the application of SA & AA) v Secretary of State for the Home Department (Dublin – Article 8 ECHR – interim relief) IJR [2016] UKUT 00507 (IAC)

Upper Tribunal
Immigration and Asylum Chamber

Notice of Decision

The Queen on the application of
SA
AA
by their litigation friend AA2

Applicants

v

Secretary of State for the Home Department

Respondent

Before The Honourable Mr Justice McCloskey, President

Application For Interim Relief

[Edited and approved version of decision given orally on 11 October 2016]

Having considered all documents lodged and having heard the parties' respective representatives, Mr M Fordham QC and Ms M Knorr, of counsel, instructed by Bhatt Murphy Solicitors, on behalf of the Applicants and Mr D Manknell, of counsel, instructed by the Government Legal Department, on behalf of the Respondent, at a hearing at Field House, London on 11 October 2016.

(i) *By virtue of the decision of the Court of Appeal in ZAT & Ors the duty to admit a person to the United Kingdom under Article 8 ECHR without adherence to the initial procedural requirements of the Dublin Regulation requires an especially compelling case.*

(ii) The question of whether the best interests of a child will be promoted by delay is an intensely fact sensitive one.

(iii) The grant of interim relief can be formulated in such a way as to respect the role and responsibilities of the relevant authorities of a foreign state.

(iv) Protection of the best interests of a child should not be outweighed by considerations of judicial comity.

Decision: Interim Relief is granted in the terms of [36] hereof

McCloskey J

(1) These are two conjoined challenges brought by two Syrian children who are siblings aged 15 and 11 respectively. I emphasise at the outset that both have been granted the protection of anonymity.

(2) This is an urgent application for interim relief. It is brought in circumstances where the pre-litigation phase, which was triggered by the first of several letters written by the Applicants' solicitors, occupied a period of approximately one month, beginning in early September 2016. The proceedings themselves, which incorporate an application for urgent consideration, were initiated precisely one week ago.

(3) Both the Tribunal and, indeed, the parties' representatives are working to very tight timescales for a variety of reasons. Furthermore there is the self-evidently important fact of the ages and circumstances of the two Applicants. I have for these reasons decided to give my decision today without any delay and I shall express it in relatively compact terms.

(4) It is appropriate to highlight at the outset that the factual matrix of these proceedings both illustrates and fortifies the truism that every case of this species is unavoidably and intensely fact-sensitive.

(5) I shall summarise the legal framework as follows. At this stage of the proceedings the Applicants do not assume the burden or confront the hurdle of having to make good their entitlement to substantive final relief. This is, rather, an application for interim relief which falls to be determined by the application of well established principles. These have not been contentious, unsurprisingly, in the parties' respective submissions.

(6) The first of the two governing tests requires the court to make an assessment of whether there is a real prospect of the Applicants establishing at the stage of a notional future substantive hearing that theirs is an especially compelling case under Article 8 of the Human Rights Convention. That is the test which has been formulated by the Court of Appeal in two successive decisions, first in CK (Afghanistan) [2016] EWCA Civ 166 at [52] and affirmed in the recent Court of

Appeal decision in Secretary of State for the Home Department v ZAT & Ors [2016] EWCA Civ 810.

(7) There are, as was stated in CK (Afghanistan) at [9], two competing legal imperatives in play. The first is the vindication of the Dublin régime which at inter-state level distributes between the Member States of the European Union responsibility for the determination of the asylum claims of third country nationals. The second is the vindication of individual claims of right (in this instance under Article 8 ECHR) which might be denied by the rigorous enforcement of the Dublin régime.

(8) In cases of this kind it is also essential to grapple with the need for urgent judicial and host state intervention (on the one hand) and the advantages, merits and imperatives of full adherence to the Dublin Regulation régime (on the other).

(9) The Court of Appeal's decision in ZAT confirms the correctness of this Tribunal's conclusion that Article 8 ECHR can in principle provide the basis of a remedy in this kind of case provided that the threshold of an especially compelling case is overcome. This is an elevated and challenging threshold.

(10) This threshold has to be calibrated in the context of an application for interim relief as my formulation in [6] above makes clear. This involves posing the question of whether the Applicants have demonstrated that they have a real prospect of establishing at the notional trial stage that theirs is an especially compelling case under Article 8 of the Convention.

(11) The Court of Appeal decision in ZAT confirms, without exhaustive prescription I would emphasise, that certain factors may be material. These are, first, a litigant's health (in that case it was mental health); second, the status of unaccompanied minor; and, third, the speed at which the Dublin Regulation process is capable of providing the ultimate goal of family reunification.

(12) It is trite to add that factors of this kind will invariably be case and context sensitive. Each of these factors, as Mr Fordham QC submitted, is present in the instant case. Each has to be examined in the prevailing context and by reference to the evidence. At this juncture, I say the following about the evidence which has been assembled. It is, as it was in ZAT, unilateral and untested. I have considered it critically and at its reasonable zenith. I have also taken into account the Respondent's approach to it in both written and oral argument, which was essentially (and properly) a stance of neutrality. Having done so, I find no reason to doubt or reject the central tenets of the evidence before the Tribunal.

(13) First there is the expert psychiatric evidence, to which I now turn briefly. This is constituted by, firstly the reports of a professional psychiatric social worker. These deal with the two Applicants. In the first of these reports it is recorded that in interview the older Applicant stated that she often thought of throwing herself under a moving vehicle. Continuing, she indicated that since arrival in France her thoughts of suicide had increased. She recounted in layman's language (and this

is my formulation), that she and her brother had become increasingly dejected and depressed with the passage of time.

(14) The word "suicide" was also used by the younger of the two Applicants when he was interviewed. These interviews must be considered in their context, which includes the history given by both Applicants of horrific experiences during their early years in Syria. The professional assessment was that there was a risk of suicide in both cases, higher in that of the older Applicant. This was supported by the fact that the older Applicant had a suicide plan, frequent suicide impulses and continuing opportunities to execute the plan. This report also adverts to the risk of accidental harm on a freestanding basis. Turning to the future, the expert opinion expressed is that the children's ability to trust would deteriorate further and make it even more difficult for them to receive psychological support in the future in the event of the status quo continuing for them.

(15) The second report is that of Dr Fairweather, who specialises in child and adolescent psychiatry. At this stage she had not assessed either of the Applicants directly. She reviewed the evidence, in particular the aforementioned report of the professional psychiatric social worker. Having done so, she expressed the clear opinion that the risks identified in the report of the former needed to be urgently managed for the safety and wellbeing of both children. Continuing, she considered it evident that these risks could not be adequately managed in their prevailing circumstances. She went on:

> *"Only reunification with family members in the UK whom they are familiar with and trust will result in reduction in this risk and improvement in their mental health. They will not be able to begin the process of recovery and rehabilitation until they are somewhere which is both objectively safe and free from danger and they perceive as safe."*

(16) Dr Fairweather then considered the objective reality that some measures could be put in place in France but explained why these would be manifestly inadequate and would not make any difference to the children's subjective state. She continues:

> *"It is important to highlight that admission to a psychiatric facility in France would do very little to reduce their risk of suicide because it would only provide environmental containment but not alter the reality of their situation."*

She expressed the same view with regard to psychotropic medication. She stated:

> *"My strong opinion is that the immediate intervention needs to be reunification with their family members. They will then need their mental health re-assessed following this."*

(17) Dr Fairweather, in a later report, has endorsed unreservedly the more comprehensive assessment of the two Applicants during the most recent phase of these proceedings, culminating in lengthy reports dated 09 October 2016. The more striking of the reports is that relating to the older girl. The author

considered, inter alia, how this girl was coping. She suggested that she appeared to be coping but only superficially, sustained only by her sense of duty in caring for her younger brother (the second Applicant) and her ever receding hope of reaching the United Kingdom thereby achieving family reunification. The author further observes that it is not clear for how long the first Applicant can sustain this hope.

The report continues:

> *"Her mental health will deteriorate the longer the situation continues. She is at high risk of developing a co-morbid depressive disorder with increase in her suicidal ideation. It is very likely that in this state she would at least attempt suicide. It is clear that she has access to her contemplated method of suicide that is jumping in front of a car. She is also at risk of accidental death when attempting to come to the United Kingdom unlawfully. Therefore the impact of delay in transfer is extremely serious with the potential of life threatening consequences."*

The report further states:

> *"While an improvement in her accommodation circumstances here in France may to a limited extent benefit her in terms of the risk to her safety and physical health it will do nothing to address other risks to her such as her vulnerability and risk of suicide. It will not be sufficient to address her mental health, developmental, social, cultural and educational needs. Therefore improvement in her living conditions will not be adequate to meet her needs."*

The unqualified terms in which this series of opinions is expressed are unmistakable and striking. The strong and unequivocal expert recommendation is reunification with an adult member of the family as quickly as possible.

(18) I juxtapose this evidence with that provided by the relevant other family member. This is the older brother, aged 30, who is living in the United Kingdom. I take into account in particular what he has said in relation to the two Applicants. This evidence also is expressed in balanced and measured terms and at this early stage of the proceedings I have no reason to doubt or reject its main elements. He too speaks of increasing desperation on the part of the two Applicants and the progressive and rapid erosion of their faith, trust and hope, all of which (I observe) are critical ingredients in their extremely fragile and vulnerable mental condition. In summary, the expert psychiatric evidence is powerful, unambiguous and compelling.

(19) I turn to consider the second of the factors which was recognised in ZAT as capable of being material in the application of the overarching test. For the purposes of this interim relief application there is sufficiently clear evidence before the Tribunal that the Applicants are who they claim to be, namely they are Syrian nationals who have fled their country; they are aged 15 and 11 respectively; they are siblings; there is no parent or parental figure in their lives; they are, therefore unaccompanied minors; and their older brother sibling, who is

a mature adult now aged 30, is living in the United Kingdom and is capable of accommodating them.

(20) The third of the three factors which I have summarised, also an intensely context specific one, places the spotlight on the evidence of the Applicants' interaction with the French Dublin Regulation process and arrangements to date. In contrast with certain other cases (including ZAT) the Tribunal is not involved here in an abstract exercise of examining general evidence of this nature. Rather these Applicants have interacted directly with the system and there is evidence of what form this has taken, how far it has progressed and how efficient and effective it has been for them.

(21) The evidence establishes, amongst other things, that there was created at the beginning of June 2016 a pilot project. It is recorded in the report of the Red Cross that this was in effect a state sponsored project. It involved the organisation FTDA (France Terre d'Asile). The project entailed the French government mandating this organisation to receive and issue registrations to claim asylum and to book appointments at the Préfecture. This gave rise to an agreement between FTDA and the charitable organisation known as Safe Passage. The project period was expressly stated to be 01 June to 01 July 2016. There is unequivocal evidence that the two Applicants were assigned to this project.

(22) In the event the project availed the Applicants nothing. Their cases had got nowhere when this short lived project came to an end on an unspecified date in early July 2016, marking the end of the first of two identifiable phases. While the reasons for this failure are unclear, this is the indelible fact. In particular, there is no clear evidence, direct or inferential, that the Applicants or any of their family members or representatives are to be faulted for this regrettable state of affairs.

(23) I pause to observe that, notably, four weeks was identified by the experts and professionals of these two organisations and, I add, those with whom they were presumably interacting on behalf of the French and United Kingdom governments as the appropriate period for the processing of a Dublin Regulation application in France and the registration of a take charge request with the relevant English authorities. This related to the cohort of persons in France who were seeking family reunification in the United Kingdom.

(24) I turn to examine the second important phase, which begins with the conclusion of the pilot project in early July 2016 and continues to date. During this period the Applicants' interaction with the French system and French authorities has included three events in particular.

(25) First, on 27 August 2016 the appropriate French court made an order directing the relevant Préfecture to appoint an administrator. This is an essential step in the case of minor children who are seeking refuge under the Dublin Regulation system in France. Second, in a context of non-compliance, on 14 September 2016 enforcement proceedings against the Préfecture were initiated. Third, and most recently, on 04 October 2016 the administrator was appointed.

(26) The most recent evidence of the process is contained in an email, the author whereof is a French government official. He is described as the Head of the Dublin section in the Département de l'Accueil à la Procédure d'Asile (the French Government Department of Asylum). On 04 October this official reported that the administrator had been appointed that morning. The communication continues:

> *"The minors should be received very soon and the request to the UK Dublin unit will follow."*

That is updated still further by the most recent statement of the Applicants' solicitor, Mr Scott. This was signed and dated yesterday, 10 October 2016. This refers to an "open" appointment with the administrator on yesterday's date, consequent upon the first direct contact between the children and the administrator the previous day. Mr Scott, elaborating, explains that he checked throughout the course of yesterday in order to ascertain what progress had been made at the Préfecture. The last contact indicated that the children were still there. It was not clear whether registration had taken place. At this point the evidential matrix ends.

(27) I return to what the senior French government official said in the electronic communication of 04 October 2016:

> *"The minors should be received very soon and the request to the UK Dublin unit will follow."*

It is difficult to confidently interpret the first part of the statement and I decline to speculate on what has been lost here in translation. However, on any showing, this statement resolves and reduces to a bare assertion of further and future progress in vague, unparticularised and aspirational terms. It contains no timetable, even indicative.

(28) In these circumstances I consider the need for swift and decisive judicial adjudication unmistakable. One option for this Tribunal today is to wait and see. I debated that with the parties' representatives. Having done so, I have concluded that this would entail an abdication of judicial responsibility which, in my judgement, is not justifiable. I elaborate on this as follows.

(29) I take into account Mr Manknell's submission relating to the intervention of a judicial organ of this state in the circumstances prevailing. Contrary, however, to what he submitted such intervention will <u>not</u> entail any trespass or intrusion vis-à-vis the French judicial authorities. They have, for the moment, completed their function and the relevant authorities involved at present are the administrative authorities.

(30) Mr Manknell further pointed out what was stated in <u>ZAT</u> by the Court of Appeal relating to the advantages which may be conferred on children by delay rather than speed. That argument is well made in the abstract. However, the evidence in these proceedings, including the electronic communication of 04 October 2016,

contains clear indications of how the Applicants' best interests have been assessed to date and will ultimately be assessed. The clear implication of the email is that this case is a proper and suitable candidate for a take charge request in circumstances where the only responsible adult in the equation is their 30 year old brother in the United Kingdom. This analysis is reinforced by the psychiatric evidence in its totality and the two witness statements of the Applicants' older brother. Furthermore, this issue can be adequately addressed in a suitably tailored judicial order (*infra*). Accordingly the submission from Mr Manknell on this issue cannot be accepted.

(31) Further, and in any event, the passage in the decision in R (Dudaev) v Secretary of State for the Home Department [2015] 3 CMLR 37, at [67], upon which Mr Manknell relied, does not in my judgement apply in the present context. In this passage Burnett LJ expressed reservations about the approach of the claimants. He described it as one which in effect sought to set up the England court as a forum for appealing the decisions of the Swedish Migration Court and Court of Appeal. That is very far removed from the present litigation context. I need not, therefore, elaborate on the question of English judicial interventions which might be considered to upset the delicate balance of judicial comity between the courts of two advanced western democracies in circumstances where the best interests of a child are crying out for a particular course of judicial action. This interesting question will, foreseeably require more detailed consideration in a suitable future case. Given that the Court of Appeal in Dudaev did not purport to prescribe any absolute prohibition, it is possible in the abstract to conceive of cases where the overwhelming best interests of children would not be sacrificed on the altar of judicial comity. That issue, however, simply does not arise in the present case.

(32) Nor does [95] of ZAT operate to defeat the Applicants' quest for interim relief for the reason that they have invoked and pursued the French system. Further, and in any event, Mr Manknell's submission on this discrete issue overlooks both the general nature of the principle formulated by Beatson LJ in this passage and the illustrative character of the illustration provided (which, as it happens, was a real case before this Tribunal, proof that truth is indeed frequently stranger than fiction). I consider it clear that the Court of Appeal deliberately avoided exhaustive prescription in the words chosen.

(33) The centrepiece of the Applicants' case is the psychiatric evidence. This evidence establishes beyond peradventure that any further delay in family reunification for them could have the most appalling consequences for either or both of them. There is no more appalling consequence than the loss of their lives. I simply cannot countenance a judicial decision which would permit the continuance, rather than the abatement, of this stark and awful risk in circumstances where abatement can be achieved. It is this factor which ultimately tips the balance in the application of both of the tests for interim relief. It outweighs the argument, which could be a powerful one in a different case and in a different context, that judicial restraint rather than judicial intervention is the appropriate course because the French Dublin Regulation process appears to be well advanced. This

argument is defeated by the stark, compelling and uncompromising terms of the expert psychiatric evidence.

(34) In the circumstances outlined above, I consider that the options for this Tribunal, a public authority under Section 6 of the Human Rights Act 1998, resolve to the single course of action of acceding to this application for interim relief. I would add that, quite properly, the parties' submissions concentrated almost exclusively on the first of the governing tests, namely that of real prospect of ultimate success. In the particular context of these proceedings, no separate consideration of particular substance arises in the application of the second test, namely the balance of convenience. There is nothing before me to suggest that the application of this test inclines towards refusing the Applicants' quest for interim relief.

(35) Finally, I observe that the potentially interesting question of the applicability of the state's positive duty to protect life under Article 2 ECHR has not arisen in the present case. This may conceivably be canvassed in a suitable future case.

(36) Having considered the submissions of the parties' respective counsel I make the following order:

Order

(i) The Applicants are not to be identified and will be known as SA and AA respectively. Similarly, in furtherance of their anonymity protection their Litigation Friend will be anonymised as AA2.

There shall be no publication of any information of any kind identifying or having the potential to identify either the Applicants or any of their family members.

(ii) The Secretary of State shall admit the Applicants to the United Kingdom.

(iii) I reserve costs.

(iv) There will be liberty to apply.

(v) I will, if desired and appropriate, relist the case for further consideration on a date to be agreed between the parties.

(37) I wish to elaborate on [ii] of the order. This is an order framed in mandatory terms. In subjecting the Secretary of State to the obligation to admit the Applicants to the United Kingdom no qualification has been added. In particular, no timetable or time limit has been ordered by the Tribunal. The significance of this in the present case is that the Applicants are under the supervision and care of the French authorities. This order does not speak directly to them and can have no consequences for the discharge by the French authorities of their legal obligations to the Applicants under French law. The final assessment of the

Applicants' best interests is respected and accommodated in this way and is further reinforced by the provision for liberty to apply, which will accommodate all future eventualities.

Signed: _____

The Honourable Mr Justice McCloskey
President of the Upper Tribunal
Immigration and Asylum Chamber

Dated: **11 October 2016 (orally)**

13 October 2016 (transcribed and approved)