Neutral Citation Number: [2009] EWHC 443 (Admin)

Case No: CO/8217/2008

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 March 2009

Before:

LORD CARLILE OF BERRIEW QC
Sitting as a Deputy Judge of the High Court

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Between:

MAJID EBADOLLAHI NOVIN	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Satvinder Singh Juss (instructed by **G. Singh, Ealing**) for the **Claimant**
David Manknell (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing date: 25 January 2009

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Judgment

Lord Carlile of Berriew QC :

1. The Claimant, Mr Novin, is a national of Iran. On the 25th September 2003 he arrived in the United Kingdom and claimed asylum. He was refused. By August 2004 he had exhausted all his appeal rights in that context. On the 19th December 2005 he applied for discretionary leave to remain. On the 5th February 2008 and thereafter the Home Office Border and Immigration Agency (now part of the United Kingdom Border Agency [UKBA]) stated that the Claimant's case fell within the so-called 'legacy' category, of electronic and paper records relating to unresolved asylum-related cases, and that the aim was to clear such cases by 2011. Before me he sought permission to apply for Judicial Review, on the basis that the Secretary of State [SSHD] has acted unlawfully in failing to determine his case within a reasonable time.

2. The SSHD defended the case on the basis that the delay is reasonable and lawful. She relied particularly on the decision of Collins J in *R (FH) v SSHD* [2007] EWHC 1571 (Admin), which is discussed below.

3. This was an oral renewed application. Permission was refused on the papers on the 11th November 2008 by Stephen Morris Q.C., sitting as a deputy Judge of the High Court, on the basis of *R (FH) v SSHD*, and that there were no exceptional circumstances.

4. On first acquaintance with a case of this kind, one is bound to be alarmed by the notion of a delay of up to six years with an important administrative decision with serious ramifications for the individual concerned. The Claimant, a 45 year old graduate engineer, has no right to work, and has no state financial assistance. On the other side of the coin, there were over 400,000 cases unresolved in July 2006, though by June 2008 the SSHD indicated that the target of completing the backlog by 2011 would be met. Thus the task of meeting the demand is huge.

5. The actual decision challenged was dated the 16th June 2008, and was contained in a letter from the UKBA Head of Ministerial Correspondence Team North to David Heyes M.P., the Labour Member of Parliament for Ashton-under-Lyne. There had been previous correspondence with another M.P., The Rt. Hon. Michael Meacher. The pertinent extracts from the letter to Mr Heyes are:

> *"I am afraid that I cannot give you an exact date when Mr Novin's case will be resolved…*
>
> *The UK Border Agency has established a dedicated resource to deal specifically with older, unresolved asylum cases such as Mr Novin's.*
>
> *We are aiming to resolve these cases by summer 2011 and are on track to do so …*
>
> *Turning to your request to expedite Mr Novin's case, the UKBA policy is not to take any application out of turn, in fairness to others. However, as Mr Novin's file is now with a caseworking unit the information that you have provided will be considered and a decision will then be made as to whether his case can be expedited".*

6. The decision of the SSHD set out in the above extracts was said by the Claimant to be irrational and an error of law. His counsel Mr Juss relied upon the following three grounds –

   i) The delay in the consideration of the material claim, with no indication given as to the date when it may be processed, *"is arguably an abuse of power"*.

   ii) On the 19th July 2006 the SSHD made a statement to Parliament that the policy of dealing with unresolved cases involved a *"focus on those who can more easily be removed"*. Dealing with cases other than on a first-come first-served basis was a politically motivated decision by which the Government fettered its discretion unlawfully by a policy in relation to legacy cases. Thus the Government thwarted the Claimant's legitimate expectation that his case would be dealt with timeously.

   iii) Given that the Claimant had produced evidence of his family having been detained in Iran, the SSHD was not justified in failing to expedite the Claimant's application on compassionate grounds.

7. I was referred to the judgment in an asylum case of Carnwath LJ in *SSHD v R (S)* [2007] EWCA Civ 547. He said [para 51]:

> "*No doubt it is implicit in the statute that applications should be dealt with within 'a reasonable time'. That says little in itself, it is a flexible concept, allowing scope for variation depending not only on the volume of applications and available resources to deal with them, but also on differences in the circumstances and needs of different groups of asylum seekers. But … in resolving such competing demands, fairness and consistency are also vital considerations.*"

8. In *R (FH) v SSHD* [2007] EWHC 1571 (Admin) Collins J, after citing the above passage, said [para 11];

> *" …The Court can and must consider whether what has produced the delay has resulted from a rational system. If unacceptable delays have resulted, they cannot be excused by a claim that sufficient resources were not available"*

9. Both the above passages are in the same vein as the speech of Baroness Hale in *E B Kosovo (FC) (Appellant) v SSHD* [2008] UKHL 41 [para 32], which included:

> " *… prolonged and inexcusable delay on the part of the decision-making authorities must, on occasion, be capable of reducing the weight which would normally be given to the need for firm, fair and consistent immigration control in the proportional exercise.*"

10. In *R (FH) v SSHD* Collins J considered ten cases under the legacy programme. Some had a shorter history than the present case, but at least four had encountered a longer delay.

11. In addition to the passage cited at in paragraph 8 above he said:

> " *… provided the approach of the defendant was based on a policy which was fair and applied consistently, such delays could not be regarded as unlawful*" [para 8]
>
> " *… a system of applying resources which is not unreasonable and which is applied fairly and consistently can be relied on to show that delays are not to be regarded as unreasonable or unlawful*" [para 10]
>
> " *[delay] can only be regarded as unlawful if it fails the* Wednesbury *test and is shown to result from actions or inactions which can be regarded as irrational*" [para11]
>
> *" … in deciding whether the delays are unacceptable, the court must recognise that resources are not infinite and that it is for the defendant and not for the court to determine how those*

> *resources should be applied to fund the various matters for which he is responsible"* [para 11]
>
> "*If a result which appears unfair to an individual is produced, unlawfulness may be established, but not necessarily since there may be a good reason for what led to the apparently unfair result.*"

12. Collins J concluded that, though the background included past incompetence and failures by the Home Office, the method of dealing with the backlog was not such as to involve delays so excessive as to be unreasonable and so unlawful. He added [para 28]:

> "*It might be possible to devise a system which may seem better. But that does not mean that the existing one is unlawful, notwithstanding the unsatisfactory and undesirable delays. In all the circumstances I am not persuaded that there has been unlawfulness, whether the high threshold of abuse of power or the lower one of unfairness has to be overcome.*"

13. Collins J added that measures should be taken to minimise any prejudice to applicants occasioned by the delay. He left ajar the door for further applications founded on delay [para 30]:

> "*Claims such as these based on delay are unlikely, save in very exceptional circumstances, to succeed and are likely to be regarded as unarguable. It is only if the delay is so excessive as to be regarded as manifestly unreasonable and to fall outside any proper application of the policy or if the claimant is suffering some particular detriment which the Home Office has failed to alleviate that a claim might be entertained by the court.*"

14. Mr Manknell for the Defendant relied on the above passages in support of the proposition that the SSHD had acted lawfully and reasonably. Mr Juss, for the Claimant, sought to push open the door to reveal delay so excessive as to be reviewable. He relied in particular on the recently decided case of *Obienna v SSHD* [2008] EWHC 1476 (Admin). That case (in which Mr Juss himself appeared for the Claimant concerned not the legacy category of incomplete asylum seekers, but a different cohort of applicants, overstayers applying for leave to remain on the basis of long residence. In giving judgment Simon J noted [at paragraph 32] that there was very much less information available to the Court than was available to Collins J in *R (FH) v SSHD*

15. The delay in *Obienna* was shorter than in the present case. There had been an indication in correspondence from the Home Office that the application would normally be dealt with within 13 weeks. The issue to be determined was how a reasonable time was to be determined. Simon J held, firstly, that for a time there had been no system at all for dealing with an accumulating backlog of applications; and that the absence of a system was unlawful. Secondly, when a system was introduced it operated conspicuously unfairly in favour of the latest applications and expedited

cases. Thirdly, a new system dealing with the cases in chronological order was, on its face, not unlawful. The Judge cited the passage from Collins J's Judgment in *R (FH) v SSHD* quoted in paragraph 13 above, and added:

> "*I would qualify that observation in the present class of cases to this extent: if the application of the policy which is now said to be in place cannot provide any indication as to when an application may be dealt with, then it may be open to question whether the policy is being applied fairly and consistently.*"

16. Sympathetic as anyone must be to an individual facing a long delay in the making of an administrative decision by a Secretary of State, I agree with the submissions by Mr Manknell on behalf of the Defendant that this Claimant must fail. Unlike *Obienna*, in the case of the legacy cohort of applicants there is a well-established and logical policy, applied albeit not in strict chronological order of applications but nevertheless in a consistent way, and fair in all the circumstances having regard to the very large number of applicants. This case does not raise what Collins J called "*very exceptional circumstances"* in his *R (FH) v SSHD*, which in my view is indistinguishable from the present matter.

17. For completeness, I reject the Claimant's third ground set out in paragraph 6 (iii) above. Nothing the SSHD could have done would affect the misfortune described: the Claimant is in no worse a position than before in relation to events befalling his family in Iran.

18. In my judgment this claim must fail, and I refuse permission accordingly.