28 April 2016

SUMMARY OF JUDGMENT OF THE ADMINISTRATIVE COURT

R on the application of

TAG ELDIN RAMADAN BASHIR & others

Claimants

- and –

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

Case No: CO/879/2015

Neutral citation: [2016] EWHC 954 (Admin)

Before: Mr Justice Foskett

This summary summarises the judgment handed down in this case. It forms no part of the judgment which should be read in full for a complete understanding of the reasons for the decision

References below in square brackets are to paragraph numbers in the judgment

1. Synopsis of case

1.1 This case concerns six families who have lived for about 16 years in a residential area known as Richmond Village situated within the Dhekelia Sovereign Base Area ('SBA') on the island of Cyprus. This SBA is one of two areas (the other being the Akrotiri SBA) that were retained under British sovereignty following the independence of Cyprus in 1960 [4, 6, 48-58]. The total area of the two SBAs is approximately 3% of the total area of the island [56]. The area where the six families live is outside the military part of the SBA, but inside its overall territory. (A map of the island appears in the Appendix to the judgment.)

1.2 The six claimants are the heads of the six families concerned. The total number of individuals comprising the families is 35. The six claimants (with some members of their families) left the coast of Lebanon in a fishing boat operated by people smugglers in October 1998. There were 75 people on board including 10 adult women and 24 children (one of whom was only 2 days old). It was the expectation of those on board they would be taken to Italy. After a few days at sea, the people smugglers abandoned the boat and the 75 on board were left to their own devices. The men on board managed to steer the boat to visible land which happened to be Cyprus. The boat came ashore near to the Akrotiri military base and all the occupants were rescued by British servicemen. [2-3]

1.3 The case is not concerned with the 115 migrants who came ashore near to the Akrotiri military base in similar circumstances in October 2015 [22 and 169-173]. Their situation is being resolved through the machinery of an agreement entered into between the UK government, through the SBAA (the Sovereign Base Areas Administration), and the Republic of Cyprus ('RoC') in 2003 (see paragraph 4.9 below) [100].

1.4 Those rescued from the boat were detained whilst their status was assessed by Home Office officials [70-72]. The six claimants were assessed as being entitled to refugee status under the Refugee Convention. The position taken by the UK government at the outset was that the Refugee Convention did not, as a matter of international law, apply to the SBAs, but that it was UK policy to act within the spirit of the Convention in circumstances such as these [e.g. 63-68]. Accordingly, those assessed as being entitled to refugee status were people to whom the UK owed an obligation (although, if the Government was correct in its legal analysis, not one arising directly under international law) to provide refuge and appropriate support. The claimants came originally from Iraq, Sudan, Ethiopia and Syria [71]. This case does not concern the others rescued from the boat who were not assessed to be refugees.

1.5 Those assessed as entitled to refugee status were provided with accommodation occupied previously by British military personnel [73]. They moved in to that accommodation during the first half of 2000. It was intended to be temporary accommodation and it is (and has been for many years) recognised as inadequate [74, 146, 309, 386]. However, efforts to resolve the long-term question of where the claimants and their families should reside have been unsuccessful and the families still reside in Richmond Village. It is not in dispute that there is an urgent need for them to be relocated.

1.6 It is not in dispute also that, because the SBAs are essentially military bases, the social infrastructure does not permit the UK government, acting through the SBAA, to meet the full complement of the obligations due to a refugee under the Refugee Convention – e.g., healthcare provision, education, opportunities for employment and so on [83, 96, 227, 296, 345, 395]. In order to comply with the Refugee Convention (if it applies as a matter of law) or to act within the spirit of it (if that is correct approach in law) alternative arrangements must be made. The case advanced on the claimants' behalf is that this can only now be achieved by relocation to mainland UK [7]. The UK government's position is that this is not so and alternative arrangements can be made on the island of Cyprus in accordance with an "informal agreement" reached with the RoC in 2005 [11].

2. The legal arguments supporting the contention that the Refugee Convention applied to the SBAs and the Judge's conclusions

2.1 The claimants seek to quash by way of judicial review the decision of the Secretary of State, expressed through her officials by a letter dated 25 November 2014, that they cannot be admitted to the UK [166]. That letter was in response to a letter jointly by the claimants' Cypriot lawyer, Ms Nicoletta Charalambidou, and the then local representative of the UNHCR (the United Nations High Commissioner for Refugees who has the responsibility of leading and co-ordinating international action to protect refugees and to resolve refugee problems wherever they arise), Mr Nasr Ishak, dated 30 September 2013 [164]. These letters are referred to further below (see paragraphs 4.4-4.10).

2.2 It was argued on the claimants' behalf that the Refugee Convention and its 1967 Protocol do, as a matter of international law, apply to the SBAs, that the UK therefore owes them directly the obligations to which the Convention gives rise and that they have the right under the Convention not to consent to any arrangement other than one which entitles them to be relocated in the UK. This legal argument was advanced in three alternative ways. In summary they were as follows:

(a) because the Refugee Convention had been declared in 1956 by the UK to apply to Cyprus when the whole of Cyprus was a colony, the position did not change in respect of the retained SBAs when Cyprus became independent and the 1967 Protocol became deemed to apply by virtue of a provision in that Protocol (Article VII.4) [182-261];

(b) if that contention was not accepted, it was argued that the Refugee Convention became applied to the SBAs by virtue of the Charter of Fundamental Rights of the European Union ('the EU Charter') when the Charter became legally binding on the EU with the entry into force of the Treaty of Lisbon on 1 December 2009 [262-284];

(c) if that argument did not succeed, it was contended that, in light of the fact that the UK government exercises "effective control" over the SBAs, and that Article 34 of the Refugee Convention (which requires the Contracting State "as far as possible [to] facilitate the assimilation and naturalization of refugees") has extra-territorial effect, the applicability of the Refugee Convention to the SBAs is achieved via this route [285-306].

2.3 The Judge has rejected each of those arguments and has concluded that the Refugee Convention and the 1967 Protocol do not, as a matter of international law, apply to the SBAs. In summary his conclusions in respect of the foregoing arguments are as follows:

(a) When Cyprus became independent and the SBAs were created, they constituted a "new political entity" in respect of which it was necessary for there to be an express declaration by the UK government that the Refugee Convention applied to them before that Convention did indeed apply. This conclusion is based upon the effect of the approach of the House of Lords in the case of *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453 ('Bancoult No 2'), a case concerning the islands of the Chagos Archipelago in the Indian Ocean, a precedent which was binding upon the judge. The decision was also consistent with the decision of the Senior Judges Courts in Cyprus in another case [225 and 259-260].

(b) If the UK government intended that the Refugee Convention should apply by virtue of the EU Charter, it is to be expected that this would have been stated expressly at the time, but (i) no such express declaration was made and (ii) this was at a time when the UK government was denying that the Refugee Convention applied to the SBAs. [279-280]

(c) In order for this argument to succeed, it would be necessary to conclude that the "effective control" over the SBAs by the UK government was equivalent to the kind of control considered in the case of *Al-Skeini v UK* (2011) 53 EHRR 18 (a case in the European Court of Human Rights concerning the applicability of the European Convention on Human Rights ('ECHR') to the post-combat situation in Iraq) and that the expression "territory" in Article 40 of the Refugee Convention extends to the SBAs. The Judge did not accept either proposition [291-295 and 296-304].

3. The claimants' argument concerning discrimination and the Judge's conclusion

3.1 It was argued on the claimants' behalf that that the Secretary of State's refusal to provide the claimants, as refugees resident in the SBAs, any route by which to obtain a permanent form of residence in the UK, either by way of leave to enter or by conferral of citizenship, constitutes unlawful discrimination under Article 14 of the ECHR [307-321]. The argument is that the claimants are discriminated against by reason of their status as refugees currently resident in the SBAs compared with refugees resident in other British Overseas Territories ('BOTs'). Before a violation of Article 14 is established the claimants need to "establish a link with one or more of the Convention's other articles" [308].

3.2 The Judge has accepted that any decision that prolongs the claimants' stay in their present circumstances affects their rights to a family and private life within Article 8 of the ECHR [309], but has rejected the argument that the Secretary of State's decision gives rise to unlawful discrimination. His conclusion is that the evidence is clear (and it appears to be common ground) that, so far as admission to the UK *per se* (in contradistinction to seeking citizenship) is concerned, there is no difference between the opportunities to gain admission for those resident in the BOTs and those resident in the SBAs [310]. In this regard the Judge said this [320]:

> "… acquiring British citizenship is the acquisition of a status rather than a means in itself of securing a change of circumstances in which an applicant for citizenship lives. It is being forced to remain in their present circumstances and accommodation that, in my view, constitutes the principal interference with the claimants' Article 8 rights. Removal from that situation by coming to the UK is no less difficult for the claimants than any other resident of another BOT …. To that extent, any discrimination arising from the fact that there is no route to citizenship for an SBA resident is far removed from the actual interference with the Article 8 rights that generate the potential for an Article 14 claim."

3.3 It is the effect of section 4A of the British Nationality Act 1981 (introduced in 2002) that British citizenship is effectively barred to anyone who seeks to obtain it by virtue only of a connection with the SBAs [317-318]. The reasons were given in and accepted by Parliament [316]. No declaration of incompatibility with the ECHR has been sought in respect of this statutory provision and, accordingly, any "discrimination" has been sanctioned by Parliament and must be treated as lawful [319].

4. Alleged failure to act within the spirit of the Refugee Convention

4.1 As indicated above (paragraph 1.4), the UK government made clear at the outset that it intended to act towards anyone assessed as entitled to refugee status in the spirit of the Refugee Convention.

4.2 The letter of 25 November 2014 demonstrates that the Secretary of State, acting through her officials, considered that she was acting in accordance with at least the spirit of the Refugee Convention [329-335].

4.3 Where the Secretary of State says that she has, when making a decision, taken into account the terms of an international convention, albeit one not incorporated into English law, but misdirects herself about its consequences, judicial review of that decision is available to the person affected by the decision. This is known as "the *Launder* principle" after the House of Lords decision in *R v Secretary of State for the Home Department, ex parte Launder* [1997] 1 WLR 839. [322-326]

4.4 The Judge's interpretation of the letter of 25 November 2014 (which is set out in full at [166]) is that the Secretary of State is saying that the UK has fulfilled its self-imposed obligation to act within the spirit of the Refugee Convention by making an agreement with the RoC in 2005 by which the claimants could either live in the Republic or remain living in the SBA (albeit not in their current accommodation) and the RoC would discharge all the obligations owed to them as refugees under the Refugee Convention. This can be seen from the passage in the letter that states that –

> "[the] families have the right to reside in the Republic of Cyprus and have strong ties with the Republic" and that is an arrangement that provides "a durable and suitable solution for their long-term residence." [166 – final paragraph]

4.5 The Judge has accepted that such a factor is a legitimate factor for the Secretary of State to consider in making her decision as to whether, when endeavouring to act within the spirit of the Convention, she ought to permit the claimants to come to mainland UK. [345-346]

4.6 However, the failure of the Secretary of State, through her officials, to address the strong concerns expressed by the UNHCR about the ability of the RoC to honour these arrangements means that a material factor in the decision-making process was not considered and the decision was thus flawed. [348-374]

4.7 Ordinarily, the courts approach an issue such as this on the basis that there is a presumption (albeit rebuttable) that a Contracting State will comply with its international obligations under the Refugee Convention [355]. However, the letter of 30 September 2013 (see paragraph 2.1 above) contains this paragraph:

> "However, UNHCR wished to add that, even if at a certain moment in time, relocation to the Republic of Cyprus, may have been seen as the most desirable or practical option, this is not the case anymore because of the financial crisis prevalent in the Republic of Cyprus, whose Government has officially stated that it cannot take any more refugees, and is appealing for solidarity of other Member States to take even those refugees recognized by their own authorities."

4.8 This was not addressed at all in the letter of 25 November 2014 and there is no evidence that the issue was considered at any stage prior to that letter being drafted [350-357]. Furthermore, the letter contains the passage highlighted in paragraph 4.4 above.

4.9 The background to the "informal agreement" made in 2005 was, the Judge concluded, "somewhat chequered" [348-349] and in early 2008 there is evidence that the RoC decided not to proceed with it [141-143] although there is some evidence that it was reinstated

thereafter [369-371], but there is no direct confirmation of this from the RoC. It has never been reduced to writing [138, 162]. The "informal agreement" was to treat the claimants as if the written agreement made between the UK and the RoC in 2003 concerning future migrants landing in the SBAs applied to the claimants [100]. (It is under that agreement that the position of the October 2015 migrants is being considered.)

4.10 Against that background and the concerns of the UNHCR, the Judge concluded that the Secretary of State should have evaluated the strength of the RoC's commitment to the informal agreement before making a decision based significantly on the existence of that agreement [355].

4.11 Accordingly, the decision has been quashed and it will be remitted to the Secretary of State for further consideration in the light of the judgment and all relevant up-to-date factors. [379]

5. General observations

5.1 The Judge emphasises that that it is not for the court to decide what happens to the claimants and their families. It is a matter for the Secretary of State. [379]

5.2 The Judge emphasises that no political considerations influence the court's decision. [21]

5.3 The Judge anticipates that if the legal process is pursued, there will be an appeal against his decision and concludes his judgment as follows:

> 398. Those are the conclusions I have reached as a matter of law. I rather doubt that those conclusions will represent the last word on the legal issues in this case and, if the question of what happens to the claimants and their families is not resolved in some other practical way in the meantime, doubtless those conclusions will be considered at a higher level.
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> 399. What I would say, in parting from this case, is that each court that is invited to consider those issues will (as I have done) endeavour to answer them correctly. At the end of the day, however, the solution to this long-standing problem is almost certainly beyond the ability of any court to direct. Indeed, as I have emphasised previously, it is not ultimately for the court to decide what should happen. There are extremely difficult and sensitive issues involved in the resolution of a situation such as this, particularly in current circumstances. However, it is to be hoped that, for the sake of everyone concerned, particularly the young people involved, active and perhaps bold steps will be taken by all relevant parties to seek a solution without further recourse to prolonged legal proceedings. The need to find a permanent solution has been clear for a very long time. It is even more urgent now.

5.4 The Judge has adjourned all consequential issues (including any application for permission to appeal) to be dealt with on the basis of written submissions. He has invited

those submissions to be made within the next 14 days. He will consider any representations by the media concerning the anonymity order made at the hearing in March [17-19] if he receives notification of an intention to make such representations within 7 days.

6. Supplemental Ruling

6.1 Following receipt of the draft judgment, the Defendant's legal team invited the Judge (as it was entitled to do) to reconsider one aspect of the judgment following oral submissions. Having considered the matter, the Judge decided not to accede to the invitation.

6.2 His reasons for taking that course are set out in the Supplemental Ruling.