Case No: C4/2008/2202

Neutral Citation Number: [2009] EWCA Civ 125
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(MR JUSTICE PLENDER)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday, 29th January 2009

Before:

LORD JUSTICE GOLDRING

- -

Between:

THE QUEEN ON THE APPLICATION OF MP (CONGO)

Appellant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

- -

(DAR Transcript of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Mr R Khubber (instructed by Messrs Fisher Meredith Llp) appeared on behalf of the **Appellant**.

THE RESPONDENT DID NOT APPEAR AND WAS NOT REPRESENTED.

- -

Judgment

(As Approved by the Court)

Lord Justice Goldring:

1. I should start by thanking Mr Khubber for the arguments which he has very well expressed in his submissions before me.

2. The appellant, who is 20, comes from the Democratic Republic of the Congo. He has applied for judicial review, expressing it in the very broadest terms, upon the basis that the Secretary of State has unlawfully delayed in dealing with his application for indefinite leave to remain. Davis J refused permission on paper. Plender J refused permission at an oral hearing on 16 July 2008. The appellant now seeks permission to appeal Plender J's decision.

3. The background facts are well summarised in Mr Khubber's skeleton argument. I quote from paragraphs 2.1 to 2.6:

> "The Claimant/Appellant, [MP], is a 20-year-old Congolese (DRC) national. He arrived in the UK on 12 November 2002 and sought asylum on the basis of a well-founded fear of persecution by reason of his political associations. His asylum claim was refused and his subsequent appeal was dismissed. On 12 February 2003, [he] was granted exceptional leave to remain in the UK until 8 December 2004, the day before his 18th birthday."

In November 2004 he applied for indefinite leave to remain. As is set out in paragraph 2.2 of the skeleton:

> "On 15 June 2005, [his] elder brother, [CP], was granted indefinite leave to remain following a successful appeal against the refuse of his asylum claim."

4. Mr Khubber observes, as is the case, that this appellant was found to be a credible witness. In paragraph 2.3 he sets out the factual background to this application:

> "In the DRC, [his] brother [CP] had been the victim of a vicious machete attack. The attack resulted in severe head injuries and caused him to suffer epilepsy as well as other injuries including memory loss. As a result of the attack, [CP] is severely disabled, unfit for employment and requires full-time care … [CP] is completely reliant on [the appellant] for this care."

5. It is clear that the appellant's brother is completely dependent upon the appellant for his care and that their relationship is an unusual one. As was said by the immigration judge:

> "I am satisfied that they have formed a family life together and this is one of the unusual cases in which the family life can be said to exist between two adult siblings, given the degree to which the Appellant is almost entirely dependent on his brother far in excess of what would be necessary or usual between such individuals."

6. On 11 August 2007 the appellant's solicitors sent to the Secretary of State a letter before action in respect of the failure by the Secretary of State to reach a decision regarding the appellant's application for indefinite leave to remain. In the Secretary of State's response of 8 October 2007, the following (as relevant) is said:

> "On 19 July 2006, the Home Secretary announced to Parliament the Immigration & Nationality Directorate … have a legacy of some 450,000 electronic and paper case records. The aim is to resolve these case records in five years or less, and by 19 July 2011.
>
> The Home Secretary set out his priorities as cases where the applicant may pose a risk to the public; can more easily be removed; is receiving public funded support or may be granted leave to remain. Cases will be considered in line with these priorities by the Case Resolution Directorate … Cases will not be considered out of turn unless there are exceptional circumstances justifying a quicker resolution of the case."

The letter goes on to say that the present case has not been considered exceptional. It goes on to say this:

> "We will consider taking cases out of turn only where there are exceptional circumstances. Examples of cases falling within these categories might include the applicant needing to visit a seriously ill close relative abroad… – eg a terminal illness, severe heart attack … or where a close relative is caught up in a natural disaster … No such circumstances exist in your client's case."

7. Reference in the letter is made to the decision of Collins J in the Administrative Court of R (FH; K; A; V; H; SW; HH; AM; SI; & ZW) v SSHD [2007] EWHC 1571, in which among other things, Collins J said:

> "…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 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."

8. In this case Mr Khubber submits that the appellant has suffered some particular detriment in the particular circumstances and that on these facts the exceptional circumstances test applies. It is put in the grounds for judicial review that the decision to delay consideration of the claim was irrational and unreasonable and a misapplication of the legacy policy.

9. The irrationality alleged can be summarised shortly. The Secretary of State, it is said, could not rationally have decided that this case was not exceptional. It is exceptional because of the particular relationship between the appellant and his brother: the unusual and strong attachment between the two brothers, as Mr Khubber put it to me. There is the exceptional care provided by the appellant to his brother. And because of the uncertainty of status, so far as the appellant is concerned no long term plans can be made either for himself or his brother There is detriment therefore both to him and to his brother, a material consideration.

10. Mr Khubber also relies upon the lapse of time since November 2004, when the application was made.

11. It is also said that the Secretary of State has failed to engage with the particular circumstances of this appellant. What the letter of 8 October 2007 suggests is, submits Mr Khubber, that the Secretary of State has regarded the categories cited as examples of cases which might be exceptional as exhaustive; that, in other words, if the particular facts of a case do not fall within those examples, then almost by definition it cannot be an exceptional case; and in applying what he describes as that unduly rigid approach, the Secretary of State is not fairly and lawfully applying the policy by restricting the discretion which she needs in the circumstances to apply.

12. Plender J's decision has attracted some observations from Mr Khubber. He submits that in paragraph four, where Plender J said: "In a completely different way, however, this case is exceptional", the judge was effectively adopting the error of the Secretary of State.

My view

13. The position, as it seems to me, is this. The delay is something over three years as at the date of the decision. By the legacy policy, as I observed to Mr Khubber, the appellant may well have priority. He fits within the final category of those who do. The fundamental issue is whether it was an arguably irrational application of the legacy policy not to categorise his case as exceptional; whether, in other words, in the absence of immediate urgency and on the particular facts of the case, the only rational decision that could be made by the Secretary of State is immediate consideration of his case.

14. Not, I am bound to say, without hesitation, I have concluded that it was open to the Secretary of State to come to the decision set out in the letter of 8 October 2007. I have also come to the conclusion that, in categorising those circumstances which are exceptional in the way that she did, it cannot be said that she was restricting herself in the way suggested by Mr Khubber. It seems to me that Plender J was entitled to come to the decision that he did.

15. I would finally make this observation. Given that this case does apparently fall within that last area of priority, it may be that Mr Khubber's solicitors would wish to write to the Secretary of State enclosing or quoting the view I have just expressed. That might result in a speedier resolution of the appellant's position.

16. In short, therefore, I refuse permission.

Order: Application refused