Neutral Citation Number: [2022] EWCA Civ 1296

Case Nos: CA-2020-000294 and CA-2021-000082

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE AND PLANNING COURT
Mr Justice Murray
CO/5712/2016

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 October 2022

Before :

LORD JUSTICE BAKER
LADY JUSTICE ELISABETH LAING
and
LADY JUSTICE WHIPPLE

- -

Between :

THE KING on the application of MH (ERITREA)	**Appellant**
-and-	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Louise Hooper (instructed by **Duncan Lewis Solicitors**) for the **Appellant**
Alan Payne KC (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing date : 20 July 2022

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Approved Judgment

This judgment was handed down remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 10.30am on 10 October 2022.

Lady Justice Elisabeth Laing:

Introduction

1. This is an appeal from a decision of Murray J ('the Judge'), with the leave of Popplewell LJ. The Respondent ('the Secretary of State') contended, for reasons which I describe below, that the appeal is now academic, and this Court should therefore decline to decide it. The Appellant ('A'), who is legally aided, contended that the appeal is not academic, or that if it is, we should nevertheless hear it on the ground that our decision on the appeal will make a difference to him as it will affect his position in relation to the legal aid charge and to costs (Murray J made no order as to costs). The Secretary of State has conceded that A was unlawfully detained in 2016. If the costs order below stands, any damages A receives in his unlawful detention claim will be subject to a charge in favour of the Legal Aid Agency ('the LAA').

2. A was represented by Ms Hooper and the Secretary of State by Mr Payne KC. I thank both counsel for their written and oral submissions. At the end of this judgment, however, I will say something about an unsolicited note which Mr Payne sent to the Court after the hearing, to which Ms Hooper felt obliged to reply.

3. Paragraph references are to the Judge's judgment, or, if I am referring to an authority, to the relevant paragraph of that authority, unless I say otherwise.

4. The central issue on this appeal is whether, as the Secretary of State now contends, it is academic, or whether, as A contends, its resolution can make a difference to his position, and, in particular, to his entitlement to damages for false imprisonment. If the appeal is academic, there is a further question about the extent to which, and the purposes for which, this Court can nevertheless consider its merits.

5. For the reasons I give below, I consider that the appeal is academic. I will consider, nevertheless (on the basis of analogous authorities on costs disputes), first, whether it can be said that A has been successful in the litigation so far and, second, whether it is tolerably clear whether or not he would have won the appeal. This is a very unusual appeal in that the Court has heard full argument which occupied nearly a day. It is only in those circumstances that, in my judgment, it was appropriate for this Court to ask the second, necessarily limited, question.

The facts

6. This summary of the facts is based on the Judge's judgment and on the Secretary of State's digital records. A is a national of Eritrea. He was born on 6 September 1997. His account was that he had travelled from Eritrea to Sudan, and then to Libya. He then moved on to Italy, spending a night there. His fingerprints were taken by the Italian authorities in Cremona on 7 October 2015. He then went to Calais, and spent about four months there. He arrived in the United Kingdom on 3 February 2016, hidden in a lorry.

7. The Judge recorded that there was a dispute between A and the Secretary of State about the date when A claimed asylum. The exact date did not matter, the Judge said. It was either 3 February 2016, or 11 February 2016. In fact, the Secretary of State's detention reviews are clear that A claimed asylum on 3 February 2016. The immigration history

summarised in all the detention reviews say that A was 'encountered' on 3 February 2016 when he 'walked into the AIU and stated that he wished to claim asylum'. The 'AIU' is the Secretary of State's Asylum Intake Unit.

8. On 11 February 2016, A had what is called a 'screening interview' at the AIU in Croydon. A told the Secretary of State in that interview that his fingerprints had been taken on his journey. He did not know in which country. The Judge recorded that a Eurodac fingerprint match showed where and when he had been fingerprinted. The match was dated 3 February 2016, which might also tend to confirm A's account of the date when he claimed asylum.

9. On 20 March 2016, the United Kingdom made a request to Italy, pursuant to article 13.1 of the Dublin III Regulation, that Italy 'take charge' of A in order to examine his application for asylum. That request came from the Secretary of State's Third Country Unit ('the TCU'), on the 6th floor of Lunar House, in Croydon. Article 22.1 required Italy to reply to the take-charge request within two months, that is, by 20 May 2016. Italy did not do so. The effect of article 22.7 was that Italy was immediately deemed to have accepted the United Kingdom's take-charge request.

10. On 16 June 2016, the Secretary of State sent a letter to A, on Home Office notepaper. Only the first page of that letter was in bundle of documents for this appeal. The Judge recorded (paragraph 9) the Secretary of State's case that this letter was 'issued in error'.

11. The first sentence said, 'We have arranged an interview for you to discuss your claim for asylum, eligibility for Humanitarian Protection and human rights claim in the United Kingdom'. Close inspection shows that the letter was sent from the 4th Floor, Lunar House. The letter told A that the interview was to be on 17 June on the 4th Floor of Lunar House. A paragraph in bold capitals then asked him to ring a particular number, not more than five days before that date to confirm that he would be going to the interview. It continued that if he did not contact the relevant office, 'your asylum claim may be treated as withdrawn'. The letter told A that a Tigrinian interpreter would be provided, 'as requested', which suggests that there had been earlier contact between A and the Secretary of State about the interview. A was asked to bring with him any documents which he wanted to rely on in support of his claim, and that any such documents must be translated into English, and certified to be authentic translations. His legal representative, if he had one, should be able to help him. If he arrived late, he might lose his opportunity to be interviewed. The interview would only be re-arranged if A had a good excuse for not going to it. If he was too ill, he would have to provide a doctor's certificate.

12. A was duly interviewed about the substance of his claim on 17 June 2016. Part of the record of that interview is in the bundle, although the first four pages seem to be missing. It is not therefore clear when the interview began, or what A was told about the purpose of the interview. A was asked 126 questions. The interview is recorded as having ended at 12.55 pm. The standard signature page is missing.

13. It is convenient to record here what the Secretary of State's digital records show. A did not register any objection to their use on this appeal. These records were referred to in argument as 'the GCID notes'. There are several cover sheets, and several strands of notes. The first two are the most significant and they run from bundle page 416 to page 426, covering 3 February 2016 to 21 December 2016, and from page 427 to page 441,

covering 9 February 2016 to 8 March 2017. A document on page 470 shows that A was 'a person on 4 cases'. They are listed as 'Asylum Claim – AIU', 'Third Country Case', 'Illegal Entry Clandestine' and 'Rule 35(3) – Torture'. Entries by the ASU Croydon Team created on 3 and 11 February 2016 relate to A's 'walk in' on the former date and to his screening interview on 11 February. The note records that A was referred to the TCU because of the Eurodac trace. 'ASU' is the Asylum Screening Unit.

14. The notes in the first strand record that A was assessed to be 'a definite TCU case under Article 13.1 of the Dublin Regulation'. A flag was applied to A's case because it was a TCU case, and 'until such time as it were to drop out of the TCU process it is not subject to the usual timeframes'. A note dated 31 May 2016 records that an interview had been booked for 17 June, that a Tigrinian interpreter had been requested, and that 'The interview invite letters are sent to sub' by recorded delivery and normal post. I think that 'sub' means 'subject', that is, A. Various questions and answers are recorded from which it seems that A's representatives were expected at the interview. A's file appears to have been in transit at that point. An entry for 28 June records the involvement of A's representatives: 'Fax from Representatives, enclosed clarifications of interview notes'. This suggests that the notes of the interview were sent to A's solicitors, and that they commented on the notes.

15. There are mysterious entries about a 'dummy file' in July and August. On 30 August, an entry says 'error'.

16. The second strand refers to the Eurodac match. A's case is described as an 'ASU' case. The note then says 'PW is in TCU hold' (9 February 2016). Two days later, A's case is described as a TCU non-detained case. An entry for 2 March 2016 says that A's is a 'definite TCU case under article 13.1 of the Dublin Regulation'. A 'non-straightforward case flag had been raised'. An entry for 20 March records that a formal request had been made to Italy under article 13. The response date was 20 May 2016, and the 'Diary Action Review date' was 21 May 2016.

17. There are no entries between 6 April and 5 September 2016. An entry on the latter date records that the TCU had received an email from a caseworker at the Sheffield Asylum Team on 1 September 2016 saying that 'she is just about to complete her action in relation to [A's] asylum decision but needed to confirm at what stage this case is in TCU before making her final decision'. The entry continues, 'It seems that this case has been overlooked as the Diary action was missed in May 16 to check for response from Italy'. The case 'could now be enforced' as Italy had not responded. The target removal date was 18 November 2016.

18. The Judge recorded, at paragraph 12, that, on 6 September 2016, the Secretary of State asked Italy to acknowledge that it was now responsible for examining A's asylum claim, and wrote to A notifying him of the decision which was later challenged in the application for judicial review. That decision was to decline to consider his asylum claim substantively, as there was a safe third country to which he could be sent. A was detained on 4 October and on 28 October served with directions for his removal to Italy on 11 November 2016. A lodged an application for judicial review on 10 November and the Secretary of State cancelled the removal directions on 11 November 2016. A was released from detention on 18 November 2016.

19. The Judge summarised the procedural history between paragraphs 17 and 24.

The application for judicial review

20. In his claim form, A challenged three decisions of the Secretary of State:
    i. her decision to certify his asylum claim on the grounds that he could be removed to a safe third country,
    ii. her decision to remove him to Italy pursuant to Regulation (EU) No 604/2013 ('the Dublin III Regulation'), and
    iii. her decision to detain him from 4 October 2016.

21. He challenged his detention on four grounds.
    i. The United Kingdom, not Italy, was the state which was responsible, under the Dublin III Regulation, for examining his claim for asylum.
    ii. His detention was a breach of article 28 of the Dublin III Regulation.
    iii. His detention was unlawful a common law because it was in breach of the Secretary of State's relevant policy.
    iv. His detention was a breach of article 5 of the European Convention on Human Rights ('the ECHR').

22. The remedies he asked for were that the certificate should be quashed, and declarations that the United Kingdom was the state which was responsible for deciding his asylum claim, and that his detention was unlawful and a breach of article 5 of the ECHR.

The procedural history

23. The claim was stayed, on 7 July 2017, on the Secretary of State's application, pending a decision of the Court of Justice in *Fathi v Predsedatal na Darzhavna agentsia za bezhantsite* (Case C-56/17) and the decision of the Court of Appeal in *R (Hemmati) v Secretary of State for the Home Department* ([2018] EWCA Civ 2122; [2019] QB 708) (paragraph 18). Both decisions were handed down on 4 October 2018. By a consent order dated 26 February 2019, the parties agreed that the part of the claim which challenged A's transfer to Italy should be re-listed and his detention claim should be stayed pending a final decision in *Hemmati*. They later agreed a further stay of the detention claim pending the Secretary of State's consideration of her position after the decision of the Supreme Court in *Hemmati* [2019] UKSC 56; [2021] AC 143. Judgment in that case had been handed down on 27 November 2019. A's claim was finally heard on 23 April 2020.

24. The Secretary of State has now conceded, in the light of the decision of the Supreme Court in *Hemmati*, that A's detention was unlawful throughout. Unless the parties agree the damages, that part of A's claim will be decided (probably) by the county court. The costs of the detention claim will also be decided (probably by the county court).

The Judge's judgment

25. The Judge summarised the relevant provisions of the Dublin III Regulation in paragraphs 25-27. One purpose of the Dublin III Regulation is to create 'a clear and workable method for determining the Member State responsible for the examination of an asylum application' (recital 4). It should be based on 'objective, fair criteria' so as to make it

possible to decide quickly which member state is responsible (recital 5). 'Examination of an application for international protection' means 'any examination of, or decision or ruling concerning an application for international protection by the competent authorities' (except for procedures for deciding which member state is responsible) (article 2(d)). The effect of article 3(1) is that member states are obliged to examine any application by a third country national who applies on the territory of any one of them; the application is to be examined by one member state, that is, the member state which is responsible in accordance with the criteria in Chapter III.

26. Article 17 is headed 'Discretionary clauses'. 'By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third country national…even if such examination is not its responsibility under the criteria laid down in this Regulation'. Paragraph 17.2 provides that 'The Member State which decides to examine an application for international protection pursuant to this paragraph shall become the Member State responsible and shall assume the obligations associated with that responsibility'.

27. The Judge noted that both parties relied on *Fahti*. A argued, in short, that it showed that a member state could exercise the discretion conferred by article 17.1 without making a formal decision to that effect. The exercise of the discretion, without more, transferred responsibility for examining the asylum claim. The Secretary of State submitted that no provision in the Dublin III Regulation showed that an act falling within article 2(d) amounted, without more, to a transfer of responsibility under the Dublin III Regulation. Article 17.1 is only engaged when a member state 'decides to examine an application for international protection pursuant to this paragraph' (article 17.2). The Secretary of State submitted that the decision to interview A was not 'taken *pursuant to* article 17(1)'. Nothing in the Dublin III Regulation provided that interviewing an applicant for asylum had that effect.

28. The Judge decided that the decision to interview A substantively on 17 June 2016 (whether or not it was a mistake) was 'not sufficient to amount to a decision by the defendant, on behalf of the UK, to exercise the discretion conferred by article 17(1)…It was common ground that the conduct of the interview falls within the words of Article 2(d) but …without more, that is not sufficient to engage Article 17(1). The decision needs to be taken pursuant to that provision. There is no evidence in this case that that happened…' (paragraph 52). No formal decision was required, but 'there must be evidence that a decision has been taken in substance that engages with the purpose of Article 17(1)…'.

1. Is the appeal academic?

The Secretary of State's arguments

29. The Secretary of State relies on three points.
    i. The Dublin III Regulation, in so far as it applies to the United Kingdom, was revoked by regulation 54 of, and paragraph 3(h) of Schedule 1 to, the Immigration, Nationality and Asylum (EU Exit) Regulations 2019. There are no Dublin cases in the pipeline, and no further cases are expected. A decision on the point of law in this case cannot affect any other cases.

ii. In any event, any decision in this case would be based on somewhat unusual facts, and would depend on the assessment of the evidence tending to show that there was an exercise of the sovereignty clause on the facts.
iii. Further, the Dublin III Regulation has no practical relevance to A's case, because on 1 April 2021, the Secretary of State wrote to A to tell him that she would be considering his asylum claim in the United Kingdom.

A's arguments

30. A accepts that the decision to transfer him to Italy has been withdrawn. He is nevertheless concerned that no decision has yet been made on his asylum claim. He does not accept that his claim for false imprisonment has been conceded. He accepts that the Secretary of State has conceded that, in the light of the decision of the Supreme Court in *Hemmati*, A was unlawfully detained. However, the Secretary of State has not conceded that when A was detained, there was no legal basis for a transfer to Italy, so that his removal was not 'imminent', nor that all the detention reviews were contrary to her policy about detention. Those issues are said to be relevant not just to the question whether the Secretary of State had power to detain A, but also to 'the conduct' of the Secretary of State 'before during and after the detention'. A is a victim of torture who experienced actual harm including a psychotic episode during detention. A submits that these are live issues which affect the amount of damages to which A will be entitled. A might claim aggravated damages but, as currently advised, would not be making a claim for exemplary damages.

31. A also submitted that there is a live issue which affects the incidence of costs. He relied on a statement by Lord Bridge in *Ainsbury v Millington* [1987] 1 WLR 379 at page 381 C-D. *Ainsbury* concerned a point of law which different decisions of the Court of Appeal had left in doubt. Neither party had any interest in the outcome of the appeal, however, as the tenancy which gave rise to the point of law had ended. Lord Bridge had no hesitation in deciding that the appeal was academic and that the House of Lords should not hear it, even though the case had been listed for the full appeal. Both the parties to the appeal were legally aided, so the possibility that either could be ordered to pay costs was 'in practice…so remote as to be negligible'. In an observation which, therefore, was not necessary to the decision in that case, Lord Bridge said 'Again, litigation may sometimes be properly continued for the sole purpose of resolving an issue as to costs when all other matters in dispute have been resolved.'

32. A further submitted that he had to challenge his detention and removal in one set of proceedings, for which there is one legal aid certificate. The Judge made no order as to costs. Any damages which A recovers for false imprisonment will be subject to the statutory charge. If the appeal is decided in his favour, the costs order below will be reversed and the costs order in this Court will be in his favour. That will mean that there will be no statutory charge to reduce his damages.

Discussion

33. Neither party referred in their written arguments to the decision of the Supreme Court in *Hemmati*, although it is clearly relevant to this case. The Court drew the parties' attention to the decision in an email before the hearing. The Secretary of State did rely on it in oral argument.

34. A's claim for judicial review contended that his detention was wrongful for four different reasons. Following *Hemmati,* a decision that his detention was unlawful on any one of those four bases would entitle him to damages to compensate him for all the loss he has suffered as a consequence of that wrong, including any aggravated damages to which he may be entitled, as aggravated damages are also compensatory. The fact that the decision was unlawful in EU law does not matter, nor does the precise bit of EU law which was infringed. If the Secretary of State accepts that she had no power to detain A at the relevant time, it does not matter why she makes that concession. The amount of damages to which A is entitled does not depend on why his detention was unlawful (whether as a matter of EU law or of domestic law) (see paragraphs 89 and 91 and 100-102 and 105 of *Hemmati*).

35. A submitted that the basis on which his detention is held, or conceded, to be unlawful makes a difference to the damages to which he would be entitled. *Hemmati* decides, among other things, however, that a person whose detention was unlawful because of the Secretary of State's failure to reflect the relevant provisions of EU law in a binding provision of general application is entitled to compensatory damages for his detention, assessed on the same basis as damages for the tort of wrongful imprisonment, because such detention is not authorised in law and therefore amounts to the tort of wrongful imprisonment.

36. A submitted that he would be entitled to damages for the shock of being told that he was going to be removed to Italy if the certificate was unlawful, following *Fahti*, and that he would not be entitled to such damages if he were simply told that he was being detained. It is well settled that a claimant who claims damages for negligence is not entitled to damages for distress alone, in the absence of a recognised psychiatric injury (see, for example, *RK and MK v Oldham NHS Trust* [2003] Lloyd's Rep Med 1 per Simon J, as he then was). A claimant in a false imprisonment case is in a different position. He is entitled to damages to compensate him for all the consequences of the tort, including injury to feelings, distress and humiliation (McGregor on Damages, 20th edition, paragraph 42-013). I am not persuaded on the facts, however, that there is likely to be any difference in practice between the compensation which would be available for the distress experienced by the claimant on being told that he was being detained in order to be removed to Italy, as compared with the distress he would suffer on being detained, full stop, in circumstances where he had been told that his asylum claim would be considered in the United Kingdom. The key point on the facts of this case, in any event, is that A knew, from the letter of 6 June 2016, and well before he was actually detained, that contrary to previous indications, the Secretary of State had declined to decide his asylum claim in the United Kingdom on the grounds that there was a safe third country to which he could be removed.

37. I do not consider, therefore, that the legal basis on which A's detention is unlawful makes any difference to the damages to which he is entitled. He is entitled to be compensated for all the harm which flowed from his detention. I therefore reject the first basis on which A contends that the appeal is not academic.

38. A did not refer the Court to any authority which decides that the incidence of the statutory charge is a factor which, either, stops an otherwise academic appeal from being academic, or is relevant to the exercise of the discretion to hear an academic appeal. In *ZN (Afghanistan) v Secretary of State for the Home Department* [2018] EWCA Civ

1059, this Court rejected a different but related argument (that in making a costs order the court should take into account that legal aid practice is not viable unless inter partes costs orders are made in favour of litigants who are represented by legal aid practitioners). I do not consider that the incidence of the statutory charge is relevant to the question whether this appeal is academic (or to the exercise of the decision to hear an academic appeal).

39. I therefore consider that, subject to the issue of costs, this appeal is academic. It has no relevant implications for the parties, and none for the public, not least because the United Kingdom has left the EU.

2. Should this Court nevertheless consider the merits of the appeal in order to make a decision on costs?

40. The remaining question, then, is whether the fact that a decision on the appeal might affect the incidence of costs in the Administrative Court, and the costs of this appeal, could be a reason for this Court to investigate the merits of the appeal.

41. It was clear from the parties' oral submissions that they have tried to settle this appeal, and that the LAA has been kept informed of developments. We were not told why those attempts failed. It may be that costs was not the only issue about which the parties disagreed. Normally, when the parties agree that an application for judicial review or an appeal is academic, but they cannot agree about the costs consequences, they agree a consent order, with a provision that the Court will decide who should be liable for costs on the basis of written submissions. The parties did not do that in this case.

42. An issue in most such cases is what approach the Court should take to the underlying merits of the claim. The leading case is *M v Croydon London Borough Council* [2012] EWCA Civ 595; [2012] 1 WLR 2607. In that case, Lord Neuberger first considered the position in private law litigation. He then applied those principles to applications for judicial review. He held that the court has power to, but is not obliged to, decide a freestanding dispute about costs (paragraph 47). In paragraphs 60-63 he held that if a claimant has been wholly successful, he should get his costs. If the claimant has been partly successful, it is usually appropriate to make no order for costs unless it is 'tolerably clear' who would have won.

43. There are also authorities about costs in the context of disputes about the application of the Dublin Regulation, and, in particular, cases in which a certificate made on safe third country grounds has been withdrawn. The leading case is *R (Tesfay) v Secretary of State for the Home Department* [2016] EWCA Civ 415; [2016] 1 WLR 4853. In *Tesfay*, the Secretary of State had settled the claims of two different groups of claimants, and resisted their applications for costs. This Court awarded costs to some claimants, who were resisting return to Italy, among other things, because the grounds on which they challenged the certificates had been vindicated by a decision of the Supreme Court, and the certificates were clearly withdrawn because of that decision. This Court refused to award costs to claimants who were resisting their return to Malta, as they had not been able to show that their certificates had been considered on a flawed legal basis. We were referred to *ZN (Afghanistan)*, supra, and *Ararso v Secretary of State for the Home Department* [2018] EWCA Civ 845. These cases all illustrate a similar principle, which is that if the claimant gets the relief he sought for a reason which is unrelated to the claim (for example, a certificate is withdrawn for reasons which have nothing to do with the

underlying merits of the claim, but because the Secretary of State has allowed the relevant time limit to expire) the claimant is not for that reason entitled to his costs when the claim settles.

44. These cases are not exactly in point, because this Court is not considering an application for costs in the light of the settlement of the appeal. I consider, nevertheless, that it is appropriate for this Court to ask, first, if A should, in the events which have happened, be treated as having been successful in his challenge to the certificate, which is the only aspect of his claim which was live in the Administrative Court.

45. A's case is not the same as the cases of the Italy claimants in *Tesfay*, as his legal argument has not been upheld so far, and, it follows, it is improbable that the certificate was withdrawn for reasons relating to the merits of his legal argument. On the contrary, it is clear that the certificate was withdrawn because, as a result of leaving the EU, the United Kingdom is no longer a party to the Dublin III Regulation. There is no causal connection between the proceedings and the withdrawal of the certificate. I therefore consider that A has not been, and should not be treated as having been, successful in the litigation so far.

46. That does not necessarily dispose of the case, as there is, in my judgment, a further question, which is whether it is tolerably clear whether or not A would have won the appeal. I will therefore, very briefly, consider the decision of Court of Justice in *Fahti*, and whether it is tolerably clear, in the light of that decision, that A would have won the appeal, or not. I should make it clear that such a course will rarely be appropriate, and is only appropriate in this case because the Court happens to have heard full argument about the underlying legal merits of the appeal, having decided to do so without prejudice to the Secretary of State's submission that the appeal was academic. The appropriate course in most, if not all, cases will be for the parties to agree that the appeal or application is academic, to agree a consent order disposing of the case, subject to costs, and to ask this Court (or the Administrative Court, as the case may be) to make a decision on costs.

Is it tolerably clear who would have won the appeal?

The decision of Court of Justice in Fahti

47. Both parties relied on *Fahti*. It does not concern the interpretation of article 17 (see paragraph 23 of the Opinion of the Advocate General), although he considered the position under article 17 in case the national court decided to make a ruling on article 17. It was a case in which there was no material to suggest that any other member state, apart from Bulgaria, could have been responsible for examining the applicant's asylum claim. The issue was whether or not, by examining and rejecting the applicant's asylum claim, Bulgaria had, by implication, applied the criteria in the Dublin III Regulation, and decided that it was the member state responsible for examining the claim. The Court of Justice held that a formal decision by Bulgaria, that, applying the criteria, it was the member state responsible, was not necessary, and that it could be inferred that such a decision had been made. It is clear from the terms of the first two questions referred to Court of Justice by the national court, which expressly ruled out an exercise of the article 17.1 discretion, from paragraphs 20 and 21 of the Advocate General's opinion, and from the judgment of the Court, that the Court of Justice was not concerned with the interpretation of article 17.

A summary of the parties' arguments

48. The Secretary of State relies on the language of article 17.1 and 17.2, and submits that a formal decision which expressly adverts to article 17.1 is necessary in order for the United Kingdom to have exercised the sovereignty clause. The Secretary of State also relies on the operational distinction between her Third Country and Asylum Units. A argues that a formal decision is not necessary. It is clear from the letter of 6 June 2016 that the Secretary of State had decided to, and told A that she was going to, consider A's asylum claim in the United Kingdom. That was evidence of a decision to exercise the sovereignty clause. That evidence was bolstered by the facts that A was invited to an interview, was interviewed, and the Secretary of State's digital records showed that an official had been considering the claim with a view to making a decision on it. A relies on the wide definition of 'examination of an application for international protection' in article 2(d) of the Dublin III Regulation.

A brief assessment of the merits of this appeal

49. There is some force in the linguistic points on which the Secretary of State relies. There is no force at all on the operational distinction between the Third Country Unit and the Asylum Unit. That distinction is a matter of internal management. Both units are, for the purposes of the *Carltona* doctrine, the Secretary of State. There is also some force in the evidence on which A relies, which is nowhere explained in a witness statement by the Secretary of State. I do not consider, however (contrary to A's argument), that *Fahti* decides this issue in this case. It concerns a different issue, which is whether it could be inferred from the facts that Bulgaria had applied the hierarchy of criteria in the Dublin III Regulation and, having applied those criteria, had decided that it was the member state responsible for examining the applicant's claim. A argues that the Secretary of State did 'examine' his claim, within the meaning of a 2(d), but I do not consider, despite the evidence on which he relies, that it is clear that the Secretary of State did so having exercised the sovereignty clause. *Fahti* does not show that if the Court of Justice were to consider this issue, it would also hold that a decision to exercise the sovereignty clause can be inferred from the evidence in this case, without the need for a formal decision which expressly adverts to the sovereignty clause, in just the same way as a decision to apply the Dublin criteria can be inferred in the absence of a formal decision to that effect. I also note that the Advocate General tended to the view (obiter), based in part on textual differences between the Dublin III Regulation and the Dublin II Regulation, that a formal decision to that effect would be necessary (Opinion, paragraphs 29 and 30).

50. On a proportionate consideration of the issues, I consider that the arguments are finely poised. This is precisely the kind of question which, before the United Kingdom left the European Union, this Court would have referred to the Court of Justice. That course is no longer available. I do not consider that it is possible, therefore, on a proportionate consideration of the arguments, to decide whether or not A would have won this appeal.

51. In the light of my conclusions, I would refuse A's application for permission to appeal against the Judge's decision about the costs of the application for judicial review.

Conclusions

52. For those reasons I consider that A's appeal is academic, and that it is not clear, either, that he has been successful in the litigation, or tolerably clear that he would have won his appeal. I would therefore dismiss the appeal.

Postscript

53. The Secretary of State, without having been asked by the Court, and without having asked for permission to do so, sent written submissions to the Court during the afternoon after the hearing. They did not raise any new point but were merely a reiteration, in more succinct terms, of points which counsel had made during the hearing. Ms Hooper felt constrained to reply to them.

54. In making the following observations I do not intend to be critical of counsel but rather to clarify what the practice should be. As a general rule, the parties should not unilaterally send submissions to the Court, after the end of the argument, which raise points which should have been raised during the hearing. If, however, there is a matter which has arisen during the hearing, on which they wish to make further submissions, they should raise that with the Court during the hearing. The Court will then be able decide whether such submissions are necessary. If, after the hearing, counsel wish to raise a further point, they should tell the other party or parties, and ask the Court's permission before filing anything else. If the point concerns an issue which arose for the first time at the hearing, or which has unexpectedly come to light immediately afterwards, the Court may well agree to the filing of further short submissions, provided that the point is raised promptly after the hearing (and subject to a right of reply). An advocate will, however, rarely be given permission to file a document which puts forward arguments which could and should have been made during the hearing.

Lady Justice Whipple

55. I thank my lady, Elisabeth Laing LJ, for her clear exposition of the issues. I agree with her conclusions that this appeal must be dismissed and permission to appeal on costs must be refused. I depart from her reasoning in one respect only and given that the disagreement makes no difference to the outcome, I state it only briefly. At paragraphs 49 and 50 of her judgment, Elisabeth Laing LJ comments on the strengths and weaknesses of the parties' submissions on the appeal and suggests that the arguments are "finely poised" such that she would have been minded to refer the appeal to the CJEU if that course had still been open to this Court. In my judgment that goes beyond what is required when considering, for costs purposes, whether it is tolerably clear who would have won the appeal. In the context of this case, it is sufficient to note the careful judgment of Murray J and to conclude, as I do, that he was not obviously wrong to dismiss the application for judicial review for the reasons he gave. Not only is that sufficient, but I consider it preferable because it avoids this Court offering a lightly reasoned view in the context of arguments about costs on issues which are complex and, given that they involve the interpretation of an EU Regulation, potentially of significance.

Lord Justice Baker

56. Save in one respect, I entirely agree with the judgment delivered by my Lady, Elisabeth Laing LJ, and for her reasons in saying that the appeal should be dismissed and the application for permission to appeal on costs refused.

57. The exception is that I agree with the observations of my Lady, Whipple LJ and her conclusion that it is sufficient to conclude that Murray J was not obviously wrong to dismiss the application for judicial review for the reasons he gave.