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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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AS's Application [2016] NIQB 88

IN THE MATTER OF AN APPLICATION BY AS FOR JUDICIAL REVIEW

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MAGUIRE J

Introduction

[1] The applicant in this case is presently aged 28 years. She is a Somalian national. She has a son who was born in October 2014. He is now aged 2.

[2] The background to the case is that the applicant alleges that she left Somalia in 2010 by herself after her husband had been kidnapped by Al-Shabaab. She made her way to Bari in Italy where she claimed, and later was granted, refugee status, the latter occurring on 12 April 2012.

[3] Due to various factors which will be outlined later, the applicant returned to Somalia in December 2013. She there resumed life with her husband but in February 2014 she says her husband was arrested by Al-Shabaab and she has not had contact with him since.

[4] On 2 June 2014 the applicant left Somalia and made her way to Belfast. There is no explanation in the papers about how she travelled to Belfast.

[5] When she arrived in Belfast she claimed asylum and was made subject to a screening interview on 5 June 2014. By this stage she was 5 months pregnant. During the interview she did not disclose that she had been granted refugee status in Italy in April 2012. Home Office checks, including fingerprint comparison with prints taken in Italy, however, revealed this to be the case. As a result, the Italian

Government was asked by the Home Office to deal with her case and on 19 November 2014 the Italian Government agreed to do so.

[6] The applicant's son was born in Belfast in October 2014.

[7] On 1 February 2015 the applicant was informed by the Home Office that she had been identified as a refugee in Italy and she was told that her asylum claim would not be examined in the United Kingdom and that Italy was viewed by the Home Office as a safe third country to which she would be sent.

[8] On 7 May 2015 the applicant's then solicitor made short representations to the Home Office on her behalf. These indicated that she had instructed her solicitor that there was inadequate accommodation in Italy for her and her child and that she had been "homeless and without social assistance in Italy previously".

[9] On 1 July 2015 a Notice of Removal was served on the applicant indicating that she would be removed to Italy from the United Kingdom on 30 July 2015.

[10] On 22 July 2015 the applicant's then solicitors made further representations on her behalf. A substantial response to these was sent by the Home Office dated 24 July 2015. This is the reasoned decision of the respondent which is impugned in these proceedings. However, in short form, the Home Office maintained its position.

[11] On 29 July 2015 the applicant's current solicitors sent a pre-action protocol letter to the Home Office.

[12] This judicial review was begun on 30 July 2015. As a result of the judicial review the applicant was not removed to Italy and remains in the United Kingdom.

[13] Leave to apply for judicial review was granted in this case in March 2016 after a contested hearing. At the hearing Mr McQuitty BL represented the applicant and Mr Henry BL represented the Home Department. The court is grateful to counsel for their helpful written and oral submissions.

Issues

[14] There are two issues in this judicial review. First, it is argued on the applicant's behalf that her removal with her son to Italy would be in breach of Article 3 of the European Convention on Human Rights in the absence of specific assurances from the Italian authorities as to how her son and herself would be dealt with and accommodated in Italy. Secondly, it is argued on her behalf that the decision of the Home Office which is impugned in these proceedings – that of 24 July 2015 – breaches Section 55 of the Borders, Citizenship and Immigration Act 2009.

[15] The impugned decision as noted is dated 24 July 2015. It is 9 pages long.

The applicant's previous stay in Italy

[16] One factual aspect which requires further consideration relates to the applicant's previous stay in Italy. This seems to have been from some time in 2010 to in or about December 2013. At this time her son had yet to be born.

[17] In the affidavits sworn in these proceedings it is indicated that the applicant had been granted refugee status in Italy in April 2012. It may be assumed that prior to that date, following her arrival in Italy, she was an asylum seeker. At some time she was provided with accommodation and lived in a two bedroomed house. Apparently, there were seven people living in the house. She states that at this time no food was provided and that conditions were very poor. The affidavits filed on her behalf, however, note that she obtained food daily from a local church. In these affidavits, it is alleged that after she had obtained refugee status she was told to provide for herself. It is said that she could not at any material time speak Italian. At some stage (unspecified) she said she was homeless and "as a result" she contracted gastric problems and suffered from internal bleeding. This resulted in a two day period in hospital in Bari in October/November 2013. It was in the aftermath of this, and by reason of help provided to her by the Somali community in Bari, she was able to return to Somalia.

[18] It would appear to be her case that because of these experiences she now feels she could not return to Italy with her son.

Refugee status in Italy

[19] As already noted, the applicant has enjoyed the above status in Italy since April 2012. There is no dispute that as a result of having it the applicant has the same or similar rights in Italy as an Italian national. These include rights to be provided with social housing, state benefits and welfare. Once her son grows older, he also will be entitled to be provided with state education.

Conditions in Italy for asylum seekers/refugees

[20] It cannot be doubted that in recent years the Italian system for dealing with asylum seekers and refugees has been operating under considerable strain. This has been because of the number of asylum seekers who have arrived in Italy by a variety of routes.

[21] The strain the system has been under has generated concerns about the human rights compliance of the Italian system, particularly in respect of Article 3 of the Convention.

[22] This compliance has been the subject of consideration in the European Court of Human Rights as well as in domestic UK courts. A considerable volume of jurisprudence in respect of it has emerged.

[23] The court in this case will not seek to set out in this judgment all of what has been said in that jurisprudence. Such authorities in Strasbourg as Mohammed Hassan v The Netherlands and Italy (Application 40524/10), Daybetgova and Magomedova v Austria (2013) 57 EHRR SE12, and Mohammed Hussein v The Netherlands and Italy (Application 27725/10), and recent United Kingdom authorities such as Tabrizagh and others v SSHD [2014] EWHC 1914 Admin, and MS v SSHD [2015] EWHC 1095 Admin have all been considered and provide considerable guidance. But it is with a variation on the general theme of the jurisprudence that this case is concerned, turning as it does on the special positon of children within the Italian asylum system. It is on this which the court will focus while not neglecting the general picture.

[24] The present case can, as far as the first ground of judicial review is concerned, be viewed as a Tarakhel case. Tarakhel is the leading authority on the position of children within the Italian asylum system and was decided by the Grand Chamber of the European Court of Human rights on 4 November 2014. It is reported at (2015) 60 EHHR 28.

[25] In the court's opinion, based on the decisions referred to at paragraph [23] above, the applicant would have no significant prospect of succeeding in impugning the Home Office's decision to remove her to Italy on grounds of breach of Article 3 were it not for the presence of her son.

[26] In these circumstances it is necessary to consider the decision in Tarakhel. The application for judicial review, it seems to the court, is dependent upon how the court views this authority.

The Tarakhel Case

[27] The key facts of this case relate to the position of a family originally from Afghanistan. The family consisted of a husband and wife and six children. It entered Italy and the members of the family sought asylum there but later they travelled elsewhere, eventually to Switzerland. The Swiss when presented with asylum applications by members of the family wished Italy to deal with them and, when Italy agreed to do so, wished to return the family to Italy.

[28] It was alleged by the members of the family that a return to Italy would breach their Article 3 convention rights. It was held by the European Court of Human Rights that there would be a violation of Article 3 if the family was returned without the Swiss authorities having first obtained individual guarantees from the Italian authorities that they (the family) would be "taken charge of in a manner adapted to the age of the children and that the family would be kept together".

[29] The underlying concern in the Tarakhel case was with the conditions at reception centres in Italy as they might affect the children. The principal problem identified in the judgment was the risk of the family being broken up. This risk is easy to understand in the context of a family where there were 6 children.

[30] It will be of assistance for the court to set out the key passages in the judgment of the court.

[31] At paragraph 93 of the judgment the court referred to the general principles governing expulsion of an asylum seeker by a contracting state in the context of Article 3. Concern would arise "where substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the receiving country". Of course any ill-treatment would have to exceed what was described as "a minimum level of severity" (paragraph 94). Article 3, however, could not be interpreted as obliging the state to provide everyone within their jurisdiction with a home. Nor did it entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living (paragraph 95).

[32] A factor which had to be kept in view was that an asylum seeker was a member of "a particularly under privileged and vulnerable population group" (paragraph 97).

[33] Paragraph 99 of the judgment is of some general importance as it dealt particularly with the position of minors. It stated:

> "… the court has established that it is important to bear in mind that the child's extreme vulnerability is the decisive factor and takes precedence over considerations relating to the status of illegal immigrant. Children have specific needs that are related in particular to their age and lack of independence, but also to their asylum seeker status."

[34] In Tarakhel the court looked separately at two aspects of the matter. First, it looked at Article 3 in the context of the asylum system as a whole – the general situation. Secondly, it looked at the applicant's individual situation.

[35] Between paragraphs 100-115 the general position was examined. At paragraph 103 the court referred to the presumption that a state participating in the "Dublin" system will respect the fundamental rights laid down in the Convention. This presumption was, however, rebuttable for example, where there were systemic flaws in the asylum procedure and reception conditions.

[36] Thereafter the court's judgment considered the overall situation for asylum seekers and examined such matters as slowness in the identification procedure; the capacity of the reception facilities; and the conditions in the available facilities.

[37] The court's conclusion on the general position was given at paragraph 115. It said:

> "While the structure and overall situation of the reception arrangements in Italy cannot therefore in themselves act as a bar to all removals of asylum seekers to that country, the data and information set out above nevertheless raise serious doubts as to the current capacities of the system. Accordingly, in the court's view, the possibility that a significant number of asylum seekers may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, cannot be dismissed as unfounded."

[38] The court pauses at this point as there is, in its mind, a level of doubt about how paragraph 115 is to be interpreted. The opening part of the first sentence appears to indicate that the European Court of Human Rights approach was not to see there being a bar to removals in the context of the structure and overall situation, but in the remainder of the paragraph, doubts are expressed about the current capacities of the system. The concerns, however, appear to be viewed in terms of possibilities.

[39] Between paragraph 116 and 122 the court moved on to look at the applicant's individual situation. In an important paragraph, the court said at 119:

> "The requirement of 'special protection' of asylum seekers is particularly important when the persons concerned are children, in view of their specific needs and their extreme vulnerability. This applies even when, as in the present case, the children seeking asylum are accompanied by their parents. Accordingly, the reception conditions for children seeking asylum must be adapted to their age, to ensure that those conditions do not 'create … for them a situation of stress and anxiety, with particularly traumatic consequences'. Otherwise, the conditions in question would attain the threshold of severity required to come within the scope of the prohibition under Article 3 of the Convention."

[40] The above passage leads into paragraph 120 which is to the following effect:

> "The possibility that a significant number of asylum seekers removed to that country may be left without accommodation or accommodated in overcrowded facilities without any privacy, or even in insalubrious or violent conditions, is not unfounded. It is therefore incumbent on the Swiss authorities to obtain assurances from their Italian counterparts that on their arrival in Italy the applicant will be received in facilities and in conditions adapted to the age of the children, and that the family will be kept together."

The Parameters of Tarakhel

[41] Tarakhel was decided by the European Court of Human Rights on 4 November 2014. There has, to the knowledge of this court, been no further European Court of Human Rights judgment on this particular issue involving children since.

[42] Tarakhel involved six children within a family of asylum seekers. It did not deal with those who already enjoyed refugee status, like the applicant in the present case.

[43] Since Tarakhel the Italian authorities have been in contact with "all Dublin units" by way of a circular letter of 8 June 2015. This letter from the Minister of the Interior is concerned with the subject of 'transfers to family groups with minors'. It enclosed a list of SPRAR projects which can provide reception facilities. These facilities, the letter states, are available through a framework and 'specific places have been reserved for family groups'. The letter contains the following paragraph:

> "Any checks of the above mentioned requirements lie with the competent authorities for the transfer to Italy of family groups …"

[44] The letter ends by offering the opinion that 'the requests by member states concerning the reception standards specifically ensured to family groups with minors can be regarded as fulfilled'.

[45] In an affidavit filed for these proceedings a senior caseworker in the Home Office observed that:

> "20. The applicant suggests specific assurances should have been sought in relation to her and her son prior to their removal to Italy.

21. The Home Office received from the Italian authorities a memorandum in June 2015 …

22. The memorandum refers to SPRAR, which is the protection system for international protection of applicants and refugees. It consists of a network of local bodies in which specific places have been reserved for family groups in local reception centres …

23. SPRAR provides immediate accommodation for a refugee, thus allowing them to apply for such housing once they get there …

24. The assistance provided under SPRAR is designed to cater for specific requirements on a continuous basis. They provide information, guidance, assistance and orientation measures by creating individual and family paths of socio-economic integration…The Home Office asserts that the assurances from the Italian authorities can be relied upon.

25. The SPRAR also provides specific paths for minors, Italian language courses, job training and projects aimed at ensuring family unity.

27. The Home Office considers that sufficient guarantees have been given in the circumstances, taking account of the presence of a child with the applicant and the circumstances particular to them.

28. There are no exceptional characteristics in the applicant's case. She will have enhanced status as a refugee upon arrival in Italy. She will have all of the rights and resources of an Italian national as well as the immediate SPRAR services available to her. There are no specific health concerns raised about the applicant or her son, but even if there were the Italian healthcare system would be able to cope with most eventualities. Again, any medical evidence the applicant feels should be supplied to the Italian authorities in advance can be arranged. It would also be easier to accommodate a single parent with one child than a

larger family group, such as the family of 8 in Tarakhel".

Assessment of Ground 1

[46] It seems to the court that the present case is materially different to the situation in Tarakhel. First of all, in Tarakhel the Strasbourg court was faced with a family of eight where there were six children. A central concern related to the family being split up. That consideration is unlikely to arise in the present case where the court is dealing with one adult, as the carer, and her son aged two.

[47] Secondly, the court is of the view that it should be slow to regard Tarakhel as applying generally in a case of the type now before it. This is because Tarakhel was plainly a case about asylum seekers and their treatment. That is not this case. In the present case, the position of the mother is that she has been given refugee status in Italy. As a result, her position is not as vulnerable as that of the asylum seeker. She effectively is treated by the Italian state similarly with Italian nationals. The vulnerability of the applicant in this case also, it seems to the court, must be viewed against the reality that she in fact lived in Italy for a substantial period of time before and indeed after she had obtained the status of refugee. While the applicant is critical of how she had been treated while in Italy before she returned to Somalia, this must be viewed with the context that there are limits on the extent of the obligations which are imposed on a member state of the Dublin system, as the Strasbourg court has recognised.

[48] Thirdly, since Tarakhel there has been available the general assurance of the Italian state which is directed particularly at the position of families and how they would be treated on arrival in Italy.

[49] All of the above goes to the issue of whether in the applicant's case there is a need for specific assurances from the Italians which was a feature of Tarakhel. This court does not believe that such assurances were or are required in the applicant's case.

[50] Support for this position may be found in a recent United Kingdom case: that of R (BG) v SSHD [2016] EWHC 786 (Admin) decided by Cranston J in April 2016. In that case the question arose as to whether a claimant and her child should not be returned to Italy because there would be a breach of Article 3.

[51] The decision in Tarakhel was expressly relied on by the applicant in that case and was reviewed by the court at paragraph [76] of the judgment. Having set out paragraphs 120 and 122 of the decision of the European Court of Human Rights, Cranston J noted that the issue of how the Dublin Regulation affected returns to Italy had much been considered in recent years. He cited the case of Tabrizagh [2014] EWHC 1914 and the case of MS [2015] (for citation see above). The judge also

referred to what appears to be the June 2015 memo which has already been discussed in this judgment.

[52] In all the circumstances Cranston J reached the clear conclusion that in his case there was no need for specific assurances and that no breach of Article 3 had been established.

[53] The court considers that it should follow the decision in BG.

Conclusion on Ground 1

[54] The court is unpersuaded that it is necessary for the Home Office to seek specific assurances in this case from the Italian authorities as to how her son and herself would be dealt with in Italy were she to be returned.

The Second Ground

[55] The second ground of judicial review in this case is an alleged breach by the Home Office of the terms of section 55 of the Borders, Citizenship and Immigration Act 2009.

[56] Section 55, so far as material, reads:

> "(1) The Secretary of State must make arrangements for ensuring that:
>
> (a) The functions mentioned in sub-section (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 sub-section (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 on 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 for the purpose of sub-section (1)."

[57] The genesis of Section 55 is said to lie in the provisions of Article 3 of the United Nations Convention on the Rights of the Child.

[58] The guidance alluded to at sub-section (3) above has since been published. It takes the form of a document called 'Every Child Matters: Change for Children'.

[59] The section 55 duty has been considered in a substantial number of cases. In ZH (Tanzania) [2011] UKSC 4, Lord Kerr said that:

> "Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them."

[60] In Zoumbas v Secretary of State for the Home Department [2013] 1 WLR 3690 Lord Hodge referred to 7 principles of significance in the context of section 55. These are set out at paragraph [10] of his judgment. For the purpose of these proceedings the following principles, in particular, are of relevance:

> "(2) In making that assessment the best interests of a child must be a primary consideration, although not always the only primary consideration; and the child's best interests do not of themselves have the status of the paramount consideration.
>
> (3) Although the best interests of a child can be outweighed by the cumulative effect of other considerations, no other consideration can be treated as inherently more significant.
>
> (4) … it is important to ask oneself the right questions in an orderly manner in order to avoid the risk that the best interests of a child might be undervalued when other important considerations were in play.
>
> (5) It is important to have a clear idea of a child's circumstances and what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations.
>
> (7) A child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent."

[61] The issue of the application of section 55 to the applicant and her son is dealt with in the letter of decision starting at paragraph 44, where the guidance is expressly referenced.

[62] At paragraph 45 the decision letter reads:

> "The circumstances of your client's case have been carefully considered. It is noted that your client and her daughter (sic) [this should read son] are due to be removed to Italy together. Your client's son is noted to have a cow's milk allergy – however this is not a serious medical condition. Should your child fall ill in Italy, he will be entitled to access healthcare whilst in Italy".

[63] At paragraph 46 the decision letter continues:

> "The fact that your client and her son would prefer to remain in the United Kingdom has been taken into account but this must also be weighed against the fact that your client had been granted refugee status in Italy and then proceeded to travel to the United Kingdom to lodge a second claim for asylum. Your client also attempted to mislead immigration officials upon arrival by failing to mention her asylum claim in Italy even when directly questioned".

[64] At paragraph 48 the author indicated that the applicant and her son would be entitled to receive support, including housing and medical care, from the Italian authorities. This paragraph also noted that there would be access to education for the applicant's child and similarly access to employment in later life.

[65] At paragraph 49 it is indicated that a balanced judgment of what can be reasonably expected in the light of the material facts had been arrived at by the Secretary of State. However:

> "…the duties set out in section 55…do not override the existing functions of the Secretary of State to maintain a secure border; therefore, while account must be taken of the child's best interests, this must be balanced against the Secretary of State's duty to maintain effective immigration controls. In this regard, the Secretary of State does not consider it would be appropriate to allow a person such as your client who (a) has shown a flagrant disregard for the United Kingdom's immigration controls and (b) has made an asylum application that is properly determinable in another European State, to remain in the United Kingdom".

[66] Mr McQuitty has criticised the way the decision as it relates to section 55 has been composed. He says that there was a failure by the author actually to determine

what would be in the best interests of the child and he claims that the letter reflects a situation where the decision maker is visiting the sins of his mother onto the child. Both aspects, in his submission, are contrary to the principles set out in Zoumbas.

[67] In the court's view it is important not to lose sight of the circumstances pertaining at the date when section 55 was being considered. At that time the applicant's child was very young – just a matter of a few months old. This was not a case where it would have been realistic to seek to discover what the child's views were as the reality at that time (and no doubt for some time to come) was and is that the child's interests are subsumed within the interests of his sole carer and mother. There could be no serious suggestion that the interests of the two were different or that the child's interests could be served by separation from his mother. It is in these circumstances that the decision acknowledges the mother's position (and by extension that of the child) of wanting to remain in the United Kingdom. In the court's eyes this was a sufficient recognition that this was the preferred option of both.

[68] Necessarily the author of the letter went on to consider factors which countervailed against the facilitation of the mother (and child's) preference. This is not unlawful and is permissible. The case is not, therefore, one in which the child's interests were not identified, or ignored, or not taken into account. The combined interests of the mother and child were not viewed as sufficient in strength to carry the day in view, in particular, of the mother's status as a refugee in Italy with the benefits this would bring with it.

[69] While there are references in the letter to the mother attempting to mislead immigration officials in the United Kingdom, these do not, in the court's view, lead to the conclusion that the treatment of the section 55 issue was unlawful on the basis claimed by Mr McQuitty. The remarks were aimed at the mother not the child but the court has difficulty with the notion that in this case the child, independently of his mother, was being damnified in any way by them.

[70] Looking at the decision read as a whole and bearing in mind that the decision maker does not have to set out in the decision every matter he has considered in detail, and given the limited factual information available in this case, the court is satisfied that the best interests of the child were not neglected and were considered. At base the interests of the child lay in staying in the care of his mother and in him being able to achieve this. This was inextricably linked to what the mother's preferences were. The mother was able to return to Italy with full refugee status and there was no evidence to suggest that there were particular reasons why the child would be disadvantaged if her mother took this course.

[71] The court does not consider that the treatment by the decision maker of the section 55 issue has rendered the decision unlawful on the facts of this case.

Conclusion

[72] As none of the grounds of judicial review have been made out, the court dismisses the applicant's application.