Neutral Citation Number: [2011] EWHC 573 (Admin)

Case No: CO/3128/2010

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14th March 2011

Before :

MR JUSTICE OUSELEY

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Between :

THE QUEEN (on the application of ABDULLAHI SHEIKH MOHAMUD	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Mr Philip Nathan (instructed by **Hersi & Co Solicitors**) for the **Claimant**
Mr Matthew Barnes (instructed by **Treasury Solicitors**) for the **Defendant**

Hearing dates: 9th February 2011

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Judgment

Mr Justice Ouseley:

1. Article 11 of Council Directive 2003/9/EC, the Reception Directive, entitles applicants for asylum to enter the labour market subject to various conditions, when their claims have not been finally determined within a year, provided they are not responsible for that delay. The Court of Appeal in May 2009 in *ZO (Somalia) v SSHD* [2009] EWCA Civ 442, upheld by the Supreme Court on 28 July 2010, [2010] UKSC 36, decided that the provisions of Article 11 also applied to those who made a subsequent application for asylum, after their first claim had been unsuccessful.

2. The issue in this case is whether a decision by the Secretary of State for the Home Department that the subsequent application for asylum does not amount to a fresh claim means that the asylum seeker, who had become entitled to work under Article 11, is no longer entitled to seek or remain in employment.

The facts

3. The Claimant arrived in the UK in 2006 and claimed asylum. His claim was rejected and his appeal was dismissed later that year. On 6 July 2007, he made further representations to the SSHD, asking him to treat them as a fresh claim. On 13 December 2007, he applied for permission to work. On 22 June 2010, the SSHD

issued her decision refusing to accept those representations as a fresh asylum claim. That decision is the subject of another judicial review application; permission has not yet been granted and no interim relief was sought.

4. Between those two dates, the Claimant had asked for and had been granted permission to enter the labour market. He asked for permission on 13 December 2007, which was refused in March 2008. These proceedings were started in March 2010 challenging the refusal of permission to work. But permission was granted on 26 May 2010 after Treacy J had ordered it by way of interim relief. The SSHD says that any right to work ended on 22 June 2010.

The legislative framework

5. Article 11 of Council Directive 2003/9/EC, the Reception Directive, which is of direct effect, provides:

> "1. Member States shall determine a period of time, starting from the date on which an application for asylum was lodged, during which an applicant shall not have access to the labour market.
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> 2. If a decision at first instance has not been taken within one year of the presentation of an application for asylum and this delay cannot be attributed to the applicant, Member States shall decide the conditions for granting access to the labour market for the applicant.
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> 3. Access to the labour market shall not be withdrawn during appeals procedures, where an appeal against a negative decision in a regular procedure has suspensive effect, until such time as a negative decision on the appeal is notified."

6. These provisions were transposed or at least were intended to be transposed into UK law by paragraphs 360 and 360A of the Immigration Rules. These were amended on 9 September 2010 but for applications for permission to work made before that date, as is the case here, they provided as follows:

> "360 An asylum Applicant may apply to the Secretary of State for permission to take up employment which shall not include permission to become self employed or to engage in a business or professional activity if a decision at first instance has not been taken on the Applicant's asylum application within one year of the date on which it was recorded. The Secretary of State shall only consider such an application if, in his opinion, any delay in reaching a decision at first instance cannot be attributed to the Applicant.
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> 360A If an asylum Applicant is granted permission to take up employment under Rule 360 this shall only be until such time as his asylum application has been finally determined."

7. On 19 August 2010, a Statement of Changes to the Immigration Rules was laid before Parliament to take effect on 9 September 2010. This was to take account of the decision of the Supreme Court in *ZO (Somalia)*. Where a further submission raising asylum grounds had been made and the applicant had no permission to take up employment, the relevant new provisions are in paragraphs 360 C-E; the most important is paragraph 360E. After a year has elapsed without determination of the further application, absent fault on the applicant's part, permission is granted only until such time as :

> "(i) A decision has been taken pursuant to paragraph 353 that the further submissions do not amount to a fresh claim; or
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> (ii) Where the further submissions are considered to amount to a fresh claim for asylum pursuant to paragraph 353, all rights of appeal from the immigration decision made in consequence of the rejection of the further submissions have been exhausted."

8. Mr Barnes submitted that this only made explicit what the SSHD contended was implicit in the earlier paragraphs of the Rules anyway.

9. Article 2(c) of the Reception Directive defines an applicant for asylum as one in respect of whose application "a final decision" has not yet been taken. As a further application for asylum was held in *ZO (Somalia)* to fall within the scope of an application for asylum, it was pursuant to the provision that this Claimant obtained access to the labour market.

10. Council Directive 2005/85/EC, the Procedures Directive, defines "final decision" at Article 2(d) using the same definition of applicant as in the Reception Directive. The provisions of the one Directive can properly be used in the interpretation of the other. A "final decision" is a decision:

> "(d)…which is no longer subject to a remedy within the framework of Chapter V of this Directive irrespective of whether such remedy has the effect of allowing applicants to remain in the Member States concerned pending its outcome, subject to Annex III to this Directive;"

11. This Directive also deals with decision-making in subsequent applications for asylum. Recital 15 provides:

> "Where an applicant makes a subsequent application without presenting new evidence or arguments, it would be disproportionate to oblige Member States to carry out a new full examination procedure. In these cases, Member States should have a choice of procedure involving exceptions to the guarantees normally enjoyed by the applicant."

12. Decisions have to be notified in writing, with information about how to challenge negative decisions.

13. Section IV of Chapter III provides in Article 32 for how further applications are to be considered. They can be dealt with in the course of decision-making on the existing application or on appeal, provided that all the further material can be considered; Article 32(1). This provision also permits a further application to be dealt with following the same procedure as for the original application.

14. However, as the recital envisages, Member States can adopt a shortened procedure. They may apply a "specific procedure" referred to in Article 32(3) where the subsequent application is made after a final decision has been taken on the previous application.

15. Article 32(3) and (4) provide:

> "3. A subsequent application for asylum shall be subject first to a preliminary examination as to whether, after the withdrawal of the previous application or after the decision referred to in paragraph 2(b) of this Article on this application has been reached, new elements or findings relating to the examination of whether he/she qualifies as a refugee by virtue of Directive 2004/83/EC have arisen or have been presented by the applicant.
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> 4. If, following the preliminary examination referred to in paragraph 3 of this Article, new elements or findings arise or are presented by the applicant which significantly add to the likelihood of the applicant qualifying as a refugee by virtue of Directive 2003/83/EC, the application shall be further examined in conformity with Chapter II."

16. Chapter II provides the basic procedural guarantees. Articles 32 and 34, but not 39, are part of Chapter III entitled "Procedures at First Instance".

17. Article 34 entitles applicants whose cases are subject to this preliminary examination to certain guarantees in Article 10. Article 10(1)(e) in Chapter II requires them to be informed of the decision and told how to challenge a negative decision. Article 34(3) also requires the applicants to be informed of the outcome of the preliminary examination and, if the application is not to be examined further, they have to be given the reasons and told of "the possibilities for seeking an appeal or review of the decision."

18. Chapter V then deals with the appeals procedures referred to in Article 2(d): by Article 39(1), applicants have the right to an effective remedy "before a court or tribunal" against "(a) a decision taken on their application for asylum, including a decision: (i) to consider an application inadmissible pursuant to Article 25(2)", and against "(c) a decision not to further examine the subsequent application pursuant to Articles 32 and 34." An application is inadmissible under Article 25(2)(f) where it is identical to an application on which a final decision has already been made. It was left for Member Sates to decide whether the remedy under Article 39(1) should have the effect of allowing applicants to remain in the country pending its outcome.

19. The SSHD's contention was that she had not adopted the preliminary examination procedure in Articles 32 (2)-(7). There was no obligation to adopt it and she had not done so. Although paragraphs 353 and 353A of the Immigration Rules describe a seemingly not very different procedure, they were not a transposition of the Directive's preliminary examination procedures. I set them out:

> "353 When a human rights or asylum claim has been refused … and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
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> (i) had not already been considered; and
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> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.
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> 353A Consideration of further submissions shall be subject to the procedures set out in these Rules. An applicant who has made further submissions shall not be removed before the Secretary of State has considered the submissions under paragraph 353 or otherwise."

20. The difference between the preliminary examination procedure in Article 32 and the procedure under the Immigration Rules, so Mr Barnes for the SSHD informed me, lies in the closeness of the examination of the claim undertaken on behalf of the SSHD which went somewhat beyond that required to satisfy the Directive's notion of a preliminary examination.

Submissions

21. Mr Nathan for the Claimant submitted that the decision was not final until the effective remedies granted or required by the Directive had been exhausted; judicial review was that remedy in respect of a decision not to treat further representations as giving rise to a fresh claim. It was in substance a suspensive remedy, for the purposes of Article 11(3) of the Reception Directive. If there was no remedy which satisfied the requirement of the Procedures Directive, the deficiency in transposition meant that the directly effective provisions of the Directive provided one.

22. Mr Barnes submitted that the decision fell within the scope of Article 11 (3), since the remedy of judicial review was not suspensive. Further, the decision not to treat further representations as amounting to an application for asylum was the final decision within Article 2(d) of the Procedures Directive, and finally determined the application for the purposes of paragraph 360A of the Immigration Rules. Permission to work thereupon ceased. But Article 39 did not apply to it so as to require a right to an effective remedy.

Conclusions

23. The starting point in my judgment is that as Article 11 applies to the applicant's ability to enter the labour market after making a further application, Article 11 (3) must be applicable to the ending of that entitlement. It clearly permits access to the labour market to be withdrawn after a negative first instance decision which only leads to a non-suspensive appeal. Access can therefore be withdrawn before the final decision as defined in Article 2(d) is reached and while the applicant for asylum remains an applicant for asylum.

24. Article 11(3) envisages, in the way in which it is applied to the decision on a further application, that the first instance decision on that further application is appealable. But it is only where that appeal has suspensive effect that the appeal against the further negative decision does not permit the ending of the entitlement to enter or remain in the labour market. Appeal for these purposes includes the effective remedy required by Article 39. As with a first application, an applicant may still be an applicant for asylum in the sense that no final decision as defined in the Procedures Directive has been reached on his asylum application. But that final decision is not what the specifically relevant provision requires for access to the labour market lawfully to be withdrawn. It only requires a decision against which the appeal is non-suspensive.

25. Chapter 3 of the Procedure Directive contains the "regular procedure", referred to in Article 11 (3) of the Reception Directive pursuant to which the decision is taken, and Chapter V contains the appeal procedures. The remedy of judicial review is clearly an effective remedy in respect of a decision that the further representations do not amount to a fresh claim, and Mr Nathan did not suggest otherwise. It falls within the scope of Article 39(1) of Chapter V dealing with appeals procedures. By Article 39(3) it is for national rules to decide whether the remedy under Article 39(1) should be suspensive, allowing the individual to remain in the country until its determination. So a non-suspensive remedy can be a sufficiently effective one.

26. The decision that further representations do not amount to a fresh claim is not appealable, and judicial review is the only effective remedy. The question is whether judicial review is a suspensive remedy. The remedy of judicial review is clearly not suspensive of itself. Suspension of removal is not inherent in the making of an application for permission to apply for judicial review nor in the grant of permission to apply for it. The Immigration Rules suspend removal until the further representations have been considered, but not once a decision has been made that the representations do not amount to a fresh claim. There is no provision in the Rules that the issuing of judicial review proceedings to challenge that decision makes it suspensive again. That is Mr Barnes' approach.

27. Mr Nathan relied upon the guidance or policy in the UKBA document "Judicial Review and Injunctions", replacing chapter 60 of its Enforcement Instructions in July 2010. Sections 4-7 deal with the circumstances in which the making of a judicial review claim, or in certain circumstances the threat of such a claim, will lead to the deferral or cancellation of Removal Directions. There are situations in which that will not be the case, and either way, there is some scope for discretion or judgment to be exercised. Charter flights are subject to special arrangements. This guidance applies to

judicial review generally and is not confined to fresh claims. It applies to cases where statute itself provides for an appeal to be non-suspensive.

28. I would add that a court would or at least should be very slow to require the cancellation of Removal Directions where the SSHD has arguably not applied this Guidance unless persuaded that there was some merit to the claim other than that the Guidance had not been followed.

29. I accept that there will be judicial review cases challenging decisions refusing to accept further representations as a fresh claim which will lead to an injunction preventing removal or a decision not to proceed with removal for the time being. There will be others where that is not the effect. I am not prepared to find that one is more common than another. The judicial review proceedings here challenging the refusal to treat the further representations as a fresh claim may have prevented removal in accordance with that policy. Mr Nathan submits that judicial review is in these circumstances a suspensive remedy. It may just be that the Claimant is not practically removable to Somalia.

30. In my judgment, Mr Barnes' approach is correct. The more natural meaning of the language of the Directive involves an examination of the legal nature or requirement of the remedy itself, rather than an examination of the way UKBA guides its officials on the practicalities of enforcement of removals. Article 11(3) is not in my judgment concerned at all with the practical enforcement policies which the national authority may apply where a challenge to removal is brought, in recognition of the difficulties created by last minute applications to court to prevent removal. These enforcement policies are not peculiar to this type of further application, and apply even where the appeal is by statute non-suspensive. Yet the same argument from Mr Nathan about what is "non-suspensive" within the Directive would apply even to those. It would be a misinterpretation of the Directive to hold that appeals which by statute are non-suspensive are in reality suspensive because of the practical enforcement issues which arise where judicial review intervenes. It seems to me that the purpose behind Article 11 (3) was to achieve certainty so that the national authority and applicant could know that seeking a particular remedy, as a matter of law and not expediency, would or would not lead to suspension of removal and so retain the right to access the labour market. The availability of judicial review, or even the grant of an injunction preventing removal in the course of judicial review proceedings, would not turn judicial review into a suspensive remedy for the purposes of Article 11(3).

31. On the proper application of Article 11(3) to the remedy of judicial review, I hold that it is non-suspensive, and the SSHD was entitled under the Directive to withdraw the Claimant's access to the labour market as from 22 June 2010.

32. However, the Directive does not require access to the labour market to be withdrawn while a non-suspensive appeal is pending. The Immigration Rules can provide for greater access if a Member State so desires. If the provision in the Rules applicable to this Claimant, paragraph 360(A) above, means that access cannot be withdrawn until the "final determination" of judicial review proceedings, by which a decision not to treat representations as a fresh claim can be challenged, the SSHD cannot withdraw access until then. That stage has not yet been reached here.

33. It is clear that the changes to the Rules after *ZO (Somalia)* in paragraph 360E above enable access to be withdrawn when the SSHD decides that the representations do not amount to a fresh claim. And for the reasons given above, the availability of judicial review does not mean that the "appeal" is suspensive.

34. I cannot however read "finally determined" in paragraph 360A of the 2005 version of the Rules as encompassing the provisions of paragraph 360 C-E of the September 2010 version of the Rules, if paragraph 360A applied at all to further applications for asylum. The expression "finally determined" is intended to cover the final determination of those asylum applications to which it applied. Paragraph 360C-E is only what the Rules would have provided if the problem had been realised. Paragraph 360C-E provides comprehensively for access to the labour market and its withdrawal during the consideration of a further claim.

35. In my judgment, however, the 2005 version of the Rules should not be construed so as to provide an enlarged right to work when the intention was to provide the minimum, or rather, as it turned out, less than the minimum required by the Directive. Paragraph 360A in that version was not intended to give any right to access the labour market while any further application for asylum was being decided, even at first instance. It simply did not apply to further applications for asylum. Their role in transposing the Directives proceeded on the false premise that the Directives did not treat a subsequent application for asylum as within the scope of an application for asylum. It assumed, wrongly, that the Reception Directive did not apply so as to give access to the labour market on a second application for asylum. "Finally determined" in paragraph 360A of the 2005 Rules meant finally determined on the first application. There was no provision in the 2005 Immigration Rules, on a further application for asylum, for access to the labour market and withdrawal of access. Both in the Court of Appeal and in the Supreme Court in *ZO (Somalia),* the argument turned on what the Directives meant by an application for asylum. The Immigration Rules were not really relevant since they had to transpose the Directives correctly to be effective.

36. I see no reason to interpret the 2005 Rules as containing a right which they were not intended to contain, and which, if they had contained it, would also have contained the lawful qualifications to it now in the 2010 version, but which cannot be implied into the words used in the 2005 version. There is no need to imply in to the 2005 Rules the right to access the labour market during the consideration of a further application since the Claimant can rely on his directly effective rights. But he has to rely on them with their associated qualifications, and can do no better under the directly effective provisions of the Directives than obtain access to the labour market which was lawfully ended on 22 June 2010.

37. Mr Barnes also argued that there had been a "final decision" under the Rules and Directives when the SSHD refused to treat the further representations as a fresh claim. Mr Nathan said otherwise.

38. In my judgment, a "final decision" in Article 2(d) of the Procedure Directive was required for the Claimant to cease to be an asylum applicant. That much is not in issue. That requires a decision which is no longer subject to a remedy within Chapter V, whether or not that remedy is suspensive. Chapter V requires the Member State to provide an effective remedy in respect of decision that an application is inadmissible

because it is identical to one already ruled on, and to decisions made under the preliminary examination procedure not to examine the new claim further.

39. Mr Nathan points out that that requires a remedy not just in respect of a decision which is of the same nature as the one made here, but also in respect of one where the authority contends that the further application is identical. Mr Barnes' answer was that the SSHD had not adopted that preliminary examination procedure and so the requirements for an effective remedy did not apply to it. The SSHD had devised a route which skirted but did not bring her within that part of the Directive; and had provided for a final decision which was not subject to a remedy within Chapter V. If so, riposted Mr Nathan, there had been an error in transposition.

40. If there needs to be a final decision on the further application for asylum before rights of access to the labour market can be withdrawn, then Mr Nathan's arguments are correct. The obligation to provide an effective remedy covers all decisions on the application for asylum which the national authority may make. These include inadmissibility decisions and decisions on the two stages of the preliminary examination procedure, including the first stage: broadly, is there anything significantly new which warrants further examination?

41. Mr Barnes' submission would run counter to the purpose of Article 39, and would require the clearest possible wording in the Directive to sustain it. There is no reason why the greater scrutiny given by the SSHD at the first stage of the examination of a fresh claim, if it is indeed greater than that required or envisaged by Article 32 (3), should mean that no effective remedy was required. Article 32 requires further claims to be examined in the framework of the earlier application or in the framework of an appeal if the nature of the appeal is sufficiently open to the admission of further evidence. Article 32(2) permits the national authority to depart from that where a person makes a subsequent application: it "may apply a specific procedure as referred to in paragraph 3", which is the preliminary examination procedure.

42. Now, it may be that the permissive nature of Article 32(2) simply permits the adoption of the preliminary examination procedure instead of the full regular procedure in Chapter 3, and does not permit varieties of national procedures to be adopted. But, if the SSHD is entitled to adopt her own variant as the "specific procedure as referred to", that specific procedure must encompass the two equivalent stages of the variant shortened procedures adopted to deal with repeat claims. These two stages are the inevitable components of a shortened procedure: is there something new of significance? If so, does the application now succeed? If it does not do that, any State could simply avoid the obligation to provide an effective remedy on further applications by some variant falling outside Article 32(3). A construction which permitted that would fail to give the necessary purposive construction to Article 32 and Article 39.

43. Therefore Chapter V does apply to the SSHD's variant procedure in the Immigration Rules, and the effective remedy of judicial review is part of the decision making process on whether someone making a further claim is still an asylum applicant.

Overall

44. However, the claim fails because Article 11(3) of the Reception Directive does not require a final decision on the further claim; it requires a decision which leads to a non-suspensive appeal or review. The Immigration Rules do not give him any greater right.