



R (on the application of BJ & Ors) v Secretary of State for the Home Department (Article 9, Dublin III; interpretation) [2019] UKUT 00066(IAC)

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Field House

London

20 November 2018

BEFORE

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE QUEEN ON THE APPLICATION OF

BJ

RHS (A CHILD BY HER LITIGATION FRIEND, AHS)

SHS (A CHILD BY HER LITIGATION FRIEND, AHS)

NHS (A CHILD BY HER LITIGATION FRIEND, AHS)

AHS

(ANONYMITY ORDER MADE)

Applicants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Appearances

Miss C Kilroy and Miss M Knorr, instructed by The Migrants Law Project, Islington Law Centre appeared on behalf of the Applicant.

Mr G Lewis, instructed by the Government Legal Department, appeared on behalf of the Respondent.

JUDGMENT

1. The approach to interpreting a provision of EU law requires a systematic approach, looking at the words in the context of the structure of EU law as a whole and asking:

(i)

Is the meaning of the provision defined in EU Law?

(ii)

If not, can the words be given their usual, ordinary meaning?

(iii)

If not, what are the possible different interpretations?

(iv)

What is the objective of the provision?

(v)

Which interpretation best preserves its effectiveness?

(vi)

Which interpretation best achieves the objective?

(vii)

What are the consequences of the different interpretations?

2. (i) The phrase "family member.....who has been allowed to reside as a beneficiary of international protection" in Article 9 of Dublin III is to be interpreted as including a person who has, since the grant of international protection, acquired the nationality of the an EU member state; and,

(ii) The phrase "persons concerned" in Article 9 of Dublin III does not include the family member or members previously granted international protection in the requested state.

JUDGE RINTOUL:

1.

The applicants challenge with permission a decision of the respondent made on 19 April 2018 to refuse a Take Charge Request ("TCR") made by the Greek government on 13 March 2018. That application was expressed to be pursuant to Article 9 of Regulation 604/2013 ("Dublin III Regulation").

2.

The background facts to this case are not substantially in dispute.

3.

A1 is married to A5; A2 to A4 are their minor children. A5 was born in Kuwait in 1976 but he was not recognised as a national as he is an undocumented Bidoon. He arrived in the United Kingdom in June 2005 and was subsequently recognised as a refugee and granted status on that basis. He was granted indefinite leave to remain in 2011 and in 2012 he was naturalised as a British citizen. Having acquired British citizenship, he returned to Kuwait where his family introduced him to A1. They were married in 2013 and A1 went to live with A5's parents in Kuwait. He returned to the United Kingdom after two months.

4.

A5 continued to return to Kuwait and his wife on several occasions and their three children, A2, A3 and A4 were born in 2013, 2014 and 2016. It is the applicant's case that the children are British citizens as they were born after A5 became a British citizen.

5.

Towards the end of 2017 A1 and the children fled Kuwait and travelled to Turkey overland and then on to Greece by boat. During the journey they were rescued by the Greek coastguard and the applicants claimed asylum in Greece on 29 December 2017. A1 supplied the Greek authorities with

evidence of A5's status in the United Kingdom who then made a TCR to the United Kingdom pursuant to Article 9 of Dublin III.

6.

On 19 April 2018 the United Kingdom refused the TCR although that decision was not communicated to the applicants until some months later. The reason given for refusal was as follows:-

You have stated that the husband of the above named-A5-lives in the United Kingdom and has status. However, according to UK immigration records, (A5) became a British citizen on 26 July 2012. As such they are not the recipients of or requesting international protection. They are therefore outside the Dublin III Regulation and thus Articles 9 and 10 are not engaged.

Consequently I regret to inform you that your request to take charge of the above named is respectfully denied.

7.

It is not contended that the Greek authorities renewed their request .

8.

The applicants obtained the assistance of the Migrant Law Project who wrote a pre-action protocol letter to the respondent submitting that the applicants fell within Article 9 Dublin III as confirmed by HA and Others [2018] UKUT 00297 or, in the alternative, they should have been accepted for transfer pursuant to Article 17 (2) of Dublin III, it being argued that the rejection of the TCR was in breach of the children's best interests, Articles 8 ECHR and/or Articles 7 and 24 of the Charter of Fundamental Rights and Freedoms ("CFR") on the basis that, at the time, A1 to A4 were housed in wholly unsuitable conditions as they lived in a shipping container, sharing toilet and cooking facilities. Further, A1 has significant health problems and the children have developed worrying developmental signs as well as one suffering a medical condition indicative of a significant spinal defect requiring correction. It was also stated that A5 has poor physical and mental health after his experience of torture in Kuwait and as a result of separation from his family.

9.

The respondent rejected that submitting that :-

(i) HA and Others and ZM could be distinguished;

(ii) the only evidence provided by the Greek authorities of the relationship being an untranslated documented which describes them as married and that no evidence had been provided that A5 was the father of the children A2 to A and so Articles 9 and 10 were not engaged;

(iii) the Greek authorities had not made the TCR under Article 17 (2) and no evidence had been provided that could reasonably allow any assessment of a request made under that the Article.

Grounds of Challenge

10.

In summary, the applicants challenge the respondent's decision on four principle grounds: that-

(i)

Properly interpreted, Article 9 of Dublin III applies to A1 to A4 as A5 had been recognised as a refugee prior to naturalisation as a British citizen and is therefore a family member "has been allowed to reside as a beneficiary of international protection"; HA and Others could not be distinguished as

Article 9 applies “regardless of whether the family was previously born in the country of origin”; and, the Secretary of State erred in requiring as an ex-post facto justification that there were additional reasons in particular a failure to provide evidence that A5 did not expressly require his desire for unification.

(ii)

In the alternative, the respondent erred in not considering the TCR under Article 17 (2) of Dublin III, the case clearly raising humanitarian grounds based on family considerations and had triggered a duty to treat the children’s best interests and their right to family life is a primary consideration, the PAP response wrongly submitting that there was insufficient evidence to trigger a 17 (2) assessment;

(iii)

In failing to assess and take into account the children’s best interests in considering the TCR as required by Articles 6(1) and (3) of Dublin III Regulation this being a breach of Dublin III and CFR Article 8; that the Greek authorities conclusions that are determinative that the children’s best interests require that they be transferred to the United Kingdom, absent evidential basis to depart from that; and, that the Secretary of State should have made enquiries and required further evidence to assess the children’s best interests, the children having a right to maintain regular direct contact with both parents pursuant to Article 24 CFR;

(iv)

In the circumstances of the respondent’s failures, it is for the Tribunal to assess for itself whether the interference with the applicants’ right to family life is disproportionate, if necessary taking into account evidence that was not before the decision maker pursuant to Articles 8 ECHR Articles and 7 and 24 CFR were being breached by the decision to refuse the TCR.

11.

The respondent considered that ground 1 was arguable and a consent order was made to that effect. He did not, however, accept that there was merit in the other grounds.

12.

In summary, the respondent rejected the claims arguing that:-

(i)

On a proper construction of Article 9 in line with Article 7(2), it did not apply to A1 to A4 as A5 is not a beneficiary of international protection as defined;

(ii)

The Greek government had not made a request pursuant to Article 17 but solely under Article 9 and there was no obligation on the United Kingdom unilaterally to accept the asylum claims pursuant to Article 17 .2 as no request in the terms set out in that Article had been made;

(iii)

That a proper rejection of the Article 9 request had been made and that a requested state was not subject to a separate freestanding obligation to accept responsibility for every asylum claim made by a child if it would be in their best interests to be admitted to the United Kingdom whose obligation was to regard the best interests of the children as a primary consideration which informs the mandatory criteria in Chapter 3 of the Dublin III Regulation; and, in any event, none of the mandatory criteria were met and no further request was made in the United Kingdom to accept the asylum claims on humanitarian grounds relating to family circumstances;

(iv)

Dublin III does not provide a generic obligation to reunite families and none of the discretionary criteria in Article 17(1) or (2) are met it only being in an exceptionally compelling case that Article 8 would provide an independent basis for requesting a member state to accept responsibility.

13.

On 19 October 2018 Upper Tribunal Judge Pitt granted permission on all grounds.

14.

When the matter came before me, substantively, Miss Kilroy raised as a preliminary matter an application to admit further evidence. I indicated that I would make a decision having considered the application as a whole as to whether this additional material should be admitted.

15.

I then proceeded to hear submissions from both parties and reserved my decision.

16.

I deal first with ground 1 and then with grounds 2 to 4. That is because ground 1 raises a discrete issue of interpretation of EU law which is more conveniently dealt with separately.

The law:

17.

Dublin III provides as follows:

Recitals

(13) In accordance with the 1989 United Nations Convention on the Rights of the Child and with the Charter of Fundamental Rights of the European Union, the best interests of the child should be a primary consideration of Member States when applying this Regulation. In assessing the best interests of the child, Member States should, in particular, take due account of the minor's well-being and social development, safety and security considerations and the views of the minor in accordance with his or her age and maturity, including his or her background. In addition, specific procedural guarantees for unaccompanied minors should be laid down on account of their particular vulnerability.

(14) In accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with the Charter of Fundamental Rights of the European Union, respect for family life should be a primary consideration of Member States when applying this Regulation.

(15) The processing together of the applications for international protection of the members of one family by a single Member State makes it possible to ensure that the applications are examined thoroughly, the decisions taken in respect of them are consistent and the members of one family are not separated.

...

(35) In order to provide for supplementary rules, the power to adopt acts in accordance with Article 290 TFEU should be delegated to the Commission in respect of the identification of family members, siblings or relatives of an unaccompanied minor; the criteria for establishing the existence of proven family links; the criteria for assessing the capacity of a relative to take care of an unaccompanied minor, including where family members, siblings or relatives of the unaccompanied minor stay in more than one Member State; the elements for assessing a dependency link; the criteria for assessing

the capacity of a person to take care of a dependent person and the elements to be taken into account in order to assess the inability to travel for a significant period of time. In exercising its powers to adopt delegated acts, the Commission shall not exceed the scope of the best interests of the child as provided for under Article 6(3) of this Regulation. It is of particular importance that the Commission carry out appropriate consultations during its preparatory work, including at expert level. The Commission, when preparing and drawing up delegated acts, should ensure a simultaneous, timely and appropriate transmission of relevant documents to the European Parliament and to the Council.

...

(37) Detailed rules for the application of Regulation (EC) No 343/2003 have been laid down by Regulation (EC) No 1560/2003. Certain provisions of Regulation (EC) No 1560/2003 should be incorporated into this Regulation, either for reasons of clarity or because they can serve a general objective. In particular, it is important, both for the Member States and the applicants concerned, that there should be a general mechanism for finding a solution in cases where Member States differ over the application of a provision of this Regulation. It is therefore justified to incorporate the mechanism provided for in Regulation (EC) No 1560/2003 for the settling of disputes on the humanitarian clause into this Regulation and to extend its scope to the entirety of this Regulation.

...

(40) Since the objective of this Regulation, namely the establishment of criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale and effects of this Regulation, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union (TEU). In accordance with the principle of proportionality, as set out in that Article, this Regulation does not go beyond what is necessary in order to achieve that objective.

Article 1

Subject matter

This Regulation lays down the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person ('the Member State responsible').

Article 2

Definitions

For the purposes of this Regulation:

(a) 'third-country national' means any person who is not a citizen of the Union within the meaning of Article 20(1) TFEU and who is not national of a State which participates in this Regulation by virtue of an agreement with the European Union;

...

(f) 'beneficiary of international protection' means a third- country national or a stateless person who has been granted international protection as defined in Article 2(a) of Directive 2011/95/EU;

(g) 'family members' means, insofar as the family already existed in the country of origin, the following members of the applicant's family who are present on the territory of the Member States:

— the spouse of the applicant or his or her unmarried partner in a stable relationship, where the law or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to third-country nationals,

— the minor children of couples referred to in the first indent or of the applicant, on condition that they are unmarried and regardless of whether they were born in or out of wedlock or adopted as defined under national law,

Article 9

Family members who are beneficiaries of international protection

Where the applicant has a family member, regardless of whether the family was previously formed in the country of origin, who has been allowed to reside as a beneficiary of international protection in a Member State, that Member State shall be responsible for examining the application for international protection, provided that the persons concerned expressed their desire in writing.

Submissions on Article 9

18.

Miss Kilroy submitted that it was plain from the recitals in the Dublin agreement particularly at Article 5 that there was a need for speed; and, at Articles 13 to 17 the issues of children are of paramount concern. She submitted further that recital 15 in this context indicated that the asylum applications of A1 to A4 should be determined in the United Kingdom given the connection with A5 this being an indication that there should be consistency and thoroughness. She submitted that, properly considered, recital 15 gave three reasons why the applications should be processed in the United Kingdom.

19.

Turning to the definitions in Article 2 Miss Kilroy submitted that the definition set out in Article 2(f) did not apply such that A5 was not a person within Article 9; it was accepted that the wording in Article 9 did, however, disapply the definition of family member in Article 2(g). Miss Kilroy submitted that regard needed to be paid to the stricture of the hierarchy in that not only did it seek to give primacy to the best interests of children in the assessment criteria particularly that it was possible that the clarity of reason overlapped, it being possible that the country identified in one Article might be different from a category in another depending on where a family was dispersed. She relied on HA & Others at paragraphs 54, 59 and 60 submitting that there was a need for Article 9 to cover children as well as adults and that this showed a concern for the right to family life.

20.

Miss Kilroy submitted that contrary to the respondent's assertions, a close temporal nexus between one member of the family's claim for asylum and the remainder is not necessary and indeed, if the family member in the member state had not acquired citizenship, then there was no time limit.

21.

Miss Kilroy submitted that Article 9 ought to be construed in its context as the Supreme Court in ZN (Afghanistan) had done and that there was no reason to depart from the analysis in HA and Others .

22.

Mr Lewis submitted that the title preceding Article 9 was an important matter to be taken into account as the title reads “are” beneficiaries of international protection and that, combined with the definition of the person in receipt of international protection in Article 2(f) indicated that the scope of Article 9 should cease once the individual in question had ceased to be such a person through for example taking citizenship. He submitted further that HA & others could properly be distinguished on the basis that the family had existed in Kuwait before the asylum claim had been made and indeed before the first applicant there had come to the United Kingdom to claim asylum. He submitted further that on a proper construction of HA & others , the point was obiter, it arising only in consideration of Article 17 (2).

23.

Although accepting that recital 15 could apply equally to Article 10 of Dublin III, Mr Lewis submitted that a temporal proximity or nexus between the claim of the person granted international protection and the claims of the family members was an important consideration. He accepted that, as I observed, the categories of people covered by Article 8 and Article 9 were different, Article 8 applying where the family member in question was a citizen of a member state. He submitted, however, that this was in the context of a different situation which was the protection of unaccompanied minors. It was submitted that it was evident that the policy here was not to admit family members arising from a family once one member had acquired citizenship that being evident both from Article 7.2 and it was important to note that on a proper construction of Article 9 the consent of the person in the member state was also required, this being the necessary part of the checks that would be undertaken by the Secretary of State. He was, however, unable to provide any evidence that this is what would be undertaken or that this was the Secretary of State’s policy or that this is what was usually done in the circumstances. He submitted that such a check might be necessary if for example there was a request from a man to join a spouse who had been recognised as a refugee in a member state as a result of domestic violence.

24.

Mr Lewis submitted that once an individual became a citizen of an EU state, they should no longer be able to obtain the benefit of family reunion under Dublin III.

25.

Mr Lewis submitted further that ZN was not directly applicable in this case, given the very different context of interpreting the Immigration Rules.

26.

Miss Kilroy submitted that it was not proper to seek to distinguish ZN there being no real difference in the language and that the Supreme Court had identified in its analysis of paragraph 352D of the Immigration Rules (see paragraph 27) that this applied equally to Article 9. She submitted further that there was nothing to suggest that Dublin III Regulation would be undermined by the particular interpretation that the applicant sought to place on Article 9 and that there was no reason to read it in the manner indicated by the Secretary of State. She submitted that in reality what the Secretary of State was doing was to make again the submission rejected in HA& Others that the family should apply for entry clearance, an argument which had been rejected. She submitted further that Article 7(2) did not assist the Secretary of State as it related not to the position of A5 but rather to the fixing position so that, for example, there could not be a marriage after a person had claimed asylum so that they would then obtain the benefit of one of the Articles. It was submitted that there was no reason.

Discussion

27.

Both parties accept that if the applicants succeed in showing that Article 9 does apply to them, then the other challenges to the decision in effect fall away. It is also accepted that the means of interpreting EU law are not the same as interpreting domestic law; that is uncontroversial.

28.

It is established law that the usual canons of statutory interpretation used in English Law are not applicable to the law of the European Union. Equally, a court of a member state is not assessing a question of foreign law. How then is a court to interpret European Law?

29.

As can be seen from CILFIT [1982] EUECJ 283/81 the starting point is the usual meaning of the words. As the ECJ has observed in BCE v Germany [2005] ECR I-10595 (Case 220/03) at [20]:

Although an interpretation of a provision of an Agreement 'in the light' of its legal context is possible in principle to resolve a drafting ambiguity, such an interpretation cannot have the result of depriving the clear and precise wording of that provision of all effectiveness.

30.

To do otherwise would be to detract from the principal of legal certainty.

31.

This principle is subject to two observations about "clear and precise":

a.

EU Legislation is drafted in several languages, each of which is equally authentic (CILFIT at [18]); and,

b.

Even if the different language versions are in agreement, EU law uses terminology which is particular to it, and legal concepts do not necessarily have the same meaning in EU law and in the law of the member states (CILFIT at [19]) as the law of the European Union constitutes a new legal order of international law (Van Gend en Loos [1963] ECR 3415 Case 26/62;

32.

With respect to the former, if there are differences then the case law of the ECJ suggests that regard should be had to the intention of the author and in light of the objectives the measure sought to achieve - see Stauder [1969] ECR 419 (case 29/69). In the case of the latter, care must be taken to consider if the words in question have an autonomous meaning given to them in EU law. A domestic court does, naturally, have significant practical problems in assessing texts in different languages. If the issue arises then it may be a factor militating in favour of a preliminary reference to the CJEU, an issue which does not arise here.

33.

If, however, the meaning is not clear and precise, regard must be had to the context and purpose of the legislation in question as the ECJ did in Elgafaji [2009] ECR I-92 (Case 465/07). Faced with an apparent contradiction within the terms of Article 15 (c), the ECJ interpreted it in such a way as to give it an autonomous meaning which gave it effect, illustrating the premise that the creator of the legislation is acting rationally, and that the provision was introduced to have effect in a logical and rational scheme. A provision of EU law cannot be redundant. It follows that where several

interpretations of a provision are possible, that which best ensures effectiveness and consistency with primary EU law should be followed.

34.

It is evident also from the case law of the ECJ that in interpreting a provision, regard may be had to the travaux préparatoires if they are available. This, in the context of immigration, can be seen in Teixeira [2010] ECR I-1107 at [58].

35.

The method of interpretation which is generally seen as most characteristic of the ECJ is a purposive or “teleological” approach. That is most easily seen in the interpretation of TFEU provisions such as Article 21 in, for example, Zambrano and the extensive case law on the meaning of “worker” within Article 45 and its predecessors. The teleological approach to interpretation may, as the circumstances require, give rise to three closely linked questions:

a.

Which interpretation, having had regard to the context of the provision, best preserves its effectiveness?

b.

If the provision is ambiguous, which interpretation best achieves the objective it pursues?

c.

What consequences would flow from each interpretation?

36.

Teleological interpretation is, however, subject to the proviso that exceptions are to be interpreted strictly (see Commission v UK [2010] I-03491 at [39]) although a broader interpretation may be adopted if that is required to give effect to the objectives.

37.

It is to be noted also that the words which are to be construed are the operative part of the instrument in question; the preamble may be an aid to the interpretation as in Toshiba Europa GmbH v Katun Germany GmbH [2001] ECR I-7945 where at [36] –[37] recourse was had to a recital because a literal interpretation of Directive 84/450 as amended would result in a contradiction with Directive 89/104 but it is not a legal Rule – see Casa Fleischhandel v Bundesantalte fur Landwirtschaftliche Marktordnun g [1989] ECR 2789 at [31]: “Whilst a recital in the preamble to a regulation may cast light on the interpretation to be given to a legal rule, it cannot in itself constitute such a rule.”

38.

It follows that the approach to interpreting a provision of EU law requires a systematic approach, looking at the words in the context of the structure of EU law as a whole and asking:

(i)

Is the meaning of the provision defined in EU Law?

(ii)

If not, can the words be given their usual, ordinary meaning?

(iii)

If not, what are the possible different interpretations?

(iv)

What is the objective of the provision?

(v)

Which interpretation best preserves its effectiveness?

(vi)

Which interpretation best achieves the objective?

(vii)

What are the consequences of the different interpretations?

39.

As a starting point, it must be recalled that in HA& Others the Upper Tribunal did not receive detailed submissions on the interpretation of Article 9, and submissions were not made in respect of the effect of Article 2(f). Article 9 was not directly in point; no Article 9 request had been made.

40.

It is not submitted that versions of Article 9 in other languages do not have the ambiguity of the English version, nor do I consider that obtaining certified translations would be appropriate in this case as the difficulty arises not from the words used; there is no suggestion that unlike in other cases such as Stauder words appeared in the German version but not others. Here, the issue is the effect of “has been”. The use of the perfect tense in English in this context suggests an event which occurred in the past and which continues to have effect in the present. That type of nuance may or may not exist in other languages but is unlikely to be resolved by a certified translation; rather, it would most likely require expert evidence as to whether the tense used had the same effect as in English.

41.

The parties take differing views of Article 9. The applicants contend that it applies to them as it includes the family members of all those who, historically, have been allowed to reside as a beneficiary of international protection. The respondent contends that it does not apply where the that person has subsequently acquired citizenship, as the definition of “beneficiary of international protection” in Article 2(f) excludes such persons, and that this interpretation is consistent with scheme of Dublin III.

42.

I therefore turn first to Article 2(f). There is no suggestion of ambiguity of the text in the different language versions and there is, I conclude, no reason why the words used cannot be given their natural meaning. That is, to be a beneficiary of international protection an individual must meet two conditions: first that the person is not a citizen of an EU state (or other state party to Dublin III), and second, that the person has been granted international protection. The first condition is consistent with CEAS framework as, under the Qualification Directive, status can be granted only to third-country nationals. The second equally, mirrors the Qualification Directive. There is only ambiguity if you read “means” as “is”. It could have been worded as a person who is a third country national and who has been granted protection, but it does not. There is a linking together of both characteristics in conformity with the overall scheme of the Common European Asylum System’s definition of refugee being limited to third-country national; citizens of member states fall outside the definition.

43.

There are two conditions to be fulfilled before the definition in Article 2(f) is met, nationality and the grant of protection. The first condition is not immutable as an individual's nationality may change but the second condition is immutable; the grant of protection is an historical fact.

44.

The phrase "beneficiary of international protection" occurs infrequently in Dublin III. It occurs only in the definition of family member within Article 2(g) where it relates only to a minor child who has been granted protection and in Article 9, where the restriction of family member confining that to a family which existed in the country of origin is disapplied.

45.

The group of individuals who fall within Article 2(f) is large and covers all those granted protection by the member states party to Dublin III. It is inevitable that people within that group may move between member states, lawfully or otherwise. For example, an individual recognised in Belgium might lawfully move to France. Unless it is the case that the grant of residence is as a beneficiary of protection, then Belgium would be the state responsible for examining the claim even many years after it had recognised the family member as a refugee. That attenuated nexus is still thinner if the family member seeking asylum within the EU becomes a family member post- grant of protection. In the case of the Belgian-recognised refugee now resident in France it would not facilitate family reunion as it would require consideration of the claim made by post-grant family members by a state in which the beneficiary of international protection is not resident.

46.

At first glance that may suggest that similar or linked cases should be determined in the same state. But in the case of post-grant family members that need not be the case: suppose the spouse was from a different country from the person recognised already - that would not be a consideration, and Article 9 would still apply.

47.

There is, I consider, no ambiguity in the provisions of Article 2 (f) which could, applying principles of family unity, or best interests of children, permissibly lead to an interpretation giving a different answer to the question of which state is responsible.

48.

Turning back to Article 9, it is useful to consider it as if it reads as follows, adding in the words from Article 2(f):

Where the applicant has a family member, regardless of whether the family was previously formed in the country of origin, who has been allowed to reside as a third- country national or a stateless person who has been granted international protection in a Member State, that Member State shall be responsible for examining the application for international protection, provided that the persons concerned expressed their desire in writing.

49.

This does not resolve the ambiguity in the text; the words "has been" apply to the whole of the definition set out in 2(f) and it is an historical fact that at the time of the grant of protection, A5 was a stateless person.

50.

It is therefore necessary to move on to a consideration of the context of Article 9, and Dublin III as a whole. In doing so, I am not persuaded that weight can be attached to the headings in the directive, contrary to what Mr Lewis submitted. There is no authority cited to me from EU case law that they are an aid to interpretation and given the presence of recitals, it is difficult to discern what their value, if any, could be. Further, as I observed during submissions, the French version has no verb in the heading, nor do the Italian or Spanish versions, each of which is authentic.

51.

Dublin III's purpose is, as is stated in Article 1, to establish the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the member states, as confirmed in Ghezalbash [2016] EUECJ C-63/15 where the CJEU held:

42. Thus, according to recitals 4, 5 and 40 of Regulation No 604/2013, the objective of the regulation is to establish a clear and workable method based on objective, fair criteria both for the Member States and for the persons concerned for determining the Member State responsible for examining an asylum application. It follows, in particular, from Articles 3(1) and 7(1) of the regulation that the Member State responsible is, in principle, the Member State indicated by the criteria set out in Chapter III of the regulation. Moreover, Chapter IV of the regulation identifies specifically the situations in which a Member State may be deemed responsible for examining an asylum application by way of derogation from those criteria.

43. The crucial importance, for the application of Regulation No 604/2013, of the process for determining the Member State responsible on the basis of the criteria laid down in Chapter III of the regulation is confirmed by the fact that Article 21(1) of the regulation provides that it is possible for the Member State with which an application for international protection has been lodged to request another Member State to take charge of an asylum seeker only if the first Member State considers that the second is responsible for the examination of the application. Moreover, under Article 21(3) of the regulation, the request for charge to be taken of the applicant must include evidence enabling the authorities of the Member State requested to check whether it is responsible on the basis of the criteria laid down in the regulation. Similarly, it is apparent from Article 22 of Regulation No 604/2013 that the response to such a request must be based on an examination of the elements of proof and circumstantial evidence whereby the criteria laid down in Chapter III of the regulation are applied.

52.

Its purpose must also be seen in the context of the CEAS and EU Immigration law as a whole. While the UK, Ireland and Denmark opted out of Directive 2003/86/EC on the right to family reunification which covers refugees and their families, it is nonetheless part of that context. Article 2 (d) of that directive extends its provisions to families coming into being after a sponsor's entry into a member state, and there are within chapter V of the Directive special provisions applicable in the case of refugees.

53.

Equally of note is Directive 2003/109/EC concerning the status of third country nationals who are long-term residents which again does not apply to the UK, Ireland and Denmark but is still part of EU immigration law. Broadly, it provides that third-country nationals lawfully resident for a period of 5 years can (subject to various conditions) acquire a status which gives them a bundle of rights under EU law including a conditional right (Articles 14- 23) to reside to pursue an economic activity, study or "other purposes". In the context of Article 9 of Dublin III it is of note that the long residence directive

applies to those granted international protection and thus would permit, as in the scenario set out above, a third-country national recognised in Belgium to move to live and work in France after acquiring 5 years' lawful residence in Belgium. It is of note that by operation of Article 8, any long residence permit issued by the member state recognising a person as entitled to international protection must state that as must any subsequent long residence permit issued by the member state in which he then takes up residence and acquires long residence. This does not, however transfer responsibility for international protection – see recital 9 of Directive 2011/51.

54.

In this context, it becomes apparent that the legislative intention is that primary responsibility for those granted international protection lies with the member state which granted. This then explains why, in the scenario set out above, it is the member state which first granted a person international protection which remains the state responsible for determining claims made by his family members. It also indicates why recital (15) of Dublin III is more relevant to Article 10.

55.

Taking these factors together, it can be seen that the hierarchy of criteria is not primarily focussed on family reunion. Although under Article 8, the best interests of minors are prioritised, the state in which the minor has a family member who is lawfully present and may even be a citizen, is responsible for assessing his claim. It is of note given the tenuousness of some of the relationships that would be covered that there may in some cases be no existing family life between the child and the relative in the other member state; they may never have met. It must, however, be borne in mind in this context that regs. 12.3 and 12.4 in the Implementing Regulations 1560/2003 as amended by Reg 118/2014, give detailed provisions as to how enquiries about relatives able to care for unaccompanied children are to be made.

56.

A different principle applies in respect of Article 9; that is, the continuance of responsibility of the state which initially granted protection without any real temporal limit. There is some degree of the promotion of family unity here, and it is complementary to Article 10 which applies only when there has yet to be a determination of status in respect of the family member who first arrived in the EU and it does not extend to family acquired post-flight from the country of origin. To that extent it promotes family unity only to a limited extent; rather, Article 10 promotes the efficiency of examining like claims together.

57.

I remind myself that all that is being decided under Dublin III is which member state is responsible for assessing an asylum claim. It need not necessarily follow that the family members who fall within Article 9 would be granted international protection or, failing that, residence in the member state to which they are transferred, particularly if the sponsor no longer resides there. That would not be family reunion; indeed, it could have the opposite effect.

58.

Pausing then to take stock, it is apparent from this analysis that the purpose of Article 9 within the overall framework of the CEAS is to ensure that the member state which granted a person international protection retains the responsibility for assessing the claims of that person's family members. That responsibility does not diminish over time, or where there is no common nexus between the claims of the person recognised and his family members, or when the person recognised has moved to another member state.

59.

The respondent's case is not that a condition that the person in question is still in receipt of international protection can be interpolated into Article 9. It is, rather, that the combination of Articles 2(f) and 9 has the effect of making it a condition that the person concerned is still in receipt of protection.

60.

If the construction the respondent seeks to place on Article 9 were correct, and it is engaged only while the historical fact of a grant of residence as a beneficiary of international protection in a member state is still subsisting, this would have the effect of, to take the example of the person recognised in Belgium moving to France, Belgium no longer being responsible. That is contrary to the purpose of Article 9 as identified above. It is not possible to put different temporal constraints on the separate conditions of a) a grant of residence and b) the basis of that grant of residence such that Article 9 could be read as requiring only the fact of a prior grant of residence but a continuing requirement of the basis of that grant.

61.

The acquisition of citizenship of the EU by the grant of citizenship by a member state significantly alters the status of the person concerned, not least as such a person ceases to be a refugee. But there are other circumstances in which that status can cease. It may be that the circumstances giving rise to the claim no longer apply, in which case the state which granted international protection could cease or revoke it. While that would not affect entitlement to a long residence permit, it would mean that Article 9 would operate differently if the respondent's submission that it can apply only where the individual in question retains international protection as that interpretation would have to be consistent with change in nationality.

62.

Accordingly, and given that only one interpretation of Article 9 can apply, it cannot be read so as to include the scenario where a person granted protection lawfully goes to another EU state, but exclude the scenario, including the acquisition of nationality, without an interpolation to the effect that the situation must still subsist. If, however, and bearing in mind that all that is being done here is the allocation of responsibility, the use of the words "has been" is simply construed as a requirement that the family member had at a time in the past been granted a right of residence as a beneficiary of international protection, there is no need to strain the wording to give effect to the purpose of the provision. It would also, and this is perhaps marginal, have an ancillary effect of, to a degree, promoting the best interest of children and family unity.

63.

I am not persuaded either that Article 7 (2) assists the respondent. As can be seen from Articles 8 to 15, it is conceivable that, depending on how a family's different members are distributed, an application of the different Articles will identify different states as responsible; it is the hierarchy which determines which. As people can and do move around, if a date on which that hierarchy was to be applied was not fixed, application of the criteria would become difficult, and subject to abuse, including for example a marriage of convenience. It is to this that the "situation" referred to in Article 7(2) applies.

64.

In summary, therefore, albeit for different reasons, I conclude that the interpretation placed on Article 9 in *HA & Others* is correct. Acquisition of British citizenship by a family member does not alter the fact that he was in receipt of international protection and so Article 9 would still apply.

65.

The respondent argues that even if that is so, the applicants cannot succeed as the take charge request requires that “the persons concerned expressed their desire in writing.” This, it is submitted, requires consent not just from those who are the subject of the TCR but of the family member who, in this case, had been granted protection in the past.

66.

It is clear that the written consent of the transferees is required. That is provided for in the standard forms prescribed by the implementing Directives. These, however, do not expressly provide for the consent of the family member who has been granted protection in the past. That is unsurprising given that the form is to be completed by the requesting state which may have no means of contact with a person outside its jurisdiction and it is not possible to imply into the scheme any requirement on the requesting state to provide it. This would cause significant delay and add a further layer of complexity and uncertainty, undermining the purposes of the Dublin III scheme.

67.

The respondent contends that the checking of consent from the person within the jurisdiction is something that he would have done as part of the checks required to be undertaken. There is, however, no evidence to support this bare assertion or the assertion that checks such as this are done to protect, for example, a woman granted status in the UK on grounds of domestic violence from being joined by an abusive husband. There is nothing that Mr Lewis could take me to in the relevant policy indicating that this would be done, still less any witness statement from a responsible official setting out what is done.

68.

If the respondent is correct that consent or acquiescence of the person to be joined is necessary, it does not apply in the case of the relative whom a minor will be joining (Article 8) or to family groups (Article 11), albeit that the Implementing Regulations make specific provision for unaccompanied minors at reg. 12.3 and 12.4. I consider nothing turns on the use of “persons” in the plural given that it has to be plural as the TCR may apply to several people.

69.

In conclusion:

(i) the phrase “family member.....who has been allowed to reside as a beneficiary of international protection” in Article 9 of Dublin III is to be interpreted as including a person who has, since the grant of international protection, acquired the nationality of the an EU member state; and,

(ii) the “persons concerned” in Article 9 of Dublin III does not include the family member or members previously granted international protection in the requested state.

70.

In conclusion, I am satisfied that first, Article 9 applies, and second, that the consent or desire to the transfer has to be expressed only by those who are its subjects. The respondent’s decision was therefore unlawful as it proceeded on an incorrect interpretation of the law and I quash that decision.

Grounds 2 to 4 - the law

71.

Article 17 (2) of Dublin III provides:

Article 17 Discretionary Clauses

17 (2). The Member State in which an application for international protection is made and which is carrying out the process of determining the Member State responsible, or the Member State responsible, may, at any time before a first decision regarding the substance is taken, request another Member State to take charge of an applicant in order to bring together any family relations, on humanitarian grounds based in particular on family or cultural considerations, even where that other Member State is not responsible under the criteria laid down in Articles 8 to 11 and 16. The persons concerned must express their consent in writing.

The request to take charge shall contain all the material in the possession of the requesting Member State to allow the requested Member State to assess the situation. The requested Member State shall carry out any necessary checks to examine the humanitarian grounds cited, and shall reply to the requesting Member State within two months of receipt of the request using the 'DubliNet' electronic communication network set up under Article 18 of Regulation (EC) No 1560/2003. A reply refusing the request shall state the reasons on which the refusal is based.

72.

In addition, the Dublin Implementing Regulation 1560/2003 provides:

Article 2 Preparation of requests for taking back

Requests for taking back shall be made on a standard form in accordance with the model in Annex III, setting out the nature of the request, the reasons for it and the provisions of Regulation (EU) No 604/2013 of the European Parliament and of the Council (*) on which it is based.

The request shall also include, as applicable:

(a) a copy of all the proof and circumstantial evidence showing that the requested Member State is responsible for examining the application for international protection, accompanied, where appropriate, by comments on the circumstances in which it was obtained and the probative value attached to it by the requesting Member State, with reference to the lists of proof and circumstantial evidence referred to in Article 22(3) of Regulation (EU) No 604/2013, which are set out in Annex II to this Regulation;

Article 3 Processing requests for taking charge

1. The arguments in law and in fact set out in the request shall be examined in the light of the provisions of Regulation (EC) No 343/2003 and the lists of proof and circumstantial evidence which are set out in Annex II to the present Regulation.

2. Whatever the criteria and provisions of Regulation (EC) No 343/2003 that are relied on, the requested Member State shall, within the time allowed by Article 18(1) and (6) of that Regulation, check exhaustively and objectively, on the basis of all information directly or indirectly available to it, whether its responsibility for examining the application for asylum is established. If the checks by the requested Member State reveal that it is responsible under at least one of the criteria of that Regulation, it shall acknowledge its responsibility.

73.

I turn now to the remaining grounds of appeal. Miss Kilroy submitted that even if the applicant did not fall within Article A9, nonetheless there was a proper Article 17 (2) request made in this case which needed to be considered because the information disclosed in the TCR was sufficient to create an obligation where, as here, it raised issues of fundamental rights, on the respondent to investigate. She relied for this submission on Ghezelbash at [42].

74.

Miss Kilroy submitted (although there is no evidence to support this, only her assertion), that the TCR form at Part 1 has a drop-down list permitting the reference to only one Article and that the evidence of how the matter was considered was lacking in any detail. She submitted further that the decision was defective in that there was no attempt to assess the impact of HA& others it being contrary to the rule of law for the Secretary of State simply to ignore decisions of the Upper Tribunal and in failing to advise the Greek government of the position taken by the courts in the United Kingdom.

75.

Miss Kilroy submitted that there was in this case a duty on the Secretary of State to investigate matters properly and to ask for further evidence as identified in R (on the application of MS) (a child by his litigation friend MAS) v Secretary of State for the Home Department (Dublin III; duty to investigate) [2019] UKUT 00009 (IAC) and also in R (on the application of MK, IK (a child by his litigation friend MK) and HK (a child by her litigation friend MK) v Secretary of State for the Home Department (Calais; Dublin Regulation - investigative duty) IJR [2016] UKUT 231 (IAC). Accordingly, on that basis the failure to do that alone rendered the decision unlawful.

76.

Miss Kilroy submitted that in light of Article 27 of Dublin III Regulation and following MS, as well as Ghezelbash and Mengesteab [2017] EUECJ C-670/16 there was on the facts of this case a duty on the Tribunal and the Secretary of State to undertake a full merits review and, where necessary, take into account evidence which had not been in existence at the time of decision and had not been in front of the Secretary of State. Miss Kilroy submitted that, having had regard to the appropriate construction of the implementing Regulations particularly Article 3(2) in the light of the Articles 21, 22 and 23 of Dublin III, the Secretary of State was compelled to ask for further evidence. She submitted further, following A v Croydon at paragraphs 197 to 209 that this was in effect a precedent fact issue and thus judicial review ought to proceed on that basis. She submitted that the decisions of the CJEU in the case of Ghezelbash and Mengesteab were supportive of this submission.

77.

Mr Lewis submitted that a TCR made pursuant to Article 17(2) was of a different character from those made under Articles 8 to 15. He submitted further that that was clear from Articles 21.1 and 21.3 as well as 22 and the nature of checks to be undertaken, as well as the Implementing Regulations particularly at Article 3.2 that there was an obligation for a proper request to seek consent to be made and that it was in effect for the government to set out all the details necessary to trigger an Article 17 (2) request. He submitted that there was in reality no evidence submitted with the application capable of generating a humanitarian protection argument and that there was no obligation in the circumstances for the Secretary of State to undertake an examination of any Article 17(2) case which may arise if it had not been made by the requesting state. I agree.

78.

Mr Lewis submitted further that having had regard to the procedural aspect with particular regard to Article 5 and what had to be done in respect of a negative reply and checking the evidence submitted,

the implementing Regulations indicate the type of evidence that was required and this was intended to be a streamlined process, the Secretary of State's decision was correct. Mr Lewis submitted further that this case could be clearly distinguished from MS at paragraphs 171 to 201, particularly 193 as this was not a hard-edged question unlike the question put there. Article 17(2) is clearly not hard-edged as it required an evaluation and balancing of factors and thus is subject to judicial review of the exercise discretion as opposed to the hard-edge question which may be susceptible to a hard-edge precedent fact analysis that (see MS 200, 208 and 209), was a proper construction. In short, he submitted that there was in fact no duty on the Secretary of State on the facts of this case make a formal assessment and that the Secretary of State was *functus officio* having made a decision on the Article 9 issue which is the only issue engaged by the Greek authorities.

79.

Mr Lewis submitted that it was fanciful in the absence of any humanitarian grounds cited by the Greek authorities that the Secretary of State should somehow magic up an Article 17(2) issue. It simply could not be said that there was an Article 17(2) request here or that if there was any basis in which it could be argued that the Secretary of State's duty is extended to, although not being the requested state (note to self and how could she actually do this given she is not the state in which people are not located) to undertake a full means appraisal.

80.

With respect to grounds 3 and 4, Mr Lewis submitted that the Secretary of State's decision could not be faulted on the very limited evidence put before him as to the best interests of the children. It could not be argued that the Secretary of State must undertake a wide ranging and broad enquiry on these facts as to the situation of the children.

81.

Mr Lewis submitted further that there was no general duty under Dublin III to reunite families the legal reality being different; it was simply a means by which the EU Member States had agreed to adopt the criteria as to who would assess asylum claims. He submitted further that the children are not unaccompanied and although their situation was bad, they were looked after by their mother in stable accommodation and the evidence which had not yet been admitted indicated their situation was better. It could not be said that they were in any great difficulties or met the necessary high Article 8 threshold.

82.

In response Miss Kilroy submitted that it was necessary to have regard to how this case had developed and how the Secretary of State's case has changed to incorporate an assertion that 17 (2) had not been raised and raising doubts as to the nature of the relationships.

83.

Miss Kilroy submitted that there was a duty on the Secretary of State to consider an Article 17 (2) issue and, in failing to do so, and indeed to make any comments whatsoever, this required the Tribunal to make a full finding on this issue applying the most intense level of review as indicated in HA and Others . She submitted also that in not allowing the children to be reunited with their father that there was an unjustified breach of Articles 7 and/or 8, given a proper understanding of what the right of family life and respecting the best interests of children required.

Discussion

84.

The applicants assert that the TCR should have been considered as a request made under Article 17 (2) of Dublin III, as that is required under Article 3 (2) of the Implementing Directive. I accept that provision requires the requested member state to consider if, on the basis of the information it has from the requesting state or as a result of its checks, and applying the hierarchy of criteria, it is responsible. That is what occurred here, the respondent considering whether Article 10 was engaged and concluding that it was not.

85.

The applicant emphasises Article 3(2) but it cannot be severed from Article 3(1) which provides the context of what is to be considered, that is, the evidence supplied by the requesting state. Nor for that matter can it be divorced from Article 2 (as amended). It is of note that in both Articles 2 and 3, the phrase “that the requested Member State is [emphasis added] responsible” is used given that Article 17(2) is expressed to allow the requesting state to make a request when the requested state is not responsible under Articles 8 to 11 and 16.

86.

There is no real indication that the Greek authorities who had primary responsibility for evaluating the position of A1 to A4 considered an exercise of their discretion under Article 17(2). While it is submitted by Miss Kilroy that the electronically generated form used permits only one Article of Dublin III to be identified, there is nothing beyond her submission to show that is so, and there is clearly in the form space for the requesting state to make additional comments. No proper reason is advanced as to why that could not include an Article 17(2) request.

87.

I do not accept the submission that the nature of the request made here and the limited information provided invoked even arguably a humanitarian or human rights claim. The reference to A1 having kidney problems is lacking in any detail, and the submission that Greece had considered matters beyond Article 9 is not borne out, not least as no medical evidence was produced. The interpretation the applicants seek to make are, in reality, contrary to the scheme of Dublin III which is to provide an efficient and rapid determination of the state responsible for assessing a protection claim. Further, it cannot in that context be argued that, as the applicants seek to do, the respondent was on notice such that he was under a duty to carry out further investigations. While there may be merit in that submission with respect to unaccompanied minors, there is no actual support for that proposition within the scheme. There was no requirement for him to seek out the medical and other evidence now presented.

Grounds 3 and 4:

88.

I am not persuaded that the new evidence put forward by the applicants should be admitted. I do not accept that the admission and consideration of new evidence not before either the Greek authorities or the respondent must be taken into account, nor that Ghezelbash requires that. As was held in R (on the application of RM) v Secretary of State for the Home Department (Dublin: Article 27(1); procedure) [2017] UKUT 00260 (IAC) at [52] and [53]

(52) . For all the reasons given above, and having considered Article 27(1) of Dublin III in the context of the wording of the Regulation as a whole, its general scheme, its objectives and its context, I conclude, as Advocate General Sharpston did in Karim (at [AG44]) that the, “intensity of any appeal or review process is not laid down in the [Dublin III] regulation and must therefore be a matter for national procedural rules...” .

(53) I am satisfied that adherence of the Tribunal to traditional principles of judicial review does not, either in this case or more generally in challenges brought to decisions made in relation to the second sub-paragraph of Article 19(2), result in a breach of either Article 27 of Dublin III or Article 47 of the Charter.

89.

In short, whether or not new evidence should be admitted is a matter for domestic procedural law. It is, I accept, permissible to adduce in some circumstances evidence to show that a mistake of fact arose, or in certain precedent fact cases, but that is not applicable here. What the applicants are seeking to do is to transform a challenge brought by judicial review into a full merits appeal assessed as at the date of hearing. That is not arguable and in the circumstances, I reject the application to adduce further material.

90.

Contrary to what is submitted by the applicants, it cannot be argued that the Greek authorities have determined that it is in the children's best interests to be transferred to the United Kingdom. There is insufficient evidence that they made such an analysis over and above a conclusion that Article 9 was engaged and that the mother consented to the transfer. Further, and in any event, there was little or no evidence upon which the respondent could have made a determination of the children's best interests, nor was there sufficient evidence for them to determine whether the children are British Citizens. That is a process entirely separate from and outwith a Dublin III consideration. It was and still is open to the applicants to apply for British passports for the children.

91.

Essentially, the submissions set out in grounds 2 to 4 seek to impose as part of the Dublin III process a duty on the respondent to make investigations in respect of children not within the jurisdiction of the United Kingdom as to their best interests, and to seek out evidence which may show that the United Kingdom is responsible for them and should allow them to come here. While it is correct that Dublin III and indeed EU and domestic law emphasises the best interests of children, that is not sufficient on the material put before the respondent to engage any duty to conduct an investigation to determine if they should be admitted if Article 9 was not made out and the Greek authorities had made no express request under Article 17(2).

92.

For these reasons, I conclude that on the basis of the very limited evidence put before the respondent, he did not err in failing to consider whether an Article 17(2) request had been made, or in failing to have proper regard to the children's best interests; or, the right to family life.

Conclusions

93.


While I find for the applicants in respect of Ground 1, I find that grounds 2 to 4 are not made out.

94.

I quash the decision under challenge.

95.

I am satisfied that it is appropriate to make an anonymity order, given the circumstances of the child applicants and as applicants 1 to 4 are claiming asylum.

A handwritten signature in black ink, appearing to read "James Rintoul". The signature is written in a cursive style with a large initial 'J' and 'R'.

Upper Tribunal Judge Rintoul

11 January 2019