Case No: C5/2007/1655

Neutral Citation Number: [2008] EWCA Civ 546
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ASYLUM AND IMMIGRATION TRIBUNAL
[AIT No. AA/10981/2006]

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 8th April 2008

Before:

LORD JUSTICE TUCKEY
LORD JUSTICE JACOB
and
LORD JUSTICE HUGHES

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Between:

MA (YEMEN) **Appellant**

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondent**

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Mr S Juss (instructed by Messrs Riaz Khan & Co) appeared on behalf of the **Appellant**.

Ms L Bausch (instructed by the Treasury Solicitors) appeared on behalf of the **Respondent**.

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Judgment

(As Approved by the Court)

Lord Justice Tuckey:

1. This is an appeal by MA from a decision of the AIT which, on a reconsideration, dismissed his appeal from the Secretary of State's rejection of his claims for asylum, related humanitarian relief and on Article 8 grounds.

2. The appellant is a citizen of Yemen; he entered the United Kingdom illegally and claimed asylum in October 2002 when he was seventeen. His claim was based on the fact that he was a member of a family against whom a rival clan had declared a blood feud because his brother had been involved in killing members of that clan. His family had limited means of protecting themselves and state protection was inadequate.

3. The claim was not rejected by the Secretary of State until August 2006. Had it been determined in 2002 or 2003, it is contended that as a failed asylum seeker from the Yemen the applicant would have been given four years' exceptional leave to remain as a matter of Home Office policy, but as by August 2006 this policy no longer applied the Secretary of State gave orders for his removal. During the period of delay and since, the appellant has established himself as a valuable member of the Yemeni community in Sheffield where he is on a four-year sandwich degree course at Sheffield Hallam University, studying business and ICT.

4. The appeal, which arises from the second stage reconsideration by the AIT, proceeded on the basis that certain of the facts giving rise to the asylum claim were accepted. Nevertheless, the immigration judge rejected this claim because in his view it had not been shown that the authorities would be unwilling or unable to protect the appellant if he was returned to Yemen and because internal relocation was possible in his case. In reaching these conclusions, the judge had taken the view that the blood feud was not as serious as the appellant contended; but, in his reasons, the judge did not specifically refer to a letter from the chief of the appellant's tribe which said that the feud was continuing, the tribe and the authorities were unable to protect the appellant and he would not be able to relocate. The immigration judge's failure to deal with this letter led a senior immigration judge to grant the appellant permission to appeal the asylum decision to this court. The AIT also rejected the Article 8 claim, based on the private life which the appellant had established in this country. I subsequently granted permission to appeal his Article 8 decision. That ground had been based in general terms upon the Secretary of State's delay in deciding the asylum claim between 2002 and 2006, but it was put as part of the Article 8 claim and it is clear from the immigration judge's decision that no reference was made and no reliance was placed upon any policy or practice to the effect that failed asylum seekers in 2002 and 2003 would be granted four years' exceptional leave to remain.

5. The Secretary of State first responded to the appeal on both these grounds on 18 October 2007 by conceding that the appeal should be remitted to the AIT for reconsideration as soon as possible. That concession has been repeated a

number of times since in correspondence and was made in the skeleton argument filed on behalf of the Secretary of State prepared by Miss Bush, who appears for her today, which is dated 17 December 2007. Some confusion has been caused by the fact that the Court of Appeal office informed the parties that Laws LJ had directed that this appeal should be heard with another appeal, FK (Afghanistan) CG [2002] UKIAT 06054, which also raised issues about delay. In fact, he had given no such direction, as the parties were subsequently informed. He had made it clear in the direction which he did give that it was not necessary for these two cases to be listed together.

6. Nevertheless, after the position had been clarified and the offer to allow this matter to be remitted for reconsideration by the AIT had been repeated the appellant's solicitors continued to reject this offer. In his skeleton argument Mr Satvinder Juss, who now appears for the applicant, maintained, and still maintains, that no such course should be taken the Secretary of State's position, he submitted, was "unsustainable and wholly misconceived".

7. In a skeleton argument which is dated 2 April 2008, Mr Juss says that this case raises important issues of law about delay resulting in the failure to apply a policy which applied to the appellant at the beginning of the period but did not do so by the end of the period of delay. This is a case in which the court should, he says, declare that the delay was an abuse of process conspicuously unfair illogical or immoral or both and so the decision of the AIT should be characterised as being unsafe and perverse and this court should uphold the appellant's claims so that he does not have to go through the process again.

8. A number of cases were relied on by Mr Juss in support of these arguments, for example, R (Rashid) v SSHD [2005] EWCA Civ 744. But, as is clear from what I have already said, none of these points were taken before the AIT when the appeal was before it. More importantly, we are told this morning by the Secretary of State in answer to Mr Juss's latest skeleton argument that there has never been any such policy in relation to the Yemen. The skeleton argument says: "the respondent did not have a country-based exceptional leave to remain policy for Yemen in 2002 or at any other time."

9. So if that is correct -- and there is absolutely no reason to doubt it – it puts, the kibosh on Mr Juss' rather extravagant submissions. This is simply a case in which delay is one factor which may be taken into account in the general Article 8 consideration. Is it proportionate to return the appellant to the Yemen, given the delay and given the life he has established here? That is obviously a fact-sensitive exercise which has to be performed by the specialist tribunal which does this day-in and day-out. It is not an exercise which this court performs.

10. Mr Juss valiantly suggested to us that, if there was not a policy, the information the appellant has put before the court supports the fact that there was a practice to the same effect. He relies on four letters from the IND granting exceptional leave to remain to Yemenis, but each of those letters makes it clear that the decision has been made in the light of the particular circumstances of those applicants' cases. I cannot possibly infer from those

letters that there is any general practice which the appellant can rely on to mount the sort of arguments Mr Juss wished to advance. If there is an issue about whether there was a practice or a policy, that is a matter of fact which can and should be investigated before the specialist tribunal. It cannot be determined by us at a hearing such as this.

11. Reconsideration of the asylum claim is again entirely fact-specific. It depends upon a reconsideration of the evidence as to risk, including the letter to which I have referred, and whether it is possible in the light of that letter and other country information available to the tribunal for this appellant to relocate. Again those are not matters which this court can decide. We are not a specialist tribunal; we decide issues of law.

12. This is a case, in my judgment, which should have been remitted to the tribunal when the Secretary of State conceded the point back in October 2007, and the fact that it has not gone there yet is regrettable but it is not a reason for us doing something which we are not equipped to do.

13. So I would allow the appeal, because that is what the Secretary of State has conceded, on both the asylum and Article 8 grounds, and remit it for reconsideration on those grounds as soon as possible by the AIT.

Lord Justice Jacob:

14. I agree.

Lord Justice Hughes:

15. I also agree.

Order: Appeal allowed