OUTER HOUSE, COURT OF SESSION

[2007] CSOH 164

P1170/06

OPINION OF LORD DRUMMOND YOUNG

in the Petition of

BASHKIM ELSHANI

Petitioner:

for

Judicial Review of a decision dated 6 October 2005 by the Secretary of State for the Home Department to refuse to grant indefinite leave to remain in the United Kingdom to the petitioner and his family

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Petitioner: Forrest; Drummond Miller WS
Defender: Carmichael; Solicitor to the Advocate General

3 October 2007

[1] The petitioner is a national of the Federal Republic of Yugoslavia, from the provenance of Kosovo. On 2 July 1999 the petitioner entered the United Kingdom with his wife and three children. He did so at the invitation of the United Kingdom government in terms of the Humanitarian Evacuation Programme operated by the government as a result of the crisis then occurring in Kosovo; that Programme was designed to assist ethnic Albanians who at the time were suffering serious persecution within Kosovo. The Home Secretary granted exceptional leave to enter and remain in

the United Kingdom until 2 July 2000. The petitioner made subsequent applications for leave to remain in the United Kingdom, which were granted until 31 January 2004.

[2] On 24 October 2003 the Home Secretary made an announcement to the effect that families who had been United Kingdom since 2 October 2000 and one of whose members had made an asylum claim before that date would be permitted to remain in the United Kingdom, even if the asylum claim had not been successful. In August 2004 the concession was amended to include Kosovan families who had arrived under the Humanitarian Evacuation Programme before 2 October 2000 but had not claimed asylum until after that date. The policy as amended is contained in APU Notice 4/2003, as updated to 20 August 2004. The significant parts of the concession as so updated are as follows:

> "*Introduction*
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> This note sets out the criteria for granting indefinite leave to remain or enter, exceptionally outside the Immigration Rules, as a result of the concession announced by the Home Secretary on 24 October 2003 to allow families who have been in the UK for three or more years to stay (the 'concession' henceforth).
>
> *Basic criteria of the concession*
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> The basic criteria for deciding whether or not a family will qualify for the exercise are:
>
> - The applicant applied for asylum before 2nd October 2000; and
> - The applicant had at least one dependant aged under 18 (other than a spouse) in the UK on 2 October 2000 or 24th October 2003.
>
> ...

Humanitarian Evacuation Programme

Kosovan families who arrived under the Humanitarian Evacuation Programme before 2 October 2000 but did not claim asylum until after this date, are included in the scope of this exercise if they meet the necessary criteria".

[3] On 22 December 2003 the petitioner applied for indefinite leave to remain in the United Kingdom along with his wife and three children. He subsequently contacted his Member of Parliament, Michael Martin MP, about the application. Mr Martin wrote to the respondent by letter dated 17 February 2004. The letter stated:

"The family have applied for indefinite leave to remain and they are interested in terms of the amnesty scheme announced by the Home Office in October. I would be obliged there for if you could let me know the present position regarding Mr Elshani's application for asylum and I look forward to hearing from you".

The letter refers to an application for asylum, but it is common ground that at its date the petitioner had not in fact made any formal application for asylum in the United Kingdom. Mr Martin received a reply dated 8 September 2004. In that reply the respondent's representative stated:

"Mr Elshani and his family entered the United Kingdom on 2 July 1999 under the Kosovan Humanitarian Evacuation Programme. As you are aware Mr Elshani and his family were granted successive exceptional leave to remain until 31 January without his asylum application being considered. On 26 January Mr Elshani applied for ILR. Regrettably, this remains outstanding.

...

Mr Elshani and his family were granted exceptional leave until 31 January. Under the original terms of the exercise they do not appear to be eligible for

> consideration as Beverly Hughes' [a Home Office minister] letter explained that the concession does not cover families who have been granted any form of leave. However, further reflection has been given to the terms of the exercise and it has now been decided that families previously granted limited leave should be included under the terms of the exercise".

The letter went on to state that neither the petitioner nor his family need "apply further to be considered, as we will be contacting families who appear from their records to qualify for the exercise...".

[4] By letter, dated 18 July 2005, a representative of the respondent wrote to the petitioner, referring to the concession of 24 October 2003 and stating that the petitioner's application for leave to remain was being reviewed as part of that exercise. Thereafter the petitioner completed a document known as a family questionnaire in relation to the application. By letter dated 6 October 2005 a representative of the respondent wrote to the petitioner in the following terms:

> "We have carefully considered whether you are eligible for a grant of indefinite leave within the terms of the exercise [in terms of the concession of 24 October 2003], but for the reasons given below we have concluded that you do not qualify.
>
> In order to be eligible for the ILR Exercise you need to have claimed asylum and that asylum claim should have been lodged before 2 October 2000, you have not lodged a claim for asylum. Therefore you do not satisfy the eligibility criteria for inclusion in the exercise".

It was common ground that that letter amounted to a refusal to grant the petitioner and his family indefinite leave to remain in United Kingdom in terms of the policy announced on 23 October 2003, as subsequently extended.

Arguments

[5] The petitioner now seeks judicial review of the decision intimated by the letter of 6 October 2005. In his petition he seeks declarator that the decision was irrational and reduction of the decision. When the application called for a first hearing, counsel for the petitioner in fact advanced submissions on two separate grounds: that the decision of the respondent was irrational, and that it defeated the petitioner's legitimate expectations. On the irrationality argument, counsel submitted first that the decision proceeded on errors that were not properly resolved in subsequent procedure. He referred to the Home Office letter of 8 September 2004, and submitted that it contained a plain error when it referred to an application for asylum that the petitioner had made; no such application had in fact been made. This error had not been resolved in any way in subsequent correspondence; indeed, in the Home Office letter of 18 July 2005 it was stated that the petitioner's application for indefinite leave to remain was being reviewed as part of the exercise under the concession of 24 October 2003. As a result of these errors, the petitioner should be treated as having made a *de facto* application for asylum. This was supported by the fact that he had fled from persecution in Kosovo under a programme sponsored by the United Nations. Secondly, counsel submitted that the decision to refuse indefinite leave to remain to the petitioner was not consistent with the Home Secretary's stated policy objective in terms of the announcement of 24 October 2003. That policy appeared in the introductory paragraph, and was to allow families who had been in the United Kingdom for three or more years to stay. The need for a formal asylum application was not relevant to that objective. Consequently it should not matter that the petitioner had made no formal application for asylum; it was sufficient that he was a *de facto* applicant by virtue of his being a refugee from persecution. Thirdly, counsel

submitted that in refusing the petitioner's application for indefinite leave to remain the respondent had failed to take into account the petitioner's personal circumstances. It should have been plain to the respondent that the petitioner had fled from persecution in Kosovo in 1999, and indeed had been encouraged by the United Nations to leave. He had been granted exceptional leave to remain on five occasions. Against that background, the petitioner's position required anxious scrutiny, as explained by Lord Bridge in *R v Home Secretary, Ex p Bugdaycay*, [1987] 1 AC 514, at 531G.

[6] Counsel's second argument was based on the statements made by the Home Secretary's representatives in the letter to Mr Martin of 8 September 2004 and in the letter to the petitioner of 18 July 2005. The first of these, he submitted, was a form of promise that the petitioner would be dealt with under the concession announced on 24 October 2003; that was what appeared from the terms of the letter and the fact that it was indicated that the petitioner need not do anything further to be considered. The second of these letters, it was said, was a representation that the petitioner's existing application was being reviewed as part of the exercise following the granting of the concession. Counsel referred to the analysis of the law by Schiemann LJ in *R (Manik Bibi) v Newham London Borough Council*, [2002] 1 WLR 237, at paragraph 19:

> "In all legitimate expectations cases, whether substantive or procedural, three practical questions arise. The first question is to what has the public authority, whether by practice or by promise, committed itself; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do".

Following that analysis, counsel submitted that the respondent, as decision maker, had committed himself to granting indefinite leave to remain to families that had been resident in the United Kingdom for three years. On the second question, the

respondent proposed to act unlawfully in denying indefinite leave to remain to the petitioner and his family, who had been resident in United Kingdom for more than three years. On the third question, the decision was conspicuously unfair; the petitioner was clearly entitled to assume that he would be granted indefinite leave to remain. Consequently the court should grant declarator and reduction as sought by the petitioner.

[7] Counsel for the respondent submitted that the refusal of indefinite leave to remain had followed the policy underlying the concession of 24 October 2003. The reason for the concession was to clear a backlog of asylum applications by letting some applicants stay, regardless of the merits of their asylum claims. The underlying problem was a backlog of claims that were subject to an appellate process. In support of this contention she referred me to the statement made by the then Home Secretary on 24 October 2003 in which he explained the reasons for the concession. He referred to the backlog of cases and stated that granting the favoured group indefinite leave to remain was "the most cost-effective way of dealing with the situation". He referred specifically to the cost of taking appeals to the courts. Counsel submitted that the purpose of the concession was not to stimulate further claims for asylum; indeed, it would be irrational to invite a claim for asylum merely to bring a family within the terms of the concession.

[8] In relation to the petitioner's argument based on irrationality, counsel submitted that the letter to Mr Martin of 8 September 2004 did not contain anything that amounted to a representation that in the absence of a claim for asylum the petitioner would be allowed to stay. There was an erroneous reference to an application for asylum, but that had not prejudiced the petitioner in any way. The petitioner had founded on the policy that was said to underlie the concession, but had

misstated that policy. The policy was not merely to permit families who had resided in the United Kingdom for more than three years to remain; it was rather to reduce the backlog of asylum claims by permitting certain families who had lodged asylum applications to remain. On that basis, there was nothing irrational in the respondent's decision. Counsel for the petitioner had also relied on an alleged failure to take into account the petitioner's personal circumstances, in particular his status as a refugee from Kosovo in 1999. On this argument, counsel for the respondent referred to the terms of the petitioner's original leave to remain in the United Kingdom. This stated that, at the request of the United Nations High Commissioner for Refugees, the petitioner had been granted temporary refuge in the United Kingdom, but that he had not been considered for refugee status under the terms of the 1951 United Nations Convention relating to the Status of Refugees. That made clear that there was nothing in the way of an asylum application in 1999. Reference was made to *Delo Mongoto v Home Secretary*, Court of Appeal, 19 May 2005, at paragraphs 23-25.

[9] On the petitioner's argument based on legitimate expectations, counsel for the respondent submitted that it is necessary for a legitimate expectation to exist that there should be a clear and unqualified representation on which the petitioner is reasonably entitled to rely. Reference was made to *R v Devon County Council, ex parte Baker* [1995] 1 All ER 72, at 87 per Simon Brown LJ, and to *R v Home Secretary ex parte Bajram Zeqiri*, [2002] INLR 291, at paragraphs [25]-[27] and [40]-[48] per Lord Hoffmann and paragraph [64] per Lord Rodger of Earlsferry. In the present case there had been no representation in any letter that the petitioner's claim under the 2003 concession would be successful, or that such claim would be successful despite the absence of any existing claim for asylum.

Irrationality

[10] In my opinion the petitioner's argument based on irrationality is misconceived. The first branch of the argument is based on errors in the letter of 8 September 2004 from the Home Office to Mr Martin and in the subsequent letter of 18 July 2005. The only significant error, however, is the reference in the first of those letters to the fact that the petitioner's asylum application had not been considered and remained outstanding. That error may result from Mr Martin's own letter of 17 February 2004, which refers to the petitioner's "application for asylum". Whatever its source, however, it seems to me that the error was incidental to the main purpose of the letter, which was to refer to the concession and its extension and to state that the Home Office would contact families who appeared from their records to qualify for the exercise; as a result nothing further required to be done by anyone who might be affected. In reality the petitioner had not made an application for asylum and consequently did not come within the terms of the concession, which expressly required that an application for asylum should have been made: see the passages cited above at paragraph [2]. The error could not affect the underlying factual situation in any way. Nor could it prejudice the petitioner; by the time when the representation was made it was too late for him to make an application for asylum that was relevant for the purposes of the concession. Consequently the error does not give rise to any ground of irrationality. The same point applies to the Home Office letter of 18 July 2005, where it was stated that the petitioner's application for indefinite leave to remain was being reviewed. Counsel for the petitioner went on to submit that the petitioner should be treated as having made a *de facto* application for asylum as a result of his status as a refugee from Kosovo in 1999. I deal with this part of the argument below at paragraph [12].

[11] The second branch of the petitioner's argument on irrationality was that the decision to refuse indefinite leave to remain was not consistent with the stated policy objective underlying the concession of 24 October 2003. The argument was that that policy was to grant indefinite leave to remain to families who had been in the United Kingdom for three or more years. In my opinion that is not the correct formulation of the policy. If the terms of the concession are considered by themselves, the intention is stated to be to grant the concession where the applicant applied for asylum before October 2000 and the applicant has at least one dependent aged under 18, other than a spouse, in the United Kingdom on either October 2000 or 24 October 2003. In relation to Kosovo in refugees, it is not necessary that the application for asylum should predate to October 2000. It follows that the policy underlying the concession cannot be merely to grant leave to remain to families who have been in the United Kingdom for the specified period; it is a critical condition that an application for asylum should also have been made. The matter is even clearer when the terms of the then Home Secretary's statement of 24 October 2003 are considered. That statement refers to a reduction in asylum claims and the backlog of cases resulting from such claims. It goes on to state that "the legacy of the historic inadequacies of the system" still existed. The statement then continues:

> "Granting this group (sc. those who benefited from the concession) indefinite leave to remain... is the most cost-effective way of dealing with this situation and will save taxpayer's money on support and legal aid. These are difficult decisions but I do not believe it is the best use of taxpayer's money to take these expensive long-standing individual appeals through the courts".

It is clear from the terms of the statement that the reason for the concession was to clear a backlog of asylum applications. On that basis I am of the opinion that the

policy underlying the concession was accurately stated by counsel for the respondent, and indeed it is the policy that appears from the terms of the concession itself. It follows that the requirement that an application for asylum should have been made is a fundamental part of the policy. The petitioner had made no application for asylum, and consequently the decision to refuse his application did not in any way run counter to the policy underlying the concession.

[12] The third branch of the petitioner's argument on irrationality was that the respondent had failed to take into account his personal circumstances. In this connection, counsel referred to the petitioner's status as a refugee from Kosovo in 1999. The petitioner's status as a refugee also led, it was submitted, to the view that the petitioner should be treated as having made a *de facto* application for asylum. In my opinion it is important to bear in mind the precise terms of the petitioner's leave to enter and remain in the United Kingdom. The material parts of this document, which is dated 2 July 1999, are as follows:

> "At the request of the United Nations High Commissioner for Refugees you have been granted Temporary Refuge in the United Kingdom.
>
> ...
>
> You have not been considered for refugee status in the United Kingdom under the terms of the 1951 United Nations Convention relating to the Status of Refugees, and your current leave to enter does not entitle you to permanent settlement in the United Kingdom".

Thus the document makes it clear that the petitioner is not to be considered for refugee status under the 1951 Convention. It is of course under that Convention that a refugee may seek asylum in the United Kingdom and other signatory countries. It follows that the terms of the petitioner's leave to enter and remain are inconsistent

with any application for asylum. On that basis, it cannot, in my opinion, be said that there was any implied or *de facto* application for asylum on the petitioner's behalf. Similarly, it cannot be said that the respondent acted irrationally in failing to treat the petitioner as a refugee who had made an asylum application; that was excluded by the terms of the leave to enter and remain.

[13] In this connection I should refer to the decision of the Court of Appeal in *Delo Mongoto v Home Secretary, supra*, a case dealing with the concession of 24 October 2003. The appellant had applied for asylum in December 2002, after the time limit stipulated in the concession. It was argued that the appellant might derive "analogical support" from the policy in asserting a claim that his removal would be disproportionate to the legitimate aim of immigration control. Laws LJ stated (at paragraph 25):

> "The Secretary of State is entitled, and this must be elementary, to elaborate a limited policy to assist particular categories of would-be entrants, provided, of course, that the policy is rational and otherwise lawful, as the family concession plainly was. It would be quite wrong for the courts to build expectations approaching enforceable rights on the back on such a policy for the benefit of persons to whom, in terms, the policy did not apply and, it is assumed, was not intended to be applied. For the courts to take such a course would or might offer a wholly illegitimate discouragement to the adoption of humane, but exceptional, policy positions by the Secretary of State. I would reject this part of the appellant's case out of hand".

I respectfully agree. It is essential, as a matter of good government, that the Home Secretary and other ministers should be able to define the precise ambit of a concession, subject only to the overriding requirements of legality and

reasonableness. In such cases the courts must respect the limits that are set, and should not seek to expand them by devices such as analogy or deeming the "*de facto*" to be as good as the *de jure*. Even if the result in an individual case seems unfair, it is essential that the line should be held; otherwise there will be a substantial disincentive to making sensible and rational concessions to limited classes of people. Moreover, the unfairness will nearly always be apparent rather than real. The point of a concession is to be generous to a limited category of people. That is not unfair, any more than it was unfair for the landowner in the parable to pay the labourers who had been hired at about the eleventh hour the same agreed wage as those who had borne the heat and burden of the day.

Legitimate expectations

[14] The petitioner's second argument was based on the concept of a legitimate expectation. The requirements for such an expectation have been discussed in a number of cases. In *R v Devon County Council, ex parte Baker, supra,* Simon Brown LJ stated (at [1995] 1 All ER 87):

> "[T]he claimant's right will only be found established when there is a clear and unambiguous representation upon which it was reasonable for him to rely. Then the administrator or other public body will be held bound in fairness by the representation made unless only its promise or undertaking as to how its power would be exercised is inconsistent with the statutory duties imposed upon it".

In *R v Home Secretary ex parte Bajram Zeqiri,* Lord Hoffmann stated (at [2002] INLR 291, paragraph [44]):

> "It is well established that conduct by an officer of state equivalent to a breach of contract or breach of representation may be an abuse of power for which

> judicial review is the appropriate remedy... This particular form of the more general concept of abuse of power has been characterised as the denial of a legitimate expectation".

In the same case, Lord Rodger of Earlsferry stated (at paragraph [64]) that what is required in this context if it is to be reasonable for a person to rely on a representation is a "clear and unambiguous representation".

[15] For the petitioner it was contended that statements in the letters sent by representatives of the respondent to Mr Martin on 8 September 2004 and to the petitioner on 18 July 2005 amounted to promises that the petitioner would be dealt with under the concession of 24 October 2003, or that the petitioner's existing application was being reviewed under the concession. In my opinion the letters cannot be construed in this way. The letter to Mr Martin merely stated that the concession was being applied, and that representatives of the Home Office would contact families who appeared from records to qualify for a concession. No promise or undertaking was given to the petitioner and his family; it is reasonably clear from the terms of the letter that they would only obtain the benefit of the concession if they met its criteria. Nor was there anything in the way of a "clear and unambiguous representation" that the petitioner and his family would benefit from the concession; the applicability of the concession was left open. Exactly the same point applies to the subsequent letter to the petitioner dated 18 July 2005. That letter stated that the petitioner's application for leave to remain was being reviewed as part of the exercise following the granting of the concession. There followed a request to complete a questionnaire "In order for us to consider whether you are eligible under this exercise". The words quoted make it clear that it was not accepted that the petitioner and his family stood to benefit from the concession; whether they did benefit was the issue that was being considered. In

the circumstances there is no promise or undertaking or representation along the lines suggested by the petitioner's counsel. Nor can it be said that there is anything in the present case remotely equivalent to a breach of contract or breach of representation. For these reasons I am of opinion that the petitioner's argument based on a legitimate expectation must fail.

Decision

[16] I accordingly conclude that the petitioner has not made out grounds for judicial review. I will refuse the orders sought and dismiss the petition.