Case note: *EM Eritrea and Others* [2014] UKSC 12

Any asylum practitioner is likely to come across cases where, rather than investigate the merits of an asylum claim, the Home Office seeks to return their client to a third country elsewhere in the European Union deemed under the Dublin II Regulation to have prior responsibility for assessing the claim, most often because that was the first territory in which they were fingerprinted or recorded as having claimed asylum having crossed the borders into the Member States. Any international system of co-operation in the assessment of asylum claims, in order to have integrity, needs to have some level of trust in the processes and decision making of fellow States, and so it is perfectly sensible for participants to proceed from an assumption that each of them respects the standards of the system as a whole. But when particular countries experience large scale arrivals that test their capacity to breaking point, or are unable to cater for the particular needs of returnees, what approach should national courts take in assessing whether the ensuing problems involve a breach of Article 3 ECHR?

The issues arises in the context of the judgment of the CJEU in *NS v Secretary of State for the Home Department* [2011] EUECJ C-411/10 and C-493/10 at [86] which ruled that Member States may not transfer an asylum seeker to the Member State responsible under the Dublin II Regulation where they cannot be unaware that systemic deficiencies in the asylum procedure and reception conditions there amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment.

The Supreme Court in *EM Eritrea and Others* [2014] UKSC 12 has now answered this question in its keenly awaited ruling addressing the test for compatibility of returns under the Dublin II Regulation with European Union law, and in doing so has overturned the decision below. The Court of Appeal had found that even if there were difficulties within an asylum reception system which created a substantial risk of incompatibility with asylum seekers' human rights, this could only bar returns under Dublin II where the problem arose due to a systemic failure. However, the Supreme Court disagrees, and in a single opinion by Lord Kerr with which the other Judges unanimously concur, it has now been made clear that in third country cases, as in all others, the relevant question is whether there is a real risk of the minimum level of severity being traversed. Identification of a systemic failure is one route by which this may be demonstrated, but it is by no means a necessity in every case.

Whilst there is a presumption that fellow Member States comply with their responsibilities vis-á-vis fundamental rights, says Lord Kerr, this does not "extinguish the need to examine whether in fact those obligations will be fulfilled": and the presumption must never stifle the presentation and consideration of relevant evidence. And, although UNHCR evidence is of special importance given the organisation's unique and unrivalled expertise in asylum law, Member States may nevertheless acquire knowledge of the possibility of inhuman and degrading treatment via other mediums. As was submitted by UNHCR at the hearing, just because UNHCR had not called for a halt of returns to Italy, this did not mean the agency had given Italy "a clean bill of health".

The decision applies both to asylum seekers and refugees, notwithstanding the potential differences between the legal norms bearing on their cases. Thus both an asylum seeker

without any meaningful ability to access accept reception conditions, and a person unable to find adequate integration conditions having been granted international protection, both benefit from the same approach, albeit that it might be expected that in general those granted status will be able to rely on rights afforded them under the Qualification Directive [75]-[79].

What does this mean in practice? In future Dublin cases, Italian or otherwise, it will be essential to evaluate all the facts of the case, including any individual characteristics which might make an asylum seeker more vulnerable. The Supreme Court did not look at the evidence for itself, and so the question of the adequacy of Italy's reception conditions for asylum seekers remains moot: a group of cases has been identified to test the issue, presently listed to be heard together before a High Court Judge after 1 May 2014. And even that may not be the last word on the subject: the Grand Chamber of the European Court of Human Rights heard *Tarakhel v Switzerland* on 12 February 2014 and will in due course express its own view on the situation.

Lord Kerr adds that "The Dublin Regulation and the Reception Directive must be interpreted and applied in conformity with fundamental rights", which may well indicate that it would be wrong to extend the principle that Dublin II does not generally confer individual rights to challenge allocations of responsibility between Member States so as to prevent asylum seekers from raising arguments based on Article 15 of Dublin II, addressing humanitarian dependency.

In the future, if running a challenge based on reception and integration conditions, advisable steps are to:

a. Take a statement which clearly specifies the historic treatment of the asylum seeker in the third country, and establishes their vulnerability – read the statement against the known procedures in that country so that it makes sense in context - Medical evidence in support (psychiatric or psychological assessment) should also be obtained if relevant;

b. Ensure you are aware whether your client was in the third country merely an asylum seeker, a person recognised as needing international protection (of course if they were street homeless in the third country or left it very quickly after claiming asylum there, they may find this out only after leaving the country, eg when the Home Office makes enquiries from here), or whether they are a failed asylum seeker there: it is very hard to see how the final class of applicant can benefit from challenges to reception conditions because the Strasbourg Court does not recognise any duty on states to alleviate poverty for persons not lawfully present in a country, so such an argument could only ever be run where you have very powerful evidence of, not only poor reception conditions, but of status determination procedures which are unreliable;

c. Locate relevant country evidence from ECRE/ELENA, UNHCR, local NGOs etc (you may be able to get assistance if you contact the national ELENA co-ordinators (google "elena co-ordinators" to find the list) – see also the useful website at www.**dublin**-project.eu which provides details of national procedures and the latest legal authorities from different national courts., addressing both the adequacy of reception conditions and the availability of effective remedies in the third country both domestically and by way of application to Strasbourg

(there are reports on the compliance of particular countries with Rule 39 obligations, for example, by ECRE and other NGOs);

d. Argue by way of representations amounting to a human rights claim that personal facts plus country evidence equates to a viable Article 3 claim, see eg *M.S.S.*reiterating the well known case law of the ECtHR: “to fall within the scope of Article 3 the ill-treatment must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment and its physical or mental effects and, in some instances, the sex, age and state of health of the victim” [219].

As well as your correspondent, the legal team included Monica Carrs-Frisk QC, Raza Husain QC, David Chirico, Melanie Plimmer, Michael Fordham QC, and Marie Demetriou, instructed by Wilson Solicitors LLP, Sutovic and Hartigan, Switalskis Solicitors LLP, and UNHCR. The case could not have been taken so far without the assistance of NGOs across Europe, including the AIRE Centre and ECRE.

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5 March 2014