OUTER HOUSE, COURT OF SESSION

[2022] CSOH 86

P194/22

OPINION OF LORD ERICHT

In the cause

(FIRST) A

(SECOND) B

Pursuer

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defender

Petitioners: Winter; Drummond Miller LLP (acting for Katani and Co Solicitors)
Respondent: MacIver, Office of the Solicitor to the Advocate General

2 December 2022

Introduction

[1] Article 17(2) of Regulation (EU) No 604/2013 of the European Parliament and of the Council (the "Dublin III Regulation") provides a process whereby a Member State can request another state to take charge of an asylum seeker in order to bring together family relatives. The UK refused a request from Greece to take charge of twin brothers who were unaccompanied minors and whose uncle was in the UK. The issue in this case is whether the words "take care" in Regulation 8(2) of the Dublin III Regulation cover a situation in which unaccompanied minors are not to be accommodated in the same house as the adult responsible for them.

Circumstances of the case

[2] The petitioners are Syrian twin brothers who sought asylum in Greece as unaccompanied minors. They were born in 2003 and were aged under 18 at the date of their application for asylum. They wish to join their uncle who resides in the UK.

[3] The Greek authorities formally requested that the United Kingdom take charge of the petitioners under the Dublin III Regulation. In a letter to each petitioner dated 10 December 2021 (the "Decision Letters") the respondent wrote to the Greek authorities rejecting the request.

[4] The petitioners' uncle lives at an address in Glasgow. The address in Glasgow is owned by a landlord who lets to Y People who then sublets to the uncle.

[5] The reasons for the rejection were set out in the Decision Letters as follows:

> "[The UK authorities]
>
> > '… noted that the YPeople Tenancy agreement was temporary accommodation for those seeking homelessness assistance and was solely for use by the Tenant and persons who were part of the Tenant's application for homelessness assistance.
> >
> > To review the situation further, on 17 September 2021 the UK authorities contacted the applicant's representatives and the Social Worker who completed the local authority assessment as part of the initial Take Charge Request. The email sent to the applicant's representatives included a request for confirmation that permission had been obtained from the landlord to allow the applicant and their sibling to come and reside at the property.
> >
> > A reply was received from the Social Worker on 20 September 2021 with a second email received on 22 September 2021.
> >
> > An email was received on 22 September from the applicant's representatives advising the UK authorities that they no longer represent the applicant. Between the 22 September 2021 and 08 October 2021 the UK authorities made efforts to contact the new representatives. On 11 October 2021 the new representatives replied to the initial enquiry and gave confirmation that permission was being sought from the landlord.

> On 25 October 2021 written confirmation was received from [the] owner of the property the UK Sponsor resides in. It confirmed he has leased the property to Glasgow City Council and he had no objections to the applicant and their sibling moving in. However, as the Tenancy Agreement is between the UK Sponsor and YPeople, the UK Authorities required confirmation from YPeople. The request for confirmation from YPeople was made to the applicant's representatives on 04 November 2021.
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> On 03 December 2021 the applicant's representatives advised the following:
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> > 'Unfortunately YPeople will be unable to house the two boys at [uncle's address] in line with health and safety regulations.
> >
> > However, our client has advised that his support worker with Glasgow City Council has informed him that he can apply for a larger property for the family as a result of the ongoing Take Charge Application. I have obtained contact details for his support worker.'
>
> Unfortunately, this information contradicts information provided by the Social Worker, received by the UK authorities on 20/22 September 2021, which stated:
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> > 'The Housing Association have advised that additional persons would not be permitted within this property as it would then be classed as overcrowded and would require a six bedroom property which they do **NOT** have within their organisation.'
>
> As such, the take care element of the application cannot be met, and it is not in the best interest of the applicant to be transferred to the UK. The UK maintains its rejection of this TCR.'

Submissions for the petitioners

[6] Counsel for the petitioners submitted that the respondent's policy guidance dated 31 December 2020 *Requests made to the UK under the Dublin III regulation prior to the end of the Transition Period* was unlawful in terms of Article 8(2) of the Dublin III Regulation in that it does not permit any discretion in terms of applicants having to live in the same accommodation as their sponsor (R (*Lumba)* v *SSHD* [2012] 1 AC 245 at para 20). There was no acknowledgment that the petitioners were entitled to accommodation in their own right: that did not mean that the petitioners' uncle was still unable to provide support and/or care

to them (see by analogy *Bundesrepublik Deutschland (family reunification of a child who has reached the age of majority)* v *XC (Directive 2003/86/EC) Case C279/20*, Opinion of AG Collins, paragraphs 63-64 and 66(ii); *Bundesrepublik Deutschland* v *XC (Directive 2003/86/EC) Case C-279/20* at paragraphs 33 and 37-42; *Bundesrepublik Deutschland* v *SW, BK and BC (Directive 2003/86/EC) Joined Cases C-273/20 and C-355/20* at paragraph 68). The petitioners' uncle is able to take care of the petitioners. For that to be done, the petitioners did not require to live with their uncle.

[7] Counsel further argued that the policy was inconsistent with Article 8(2) of the Dublin III Regulation. Article 8(2) focusses on whether the sponsor can take care of an applicant: accommodation is not mentioned. The policy conflates a requirement for the uncle to be able to take care of the petitioners with the requirement to be able to accommodate the petitioners. A teleological interpretation was to be applied to Dublin III (*EGR* v *V [*2011] EWCA crim 2342 at para 19). Dublin III is to maintain and promote family unity (*XC* at paragraphs 33 and 37 to 42, preamble to Dublin III at 13-15 and 17; *Shiri* v *Bundesamt fur Fremdenwesen und Asyl* (ECJ) [2018] 1 WLR 3384 at paragraphs 31 and 44). Dublin III is to ensure that families are not split up. The petitioners' uncle can take care of the petitioners even if they are living in separate accommodation. The distinction relied upon by the respondent is artificial given that the reality is that the petitioners are over 18, although they were under 18 when the application was made. The possibility of living apart is envisaged in the words of the Leaflet to be given to minors under the Implementing Regulation 118/2014. It was in the best interests of the petitioners to be able to come to the UK where their uncle is able to take charge of them.

Submissions for the respondent

[8] Counsel for the respondent submitted that the application of Article 8 was not a discretionary provision. Its application was a matter of determining the correct allocation of responsibility between the states concerned and on the basis of the criteria therein. The principle in *Lumba* was correct but had no application in the present case as *Lumba* concerned a matter within the Secretary of State's discretion. The tests for lawfulness was whether the guidance misstated the law (*R* (*A)* v *Secretary of State for the Home Department* [2021] 1 WLR 3931). The opinion of the advocate general in case 279/20 *XC* was provisional and in any event contained a different legal instrument before Dublin III. *XC* had no bearing on the present case.

[9] Counsel further submitted that the ordinary reading of "take care" entails accommodating a child. One does not take care by leaving it to someone else to make sure that the child is not homeless. The references to "live with" and "stay together" in the Leaflet make it clear that the relative in question is to accommodate the minor. If the Secretary of State did misdirect herself on Article 8(2), such error would be immaterial in the light of her finding that it was not in the best interests of the petitioners, which was not challenged in this petition. It follows the statement in the policy as to the provision of accommodation, is, in the present case, academic. In order for responsibility to pass from the host member state to another member state Article 8(2) required both (a) the relative to be able to take care of the minor and (b) such transfer to be in the best interests of the minor. If the Secretary's interpretation is correct, paragraph (a) is met. If it is not, paragraph (b) is met as the finding that the transfer was not in the petitioners' best interest is not under challenge.

Analysis and decision

[10] For the purposes of this petition the Dublin III Regulation is to be considered as remaining in force in the UK, despite the UK's exit from the EU, as a result of Schedule 2 para 9 to the Immigration, Nationality and Asylum (EU Exit) Regulations 2019, the request from Greece having been made before withdrawal.

[11] The petitioners seek reduction of the Decision Letters and declarator that the Home Office guidance dated 31 December 2020 on *Requests made to the UK under the Dublin III regulation prior to the end of the Transition Period* (the "Home Office Policy") is unlawful.

[12] This case turns on the interpretation of the words "take care" in Article 8(2) of the Dublin III Regulation. Article 8(2) states:

> "Minors
>
> 2. Where the applicant is an unaccompanied minor who has a relative who is legally present in another Member State and where it is established, based on an individual examination, that the relative can take care of him or her, that Member State shall unite the minor with his or her relative and shall be the Member State responsible, provided that it is in the best interests of the minor."

[13] "Unaccompanied minor" is defined as "a minor who arrives on the territory of the Member State unaccompanied by an adult responsible for him or her…and for so long as he or she is not effectively taken into the care of such an adult" (Article 2(j)). "Relative" is defined as "the applicant's adult aunt or uncle or grandparent who is present in the territory of a Member State."

[14] The respondent's interpretation of "take care" is that it is a necessary condition of taking care of a minor that the relative must be able to accommodate the minor. This position is reflected in the Home Office Policy which states:

> "As stated under Article 8(2), where another relative (adult aunt, uncle or grandparent - as per Article 2(h)) is legally present and where it can be established that the relative can take care of the child and it is in the best interests of the child,

> then the Dublin State where the relative is present shall be responsible. **Article 8(2) presents an additional requirement (compared to Article 8(1)) on being able to demonstrate they can 'take care' of the child). In order to accept the take charge request, there must be evidence the UK-based qualifying relative(s) are able to accommodate and support the child**. Such evidence should be provided by the UK based relative(s) to the EIU and Local Authorities". (emphasis added)

[15] The respondent's interpretation of the words "take care" was applied by them in the Decision Letter:

> " 'The Housing Association have advised that additional persons would not be permitted within this property as it would then be classed as overcrowded and would require a six bedroom property which they do **NOT** have within their organisation.'
>
> As such, the take care element of the application cannot be met…"

[16] The petitioner's interpretation of the words "take care" on the other hand is that taking care does not necessarily mean that the relative must accommodate the minor.

[17] The petitioners were born in 2003 and at the time of application were minors. A minor is a person below the age of 18 (Dublin III Regulations Article 2(i)), so they were at the time of application at the higher end of that range. They wish to live with their uncle in the UK. Their uncle wishes them to live with him. The owner of the flat that the uncle lives in is happy for them to live with him in that flat. So far, the situation is straightforward. The applicants are unaccompanied minors who have a relative who is legally present in another member state. The relative wishes to accommodate them in his flat. The difficulty in this case arises because a view has been taken that the uncle's flat is not big enough for his enlarged family including the petitioners. The Decision Letters narrate that the respondent was advised by a social worker that a particular housing association did not have a property which is big enough. I was not addressed on whether the local authority or the respondent were under any absolute statutory duty to provide accommodation for the petitioners (or

the uncle's enlarged family including the petitioners) if the take charge request was accepted: any such absolute duty must be complied with and compliance cannot be avoided by circumstances such as a particular housing association not having a suitable property (*X* v *Glasgow City Council* [2022] CSOH 35). As parties did not wish to argue this point, this opinion proceeds on the basis that the uncle is unable to accommodate the petitioners in the property in which he lives.

[18] The task for this court is to ascertain the correct meaning of the words "take care" in Article 8(2) of the Dublin III Regulation. That task requires a consideration of the context and purpose of the Dublin III Regulation, as EU law requires to be given a teleological interpretation. The substantive provisions of an EU instrument are to be interpreted in the light of its objectives, which are most readily available in the recitals (eg *R* v *V* [2011] EWCA crim 2342 at para 19). That task also requires a consideration of the words of the Regulation as a whole. I was not referred to any decision from any EU court nor any domestic court of a Member State which had considered the question of whether "take care" necessarily requires accommodation with the relative. Nor was I referred to any travaux preparatoirés which might have cast light on that question.

[19] EU law stresses the importance of family unity (see generally *Bundesrepublik Deutschland* v *XC* (Directive 2003/86/EC) Case C- 279/20 (ECJ) at paragraphs 33, 37-42 and 69). In particular, the importance of family unity within the same country is stressed in the recitals to the Dublin III Regulation which state (emphasis added) :

> "(14) In accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms and with the Charter of Fundamental Rights of the European Union**, respect for family life should be a primary consideration** of Member States when applying this Regulation.
>
> (15) The processing together of the applications for international protection of the members of one family by a single Member State makes it possible to ensure that the

> applications are examined thoroughly, the decisions taken in respect of them are consistent **and the members of one family are not separated.**
>
> (16) In order to ensure full respect for **the principle of family unity** and for the best interests of the child, the existence of a relationship of dependency between an applicant and his or her child, sibling or parent on account of the applicant's pregnancy or maternity, state of health or old age, should become a binding responsibility criterion. **When the applicant is an unaccompanied minor, the presence of a family member or relative on the territory of another Member State who can take care of him or her should also become a binding responsibility criterion.**"

[20] Accordingly, the principle of family unity is to be given effect to when applying a teleological interpretation.

[21] Against that background I turn to the wording of the Dublin III Regulation.

[22] The concept of "taking care" of an unaccompanied minor is referred to in various places in the Dublin III Regulation. In none of these places does it specify that living in the same residential property is an essential component of "taking care."

[23] The first place in which the phrase "take care" is mentioned is in Recital (16). It is used in the context of ensuring full respect for the principle of family unity. The emphasis is on family unity in the same member state, not family unity in the same residential property.

[24] The phrase is also used in the definition of "unaccompanied minor" (Article 2(j)). A minor is someone who arrives "unaccompanied by an adult responsible for him or her." A minor remains an unaccompanied minor "for as long as he or she is not effectively taken into the care of such an adult." "Such an adult" is a reference back to the previous mention of "an adult responsible for him or her" The emphasis in this definition is on taking responsibility for the minor, not on living in the same residential property. On the ordinary use of language, taking responsibility for someone is not the same thing as living with them.

[25] The next use of the phrase is the one in Article 8(2) which is the subject of this judicial review. There is no specific requirement in Article 8(2) to live in the same residential property. Any such requirement can only be found by reading it into the meaning of "take care". If the intention of the Dublin III Regulation had been to impose a requirement that the relative and minor must live in the same residential property, it would have been a simple matter of drafting for the Dublin III Regulation to expressly impose that requirement. That was not done, and the respondent asks me instead to give a wide interpretation to "take care" so that it includes such a requirement. Therefore it is necessary to examine the phrase "take care" to see whether it is wide enough to bear the meaning placed on it by the respondent.

[26] In my opinion the words "take care" in Article 8 do not necessarily mean that the relative and the minor must live in the same residential property. The ordinary English language meaning of "take care" is not "live in the same residential property". It means look after, or keep safe. The wording of the Regulation itself uses "take care" in the sense of "take responsibility for." This can be seen from the definition of "unaccompanied minor" in Article 2(j), which places the main emphasis on an adult being **responsible** for an unaccompanied minor.

[27] Whether in any particular case a relative can take care of a minor only if they are living at the same residential address will be a matter of fact and circumstance.

[28] In many cases, particularly for younger children, in order for someone to take responsibility for and take care of a child it will be necessary to them to live in the same property. But even for young children that may not always be the case. An adult family member does not cease to take responsibility or take care for a young child if the child leaves

the family home to reside in long-term disabled or hospital accommodation: that child remains part of the family, and the Dublin III Regulation seeks to preserve family unity.

[29] For older minors, there may be less necessity to live in at the same residential address in order to preserve family unity. The Dublin III Regulation recognises that "minors" covers persons from birth to age 18 and what is appropriate for one minor will not be appropriate for another with a greater age or maturity. This is made explicit in Recital (13) which states:

> **"(**13) In accordance with the 1989 United Nations Convention on the Rights of the Child and with the Charter of Fundamental Rights of the European Union, the best interests of the child should be a primary consideration of Member States when applying this Regulation. In assessing the best interests of the child, Member States should, in particular, take due account of the minor's well-being and social development, safety and security considerations and the views of the minor in accordance with his or her age and maturity, including his or her background. In addition, specific procedural guarantees for unaccompanied minors should be laid down on account of their particular vulnerability."

Just as the age and maturity of a minor is to be taken into account in assessing his or her best interests, in my view the age and maturity of a minor can be relevant in assessing whether a minor can be taken care of only in the same residential property as its relative. As the advocate general of the European Court of Justice said *Bundesrepublik Deutschland (family reunification of a child who has reached the age of majority)* v *XC* (Directive 200386/EC) Case C-279/20:

> "it is perfectly 'normal' for young adults to live separately from their parents and other family members".

[30] The Dublin III Regulation has as one of its objectives family unity in the one country up to the age of 18. That objective takes a person beyond the age of 16, at which point they acquire the legal capacity to enter into any transaction (Age of Legal Capacity Act 1991 section 1(1)(b)). However the cut-off under the Dublin III Regulation is 18 not 16. The

Regulation must be interpreted in a way that the principle of family unity in the one member state applies to 16 to 18 year olds as well as those under 16. In Scotland, many people go to university aged 17, but if they move to university accommodation that does not mean that the adults in the family home cease to take care of them. 16 to 18 year olds have the legal capacity to enter into a lease of residential property or to buy residential property, and to live there separately from their parents or relatives. The principle of family unity in the one country until 18 would be frustrated if it did not apply to a particular 16 to 18 year old based on the random circumstance of whether that 16 to 18 year old lived in the same residential property as the adult family member.

[31] In my opinion, the Implementing Regulation 118/2014 does not detract from the conclusion that it is not the case that an adult "takes care" of a minor only if they are living at the same residential address. The Implementing Regulation sets out wording for a leaflet ("the "Leaflet") which is to be given to unaccompanied minors. Neither the Implementing Regulation itself nor the wording of the Leaflet state that it is necessary for an unaccompanied minor to live with their relative. The Leaflet refers to family reunification in the same country, not in the same residential property:

> **"**If we have sufficient information about them, we will look for your parents or relatives in the Dublin countries. If we manage to find them, we will try to bring you together **in the country** where your parents or relatives are present." (page L39/38)
>
> What does it mean that we have to always act in your best interests? It means that we will have to:
> — check whether it is possible to bring you together with your family **in the same country**;" (page L39/38) (emphasis added)

An unaccompanied minor can be brought together with relatives or family in the same country without necessarily living in the same residential property.

[32] The Leaflet goes on to say:

> "If this is your first asylum application in a Dublin country, you will be sent to another country because your mother, father, brother, sister, aunt, uncle, grandfather or grandmother is present in that country and you will join him/her/them there and stay together for the examination of your asylum application." (page L39/39)

Read in the context of the other passages in the Leaflet quoted above, "join" and "stay together" in that passage are a reference to joining and staying in the same country, not in the same residential property.

[33] Accordingly, the interpretation of the words "take care" in Regulation 8(2), advanced by the respondent, that in order to "take care" the relative must be able to accommodate the unaccompanied minor, is incorrect. The respondent rejected the take charge request on the ground that the petitioners could not be accommodated in the same residential property as their uncle and "as such, the take care element of the application cannot be met." In rejecting the request on that ground the respondent erred in law.

[34] However that is not the end of the matter. The respondent draws my attention to the proviso to Article 8(2) ("provided that it is in the best interests of the minor") and argues that the error is immaterial. In my view the error is a material one. The respondent did not make a separate decision as to the best interests of the minors. Its decision as to best interests is part and parcel of its decision that the take care element of the application could not be met. The only reason given for it not being in the best interests of the petitioners to be transferred to the UK is that they cannot be accommodated with the uncle. This is clear from the final paragraph of the decision letter: "As such, the take care element of the application cannot be met, and it is not in the best interest of the applicant to be transferred to the UK." "As such" refers back to the quotation about the housing association about not being able to accommodate the petitioners with their uncle. So the sole ground for finding that it is not in their best interests to be transferred is that they could not be accommodated

with their uncle. The respondent does not address the question of best interests separately from the question of accommodation, and does not explain why it would not be in the best interests of the petitioners to be reunited in the same country as their uncle but living in separate accommodation. In these circumstances the error is material to the decision on the proviso to Article 8(2), as well as the main part of that article.

[35] It follows from my decision as to the correct interpretation of "take care" that the Home Office Policy is erroneous as it proceeds on an incorrect interpretation of "take care". I shall grant declarator that the Policy is unlawful to that extent.

Order

[36] I shall sustain the petitioners' third plea in law and grant reduction of the Decision Letters. I shall also sustain the petitioners' second plea in law and grant declarator that the Home Office Policy is unlawful insofar as it proceeds on the basis that is a necessary condition of accepting a take charge request that there must be evidence that the UK-based qualifying relative(s) are able to accommodate the minor.