Trinity Term
[2010] UKSC 36
On appeal from: 2009 EWCA Civ 442

JUDGMENT

R (on the application of ZO (Somalia) and others) (Respondents) *v* Secretary of State for the Home Department (Appellant)

before

Lord Hope, Deputy President
Lord Walker
Lord Brown
Lord Kerr
Sir John Dyson SCJ

JUDGMENT GIVEN ON

28 July 2010

Heard on 17 and 18 May 2010

Appellant
Robin Tam QC
Daniel Beard
(Instructed by Treasury Solicitor)

Respondent (ZO)
Richard Wilson QC
Philip Nathan
(Instructed by Duncan Lewis & Co Solicitors)

Respondent (MM)
Michael Fordham QC
Christopher Jacobs
(Instructed by Scudamores Solicitors)

LORD KERR (delivering the judgment of the court)

1. Recitals 4, 5 and 7, taken together with Article 1, of Council Directive 2003/9/EC (the Reception Directive), encapsulate its purpose. They respectively provide: -

> "*The recitals*
>
> (4) The establishment of minimum standards for the reception of asylum seekers is a further step towards a European asylum policy.
>
> (5) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the said Charter [inviolability of human dignity and the guarantee of the right to asylum with due respect to the Geneva Convention 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees]
>
> …
>
> (7) Minimum standards for the reception of asylum seekers that will normally suffice to ensure them a dignified standard of living and comparable living conditions in all Member States should be laid down.
>
> …
>
> *Article 1*
>
> **Purpose**
>
> The purpose of this Directive is to lay down minimum standards for the reception of asylum seekers in Member States."

2. Notwithstanding the seemingly clear terms of these provisions, the appellant in these cases argues that where an asylum seeker makes a second application for asylum after his first application has been finally rejected, he is not

entitled to the benefits that are conferred by the Reception Directive. Those benefits include (in Article 11) certain provisions in relation to entitlement to be employed while awaiting the outcome of an asylum application. The Secretary of State's argument was rejected by the Court of Appeal (*Regina (ZO (Somalia) and others) v Secretary of State for the Home Department* [2009] 1 WLR 2477, [2009] EWCA Civ 442) in its judgment delivered on 20 May 2009, allowing appeals by *ZO (Somalia)* and *MM (Burma)* from a decision of HH Judge Mackie QC of 25 June 2008. The Court of Appeal had also dismissed an appeal by the Secretary of State from a decision of Blake J of 11 December 2008 in the case of *DT (Eritrea)*. Originally the appellant had appealed to this court against all three decisions of the Court of Appeal. Subsequently, however, *DT* was granted indefinite leave to remain in this country and, with the agreement of all the parties, the Secretary of State was permitted to withdraw the appeal in that case.

The facts and history of proceedings

ZO

3. *ZO* is a Somali national who arrived in the United Kingdom in 2003. She applied for asylum. That application was refused on 17 February 2004. A number of challenges were made to that refusal but the last of these finally foundered towards the end of 2004. On 31 March 2005 the Immigration Appeal Tribunal issued its determination in the case of *NM and others (Lone Women – Ashraf) (Somalia) CG* [2005] UKIAT 00076. On 9 May 2005, solicitors acting on behalf of *ZO* made further submissions to the Secretary of State based on the IAT's determination in the *NM* case. It was contended that this amounted to a fresh claim for asylum within the meaning of rule 353 of the Immigration Rules. AT the time of the hearing of this appeal, the Secretary of State had yet to decide whether leave to enter the UK should be given to *ZO* or whether the further submissions made on her behalf constitute a fresh claim.

4. On 27 February 2007 *ZO* was granted permission to apply for judicial review to challenge the delay in dealing with her further submissions. On 5 June 2007 she wrote to the Secretary of State asking for permission to work. She advanced this claim on the grounds of hardship and suggested that, if it could not be granted, she would seek priority for her application for judicial review. The Secretary of State refused to prioritise consideration of *ZO's* further submissions and on 31 August 2007 refused permission to work. *ZO* renewed her application for permission to work on 8 October 2007, referring to rule 360 of the Immigration Rules (which deals with applications for permission to work) but this was rejected on 15 October 2007, on the ground that her application for asylum had been refused on 17 February 2004.

5. Prompted by consideration of the decision of the High Court in *R (FH) v Home Secretary* [2007] EWHC 1571 (Admin), *ZO* conceded the ground of her application in relation to delay but in November 2007 she was given permission to amend the judicial review proceedings in order to challenge the refusal of permission to work under rule 360 of the Immigration Rules. The gravamen of the grounds of this latter challenge was that she had made an asylum claim on 9 May 2005. At an oral hearing on 30 January 2008, Stanley Burnton J set aside the grant of permission on the delay ground and refused permission to apply for judicial review on the Secretary of State's refusal of consent to her taking up employment. She was subsequently given permission to appeal the dismissal of her application in relation to the employment ground and by a consent order of 7 May 2008, the Court of Appeal granted permission to apply for judicial review. This was the application that was subsequently heard and dismissed by HH Judge Mackie QC.

MM

6. *MM* is a Burmese national who made an application for asylum after he arrived in the United Kingdom in 2004. That application was refused and all attempts to challenge the refusal had failed by March 2005. On 9 May 2005 he also made further submissions which, he said, amounted to a fresh claim based on new evidence. Again in his case the Secretary of State has not yet decided whether to grant *MM* leave to enter the United Kingdom or whether he has made a fresh claim for asylum.

7. On 27 July 2007 *MM* wrote to the Secretary of State asking for permission to work and referring to rule 360. This application was refused on 26 September. On 25 October 2007 *MM* applied for judicial review to challenge the delay in considering his further submissions and to challenge the refusal of permission to work. As in the case of *ZO* he based this on the circumstance that he had made an asylum application some 2 years and 5 months previously. On 10 March 2008, applying the decision in *FH*, the High Court refused permission to apply for judicial review on the delay ground but granted permission on the refusal of consent to take up employment. This application was also dismissed by Judge Mackie and allowed by the Court of Appeal.

The issues

8. On the hearing of the appeal to this court two principal issues were identified. The first was whether Article 11 of the Reception Directive applies to a person who has had an application for asylum in the United Kingdom finally determined against him when he makes a further application for asylum. Article 11

(2) of the Reception Directive is the critical provision in this instance. It provides: -

> "If a decision at first instance has not been taken within one year of the presentation of an application for asylum and this delay cannot be attributed to the applicant, Member States shall decide the conditions for granting access to the labour market for the applicant."

9. The second main issue was whether this court should make a request of the Court of Justice for the European Union under Article 267 of the Treaty on the Functioning of the European Union (TFEU) for a preliminary ruling on the proper interpretation of the Reception Directive, in particular whether it is a measure intended to cover only the first application for asylum made by an individual to a Member State.

10. A subsidiary argument was made in the printed case for *MM* and supported by *ZO* in her printed case. It was contended that, even if the Secretary of State's claimed interpretation of the Reception Directive was accepted, the policy of refusing permission to work was in violation of Article 8 of the European Convention on Human Rights and Fundamental Freedoms. Blake J had dealt with this argument in the case of *DT*. He held that the Secretary of State's policy was unlawful as an unjustified interference with the right to respect for a private life. The Court of Appeal did not address the Article 8 issue because of its conclusion on the reach of the Reception Directive. Notwithstanding this, Mr Fordham QC for *MM* submitted that this court should deal with the Article 8 argument and uphold the reasoning of Blake J. The court indicated that, if we required argument on the Article 8 point, an opportunity would be given to present it. In the event, however, since we have reached the same conclusion as did the Court of Appeal on the interpretation of the Reception Directive, this is not necessary.

The case for the Secretary of State

11. For the appellant Mr Tam QC submitted that the clear purpose of the Reception Directive was to devise minimum standards for those who were 'received' by Member States for the first time as asylum seekers. He drew particular attention to the use of the expression "reception" in Article 1 and the title of the Directive. This, he said, indicated that the Directive was concerned with the initial encounter between the asylum seeker and the receiving State. That this was its purpose was reinforced by consideration of the corresponding words in some of the other Community languages, for example, "*opvang*", "*accueil*",

"*aufnahme*", "*accoglienza*", "*acogida*" which translated to "acceptance", "reception" or "welcome".

12. Mr Tam's second argument was that the Directive had a settled meaning at the time of its adoption. That meaning could not be influenced by subsequent EU measures such as Directive 2004/83/EC of 29 April 2004 (the Qualifications Directive), Council Directive 2005/85/EC of 1 December 2005 (the Procedures Directive) or Council Regulation 343/2003/EC (the Dublin Regulation) adopted on 18 February 2003. The Court of Appeal had been wrong, Mr Tam said, to have had regard to these subsequent measures in reaching a conclusion on the interpretation to be applied to the Reception Directive.

13. Mr Tam also argued that support for the interpretation that he advanced was to be found in various of the specific provisions of the Reception Directive. He suggested that, if the literal interpretation that the respondents contended for was adopted, a number of anomalies in the application of those provisions would be produced. He further claimed that the scheme that the Directive contained for dealing with abuse was inapt for repeat applications. If the Reception Directive was held to apply to such applications there was no effective mechanism to deal with abuse of the system.

The enactment of the Directives, the Immigration Rules and the Dublin Regulation

14. The Reception Directive was made pursuant to the power conferred by Article 63 (1) (b) of the Treaty Establishing the European Community (TEC). Article 63 was introduced to the TEC by the Treaty of Amsterdam which was concluded on 2 October 1997 and came into force on 1 May 1999. So far as is material, Article 63 provides: -

> "The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of five years after the entry into force of the Treaty of Amsterdam, adopt:
>
> > 1. measures on asylum, in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and other relevant treaties, within the following areas:
> >
> > (a) criteria and mechanisms for determining which Member State is responsible for

considering an application for asylum submitted by a national of a third country in one of the Member States,

(b) minimum standards on the reception of asylum seekers in Member States,

(c) minimum standards with respect to the qualification of nationals of third countries as refugees,

(d) minimum standards on procedures in Member States for granting or withdrawing refugee status; …"

15. Quite clearly, a comprehensive charter dealing with the various aspects of asylum applications was contemplated. This circumstance alone suggests that an identity of purpose for all the measures adopted to implement the proposed scheme was to be expected and, as we shall see, this conclusion is reinforced by examining the legislative history of those measures.

16. The Reception Directive was adopted on 27 January 2003 and by Article 26 (1) it was required to be transposed into national law by 6 February 2005. Immigration Rules intended to implement the Directive were laid before Parliament on 11 January 2005. Rules 360 and 360A provide:-

"360 An asylum Applicant may apply to the Secretary of State for permission to take up employment which shall not include permission to become self employed or to engage in a business or professional activity if a decision at first instance has not been taken on the Applicant's asylum application within one year of the date on which it was recorded. The Secretary of State shall only consider such an application if, in his opinion, any delay in reaching a decision at first instance cannot be attributed to the Applicant.

360A If an asylum Applicant is granted permission to take up employment under Rule 360 this shall only be until such time as his asylum application has been finally determined."

17. Rules 353 and 353A of the Immigration Rules deal with the question of whether submissions made after an asylum claim has been refused should be treated as a 'fresh claim'. They provide: -

"353 When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:

(i) had not already been considered; and

(ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.

This paragraph does not apply to claims made overseas.

353A Consideration of further submissions shall be subject to the procedures set out in these Rules. An Applicant who has made further submissions shall not be removed before the Secretary of State has considered the submissions under paragraph 353 or otherwise.

This paragraph does not apply to submissions made overseas."

18. The Secretary of State does not treat as an asylum seeker a person who has made a new application for asylum until that application has been accepted as a fresh claim. Once it is accepted, however, the asylum seeker enjoys the same rights of appeal as those given to a person whose first claim for asylum in this country has been rejected. He is also given the right to apply for permission to work (PTW). The Enforcement Instructions and Guidance Manual ("the manual") issued by the Secretary of State provides in paragraph 23.10.4:-

"Permission to work – Fresh claims

If a failed asylum seeker makes a fresh asylum claim then provided it is accepted as a fresh claim the procedures set out above should be followed, *i.e.* the Claimant will be entitled to apply for PTW provided he satisfies the criteria in Paragraph 360 of the Rules, otherwise any request for PTW would be a mandatory refusal. If the

> new asylum claim is not accepted as a fresh claim the person will have no entitlement to apply for PTW."

19. As a matter of general practice the Secretary of State does not make a preliminary decision on whether a repeat application constitutes a fresh claim. Instead, the decision on whether the new application is to be treated as a fresh claim is made at the same time as the decision to either allow or reject the claim. On this account, the Court of Appeal unsurprisingly decided that paragraph 23.10.4 was unlikely to benefit a subsequent asylum seeker. It was also concluded that the fact that para 23.10.4 of the manual gives the potential benefit of article 11 to a subsequent asylum seeker whose claim has been accepted as a "fresh claim" does not assist in the interpretation of the Reception Directive.

20. A short time after the adoption of the Reception Directive, on 18 February 2003, the Dublin Regulation was adopted. This established the criteria and mechanisms for determining which Member State should have the responsibility of examining an asylum application lodged in one of the Member States by a third country national. It came into force on 17 March 2003.

21. The Qualification Directive was adopted on 29 April 2004. It prescribed minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection to be granted to them.

22. The Procedures Directive was adopted on 1 December 2005. As Mr Tam pointed out, this was some ten months after the Reception Directive was required to be transposed into national law. The Procedures Directive set out minimum standards on procedures in Member States for granting and withdrawing refugee status.

The interpretation of 'application for asylum' in the Reception and Procedures Directives

23. Article 2 of the Reception Directive contains definitions of the expressions, "application for asylum" and "applicant or asylum seeker" as follows: -

> "(b) 'application for asylum' shall mean the application made by a third-country national or a stateless person which can be understood as a request for international protection from a Member State, under the Geneva Convention. Any application for international protection is presumed to be an application for asylum unless a third-country

national or a stateless person explicitly requests another kind of protection that can be applied for separately;

(c) 'applicant' or 'asylum seeker' shall mean a third country national or a stateless person who has made an application for asylum in respect of which a final decision has not yet been taken;"

24. Virtually identical definitions are contained in Article 2 of the Procedures Directive: -

"(b) "application" or "application for asylum" means an application made by a third country national or stateless person which can be understood as a request for international protection from a Member State under the Geneva Convention. Any application for international protection is presumed to be an application for asylum, unless the person concerned explicitly requests another kind of protection that can be applied for separately;

(c) "applicant" or "applicant for asylum" means a third country national or stateless person who has made an application for asylum in respect of which a final decision has not yet been taken;"

25. There can be no doubt that subsequent applications for asylum come within the definitions contained in Article 2 of the Procedures Directive and Mr Tam did not seek to argue otherwise. Subsequent applications are mentioned in recital 15 of the Procedures Directive and in Articles 7 (2), 23 (4) (h), 32, 34 and 39 (1) (c). It is clear that the scheme of the Directive is workable only if the definition covers repeat applications. In particular, Article 32 gives power to Member States to undertake a preliminary examination of a subsequent application in order to ascertain whether new elements or findings have arisen or have been presented by the applicant which touch on the question whether he or she qualifies as a refugee. This unquestionably means that a subsequent application is an application for asylum within the meaning given to that term in Article 2 (b).

26. On the Secretary of State's case, the expression 'application for asylum' must be given a markedly different meaning in the Reception Directive from that in the Procedures Directive. Mr Tam seeks to dismiss this apparent anomaly by suggesting that the purpose of each of the Directives is quite different. By way of preliminary observation on this claim, one may note that, if it is correct, it is surprising that the draftsman of the later measure did not employ a different formulation for the definitions of the terms 'application for asylum' and 'applicant

for asylum' from those used in the Reception Directive. If Mr Tam is right, using almost identical language was, at best, highly misleading. But it is even more surprising, if the Reception Directive was not intended to apply to subsequent applications, that the text of the Directive did not make it unequivocally clear that these would not be covered.

27. It is in any event clear that the purpose of both Directives (and, incidentally the Qualification Directive and the Dublin Regulation) is the same. Apart from mirroring the definitions contained in Article 2 of the Reception Directive, the critical recitals in the Procedures Directive bear a striking resemblance to those in the Reception Directive. While Mr Tam may be right that, as a matter of general principle, later legislation should not operate to change the established meaning of an earlier enactment, the manner in which the later legislation is framed may provide an insight into the proper interpretation of the earlier instrument. Whatever may be said on this matter on a theoretical basis, however, the matter is put beyond any doubt by an examination of the legislative history of the two measures.

28. Much was made by Mr Tam of the fact that the Procedures Directive was a much later instrument than the Reception Directive but it is quite clear that both Directives shared – if not an exactly time-coincident genesis – at least a broadly common ancestry. In fact, the proposal for a Council Directive on minimum standards on procedures in Member States for granting and withdrawing refugee status was first made on 20 September 2000 whereas the proposal for the Reception Directive was published in the Official Journal of the European Union on 31 July 2001 (Official Journal 213E, 31/07/2001 P. 0286 –0295).

29. The proposal for the Reception Directive contained an overview of the standards that the Directive would be designed to cover. Among these were the "reception conditions that should be granted, in principle, *at all stages and in all kinds of asylum procedures*" (the emphasis has been added). The most significant portion of the proposal document, however, is found in the part that deals with definitions. The proposed definition for 'application for asylum' is in broadly similar terms to those that ultimately were enacted. The proposal for Article 2 (c) is particularly illuminating. It is in these terms: -

> "'Applicant' or 'applicant for asylum' means a third country national or a stateless person who has made an application for asylum in respect of which a final decision has not yet been taken. A final decision is a decision in respect of which all possible remedies under Council Directive …/…/EC [on minimum standards on procedures in Member States for granting and withdrawing refugee status] … have been exhausted;"

30. From this it is indisputably clear that it had always been intended not only that the definitions of applicant for asylum in both Directives should be congruent with one another but also that an application should not be regarded as having been subject to a final decision until all possible remedies had been pursued and determined. This can only mean that subsequent applications would fall within the purview of the definitions of 'application for asylum' and 'asylum seeker' in the Reception Directive. If further proof that this was so was needed, it is provided in a document which sets out the suggested amendments of the proposal document. Amendment 114 deals with Article 2 (c). It states: -

> "(c) 'Applicant' means a third country national or a stateless person who has made an application for asylum *or another form of international protection* in respect of which a final decision has not yet been taken. A final decision is a decision in respect of which all possible remedies have been exhausted (original emphasis but underlining added)."

31. I therefore conclude that 'an application for asylum' in the Reception Directive must be interpreted to include a subsequent application made after an original application has been determined and that the term 'asylum seeker' should be construed accordingly to include a person who makes such a subsequent application. This conclusion seems to me to chime well with the spirit of the recitals to the Directive, particularly recital 7. The Directive seeks to set minimum standards for the reception of asylum seekers that will normally suffice to ensure them a dignified standard of living. It would be, in my view, anomalous and untoward that an applicant who makes a subsequent application after his first application has been finally disposed of should be denied access to standards that are no more than the minimum to permit him to live with some measure of dignity. Moreover, if the Directive was found not to apply to subsequent applications for asylum this would give rise to a surprising incongruity. First time applications for asylum made long after an asylum seeker arrived in this country would be governed by the Directive but a perfectly genuine applicant who makes a subsequent application, perhaps within a relatively short time of arrival, would be denied the benefits that it affords. Article 3 applies the Directive to all third country nationals and stateless persons who make an application for asylum at the border *or in the territory of a Member State*. It is clear, therefore, that a person who has been in the United Kingdom for some time can apply for asylum and, on the interpretation that the appellant espouses, such a person would be entitled to the benefits of the Reception Directive whereas an applicant who has made an application immediately on arrival would lose those benefits forever after the first application has been determined.

32. The Court of Appeal considered that the strongest argument in favour of the interpretation advanced by the Secretary of State was that the word 'reception' had been used so prominently in the Directive. I have therefore considered that argument carefully but, as Mr Fordham pointed out, one can be received, or have an application received, or return to reception more than once. The Directive stipulates what must happen when one is 'received into the asylum system'. There is nothing unusual or untoward in the notion that one can be received into that system on more than one occasion. I do not consider that the corresponding words of the other Community languages on this point detract from that conclusion. One can be received, accepted or even welcomed several times.

33. I would therefore dismiss the appeals. Since, however, much of the argument for the appellant was devoted to the anomalies that, it was said, would arise if the Reception Directive was held to apply to subsequent applications, it is right that I should deal, albeit briefly, with those claims. By way of preamble, however, I should observe that, while seeking to deduce the purpose of an item of legislation from claimed difficulties that its literal implementation will involve is not an illegitimate exercise, it is one that must be approached with caution. Where a different purpose from that canvassed is unmistakably clear from, for instance, the text of the instrument and its enacting history, supposed problems that may arise from giving effect to that purpose cannot be permitted to frustrate the intention of the legislative body.

The claimed anomalies

34. Articles 5 and 6 of the Reception Directive deal respectively with information and documentation that must be given to an applicant for asylum. Mr Tam pointed out that there is no reference in either article to subsequent applications and it is therefore to be supposed that, if the Reception Directive applies to these, the same information and documentation will have to be provided on each occasion. In order to assess the administrative burden that Mr Tam suggests will thereby be cast on the Home Department, it is necessary to look at the actual provisions. Article 5 is in the following terms: -

> "Article 5
>
> Information
>
> 1. Member States shall inform asylum seekers, within a reasonable time not exceeding fifteen days after they have lodged their application for asylum with the competent authority, of at least any

established benefits and of the obligations with which they must comply relating to reception conditions.

Member States shall ensure that applicants are provided with information on organisations or groups of persons that provide specific legal assistance and organisations that might be able to help or inform them concerning the available reception conditions, including health care.

2. Member States shall ensure that the information referred to in paragraph 1 is in writing and, as far as possible, in a language that the applicants may reasonably be supposed to understand. Where appropriate, this information may also be supplied orally."

35. The information that is required to be provided under this Article is likely to be of a routine nature and one may reasonably anticipate that in most cases it will involve no more than issuing precisely the same material as was provided when the first application was made. Presumably, it could be conveniently held on file and generated more or less automatically on receipt of a second or subsequent application. On that basis, it is difficult to accept that this would impose a substantial logistical burden on the authorities. In any event, it is not in dispute that subsequent applicants for asylum must be provided with information under Article 10 (1) (a) of the Procedures Directive which provides: -

"1. With respect to the procedures provided for in Chapter III, Member States shall ensure that all applicants for asylum enjoy the following guarantees:

(a) they shall be informed in a language which they may reasonably be supposed to understand of the procedure to be followed and of their rights and obligations during the procedure and the possible consequences of not complying with their obligations and not cooperating with the authorities. They shall be informed of the time-frame, as well as the means at their disposal for fulfilling the obligation to submit the elements as referred to in Article 4 of Directive 2004/83/EC. This information shall be given in time to enable them to exercise the rights guaranteed in this Directive and to comply with the obligations described in Article 11;"

36. To have to provide the further information that Article 5 of the Reception Directive requires does not seem to me to be a significant encumbrance. There has to be a relay of information in any event. The extra material that has to be provided will in most cases have been prepared already. In those circumstances, I find it impossible to accept that the requirement to supply the Article 5 information again could be described as an anomaly. Moreover, as Mr Fordham put it, a renewed entitlement to information is not in the least absurd. If it is considered that the provision of the information on the first application for asylum is vital, why should it not be considered important on subsequent applications?

37. Article 6 of the Reception Directive provides: -

> "Documentation
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> 1. Member States shall ensure that, within three days after an application is lodged with the competent authority, the applicant is provided with a document issued in his or her own name certifying his or her status as an asylum seeker or testifying that he or she is allowed to stay in the territory of the Member State while his or her application is pending or being examined.
>
> If the holder is not free to move within all or a part of the territory of the Member State, the document shall also certify this fact.
>
> 2. Member States may exclude application of this Article when the asylum seeker is in detention and during the examination of an application for asylum made at the border or within the context of a procedure to decide on the right of the applicant legally to enter the territory of a Member State. In specific cases, during the examination of an application for asylum, Member States may provide applicants with other evidence equivalent to the document referred to in paragraph 1.
>
> 3. The document referred to in paragraph 1 need not certify the identity of the asylum seeker.
>
> 4. Member States shall adopt the necessary measures to provide asylum seekers with the document referred to in paragraph 1, which must be valid for as long as they are authorised to remain in the territory of the Member State concerned or at the border thereof.

5. Member States may provide asylum seekers with a travel document when serious humanitarian reasons arise that require their presence in another State."

38. The provision of a document that confirms the holder as an asylum seeker is obviously important to any applicant for asylum. Without it, he or she is liable to be removed from the jurisdiction. So far from being anomalous that this should be provided to someone who has made a subsequent application for asylum, it seems to me that, in order to forestall removal, the availability of such a document is imperative so that the applicant's continued entitlement to remain in the jurisdiction may be established. I do not therefore accept that the need to provide documentation under Article 6 on subsequent applications can be characterised as irregular or anomalous. Furthermore, there is no requirement under the Procedures Directive to supply the documentation specified by Article 6 of the Reception Directive. Plainly, an asylum seeker who makes a subsequent application must be entitled to remain in the jurisdiction in which the application is made until the procedures provided for in the Procedures Directive have been completed. This is a clear indication that Article 6 of the Reception Directive was intended to apply to subsequent applications for asylum and, by the same token, an obvious sign that the Procedures Directive was drafted on the assumption that this was so. Otherwise, one would have expected that the Directive which was enacted later would have contained provision for the supply of documentation that would have protected the asylum seeker from removal.

39. The next avowed anomaly that Mr Tam identified was in the application of Article 9. It provides that Member States may require medical screening for applicants on public health grounds. He suggested that this power "makes sense" only in the context of an initial encounter between an asylum seeker and a Member State. Properly understood, the appellant's complaint about this Article being applied to subsequent applications, is that it is unnecessary rather than anomalous for this to happen. Even if this is so, it is contrived to argue that because medical screening is not necessary for subsequent applications for asylum, it must be taken that the entire Reception Directive should be held not to apply to such applications. This is a power to be used when required and it is entirely unsurprising that it is expressed in the general and pithy way in which it appears in the Directive.

40. The assertion made by the appellant in relation to Article 10 falls into essentially the same category. It provides: -

"**Schooling and education of minors**

1. Member States shall grant to minor children of asylum seekers and to asylum seekers who are minors access to the education system

> under similar conditions as nationals of the host Member State for so long as an expulsion measure against them or their parents is not actually enforced. Such education may be provided in accommodation centres.
>
> The Member State concerned may stipulate that such access must be confined to the State education system.
>
> Minors shall be younger than the age of legal majority in the Member State in which the application for asylum was lodged or is being examined. Member States shall not withdraw secondary education for the sole reason that the minor has reached the age of majority.
>
> 2. Access to the education system shall not be postponed for more than three months from the date the application for asylum was lodged by the minor or the minor's parents. This period may be extended to one year where specific education is provided in order to facilitate access to the education system.
>
> 3. Where access to the education system as set out in paragraph 1 is not possible due to the specific situation of the minor, the Member State may offer other education arrangements."

41. The appellant is unquestionably right that some of the provisions contained in this Article cannot be fitted comfortably into second time applications. The power to postpone access to education, for instance, provided for in para 2 of the Article cannot have been intended to be exercisable by the Member State on more than one occasion. But this is not a sound basis on which to reason that, as a consequence, it cannot have been intended that the Reception Directive should apply to subsequent asylum applications. The Article should be understood for what it is – a general purpose provision setting out various duties and powers covering a variety of circumstances. It would perhaps have been preferable if the Article had stated which of its parts should not apply to subsequent applications but the absence of such a statement does not establish that those applications are not covered by the Directive.

42. I have concluded therefore that none of the claimed anomalies (or their collective impact) constitutes a reason for believing that it was intended that the Reception Directive should not apply to subsequent applications for asylum. I am reinforced in that view by the consideration that, if the Reception were held *not* to apply, some decidedly curious consequences would follow. For instance, the duties under Article 8 of the Directive (to maintain as far as possible family unity) and under Article 13 (2) (to ensure a standard of living adequate for the health of

applicants and capable of ensuring their subsistence) and 15 (1) (the provision of necessary health care) would not apply to those who make subsequent applications for asylum. When one considers that many of these will be genuine applicants, it is impossible to believe that it was intended that they should not have access to these basic amenities and facilities.

Abuse

43. Mr Tam submitted that, if the Reception Directive is held to apply to subsequent applications, the potential for abuse of the system of applications for asylum is greatly increased. Wholly unmeritorious claims would be put forward by applicants who saw the opportunity of not only delaying their removal but also of gaining access to the benefits that the Directive confers. This argument was rejected by the Court of Appeal on, according to Mr Tam, two grounds – first that administrative problems because of unmeritorious claims should not determine the proper interpretation to be given to the Directive and, second, that abuse of the system by lodging subsequent applications was sufficiently catered for by Article 16 of the Directive which provides: -

> "Reduction or withdrawal of reception conditions
>
> 1. Member States may reduce or withdraw reception conditions in the following cases:
>
> > (a) where an asylum seeker:
> >
> > - abandons the place of residence determined by the competent authority without informing it or, if requested, without permission, or
> >
> > - does not comply with reporting duties or with requests to provide information or to appear for personal interviews concerning the asylum procedure during a reasonable period laid down in national law, or
> >
> > - has already lodged an application in the same Member State.
> >
> > When the applicant is traced or voluntarily reports to the competent authority, a duly motivated decision, based on the reasons for the disappearance, shall be taken on the reinstallation

> of the grant of some or all of the reception conditions;
>
> (b) where an applicant has concealed financial resources and has therefore unduly benefited from material reception conditions.
>
> If it transpires that an applicant had sufficient means to cover material reception conditions and health care at the time when these basic needs were being covered, Member States may ask the asylum seeker for a refund.
>
> 2. Member States may refuse conditions in cases where an asylum seeker has failed to demonstrate that the asylum claim was made as soon as reasonably practicable after arrival in that Member State.
>
> 3. Member States may determine sanctions applicable to serious breaching of the rules of the accommodation centres as well as to seriously violent behaviour.
>
> 4. Decisions for reduction, withdrawal or refusal of reception conditions or sanctions referred to in paragraphs 1, 2 and 3 shall be taken individually, objectively and impartially and reasons shall be given. Decisions shall be based on the particular situation of the person concerned, especially with regard to persons covered by Article 17, taking into account the principle of proportionality. Member States shall under all circumstances ensure access to emergency health care.
>
> 5. Member States shall ensure that material reception conditions are not withdrawn or reduced before a negative decision is taken."

44. Systemic difficulties which the interpretation adopted by the Court of Appeal would create were not advanced in order to influence the choice of interpretation, Mr Tam claimed, but to demonstrate that an interpretation that leads to such difficulties is not consistent with the purpose of the Reception Directive. As a general principle, it is of course correct that difficulties in implementing legislation may provide a useful guide to the identification of the true purpose of an enactment but where, as here, the purpose of the Directive is unmistakably clear, the fact that this may give rise to administrative difficulties cannot impel an interpretation which is inconsistent with that purpose. It appears to me that Hooper LJ was saying no more when he observed in para 70 that he would "be loath to interpret the Reception Directive restrictively because of the administrative problems which this country faces dealing with the backlog".

45. It is, I think, clear that the impact of Article 16 will fall principally on first time applications for asylum. I consider that there is force in the appellant's argument that the first and second tirets of Article 16 (1) (a) cannot sensibly be applied to subsequent applications. Mr Tam accepted, however, that the third tiret could perform an effective attenuation of abuse but he characterised this as a "bootstrap" argument. In other words, just because the third tiret can be applied to those who re-apply for asylum after their first application has been finally determined, this is not a reason to expand the overall relevance of the Directive to subsequent applications. This argument is eclipsed, however, by the determination that, for the reasons given earlier, the Directive *does* apply to subsequent applications. Once that position is reached, the efficacy – albeit limited – of Article 16 (1) (a) to subsequent applications emerges.

46. Mr Tam is also undoubtedly right in saying that Article 16 (2) does not apply to subsequent applications but his submission on this point is met by his own 'bootstrap' argument. Simply because one aspect of a particular provision is not capable of adaptation to a particular species of application it does not follow that it must fall outside the Directive's ambit. In other words, although the principal focus of Article 16 is on first applications, it should not be assumed that it was not intended to cover subsequent applications as well.

47. Article 16 (4) requires individual attention to be given to decisions for reduction, withdrawal or refusal of reception conditions and the appellant has argued that the detailed assessment that this will entail would impose an onerous burden on the immigration authorities which would in turn limit the scope for withdrawal or reduction of reception conditions. I cannot accept this argument. There does not appear to be any reason in principle why the State should not be able to adopt what the respondents described as "the screening short-cut of accelerated determinations", particularly in view of the inroads which Mr Tam has told us are being made in the backlog of repeat applications. The answer to the possibility of abuse in the making of repeat applications must surely lie in the devising of streamlined procedures for identifying and rejecting promptly those that are devoid of merit.

48. This is undoubtedly what was contemplated by certain provisions in the Procedures Directive, particularly Article 24 (1) (a) (which empowers Member States to create specific procedures to allow for a preliminary examination for the purposes of processing cases); and Article 32 (2) (which permits a specific procedure to be applied after a decision has been taken on a previous application). Recital 15 of the Procedures Directive is also relevant. It states: -

> "(15) Where an applicant makes a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige Member States to carry out a new full examination procedure. In these cases, Member States should have a choice of procedure involving exceptions to the guarantees normally enjoyed by the applicant."

49. These provisions point powerfully to the way in which the problem of unmeritorious applications should be confronted and dealt with. This is not to be achieved by disapplying the Reception Directive to all repeat applications whether or not they have merit. The problem of undeserving cases should be counteracted by identifying and disposing promptly of those which have no merit and ensuring that those applicants who are genuine are not deprived of the minimum conditions that the Directive provides for.

A reference under Article 267 of TFEU?

50. In support of the application for a reference to ECJ under Article 267 of TFEU, the appellant relied on Case 283/81 *CILFIT Srl v Ministro della Sanita* [1982] ECR 3415. At paragraph 16 of its judgment in that case, the ECJ had said: -

> "the correct application of Community Law may be so obvious as to leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved. Before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice. Only if those conditions are satisfied, may the national court or tribunal refrain from submitting the question to the Court of Justice and take upon itself the responsibility for resolving it."

51. This sets what appears at first sight to be a very high standard. The national court must not only be convinced that there is no reasonable doubt as to how the question should be answered but must also be of the unequivocal view that its opinion would be shared by courts in all the Member States and the Court of Justice. But I do not believe that this passage was meant to convey to national courts the need to conduct an analysis of how the matter might be approached in all of those other courts. Rather, it seems to me that what is required is for the national court to conduct a careful examination of the reasoning underlying any contrary argument ranged against the view that it has formed. If, having done so, the court is of the opinion that such an argument, on any conventional basis of reasoning, could not be accepted, a reference should not be made. Having

anxiously assessed the appellant's arguments against this yardstick, I have come firmly to the view (particularly in light of the legislative history of the Reception Directive and the Procedures Directive) that a reference is not required in this case and I would therefore also dismiss the appellant's application under Article 267 of TFEU.