CO/4647/2006

Neutral Citation Number: [2008] EWHC 2302 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 24th July 2008

B e f o r e:

MR JUSTICE MITTING

Between:
THE QUEEN ON THE APPLICATION OF JANET NLEYA
Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

Computer-Aided Transcript of the Stenograph Notes 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)

Victoria Laughton (instructed by Thakrar & Co Solicitors) appeared on behalf of the **Claimant**
Lisa Busch (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

J U D G M E N T
(Approved by the court)

1. MR JUSTICE MITTING: The claimant is a citizen of Zimbabwe. As found by an adjudicator in a reasoned determination, from May 2002 onwards she was a member of the Movement for Democratic Change and attracted the adverse and violent attention of state-sponsored political opponents.

2. She came to the United Kingdom on 8th May 2003 and claimed asylum. Her claim was rejected by a letter dated 26th June 2003, principally on credibility grounds.

3. She appealed to the adjudicator, who in a determination promulgated on 1st October 2003 upheld her appeal. He found that, notwithstanding discrepancies between her witness statement and her answers given in the interview with immigration officials, her account was credible. He concluded that the reason for the differences between the two accounts was a difficulty of interpretation, given the language that she spoke.

4. The Secretary of State applied to the Immigration Appeal Tribunal for permission to appeal. In a decision dated 29th October 2003 permission was granted, and in a determination promulgated on 25th May 2004 the Secretary of State's appeal was allowed and the matter was remitted for rehearing by another adjudicator. The ground upon which the appeal was allowed and the case remitted for a fresh hearing was that the discrepancy that existed between the screening interview and the statement could not reasonably be attributed to an error in translation.

5. The claimant sought to challenge that decision by judicial review proceedings. Permission to apply for judicial review was given by Lindsay J on 20th December 2004. A hearing was set for 24th June 2005, but in the event did not occur because on 17th June 2005 the parties signed a consent order, which provided, amongst other things, that "the decision of the Adjudicator Mr Mark Davies promulgated on 1st October 2003 be restored". The order was sealed on 6th July 2005.

6. In the summary grounds of defence it was argued that the date of sealing of the order was the relevant date for the purpose of determining whether and, if so, what delay had occurred in progressing her application for leave to remain, but Ms Busch rightly concedes that it is the date on which the form of consent was signed, 17th June 2005, which is the relevant date. She made that concession in the light of evidence given to Davis J in **R (Yusuf & Others) v Secretary of State for the Home Department** [2006] EWHC 3513. It was noted by him in paragraph 31 that time started to run from the date on which a decision of an adjudicator or an Immigration Judge was received, rather than from the date on which it was promulgated. The effect of the litigation was therefore that, by dint of the determination of the adjudicator, the United Kingdom recognised the claimant's status as a refugee. There remained only one further administrative step to take to grant her leave to remain. There was no need for any application for such a grant to be made; it followed automatically from the allowing of her appeal by the adjudicator. Nevertheless, on 24th July 2005 her solicitors wrote to the Immigration and Nationality Directorate, enclosing a copy of the consent order agreed with the Treasury Solicitors and inviting the Home Office to issue the claimant with "her status papers".

7. Nothing relevant to the grant of leave to remain then occurred until the Home Office wrote to the claimant's solicitors on 15th February 2006 requesting them to confirm the claimant's details (that is to say her name, nationality and date of birth) and requiring the submission of passport-sized photographs.

8. By a letter dated 15th March 2006 the Home Office made it plain that its decision as to the type of leave to remain which it would grant to the claimant would be determined by the policy as at the date of the grant and not the date on which the appeal was allowed. By a letter dated 13th April 2006, the Home Office granted to the claimant 5 years' limited leave to remain.

9. Representations had been made about the evident delay between the consent order on 17th June 2005 and the grant of leave on 13th April 2006. The letter stated:

> "The Secretary of State does not accept that the delay in granting leave is entirely attributable to him insofar as you have failed to comply with his requests to submit photographs. The delay has been neither startling or prolonged to warrant the Secretary of State departing from his published policy."

The first sentence, it is now accepted, is irrelevant. Insofar as there had been any delay in submitting photographs, it occurred after the change in policy and therefore has no impact on the question that I have to decide. As far as the second sentence is concerned, it is at the heart of the claimant's challenge to the decision and requires detailed consideration.

10. From 1998 until 30th August 2005 it was the declared policy of the Home Office to grant indefinite leave to remain to those recognised as refugees, subject always to exceptions in the case of those who had committed grave crimes or who had made fraudulent or deceptive claims, and possibly other exceptions too. None are relevant in this case. The genesis of the policy was explained in Davis J's decision in **Yusuf**, which I gratefully adopt.

11. In February 2005 a paper called "Controlling our borders: Making migration work for Britain" gave notice of the government's intention to grant to refugees temporary leave to remain rather than indefinite leave to remain.

On 19th July 2005 Mr Tony McNulty, in a written ministerial statement, announced that the change of policy would take effect from 30th August 2005. The policy was published in a guidance note on 25th August 2005. It explained that indefinite leave to remain would no longer be granted to those recognised as refugees, only 5 years' limited leave to remain, at the end of which an extension could be permitted but, if the conditions in the refugee's own country permitted it, the refugee could be expected to return home.

12. The lawfulness of that change of policy is not in issue. For those recognised as refugees it had one very significant and one less significant consequence. The very significant consequence was that the refugee would not be granted indefinite, ie permanent, leave to remain but only 5 years'. A less significant consequence was that a

refugee granted only 5 years' limited leave to remain would not be entitled as of right to secure the admission of new family members, ie a new spouse.

13. The guidance note also addressed circumstances in which it might still be appropriate to grant indefinite leave to remain:

> "**Circumstances in which it may still be appropriate to grant ILR**
>
> Where a claimant is to be granted leave on or after 30 August but we had previously undertaken to grant him/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 30 August when it otherwise would not have been;
>
> Then it **may** be appropriate to grant ILR instead of limited leave."

14. At the forefront of the claimant's submissions advanced by Miss Laughton is the proposition that the Home Office has not in this case applied its published policy. As a preliminary question, Miss Laughton also submits that the issue whether or not indefinite leave to remain should be granted was in effect determined by the consent order on 17th June 2005. Indeed, she goes further than that and submits that the effect of the consent order which reinstated the decision of the adjudicator meant that the decision as to the type of leave to remain to grant had actually been taken in or not long after 1st October 2003. I do not accept either way in which that proposition is put.

15. The Secretary of State was in my view clearly entitled to pursue legitimate challenges, by and in the appeal process, to the claim for asylum. Only when the appeal process was finally determined by consent order could the Secretary of State have come under any obligation to take the administrative step of granting leave to remain of any kind. Accordingly, in my judgement it cannot be said that there is any unlawfulness in the Secretary of State declining to grant indefinite leave to remain merely because the adjudicator's restored decision was made on 1st October 2003, or merely because the litigation finally ended with the consent order on 17th June 2005. The obligation to grant leave to remain only arose, and only arose for the first time, after the signing of the consent order.

16. The proposition can readily be tested in this way: if the consent order had been made on 29th August 2005, would the claimant then have been entitled automatically to the grant of indefinite leave to remain because that was the policy applicable until the following day? The answer, in my view, is self-evident: any administrative step, even the simplest, takes some time to perform. The policy that the type of leave to be granted would be determined as at the date on which the administrative step was taken is clearly lawful. It therefore follows that a consent order made as late as 29th August

2005 would inevitably have resulted in the grant of leave to remain after the policy changed.

17. I accept Davis J's proposition in paragraph 25.3 of his judgment that the Secretary of State made no promise or representation to any individual claimant to the effect that he would not change the policy or not apply the new policy as changed today, and that all that the claimants had was a expectation that:

> "25.3... upon a final disposal of the appeal process, they would thereafter be granted relief respecting their refugee status, in accordance with the 1951 Convention, and would be granted that relief without undue delay. But what precise form that grant took -- be it indefinite leave to remain or some other leave to remain -- was not a matter in respect of which they could have had a legitimate expectation, in the public law understanding of those words."

However, what the claimant was entitled to expect was that the published policy would be applied to her. Miss Busch accepts that an unexplained failure to apply published policy is irrational and accordingly capable of being quashed. The public policy in issue here is the statement in the guidance note of 25th August 2005 as to the circumstances in which it may still be appropriate to grant ILR. The first such circumstance, that the Home Office had undertaken to grant ILR does not apply here; it is only the second which does.

18. Like Davis J in paragraph 30 of his judgment, I understand the "significant delay" referred to to be the delay between the final determination of an appeal and the actioning of the outcome of the appeal by granting leave to remain and not any prior period, whether it can be categorised as delay or otherwise. On the facts of this case, the delay is 74 days.

19. The first question to be asked is what is meant by "significant delay". My tentative suggestion, with which Mr Busch agreed, was that two factors were relevant. Firstly, the period of delay and, secondly, the consequences. The word "delay" imports more than just the elapse of time; it implies that the time which has elapsed before a step is taken is longer than normal, or longer than is reasonable or some similar phrase. The word "significant" implies that the period longer than normal or reasonable is more than minimal. However, it is not a phrase that is capable of precise definition.

20. I remain of the belief that the consequences of delay are a factor to be considered in determining whether or not delay has been significant, but in a case such as this, where different categories of leave to remain are in issue, it seems to me it is inevitable that any delay which produces a less advantageous grant of leave than would have occurred but for the delay is going to be significant. I do not accept Miss Busch's proposition that for a claimant to be able to contend that in her case delay has been significant, she must establish something beyond the fact that she has been granted only limited rather than indefinite leave to remain.

21. The guidance identifies three particular factors which must be found to exist before the Home Office will consider that it may be appropriate to grant indefinite leave to remain after 30th August 2005. The first is that the delay is "out of step with other appeals of a similar nature". No evidence has been given in this case by Home Office officials about the length of time taken for appeals of a similar nature to this, but evidence was given to Davis J, and Miss Busch accepts that I should have regard to that.

22. In paragraph 31 Davis J noted the evidence of Mr Jones, the policy officer in the Asylum and Appeals Policy Directorate in the IND, in which he accepted that "33 days is the average period", according to statistics collected for the purpose, between an appeal being allowed and the grant of leave to remain. It is not entirely clear from Davis J's quotation from Mr Jones's evidence whether the starting point was the date upon which appeal rights had been exhausted or some earlier time, but even if it is taken as the latest of the possible dates, the date on which appeal rights were exhausted, the difference has no consequence on the facts of this case.

23. Miss Busch accepts that in the light of that evidence the delay of 74 days here was out of step with appeals of a similar nature. There is no explanation for the delay in the evidence which I have. Miss Busch again accepts that realistically, absent such evidence, the inference that the delay was attributable to the Home Office is inevitable. It is self-evident that if the grant of leave had occurred within a time which was in step with appeals of a similar nature, but for reasons attributable to the Home Office, it would have been granted before 30th August 2005. Accordingly, all three of the conditions identified in the policy are satisfied here.

24. The fact that all three of the conditions required by the policy are satisfied is a strong pointer to the conclusion that the delay is significant. Even if not, I am satisfied that the delay of 74 days was significant, both because of its length and because of the consequence for the claimant: she was deprived of the opportunity of being granted indefinite leave to remain rather than 5 years' limited leave to remain.

25. I turn, therefore, to whether or not the Secretary of State applied the policy in the decision letter of 13th April 2006. Miss Busch submits that she did, because in her submission "significant" means "startling or prolonged". I reject that proposition. Were the policy to have been framed using those words, it would have been open to challenge as itself unreasonable. If consideration could only be given to the granting of indefinite leave to remain after 30th August 2005, if the Home Office's delay had been "startling and prolonged", the policy would have been greeted with some surprise. "Significant" does not mean "startling or prolonged"; it means, as I have indicated, a period of time longer than is normal or reasonable, which has a significant consequence.

26. Miss Busch's formulation in effect equates "significant" with "unlawful". She referred me in the course of her argument to **R (Mambakasa) v Secretary of State for the Home Department** [2003] EWHC 319 (Admin), in which a period of 6 months' delay between appeal and the grant of indefinite leave was held to be unlawful, and in which the judge, Richards J, expressed the opinion that a period of 4 months' delay would also

have been unlawful, without determining what, if any, period of delay would have been lawful.

27. Applying this policy, the question is not whether the delay is unlawful, but whether it was significant, having regard to the three factors specifically identified in the policy. I am satisfied that, by directing herself that because the delay had been neither startling nor prolonged the Secretary of State should not depart from the published policy, she misdirected herself and that her departure from her published policy was irrational.

28. I turn, therefore, to the question of relief. Miss Laughton seeks a declaration that the claimant should be granted indefinite leave to remain. Tempted though I am to adopt that course to put an end to what has already been lengthy litigation, I do not believe that it would be right for me to do so. The relevant policy is discretionary. It does not require that indefinite leave to remain be granted if a claimant satisfies the conditions of the policy. All that it provides is that it may still be appropriate to grant indefinite leave to remain. Accordingly, I direct that the Secretary of State reconsider whether or not to grant indefinite leave to remain in the light of her published policy in the guidance note of 25th August 2005 and, in particular, of the circumstances in which her predecessor declared that it may still be appropriate to grant indefinite leave to remain even though the grant is made after 30th August 2005.

29. None of the other grounds of appeal advanced in the documents adds anything to the conclusion that I have already reached and I am not to be taken as accepting that they are well founded. To the extent that I have indicated, this claim succeeds.

30. MISS LAUGHTON: I am grateful, my Lord. I understand that it would be helpful if we drew up the order.

31. MR JUSTICE MITTING: Yes, please, as there is no associate in court. My clerk, although highly skilled, is not necessarily skilled in the drawing-up of orders.

32. MISS LAUGHTON: My Lord, the other issue is that of costs. My client is legally aided. However, that should not necessarily prevent the court from issuing costs.

33. MR JUSTICE MITTING: Miss Busch, it is normal practice for the taxpayer to be required to put a hand in one pocket and transfer the money to the other.

34. MISS BUSCH: I cannot think of any reason why the normal rules should not apply in this case.

35. MR JUSTICE MITTING: No. The defendant will pay the claimant's costs to be the subject of a detailed assessment if not agreed; public funding assessment of the claimant's costs. Anything else?

36. MISS BUSCH: I do ask for permission to appeal on the basis that this is a matter which has been considered both in **Yusuf** and in the present case, and the question of how this policy should be interpreted is of some significance. In particular, the question of whether or not the bare fact of the change of status is significant for the purposes of the policy, or whether instead additional factors are required to be taken

into account. This is a short point but, in my submission, one which would benefit from being examined by the Court of Appeal, with reasonable prospects of success, in my submission, that they would find that something additional requires to be satisfied, because otherwise everybody who comes within the terms of the policy and whose cases are subject to today, would automatically be subjected to significant delay.

37. MR JUSTICE MITTING: Miss Busch, I cannot believe that there are a significant number of cases still in the pipeline to which my decision could apply. If that had been the case, I would have granted you permission to appeal because of the general importance of the point, but I cannot believe that it is. I am, I am afraid, not persuaded that my decision is likely to be held to be wrong. So I do not think there is a realistic prospect of success and I refuse that application. Thank you both for interesting arguments.