Neutral Citation Number: [2014] EWCA Civ 854

Case No: C1/2013/2010

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT, QUEEN'S BENCH DIVISION, THE ADMINISTRATIVE COURT
MR JUSTICE HICKINBOTTOM
[2013] EWHC 2281 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/06/2014

Before:

MASTER OF THE ROLLS
LORD JUSTICE MOSES
and
LORD JUSTICE PATTEN

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Between:

THE QUEEN ON THE APPLICATION OF MOZAFFAR BARADARAN	**Appellants**
- and –	
MELIKE BARADARAN	
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**
- and –	
SIKH COUNCIL HAMPSHIRE	**Intervener**

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SIBGHAT KADRI QC and RASHID AHMED (instructed by **Britannia Law Practice LLP**) for the **Appellants**
DAVID MANKNELL (instructed by **Treasury Solicitors**) for the **Respondent**
SATVINDER JUSS (instructed by **HSBS Law Solicitors**) for written submissions only for the **Intervener**

Hearing date: 13 May 2014

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Approved Judgment

Master of the Rolls:

1. The appellants are Iranian nationals (father and daughter) who by these proceedings challenge the Secretary of State's decision on 5 December 2011 to refuse their asylum claims on safe third country grounds and to remove them to France. France has accepted responsibility for their asylum claims pursuant to the Council Regulation 343/2003/CE ("the Dublin II Regulation"). Before Hickinbottom J, they challenged their return to France on the basis of French Law 2010-1192 of 11 October 2010 ("the 2010 law") which effectively bans the wearing of the burka and the niqab in public. They alleged that this would breach their rights under articles 3, 8, 9, 11 and 14 of the European Convention on Human Rights ("the Convention"). Their claims were dismissed by the judge in their entirety. Maurice Kay LJ gave them permission to appeal in relation only to articles 8, 9 and 14 by reference only to the French Law 2004-228 ("the 2004 law") and in relation to section 55 of the Borders, Citizenship and Immigration Act 2009 ("BCIA"). The 2004 law had not featured in argument before the judge. It is, however, common ground that the appeal is concerned with the 2004 law and not the 2010 law. The 2004 Law provides that "in public elementary schools, middle schools and secondary schools, the wearing of symbols or clothing by which the students conspicuously indicate their religious belief is prohibited".

The facts

2. The first appellant ("B") was born in Iran. The second appellant ("M") is his daughter. She was born on 22 August 2002. B divorced his wife in 2007 and he and M have lived together since then. He says that he was forced to leave Iran in February 2011 because of his political views and activity in Iran. He and his daughter are both practising Muslims who according to their religious faith believe that females should cover their heads in public. They went first to France and then came to the UK. On 5 December 2011, France formally accepted responsibility for dealing with their asylum claim. On the same day, the Secretary of State refused the claim on safe third country grounds on the basis that they could safely be removed to France where their application for refugee status would be determined.

3. On 31 January, a family return conference was convened. This was attended by B, but not M. B presented a questionnaire which he had completed. In answer to a question designed to ensure that he understood that, if he did not leave the UK voluntarily, he and his daughter were liable to be removed, he responded:

> "Yes, understand but what about my daughter's school? She wears a cover but France won't accept her at school. Mentally she will suffer a lot. France gave us a letter to leave in 8 days. Did not treat us well."

4. The head teacher at the primary school where M had been studying for four months sent the UK Border Agency a letter saying that she was an industrious student and a

settled pupil, and that the school would be concerned about the impact of a family move to France on her well-being and future welfare.

5. Following the conference, written representations were submitted by B's solicitors in their letter of 6 February 2012. These made no reference to M's dress or to any problems that wearing a veil in France might cause. On 14 February, the Secretary of State responded by confirming the decision to refuse the asylum claim on safe third country grounds and stated that she proposed to remove B and M to France. The letter also stated that section 55 of the BCIA had been taken into account.

6. The question of M's dress was not pursued further in correspondence. On 16 March 2012, however, the appellants issued these judicial review proceedings challenging the decision of 14 February. The summary grounds of claim asserted that removal of the appellants to France would violate their Convention rights, because of the effect of domestic French law which prohibited face-covering clothing.

7. In answer to the claim, the Secretary of State cancelled the removal directions and issued a new decision on 7 June 2012 responding to the Convention claims. The new decision confirmed the 5 December 2011 decision to refuse the asylum claim. It also rejected the human rights claim, dealing at some length with the best interests of M. Under para 5(4) of Part 2 of the Schedule to the 2004 Act, the letter certified that the human rights claim was clearly unfounded. It was this decision which was in substance the real target of the claim before the judge.

The judgment

8. As I have said, the claim before the judge was directed to the 2010 Law and the argument advanced by Mr Sibghat Kadri QC concentrated on article 3 of the Convention. At para 102 of his judgment, the judge accepted the Secretary of State's submission that "potential treatment at the hands of the French state under the 2010 Law could not, even as a future hypothetical construct, anywhere near approach the high threshold required to engage article 3". At para 103, he said that there was no reliable evidence that France systematically fails to comply with its obligations under the Convention with the risk of a serious violation of the dignity of an asylum-seeker such as would amount to degrading treatment for the purposes of article 3. On the contrary, the French government and especially the French courts take their obligations in respect of human rights compliance seriously. That is underlined by the consideration by the Conseil d'Etat of the 2010 Law. Permission to appeal the judge's decision in relation to article 3 was refused by Maurice Kay LJ and I need say no more about it.

9. The second ground of challenge before the judge was that, in breach of article 8 of the Convention and section 55 of the BCIA, the Secretary of State had failed to have regard to the best interests of M as a primary consideration. The judge rejected this ground. He said that the argument based on the 2010 Law had not been raised at the time of the letter of 5 December 2011; and when it was raised in these proceedings, it

was adequately addressed in the letter of 7 June 2012 (to which I shall refer later). At para 117, the judge concluded in any event that the case against removal was "too exiguous" to stand up in any legal forum "when set against the history of their entry and stay here, and the legal imperatives for removing them to France".

The report of Professor Lichere dated 8 April 2014

10. The report of Professor Lichere dated 8 April 2014 provides the only evidence available to this court as to the meaning and effect of the 2004 Law. A number of facts emerge from the report. First, the 2004 Law provides that in public (i.e. state) schools, the wearing of symbols or clothing by which students conspicuously indicate their religious belief is prohibited. This would extend to the wearing of a scarf, a hijab, a jilbab, a niqab or a burka. The prohibition applies only in public schools. There is no such prohibition in private schools. Secondly, the only sanction for breach of the law is expulsion from the school. Before this sanction is applied, there is a "dialogue phase" during which the student is denied access to the classrooms. During this phase, the student is usually kept in study rooms and given courses in writing. Following expulsion, the student has the possibility of continuing his or her schooling by correspondence. No criminal or other sanction is imposed by the courts. Thirdly, the Conseil d'Etat considered the conformity of the law with articles 8, 9, 10 and 14 of the Convention in its rulings of 5 December 2007 and 6 March 2009. It concluded that the law "does not either have an excessive impact on freedoms of thought, conscience; moreover such a penalty, which is imposed without discrimination between the beliefs of the students, does not breach the non-discrimination principle..." Fourthly, in 2009 the ECtHR considered the compatibility of the 2004 Law with the Convention in the six conjoined cases of *Aktas* (no 43563/08), *Bayrak* (no 14308/08), *Gamaleddyn* (no 18527/08), *Ghazal* (no 29134/08), *Singh* (no 25463/08) and *Singh* (no 27561/08). The court held that, although the ban constituted a restriction on the applicants' freedom to manifest their religion, it pursued the legitimate aim of protecting the rights and freedoms of others and public order and was not disproportionate. A "spirit of compromise on the part of individuals was necessary in order to maintain the values of a democratic society" and "expulsion was not disproportionate as a sanction because the pupils still had the possibility of continuing their schooling by correspondence courses". The court also rejected an argument based on discrimination: the ban "applied to all conspicuous religious symbols". The claim was rejected at the admissibility stage as manifestly unfounded.

The Dublin II Regulation

11. The objectives of the Dublin II Regulation are stated in its title, namely:

> "establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third country national."

12. The preamble to the Dublin II Regulation refers at para (2) to the fact that Member States all respect the principle of non-refoulement and are considered as safe countries for third-country nationals; and to the need to establish a Common European Asylum System and a clear and workable method for determining the Member State responsible for the examination of an asylum application. At para (4) it states that the method for determining the Member State responsible for the examination of an asylum application must:

> "make it possible to determine rapidly the Member State responsible, so as to guarantee effective access to the procedures for determining refugee status and not to compromise the objective of the rapid processing of asylum applications"

13. The Dublin II Regulation is based on the fundamental principles that (i) Member States are deemed to comply with their obligations in determining asylum applications; and (ii) one Member State has exclusive responsibility for examining an application for asylum, such responsibility being determined (a) on the basis of the situation obtaining when the asylum seeker first lodged his application with a Member State (article 5(2)) and (b) in accordance with the Hierarchy of Criteria set out in articles 5-14 in Chapter III. The Member State identified by the Hierarchy of Criteria as responsible for the application for asylum is required to "take charge" of the application (article 16(1)(a)). Once a Member State has "taken charge" of an application (as France has in this case) it has exclusive responsibility for processing and determining the claim for asylum (article 16(1)(a)). A Member State which has taken charge of an application is obliged to "take back" any applicant who has subsequently travelled, without permission, to another Member State (article 16(1)(c)).

The grounds of appeal to this court

14. The two principal grounds of appeal for which the appellants have permission to appeal and which have been pursued in argument are that the Secretary of State's decision to remove the appellants to France (i) violated their rights under articles 8, 9 and 14 of the Convention and (ii) was made in breach of section 55 of the BCIA.

Ground 1: breach of articles 8, 9 and 14 of the Convention

15. At the heart of the appellants' case is the submission that the 2004 Law violates articles 8, 9 and 14 of the Convention and that for that reason the Secretary of State's decision to remove M to France was unlawful. The Secretary of State disputes this submission on the grounds that (i) it would be inappropriate for a UK court to scrutinise legislation which has been passed by the democratically-elected legislature of another country; (ii) there is very limited extra-territorial application of qualified Convention rights such as those conferred by articles 8 and 9; and (iii) it is a requirement of the Dublin II Regulation that Convention challenges to the domestic law of a state which has accepted responsibility for an asylum claim (the "responsible

state") should be considered only by that state, save in exceptional circumstances. I shall examine these points in turn.

16. The Secretary of State's first submission is that the court would be placed "in a very difficult position" if it were called upon to assess the compatibility of French legislation with the Convention. The 2004 Law was passed by a democratically-accountable legislature and any challenge under articles 8, 9 and 14 would call for a balance to be struck by the French authorities and courts (subject to the supervision of the ECtHR) and not by any other country. The court would have to grapple with the question whether the interference with the rights was justified and proportionate. Mr Manknell submits that such questions are difficult and require careful examination of the justification for the interference by the state. He refers to *R (Begum) v Denbigh High School* [2006] UKHL 15, [2007] 1 AC 100 where the House of Lords explained how difficult such an analysis is. The question in that case was whether there was an unlawful interference with the article 9 rights of a 13 year old girl where her school refused to permit her to wear the jilbab. Lord Bingham said at para 34:

> "On the agreed facts, the school was in my opinion fully justified in acting as it did. It had taken immense pains to devise a uniform policy which respected Muslim beliefs but did so in an inclusive, unthreatening and uncompetitive way. The rules laid down were as far from being mindless as uniform rules could ever be. The school had enjoyed a period of harmony and success to which the uniform policy was thought to contribute. On further enquiry it still appeared that the rules were acceptable to mainstream Muslim opinion. It was feared that acceding to the respondent's request would or might have significant adverse repercussions. It would in my opinion be irresponsible of any court, lacking the experience, background and detailed knowledge of the head teacher, staff and governors, to overrule their judgment on a matter as sensitive as this. The power of decision has been given to them for the compelling reason that they are best placed to exercise it, and I see no reason to disturb their decision."

17. Hickinbottom J said at para 81 of his judgment that the court in the present case should adopt a similarly cautious approach to the question whether a French law (before him it was the 2010 law) is lawful.

18. I accept the need for great caution here. The court should be very slow to decide that the legislation of a democratically-elected legislature of a member state of the European Union is incompatible with the Convention. But I do not consider that our courts are powerless to assess the compatibility with the Convention of legislation enacted by a foreign legislature. There might be exceptional circumstances in which it would be appropriate for such an assessment to be made. But I am not persuaded that such circumstances exist here. I emphasise that the Dublin II Regulation issue (the Secretary of State's third submission) is a distinct submission.

19. The second submission is that it is "difficult" for an individual to establish that a removal would violate a qualified Convention right such as is conferred by articles 8 and 9. The courts have drawn a distinction between (i) alleged violations of articles 2 and 3 (which require a "real risk" of violation) and (ii) alleged violations of other Convention rights (which require a "flagrant" violation): see, for example, *R (Ullah) v Special Adjudicator* [2004] UKHL, [2004] 2 AC 323 at para 24:

> "While the Strasbourg jurisprudence does not preclude reliance on articles other than article 3 as a ground for resisting extradition or expulsion, it makes it quite clear that successful reliance demands presentation of a very strong case. In relation to article 3, it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment: *Soering*, para 91; *Cruz Varas*, para 69; *Vilvarajah*, para 103. In *Dehwari*, para 61 (see para 15 above) the Commission doubted whether a real risk was enough to resist removal under article 2, suggesting that the loss of life must be shown to be a "near-certainty". Where reliance is placed on article 6 it must be shown that a person has suffered or risks suffering a flagrant denial of a fair trial in the receiving state: *Soering*, para 113 (see para 10 above); *Drodz*, para 110; *Einhorn*, para 32; *Razaghi v Sweden; Tomic v United Kingdom*. Successful reliance on article 5 would have to meet no less exacting a test. The lack of success of applicants relying on articles 2, 5 and 6 before the Strasbourg court highlights the difficulty of meeting the stringent test which that court imposes. This difficulty will not be less where reliance is placed on articles such as 8 or 9, which provide for the striking of a balance between the right of the individual and the wider interests of the community even in a case where a serious interference is shown. This is not a balance which the Strasbourg court ought ordinarily to strike in the first instance, nor is it a balance which that court is well placed to assess in the absence of representations by the receiving state whose laws, institutions or practices are the subject of criticism. On the other hand, the removing state will always have what will usually be strong grounds for justifying its own conduct: the great importance of operating firm and orderly immigration control in an expulsion case; the great desirability of honouring extradition treaties made with other states. The correct approach in cases involving qualified rights such as those under articles 8 and 9 is in my opinion that indicated by the Immigration Appeal Tribunal (Mr C M G Ockelton, deputy president, Mr Allen and Mr Moulden) in *Devaseelan v Secretary of State for the Home Department [2003] Imm AR 1*, para 111:
>
> > "The reason why flagrant denial or gross violation is to be taken into account is that it is only in such a case—where the right will be completely denied or nullified in the destination

> country—that it can be said that removal will breach the treaty obligations of the signatory state however those obligations might be interpreted or whatever might be said by or on behalf of the destination state."”

20. “Flagrancy” has been defined by the ECtHR as “a nullification or destruction of the very essence of the right guaranteed by [the relevant] article”: *Mamutkulov and Askarov v Turkey* (2005) 41 EHRR 494, para OIII-14. It seems that there never has been a successful article 9 challenge in a “foreign case”. I use the phrase “foreign cases” in the sense in which it was used by Lord Bingham in *Ullah* at para 9, viz to mean those where it is claimed that the conduct of the state removing a person from its territory to another territory will lead to a violation of that person’s Convention rights in that other territory.

21. In my judgment, the present claim comes nowhere near satisfying the stringent “flagrancy” test that is required to be satisfied in an article 8 or 9 case. First, the ECtHR has decided that the 2004 Law does not amount to a violation, let alone a “flagrant” violation of article 9. As I have said, the applicants’ complaints in the six cases were dismissed as “manifestly unfounded.” Secondly, the ECtHR has held that a similar prohibition on the wearing of headscarves in educational institutions is not a violation, let alone a “flagrant” violation of article 9. Thus, in *Sahin v Turkey* (2007) 44 EHRR 5, the Grand Chamber held that the denial of access by a university student to an examination on the grounds that she was wearing a headscarf was justified having regard to the Turkish state’s principle of secularism. Thirdly, M would not be exposed to the possibility of criminal sanction for wearing a burka at school (although she would eventually be expelled). Fourthly, M would retain the possibility of being educated privately, at home or by correspondence, in the event of her expulsion for wearing a burka at school (although I note that it is said that B could not afford to pay for private education). Fifthly, M would be permitted to wear her burka at home and at places of worship.

22. I conclude, therefore, that even if this were not a Dublin II Regulation case, the claim that the decision to remove the appellants to France violated M’s rights under articles 8, 9 and 14 of the Convention would fail.

23. I turn to the Secretary of State’s third submission. It is not in dispute that the purpose of the Dublin II Regulation is to introduce a clear division between a responsible state (France in this case) and a non-responsible state (the UK in this case) for managing the asylum claims of third country national asylum seekers. Mr Manknell submits that (i) it would be inconsistent with the policy of the Dublin II Regulation if a non-responsible state (the UK in this case) were required to assess Convention challenges to the legislation of a responsible state (in this case France); and (ii) it is clearly established in the relevant EU, ECtHR and domestic case law that a Convention challenge to the legislation of a Dublin II Regulation state must be brought in the responsible state, save in exceptional circumstances.

24. I accept the first submission. There are strong policy reasons for allocating responsibility for human rights challenges between Member States in a clear, accessible and foreseeable manner. As Lord Kerr said in *EM (Eritrea) v SSHD* [2014] UKSC 12 at para 40:

> "The need for a workable system to implement Dublin II is obvious. To allow asylum seekers the opportunity to move about various member states, applying successively in each of them for refugee status, in the hope of finding a more benevolent approach to their claims, could not be countenanced. This is the essential underpinning of Dublin II. Therefore, that the first state in which asylum is claimed should normally be required to deal with the application and, where the application is successful, to cater for the refugee's needs is not only obvious, it is fundamental to an effective and comprehensive system of refugee protection. Asylum seeking is now a world-wide phenomenon. It must be tackled on a co-operative, international basis. The recognition of a presumption that members of an alliance of states such as those which comprise the European Union will comply with their international obligations reflects not only principle but pragmatic considerations. A system whereby a state which is asked to confer refugee status on someone who has already applied for that elsewhere should be obliged, in every instance, to conduct an intense examination of avowed failings on the first state would lead to disarray".

25. The second submission raises more difficult questions. The leading CJEU authority is *R (NS) v SSHD* (cases C-411/10 and C-493/10) [2013] QB 102. The claimants argued that their removal to Greece under the Dublin II Regulation would violate article 3 of the Convention and article 4 of the EU Charter. The court said at para 83 that what was at issue was the raison d'etre of the EU and the creation of an area of freedom, security and justice and, in particular, the Common European Asylum System "based on mutual confidence and a presumption of compliance, by other member states, with European Union law and, in particular, fundamental rights". It said, however, that it would be unlawful for a Member State to remove an asylum seeker to a responsible state under the Dublin II Regulation where:

> "[it] cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that member state amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of article 4 of the Charter"

26. In *MSS v Belgium* (2011) 53 EHRR 2, the ECtHR accepted that "in principle the most normal course of action" under the Dublin II Regulation would be for an asylum seeker to "lodge applications with the court only against [the responsible state], after having exhausted the domestic remedies in that country". However, this principle

was displaced on the facts of that case because the possibility of lodging a domestic ECHR claim in Greece was "illusory" at the material time (paras 356-357). This analysis has been applied by our courts in *R (Elayathamby) v SSHD* [2011] EWHC 2182 (Admin), *R (Medhanye) v SSHD* [2011] EWHC 3012 (Admin) and *R (Medhanye) v SSHD (No 2)* [2012] EWHC 1799 (Admin).

27. The Supreme Court considered this issue in *EM (Eritrea).* Lord Kerr clarified the CJEU's ruling in *NS* in these terms at para 41:

> "It is entirely right, however, that a presumption that the first state will comply with its obligations should not extinguish the need to examine whether *in fact* those obligations will be fulfilled when evidence is presented that it is unlikely that they will be. There can be little doubt that the existence of a presumption is necessary to produce a workable system but it is the nature of a presumption that it can, in appropriate circumstances, be displaced. The debate must centre, therefore, on how the presumption should operate. Its essential purpose must be kept clearly in mind. It is to set the context for consideration of whether an individual applicant will be subject to violation of his fundamental rights if he is returned to the listed country. The presumption should not operate to stifle the presentation and consideration of evidence that this will be the consequence of enforced return. Nor should it be required that, in order to rebut it, it must be shown, as a first and indispensable requirement, that there is a systemic deficiency in the procedure and reception conditions provided for the asylum seeker.

28. At para 58, he said that:

> "I consider that the Court of Appeal's conclusion that only systemic deficiencies in the listed country's asylum procedures and reception conditions will constitute a basis for resisting transfer to the listed country cannot be upheld. The critical test remains that articulated in *Soering v United Kingdom* (1989) 11 EHRR 439. The removal of a person from a member state of the Council of Europe to another country is forbidden if it is shown that there is a real risk that the person transferred will suffer treatment contrary to article 3 of ECHR."

29. At para 68, he said:

> "Although one starts with a significant evidential presumption that listed states will comply with their international obligations, a claim that such a risk is present is not to be halted *in limine* solely because it does not constitute a systemic or systematic breach of the rights of refugees or asylum seekers.

> Moreover, practical realities lie at the heart of the inquiry; evidence of what happens on the ground must be capable of rebutting the presumption if it shows sufficiently clearly that there is a real risk of article 3 ill-treatment if there is an enforced return."

30. It is clear, therefore, that in order to establish a violation of article 3 it is not necessary to show that the conditions in the responsible state which are said to be degrading conditions are the product of *systemic* shortcomings: see also para 42 of Lord Kerr's judgment. There is a "significant evidential presumption" that Member States will comply with their Convention obligations in relation to asylum procedures and reception conditions for asylum seekers within their territory. Lord Kerr said (para 64) that it is "against the backdrop of that presumption that any claim that there is a real risk of breach of article 3 rights falls to be addressed". Thus, in relation to article 3 claims, the only difference between the principles applicable to "foreign cases" under the Convention (as summarised in *Ullah*) and those applicable under the Dublin II Regulation seems to be that in the latter, one starts with the significant evidential presumption that Member States comply with their international obligations. But in practice, the evidence that an asylum seeker adduces to support an article 3 claim in a "foreign case" is likely to be the same as that on which he relies to rebut the "significant evidential presumption".

31. *EM (Eritrea)* was an article 3 case as was *NS.* It is, of course, binding on this court. It is difficult to avoid the conclusion that, although the Supreme Court was purporting to apply and explain *NS,* it was to some extent departing from it. At the very least, *EM (Eritrea)* gives less weight than *NS* to the mutual confidence in Member States and the presumption of their compliance with EU law and fundamental rights. The reason for this may be that complaints of violations of article 2 and 3 are rightly regarded as more serious and treated differently from complaints of violations of other articles of the Convention. That is why the threshold for a successful complaint in the former in a foreign case is substantially lower than for a successful complaint in the latter. As we have seen, the "flagrancy" threshold is so stringent that successful complaints in "foreign cases" based on violations of Convention rights other than articles 2 and 3 are very rare.

32. Even if the *EM (Eritrea)* approach falls to be applied in the present case, I have no doubt that, for the reasons given at paras [21] above, the appellants come nowhere near rebutting the presumption that France would comply with its obligation to respect the rights enjoyed by the appellants under articles 8, 9 and 14 of the Convention.

Ground 2: breach of section 55 of BCIA

33. Section 55 of BCIA requires the Secretary of State to "make arrangements for ensuring that [she has] regard to the need to safeguard and promote the welfare of children when making immigration decisions". The relevant principles that have been

derived from section 55 and article 8 of the Convention are now well established: see *Zoumbas v SSHD* [2013] UKSC 74, [2013] 1 WLR 3690 at para 10. Thus (i) the best interests of a child are an integral part of the proportionality assessment under article 8; (ii) in making that assessment, the best interests of the 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; (iii) 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; (iv) while different judges might approach the question of the best interests of a child in different ways, 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 are in play; (v) it is important to have a clear idea of a child's circumstances and of what is in a child's best interests before one asks oneself whether those interests are outweighed by the force of other considerations; (vi) to that end there is no substitute for a careful examination of all relevant factors when the interests of a child are involved in an article 8 assessment; and (vii) a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent.

34. Mr Kadri's principal submission is that the Secretary of State did not have regard to the best interests of M in reaching her decision. In particular, she did not have regard to the fact that, if M is removed to France, she will be deprived of education in a public school and, therefore, of education altogether.

35. It is necessary first to see what the Secretary of State has said about M's best interests. The first relevant letter is dated 14 February 2012. This refers to section 55 of the BCIA. It is a response to the solicitors' letter dated 6 February 2012 which, as we have seen, said nothing about M's dress or any problem about wearing a veil in France. Mr Kadri makes the point that B had referred to this problem at the family conference on 31 January (para 3 above). But I do not consider that the Secretary of State can reasonably be criticised for failing to address this point in her letter of 14 February. She was entitled to assume that the matters on which the appellants wished to rely were those set out in the solicitors' letter.

36. The issue of M's dress was, however, clearly raised in the judicial review claim form. It is to this claim that the Secretary of State responded in her letter dated 7 June 2012. Having rejected the human rights claims which form the subject of the first ground of appeal to this court, she dealt separately with the issue of the best interests of M. She said:

> "13. The best interests of your client's daughter have also been considered in light of the findings in the case of *ZH (Tanzania) v SSHD [2011] UKSC 4* (referred to hereafter as *ZH*). While the best interests of children are a primary consideration when considering Article 8 ECHR, they are not the only issue of relevance when considering whether the removal of a parent is proportionate to need to maintain an effective immigration control. In the case of

> *ZH* the importance of the British children remaining with their primary carer in a country where they had spent all their lives and had established ties in the community was highlighted. However in your client's case his daughter is an Iranian citizen, who has only recently arrived in the United Kingdom, having spent the significant majority of her life living in other countries. In view of this your client's child, unlike those in *ZH*, is not being denied the inherent advantages of growing up in her country of nationality.
>
> 14. Whilst it is accepted that your client and his daughter's preference may be to remain in the United Kingdom, it is not accepted that this reflects the child's best interests. It is suggested that an important issue in relation to a child's best interests is stability and permanence of status. This will be best achieved by your client returning to France for a relatively short period for the consideration of his asylum claim. Then, depending on the outcome of his asylum application, he and his daughter can continue their family life lawfully in France or Iran. This in turn will remove the uncertainty as to their future which has arisen due to your client and daughter living illegally in the United Kingdom.
>
> 15. Furthermore, your client's daughter is considered to be young enough to adapt to life abroad with the support of her father while your client's asylum claim is considered in France. Nevertheless, even if the child's best interests may be adversely affected by your client's removal to France it is considered that any adverse affect will be limited by the fact that she is remaining with her father, her primary carer. Any limited adverse affect your client's removal may have on his daughter is considered to be proportionate to the need to maintain an effective immigration control and an efficient implementation of the Dublin Regulation."

37. In her letter dated 7 May 2014, the Secretary of State addressed the particular issue of prohibition in France of the wearing of religious garments in public schools. She said:

> "10. Furthermore, your client's daughter is considered to be young enough to adapt to life abroad with the support of her father while your client's asylum claim is considered in France. Nevertheless, even if the child's best interests may be adversely affected by your client's removal to France it is considered that any adverse affect will be limited by the fact that she is remaining with her father, her primary carer. It is noted that your client's daughter will not be able to

attend public school if she chooses to wear a religious garment but it will be open to her to be educated elsewhere (either at home or at a private school). Any limited adverse affect your client's removal may have on his daughter is considered to be proportionate to the need to maintain an effective immigration control and an efficient implementation of the Dublin Regulation.

11. Overall, the Secretary of State has made "a balanced judgement of what cab reasonable be expected in the light of all the material facts" (AB (Somalia) and VW (Uganda) [2009] EWCA Civ 5) [19]). The duties set out in section 55 of the 2009 Act 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 as a primary consideration, 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 that it would be appropriate to allow a person such as your client, who has no leave to enter or remain in the United Kingdom, and whose asylum claim is the responsibility of the French authorities, to remain in the United Kingdom."

38. The judge dealt with the section 55 issue in the following terms:

"115. iv) The rights and best interests of relevant children in a Dublin II Regulation return case have been considered in two recent cases, namely EM and Toufighy especially in the latter [95] and following. In EM, Sir Stephen Sedley, giving the judgment of the Court of Appeal, having set out the relevant passages from ZH, found in this context the best interests of the child — to remain in the United Kingdom — came up against:

> "…the formidable fact that the children's position in this country, albeit through no fault of theirs, is both fortuitous and highly precarious, with no element whatever of entitlement …
>
> [The claimant's] son, now 14, is settled in school; but he is only here because his mother has been able for four years to resist removal."

116. Given that the destination country in that case was deemed to comply with its international obligations, he said:

> "… the case against the removal of MA, albeit with her son, is too exiguous to stand up in any legal forum when set against the history of her entry and stay here and the

> legal and policy imperatives for returning her to the destination country."
>
> 117. Of course, every case will turn on its facts, but the case before me, if anything, is weaker than that, so far as the Claimants are concerned, because, amongst other things, the Claimants in this case have not been in the United Kingdom as long and the claimants in EM, prior to their clandestine flight to the United Kingdom from Italy, had suffered for three months on the streets in that country as described in [24] of Sir Stephen Sedley's judgment. Adapting his words of, given my firm conclusion that France will be compliant with its international law obligations (including its obligations under the ECHR), as the removal of the Claimants would be pursuant to the Dublin II Regulation, the case against their removal is "too exiguous" to stand up in any legal forum when set against the history of their entry and stay here, and the legal imperatives for removing them to France. In this context, it is noteworthy that the European Court of Human Rights in the recent reference of Hussein v Netherlands and Italy [2013] 57 EHRR SE1, after referring to NS and EM, found a claim on its face similar to this claim not only inadmissible, but "wholly unsubstantiated" and "manifestly ill-founded" (see [85])."

39. I would reject the criticisms of the judge's treatment of the section 55 issue largely for the reasons given by Mr Manknell. The best interests of M were expressly considered by the Secretary of State in the letter dated 14 February 2012 following the family conference on 31 January and in the light of the representations made by the appellants' solicitors. The only aspect of M's welfare that it is now said was not considered was the impact of the Law of 2004 and her access to education while wearing religious clothing. As I have already said, however, this issue was raised for the first time in this appeal.

40. The substantive consideration by the Secretary of State of this issue is to be found in her letter of 7 May 2014. It is clear both from this letter and the letter of 7 June 2012 that she did consider the best interests of M under section 55 of the BCIA. This is not a case where those interests were ignored or treated as being of little or no importance. The Secretary of State considered it to be of some significance that the majority of M's life had been spent outside the UK. In both letters, she said that any adverse effect of her removal to France would be limited by the fact that she was remaining with her father, her primary carer. In the letter of 7 May 2014, she specifically addressed the issue of the Law of 2004 and noted that she would be unable to attend public school if she chooses to wear a religious garment, but it would be open to her to be educated elsewhere (either at home or at a private school). Importantly, she said that she considered that any adverse effect removal may have was proportionate to the need to maintain an effective immigration control and an efficient implementation of the Dublin II Regulation.

41. The argument advanced by Mr Kadri appears to proceed on the basis that section 55 requires that a child in the position of M be permitted to remain in the UK if that is the place where she would prefer to live. But that is not a correct understanding of section 55 as is clear from *Zoumbas.* The conclusion of the court in *Zoumbas* at para 24 is instructive and applicable here:

> "There is no irrationality in the conclusion that it was in the children's best interests to go with their parents to the Republic of Congo. No doubt it would have been possible to have stated that, other things being equal, it was in the best interests of the children that they and their parents stayed in the United Kingdom so that they could obtain such benefits as health care and education which the decision-maker recognised might be of a higher standard than would be available in the Congo. But other things were not equal. They were not British citizens. They had no right to future education and health care in this country. They were part of a close-knit family with highly educated parents and were of an age when their emotional needs could only be fully met within the immediate family unit. Such integration as had occurred into United Kingdom society would have been predominantly in the context of that family unit. Most significantly, the decision-maker concluded that they could be removed to the Republic of Congo in the care of their parents without serious detriment to their well-being. We agree with Lady Dorrian's succinct summary of the position in para 18 of the Inner House's opinion."

42. In so far as Mr Kadri submitted that section 55 requires M to be permitted to remain in the UK because that would be in her best interests, in my judgment, the weighing of the best interests of M conducted by the Secretary of State in the letters of 14 February 2012 and 7 May 2014 is unimpeachable. It accords with *Zoumbas.* She has recognised the importance of M's best interests and given cogent reasons for concluding that they do not point against removal to France. She has also weighed in the balance (as she is entitled to do) the need to maintain an effective immigration control and an efficient implementation f the Dublin II Regulation.

43. I conclude, therefore, that (i) the judge reached the correct decision on the section 55 issue on the basis of the case as it was presented to him by reference to the Law of 2010 and (ii) the section 55 claim in so far as it is based on the Law of 2004 must also be dismissed.

Overall conclusion

44. I would, therefore, reject both grounds of challenge and dismiss the appeal.

Lord Justice Moses:

45. I agree.

Lord Justice Patten:

46. I also agree.