19 February 2014

PRESS SUMMARY

R (on the application of EM (Eritrea)) (appellant) *v* Secretary of State for the Home Department (respondent) [2014] UKSC 12
On appeal from [2012] EWCA Civ 1336

JUSTICES: Lord Neuberger (President); Lord Kerr, Lord Carnwath, Lord Toulson, Lord Hodge

BACKGROUND TO THE APPEALS

This appeal concerns the circumstances in which an asylum seeker should be sent back to the country where he or she first claimed asylum if it is claimed that such a return would expose the asylum seeker to the risk of inhuman or degrading treatment, which is forbidden by article 3 of the European Convention on Human Rights (ECHR).

At this stage the appellants' account of the risk that they face must be assumed to be true. They are an Iranian national (EH) and three Eritrean nationals (EM, AE, and MA) who have come to the United Kingdom via Italy. In each of their cases Italy is the country responsible for processing their asylum applications according to the relevant EU law, Council Regulation 343/2003 (commonly known as Dublin II). The basis of EH's asylum claim is that he was tortured as a political prisoner in Iran. He is now severely psychologically disturbed and needs treatment. He claims that if he were returned to Italy he would be homeless and without treatment. EM, AE, and MA were left homeless and destitute in Italy. AE and MA, who are women, claim that they were repeatedly raped there, despite having been recognised as refugees. MA has come to the UK with two of her children; a third was separated from the family during the attempt to make it here and has not been found. AE's experiences have traumatised her, and she is suicidal at the thought of being taken back to Italy.

Italy is one of a list of countries which is presumed by the United Kingdom to be safe for returning asylum seekers. The Home Secretary therefore must be satisfied that the appellants' claims that they will be subject to degrading and inhuman treatment are not 'clearly unfounded' if they are to be allowed to stay in the United Kingdom while they pursue their asylum applications. That is important to the appellants because of the threats to their well-being if they were returned to Italy.

The Home Secretary certified all of the appellants' claims as clearly unfounded because Italy was not in *systemic* breach of its international obligations to treat asylum seekers with dignity. The Court of Appeal considered that a systemic breach, rather than merely a breach, of those obligations was indeed required before the United Kingdom could decline to return an asylum seeker to Italy.

The Court of Appeal reached that conclusion on the basis of a decision of the Court of Justice of the European Union (CJEU), *NS (Afghanistan) v Secretary of State for the Home Department*. The CJEU is responsible for interpreting EU law, including Dublin II. However, the Court of Appeal read the decisions of the European Court of Human Rights (ECtHR) as requiring only a breach, rather than a systemic breach, of a person's human rights. The ECtHR is responsible for interpreting the ECHR, and belongs to a separate legal system established by the Council of Europe. By virtue of legislation in the UK, decisions of the CJEU are binding on UK courts, while decisions of the ECtHR need only be taken into account.

The Court of Appeal therefore felt bound to apply the CJEU case, as it understood it, over the ECtHR cases. Since it held that Italy was not in systemic breach of its duties, it found for the Home Secretary.

JUDGMENT

The Supreme Court unanimously allows the asylum seekers' appeals and remits all four cases to the administrative court to determine on the facts whether in each case it is established that there is a real possibility that, if returned to Italy, the claimant would be subject to treatment in violation of the Convention.

REASONS FOR THE JUDGMENT

The Court of Appeal was wrong to consider that only a systemic breach by the receiving country of its human rights obligations would justify not returning an asylum seeker to that country. The CJEU's judgment in *NS* had to be read according to the context in which it was given. While it did refer to a systemic breach, such a breach was well-established on the case's facts. The CJEU's focus was therefore not on the sort of breach that had to be established, but rather on EU member states' awareness of such a breach. There was therefore no warrant for concluding that CJEU's judgment was that there *had* to be a systemic breach; it only meant that a systemic breach would be enough. The CJEU was not calling into question the well-established test applied in human rights law, which is that the removal of a person from a member state of the Council of Europe to another country is forbidden, if it is shown that there is a real risk that the person transferred will suffer treatment contrary to article 3 of the ECHR **[56–58]**.

Indeed, the EU requires its laws to be interpreted in accordance with fundamental rights, such as those guaranteed by the ECHR. And beyond that it is clear that the EU scheme of asylum law in general is to be applied in a way that respects the dignity of asylum seekers, and ensures a basic minimum standard of support.

Council Directive 2003/9/EC (commonly known as the Reception Directive) requires that member states provide asylum seekers with at least enough to sustain their health and ability to subsist. And under Council Directive 2004/83/EC (the Qualification Directive), those granted refugee status are not to be discriminated against in terms of access to welfare support, accommodation, and so on **[59–60]**.

These duties coalesce with the positive obligations on members of the Council of Europe who are also member states of the European Union. Article 4 of the EU Charter of Fundamental Rights contains a human rights protection in equivalent language to article 3 of ECHR. The UK, as an EU member state, is obliged to observe and promote the application of the Charter whenever implementing an instrument of EU law. There was no dispute before this Court that the positive obligations under article 3 of ECHR include the duty to protect asylum seekers from deliberate harm by being exposed to living conditions (for which the state bears responsibility) which cause ill treatment. And in *R (Limbuela) v Secretary of State for the Home Department* the House of Lords held that article 3 ECHR could be engaged where asylum seekers were 'by the deliberate action of the state, denied shelter, food or the most basic necessities of life' **[62]**.

Where, therefore, it can be shown that the conditions in which an asylum seeker will be required to live if returned under Dublin II are such that there is a real risk that he will be subjected to inhuman or degrading treatment, his or her removal to that state is forbidden. The evidence about breaches of a positive obligation is more likely to concern systemic failings, but a focus on such failings is only by way of establishing that there is a real risk of a breach of article 3, rather than a distinct hurdle to be surmounted **[63]**.

References in square brackets are to paragraphs in the judgment.