R (on the application of Weldegaber) v Secretary of State for the Home Department (Dublin Returns - Italy) IJR [2015] UKUT 00070 (IAC)

In the Upper Tribunal
(Immigration and Asylum Chamber)

In the matter of an application for judicial review

Before

Mr Justice McCloskey, President

The Queen (on the application of

Yosief Weldegaber)

Applicant

v

Secretary of State for the Home Department

Respondent

1. *Dublin cases require the Respondent to undertake a thorough and individuated examination of the situation and circumstances of the person concerned.*

2. *The European Court of Human Rights in Tarakhel v Switzerland [App.no. 29217/12 (GC)] was not purporting to promulgate a general rule or principle that a sending state is required to secure specific assurances from the destination state as to accommodation or the like.*

3. *In light of the considerable body of relevant background country information considered by the Respondent, it was open to her to find that there was neither systemic deficiency nor serious operational failure in the conditions prevailing in Italy for the reception, processing and treatment of asylum seekers.*

On the renewed application of the Applicant for permission to apply for judicial review, heard on 05 January 2015 and following consideration of all documents lodged and having heard the parties' respective counsel, Ms Harriet Short (instructed by Barnes, Harrild and Dyer Solicitors) and Ms Amelia Walker (instructed by the Treasury Solicitor).

1. This is a Dublin Regulation case. It is a renewed application for

permission to apply for judicial review, in the wake of the refusal decision on the papers of Upper Tribunal Judge Freeman, dated 18 October 2014. The renewal application is stamped with the date of 28 October 2014. The Respondent subsequently sought to remove the Applicant from the United Kingdom. This was prohibited by a stay order of this Tribunal, dated 15 December 2014. The underlying decision of the Respondent was to remove the Applicant to Italy for the purpose of processing and determining his asylum application.

2. The Applicant is a national of Eritrea, aged 31 years. In common with many Dublin Regulation return to Italy cases, which have been marked by landmark decisions, both domestic and European, during the past year, the present case has something of a history. It suffices to record that an earlier decision was voluntarily withdrawn and remade by the Respondent. This is contained in the Respondent's letter dated 23 July 2014. This was initially the target decision. Its effect was to reject the Applicant's case that his removal to Italy would infringe his rights under Article 3 ECHR. It embodies the following key assessments and conclusions:

(a) The evidence on which the Applicant relies "*does not even arguably approach the level of weight and significance to establish a case that* [the Respondent] *could not be unaware that systemic deficiencies or serious operational difficulties in the asylum procedure in Italy amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment.*"

(b) "*….. the evidence and claims advanced by you do not come close to rebutting the presumption that Italy will treat* [you] *in compliance with the requirements of the EU Charter, the Geneva Convention and the ECHR*".

(c) Finally, the Applicant's human rights claim was certified as clearly unfounded, per paragraph 5(4) of Schedule 3 to the Asylum and Immigration (Treatment of Claimants) Act 2004.

3. The initial target decision no longer exists in isolation. Rather, it now co-exists with a more recent decision of the Respondent dated 02 January 2015. Both counsel concurred with my suggestion that this should be treated as supplementing and merging with the initial decision. Both decisions are now challenged and I grant permission to amend the Claim Form accordingly.

4. The stimulus for the more recent decision of the Respondent was the submission of further representations by the Applicant's solicitors. It records the certification of the Applicant's case under Part 2 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants) Act 2004, on 23 August 2011, following receipt of acceptance of responsibility by the Italian authorities under the Dublin Regulation. The materials submitted with the further representations included a substantial volume of reports and kindred documents pertaining to asylum procedures and reception conditions in Italy. The decision maker accorded very little weight to those predating 2013 and, correspondingly, particular attention was given to the more recent materials. It was concluded that the materials submitted did not suffice to displace the significant evidential presumption that EU Member States will comply with their ECHR and other international law obligations. It was further concluded that the evidence provided did not establish any systemic failings in the asylum processing and reception arrangements and

conditions prevailing in Italy. Finally, it was concluded that no serious risk of exposing the Applicant to treatment proscribed by Article 3 ECHR in the event of a forced return to Italy was demonstrated. This is my condensed digest of a characteristically comprehensive letter.

5. Pursuant to the decision in R v SSHD, ex parte Yogathas [2002] 3 WLR 1276, the duty imposed on the Secretary of State in making this species of certification decision is to carefully examine the individual's case and supporting evidence and to be reasonably and conscientiously satisfied that the asserted human rights violation "*must clearly fail*", per Lord Bingham at [14]. Lord Hope devised the test at [34] in these terms:

> "*The question to which the Secretary of State has to address his mind ….. is whether the claim is so clearly without substance that the appeal* [to the FtT] *would be bound to fail*".

More prescriptive guidance to the correct approach for the decision maker is contained in the decision of the Court of Appeal in R (L) v SSHD [2003] EWCA Civ 25. This contains the following notable formulation:

> "*If on at least one legitimate view of the facts or the law the claim may succeed, it will not be clearly unfounded. If that point is reached, the decision maker cannot conclude otherwise.*"

I remind myself that in the matter of certification decisions and challenges the facts of the claimant's case are to be evaluated at their reasonable zenith: EM (Eritrea) [2014] UKSC 12, at [8].

6. In a recent renewed permission application, a return to Italy case, in the Administrative Court, NMA v SSHD [CO/7110/2013], which I granted permission to cite, I formulated the correct approach to a permission application in these terms:

> "[4] ….. *In summary, given the low threshold governing the present application for permission, the test is whether it is arguable that there is a reasonable doubt as to whether the Claimant's substantive human rights claim may succeed.*"

In granting permission to apply for judicial review, I highlighted that the standout feature of that challenge was its individuality, composed of the Claimant's gender, background, past experiences, psychological condition and personal vulnerabilities, supported by medical and psychological evidence: see [5]. Furthermore, significantly, various pieces of "country" evidence relating to conditions prevailing in Italy not considered in Tabrizagh [2014] EWHC 1914 (Admin) formed part of the claim. I further noted that the Supreme Court has held that it is necessary to consider not only the general situation in the country of proposed destination but also "*the Claimant's personal circumstances, including his or her previous experience*": EM (Eritrea) [2014] UKSC 12, at [70].

7. The Applicant in this case is described as a national of Eritrea, now aged 31 years. He asserts that he was forced to flee from Eritrea, where he was pursuing studies for the priesthood, following an initial raid by the Eritrean authorities and his later detention by the Ethiopian authorities, ultimately fleeing to Sudan. Then he travelled to Italy and onwards to Holland, where the authorities returned him to Italy. He then travelled to the United Kingdom, where he claimed asylum. He has been present in the United Kingdom since March 2009. The Applicant's account describes two sojourns in Italy, both in Rome and each of only a couple of weeks

duration. He claims to have received no support or assistance from the authorities. Fundamentally (he asserts) he had no accommodation and no food.

8. As noted above, in resisting his forced return to Italy and advancing this judicial review challenge, the Applicant has relied on a substantial quantity of evidence pertaining to conditions in Italy. This includes in particular the report of an Italian lawyer, Ms Leo, dated March 2012. Its central theme is that the Applicant would be at real risk of receiving no accommodation, care or assistance of any kind, being thereby assigned to "*a grave situation of social marginality*". This is supplemented by sundry other materials emanating from an assortment of organisations including UNCHR, MSF and Human Rights Watch.

9. As pleaded, the essential elements of this Applicant's case are the following. The letter of decision is criticised for its formulaic composition, betraying a failure to properly consider the case made. The decision maker has failed to engage with the evidence put forward. The letter erroneously states that the Applicant has provided no evidence of his previous experiences in Italy. The decision fails to demonstrate any proper assessment of the substantial documentary evidence submitted on the Applicant's behalf. The so-called "reconsideration" of the Applicant's case has been superficial and perfunctory.

10. As presented, however, the Applicant's case was significantly different and considerably more focused than the written pleading. Ms Shortt (of Counsel) developed an interesting argument, the essence whereof was that the decision in Tabrizagh must be re-examined, having regard to the different treatment accorded by the ECtHR in Tarakhel v Switzerland [App No 29217/12] to the same evidence considered by both Courts. Ms Shortt further submitted that having regard to what was decided in Tarakhel, the impugned decisions of the Respondent are arguably in breach of Article 3 ECHR on the sole ground of a failure to secure a specific assurance that "CARA" accommodation, a "*named bed*" as Ms Shortt formulated it, will be available to this Applicant upon his return to Italy. Replying on behalf of the Respondent, Ms Walker (of Counsel), in an equally focused submission, emphasised that the decision in Tarakhel is highly fact sensitive, is not of general application and, in particular, does not apply to adult males suffering from no particular vulnerabilities. Ms Shortt made clear in her submissions that the Applicant does not rely on any personal vulnerability, to which I add that there was no evidence to this effect.

11. In Tarakhel, there is a strong emphasis on the extreme vulnerability of the six children of the family, aged ranging from two to 15 years. The Court considered that their particular needs were related to their age, lack of independence, vulnerability and asylum seeker status: see [99] and [115] especially. The Court rehearsed the available evidence relating to conditions in Italy. Having done so, it considered, in general and unparticularised terms, that the removal of some asylum applicants to Italy will not be permissible: see [115]. It reiterated the Article 3 ECHR threshold, namely *substantial grounds for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the host country*: see [94]. It recalled the special vulnerability theme of its earlier decision in MSS v Belgium and Greece (App. No. 30696/09). Based on its assessment of the specific needs and vulnerabilities of the children, one of the dominant themes of the judgment, the Court concluded that it was incumbent upon the sending state to obtain appropriate information and assurances from the proposed destination state: see [19], [104] and [121]. What is required is "*a thorough*

and individualised examination of the situation of the person concerned".

12. The submissions of Ms Short highlighted, correctly, that one particular piece of evidence, namely a report compiled by the Swiss Refugee Council ("SRC"), features in both the Tabrizagh and Tarakhel judgments. In Tarakhel, see in particular [75], [92] – [94] and [99]. Laing J considered the SRC report, together with others, in the context of examining the discrete issue of the numbers of asylum seekers and international protection beneficiaries seeking accommodation in Italy. In doing so, she noted, at [75]:

> "*The SRC Report candidly accepts that many key numbers are missing.*"

She further endorsed the observation in EM (Eritrea) at first instance, [2012] EWHC 1799 (Admin), at [28], that in view of the rapid fluctuations on the ground statistical exercises aimed at establishing capacity versus demand are futile. The Judge clearly found the UNCHR 2012 and 2013 reports more persuasive. Following a careful assessment, which included the exercise of juxtaposing the SRC report with the UNCHR reports in particular, the Judge concluded that the former failed to demonstrate systemic deficiencies in the reception conditions in Italy: see [99]. In Tarakhel, the SRC report (under the different acronym "SFH-OSAR") was one of many upon which the Applicants relied: see [57] and [81] – [83], together with [108] – [110].

13. As regards this discrete issue, my assessment of the judgment of the ECtHR is that, in contrast with Laing J, it did not undertake a detailed critique of the SRC report. Nor did it carry out the comparative evaluative exercise undertaken in Tabrizagh. Notably, it recorded specifically, in [110],, that the methods employed to calculate the number of asylum seekers without accommodation in Italy were a matter of controversy. It made no comment on the undisguised deficiency recognised in the report itself, highlighted in [75] of Tabrizagh. The Court specifically declined to descend into this particular arena:

> "*Without entering into the debate as to the accuracy of the available figures …….*"

The Court confined itself to the expressly limited assessment that the concern that a significant number of asylum seekers may not be provided with accommodation or may be accommodated in unsatisfactory conditions "*cannot be dismissed as unfounded*": see [115]. Notably, the Court couched this in the terms of a "*possibility*". Furthermore, I consider that there is no ringing endorsement of the SRC report in the Court's judgment. Rather, the report is recited in neutral terms. Furthermore, neither this report, nor others, persuaded the Court to conclude other than that –

> "*…. the current situation in Italy can in no way be compared to the situation in Greece at the time of the MSS judgment ….*
>
> *Hence, the approach in the present case cannot be the same as in MSS*"

All of these passages in the judgment repay careful reading.

14. In my view, the national Court in Tabrizagh and the ECtHR in Tarakhel carried out different exercises. That performed by the former was more intense, more penetrating. That performed by the latter belonged to a

higher, more general level. I can find nothing in the Strasbourg judgment which calls into question the evaluation of the SRC report by the Administrative Court in Tabrizagh. Bearing in mind the duty imposed by section 2(1) of the Human Rights Act 1998, I cannot agree with Ms Short's submission that the decision in Tabrizagh is undermined in the discrete respect advanced.

15. Accordingly, I reject the first limb of the argument. The essence of the second limb consisted of the invocation of the conclusion in Tarakhel in support of the contention that the impugned decisions are infected by a failure to secure from the Italian authorities a specific guarantee that the Applicant will be provided with a "*named bed*" in one of the CARA reception centres. I reject this contention. The conclusion of the ECtHR in Tarakhel in inextricably bound up with its highly fact sensitive context. It cannot be plausibly argued that the ECtHR was purporting to promulgate a general rule or principle that this kind of assurance must be secured in every case. I prefer the submissions of Ms Walker on this discrete issue. Furthermore and in any event, taking into account the personal characteristics of this Applicant, I am unable to conclude that even if accommodation were not immediately available to him for a limited period this would suffice to overcome the Article 3 threshold of a serious risk that he would thereby be exposed to proscribed, that is to say inhuman or degrading, treatment. I consider that, evidentially, the Applicant's case fails to displace the potent presumption that Italy will comply with its international obligations. There is no sustainable challenge to the assessment and assertions contained in the second decision letter:

> "*[46] In regard to what your client can expect upon arrival in Italy, the local authorities will be made aware of your client's planned arrival from the United Kingdom and that your client has never previously claimed asylum in Italy. Therefore, once the authorities have completed their identity procedures and relevant checks, your client will be entered into a project for the reception and asylum claim procedure. Your client will be guided through the asylum process …..*
>
> *Your client will be entitled to access health care whilst in Italy ……..*
>
> *[57] Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers ……. provides that Member States shall ensure that 'material reception conditions' are available to applicants when they make their applications for asylum. These must 'ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence' …….*
>
> *[58] …….. You have provided no evidence to suggest that the presumption that Italy will comply with its legal obligations in this regard is rebutted in this case.*"

For the reasons elaborated above, and having regard to the very focused nature of the Applicant's challenge, I concur with this assessment. In particular, I conclude that this presumption is not displaced by a failure on the part of the United Kingdom authorities to secure the assurance of accommodation from the Italian authorities which is canvassed on behalf of the Applicant.

16. Turning to the Applicant's pleaded case, I consider that his criticisms of the decision letters are not really in point. In human rights cases, the focus of the Court is directed to the outcome of the decision making process in question, rather than the process itself: Begum v Governors of Denbigh High School [2006] UKHL 15 and Misbehavin' v Belfast City Council [2007] UKHL 19. Under the scheme of the Human Rights Act 1998, the Court is the arbiter of all aspects of an asserted breach of a Convention Right, including proportionality: Huang v SSHD [2007 UKHL 11.

17. For the reasons elaborated above, I conclude that the Applicant has failed to establish an arguable case. His renewed application for permission to apply for judicial review is, therefore, dismissed.

Costs

18. There is no application for costs on behalf of the Respondent and, in this respect, I need only affirm the earlier order of UTJ Freeman.

Permission to Appeal

19. There was no representation on behalf of the Applicant when judgment was handed down. Any application for permission to appeal will be made in writing, on notice to the other party, by 26 February 2015.

Signed: **Bernard McCloskey**

The Honourable Mr Justice McCloskey
President of the Upper Tribunal

Dated: 12 February 2015