OUTER HOUSE, COURT OF SESSION

[2018] CSOH 76

P1149/17

OPINION OF LORD TYRE

In the cause

BH

Petitioner

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioner: Caskie; Drummond Miller LLP
Respondent: Pirie; Office of the Advocate General for Scotland

13 July 2018

Introduction

[1] The petitioner is a citizen of Iraq who arrived illegally in the United Kingdom on 21 December 2015 and claimed asylum. The respondent established that he had previously been in Bulgaria and made a request under the Dublin III Regulation to Bulgaria to take him back. That request was accepted on 8 January 2016. The petitioner's asylum claim was refused on 20 January 2016, and a third country certificate was issued. Directions for the petitioner's removal to Bulgaria were set. The petitioner sought judicial review of the decision to remove him on the ground that, because of the treatment of asylum seekers generally in Bulgaria, removal there would result in a breach of his rights under article 3 of

the European Convention on Human Rights. The removal directions were cancelled. The petition was, however, dismissed of consent on 21 June 2017.

[2] On 31 July 2017, the petitioner's agents wrote to the respondent requesting that the UK take responsibility instead of Bulgaria for determining the petitioner's asylum claim, on the ground that removal to Bulgaria would breach his article 3 rights. Different arguments (narrated below), this time specific to the petitioner, were relied upon. The respondent replied on 16 August 2017, refusing the application and certifying it as clearly unfounded. The effect of such certification was that the petitioner could not pursue an immigration appeal while he remained in the UK. On 11 September 2017, the respondent issued a notice to the petitioner intimating that he was liable for removal to Bulgaria without further notice for up to 3 months (though not within 7 days after the date of the notice). The respondent also, on the same date, issued a third country certificate, certifying that it was proposed to remove the petitioner to Bulgaria, and that in the respondent's opinion the petitioner was not a citizen of Bulgaria.

[3] On 28 September 2017, the petitioner's agents renewed his article 3 claim and sought cancellation of the removal notice. On 29 September 2017, the respondent refused the claim and again certified it as clearly unfounded, with the same effect as above.

[4] In the present application, the petitioner seeks (i) reduction of the decision to remove him to Bulgaria; (ii) reduction of the third country certificate issued on 11 September 2017; and (iii) reduction of the decision dated 29 September 2017 to certify his article 3 claim as clearly unfounded.

Removal of an asylum seeker to a "safe" country: the law

[5] Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2014 contains provisions for determining whether a person who has made an asylum claim or a human rights claim can be removed from the UK to a country of which he is not a national or citizen. Paragraph 2 lists countries regarded as safe countries for the purposes of both the 1951 Refugee Convention and human rights. Since 2007, Bulgaria has been included in the list.

[6] Paragraph 4 of the Schedule creates an exception to the rule in section 77 of the Nationality, Immigration and Asylum Act 2002 that no person can be removed from the UK while their claim for asylum is pending. The exception is where the person is to be removed to one of the listed "safe" countries, and the Secretary of State certifies that in his/her opinion the person is not a national or citizen of that state. Such certification is referred to as a third country certificate.

[7] Paragraph 5 of the Schedule sets out the consequences of the issuing of a third country certificate. One of those, in subparagraph 5(4), is as follows:

> "The person may not bring an immigration appeal from within the United Kingdom in reliance on a human rights claim… if the Secretary of State certifies that the claim is clearly unfounded, and the Secretary of State shall certify a human rights claim… unless satisfied that the claim is not clearly unfounded."

The petitioner's claim

[8] The reasons for the petitioner's claim that his article 3 rights would be breached by removal to Bulgaria were set out in his agents' letters dated 31 July and 28 September 2017. They may be summarised as follows. The petitioner had been brought to Europe by people smugglers. When he came to the attention of the Bulgarian authorities in October 2015, he was handed back by the police to the people smugglers, who kept him in inhumane

conditions and forced him to work for long hours unpaid in a warehouse. He escaped but was tracked by the people smugglers to Belgium and taken back by them to Iraq, where he was held to ransom until his family paid the fee that he had agreed to pay to the smugglers. He and his family subsequently paid a new agent for him to be brought back to Europe and in particular to the UK, where he arrived in the back of a lorry on or about 21 December 2015.

[9] The petitioner feared that if he were to be removed to Bulgaria, he would again face the risk of mistreatment and inhumane treatment at the hands of the people by whom he had been mistreated before. His past experience demonstrated that he could not rely upon obtaining protection from the Bulgarian authorities, who had been instrumental in handing him back to the people smugglers on the previous occasion. Three online press reports (from Sky News, Mail Online and Deutsche Welle respectively) were produced which narrated incidents of mistreatment of asylum seekers by Bulgarian police, as well as collaboration between police and people smugglers to move asylum seekers on from Bulgaria into Serbia for the next stage of their intended journey to western Europe. Those reports accorded with the petitioner's own experience and supported his claim that there was a real risk of treatment that breached article 3, were he to be returned to Bulgaria.

The decision letters

[10] As already noted, the respondent's letter dated 11 September 2017 certified that it was proposed to remove the petitioner to Bulgaria, and that in the respondent's opinion he was not a national or citizen of Bulgaria. The letter was in terms identical to the one that had been issued on 20 January 2016, prior to the petitioner's first application for judicial review.

[11] In her letter dated 29 September 2017, rejecting the petitioner's article 3 claim, the respondent first addressed the situation generally of asylum seekers in Bulgaria, noting that there was a "significant evidential presumption" that European member states would comply with their human rights obligations: cf *R* (*EM (Eritrea)*) v *Secretary of State for the Home Department* [2014] AC 1321, Lord Kerr at paragraph 64. Reference was made to ECHR cases confirming that a test of "systemic deficiencies" should be applied in determining whether the presumption of compliance had been rebutted. Neither the UNHCR nor any other internationally recognised NGO had stated that such deficiencies existed in the case of Bulgaria.

[12] The respondent then addressed the petitioner's personal circumstances, stating *inter alia*:

> "22. Your client claims he fears return to Bulgaria due to his alleged past experiences there. Past ill-treatment is not an indicator of future risks: see *Miruts Hagos v Netherlands and Italy* 9053/10 (27 August 2013).
>
> 23. It is considered that Bulgaria has a functioning policing and judicial system, and follows the rule of law. Accordingly, upon the reporting by a victim of a crime, the Bulgarian police will conduct a thorough investigation and, where sufficient evidence is gathered, prosecute those who carry out unlawful acts. A Bulgarian court will consider the evidence and, when necessary, punish those who are found guilty of such acts. The Bulgarian authorities also have a responsibility to protect complainants and witnesses as deemed necessary.
>
> 24. In relation to any future risk of ill-treatment your client fears, the existence of an adequate police enforcement system means that such ill-treatment would not breach ECHR Article 3…
> …
>
> 26. As set out in detail above, you have provided no evidence to suggest that the presumption that Bulgaria will comply with its legal obligations in this regard is rebutted in this case. On the information available, it is considered that your client will be able to access adequate support in Bulgaria…"

The respondent proceeded to certify the petitioner's claim under paragraph 5(4) of Schedule 3 to the 2014 Act as clearly unfounded, thereby preventing him from appealing to the FtT until after he had left the UK.

Argument for the respondent

Third country certificate

[13] On behalf of the respondent it was submitted that reduction of the third country certificate should be refused for two reasons. In the first place, reduction would serve no practical purpose because the previous third country certificate, dated 20 January 2016, remained and would remain extant. This certificate, which was in terms identical to the certificate dated 11 September 2017, had never been withdrawn or superseded. It was unclear why the fresh certificate had been issued but there had been no basis for a new exercise of the respondent's discretion as to whether to issue a third country certificate.

[14] In the second place, it was submitted that the petitioner's application in so far as relating to third country certification was time-barred. It was explained to me that the issue of time bar was a live one only if the petitioner insisted in his argument (contrary to, *inter alia*, the view of the Inner House in *MIAB* v *Secretary of State for the Home Department* 2016 SC 871) that the 6 month period for removal of the petitioner to Bulgaria was not suspended where removal directions were halted by administrative directions under article 27(4) of the Dublin III Regulation. If that argument were to prevail, then the 3 month period for bringing judicial review proceedings had begun to run on the expiry of 6 months from the date when Bulgaria had accepted the UK's take back request, ie on 7 July 2016. On the petitioner's hypothesis, that was when the real substance of his complaint arose. At any time thereafter he could have amended his first petition to include the present

complaints, and/or sought interim interdict against his removal. Such proceedings would not have been challengeable as premature. Nor was the 2016 certificate superseded by the identical 2017 certificate. The statutory 3 month time limit for raising judicial review proceedings could not be circumvented by persuading the decision-maker to repeat the decision complained of: *Wightman* v *Advocate General* [2018] CSIH 18 at paragraph 33. There were no grounds upon which the court ought to exercise its discretion to extend the 3 month time limit.

Certification of claim as clearly unfounded

[15] The test for whether a claim was clearly unfounded was whether on any legitimate view it would fail in an appeal to the First-tier Tribunal: *EM (Eritrea)*, above, paragraph 6. The tribunal would have to direct itself correctly in law, including applying the significant evidential presumption that Bulgaria would comply with its obligations under article 3. The presumption would not be rebutted if Bulgaria provided an effective domestic remedy for a threatened breach of the petitioner's article 3 rights. The tribunal could not legitimately find on the evidence in the petitioner's claim that the presumption had been rebutted because (1) the UNHCR had been closely monitoring developments in Bulgaria and did not consider that there was a real risk to asylum seekers there of suffering inhuman or degrading treatment, nor call on member states not to remove asylum seekers there; (2) considerable weight attached to the finding of Garnham J in *Khaled* v *Secretary of State for the Home Department (No 1)* [2016] EWHC 857 Admin that the FtT could not legitimately find that conditions for asylum seekers in Bulgaria breached article 3; (3) the evidence did not suggest a real risk of ill-treatment: there was no evidence that the petitioner would again take the smuggler route to Serbia, or that his earlier treatment by the police was more than

an aberration, or that the people smugglers would still be interested in him or aware of his return; and (4) there was no evidence that there was a real risk that the Bulgarian justice system would not provide the petitioner with sufficient protection. In these circumstances the test for certification as clearly unfounded was met.

Argument for the petitioner

Third country certificate

[16] On behalf of the petitioner it was submitted that the application in so far as seeking reduction of the third country certificate was neither academic nor time-barred. There was only one relevant and extant decision, namely that of 11 September 2017. Any attempt to challenge the previous certificate would have been opposed as premature. Although the September 2017 letter was in the same terms as the January 2016 letter, it was a fresh decision superseding the previous one. When issuing a third country certificate the respondent was exercising a discretion expressly recognised by the Dublin Regulation: she might decide that an asylum seeker who could be sent back to a third country ought rather to have his or her claim dealt with in the UK, in which case third country certification would not be made. Exercise of the discretion depended upon circumstances pertaining at the time of exercise, which might differ from those that had pertained at the time of the previous certification. In this case, those circumstances included the passage of time and the fact that the applicant was making an article 3 claim. In any event the real substance of the complaint arose not when the respondent notified the petitioner of third country certification, but rather when the petitioner was informed that he could henceforth be removed without further notice. If, however, the court were to hold that the 3 month time limit had expired

during 2016, it should exercise its discretion to allow the application to proceed outside the time limit.

Certification of claim as clearly unfounded

[17] It was not the case that removal of the petitioner to Bulgaria could not "on any legitimate view" constitute a breach of his article 3 rights. When deciding whether an asylum claim was capable of succeeding, it was customary to take the facts at their highest in the claimant's favour: *EM (Eritrea)* at paragraph 8. In effect the respondent was considering the relevancy of the application. Withdrawal of the UNHCR's previous recommendation against removal to Bulgaria did not necessarily equate to a clean bill of health. Although aberrations could be disregarded, systemic failure was not required if there were circumstances in which the system failed to operate satisfactorily to protect human rights.

[18] As regards the significance of the petitioner's previous experience, reference was made to Immigration Rule 339K, which stated that

> "the fact that a person has already been subject to persecution or serious harm… will be regarded as a serious indication of the person's well-founded fear of persecution or real risk of serious harm, unless there are good reasons to consider that such persecution or serious harm will not be repeated".

The respondent was bound, in accordance with *EM (Eritrea)*, to accept the petitioner's account of what had happened to him when he was last in Bulgaria. There was no material before the respondent to indicate that anything had changed, and no mention was made of any such material in the decision letter. The respondent had not been entitled to disregard her own rule, as she appeared to have done at paragraph 22 of the letter (above). An immigration judge would be entitled to find that there was no effective system in Bulgaria to

prevent harm by people smugglers. It was incorrect to assert that there was no evidence to rebut the presumption of compliance: that evidence consisted of the petitioner's previous experience, plus rule 339K and the absence of evidence of any change. In all of these circumstances the respondent had erred in certifying the claim as clearly unfounded, and that decision fell to be reduced.

Decision

Third country certificate

[19] I understood it to be accepted by counsel for the respondent that when exercising the power to certify in paragraph 4 of Schedule 3 to the 2014 Act, the respondent is exercising a discretion. I further understood him to agree with counsel for the petitioner that if, for whatever reason, the respondent considered that an asylum seeker's claim ought to be dealt with in the UK rather than in a country obliged under Dublin III to take back the claimant, the practical means of achieving that outcome would be to not issue a third country certificate. That being so, it seems to me that the petitioner is correct to characterise the letter of 11 September 2017 as a fresh exercise of the discretion, carried out against the background of the then prevailing circumstances. It is immaterial that in the present case the respondent did not in fact take into consideration anything that had not been considered when the January 2016 letter was sent. In my opinion, the decision in September 2017 to issue a third country certificate was a new decision, superseding the January 2016 decision. It follows that the January 2016 decision is no longer extant or capable of being founded upon by the respondent.

[20] The present case is not, in my view, analogous to *Payne* v *Secretary of State for the Home Department* [1999] Imm AR 489, to which I was referred. In that case, the Court of

Appeal held that a letter from the Secretary of State declining to alter his view in the light of additional information submitted did not re-start the time limit for bringing judicial review proceedings. Here the 2017 application was made on a different basis, after unsuccessful judicial review proceedings in relation to the initial certification. It was, in essence, a new decision by the respondent, albeit in exactly the same terms as the first one. Nor, for the same reason, is the observation in *Wightman* v *Advocate General* in point. It follows, in my view, that the petition in so far as it seeks reduction of the third country certificate is neither academic nor time-barred.

Certification of claim as clearly unfounded

[21] In *IMI and others* v *Secretary of State for the Home Department* [2016] CSOH 102, Lord Boyd of Duncansby set out at paragraph 13, under reference to authority, certain principles which were agreed by the parties to be applicable in a judicial review of a clearly unfounded certificate. The first of these was that the court is as well placed as the Secretary of State to decide whether on any legitimate view a human rights claim could succeed in the FtT, and should therefore do so rather than reviewing the certificate on *Wednesbury* grounds. Parties in the present proceedings were agreed that this was the correct approach for me to take.

[22] The question for the court is therefore whether, on any legitimate view, the petitioner's claim that removal to Bulgaria would constitute a breach of his article 3 rights would fail on appeal to the FtT. The onus in the FtT would be on the claimant, and in assessing whether the claimant would be bound to fail, the court proceeds on the basis of the material before the respondent at the time when the claim was certified. In answering the question, I proceed on the assumption that the petitioner's account of his previous

experience in Bulgaria, as narrated in the two letters from his agents, is broadly true and accurate so far as it goes. I note, however, that it leaves a number of important questions unanswered, such as how long the petitioner had been in Bulgaria before coming to the attention of the authorities there; how he came to their attention; at whose instigation he was returned to the people smugglers; and how the police made contact with the people smugglers if not with the petitioner's assistance.

[23] Counsel for the petitioner founded strongly upon the terms of Rule 339K as amounting, in effect, to evidence that because the petitioner had been subject to serious harm before, his fear of serious harm again was well-founded in the absence of good reasons to consider that it would not be repeated. In my opinion the rule has no such evidential value. It does little more than state the obvious: namely that if a person who has suffered serious harm is returned to the same situation as before, there is a risk that he will once again suffer serious harm, so that his fear is likely to be well-founded and ought to be so regarded. It is equally obvious, however, that the circumstances may be such that there is little or no risk of repetition.

[24] In my opinion the petitioner has failed to identify circumstances in which he could be regarded as having a well-founded fear of suffering serious harm if returned to Bulgaria. The fear that he professes is of being once again handed over by the Bulgarian police to, and then ill-treated by, the people who smuggled him from Iraq to Bulgaria and who then took him back to Iraq pending payment of their fee by his family. But there have been obvious and significant changes of circumstances since the experience he has described. In the first place, it is not explained why the people smugglers would now have any interest in him at all. It appears from the information provided by his agents that the people smugglers' interest in pursuing him to Belgium and returning him to Iraq was to obtain payment of

their fee for trafficking him from Iraq to Europe; by his own account that fee was paid by his family in exchange for his release. There is nothing to suggest that he has been of any further interest to them since payment was made. He was able to engage a different "agent" to smuggle him to Europe for a second time.

[25] In the second place, it is not explained how or why he would come into contact in Bulgaria with any of the people who mistreated him when he was there before. He now has an outstanding claim for asylum, responsibility for which the Bulgarian authorities have accepted. That is a significantly different situation from "coming to the attention of" the Bulgarian authorities in 2015, and I have already observed that the information regarding that episode is far from satisfactory. There is a presumption that the Bulgarian authorities will deal appropriately with the claim. To the extent that the online articles disclose collaboration between the Bulgarian police and traffickers to move people over the border to Serbia, they are irrelevant to the petitioner's circumstances.

[26] For these reasons I am satisfied that, on any legitimate view, an appeal to the FtT would fail, and that the petitioner's claim was properly certified by the respondent as clearly unfounded.

Disposal

[27] As I understand it, the only remaining live issue is whether the petitioner wishes to insist, despite its rejection in three decisions of this court, on his argument that because his removal was suspended by administrative direction under article 27(4) of Dublin III, and not by any of the means listed in article 27(3), the running of the 6 month period for carrying it out was not deferred, with the consequence that responsibility for dealing with his claim has

passed to the UK. I shall, however, put the matter out by order to discuss what, if any, further procedure is required.