RE F (ABDUCTION: REMOVAL OUTSIDE JURISDICTION) [2008] EWCA Civ 842

Court of Appeal

Thorpe, Toulson and Rimer LJJ

22 July 2008

Abduction – Welfare – Immigration status – Degree of settlement – Prospects of children remaining in jurisdiction – Interface between wardship and immigration authorities

The Congolese mother abducted the children from the family home in Mozambique, bringing them to England, changing their names and concealing their whereabouts. She made an asylum claim, which was rejected by the UK authorities; after a number of unsuccessful appeals, she eventually admitted that the asylum claim was entirely fraudulent. She remained in the jurisdiction as a failed asylum-seeker. However, the immigration authorities intended to remove her and the children to the Democratic Republic of Congo. In the interim the father had begun proceedings for the immediate return of the children; in time the court located the mother, and the judge granted the father an order for summary return under the inherent jurisdiction, subject to undertakings. However, the mother elected not to accompany the children, and there was a delay while the father sought a visa to enable him to collect them. The mother then changed her mind, and agreed to accompany the children. However, after a delay in which she obtained a passport, she changed her mind again, requiring the father to collect the children. After the father obtained confirmation that the children would be able to re-enter Mozambique, the mother changed her mind yet again, and there was a further delay while she obtained a visa. At this stage, the mother asked the judge to reconsider arguing that there were welfare considerations that needed to be investigated. The judge refused to allow the children, aged 8 and 5, to be separately represented, but did order a s 7 report from the local authority as to the children's domestic circumstances plus a Cafcass report as to the children's wishes and feelings. At the end of the hearing the judge discharged his own order for the children's return to Mozambique, made over a year earlier, on the basis that the children were more settled now and their welfare no longer required immediate return; however, he declined to give any directions for a full welfare investigation, pending a final decision from the immigration authorities. The father appealed. Before the appeal hearing, the immigration authorities wrote to the mother, rejecting her most recent attempt to remain, but stating that no steps would be taken to remove her to the Democratic Republic of Congo until the family proceedings were finalised.

Held – joining the children as parties and allowing the appeal –

(1) This was not a Convention case but one in which the children were entitled to be considered for separate representation under r 9.5 of the Family Proceedings Rules 1991 and, exceptionally, the children should be represented, given the involvement of the State in the form of the immigration authorities (see paras [11], [12]).

(2) The judge's conclusion that the children were settled had failed to reflect sufficiently the mother's fragile prospects of remaining in the UK; in any event, fresh evidence had made it clear that the mother now had no realistic prospect of avoiding a removal to the Democratic Republic of Congo. Settled future residence for the children in this jurisdiction had ceased to be a realistic option. When the power of the judge in wardship interfaced with the power of the Secretary of State it was highly desirable that the two powers communicated and collaborated; in the instant case such communication and collaboration had been absent at the trial stage, with the result that each power had ended up deferring to the other. In reality the choice was between the Democratic Republic of Congo and Mozambique. The family court had an obligation

to make it plain to the Secretary of State that the interests of the children would be better served by a return to Mozambique under the court's control than by forcible removal to the mother's country of origin, the Democratic Republic of Congo (see paras [16], [36]–[38]).

(3) In allowing the appeal the court was not merely restoring the original order for immediate return. The children's return had to be subject to the strictest supervision and control by the court (see para [39]).

Statutory provisions considered

Children Act 1989, s 7
Family Proceedings Rules 1991 (SI 1991/1247), r 9.5

Cases referred to in judgment

Beoku-Betts v SSHD [2008] UKHL 39, [2008] 3 WLR 166, HL
BK (Failed Asylum-Seekers) DRC CG [2007] UKAIT 33398, UKAIT
Chikwamba v SSHD [2008] UKHL 40, [2008] 1 WLR 1420, HL
D (Abduction: Rights of Custody), Re [2006] UKHL 51, [2007] 1 AC 619, [2006] 3 WLR 989, [2007] 1 FLR 961, [2007] 1 All ER 783, HL
J (Child Returned Abroad: Convention Rights), Re [2005] UKHL 40, [2006] 1 AC 80, [2005] 3 WLR 14, [2005] 2 FLR 802, [2005] 3 All ER 291, HL
M (Abduction: Zimbabwe), Re [2007] UKHL 55, [2007] 3 WLR 975, [2008] 1 FLR 251, [2008] 1 All ER 1157, HL

Anthony Kirk QC and *Gina Allwood* for the father
Geraldine More O'Ferrall for the mother
Jonathan Cohen QC and *Hassan Khan* for the interveners

Cur adv vult

THORPE LJ:

[1] This is a troublesome appeal with a complex history. A concise summary is to be found in the judgment of Munby J dated 24 November 2006 as follows:

> '2 The case involves two children: R, who was born on 2 June 1999 in the Democratic Republic of Congo (DRC) and who is therefore now a little over seven years old, and her younger sister A, who was born on 5 May 2002 in South Africa, and who is therefore now some four and a half years old.
>
> 3 Their father was born in Lebanon, their mother in the DRC. The father is a businessman and has worked for a number of years in Africa. The parties married in Zambia on 3 April 1998. They relocated for a short time to the DRC, but within a matter of months had been moved (because of the father's work) back to Zambia, where the father worked for some two to two and a half years before moving to South Africa. In either 2003 or 2004 they moved to Mozambique.
>
> 4 The mother abducted the children from Mozambique and brought them to this country in August 2005. That is not assertion or speculation; it is frankly admitted by the mother. So far as the father was concerned, the mother and the children were coming to this country for a brief holiday, the mother's brother living in this country. The mother, in an affidavit which she has sworn in these proceedings, says:

"[The father] thought that we were going away on a holiday, but it was always my intention that I would not return. My brother knew that was the plan as I had told him."

5 Although for a while the father was able to maintain telephone contact with his wife and children, the mother effectively went to ground soon after her arrival in this country, and indeed changed the children's names.

6 Within a short time of her arrival in this country, the mother made an application for asylum. The application was made on 24 August 2005. It was rejected by the Secretary of State on 13 October 2005. The mother then appealed. Her appeal was dismissed by an immigration judge on 12 December 2005. The mother sought reconsideration from a senior immigration judge, which was refused on 6 January 2006. Her further application for statutory reconsideration by the Administrative Court of the High Court of Justice was refused on 3 March 2006. Since then she has been living in this country on sufferance as a failed asylum seeker.

7 That asylum claim was utterly fraudulent. That again is not assertion; it is fact admitted by the mother. When the matter came before the immigration judge, the mother's case (see paragraphs 3 and 14 of the immigration judge's determination and reasons) was based upon various interviews she had given as part of the asylum process, and more particularly (and more recently) upon a statement dated 18 November 2005. I need not take time summarising the nature of her fraudulent asylum claim. Her case and the evidence in support of it is summarised accurately and succinctly by the immigration judge in paragraphs 15 to 25 of her determination and reasons.

8 When I say that her claim for asylum was utterly fraudulent, it appears to be the fact that, with the sole exception of her truthful assertion that she was born in the DRC, her truthful assertion that she was the mother of the two children, and her truthful assertion that she had arrived in this country in August 2005, every other matter which was put forward by the mother in support of her asylum application was a complete fabrication from beginning to end, bearing not the slightest relation to anything which had happened in reality. This was not a case of an asylum seeker who had embellished an account the central core of which (or even the substratum of which) was truthful. Her account was a complete fabrication from beginning to end.

9 I draw attention to that matter, as understandably Mr Scott-Manderson QC did, appearing before me on behalf of the father, because that fraudulent claim involved, over a period from August 2005 until March 2006, the consistent putting forward by the mother (not merely to public authority in the guise of the Secretary of State, but also in circumstances amounting to perjury before a succession of judicial tribunals, namely the immigration judge, the senior immigration judge, and the judge of the Administrative Court) a wholly false case and a case which quite plainly she knew was a complete fabrication.

10 The father became increasingly concerned once it became apparent that the mother was not going to return the children to Mozambique in accordance with his understanding of the arrangements. Such telephone contact as there had been came to end in about March 2006, whereupon

> the father commenced the current proceedings. A surprisingly large number of orders had to be obtained from the court, seeking information from a very wide range of sources as to where the mother and children might be, before the mother and children were located in Newcastle-upon-Tyne early in September 2006. The mother was served with the proceedings on 13 September 2006 and two days later, on 15 September 2006, the matter came before Ryder J.'

[2] Munby J then proceeded to determine the application before him namely the father's application under the inherent jurisdiction seeking the summary return of the two children to Mozambique.

[3] He granted the father's application ordering the children's return forthwith subject to a series of undertakings to ensure the safety and comfort of the children and of their mother should she elect to return with them. By para 3 of the order the judge stipulated for the mother's election either to accompany or to hand the children over to their father at the offices of her solicitors.

[4] That should have been the end of this troublesome case but it was not. The mother did not appeal the order and elected not to accompany the children. The father then sought a British visa to enable him to collect.

[5] On 16 January 2007 the mother changed her mind and elected to accompany. That resulted in problems in obtaining a passport for her from the DRC Embassy. Her passport was not received until 19 July 2007 whereupon, on 27 July, the mother stated that she had changed her mind again and would not accompany the children.

[6] Thereupon the father returned to his pursuit of a visa and, with the aid of orders made in the Family Division he obtained confirmation from the Mozambique High Commission that the children would be allowed re-entry on one-way temporary travel documents.

[7] The mother's response was to change her mind yet again and to state that she would accompany. At a hearing in October the case was adjourned to enable the mother to apply for a visa.

[8] The case returned to the list of Munby J on 7 November 2007. The mother argued that there were welfare considerations that needed to be investigated before a return and applied unsuccessfully for the children to be separately represented. However Munby J did seek a s 7 report from the local authority relating to the children's domestic circumstances and schooling. At the same time he ordered a Cafcass report as to the children's wishes and feelings. Those reports were filed in November and December 2007 respectively. A further application for the joinder of the children was dismissed by McFarlane J on the 15 November 2007.

[9] That then was the state of the case when listed before Munby J on 31 January 2008.

[10] At the end of the day he delivered an extempore judgment discharging his previous order for the return of the children to Mozambique. His essential reasoning was that within the intervening months the children had become more settled in their routines and that therefore the paramount consideration of welfare no longer indicated an order for summary return. However he declined to give any directions for the consequential welfare investigation,

pending the Secretary of State's decision on the mother's latest appeal to avoid or defer the removal of the family to the DRC.

[11] The appellant's notice was filed in this court on 21 February. It was initially directed to an oral hearing at which, on 20 March 2008 permission was granted. The appeal was fixed for 1 July and, a few days before, an application was filed for the children to be joined as parties. At the outset we determined the application advanced by Mr Jonathan Cohen QC, supported by Miss Geraldine More O'Ferrall for the respondent mother, and hardly opposed by Mr Anthony Kirk QC for the appellant father. Mr Kirk's stance was well judged given that:

(a) The appeal bundle had been disclosed to Dawson Cornwell, instructing Mr Cohen, during the previous week.
(b) Dawson Cornwell had referred the case to Cafcass who supported the application and who offered as guardian Miss Sunderland who had signed the December 2007 Cafcass report.
(c) Subsequently Mr Cohen had prepared a full skeleton argument, not only advancing his submissions in support of the application to intervene but also his submissions on the appeal, thus achieving something of a fait accompli.
(d) This was not a Convention case but one in which the children were entitled to be considered for separate representation under the provisions of r 9.5 of the Family Proceedings Rules 1991.
(e) The children's future presence within this jurisdiction was subject not only to the power of the judge in the Family Division but, more crucially, the power of the State in the enforcement of its immigration policy.

[12] Thus the decision of the court to permit the intervention is not to be taken as any departure from the general rule, certain in Convention cases, that only in exceptional circumstances will children be joined as parties to the case.

[13] Also at the outset the parties were invited to clarify the state of play as between the respondent mother and the Home Office. In the appeal bundle there was nothing beyond a letter dated 22 April 2008 by which the mother's immigration solicitors had sought yet another review under something labelled the Legacy Exercise. The only information offered by the parties came from Miss More O'Ferrall to the effect that the letter of 22 April had not been answered or acknowledged. To clear this and other questions overhanging the mother's continuing presence in the jurisdiction we immediately requested the attendance of the Treasury Solicitors representative at 2 pm.

[14] Before coming to any consideration of the judgment below or of the submissions of the parties I wish to establish the very significant developments between 31 January and 1 July 2008.

[15] First the decision of the Secretary of State anticipated by Munby J came only days later by letter dated 12 February. The decision letter is very detailed, extending to some 6 1/2 pages. It determined the mother's application by letter of 17 December 2007 for the consideration of her

representations as a fresh asylum and human rights claim. The essence of the determination is to be found at page 6 as follows:

> 'Your client's asylum claim has been reconsidered on all the evidence available, including the further submissions, but it has been decided that the decision of 13 October 2005 upheld by the immigration judge on the 15 December 2005 should not be reversed as they do not give rise to a realistic prospect of success before an Immigration Judge.
>
> Because it has been decided not to reverse the decision on the earlier claim and it has been determined that your client's submissions do not amount to a fresh claim, you have no further right of appeal.
>
> Your client has no legal basis of stay in the United Kingdom but no step will be taken to remove her until the proceedings in the family court are finalised.'

[16] It will be seen that the resulting position was, in effect, that Munby J had deferred to the Secretary of State and the Secretary of State had in turn deferred to Munby J. This unsatisfactory state of affairs is the result of the absence of direct communication between the two powers.

[17] The mother seemingly accepted that decision since by letter of 16 April 2008 the solicitors acting for her in these proceedings wrote:

> 'Our client has been advised by the Immigration solicitor dealing with her case that there is no further action she can take in respect of the decision to refuse her claim for asylum.'

[18] However by 22 April that view shifted leading to the application, which I have mentioned above, for consideration under the Legacy Exercise. The letter explained the application thus:

> 'Our client entered the UK as a visitor together with her two dependant daughters on 24 August 2005. She made an in-country application for asylum on 24 August 2005. She and her daughters have remained living in the UK continuously since that time.
>
> We understand that the Home Office is currently considering families under the Legacy Exercise who have been in the UK for around 3 years. Our client has been in the UK for a period approaching 3 years. Her daughters are now aged 5 and 8. They have undertaken all of their education in the UK and have very strong ties to the UK now.'

[19] Thus prior to the arrival of the Treasury Solicitor's representative the mother's case was that she was not at risk of removal because:

(a) Her Legacy Exercise application had not been determined; and
(b) There was a moratorium on removals to the DRC, the only country to which the Secretary of State had power to remove since both she and the children are DRC nationals.

[20] The Treasury Solicitor's representative who attended at 2 pm was Miss Jennifer Bautista, the solicitor who has conduct of the case on behalf of

the Secretary of State. We were very fortunate that she was able to attend at such short notice and we are extremely grateful for her crucial contribution to our understanding of developments on the immigration front.

[21] First Miss Bautista provided the Secretary of State's determination of the mother's application under the Legacy Exercise. By coincidence the letter was dated 1 July. Having reviewed the mother's immigration history the Secretary of State's representative concludes:

> 'Although the time your client has spent in the United Kingdom is nearing three years, from September 2005 until March 2006 Miss M failed to comply with her reporting restrictions and was considered to have absconded. Thus this time would not be taken into account when assessing her length of residence.
>
> Similarly, her personal history and character are in question given that she supplied false identities for both her and her children, when arriving/claiming and submitted an asylum claim on false grounds concerning her husband working for *Médecins Sans Frontières*.
>
> Your client does not have any domestic or compassionate circumstances indeed there is an issue before the family court about the return of the children to their father in Mozambique.
>
> Therefore whilst it is accepted that your client's children have had a small proportion of their education conducted in the United Kingdom, when balanced against the issues detailed above this is outweighed by the contrary issues within her case. In the circumstances and having taken into account the above factors and your client's circumstances it has been decided that your client does not qualify for status and is subject to administrative removal.'

[22] That left only the question of the moratorium. Here Miss Bautista informed us that the Immigration Appeals Tribunal in the case of *BK (Failed Asylum-Seekers) DRC CG* [2007] UKAIT 33398, had ruled against a continuing need for moratorium: that the decision had been appealed to this court: that the appeal was fixed for 17/18 November 2008: and that, pending the hearing, the Secretary of State had decided to continue the moratorium. Thus although mother and children are to be removed no steps will be taken pending the outcome of the appeal in *BK*.

[23] I turn now to the judgment below. The judge's findings and conclusions can be summarised as follows:

(i) That the mother by not co-operating with the previous order and changing tack from time to time had shown scant regard for the welfare of the children and had managed to delay the implementation of the order.

(ii) That the children, on account of these proceedings and those in relation to the mother's asylum application, were in a state of limbo and uncertainty that was undoubtedly affecting their welfare.

(iii) That the children, with the passage of intervening time had been building up day by day a connection with this country.

(iv) That, following *Re M (Abduction: Zimbabwe)* [2007] UKHL 55,

[2007] 3 WLR 975, [2008] 1 FLR 251 the decision had to be taken in accordance with the best interests of the children in the immediate future rather than in the medium or long-term future.

(v) That with the passing of time it was no longer the case that the welfare of the children required their immediate summary return to Mozambique.

(vi) That the court had to be guided by the welfare of the children and could not allow its decision, dominated by welfare, to be affected by a moral or ethical comparison of the parents.

(vii) That a welfare investigation as to the long-term future of the children could be deferred for a short period without being disadvantageous to the children given that the decision of the Secretary of State might make such an investigation unnecessary in this country.

(viii) That as far as directions for welfare proceedings were concerned, the matter should be adjourned until after the decision of the Secretary of State was known so that the judge could better assess whether there was utility in the court embarking upon welfare proceedings.

(ix) That it was in the children's best interests, if they were to be returned to Africa (by decision of this court or as a result of a decision of the Secretary of State), to be returned to Mozambique and not the DRC.

(x) That the court could not interfere with the decision of the Secretary of State and had no jurisdiction to require the Secretary of State to return to Mozambique rather than to DRC.

[24] I turn now to the submissions of counsel. Mr Kirk set out five legal propositions which were common ground at the Bar and which were largely drawn from the decision of the House of Lords in *Re J (Child Returned Abroad: Convention Rights)* [2005] UKHL 40, [2006] 1 AC 80, [2005] 3 WLR 14, [2005] 2 FLR 802. He did not submit that Munby J had disregarded any of those principles but rather that he had erred in his analysis of the welfare balance. Mr Kirk advanced that case under three heads.

[25] First he said that the judge has concentrated on the assessment of the welfare in the short term, ignoring risks arising in the medium and long term. Specifically the judge failed to recognise that the children cannot stay in this jurisdiction. He ignored the overwhelming probability that they will be removed to the DRC. An order for the children's summary return to Mozambique avoids the imminent risk of deportation to the DRC. The mother will be free to accompany them since she had been offered a visa by the Mozambique Consulate.

[26] Second Mr Kirk criticises the judge's finding of enhanced settlement. It is only well founded on the extension of the period of physical presence. Settlement is a many faceted concept that requires equal regard to its emotional and psychological aspects. Miss Sunderland's report at paras 2.11, 2.12 and 4.8 shows the stress and turmoil that the children have suffered, despite the stability flowing from the extension of their stay in Newcastle.

[27] Mr Kirk's third submission is that the judge should have had greater regard to the wider policy considerations. What message does it give to those

who read of a judge manipulated and mocked by a determined and maligned abductor who has treated the court with the utmost contempt?

[28] As a footnote to these submissions Mr Kirk added that in any event the judge was wrong to defer to the Secretary of State by refusing to give directions for a welfare inquiry.

[29] Miss More O'Ferrall in relation to Mr Kirk's third submission accepted the judge's findings in paras [7]–[9] of his judgment. However she submitted that these considerations were well recognised by the judge and duly assessed by him in looking to the welfare of the children over and above adult turpitude.

[30] As to Mr Kirk's second submission she accepted that settlement was a many faceted concept but submitted that the judge had sufficiently recognised the illegality of the children's presence within the jurisdiction.

[31] Miss More O'Ferrall, in relation to the mother's immigration status explained that her instructing solicitors had only discovered the possibility of an application under the Legacy Exercise at some time between 16 and 22 April, thus explaining the inconsistency of the letters written on those dates. She drew attention to paras 4 and 6 of the order of Munby J which ensured that in the future any application made by the mother to the Secretary of State had to be filed and served within the wardship proceedings and that any future application in the Administrative Court would be reserved to Munby J.

[32] Mr Cohen relied heavily upon the cases in the House of Lords *Re D (Abduction: Rights of Custody)* [2006] UKHL 51, [2007] 1 AC 619, [2006] 3 WLR 989, [2007] 1 FLR 961, and *Re M (Abduction: Zimbabwe)* [2007] UKHL 55, [2007] 3 WLR 975, [2008] 1 FLR 251. The principles there stated supported the judge's refusal of a summary return. They demonstrate the need for a full London welfare inquiry in which the children would continue to be separately represented.

[33] Mr Cohen then submitted that the decision of the House of Lords in the case of *Beoku-Betts v SSHD* [2008] UKHL 39, [2008] 3 WLR 166 and *Chikwamba v SSHD* [2008] UKHL 40, [2008] 1 WLR 1420, given on 25 June had thrown the mother another lifeline. When asked to formulate what claim the mother could now advance to the Secretary of State Mr Cohen candidly conceded that he is not an immigration lawyer. He accepted that Miss More O'Ferrall, whose instructing solicitors act for the mother on both fronts, had not sought to suggest that those cases would give rise to any further claim.

[34] Mr Cohen equally made plain that he had only had access to the appeal bundle and therefore had very little information upon welfare issues.

[35] In general I found Mr Kirk's criticisms of the judgment below more persuasive than Miss More O'Ferrall's defence. If Mr Cohen's task was to advocate the children's wishes and feelings, striving for their desired outcome, he did so skilfully and effectively. However if his task was to advocate the children's welfare his submissions seemed to me to lack balance. He did not seem to acknowledge the extent to which the mother had influenced the children to support her cause and to reject their father. He did not seem to bring into the reckoning the consideration that the restoration of the relationship between the children and their father would be prejudiced by the further extension of their separation. I have no doubt that this imbalance was the result of the paucity of Mr Cohen's information. By way of instance it

emerged during his submissions that he was under the impression that the father had had no communication with the children since March 2006 when in fact he has been in very regular telephone contact. So much was common ground between the parents save that telephone contacts in May and June were disputed.

[36] The preference that I have expressed for Mr Kirk's submissions indicate my conclusion that the appeal must be allowed. I would do so principally on the grounds of fresh evidence and the wider appreciation that it gives us of the insecurity of the mother's presence within the jurisdiction. In his conclusions My Lord, Toulson LJ, explains that the mother has no realistic prospect of escaping or much further deferring the family's removal to DRC. The consequence is that settled future residence for the children in this jurisdiction ceases to be a realistic option. The realistic choices are between the DRC or Mozambique. Mozambique is the infinitely preferable option. A summary order avoids the risk of forcible deportation.

[37] In these difficult cases where the power of the judge in wardship and power of the Secretary of State interface it is highly desirable that there should be communication and collaboration between the two powers. This was absent at the trial stage with the result that each power ended up deferring to the other. This appeal has achieved the essential sharing of information. Miss Bautista remained in court to hear the argument. We undertook to send her a copy of our judgment. The family court has the opportunity and the obligation to make plain to the Secretary of State that the interests the children would be better served by return to Mozambique under the court's control rather than by forcible removal to the DRC.

[38] Perhaps with less confidence I would allow the appeal on the ground that Munby J erred in his fundamental conclusion that his prior order should be discharged, in full appreciation of all the mother's efforts to thwart it, on the grounds of settlement achieved as a consequence of the mother's antics. In my opinion, the judge did not sufficiently reflect the fragility of the mother's prospects of further extending presence in the jurisdiction, no doubt largely because of the absence of any determination of her application of 17 December. However the refusal that it received was perfectly predictable and if factored in should have led to an evaluation of the DRC as a live alternative.

[39] To allow the appeal is not simply to restore the order of November 2006. The children's return must be subject to the strictest supervision and control of this court. At the conclusion of the argument we invited written submissions on the mechanics of return and of protective measures to be put in place in Mozambique in advance of the children's return.

TOULSON LJ:

[40] I agree. The mother has never had leave to enter or to remain in the UK. After her arrival with the children in August 2005 she claimed asylum on the basis that her husband was a Belgian doctor working for a medical organisation at a hospital in the DRC, when he was abducted by the authorities on suspicion of supplying arms to the rebels. She had then fled to the UK with the children in order to escape the risk of persecution by Congolese state agents. The truth was that her husband is not a Belgian doctor but a Lebanese born businessman, with dual nationality for Sierra Leone and

with residence permits for South Africa and Mozambique. They were married in the DRC in 1998. The father had been sent there by his company to open a factory and worked there for a matter of months. After their marriage they moved to Zambia and subsequently to Mozambique. It was from Mozambique that she brought the children to the UK after telling the father that she wanted to have a 3-week holiday with her brother. Her claim for asylum was refused and her appeal to an immigration judge was dismissed.

[41] On 18 September 2006 the mother advanced a purportedly fresh asylum and human rights claim on behalf of herself and the children. It was put forward on a fundamentally different basis from her original claim. This attempt followed hard on the mother being served with proceedings in the present matter. Those representations were considered by the Secretary of State and refused. There was no legal challenge to that decision. However, on 18 December 2007 the mother made further submissions to the Secretary of State contending that the issues raised in her previous submission had not been fully considered. Thorpe LJ has referred in para [15] to the letter from the Secretary of State dated 12 February 2008 in which she concluded that the mother's representations did not amount to a fresh asylum and human rights claim. There has been no legal challenge to that decision and the time for any such challenge has now long passed.

[42] The mother then applied to the Secretary of State on behalf of herself and the children for permission to remain in the UK as a 'Legacy Case.' As Thorpe LJ has recounted (in para [21]), that application has been rejected.

[43] In the course of argument it was suggested that the mother may yet be allowed to remain in the UK with the children on either of two separate grounds, one based on the recent decision of the House of Lords in *Beoku-Betts v SSHD* [2008] UKHL 39, [2008] 3 WLR 166, and the other based on the forthcoming appeal to this court in *BK (Failed Asylum-Seekers) DRC CG* [2007] UKAIT 33398.

[44] In *Beoku-Betts* the House of Lords held that in considering the Art 8 rights of a person threatened with removal from the UK the court must consider whether the applicant's proposed removal would be disproportionate looking at the family unit as a whole. I do not see how on the facts of this case that principle could give the mother (or children) a fresh claim. The asylum and human rights claim put forward by her solicitors in September 2006 was expressly advanced 'on behalf of her and her dependant daughters'. At no stage has the Secretary of State quarrelled with the suggestion in this case that the position of the dependant children must be considered along with that of the mother. The Secretary of State's letter dated 1 July 2008 (referred to para [21]) shows that express consideration was given to the position of the children and to the fact that some part of their education has now been conducted in the UK. The removal of the mother and the children together to the DRC would not break the family unit such as it presently exists in the UK. It is true that the mother has one brother in the UK, but no great point has been made or could be made about that. The other members of the mother's family (comprising her mother, two brothers and two sisters) all live in the DRC (according to what was said on her behalf in September 2006). Miss More O' Ferrall, appearing for the mother, did not suggest that her client would have a fresh line of argument based on *Beoku-Betts*. The suggestion

came from Mr Cohen QC, but he was not able to indicate how any such argument might be advanced. I am unable to see any basis for it.

[45] However, there remains the moratorium pending the decision of this court in *BK*. In that country guidance case the AIT considered at length the issue whether failed asylum-seekers returned to the DRC against their will are as a class at real risk of persecution or serious harm or ill-treatment. In its judgment the tribunal said:

> '188 It was common ground between the parties that persons involuntarily returned or expelled from the UK to the DRC will not be seen as normal returnees. They will be questioned with a view to establishing what type of expellee they are; and in particular whether they are either a failed asylum-seeker or a deportee …
> 189 The fact that a person's identity as a failed asylum-seeker will become known at the point of return reflects the main thrust of the evidence; and we are prepared to accept that for the purposes of this appeal this is the case. The fact that a failed asylum-seeker have substitution documents (a laissez passez) will suffice to arouse initial interest. In respect of those who have travelled with escorts, the fact that they are not ordinary returnees will be known to the DRC airport officials in any event from the flight manifest. Those who are handed over to DRC airport officials by UK immigration officials … will observably not be normal returnees.
> 190 At the heart of the case put by the appellant's representatives is the contention that failed asylum-seekers on return to the DRC are perceived as traitors, or persons who have dishonoured, or said 'bad things' about, their country and as a result are seen by the DGM and security services at the airport (or afterwards) as deserving of ill-treatment.'

[46] The tribunal rejected that contention for various reasons, including that there was ample evidence to show that the DRC authorities were well aware that many of their nationals who go abroad to Europe do so for reasons of economic betterment and also well aware that the legal routes of migration to Europe are very restricted.

[47] Permission to appeal to this court has been given and in the meantime the Secretary of State is not deporting any failed asylum-seeker to the DRC.

[48] It would be wrong to try to form any view for the purposes of the present appeal about how this court may deal with the appeal in *BK*. But, in my judgment, it would be equally wrong to suppose that if the appeal is successful it would automatically follow that every person from the DRC who claims asylum in the UK must succeed in that claim on the basis that, whatever the circumstances, they must necessarily face a risk of persecution on return by virtue of having claimed asylum.

[49] In this case the mother has said many inconsistent things in her attempts to claim asylum, but she has never suggested to date that she would be at risk on return to the DRC by virtue of the fact of her having claimed asylum. Hers is a peculiar case. As already noted, she did not flee to the UK from the DRC. She left the DRC 10 years ago on her marriage. She and her husband then went to live in other countries for economic reasons. She

decided to separate from him and to take the children. If she is now removed to the DRC, she will be returning to her country of origin, where most of her family are, after a decade of living in other countries. It has not been suggested that she herself, or her family, have ever done anything hostile to the Congolese authorities. For the time being she is a fortuitous beneficiary of a general moratorium on the return of failed asylum-seekers to the DRC. But I fail to see a basis on which she has any real prospect of being able to remain in the UK for much longer. That seems to me important in considering the quality and degree of any 'settlement' which she may claim to have in the UK. As Thorpe LJ has observed, thanks to Miss Bautista the precariousness of the mother's presence in the UK has now become much clearer than at the time of the judgment under appeal.

RIMER LJ:
[50] I agree with both judgments.

Order accordingly.

Solicitors: *International Family Law Group* for the father
David Gray, *Newcastle-on-Tyne* for the mother
Dawson Cornwell for the interveners

PHILIPPA JOHNSON
Law Reporter