Neutral Citation Number: [2021] EWCA Civ 59

Case No: C4/2019/0561

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
Mr Justice Murray
[2018] EWHC 3475 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/01/2021

Before :

LORD JUSTICE SINGH
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE PHILLIPS

- -

Between :

The Queen (on the application of FA (Sudan))	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -
- -

Mr Ramby de Mello and Mr Danny Bazini (instructed by **Bhatia Best Solicitors**) for the **Appellant**
Mr Gwion Lewis (instructed by **The Government Legal Department**) for the **Respondent**

Hearing date : 13 January 2021

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Approved Judgment

Lord Justice Singh:

Introduction

1. This is an appeal against the dismissal on 18 December 2018 by Murray J of a claim for judicial review, in which the Appellant challenged a decision by the Respondent dated 9 August 2016, to the effect that she did not qualify for leave to remain in the United Kingdom outside the Immigration Rules under a concessionary policy made in April 2012: the 'Destitution Domestic Violence Concession' ("the DDVC" or "the Concession"). In these proceedings the Appellant in substance challenges the lawfulness of the policy in the DDVC.

2. Permission to appeal to this Court was granted by Longmore LJ in an order sealed on 5 August 2019.

3. We are grateful for the submissions of Mr Ramby de Mello, who appeared for the Appellant with Mr Danny Bazini, and Mr Gwion Lewis, who appeared for the Respondent.

Factual Background

4. The Appellant, FA, was born in Sudan on 4 November 1994. She married Ashraf Mohammed Ahmed, a British Citizen, on 28 October 2011 and gave birth to their first child in Sudan on 4 August 2012.

5. The Appellant travelled to the Netherlands from Sudan on 12 December 2014 and later entered the UK with her husband, using a Dutch residence card, on 13 August 2015. FA resided with her husband in Birmingham from that date until January 2016, when she left the matrimonial home. FA gave birth to their second child on 21 September 2015.

6. On 4 August 2016, FA applied for leave outside the Immigration Rules ("LOTR") under the DDVC. On 9 August 2016, that application was refused by the Respondent on the grounds that FA was not eligible for LOTR under the DDVC, as she did not meet the criteria set out in the DDVC. The material paragraph of the decision letter said:

> "You have been found not to be eligible under the [DDVC] as you did not enter the United Kingdom or were not given leave to remain in the United Kingdom as a spouse, civil partner, unmarried or same sex partner of a British citizen or someone present and settled in the UK."

7. On 3 November 2016, FA applied for permission to bring a claim for judicial review of that decision. This was granted by Mr Timothy Brennan QC, sitting as a deputy High Court judge, on 13 March 2017.

8. Thereafter the proceedings took an unusual turn in the context of judicial review. The Secretary of State applied for there to be a preliminary hearing to determine issues of

fact on the date when the substantive hearing of the claim for judicial review was due to take place. On 3 July 2017, HHJ Peter Lane (as he then was), sitting as a judge of the High Court, granted that application.

9. The preliminary hearing was held on 11 July 2017 before Jefford J to decide three questions of fact:

(1) Did FA enter and then reside in the Netherlands, as she claimed, in or around 2014-2015?

(2) Did FA enter the United Kingdom lawfully in 2015 as the "family member" of a returning British citizen, as she claimed?

(3) Did FA reside with her husband for five years, as she claimed?

Judgment was handed down on 13 December 2017: [2017] EWHC 3194 (Admin).

10. In answer to the first question, Jefford J found that FA did enter and reside in the Netherlands in 2014-2015.

11. Jefford J declined to answer the second question as formulated because in part it raised an issue of law (that is the lawfulness of FA's entry to the UK). Jefford J dealt with the question only in so far as it raised issues of fact about the circumstances in which FA had entered the UK. She found that FA's husband visited from the UK for short periods monthly. During those visits he spent time with FA and focussed on her. Jefford J found that FA's husband was not working or studying in the Netherlands while FA lived there. She found that FA was not working but was being paid around €100 to €250 per month by her husband and he paid her rent. She had no other means of funding. Jefford J found that FA obtained the Dutch residence card from a government building and that it was not a "black-market fake of some description". She found that FA's husband assisted her in obtaining the residence card, attending interviews as her interpreter and attending to paperwork.

12. In relation to the journey from the Netherlands to the UK, Jefford J found that FA did not conceal herself aboard the ferry and had her credentials checked by an officer when she boarded the ferry, but not on arrival into the UK. She found that FA did not know that she was leaving the Netherlands when she travelled to the UK and did not know where she was. It is likely that the ferry left from a port in France.

13. In answer to the third question, Jefford J found that FA had not resided with her husband for five years. They did not live together until they moved to the matrimonial home in Birmingham in August 2015 and FA left that residence in January 2016.

14. Following the judgment of Jefford J, FA applied for permission to amend the grounds of claim on 13 February 2018. This was granted by Mostyn J on 24 July 2018.

15. The substantive claim for judicial review was heard by Murray J on 7 November 2018 and dismissed in the judgment given on 14 December 2018.

The Concession

16. The relevant provisions of the DDVC and Immigration Rules were helpfully summarised by Murray J, at paras. 10-16 of his judgment, as follows:

> "10. At the time of the Decision, the DDV Concession was set out in a Home Department policy document entitled 'Victims of domestic violence'. Version 13 of that document, which was published on 29 May 2015, was the relevant version at the time of the Decision and remained in effect until 4 February 2018. The DDV Concession was set out at pages 44 to 48 of that document, where it is referred to as the 'destitution domestic violence (DDV) concession'.
>
> 11. The current version of the policy is now published by the Home Office, separately from its other guidance on victims of domestic violence, in a document entitled 'Destitute [sic] domestic violence (DDV) concession – version 1.0', which was published for Home Office staff on 5 February 2018. The key provisions remain essentially the same.
>
> 12. The DDV Concession is a policy operated by the Home Office outside of the Immigration Rules to allow eligible applicants, who intend to make an application for settlement under the domestic violence rules, to be granted LOTR and permitting them to access public funds and vital services. This gives the applicant access to temporary accommodation such as a refuge in order to leave her or his abusive partner and to submit a settlement application under the domestic violence rules. A successful applicant for LOTR under the DDV Concession does not have to meet the habitual residence test she or he would otherwise have to meet with other types of leave under criteria set by the Department of Work and Pensions.
>
> 13. If a successful applicant for LOTR under the DDV Concession fails to submit her or his application for settlement under the domestic violence rules within three months of the grant of LOTR under the DDV Concession, then the applicant becomes an overstayer and becomes subject to removal from the United Kingdom. The DDV Concession stipulates that within 28 days of an applicant's LOTR lapsing the applicant's case should be referred for enforcement action.
>
> 14. In order to be eligible for the DDV Concession, the applicant must satisfy all of the following conditions:
>
> i) the applicant must previously have been granted leave to enter or remain as the spouse, civil partner or unmarried or same-sex partner of a British citizen, a

> settled person or a member of HM Forces who has served for at least four years;
>
> ii) the applicant's relationship with her (or his) spouse, civil partner, unmarried or same-sex partner must have broken down as a result of domestic violence;
>
> iii) the applicant must claim to be destitute and not to have access to funds; and
>
> iv) the applicant must intend to apply for indefinite leave to remain as a victim of domestic violence under one of the following provisions of the Immigration Rules:
>
> a) paragraph 289A;
>
> b) paragraph 40 of Appendix Armed Forces; or
>
> c) section DVILR of Appendix FM (Family Members).
>
> 15. Paragraph 289A sets out requirements that must be met by a person who is a victim of domestic violence and who is seeking indefinite leave to remain in the UK. It forms part of part 8 of the Immigration Rules, which is concerned with family members. Section DVILR of Appendix FM (Family Members) provides an alternative set of requirements to be met by a person who is a victim of domestic violence and who is seeking indefinite leave to remain in the UK.
>
> 16. It is common ground that FA satisfies criteria (ii) and (iii) set out at [14] above, but not criteria (i) or (iv). In relation to criterion (iv), she cannot have the requisite intention, because she does not satisfy the pre-conditions to applying under any of the routes mentioned in (iv). It follows, therefore, that FA is ineligible for the DDV Concession on its terms."

17. The background to the Concession was described by Moore-Bick LJ in *R (T) v Secretary of State for the Home Department* [2016] EWCA Civ 801, at para. 2, as follows:

> "The DDV Concession was established outside the Immigration Rules in April 2012 as a means of providing temporary support and assistance to destitute victims of domestic violence, who through lack of means would otherwise be forced to remain in abusive relationships. Under it a successful applicant is granted leave to remain for a period of three months, without a condition prohibiting recourse to public funds, to enable her (most applicants are inevitably women) to

> make an application for indefinite leave to remain under section DVILR of Appendix FM to the Immigration Rules. The Concession can therefore be viewed as a basis of granting temporary relief designed to enable a victim of domestic violence to make a substantive application for indefinite leave to remain."

18. It is also important to note that, at para. 11, Moore-Bick LJ said:

> "In my view when considering an application under the DDV Concession for temporary relief the Secretary of State must ask herself whether, as things stand at the date of the application, the applicant would on the face of it be able to meet the requirements of section DVILR. If it is clear that she would not, the Secretary of State is entitled to refuse relief. That does not involve construing section E-DVILR by reference to the concession; it simply involves asking oneself whether, if the applicant were to make an application for indefinite leave to remain, she could satisfy the terms of the section. In the present case it was clear that she could not do so and for that reason alone she cannot succeed in this case."

The judgment of Murray J

19. The Judge held, first, that FA did not enter the UK as the spouse of a British citizen exercising EEA rights. He held that regulation 9 of the Immigration (European Economic Area) Regulations 2006 only applies if the returning British citizen was residing in the EEA state as a worker or self-employed person; FA's husband was not. The Judge also held that the fact that FA entered the UK using a valid Dutch residence card which was checked by an immigration officer as she boarded a ferry was not sufficient for the purposes of regulation 9.

20. Secondly, the Judge held that FA had not been unlawfully discriminated against in contravention of Article 14 of the European Convention on Human Rights ("ECHR"), read with Article 8. In that context, he said that this case was distinguishable on its facts from the decision of the Inner House of the Court of Session in *A v Secretary of State for the Home Department* [2016] CSIH 38; [2016] SC 776.

21. Thirdly, the Judge held that there was no violation of Article 24 of the EU Charter of Fundamental Rights, whether read with Article 18 of Directive 2012/29/EU of the Parliament and Council establishing minimum standards on the rights, support and protection of victims of crime ("the Directive") or alone.

22. Fourthly, the Judge held that section 55 of the Borders, Citizenship and Immigration Act 2009 ("the 2009 Act") was not relevant to this case.

Grounds of Appeal

23. On 5 August 2019, permission to appeal to this Court was granted by Longmore LJ on Grounds 1 to 6 but refused on Ground 7.

24. **Ground 1:** The Judge was wrong to hold that it is not sufficient for regulation 9 of the Immigration (European Economic Area) Regulations 2006 for FA to have a "validly issued Dutch residence card and that it was checked by an immigration officer on her entry to the UK" and that FA did not enter the UK as the spouse of a British citizen exercising EEA rights. This ground is no longer pursued.

25. On 30 June 2020, the Appellant was granted permission by Master Bancroft-Rimmer to withdraw Ground 1. It is accepted on her behalf that that ground is unsustainable in the light of the decision of this Court in *Kaur v Secretary of State for the Home Department* [2020] EWCA Civ 98; [2020] 3 CMLR 9; but Mr de Mello reserves the right to argue the point should this case go further. We were informed by him that there is an appeal pending before the Supreme Court in *Kaur*.

26. **Ground 2:** The Judge erred in law by not holding that FA had been unlawfully discriminated against in contravention of Article 14 ECHR, read with Article 8.

27. **Ground 3:** The Judge failed to consider the discriminatory impact of the DDVC on four particular groups of victims of domestic violence, by reference to nationality, gender, motherhood and immigration status.

28. **Ground 4:** The Judge erred in holding that this case was distinguishable on the facts from *A v Secretary of State for the Home Department*.

29. **Ground 5:** The Judge was wrong to hold that there was no contravention of Article 18 of the Directive, taken together with Article 24 of the EU Charter.

30. **Ground 6:** The Judge was wrong to hold that section 55 of the 2009 Act has no relevance.

Grounds 2 and 3

31. Both in his written submissions and at the hearing before us Mr de Mello took Grounds 2 and 3 together and I will do the same. In essence Mr de Mello submits that there was a breach of Article 14 ECHR, read with Article 8. Both are Convention rights, within the meaning of the Human Rights Act 1998, and are set out in Sch. 1 to that Act.

32. Article 14 ECHR, the equality provision, provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

33. Article 8 ECHR, the right to respect for private and family life, provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

34. On behalf of the Respondent Mr Lewis did not dispute that the present case falls within the ambit of Article 8 and therefore, in principle, Article 14 is applicable.

35. Mr de Mello no longer pursues the argument which was made in writing that there was unlawful discrimination on grounds of nationality. He does, however, maintain that there was discrimination on the following three grounds: (i) gender (or "sex", to use the language of Article 14); (ii) motherhood; and (iii) immigration status.

36. Again, it was common ground before us that each of those grounds is, in principle, a relevant ground within the meaning of Article 14. Sex is one of the express grounds mentioned in that Article and the other grounds fall within the concept of "other status".

37. It was also common ground that, in principle, Article 14 prohibits both direct discrimination and indirect discrimination; but that such discrimination is capable of justification and so will not be unlawful if it is objectively justified. In principle direct discrimination is more difficult to justify than indirect discrimination but not all grounds of discrimination are "suspect" grounds. Me de Mello submits that sex is a suspect ground but accepts that motherhood and immigration status are not. He submits that, where there is a suspect ground of discrimination such as sex, very weighty reasons are required for it to be justified.

38. Mr de Mello accepted at the hearing before us that, in so far as he relies on the ground of immigration status, the test for review by a court is whether the distinction drawn by the Secretary of State is manifestly without reasonable foundation.

39. As I have said, Mr de Mello submits that FA was discriminated against on the grounds of gender, motherhood and immigration status. He submits that the relevant comparison is between victims of domestic violence who have been granted a spousal visa under the Immigration Rules (and granted assistance under the DDVC) and those who have not. He submits that the distinction is one of form, not substance. The situations are comparable in that they are partners who have suffered domestic violence during their marriage and stay in the UK and require assistance from the state.

40. Mr de Mello further submits that there is no objective and reasonable justification for the difference in treatment.

41. In the present case I accept that the Concession does distinguish directly between those who have a visa as the spouse or partner of a person who is, for example, a British citizen and those who do not. It does not, however, differentiate between men and women, so there is no direct discrimination on grounds of sex. Nor is there direct discrimination on grounds of motherhood, since the Concession applies to fathers as well as mothers; and applies whether or not an applicant has children.

42. Mr de Mello submits that there was nevertheless indirect discrimination on those grounds. In that context he complains that the Judge made no reference to the "Expert Statement" of Dr Sundari Anitha, dated 27 October 2016, which sets out the discriminatory impact of the Concession on female applicants who suffer domestic violence, particularly mothers with dependent children.

43. The onus to prove as a matter of fact that an apparently neutral policy has a disproportionate impact on a protected group, and therefore constitutes indirect discrimination, lies on a claimant. In my view, the evidence on this issue is unsatisfactory. There is evidence, if it were needed, that the victims of domestic violence are more likely to be women than men: see the statement of Dr Anitha. It seems to me, however, that what would be required in a case like the present is more specific evidence, to show that the distinction drawn on its face by the Concession has a disproportionate impact on a protected group.

44. It may well be that more women are likely to fail under the Concession than men because more women are the victims of domestic violence than men. But, as Mr Lewis pointed out at the hearing before us, it will probably be the case that the beneficiaries of the Concession are also predominantly women. Both consequences would seem to follow from the unfortunate reality that most victims of domestic violence are women. In principle, I would have thought that, before a complaint of indirect discrimination could get off the ground, it would have to be established on evidence that the beneficiaries of a policy are more likely to be men, whereas those who are disadvantaged by it are more likely to be women.

45. Nevertheless, without deciding the point, I am prepared to assume for the purposes of the argument that there was relevant indirect discrimination. The critical question, in my view, is whether any discrimination was objectively justified. In my view, it was.

46. The fundamental starting point is, as the Judge recognised, the rationale for the policy in the Concession. It was that a person whose application for settlement in the UK is dependent on her spouse or partner should not feel compelled to stay in an abusive relationship for that reason. Otherwise there is a danger that the immigration system itself will contribute to an injustice, because the victim of domestic violence may be exploited by her abuser precisely because her ability to apply for settlement will be jeopardised if she is no longer living with the abusive partner.

47. That underlying rationale was recognised by this Court in the case of *T*, at para. 2, which I have quoted above. It was also recognised by the Inner House of the Court of Session in *A v Secretary of State for the Home Department*, at para. 28 (Lady Dorrian).

48. Once it is recognised that that is the underlying rationale of the Concession, it seems to me that there is an objective justification for the distinction drawn based on immigration status. If that distinction were not made, the rationale for the policy would simply not be achieved. For the same reason, any indirect discrimination on grounds of sex or motherhood is also objectively justified.

49. It is important to bear in mind that the Concession is limited in its scope. It is not a general policy dealing with all aspects of domestic violence in this country or even all aspects of domestic violence against people who have no right to remain in the UK. It is a limited concession, for a period of three months, to enable a person to make an application for settlement in the UK, so that they can access public funds that would otherwise be unavailable to them.

50. There are many other ways in which a state protects the victims of domestic violence. An obvious way is through the criminal law. The enforcement of the criminal law will not depend on the immigration status of the victim. There may also in principle be access to publicly funded accommodation or other assistance. For example, in the present case, there is evidence from the Appellant herself that she and her two children have been accommodated at public expense since they left the matrimonial home, pursuant to section 17 of the Children Act 1989.

51. In support of his argument under Article 14, Mr de Mello placed reliance on the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence ("the Istanbul Convention"). Leaving aside potential difficulties arising from the fact that the UK has not yet ratified that Convention (although it is a signatory to it) and that the Convention has not been incorporated into domestic law, I cannot see any incompatibility with that Convention. In that context it is instructive to see the terms of Article 59:

> "1. Parties shall take the necessary legislative or other measures to ensure that victims *whose residence status depends on that of the spouse or partner as recognised by internal law*, in the event of the dissolution of the marriage or the relationship, are granted in the event of particularly difficult circumstances, upon application, an autonomous residence permit irrespective of the duration of the marriage or the relationship. The conditions relating to the granting and duration of the autonomous residence permit are established by internal law.
>
> 2. Parties shall take the necessary legislative or other measures to ensure that victims may obtain the suspension of expulsion proceedings initiated in relation to a residence status dependent on that of the spouse or partner as recognised by internal law to enable them to apply for an autonomous residence permit.
>
> 3. Parties shall issue a renewable residence permit to victims in one of the two following situations, or in both:

> a. where the competent authority considers that their stay is necessary owing to their personal situation;
>
> b. where the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.
>
> …" (Emphasis added)

52. I would agree with Mr Lewis that Article 59(3) does not necessarily create a freestanding obligation and should be read within the context of the preceding paragraphs. It is important to note the language of paragraph (1), which refers to a person whose status "depends" on the status of their partner. It seems to me that that is consistent with the underlying rationale of the Concession under challenge in this case.

53. But, even if Article 59(3) were freestanding, it leaves contracting states with a wide discretion as to the circumstances in which the "competent authority considers" that an applicant's stay in a country is necessary. The fact is that, in the present case, the Respondent does not consider that it is necessary to give the Appellant the leave which she sought in August 2016. There is nothing in the Istanbul Convention which requires a different outcome.

Ground 4

54. Under Ground 4, Mr de Mello complains that the Judge was wrong to say (at para. 49 of his judgment) that the decision of the Inner House in the case of *A* was distinguishable on its facts. In my view, it would have been preferable if the Judge had explained his reasons for reaching the conclusion that he did but I am in no doubt that his conclusion was indeed correct.

55. The judgment of the Inner House in *A* was given by Lady Dorrian. The version of the Concession which was in effect at the relevant time has subsequently been amended to take account of the judgment of the Inner House. At the relevant time the policy did not apply to a sponsor who was a refugee in the UK: it only applied if the sponsor was a British citizen or was settled in the UK. On behalf of the Secretary of State it was submitted that this was not unlawful under Article 14 because a refugee sponsor could be regarded as being in an analogous position to a student or a visitor to the UK. The Inner House rejected that argument.

56. Lady Dorrian considered that the proper analogy was with a British citizen or a person who has settled in the UK. One reason for this was that there was evidence before the Court that a very high percentage (95%) of refugees go on to acquire settled status in the UK: see para. 67. Another reason for this was that, unlike students or visitors who come to this country from choice, refugees are outside their own country out of

necessity, because of a well-founded fear of persecution. Accordingly, the UK owes them international obligations of protection: see para. 66.

57. The critical point of distinction from the present case is that the appellant in *A* did have limited leave to be in the UK as the result of her relationship with her sponsor. The present Appellant does not have such limited leave. The appellant in *A* therefore fell within the rationale of the policy in the DDVC, whereas the present Appellant does not.

Ground 5

58. Under Ground 5, Mr de Mello complains of a breach of Article 18 of the Directive, both on its own and when read with Article 24 of the EU Charter of Fundamental Rights.

59. Article 18 of the Directive appears in Chapter 4, which is headed: "Protection of victims and recognition of victims with specific protection needs". It provides as follows:

> "Without prejudice to the rights of the defence, Member States shall ensure that measures are available to protect victims and their family members from secondary and repeat victimisation, from intimidation and from retaliation, including against the risk of emotional or psychological harm, and to protect the dignity of victims during questioning and when testifying. When necessary, such measures shall also include procedures established under national law for the physical protection of victims and their family members."

60. Article 24 of the EU Charter provides:

> "1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
>
> 2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
>
> 3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."

61. This Court has not heard any submissions about the continuing relevance in domestic law of either the Directive or the Charter after the departure of the UK from the EU on 31 January 2020 and the end of the transitional period on 31 December 2020. I will therefore address the merits of the arguments as if they are still relevant in full; but, in case the point should arise in other cases, it should not be assumed that that is correct. If the point were material (as it is not in the present case, for reasons that will become apparent) close scrutiny would have to be given to the terms of the European Union (Withdrawal) Act 2018, the European Union (Withdrawal Agreement) Act 2020 and the European Union (Future Relationship) Act 2020.

62. I can deal with Article 24 of the EU Charter briefly. It has particular relevance to the rights of children. The difficulty which Mr de Mello faces is that the Concession does not distinguish between people on the basis of whether they have children or not. This may explain why Mr de Mello did not make reference to Article 24 in his oral submissions, although he did not abandon the argument which he had made in his written submissions.

63. I turn then to the Directive. The first point to note is that the Directive is not concerned exclusively with domestic violence. It is clear from its long title that it is concerned more generally with the rights of victims of crime. This is also clear from a number of the recitals to the Directive and from the language of Article 1, which sets out the purpose of the Directive:

> "1. *The purpose of this Directive is to ensure that victims of crime* receive appropriate information, support and protection and are able to participate in criminal proceedings.
>
> Member States shall ensure that victims are recognised and treated in a respectful, sensitive, tailored, professional and non-discriminatory manner, in all contacts with victim support or restorative justice services or a competent authority, operating within the context of criminal proceedings. *The rights set out in this Directive shall apply to victims in a non-discriminatory manner including with respect to their residence status*.
>
> …" (Emphasis added)

64. Turning to the provisions of Article 18 itself, again it is clear from its opening words that it is concerned *principally* with criminal proceedings: this is why it provides that it is without prejudice to the rights of the defence. The Judge did not say that Article 18 is *only* concerned with criminal proceedings. In my view, he was right to reach the conclusion which he did.

65. Even at its highest, Article 18 says nothing which would mandate the outcome which Mr de Mello seeks to achieve in the context of this particular case. The provision says nothing in terms about immigration, still less about a specific policy such as the Concession. The reference in the final sentence of Article 1.1 to residence status, requires that where, for example, victims are given rights in the criminal justice

process, there should be no discrimination on grounds of residence status. It says nothing about the circumstances in which residence status must be given to a victim.

66. Article 18 leaves Member States with a wide degree of discretion as to which particular measures they should adopt in order to protect the rights of victims of crime generally and domestic violence in particular. As I have already said, the main way in which a state fulfils that obligation is through the criminal law.

67. Before I leave Article 18 I should say that I am far from convinced that it satisfies the criteria for direct effect of directives in EU law. Again, we did not hear submissions about that. In view of the conclusion I have reached, however, it is unnecessary to go into that question here.

Ground 6

68. Under Ground 6, Mr de Mello complains of a breach of section 55 of the 2009 Act.

69. Section 55 of the 2009 Act provides:

> "(1) The Secretary of State must make arrangements for ensuring that—
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
>
> (b) any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.
>
> (2) The functions referred to in subsection (1) are—
>
> (a) any function of the Secretary of State in relation to immigration, asylum or nationality;
>
> (b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;
>
> …"

70. Mr de Mello emphasises that FA has two dependent children who are British citizens. Before us he described them as being "secondary victims" of the domestic abuse suffered by their mother.

71. Section 55 is undoubtedly important, as has been stressed by the Supreme Court, including in immigration cases such as *R (MM (Lebanon)) v Secretary of State for the*

Home Department [2017] UKSC 10; [2017] 1 WLR 271. Nevertheless, it is a process duty and does not dictate any particular outcome in a case like the present. Yet Mr de Mello submits, as he must if his challenge is to succeed, that the Respondent was required to extend the scope of the Concession to include applicants such as this Appellant.

72. As I have already said, the policy under challenge does not distinguish between those who have children and those who do not. Section 55 does not, in my view, require the Secretary of State to contradict the fundamental rationale for the Concession, which I have described earlier. If the policy were to be extended in the way which the Appellant seeks to do, that is the effect of what would happen. Section 55 does not dictate that result.

Conclusion

73. For the reasons I have given I would dismiss this appeal.

Lord Justice Popplewell:

74. I agree.

Lord Justice Phillips:

75. I also agree.