Neutral Citation Number: [2013] EWCA Civ 778

Case No: C4/2012/1041

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)
(Mr. Justice Mitting)
[2012] EWHC 1207 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 28th June 2013

Before :

LORD JUSTICE MOORE-BICK
LORD JUSTICE UNDERHILL
and
SIR RICHARD BUXTON

- -

Between :

THE QUEEN (on the application of AR (Iran))	**Claimant/ Appellant**
- and -	
SECRETARY of STATE for the HOME DEPARTMENT	**Defendant/ Respondent**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Mr. Hugh Southey Q.C. and Mr. Paul Turner (instructed by **Barnes Harrild & Dyer**) for the **appellant**
Mr. Alan Payne (instructed by the **Treasury Solicitor**) for the **respondent**

- -

Judgment

Sir Richard Buxton :

The facts; and some elements of the law

1. The Judicial Review application in which the decision of Mitting J under appeal was made relates to a dispute as to which of the UK or Belgium should adjudicate on AR's application for asylum. No findings have been made as to the facts of the case, the major part of which depend on evidence by the appellant.

2. AR is a national of Iran, who on 18 December 2003 made a claim for asylum in Belgium. That event is vouched for by the Belgian authorities. He has not said why the claim was made in Belgium: he may have had particular reasons for choosing that country, or it may be that he was using an agent who simply dumped him there. The claim was refused on 14 January 2005, nothing being known of the reasons for refusal, or of what AR had been doing in the interim period in Belgium. In the meantime, however, according to what AR said in interview in 2011, he had already left Belgium in December 2004, travelling with brief stays in Italy and Greece to Turkey, whence he returned to Iran. He then gives a history of recurrent persecution in Iran, which eventually caused him to leave that country in December 2010, and eventually to arrive in the UK on 19 March 2011.

3. AR claimed asylum in the UK on 21 March 2011. In interview he revealed the existence of the earlier claim for asylum in Belgium, and that was confirmed by consultation of the European fingerprint data base [EURODAC]. That earlier application, in another member state of the EU, was considered by the Secretary of State potentially to engage the arrangements under Council Regulation 343/2003, colloquially known as Dublin II. Subsequent developments in the case cannot be understood without reference to that authority.

4. The basic principle of Dublin II is that there should be a common EU policy on asylum, with member states applying the same principles: so that a third-country national seeking asylum in the Union should receive the same treatment irrespective of the member state in which he makes his application. As an important corollary of that principle, any asylum application should be considered in only one country of the Union. Chapter III of Dublin II sets out a hierarchy of special cases to determine which member state should examine an asylum application, none of which apply here, and then provides by article 13 that when no responsible member state can be otherwise identified the application will be examined by the first state with which that application was lodged. By Article 16, paragraph 1(e) the state in which the claim was first lodged is obliged to " take back" any third country national who is in the territory of another member state without permission. By article 16.3 that obligation ceases if the third country national had left the territory of the member states (i.e. has left the EU area) for a period of at least three months.

5. Also relevant to the EU system for dealing with applications for asylum is Council Directive 2005/85, known as the Procedures Directive. An English immigration lawyer reading through those provisions may be forgiven for thinking that they do not go beyond existing domestic practice; and indeed this is the first case of which I am aware in which it has been argued that implementation of the UK's rules on immigration was unlawful solely on the basis of a breach of the Procedures Directive.

However that may be, the two provisions of that Directive with which we will be concerned in this case are article 6.2, which says that

> Member states shall ensure that each adult having legal capacity has the right to make an application for asylum on his/her own behalf;

and article 25.1, dealing with inadmissible applications and therefore derogating from article 6.2, that excludes from the Procedures Directive

> cases in which an application is not examined in accordance with Regulation (EC) No 343/2003.

That exclusion is reinforced by recital 29 to the Procedures Directive which says:

> This Directive does not deal with procedures governed by Council Regulation (EC) No 343/2003 of 18 February 2003 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.

6. Against that background I return to the history.

7. AR, not then with the benefit of legal advice, was interviewed on 21 March 2011, having been warned that return to Belgium was under consideration. He gave the history summarised in paragraph 2 above. When asked whether he had any evidence to show that he had returned to Iran he replied "You get fingerprinted for your bills in Iran". No questions were asked to elucidate the meaning of this statement, and he was not asked whether he had, or whether he could produce, any such or other documentary evidence.

8. On 23 March 2011 the UK requested Belgium to accept responsibility for the case. Belgium replied on 5 April 2011 asking whether it could be proved that AR had not left the [EU] area, and for any information about his places of residence or whereabouts. The UK replied on 11 April 2011, setting out what is agreed to have been a fair account of what AR had said in interview, but pointing out that the applicant was unable to provide any evidence to substantiate his alleged return to Iran; that the detail in which he had described his journey in 2004/2005 contrasted with his difficulty in specifying the details of his journey in 2011; and that he claimed to have returned to where his life was allegedly in danger from his political activities and where he believed that the government would kill him. The letter concluded:

> Applicant's accounts do not therefore seem credible. There is no evidence to suggest that he has left the territory of the Member states. He was only encountered when he went to the Asylum Screening Unit in Croydon to claim asylum.

9. Belgium responded on 14 April 2011 saying that the Belgian authorities accepted the transfer of AR "according to Article 16.1.e of the Dublin Regulation." That was a factually correct decision because (see paragraph 4 above) AR, having lodged an application in Belgium, was now in the UK without permission. On the same day, 14

April 2011, the Secretary of State informed AR that Belgium was a country to which he could properly be sent under the provisions of Dublin II, and that it was proposed to send him there, removal directions then being set for 18 May 2011. The present Judicial Review proceedings were issued just before the latter date, the relief sought being to set aside the Secretary of State's decision of 14 April 2011. The ground for that relief that is relevant to this appeal was that the case was not in fact covered by Dublin II, as the appellant had evidence, which he wished to produce in the application, to demonstrate that he had in fact been in Iran, and therefore outside the EU, for more than three months after his original encounter with the Belgian authorities. The involvement of the latter had therefore expired through the operation of article 16.3 of the Regulation.

Some further aspects of Dublin II; and herein of individual rights

10. The objective of Dublin II, as set out in for instance recitals (3) and (4) to the Regulation, is to provide a clear and workable method for determining the member state responsible for the examination of an asylum application. Recital (4) states that the method

> 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 asylum applications.

11. The Dublin II system depends on the assumption between member states that each will properly respect that state's international obligations springing from their adherence to the (Geneva) Refugee Convention. As the CJEU put it in Case C-411/10 *NS*, at paragraph 83 of its Judgment:

> At issue here is the raison d'être of the European Union and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System, based on mutual confidence and a presumption of compliance, by other Member States, with European Union law and, in particular, fundamental rights.

That assumption is only displaced where there is evidence of systemic failure in either refugee or human rights law in the receiving state. That was the issue in *NS* itself. There is no suggestion that that issue arises in our case.

12. It was conceded before Mitting J, and the concession was maintained before us, that Dublin II does not give rise to rights for an individual but regulates the responsibility between states for dealing substantively with asylum claims. That is well established in the jurisprudence of this court, by which we are bound. In *R (MK(Iran))* [2010] 1 WLR 2059[42] Carnwath LJ, with the agreement of Sedley and Smith LJJ, said that Dublin II "is concerned with the allocation of responsibility as between states, not the creation of personal rights."

13. That position is confirmed in the jurisprudence of the CJEU. The status of Dublin II, and division of labour between member states in dealing with asylum claims that

involve more than one state, is with great respect very clearly set out by A-G Trstenjak in paragraph 29 of her Opinion in Case C-620/10 *Kastrati,* cited with approval by her colleague A-G Jaaskinen in paragraph 58 of his Opinion in Case-C4/11 *Puid*. It is true that the Advocate-General's view on the substantive question in that case, as to the effect of a withdrawal of an asylum application before a decision had been made on transfer, was not adopted by the CJEU, but that does not affect the value of her general guidance:

> The asylum procedure consists of two phases, that is to say the determination of the responsible Member State after an asylum application has been lodged for the first time in accordance with Regulation No 343/2003 and, subsequently, the actual examination, which is incumbent upon the Member State responsible in each case and in the context of which minimum standards in accordance with Directive 2005/85 must be observed. Two phases of the asylum procedure are thus involved, which must be distinguished from one another. That consideration was already the starting point for the first considerations on the drafting of Directive 2005/85 and was then also reflected in recital 29 in the preamble to that directive, which expressly provides that Directive 2005/85 does not deal with procedures governed by Regulation No 343/2003. Accordingly, the objective of Regulation No 343/2003 is not to create procedural safeguards for asylum seekers in terms of the determination of conditions for the acceptance of their asylum applications. Rather, that regulation primarily governs the allocation of the duties and tasks of the Members States amongst themselves. Against that background, the provisions of Regulation No 343/2003, which concern the duties of Member State in regard to asylum seekers subject to the Dublin procedure, relate in principle only to the conduct of the procedures concerning the relationship of Member States amongst themselves or are aimed at guaranteeing conformity with other instruments of asylum law legislation.

14. As a footnote to the foregoing I mention that out of consideration for the applicant we spent more time than we should have done in attempting to read the runes of a question put to the CJEU by the Austrian Asylgerichtshof in case C-394/12, and handed to us more or less as we walked into court as hot from the press after a hearing before the Grand Chamber. The opacity of the question was only increased by the fact that neither we nor the applicant's advisers who sought to rely on it knew anything about the substance of the case, or of the hearing before the Grand Chamber. It is possible, and no more than that can be said, that the Austrian court may have wished to disturb or question some of the existing jurisprudence in this area. However, the present state of the law, and that which we have to apply, is as set out above.

The hearing before Mitting J

15. It will not be disrespectful to the judge if I do not set out a full account of the hearing in the court below, because as will be seen the case before us very substantially

departed from, or on a more benevolent view amplified, the issues that Mitting J had been asked to consider.

16. Faced with the agreed barrier that Dublin II creates no rights for the asylum-seeker, Mr Southey QC based his argument on an assertion that Dublin II did not apply at all in the present case. The complaint was rather that that the Secretary of State's decision of 14 April 2011, to return AR to Belgium, had entailed a breach of article 6.2 of the Procedure Directive. His reiterated contention was that article 6.2 gave any adult having legal capacity a right to make an asylum application. AR therefore had a right to make an application for asylum wherever in the EU he happened to find himself, in this case in the UK. That right could only be lost if, under the terms of article 25.1, the application had not been examined in accordance with Dublin II. In the present application the failure to examine the case in the UK had not been "in accordance with" Dublin II because the obligation prima facie imposed on Belgium by articles 13 and 16.1 of Dublin II to examine the claim had ceased under article 16.3 by reason of the Appellant's asserted absence for more than three months from the territory of the EU. That assertion, if correct, showed that removal to Belgium would infringe the Appellant's Community right created by article 6.2 of the Procedures Directive. Therefore article 47 of the Charter of Fundamental Rights required that assertion to be examined and, if well founded, an appropriate remedy to be provided by a tribunal, in this case the Administrative Court.

17. Mitting J considered, rightly, that if the argument were correct it would in practice lead to challenges by individuals to the allocation of responsibility between member states, in a way that the Community legislator had not envisaged. However, he rejected the claim not on grounds of policy but on the basis of the wording of the Procedures Directive. Pointing out that paragraph 25.1 in terms excluded cases that had not been examined in the state to which the second application had been made, he continued, at paragraph 17 of the Judgment:

> As a matter of fact in this case, the United Kingdom has not examined the claimant's application. It has declined to do so under the Dublin II Regulation. It is not the decision of the United Kingdom to accept or refuse an obligation under Article 13 of the Dublin II Regulation. That is the decision of Belgium. What the claimant would be seeking to do would be to challenge in a British court the decision of the Belgian authorities to accept their obligation under Article 13.

The appeal to this court

18. The application for permission to appeal to this court was considered on paper by Sir Stephen Sedley. He was clearly unimpressed by the argument, based on the decision of 14 April 2011, that had been addressed to Mitting J, but he did not refuse permission for that argument to be pursued, and it remains on our agenda. Sir Stephen however continued:

> If one focuses on the underlying public duty, it is arguable that the letter of 11.4.2011 is a justiciable decision of HMG and was directly responsible for Belgium's acceptance. It appears to have been assumed-I believe correctly-that justiciability can put

> factuality in issue and make evidence admissible on JR. At all events, this is a necessary sequel to the present argument. Whichever way it is approached, if a justiciable UK decision can be shown to be responsible for the proposed removal, Mitting J's otherwise compelling objections fall away.

19. The applicant made only very brief further submissions in advance of the hearing to explain how he would wish to amplify this, significantly different, way of pursuing the case. With the indulgence that the court customarily advances to asylum-seekers we permitted that explanation to be developed through dialogue between the court and Mr Southey. That is not a course that would necessarily be followed in other cases. It seemed to the court that Sir Stephen, by his reference to the potential justiciability of what may have been a decision made by or contained in the letter of 11 April 2011, may have had in mind that that decision or that letter was vulnerable in English, domestic, administrative law terms. Mr Southey, however, was adamant that that was not his case. His challenge was still to the decision of 14 April 2011, on the basis of Community law, though recognising that the letter of 11 April 2011, itself defective in Community law terms, was part of the challenged decision.

20. That approach poses some difficulties, but the whole of the appellant's case can be fairly reviewed by considering it under two related but different heads:

    I Article 25.1 of the Procedures Directive did not apply in this case because the failure of the UK to examine the asylum claim had not been in accordance with Dublin II. The UK was therefore obliged under article 6.2 of the Directive to examine the appellant's claim. That is, broadly, the argument that was put to Mitting J.

    II Even if argument I fails, because the decision had in form been made under Dublin II and therefore article 25.1 took the case outside the Procedures Directive, the Dublin II decision was flawed and had to be set aside because of procedural irregularities in or behind the letter of 11 April 2011 that had set the Dublin II process in motion.

Argument I: On the facts that the Appellant says he should be permitted to establish, this is not a Dublin II case

21. It should first be observed that the right to make an application for asylum in the state in which the applicant finds himself, in the terms of article 1A(2) of the Geneva Convention is outside his country of nationality, does not derive from article 6.2 of the Procedures Directive. That right is the correlative of the obligations that any state has been under since subscribing to the Geneva Convention many years before the EU was thought of, and 35 years before the Procedures Directive was adopted. Article 6.2 merely recites that existing right as a precursor to detailed rules as to how the application once made should be examined. The references to Dublin II in article 25.1 and recital 29 of the Procedures Directive (see paragraph 5 above) are merely a precautionary reminder that under the Community legislation a member state will be exempted from the obligation to examine an application if Dublin II applies to that application. That in itself makes it very unlikely that the appellant is correct in placing emphasis, as he has to, on the particular language used in the Procedures

Directive to record the relationship between Dublin II and the prima facie obligation of the state in which the applicant is located to examine his application.

22. Second, as to language, the phrase "in accordance with" is very general, and as used by a Community legislator can well mean something like applying or acting under a provision, as opposed to what the Appellant wishes to say, of conforming to the strict rules of that provision. In the present case, as Mitting J pointed out, the member states concerned did follow the procedure laid down by Dublin II. Belgium accepted responsibility for the case. It was for that country to judge whether it had sufficient information to enable it to decide on that course. If it had been dissatisfied with the Secretary of State's information it could have refused the case, or asked for clarification. But once the Belgian state had accepted the case it would have been inconsistent with the one country principle that is the bedrock of Dublin II for the English authorities, or the English courts, to have intervened further. The case became one, in the terms of article 25.1, in which the UK authorities had, as a matter of fact, not examined the application in accordance with Dublin II.

23. Third, when Miss Elizabeth Laing QC, sitting as a Deputy High Court judge, refused permission to apply for Judicial Review in this case she did so on the basis of article 4 of Regulation 1560/2003, which lays down detailed procedures for the application of Dublin II. Article 4 provides:

> Where a request for taking back is based on data supplied by the Eurodac Central Unit [as in the present case]…the requested Member State shall acknowledge its responsibility unless the checks carried out reveal that its obligations have ceased under….Article 16(3) of [Dublin II]. The fact that obligations have ceased on the basis of those provisions may be relied on only on the basis of material evidence or substantiated and verifiable statements by the asylum seeker.

The position when Belgium received the request of 11 April 2011 was that there was no material evidence and no substantiated statements by the asylum seeker that article 16(3) applied in his case. Belgium was therefore under an obligation to acknowledge its responsibility for his case; and it was that obligation, and not an exercise of discretion or grace by Belgium, that founded Belgium's agreement to take the appellant back.

24. Despite some encouragement by the court, both parties were reluctant to pursue this issue, though neither of them gave us any reason why the court should not do so: apart from the complaint by the appellant, to which we will come, that the Secretary of State should have assisted the appellant to produce such information. For my part, Miss Laing's reasoning points to another and conclusive reason why the procedure in this case entirely followed the requirements of Dublin II.

25. Fourth, although the present argument was adopted to avoid the fact that Dublin II does not create individual rights, it does not succeed in that objective. In order to exclude Dublin II from the case the appellant had to show that (although the member states concerned were perfectly content with the allocation of responsibility between them) that allocation had nonetheless been improper. He could only have locus to litigate that point, as he seeks to do in this application, if he had some sort of right

created by Dublin II. But the guidance of A-G Trstenjak quoted in paragraph 13 above makes clear that Dublin II does not create procedural safeguards for asylum seekers but governs the allocation of duties and tasks between the member states.

Argument II: The Dublin II decision was vitiated by procedural errors in and around the Secretary of State's letter of 11 April 2011

26. The argument based on the mutual decision of the UK and Belgium of 14 April 2011 having failed, as it did before Mitting J, the Appellant had to fall back on the argument that defects in the letter of 11 April 2011 nullified that decision. If the Secretary of State was under a duty to the appellant when and before writing her letter of 11 April 2011, then there would plainly be room for argument as to whether, faced with a largely incomprehensible statement about available evidence, she should nonetheless have pressed the appellant to see if he could improve his case. I doubt whether any such obligation would be consistent with the emphasis placed in relation to Dublin II on swift decision-making, but that would be for discussion.

27. First, however, what would be the source of that duty? Mr Southey relied on article 41 of the Charter of Fundamental Rights of the European Union, which provides, as expanded by jurisprudence, that in matters relating to Community law citizens have a right to be heard "before any individual measure which would affect him or her adversely is taken". That and a contingent obligation to make proper enquiries was, Mr Southey said, this case.

28. Mr Southey was encouraged in that direction by the Judgment of the CJEU in Case-277/11, *MM v Ireland*, an asylum case, in which the court held, at its paragraphs 83-89, that the right derived from Article 41 to be heard and make views known effectively during an administrative process of an applicant for asylum

> must apply fully to the procedure in which the competent national authority examines an application for international protection pursuant to rules adopted in the framework of the Common European Asylum System.

That case, however, had nothing to do with Dublin II. It concerned the substantive examination of an asylum application, the second phase of the process described by A-G Trstenjak. And as to the possibly more general application of the observation of the court there are two difficulties for the appellant.

29. First, article 41 only applies to measures that would adversely affect the citizen, that is, are sufficiently important to him to justify the obligation imposed on the state party. When we asked Mr Southey how the letter of 11 April 2011 adversely affected the appellant, he said that it led to his case being heard in Belgium when he would prefer it to be heard in the UK: because he had already received a negative decision in Belgium. That will not do. The whole point of the Dublin II arrangements is that they assume that it will not matter to the outcome where in the Community an asylum application is heard. If (see paragraph 11 above) the member states cannot pick and choose amongst themselves as to the validity and reliability of particular state systems, *a fortiori* an individual applicant cannot do so.

30. Second, and in any event, in a system such as that of Dublin II, which makes so great a distinction between the full justiciability of the second phase of the asylum process and the threshold allocation of responsibility of the first phase, it is very unlikely that article 41 obligations were intended to apply to that first phase.

31. This part of the argument therefore fails in any event, but it is also fatally undermined by the fact that Dublin II does not create individual rights. The rights that the appellant asserts under this argument are said to be inherent in or to spring from the application of Dublin II to his case. The whole point of the Dublin II jurisprudence is that while member states may complain of defects in procedure the asylum seeker may not do so.

Conclusion

32. We were asked to refer various questions to the CJEU, but this case, once the facts are understood, turns on established principles of Community law. I would therefore not make any reference and would dismiss this appeal. If my Lords are of the same mind the way is now clear for the removal of AR to Belgium, where the substantive consideration of his asylum application, which under the principle of prompt attention to asylum matters should have taken place two years ago, can now be put in hand.

Envoi

33. I have reached these conclusions strictly as a matter of construction of the EU legislation. Since, however, this is at least potentially an asylum case, I venture to add a number of further general considerations which, while not determining the outcome, strongly suggest that that outcome properly respects both the UK's important obligations under the Refugee Convention.

    1. The Appellant has lost none of his rights as an asylum seeker. His right as such is, but is only, not to be returned to the country of persecution. He has no right to be sheltered from that persecution in any particular country.

    2. The Appellant objected to removal to Belgium on medical grounds, but those grounds were rejected by the Secretary of State, a decision that has not been appealed. Apart from the Appellant's wish to choose his own tribunal, there is no reason demonstrated, and none that could be conceived, why his case has to be considered in the UK rather than in Belgium.

    3. The enquiries that the Appellant wishes the Secretary of State to have made would be quite inconsistent with the principles of Dublin II, which emphasise swift decision-making to allocate cases between countries that, as members of the EU, are assumed to be equally capable of making proper asylum decisions. As Sir Stephen Sedley put it, justiciability can put factuality in issue. To decide that the letter of 11 April 2011 was justiciable would lead to the elaborate enquiries that Dublin II eschews.

    4. That swift decision-making is strongly in the interests of the asylum-seeker, whose principal (legitimate) interest is in having his substantive claim rapidly decided. The two-year delay in the consideration of his substantive claim occasioned by this litigation has not well served that interest of AR.

5. Full faith and credit between member states, including the courts of those member states, does not permit or encourage further enquiry into or disregard of decisions of fellow member states, as in this case the decision of the Belgian authorities.

6. And the Appellant will be able to prove to the Belgian authorities what happened to him in Iran, as part of the asylum claim that he retains full ability to pursue in Belgium.

Lord Justice Underhill :

34. I agree.

Lord Justice Moore-Bick :

35. I also agree.