CO/585/2007

Neutral Citation Number: [2008] EWHC 1604 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Date: Wednesday, 25th June 2008

B e f o r e:

HIS HONOUR JUDGE MACKIE QC

- -

Between:
THE QUEEN ON THE APPLICATION OF
(1) MIN MIN
(2) ZAHRA ALI OMAR

Claimant

v

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

- -

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Richard Wilson QC and Philip Nathan (instructed by Duncan Lewis & Co) appeared on behalf of the **Claimants**
Robin Tam QC and Daniel Beard (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

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J U D G M E N T

1. JUDGE MACKIE: The claimants Ms Omar and Mr Min today seek judicial review of the Secretary of State's decisions to refuse them a right to work while awaiting decisions on their applications to make fresh claims, both of which were put forward on 9th May 2005. The second claimant received permission from Cranston J on 10th March 2008, and as regards the first claimant, permission was conceded by the defendant in the Court of Appeal following a previous refusal by Stanley Burnton J (as he then was). There is also an application by the second claimant to renew an application for permission, which I propose to deal with separately, after giving judgment in this case.

2. The issue in these two cases is the meaning of "application for asylum" within Article 11 of the Council Directive 2003/9/EC of 27th January 2003, laying down minimum standards for the protection of asylum seekers, which I shall refer to as the "Reception Directive".

3. Both claimants arrived in this country and claimed asylum. Their applications were unsuccessful and their appeals failed. They have each sought to make fresh claims and seek the right to work. The claimants say that their proposed fresh claims amount to an application for asylum within Article 11; the defendant submits that they do not.

4. I turn first to the facts which I will deal with briefly because they are not central to this case, it being one of interpretation of the provision which I have identified. Like counsel, I will not deal with the first claimant at all, but concentrate only on the facts as they affect Ms Omar. Ms Omar arrived in the United Kingdom on 29th December 2003 and made an asylum claim the following day, which the defendant rejected on 17th February 2004. On 12th May 2004 the Immigration Adjudicator rejected the asylum claim, finding that the appellant's account lacked credibility. On 8th October 2004 the claimant's attempts to challenge the Adjudicator's determination were rejected by Collins J. On 9th May 2005 the claimant made a fresh application for asylum and there followed a sequence of correspondence which I need not record until February 2007, when permission to apply for judicial review was granted by Bean J. On 31st August 2007 the respondent refused the appellant's application for a right to work. There ensued a correspondence which led to this application.

5. I next turn to the provisions which are at the heart of the application, which have been the subject of admirable submissions to me from Mr Wilson QC and Mr Nathan for the claimant, and Mr Tam QC and Mr Beard for the respondent. The starting point is fresh claims and the Immigration Rules at 353, which are familiar to those who work in this court. 353 provides, amongst other things that:

> "353... [A] 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:
>
> (i) had not already been considered; and

> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

For a reason I shall give shortly, I also mention the new paragraph 353A which came into effect on 1st December 2007. This provides:

> "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."

Of course 353 begins "When a human rights or asylum claim has been refused and any appeal relating to that claim is no longer pending". So it follows that the further applications made in this case begin from that starting point.

6. Paragraphs 360 and 360A deal with a grant of permission to take up employment, and provide in relevant part 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."

7. That provision springs from the Reception Directive to which I have already referred. Both sides place considerable reliance on various provisions within the Directive to support their competing submissions. So I will refer briefly to the principal provisions upon which they rely. The recitals to the Reception Directive include:

> "(4) The establishment of minimum standards for the reception of asylum seekers is a further step towards a European asylum policy.
>
> (5) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. In particular, this Directive seeks to ensure full respect for human dignity and to promote the application of Articles 1 and 18 of the said Charter...
>
> (7) Minimum standards for the reception of asylum seekers that will normally suffice to ensure them a dignified standard of living and comparable living conditions in all Member States should be laid down."

There is a reference at (12) to the possibility of abuse being restricted by laying down cases for the reduction or withdrawal of reception conditions. (16) refers to Member States being invited to apply the provisions of the Directive in connection with procedures for deciding on applications for forms of protection other than that emanating from the Geneva Convention for third country nationals and stateless persons. This is in effect a reference to what I will call the "Procedures Directive". That is Council Directive 2005/85/EC of 1st December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

8. Beyond the recitals, and I have regard to all of them when construing the Directive, there are the articles, of which particular emphasis is laid on the following. Article 1 provides that the purpose of the Directive is to lay down minimum standards for the reception of asylum seekers in Member States. The claimants emphasise that there is nothing explicit that limits the reception of asylum seekers to first time or initial asylum seekers only. Within the definitions, there is, at Article 2(b):

> "(b) 'application for asylum' shall mean the application made by a third-country national or a stateless person which can be understood as a request for international protection from a Member State, under the Geneva Convention. Any application for international protection is presumed to be an application for asylum unless a third-country national or a stateless person explicitly requests another kind of protection that can be applied for separately..."

The claimants emphasise what they say is the breadth of the words "Any application for international protection", because they submit that that would cover not only an application for asylum as such, but any other application in the broader sense for that protection, which they submit includes the potential fresh claims which have been put forward.

9. At 2(c):

> "(c) 'applicant' or 'asylum seeker' shall mean a third country national or a stateless person who has made an application for asylum in respect of which a final decision has not yet been taken..."

The defendant submits that that is what, amongst other things, takes the claimants out of the definition of an applicant or asylum seeker because the final decision has, they submit, been taken in their cases. There are, elsewhere in 2, definitions of reception conditions, and material reception conditions, which I will not read out, but which are relied upon by Mr Wilson.

10. Article 3 is concerned with the scope and reads as follows:

> "1. This Directive shall apply to all third country nationals and stateless persons who make an application for asylum at the border or in the territory of a Member State as long as they are allowed to remain on the territory as asylum seekers, as well as to family members, if they are

covered by such application for asylum according to the national law."

The claimants place emphasis on the assumption within that article of asylum seekers being allowed to remain on the territory as asylum seekers. The defendant says that is not the case because once they have exhausted their appellate remedies they cease to be asylum seekers. That is one of a series of provisions in this and the Procedures Directive, where points made by both sides beg the question of what is meant by "application for asylum", "applicant" and "asylum seeker".

11. Article 5 and Article 6, dealing with information and documentation, contain provisions relied upon by the defendant as showing that what is intended by the Directive is indeed a reception or welcome to asylum seekers, not a regime to deal with those who have been received into this country, had their applications dealt with and refused and then exhausted rights of appeal.

12. Some reliance is placed by the claimants on Article 7, dealing with residence and freedom of movement, but the central article in this case is Article 11 that provides in relevant part as follows:

> "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.
>
> 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."

13. Another article to which attention has been directed is Article 16. Article 16 is headed "Reduction or withdrawal of reception conditions" and is a sort of anti-abuse provision. The article provides:

> "1. Member States may reduce or withdraw reception conditions in the following cases:
>
> (a) where an asylum seeker:
>
> —— Abandons the place of residence determined by the competent authority without informing it or, if requested, without permission, or
>
> —— Does not comply with reporting duties or with requests to provide information or to appear for personal interviews concerning the asylum procedure during a reasonable period laid down in national law, or
>
> —— Has already lodged an application in the same Member State."

14. The claimants rely upon that third condition as being an indication that an asylum seeker may already have lodged a previous application but still be an asylum seeker within the Reception Directive. The defendant says that the condition is entirely consistent with what happens in this and other jurisdictions, those seeking asylum often make multiple applications, frequently under different names.

15. Paragraph 4 of Article 16 provides:

> "4. Decisions for reduction, withdrawal or refusal of reception conditions or sanctions referred to in paragraphs 1, 2 and 3 shall be taken individually, objectively and impartially and reasons shall be given."

Paragraph 5 says:

> "5. Member States shall ensure that material reception conditions are not withdrawn or reduced before a negative decision is taken."

Some reliance was placed upon that by the claimants, but it seems clear from the definitions that the material reception conditions do not include the right to work. I will come back to Article 16. I am concerned today with its relevance to the issue of construction with which I am concerned, but not with any other aspects of how it should operate.

16. I turn from the Reception Directive to the Procedures Directive, which I will mention more briefly. The recitals provide at (1):

> "(1) A common policy on asylum, including a Common European Asylum System, is a constituent part of the European Union's objective of establishing progressively an area of freedom, security and justice open to those who, forced by circumstances, legitimately seek protection in the community...
>
> (5) The main objective of this Directive is to introduce a minimum framework in the Community on procedures for granting and withdrawing refugee status."

17. There is a further reference to the Charter of Fundamental Rights at (8). There is a reference at (11) of the recitals to the interests of applicants and Member States of deciding as soon as possible on applications for asylum. Recital (15) refers to the situation where an applicant makes a subsequent application without presenting new evidence or arguments, and provides that:

> "(15) ... 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."

The purpose of this Directive given in Article 1:

> "... is to establish minimum standards on procedures in Member States for granting and withdrawing refugee status."

There are similar definitions as to those in the first Directive, with the addition of "final decision" being defined in Article 2 as:

> "(d)... a decision on whether the third country national or stateless person be granted refugee status by virtue of Directive 2004/83/EC and 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 [various matters]..."

The scope of the Directive is given at Article 3 as applying to:

> "1... all applications for asylum made in the territory, including at the border or in the transit zones of the Member States, and to the withdrawal of refugee status."

18. Throughout this Directive there are, at passages identified by counsel for the claimants, references to the word "application" preceded by an adjective such as "subsequent", "inadmissible" or "unfounded", which they rely upon to suggest that the absence of such adjectives from "applications" in the Reception Directive connotes a broad meaning.

19. Under Section 4 [of Chapter 3] there is Article 32, dealing with subsequent application, which contains a framework. Article 32.1 provides that:

> "1. Where a person who has applied for asylum in a Member State makes further representations or a subsequent application in the same Member State, that Member State may examine these further representations or the elements of the subsequent application in the framework of the examination of the previous application or in the framework of the examination of the decision under review or appeal, insofar as the competent authorities can take into account and consider all the elements underlying the further representations or subsequent application within this framework."

20. The article begins at 1 by referencing to a "person who has applied" not to "an asylum seeker". That categorisation applies elsewhere within the article, notably in paragraph 2. It is submitted on behalf of the defendant that it is clear from Article 32 that subsequent attempts to renew asylum claims are to be looked at in the context of Article 32 and not to be seen in the same category as asylum claims. In the interests of comparative brevity, I have not read out all the passages relied on by the parties.

21. I next turn to another document relied upon, which is the Charter of Fundamental Rights of the European Union. There is some uncertainty or disagreement about the

status of this document, which seems to me not to matter greatly, bearing in mind that its provisions are specifically referred to in the Directive. Reliance is placed by the claimants particularly on the articles identified in the Directive, which are Articles 1 and 18. Article 1, under "Human dignity", provides that:

> "Human dignity is inviolable. It must be respected and protected."

The defendants say that reliance on human dignity has to be trimmed to take account of the fact that in this context it is a term of art, not a broad and general phrase intending to encompass the complete range of what we would regard as dignity in a lay sense.

22. Article 15 grants a freedom to choose an occupation and the right to engage in work, which applies not just to every citizen of the Union, at 15.2, but to "everyone", at 15.1, but needs to be seen, as the defendant points out, in the context of 15.3:

> "3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union."

That presupposes authorisation.

23. Article 18 is the right to asylum. The defendant also points out the existence of Articles 51, 52, 53 and 54, which are familiar concepts in charters and treaties of this kind, which place restrictions on the practical scope of guaranteed rights and "abuse". Against that background I was also taken to some authorities.

24. As regards the approach to be adopted to construing EU legislation, I was referred to the well-known passage of Sir Thomas Bingham, Master of the Rolls (as he then was) in **R v Stock Exchange ex parte Else** [1993] WLR 70 where, in the well-known passage at page 76, between F and H, he observes that:

> "[If a] Community law issue is critical to the court's final decision, the appropriate course is ordinarily to refer the issue to the Court of Justice unless the national court can with complete confidence resolve the issue itself."

There is then guidance given about that. Both sides submitted that this matter need not go to the European Court of Justice, because I could and must resolve the matter with complete confidence in their favour. So in a sense they are united about that.

25. I was taken also to two decisions concerning the approach to construction, very short passages in the case of **Humblet v Belgian State** [1960] ECR 559, and in another ECJ case**, Cimenteries** (15th March 1967), to a short passage about the approach to construction. I say at once that I approach those cases and the question of the approach to construction with considerable caution. If any point were to arise on the approach to interpretation, the examination of the relevant law would need to be of greater length and, from one's experience of previous cases, of a wider range of authorities than those that have been produced, helpfully but at very short notice, by the claimants. So if this case goes any further, I would urge those seeking to rely on points of European

interpretation to develop their case more fully and with more notice than I have had the benefit of.

26. Turning to the competing submissions, the claimant's case as set out in their skeleton argument is that, having made their respective claims for asylum on 9th May 2005, they became entitled to work under Article 11.2 of the Reception Directive 12 months later. They submit that the Reception Directive draws no distinction between initial and subsequent claims for asylum, and that accordingly nor should its domestic implementation in the form of paragraph 360 of the Immigration Rules. They submit that the defendant's own policy, at least in part, accepts this by conferring the rights available under paragraph 360 to those whose claims have been recognised as fresh under 353 but for whom the final decision has not been taken. The only other written submission in support of their application, other than in response to the defendant's argument, briefly makes a point on Article 16.

27. Those brief submissions were very helpfully developed in more detail by Mr Wilson for the claimants. The backdrop to his submissions is his suggested approach to construction: he says that the Directives are of direct effect and should be given effect to in that sense. The proposition was not conceded by Mr Tam. Mr Wilson submits that another principle of interpretation supported by his authorities is that where the wording is open to more than one interpretation the provisions should be construed in accordance with the relevant European Union principles. He submits that similarly directives must be construed having regard to respect for fundamental rights.

28. His first submission is that, simply on the face of the provision, one should see that the interpretation of the defendant is not available because it faces no restrictions upon the definition of "application for asylum" to limit it to a meaning such that only an initial application for asylum is covered. Yes -- but as far as that broad approach is concerned, the meaning of "application for asylum" and "applicant" or "asylum seeker" must be derived where there is an express definition from that definition. That led to counsel's second point, which is the one that I have already indicated in relation to Article 2(b). He says that an application for international protection is what his clients had made. That is presumed to be an application for asylum, another kind of protection that can be applied for separately. As a result, that definition carries over into 2(c) and, on the face of the definition, his clients are asylum seekers or applicants making applications for asylum. He says that, in a sense, the argument stops there, but then he relies upon a number of other factors which he says support his client's position.

29. He places emphasis on the Articles of the Directive to which I have referred. He relies upon the references in the preambles as being consistent only with the approach which he urges the court to take. He relies upon Articles 1 and 18 of the Charter, which he says should remove any doubts that there might be in construing these provisions as he submits they should be read.

30. He next argues that Article 16 contemplates that an "asylum seeker", the expression used in 16.1, may also be in the position of being someone who has already lodged an application in the same Member State, and submits that it is clear from Article 16 that the definition should include his clients. He submits that the use of the word

"applications" in the Reception Directive without adjectives points to that word having a broad meaning, given the frequency with which that same word is qualified by adjectives in the Procedures Directive.

31. Finally he submits that where the court is concerned with the interpretation of fundamental rights, those should not be derogated from unless the words are very clear, and he relies upon the ECJ authorities which I have referred to earlier.

32. For the defendant, Mr Tam relies first on the fact that the Reception Directive is concerned with the minimum conditions for the reception or "welcome" of asylum seekers. That is to say what he describes as an "initial encounter". He submits that the Directive, as its provisions indicate, focuses on this initial encounter between Member State and the person seeking protection. He submits that the definitions of "applicant" and "asylum seeker" confirm this because an applicant or an asylum seeker is not merely a person who has made an application for asylum, but a person who has made an application for asylum in respect of which a final decision has not yet been taken. He relies on some provisions within Article 5 and Article 6 which he says support the concept of initial encounter.

33. Mr Wilson relies on other provisions which suggest that the encounter may be more than an initial encounter, but that leads to Mr Tam's submission, given the overall purpose of the Reception Directive, the way in which the definitions of "applicant" and "asylum seeker" were expressed, that one can only read the two terms applicant or asylum seeker as being someone whose initial application for asylum has not been finally determined, which in this case both have.

34. He relies also upon the Reception Directive as being part of a general scheme developed by the Community, and to the specific recognition one finds in the Directive in Recital 15 and in Articles 32 and 34 of a subsequent application being distinct from an initial application. He submits that the purpose and wording of the Procedures Directive indicates that a person making a subsequent application is not to be treated in the same way as an applicant or asylum seeker.

35. Finally he submits that an alternative reading of these provisions would facilitate abuse. If a failed asylum seeker knows that the simple expedient of making a further claim or further submissions is likely to permit access to certain types of benefits and support, there is almost no disincentive to such an action. He submits that the greater the number of further claims or submissions that are made, the longer it is likely to take for each to be dealt with, and the longer the period for which the benefits or support would be secured. In response to a question from me, he submitted that the difference of interpretation here was so fundamental that it would bear equally harshly and abusively in every single Member State, given the breadth of the distinction which is sought to be drawn.

36. In my judgment the position is as follows: first, no fine points or distinctions arise over the approach to the interpretation of the directives for the reasons that I have given. If they were to have arisen, I have not been equipped with the material to evaluate them. Secondly, these directives clearly interlink and must be construed with each other in

mind. Expressions are used interchangeably and each gives guidance as to the approach to be taken by the other. Thirdly, one must start by looking at the framework of the directives as a whole. When one looks at the directives, the first one deals with the reception of asylum seekers who arrive and seek to make a claim and then have that claim evaluated. The Procedures Directive recognises, in the parts which I have identified, that a separate regime may be appropriate for subsequent applications where applicants make new claims or potential claims without new evidence or material.

37. Fourthly, it does not seem to me that there are any compelling human or fundamental rights imperatives. When approaching the question of construction one is dealing here with people who arrived in this country, they claimed asylum, their applications were unsuccessful, their appeals failed, they have each sought to make fresh claims and now they seek the opportunity to work. While the fact that they wish to work is entirely understandable and commendable, it does not seem to me that, in the context in which they find themselves, there are any human rights imperatives requiring me to approach the question of construction in a special way.

38. Fifthly, it is highly pertinent to have regard to observations made by Stanley Burnton J (as he then was) in the judgment he gave in January, which went to the Court of Appeal but resulted, I recognise, in permission then being granted. The judge said this in relation to the issue with which I am concerned:

> 1.6... It is the experience in this court that there are many, many applications for asylum in cases where there has been a comprehensive, cogent and lawful rejection of an asylum application on bases which are alleged to constitute a fresh claim and which do not in fact constitute a fresh claim when critically examined, either by the Home Secretary or bought the court. A fresh claim must put forward material which creates a realistic prospect of success before an Immigration Judge, having regard to the decision which has already been taken. I do not say [that] this is such a case, but it is the case that the decision already taken in this case, as I have already indicated, was adverse to the claimant."

He then goes on to deal with other matters at paragraph 1.7, and at 1.8, 1.9 and 1.10 sets out a series of considerations:

> "1.8. In my judgment, in interpreting the Council Directive I should bear in mind that background fact. Of course, when someone applies for asylum at first instance (that is to say where a claim has not previously been considered), that person is an asylum seeker but, in my judgment, it would defeat any proper system of dealing with asylum applications if the mere fact that some wholly unverified alleged fresh claim were put forward resulted in someone being an asylum seeker for the purpose of the Directive and the Immigration Rules. Different considerations arise if, on proper examination, the fresh claim is indeed a fresh claim, but I would be loath to interpret either the English legislation or the European legislation as conferring rights on someone whose asylum claim has been rejected and is therefore relying on some supplemental and frequently illusory grounds in order to obtain a different decision from that which

was originally made.

1.9. It is more convenient in this case to begin by reference to the Directive itself. Article 2 contains a definition of an application for asylum, which does not call for consideration. But 'applicant' or 'asylum seeker' is defined to mean a 'third country national and stateless person who has made an application for asylum in respect of which a final decision has not yet been taken'. That cannot be said of the claimant. She is a person who has made an application for asylum in respect of which a final decision has indeed been taken. It seems to me that therefore she is not an asylum seeker or applicant within the meaning of the Directive. I do not find that conclusion surprising, notwithstanding her current and outstanding contention that she has a fresh claim, for reasons I have already indicated.

1.10. That approach to the interpretation of the Directive is supported by Article 3 which defines a scope as being applicable:

> '... to all third country nationals and stateless persons who make an application for asylum at the border or in the territory of the member state as long as they are allowed to remain on the territory as asylum seekers... if they are covered by such an application for asylum according to the national law.'

I emphasise the words 'if they are covered by such application for asylum according to national law'. There is no pending application for asylum according to national law. It may be that that only applies to the family members referred to in Article 3, but again the claimant is someone who has made an application for asylum. It having been rejected, she at the moment is not allowed to remain on the territory as an asylum seeker because her claim has been rejected and therefore she is not lawfully within this country."

39. It is correct that one observation made by the learned judge at paragraph 1.10 is a reference to the claimant at the moment being not allowed to remain on the territory. That is an observation that may be incorrect, resulting from the fact that 353A was not before the court on that occasion.

40. When it comes to the interpretation, it seems to me that Mr Tam is correct for the reasons that he gives. Mr Wilson's best point is on the definition within Article 2(b) but when read in context the "application for international protection" is as equally limited to the process of "reception" as an "application for asylum". When looking at the matter in context, I reach the conclusion that the approach of the claimant is not the correct one and that an application by the claimant to make a fresh claim is not an application for asylum within Article 11.

41. A final reason why I reach that conclusion is because of the potentially abusive effect of that construction identified by Mr Tam, which seems to me to be inconsistent with the purpose and approach of the Directive. There will accordingly be judgment for the defendant.

42. I will deal with matters arising from the judgment which I have just given before turning to the further matter which I understand Mr Nathan is to raise on the second claimant's behalf.

43. MR TAM: My Lord, I am grateful for that. The discussions that I have been having with learned junior centre around the question of costs. I do not know what the position is as far as legal aid is concerned. We are not aware of there being any certificate on the file.

44. MR NATHAN: Legally aided on both.

45. MR TAM: Legally aided on both, I am told. Subject to seeing the certificates which ought to have been served on us, I do not think that I can properly ask for any costs in the circumstances.

46. JUDGE MACKIE: No.

47. MR TAM: So I would have to leave it there.

48. MR WILSON: My Lord, I have nothing to add to that. That is the position with regards to costs.

(Submissions regarding application for permission to appeal)

49. JUDGE MACKIE: This is an application for permission to appeal. I do not consider that the appeal has a real prospect of success, its lack of merit being disguised by the able submissions made on behalf of the claimants. It is suggested in this case there is some other compelling reason why the appeal should be heard. It is said there are large numbers of potential claimants who are or may be affected by the outcome. I do not think it is appropriate for me as an occasional judge in the Administrative Court to evaluate that; that is a matter, it seems to me, best left to a Lord or Lady Justice of the Court of Appeal. If there is any doubt of about the position, it seems to me that an application to a Lord or Lady Justice would be justified in legal aid terms.

50. Anything else?

51. MR NATHAN: My Lord, I think those provisions still apply today. My Lord, again with respect, and with deference to my leader, can we ask for an expedited transcript, my Lord, in light of the effect on various others?

52. JUDGE MACKIE: Yes.

53. MR NATHAN: I am grateful. **(Pause).** Sorry, I am grateful to Mr Tam.

54. JUDGE MACKIE: You would like to be paid for your efforts?

55. MR NATHAN: We would indeed, my Lord, detailed assessment.

56. JUDGE MACKIE: You are both just about worth it. I will do that.

57. MR NATHAN: Your Lordship has not heard my application for permission yet.

58. JUDGE MACKIE: I better do that now.

59. MR NATHAN: My Lord, before I embark on that, can I just draw to your Lordship's attention one possible error in the judgment. There is a reference to Article 32 of the Procedures Directive falling within Section 4 of the Directive. In fact the correct citation for that would be that it falls within Section 4 of Chapter 3, Chapter 3 being entitled "Procedures at first instance".

60. JUDGE MACKIE: Thank you.

(Submissions regarding renewed application for permission to apply for judicial review)

61. JUDGE MACKIE: Thank you. This is a renewed application for permission to apply for judicial review, the relevant part of which was refused by Cranston J on 10th March 2008. He said this:

> "There is no basis for judicial review of the delay in hearing the 'fresh claim'. FH & Others v SSHD [2007] EWHC 1571 (Admin) demands that the delays be so excessive as to be manifestly unreasonable. That is not the position here and the Claimant has not provided any exceptional circumstances."

62. In his application to renew the second ground of the claimant, Mr Nathan faces two hurdles: first he is out of time but seeks the court's indulgence in relation to that; secondly he submits that his client's case falls arguably within the very exceptional circumstances identified by Collins J in **FH** when he said this:

> "30. It follows from this judgment that claims such as these based on delay are unlikely, save in very exceptional circumstances, to succeed and are likely to be regarded as unarguable."

63. What Mr Nathan says is that his client's case is arguably exceptional. He claims that the case was last before the Immigration Adjudicator or Immigration Judge by reason of a failure, not a culpable failure in the sense of deliberately suppressing it, but a failure by the defendant to appraise the original judge of the existence of various FCO letters about the risk of persecution in Burma. He submits, by reference to observations of Maurice Kay J (as he then was) in **R v IAT ex parte Cindo** [2002] EWHC 246 (Admin), that this should take his client out of the queue because this is not some failure by his client to get hold of relevant material but a failure by the defendant to produce it.

64. Mr Tam QC relies first on the delay but also points to what happened when the matter came before the adjudicator. The fact is the adjudicator found the claimant to be a liar,

and that is what governed his conclusions. This is a familiar sort of dispute and does not begin to reach exceptional circumstances of the kind identified by Collins J.

65. I emphasise that I have given these reasons briefly against a backdrop where we have spent the entire day on another aspect of the this case, and that has given me a full opportunity to read the papers and the skeleton argument of Mr Nathan. I am going to refuse this renewed application for permission.

66. Unless there is anything else.

67. MR NATHAN: My Lord, I do not have my instructing solicitor sitting behind me at this stage. I believe on a refusal of permission one is absolutely obliged. Can I just formally ask for permission to appeal on the basis that that allows me to take instructions from my client as well.

68. JUDGE MACKIE: I do not think I can give permission. If I did have the power to give permission, with respect to Mr Nathan, I would certainly not give it. I say nothing about the underlying merits of the claim, but the suggestion that this is an exceptional circumstance seems to me to be completely hopeless.

69. MR NATHAN: There is one further application. Just as a matter of housekeeping, in order to appeal your Lordship's substantive decision the time limit is 21 days. I believe on a refusal of permission it is 7 days. I suspect it is highly unlikely an appellant's notice will go in on the renewal of permission, but can I ask for an extension of time from 7 days to 21 days for that application.

70. JUDGE MACKIE: Any objection? Yes, you can.

71. MR NATHAN: Thank you.

72. JUDGE MACKIE: Thank you all very much.