UK - The Queen 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, JR/2471/2016, 29 April 2016

Country of Decision:
United Kingdom

Country of Applicant:
Iraq

Date of Decision:
29-04-2016

Citation:
MK, IK and HK v Secretary of State for the Home Department

Court Name:
UK Upper Tribunal, Immigration and Asylum Chamber

Keywords:
Dublin Transfer
Family member
Family reunification
Family unity (right to)
Request that charge be taken
Unaccompanied minor
Vulnerable person

Headnote:
The procedural dimension of Article 8 ECHR as well as the investigative and evidence gathering obligations on Member States within the Dublin III Regulation require the Secretary of State to proactively and expeditiously undertake steps to verify familial links. Passiveness in this regard will lead to an unlawful decision making procedure.

Facts:

The applicants are said to constitute a family unit, MK being the mother, IK and HK her two children. MK has indefinite leave to remain in the UK. Both children resided in Calais for a period of 2 ½ months and have made an application for asylum in the country. The French authorities requested the UK to take charge of the applicants under the Dublin Regulation III to which the Home Office refused to accede to on grounds that MK?s asylum interview along with other documentation presented in 2010 did not match with evidence given under the take charge request. Whilst specifying that a DNA match would be needed to prove the contrary, the UK rejected the take charge request. Upon a further take charge request from the French authorities with additional evidence of the applicants? relationship, as well as psychiatric reports of the children, the Home Office made two further rejection decisions both questioning the credibility of evidence from 2010 and fresh evidence presented.

Applying for judicial review of the Home Office?s decisions to the Upper Tribunal, the applicants advanced that the Secretary of State has investigative and evidential gathering obligations which stem from the Dublin III Regulation, Commission Regulation 1550/2003, the Charter, the ECHR and the UN Convention on the Rights of the Child. However these positive legal duties, which, in this case, took the form of a DNA testing, were neither undertaken nor facilitated by the Home Office. As a consequence the applicants? argued that both their procedural and substantive rights under Article 8 ECHR and Article 7 of Charter had been breached.

Conversely the Secretary of State argued that in light of the insufficient and lack of credible evidence establishing a family relationship, the applicants? family life rights had not been violated. Moreover, on the basis of Article 22(5) of the Dublin Regulation III, which requires coherent verifiable and sufficiently detailed evidence to establish responsibility, the Home Office contended that there is no obligation on the Member States to seek out evidence but merely to consider evidence brought before it.

Decision & Reasoning:
As a first port of call the Upper Tribunal (UT) undertook a comprehensive review of the legal framework pertaining to the case at hand. The UT made clear that rights relating to respect for private and family life and best interest determination in the ECHR and Charter cannot be read in a vacuum but instead form part of a broader legal framework which encompasses the UN Convention on the Rights of the Child (UN CRC) as well as the UNCRC?s General Comment in 2013 on the child?s best interests. Noting that this Comment defines the best interest as a right, a principle and a rule of procedure and that the comment has authoritative guidance, the Tribunal cites that the procedural element requires an evaluation of the possible impact of the decision on the child concerned. Moreover, any information and data gathered must be verified and analysed prior to being used in the child?s best interest assessment.

In that vein the UT reifies the link between the substantive right and the procedural duty by referring to ZH Tanzania v SSHD and Mathieson v SSWP. This is further explored with reference to JO and Others (Nigeria) and the ?Tameside? principle whereby it is incumbent on the decision maker to have regard to all material considerations, in other words a duty of enquiry. As a corollary to this, the objective of the Act must also be promoted (a principle of public law). In addition the UT takes note of ZAT and Others v SSHD and notes that, by virtue of Article 8 of the ECHR and ECtHR case law, applications for family reunion involving children must be done in a positive, humane and expeditious manner requiring appropriate proactive steps on the part of the state concerned.

With this in mind the UT finds the decisions of the Home Office unlawful from two different angles. From a public law principle and the Tameside duty of enquiry the UT finds that the Home Office

was completely passive in investigating the possibility of DNA testing for the applicants in France as well as an enquiry into French domestic legislation and the possibility of allowing the children?s entry to the UK for DNA testing purposes.

Secondly from the prism of the Dublin Regulation the UT found that the duties of enquiry, investigation and evidence gathering ?course through the veins of the DRIII? as well as the Implementing Regulation. Such duties are both explicit and implicit and the content is necessarily context specific. Nonetheless the Member States must take reasonable steps to secure these duties. Moreover these investigate obligations are not extinguished, as the Secretary of State contended, upon the initial refusal decision. Indeed, the Dublin regime acknowledges that there may be several formal requests by one Member State alongside several formal decisions by another.

With this in mind the UT found that the Secretary of State?s erroneous passiveness with regards to the collection or organisation of DNA evidence to be incompatible with the increased procedural mechanisms in the Dublin Regulation, *inter alia* gathering of evidence, as well as the Regulation?s emphasis upon the safeguarding of children and family life. Therefore, all decisions of the Secretary of State were in breach of both the Dublin Regulation and the procedural dimension of Article 8 ECHR.

Outcome:
The Tribunal:

1. Quashed the Home Office's decisions to refuse the take charge requests;
2. Ordered the Home Secretary to "take all reasonable steps and use her best endeavours to facilitate and secure DNA testing of IK and HK" by 31 May 2016; and
3. Ordered the Home Office to make a fresh decision on the take charge requests by 14 June 2016.

Observations/Comments:
For a case commentary see, Bhatt Murphy Briefing Note [1].

Attachment(s):

MK HK & IK APPROVED JUDGMENT.doc[2]

Other sources cited:
Commission Regulation (EC) 1550/2003 Art 12, 15, 3, 9

General Comment Number 14 (2013) on the Right of the Child to have his or her best interests taken as a primary consideration? (the ?General Comment?)

National / Other Legislative Provisions:
United Kingdom- Human Rights Act 1998 [3]
UK - Borders, Citizenship and Immigration Act 2009, Section 55 [4]

Links:
[1] http://www.bhattmurphy.co.uk/media/files/MKbriefing_note.pdf
[2] https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/MK%20HK%20%26%20IK%20APPROVED%
[3] https://www.asylumlawdatabase.eu/en/taxonomy/term/8340
[4] https://www.asylumlawdatabase.eu/en/taxonomy/term/8154