Case No. CO/5850/2008

Neutral Citation Number: [2009] EWHC 468 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL
Date: Tuesday, 17th February 2009

B e f o r e:

MR JUSTICE PLENDER

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Between:
THE QUEEN ON THE APPLICATION OF SAMUEL HAILEMARIAM
Claimant

v

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

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Ranjiv Khubber (instructed by Fisher Meredith) appeared on behalf of the **Claimant**
John-Paul Waite (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

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J U D G M E N T

1. MR JUSTICE PLENDER: This is an application for judicial review brought by the claimant, Samuel Hailemariam, with leave granted by Lloyd Jones J. The claimant is an Ethiopian national of Eritrean origin, whose claim to remain in the United Kingdom, on the basis of both asylum and human rights grounds, has been considered in circumstances that I shall describe.

2. The background to the claim is the Secretary of State's change of policy in relation to the grant of leave to asylum seekers dated 30th August 2005. Prior to that date, it had been the general policy of the Secretary of State to grant indefinite leave to remain to those recognised as refugees. With effect from 30th August 2005, however, that policy was changed and persons having refugee status were granted only 5 years' limited leave to remain. Where there had been a significant delay in actioning the appeal, however, the new policy provided that it might be appropriate to grant indefinite leave to remain, subject to the satisfaction of certain conditions. Those conditions are laid down in a Home Office Appeals Directorate's operational guidance, which reads in the material passage as follows:

> "Circumstances in which it may still be appropriate to grant ILR
>
> Where a claimant is to be granted leave on or after 30th August, but we had previously undertaken to grant him or her ILR, we should honour that undertaking.
>
> Where there has been a significant delay in actioning an appeal and that delay:
>
> • is out of step with other appeals of a similar nature; and
>
> • is for reasons attributable to the Home Office; and
>
> • means that leave is being granted on or after 30th August when it otherwise would not have been;
>
> then it may be appropriate to grant [indefinite leave to remain] instead of limited leave. Such a decision should not, however, be taken without consulting the AD [which I take to mean the Appeals Directorate] responsible for AIU [the Asylum and Immigration Unit]."

In the case of Samuel Hailemariam, the delays involved in the processing of his claim have been very substantial. Counsel for the Secretary of State, Mr JP Waite, prudently and correctly did not seek to minimise or to excuse it.

3. Mr Hailemariam arrived in the United Kingdom on 1st November 2000. He claimed asylum on 20th November 2000. An immigration decision in his case was not made until 23rd October 2007. An appeal against that decision was heard on 19th December 2007. The background to those key dates is that there was substantial and regrettable delay on the part of the Secretary of State in taking the decision relevant to Mr Hailemariam's case, and there was a series of administrative errors. First, Mr Hailemariam was interviewed in respect of his asylum claim, without having a

representative present. Second, a decision was made in respect of his asylum claim on 11th January 2001, but the decision included no immigration decision, no refusal of leave and, accordingly, there was nothing against which an appeal could properly be brought under the Immigration Act. Nevertheless, the claimant lodged an appeal within 10 days, but even then the Home Secretary did not send it to the tribunal for determination.

4. From August 2002 to November 2006 there was no action on the part of the Home Office, and no explanation has been given for the lack of it. In November 2006 there was sent to Mr Hailemariam what is commonly known as a "legacy letter". This confirmed to him that his case fell within a legacy of some 400,000-450,000 case records. The Home Secretary could not give any indication of when it would be processed. A leaflet was enclosed with the letter and Mr Hailemariam was asked to wait. On 1st May 2007 solicitors acting for Mr Hailemariam sent a letter before action. There followed a consent order, by which the claimant withdrew his application for judicial review and the Secretary of State agreed to reconsider his claim for asylum. It was as a result of that reconsideration that the immigration decision was made on 23rd October 2007. The Immigration Judge then allowed his appeal, both on refugee and on human rights grounds. He reached strong findings in favour of Mr Hailemariam on Article 8 of the European Convention on Human Rights and on proportionality. The Secretary of State did not appeal. As a result of this decision, the Mr Hailemariam was given 5 years' leave to remain in the United Kingdom on 12th March 2008. There followed detailed representations from his solicitors, dated 24th April 2008, setting out the reasons why, as they contended, he should be granted indefinite leave to remain. The Secretary of State concluded that there were not sufficiently compelling reasons to grant this applicant indefinite leave to remain.

5. The case law on this subject is surprisingly plentiful. In the case of FH and others v the Secretary of State for the Home Department [2007] EWHC 1571 (Admin), the delay was one of 5 years and Collins J, at paragraph 27 of his judgment, indicated that he regarded that as an exceptional case. In the case of Rechachi and others v the Secretary of State for the Home Department [2006] EWHC 3513, Davis J thought that significant delay in actioning an appeal could take the form of either delay by the Secretary of State or delay on the part of the Immigration Judge. On the facts of the case before him, he thought it more likely that the reference to "significant delay in actioning an appeal" in the document of the Appeals Directorate to which I have referred meant delay on the part of the Immigration Judge, because, he said, it is not ordinarily the Secretary of State who delays actioning an appeal but the appellate authorities. He was not, in my view, considering a case such as the present, where there has been a very significant delay on the part of the Secretary of State in making a decision which was capable of triggering an appeal to the appellate authorities. On the facts of this case, the appellate authorities have acted promptly. The relevant delay was that on the part of the Secretary of State.

6. In order that there should be a correction of injustice resulting from a delay in actioning an appeal, it is necessary that there should be something other than the delay itself, such as consequential disadvantage to the applicant. The intensity of review appropriate to the present case is set out in the speech of Lord Steyn in the case of Daly v Secretary of

State for the Home Department [2001] 2 AC 532. I refer to paragraph 27 of the speech of Lord Steyn. He there said:

> "... the intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued."

As Lord Steyn there indicates, the intensity of review applicable in the present case is that of proportionality. The matter is revisited in circumstances more apt to the present case in the judgment of Collins J in R (S) v Secretary of State for the Home Department [2007] EWHC 51 (Admin), at paragraph 24 [23]. He there said:

> "... I am not in a position to say that that [the delay] was so obviously and conspicuously unfair as to amount to an abuse of power. Indeed, it is difficult to see that delay by itself could, unless it was extreme and arose for wholly bad reasons in an individual case, enable a court to say that the decision made after the delay was unlawful if it deprived the person affected of some advantage he would have enjoyed if the decision had been made timeously."

7. In response to questions from myself, Mr Waite for the Secretary of State rightly, in my judgement, accepted that in the present case the delay was extreme. As to whether it arose for wholly bad reasons, Mr Waite replied that there were certainly no good reasons. As for the third condition, that the person affected should be deprived of some advantage that he would have enjoyed, Mr Waite denied that there was any deprivation of an advantage. He was referring there to the passage in the judgment of the Immigration Judge in the case of Mr Hailemariam, in which the Immigration Judge said that he reached the decision that he did in respect of the claim for refugee status only in the light of the judgment of the Court of Appeal in the decision of EB (Ethiopia) v Secretary of State for the Home Department [2007] EWCA Civ 809. At paragraph 41 of his judgment the Immigration Judge said:

> "... but for the Court of Appeal decision in EB, to which I refer below, and on which reliance was heavily placed by Mr Khubber [in that case, and in the present case, counsel for the claimant], my decision on this appeal would have been different. I would not have allowed the appeal."

What was said on behalf of the Secretary of State was that if this decision had been dealt with more timeously, then Mr Hailemariam would not have succeeded before the adjudicator, because the adjudicator, or any other person giving judgment, would have reached the conclusion that the claimant could not establish a claim to asylum on the basis that the Ethiopian authorities were unwilling to supply him with a travel document. He submits, therefore, that the decision in the present case did not deprive Mr Hailemariam of an advantage that he would have enjoyed had the decision been made timeously. This reasoning overlooks the fact that the advantage of which Mr Hailemariam was deprived was the expectation of receiving indefinite leave to remain,

which would have been conferred upon him had he been recognised as a refugee before 30th August 2005. That would have been conferred upon him had the law been correctly applied, as the law has now been interpreted by the Court of Appeal in the case of EB.

8. In his closing submissions Mr Waite said to me, I think correctly, that what this case really turns upon is whether the present claimant has suffered any disadvantage. I quite follow his reasoning when Mr Waite for the Home Office says that had this case been dealt with timeously, the present claimant might have failed, because the law might have been applied to him incorrectly before the decision of the Court of Appeal in EB. I cannot go as far as I think Mr Waite did in saying that this is what would have happened. We cannot be certain what would have happened. It is always possible that some other Immigration Judge would have applied the law correctly, or that if the Immigration Judge hearing Mr Hailemariam's case had decided it incorrectly, there might have been an appeal and the error corrected. What I think we can say with some confidence is that if the law had been correctly applied to Mr Hailemariam before 30th August 2005, then he would have been granted indefinite leave to remain. A court cannot always correct an error on the application of a law which has been made before its correction, but, in my judgement, it is not bound to proceed on the premise that the position of a claimant before it is as it would have been if the law had been misapplied. I consider that Mr Hailemariam is entitled to be put in a position in which he would have been, had the law been correctly applied to him before 30th August 2005 and that it would [be an] injustice to put him in a position in which he might have been, had the law been misapplied in his case, as it appears to have been in the case of some others. For these reasons, the present appeal will be allowed.

9. The question is the form of the order.

10. MR KHUBBER: Yes.

11. MR JUSTICE PLENDER: Mr Khubber, you may have a form on which you and Mr Waite are agreed, or think you may agree, or you may like to take 5 minutes to draft it. I have a medical appointment at 5.00 pm, so I would like to be away rather swiftly. If, in the circumstances, you would prefer to draft an order overnight, I am quite content for you to do that.

12. MR KHUBBER: My Lord, I will obviously take instructions on that and perhaps discuss it with my learned friend. Obviously, one of the primary aspects will be in relation to the declaration of the consequences of the judgment.

13. MR JUSTICE PLENDER: Yes. What I have in mind is the final words of the Appeals Directorate's operational guidance, that the decision should not be taken without consulting the AD directorate [responsible] for the AIU. It may be that the right course now is for the AD directorate responsible for the AIU to consider, in the light of the correct interpretation of the Refugee Convention, what leave should be granted to Mr Hailemariam.

14. MR KHUBBER: Yes.

15. MR WAITE: My Lord, in light of the correction, obviously the Secretary of State's policy is to apply the policy that has been in existence since August 2005, so if you were to ask the Directorate to consider the position following, for example, the Court of Appeal decision in EB, then it would result in the same outcome.

16. MR JUSTICE PLENDER: Meaning this claimant would be given indefinite leave to remain?

17. MR WAITE: No, the policy of granting indefinite leave to remain has not been in existence, obviously, since August 2005.

18. MR JUSTICE PLENDER: The guidance says, "it may be appropriate to grant [indefinite leave to remain] instead of limited leave, [but] such a decision should not, however, be taken..." "Such a decision" appears to me to be a decision to grant indefinite level to remain.

19. MR WAITE: Indefinite leave to remain, my Lord, yes, on an exceptional basis.

20. MR JUSTICE PLENDER: That is right.

21. MR WAITE: Is your Lordship's order that they should consider whether to grant indefinite leave to remain, just so that we know?

22. MR JUSTICE PLENDER: Yes, I think it is. There may be some fine tuning of that order for you and Mr Khubber to agree.

23. MR WAITE: My Lord, yes. There remains the matter --

24. MR JUSTICE PLENDER: To consider whether to grant indefinite leave to remain upon the understanding that the law always has been as stated by the Court of Appeal in EB. That may give a little guidance. For all I know, there may be some other reason which would call for the exceptional policy not to apply.

25. MR KHUBBER: My Lord, I can understand the observations you make. Just as a background point, it is clear that, in the light of the guidance, and even without the guidance, the Secretary of State still retains a discretion to grant indefinite leave to remain. Even with the advent of the new policy, he can still grant indefinite leave to remain in dealing with cases. My Lord, the point that I was going to make is that the thrust of you judgment would tend to support the conclusion that he should be put in a position where he should be granted indefinite leave to remain, subject to any other considerations.

26. MR JUSTICE PLENDER: That is right. If he was a high-ranking Al-Qaeda member, the Secretary of State might --

27. MR KHUBBER: Exactly, but I am sure that that is not the scenario here, but I think that that is the thrust of your Lordship's judgment, and I am just concerned that we are clear, to the extent of not having a situation where we are faced with the response that the Secretary of State does not give us ILR and we are back to square one.

28. MR JUSTICE PLENDER: I hope that the judgment, although extempore, was clear. The thrust of it is that this claimant should be put in the position in which he would have been, had the law been correctly applied to him before 30th August 2005.

29. MR KHUBBER: I think that is the wording that is accurate for a declaration and that is helpful. Obviously, there will be a quashing order anyway, but the declaration is there.

30. MR JUSTICE PLENDER: If you would kindly get that to me on a sheet of paper overnight.

31. MR KHUBBER: Yes, my Lord, I think that is the best way for it.

32. MR JUSTICE PLENDER: I shall sign it and it will be so ordered tomorrow morning. Is there anything else?

33. MR KHUBBER: A couple of consequential matters. Obviously, the claim is successful. So we would ask for our costs from the defendant in the normal course.

34. MR JUSTICE PLENDER: Costs of today's appearance. Any other costs asked for?

35. MR KHUBBER: My Lord, the costs of the claimant.

36. MR JUSTICE PLENDER: That includes the application?

37. MR KHUBBER: Yes.

38. MR JUSTICE PLENDER: Lloyd Jones J made no order, I presume.

39. MR KHUBBER: No, there was no order and, because the claimant is publicly funded, my Lord, a detailed assessment is also a necessary part of the order. We can put this order in order anyway, but I just make the point now.

40. MR JUSTICE PLENDER: Mr Waite, what do you have to say about that?

41. MR WAITE: My Lord, this was listed as a permission hearing.

42. MR KHUBBER: It was a rolled-up hearing.

43. MR JUSTICE PLENDER: It was a rolled-up hearing.

44. MR WAITE: The Secretary of State has not had any of the normal opportunity that follows, for example, a grant of permission to consider his case. For example, if your Lordship had granted permission, I do not know what the outcome of that would have been, but certainly there would have been consideration and the Secretary of State is then able to decide whether to concede or contest the case. If a case is conceded at an early stage, your Lordship will be familiar with the principle that the costs are not payable by the defendant in those proceedings.

45. MR JUSTICE PLENDER: Yes, but the hearing you have had is the hearing entirely as foreseen by Lloyd Jones J. I can quite see that his order leaves you in some uncertainty

as to the costs to which you are exposed. What do you say is the right order as to costs against a publicly funded claimant?

46. MR WAITE: Clearly, there should be detailed assessment of the claimant's costs, but we would ask for no order for costs. No order for costs and a detailed assessment of the claimant's publicly funded costs.

47. MR KHUBBER: My Lord, I, perhaps unsurprisingly, disagree with that submission, because the normal course in judicial review, even if there is a claimant who is publicly funded, is costs follow the event. We have been successful in the challenge. In my experience the court's position is to follow the principle.

48. MR JUSTICE PLENDER: That is, of course, right. It is a principle from which I departed once this week, in what I thought were very exceptional circumstances.

49. MR KHUBBER: But, my Lord, this was, in my submission, a successful claim, and a relatively clear one.

50. MR JUSTICE PLENDER: It was a successful claim and both sides were extremely clear on their submissions, which did not depart from the previous correspondence or the claim form. I think that the right order is that the claimant should have an order for costs of the claim and detailed assessment for publicly funded costs.

51. MR KHUBBER: I am grateful.

52. MR WAITE: There remains one question, of leave to appeal. I make an application for leave to appeal on this basis, identifying this point of principle. It is your Lordship's conclusion that the claimant should be restored to the position he would have been in, had the law been properly applied to him, or correctly applied to him at that time. The issue of principle is, we say, no, it is simply that he is restored to the position he would have been in, had his claim been decided at an earlier time, full stop.

53. MR JUSTICE PLENDER: That is the issue. I do not say that it is an unappealable issue, but I do say that the right course is for you to apply to the Court of Appeal and not for me to saddle them with a decision that they may not want to make. Accordingly, I do not grant that application, but it is not an application I would discourage.

54. Thank you very much, both of you, for your assistance.