



30 July 2018

PRESS SUMMARY

R (on the application of Tag Eldin Ramadan Bashir and others) (Respondents) v Secretary of State for the Home Department (Appellant) [2018] UKSC 45
On appeal from [2017] EWCA Civ 397

JUSTICES: Lady Hale (President), Lord Mance, Lord Kerr, Lord Wilson, Lord Sumption, Lord Reed, Lord Carnwath

BACKGROUND TO THE APPEAL

Until 1960 Cyprus was a colony of the UK. In 1960, pursuant to the Cyprus Act, the Treaty concerning the Establishment of the Republic of Cyprus between the UK, Turkey Greece and Cyprus and an exchange of notes between the UK and Cyprus, Cyprus became an independent Republic. The territory of the new republic was composed of the island of Cyprus with the exception of two areas - Akrotiri and Dhekelia - which were retained under UK sovereignty as Sovereign Base Areas (“SBAs”) for the purposes of accommodating military bases.

Article 40(1) of the United Nations Convention Relating to the Status of Refugees (1951) (‘the Convention’) as modified by the Protocol Relating to the Status of Refugees (1967) (‘the Protocol’) states that: *‘any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible...’*. On 24 October 1956, prior to Cypriot independence, the UK notified the UN Secretary-General that, subject to certain reservations, the Convention would be extended to Cyprus. Post independence, Cyprus notified the Secretary-General in 1963 that it had acceded to the Convention and in 1968 to the Protocol. No notification has ever been made by the UK specifically in relation to the SBAs post Cypriot independence.

The Respondents are six refugees. In October 1998 they boarded a ship in Lebanon which was bound for Italy but which foundered off the coast of Cyprus. On 8 October 75 passengers including the respondents were airlifted to safety by RAF helicopters and brought to Akrotiri in south-western Cyprus. In due course they were accepted as lawful refugees under the Convention by the SBA Administration, and permitted to remain. The SBA Administration sought to persuade the UK government to allow them to resettle in the UK but this was not acceptable to Ministers. Ever since then they have lived in disused and highly unsatisfactory service accommodation in the SBA, while continuing to press for their admission to the UK, on the basis that this is the only practicable way for the UK to discharge its obligations to them under the Refugee Convention.

The arrival of the Respondents in the SBAs followed by further arrivals in 2000 and 2001 gave rise to arguments between the SBAs and Cyprus about which of them was to be responsible for the refugees and asylum-seekers among them. These arguments were resolved for future arrivals on 20 February 2003 when the UK and Cyprus entered into a Memorandum of Understanding relating to ‘illegal migrants and asylum seekers’ (‘the 2003 Memorandum’). The agreement provided, in summary, for the full range of governmental services to be provided to refugees by Cyprus but at the expense of the UK. Shortly after the 2003 Memorandum, the SBA Administrator enacted the Refugee Ordinance 2003 which gave effect within the SBAs to rights substantially corresponding to those conferred by the Convention. The 2003 Memorandum did not apply to refugees such as the Respondents who had arrived in the SBAs prior to the date of its conclusion. The Appellant’s case is that in 2005 the Cypriot authorities agreed with the SBA Administration that they would deal with refugees recognised as such by the SBA Administration in accordance with the 2003 Memorandum irrespective of the date of their arrival in the SBAs. This agreement, however, has never been reduced to writing.

The Respondents were unwilling for responsibility for them under the Convention to be transferred to the Republic, and did not accept that this could lawfully be done without their consent. They continued to press for admission to the UK, latterly with the support of the UN High Commissioner for Refugees ('UNHCR'). The unhappy course of the ensuing dispute is summarised in the judgment.

It came to a head when in 2013, the Respondents formally asked to be admitted to the UK. In a decision dated 25 November 2014, the Secretary of State refused entry. The Respondents challenged that decision on the basis that it was inconsistent with the Convention.

The High Court held that the Convention did not extend to the SBAs as a matter of international law, but quashed the Secretary of State's decision on the basis that she had failed to take into account concerns raised by the UNHCR. The Court of Appeal overturned that decision, declared that the Convention did extend to the SBAs and directed the Secretary of State to make a fresh decision on whether to admit the Respondents to the UK, having regard to the UK's obligations under the Convention.

On 6 July 2017, the Secretary of State made a fresh decision refusing to admit the Respondents on the basis that she considered that they could resettle in the Cyprus or, alternatively that the UK could comply with its obligations by arranging for the Respondents to be supported by Cyprus as agreed in 2005.

The broad question at issue in the appeal is whether the Respondents are entitled or should be permitted to be resettled in the UK on the basis of the Convention or that in the exceptional circumstances of the case the Secretary of State should exercise his discretion to admit them.

The specific issues identified by the Court as essential to the resolution of the appeal are as follows [60]:

- (i) Does the Convention (as extended by the 1967 Protocol) apply to the SBAs?
- (ii) Does the Convention by its terms entitle the Respondents to be resettled in the UK?
- (iii) Was the Memorandum of Understanding of 2003 a valid performance of the Convention obligations for those within its scope? In particular:
 - a. Was the UK in principle entitled to fulfil its obligations under the Convention by arranging for support to be provided by Cyprus?
 - b. If so, were the terms of the Memorandum of Understanding (including the 2003 Refugee Ordinance) a proper basis on which to do so?
- (iv) If the answer to (iii) is 'yes':
 - a. Was the UK entitled in 2005 to make the same arrangements in respect of the Respondents without their consent given their lawful and accepted presence as refugees in the SBAs since 2000 (it being accepted that the Respondents are entitled to continue to live in the SBAs [107])?
 - b. If so, was the 2005 'agreement' with Cyprus a legally effective means of doing so, having regard to its informality and the absence of incorporation into SBA law?
 - c. Has the support of Cyprus for the Respondents in accordance with the 2005 agreement been available in practice, and can it be assured in the future?
- (v) If the 2005 agreement, for whatever reason, was not a legally effective means of discharging the UK's obligations to the Respondents under the Convention, or if such support has not been available in practice, what are the consequences, in terms of rights or remedies potentially available in these proceedings, and how should the court give effect to them in its order?

JUDGMENT

The Supreme Court gives an interim judgment. It is final as to the issues covered (issues (i)-(iii)), but interim in the sense that other issues will have to be decided (issues (iv)-(v)) before the appeal can be finally determined. Certain critical and difficult issues had not been clearly identified in the agreed statement of facts and issues, nor adequately covered by the written or oral submissions. In fairness to the parties and in order to reach a fully informed conclusion, the court sees no alternative but to invite further submissions on the matters identified in the interim judgment.

REASONS FOR THE JUDGMENT

Issue (i)

Until 1960 the Convention unquestionably applied to the territory now comprised in the SBAs [63]. Treaty obligations cease to apply to a territory where it secedes from the state which entered into the treaty, or where a formerly dependent territory becomes independent of the parent state which entered into the treaty [64]. The Cyprus Act 1960 did not alter the status of the SBAs but merely excluded them from the transfer of territory to the new Republic of Cyprus when it became independent [69]. As a matter of international law the Convention continues to apply to the SBAs by virtue of the declaration in 1956, in the same way it applied to the colony of Cyprus before 1960. Article VII(4) of the Protocol provides that where a state made a declaration under Article 40(1) or (2) of the Convention extending its application to a territory for whose international relations it was responsible, and then acceded to the Protocol, the declaration should apply to the Protocol also, unless that state notified the Secretary-General to the contrary. No further declaration was required to extend the Protocol to dependent territories where the original Convention applied. The UK acceded to the Protocol without any reservation relating to the SBAs. Since the Convention continued to apply to the SBAs after 1960, the Protocol applies there also [71].

Issue (ii)

The Convention does not entitle the Respondents to be resettled in the UK metropolitan territory. A state's duties under the Convention to a refugee reaching a particular territory for whose international relations the state is responsible are in principle and in normal circumstances limited to providing and securing the refugee's Convention rights in that context [89]. The widespread use of colonial clauses in international treaties reflects the principle that for certain purposes, including the application of treaties, dependent territories of a state are treated as having a status in international law distinct from that of the parent state's metropolitan territory [76]. Like many multilateral treaties, the Convention was framed to apply only to a state's 'home country' or 'metropolitan territory' unless extended to other territories under Article 40 [78]. Article 40 suggests that for the purposes of the Convention the metropolitan territory and its dependent territories are to be treated as separate units [80]. Similarly, other articles of the Convention indicate that the metropolitan territory is to be treated as distinct such as Articles 15, 17 to 24, 26, 19, 32 and 34 [81-88].

Issue (iii)

The Respondents' submission that the 2003 Memorandum was not a proper basis for the provision of the support for refugees required by the Convention is rejected [103]. There are uniquely close practical links between the SBAs and Cyprus [91-93]. The Convention does refer to the appropriate treatment of refugees in a State's territory and the provision of facilities to refugees there. But nothing in the Convention is expressly directed to a situation like that which exists in Cyprus and nothing in it is expressly inconsistent with the nature of the arrangements which the UK has made with Cyprus [94]. International courts and tribunals will interpret a treaty in line with Article 31(1) of the Vienna Convention on the Law of Treaties. They will endeavour to place the factual situation as it has developed since the inception of the treaty within the context of the preserved and developing treaty relationship in order to achieve its object and purpose in so far as that is feasible [95]. Subject to issues about the precise interpretation of certain articles, the court does not find objection in principle to some, most or all of the supporting facilities required for refugees being provided by co-operative and effective arrangements with the Republic. The more difficult issues are as to its application to those already accepted as lawful refugees [96].

Issues (iv) and (v) have been left for future determination and further submissions. The parties may be able to reach agreement without further argument on those issues [104-114]. So far as they remain in dispute the appeal should be relisted for further submissions as soon as practicable [115].

References in square brackets are to paragraphs in the judgment

NOTE: This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>