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CO/6613/2008

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

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 3 April 2008

B e f o r e:

MR JUSTICE COLLINS

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Between:
THE QUEEN ON THE APPLICATION OF N

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

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Mr Ranjiv Khubber appeared on behalf of the Claimant
Miss Samantha Broadfoot appeared on behalf of the Defendant

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J U D G M E N T

1. MR JUSTICE COLLINS: The claimant in this case is a national of Iraq. He arrived in this country on 26 August 1996 on a Sudanese flight which was scheduled to have gone from Khartoum to Amman in Jordan but which was hijacked by six other Iraqis. The claimant himself was, on the face of it, not apparently involved in that inasmuch as he was one of those who had been tied up with other passengers and thus appeared to be a victim of the hijacking. But he was charged with conspiracy to hijack because, no doubt, and I have not seen the full details, there was evidence which indicated that he had been concerned in the decision to hijack the aeroplane in order to get to this country.

2. The claimant indicates that he was afraid that he would be returned from Jordan to Iraq - the situation then being that Saddam Hussein was still in control in Iraq - and he and his family had been involved in activities which were believed by the Ba'ath Party to be inimical to them. Thus he had attracted the attention of Hussein's people and had suffered and believed that he would suffer as a result.

3. The other six were charged with hijacking and ran the defence of duress. The claimant was charged with conspiracy to hijack and did not run a duress argument. His defence was throughout that he had not been involved in any agreement to hijack and thus was not guilty at all. The judge at trial withdrew from the jury the defence of duress. Thus all six were convicted but the jury was unable to agree in relation to the claimant. In due course he was re-tried and convicted. He was sentenced to a total of two-and-a-half years' imprisonment.

4. The other six appealed against their convictions. The Court of Appeal allowed their appeals because, they said, it was wrong for the trial judge to have withdrawn the defence of duress. It was decided that they would not be re-tried. Thus the actual hijackers were all acquitted, whereas the claimant who had been involved in the agreement but had not, it seems, been involved in the actual hijacking, possibly because he had changed his mind and decided that in the end he did not want to involve himself in the hijacking albeit he took advantage of it in that it got him to this country and enabled him to make the asylum claim, as one can see in those circumstances, does have a sense of grievance that he finds himself convicted because that conviction has operated very much to his detriment.

5. It is the policy of the Home Office to grant for those who are entitled to humanitarian protection - that is to say whose return would be prevented because of the European Convention on Human Rights - discretionary leave for three years. That can be extended if the circumstances remain that return cannot take place. Once six years have passed, then an individual in that position can expect to receive indefinite leave to remain in this country.

6. Refugees were at that time - although the approach has changed more recently - granted an immediate indefinite leave to remain if they established that they were indeed refugees. But Article 1 F (b) of the Refugee Convention provides that those who have committed serious non-political criminal offences before reaching the country in which they seek asylum - and outside the country of their nationality - are not entitled to be regarded as refugees.

7. The effect of that provision is that prima facie such people, even though they may be persecuted in the country of their nationality, can be returned because the framers of the Convention decided that they were not such as should be entitled to be regarded as refugees.

8. The European Convention on Human Rights contains no such limitation largely because the framers of that Convention may well not have believed that it would have extra-territorial effect inasmuch as it was not intended to protect those who were to be removed from a particular country. It was designed to protect those who were within the particular country and whose rights were affected by a decision of the public authority in that country. However in Chahal the European Court of Human Rights decided that the Convention did protect those who were to be removed in the sense that if there were to be a removal to a real risk of treatment which would contravene Article 3 in particular (the Article that prohibits degrading or inhuman treatment or torture), then the individual was entitled to claim that that would be a breach of his human rights and he should not in the circumstances be removed.

9. That principle has since been confirmed by the European Court and has been recognised by the European Union in that there are now Directives that deal with the approach that should be adopted to those who seek what is described in the Directive as subsidiary protection which is translated into our law as humanitarian protection.

10. The offence committed by the claimant clearly, on its face, fell within Article 1 F (b). That decision was one reached by the Home Office and was a decision confirmed insofar as that was a matter in issue in due course by an adjudicator. Accordingly he was not entitled to be regarded as a refugee.

11. The Home Office did not make a decision on the asylum claim until 12 March 2003. There was thus nigh on a seven-year delay in considering that application. Miss Broadfoot indicates that she has no instructions on what were the reasons for that delay and whether there was in the circumstances a reasonable excuse for it. I am bound to say that I can think of no reasonable excuse for a delay of seven years in determining an asylum claim. Of course, having regard to pressures, it is understandable and acceptable that there should be some time taken. The matter has to be considered carefully, and there was pressure on the Home Office albeit the pressure in 1996 was significantly less than it has become in more recent years. I do not speculate on the reasons for that delay; it would not be appropriate for me to do so. All I say is that it is, in my judgment, virtually impossible to conceive of any reasonable excuse for a delay of that magnitude.

12. When the decision was eventually made the asylum application was refused. The claimant appealed to an adjudicator against that refusal. I should add that although the claim for asylum was refused, the decision was that he should be granted six months' discretionary leave to be here, that six months expiring in September 2003. He lodged an appeal against that refusal. The existence of the appeal meant that the leave remained in being until the appeal was determined. There was some delay which, I assume, was a delay involved in the tribunal at that time. On 14 January 2005 a

supplementary refusal letter was provided. I do not have the details of either of those letters, but perhaps that matters not.

13. The appeal was heard by an adjudicator on 10 March 2005. On 17 March he produced his determination. The asylum appeal was dismissed on the basis of Article 1 F (b), but the decision was that he could not be returned because he was entitled to humanitarian protection although by then Saddam Hussein was no longer in power. Nonetheless the adjudicator took the view that he would not be safe in Iraq. What he was asserting was that either he would be regarded as a hero by some parts of the population or - and this was significant - as a traitor by others because the hijack received extensive publicity and therefore he would be likely to be identified as having been involved in the hijacking, and so would be at risk of relevant ill treatment which crossed the threshold to bring it within Article 3.

14. The Home Office's response to the adjudicator's decision was to grant a further discretionary leave for six months; that expired on 23 December 2005. Prior to the expiry, on 2 December 2005, the claimant applied for further leave to remain. The request was then specifically made to up-grade his leave from a discretionary leave to leave which would have been appropriate to humanitarian protection, that is to say three years' exceptional leave to remain.

15. The claimant's solicitors sent chasing letters in 2006. They received no response, which was the Home Office's bad habit at that time; a total failure not only to deal with matters expeditiously but even to answer or acknowledge any correspondence. That was a matter which has since troubled the courts. I hope that those bad habits have now ceased. Be that as it may, no decision was reached throughout 2006 and 2007 despite a number of chasing letters. Again in early 2008 there were threats that it was unreasonable and that a judicial review application would follow. In the absence of any response from the Home Office, the application for judicial review was lodged in July 2008.

16. The application was based upon the delay which had occurred in considering the claim made in December 2005. Essentially it was said that the time had come when it was unreasonable for the Home Office not to have made a decision. The relief sought in the claim as lodged was a mandatory order requiring the Secretary of State to make a decision on the application for further leave to remain, a declaration that the delay in resolving the claimant's immigration status was irrational, unlawful and conspicuously unfair so as to amount to an abuse of power. Permission to bring that claim was granted on 18 August 2008 by a deputy judge of this court. He indicated that it was a very unusual case on its facts and that it was arguable that it might be regarded as exceptional within the final paragraph of a judgment I gave in FH v Secretary of State for the Home Department [2007] EWHC 1571 Admin.

17. Despite that, there was further delay. But on 5 March 2009 the Secretary of State, having received correspondence and having said that a decision was due to be reached very quickly, decided that there should be a further six months' discretionary leave which would expire in early September.

18. It was then suggested that this claim had become academic and should be withdrawn. The response of those advising the claimant was that they still wished to have a declaration that the delay had been inordinate, unreasonable and so unlawful but that they sought also to amend to challenge the grant being limited to six months only and suggested that it should be longer than that. Essentially it was put on the same basis, namely that he should be regarded as someone who was entitled to the result that would follow from humanitarian protection.

19. There was some opposition to the application to amend. But it seemed to me that rather than run the risk of yet further costs in a fresh claim being made - and particularly as I formed a clear view that there was merit in the approach that the Secretary of State had not had regard to all to which she ought to have had regard in reaching the decision of 9 March - that it would be sensible, insofar as it was possible in fairness to the Secretary of State, to deal with that issue and thus save public money in due course.

20. The policy applied by the Secretary of State is - as I think is made clear by what was granted - that for someone such as the claimant, that is to say someone who is able to remain here only because of the inability to return under the Human Rights Act, a leave of six months at a time is appropriate; appropriate of course if the individual behaves himself otherwise and so long as it remains unsafe for him to be returned.

21. This policy relating to those who are not within the protection of the Refugee Convention because of Article 1 F (b) seems to me to be entirely reasonable. The rationale behind it I have not had spelled out before me, but it seems obvious that what is desired is to keep open the possibility of return and the need to consider at regular and relatively short intervals whether return can be effected because, as a general approach, those who would not qualify because of the commission of a serious offence should not generally be considered to be able to remain within this country. One can understand why that policy has been adopted.

22. Accordingly, in principle, to award only six months is not in the least unreasonable. But the policy has, as it were, a cap. It is recognised that there will come a time when - provided the individual has behaved himself in this country - it would be proper to regard him as having put behind him, as it were, the original offending. Thus if someone has been here for ten years and subjected to a series of discretionary leaves for that period he will normally he able to remain here indefinitely. He will, after all, be expected by then to have made his life in this country, to have settled here, perhaps to have established family life here. The view is, again as it seems to me, entirely reasonably taken that generally speaking - and of course each case has to be considered on its own merits - such an individual will have leave to remain indefinitely and thus will be entitled to settle here.

23. The policy also indicates that any time spent in prison will not count towards that ten-year period. Again one can understand why that should be so. So far as the claimant is concerned, that means a period of what one would anticipate to be fifteen months - that is to say half of the two-and-a-half year sentence that he received - would not count in his favour.

24. Equally, if one approaches the policy in a purely technical manner, he has not had any discretionary leave until March 2003 when eventually the Home Office got around to deciding on his asylum claim. He therefore had spent nearly seven years in this country, not unlawfully, while his claim was being considered. Technically that does not count because it was not a period while he was subject to discretionary leave to remain here. So long as he applied within any current leave for an extension, then that leave is deemed to continue. That applies not only to appeals but also to any application. The result of that is that since March 2003 he has been here subject to the various discretionary leaves. Thus so far as the policy technically is concerned, he has been here now for just over six years. Therefore he has, it is said, still four years to run.

25. That would be reasonable but for the appalling seven-year delay. It seems to me that in all the circumstances it is entirely unreasonable, irrational and an abuse of power for the Secretary of State not to take account of that delay in deciding whether the ten-year period should be considered to have run in favour of the claimant. Of course, one recognises that it is entirely reasonable to have spent some time in the original consideration of the claim. I am not indicating - nor would it be appropriate for me to indicate - a particular period. That will no doubt depend upon the individual circumstances of the case. All I have said, and I do say, is that it seems to me that it is quite impossible - or virtually impossible - to conceive of anything reasonable in a delay of seven years.

26. In those circumstances it seems to me that the recent decision of 9 March is one that is flawed for a failure to have regard to those facts. Whether that should result in an immediate grant of indefinite leave is not for me to say although it may be that it is very close to any reasonable borderline. There would have to be strong justification for a refusal to regard someone like the claimant - who has been here now for well over twelve years - to have to wait any longer before being granted settlement, provided of course that he still cannot be removed and that there is nothing against him other than the original conviction which has created all the difficulties for him.

27. So far as the original claim was concerned based upon the time taken in reaching a decision, I do not think that - contrary to the view taken by the deputy judge - there was anything so exceptional as to justify the court intervening. True it is, that it would have been desirable that there should have been a quicker determination. And the closer one came to any reasonable time - having regard to the original delay - the less reasonable any delay would become.

28. I sought to spell out in FH the circumstances in which delay by itself could be regarded as so unreasonable as to justify judicial review proceedings. I recognise that - as one would expect - each case must be considered on its own facts. But it would only be if those facts were exceptional that a delay would, by itself, justify judicial review, at least where that delay - having regard to the enormous backlog that had been created - amounting, certainly on the evidence in late 2006, to between 400,000 and 450,000 cases had to be dealt with.

29. In those circumstances I reject the claim for a declaration that the time taken was so excessive as to justify any form of relief. I think the best way to deal with this is to

declare that the 9 March decision should be reconsidered, taking into account the matters to which I have referred in the course of this judgment. I am satisfied that as it stands that decision is flawed for the reasons I have indicated. But I recognise that I have no evidence as to what, if any, excuses there may be for the original delay and those can be taken into account and should be spelled out in any further decision that is made if that decision is going to be adverse to the claimant.

30. It goes without saying that having regard to the history of delay in this case, it must, in my judgment, now be dealt with as a priority case. I would be, to say the least, disappointed if a decision was not reached well before the expiry of the current discretionary leave, that is to say before September. The claimant is here not only lawfully but subject to a series of discretionary leaves which have been deemed to be extended as necessary. I recognise that he has still the situation that he does not know finally whether he will be able to stay here. But subject to that, the policy having been properly applied to him, he has not suffered any disadvantage save that to which I have referred, namely that the consideration of the ten-year period only began in March 2003.

31. For those reasons I permit the amendment to the claim. I indicate that I would have dismissed the claim without the amendment and will not grant any declaration. But I allow the claim as amended directed at the 9 March letter to the extent I have indicated.

32. (To Mr Khubber) Are you legally aided?

33. MR KHUBBER: Yes.

34. MR JUSTICE COLLINS: In all the circumstances I think the appropriate order is no order because although you have the advantage it is very much the last minute one. I do not think that for the reasons I have given that you would have succeeded on the original claim. It does not directly affect you or your client obviously, but, unless you seek to persuade me to the contrary, I think that is the appropriate order to make.

35. Miss Broadfoot, would you have any comment on that?

36. MISS BROADFOOT: I would not make any submission.

37. MR JUSTICE COLLINS: (To Mr Khubber) You can have the - - - - -

38. MR KHUBBER: Detailed assessment. The only other matter is whether your Lordship considers - you have made the observations - whether any particular timetable for - - - - -

39. MR JUSTICE COLLINS: No. I have indicated as I have. I think the Secretary of State will realise that if she does not reach a decision by then the likelihood is that you will come running back to this court. I do not think she will have much of a leg to stand on.

40. MISS BROADFOOT: Your Lordship repeatedly referred to the decision being 9 March; I think it is 5 March.

41. MR JUSTICE COLLINS: You are quite right. I will correct that.

42. MR KHUBBER: I noticed that it was a grant of discretionary leave to enter on 6 March 2003, not discretionary leave to remain.

43. MR JUSTICE COLLINS: That is a minor technicality. Shall I say "discretionary leave to be here"?

44. MR KHUBBER: That is neutral enough not to make a difference.

(Short discussion ref a possible ordering of transcript)

45. MR JUSTICE COLLINS: Incidentally, so far as the declaration is concerned, I hope I have made clear what it should be. Can I ask you, between you, to send a form of words to the associate for the declaration? If there is any argument, I will look at it this afternoon or whenever.

46. MISS BROADFOOT: You declare that the decision of 5 March should be reconsidered.

47. MR JUSTICE COLLINS: Yes, in the light of the judgment.

48. MISS BROADFOOT: That is fine.

49. MR KHUBBER: I think that is relatively clear.

50. MR JUSTICE COLLINS: Yes, that is fine. If you are happy with that, I am happy with that. We will put it on that basis.
