CO/6088/2007

**Neutral Citation Number: [2008] EWHC 2069 (Admin)**
**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**THE ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 31 July 2008

**B e f o r e:**

**MR JUSTICE BLAIR**

- - - - - - - - - - - - - - - - - - - - -

**Between:**
**THE QUEEN ON THE APPLICATION OF SS**

**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)

- - - - - - - - - - - - - - - - - - - - -

**MS G WARD** (instructed by Duncan Lewis) appeared on behalf of the **Claimant**
**MR M BARNES** (instructed by Treasury Solicitors) appeared on behalf of the **Defendant**

- - - - - - - - - - - - - - - - - - - - -

J U D G M E N T

1. MR JUSTICE BLAIR: By this claim for judicial review, the claimant seeks to challenge the decision of the Secretary of State for the Home Department, dated 22 June 2007, not to grant the claimant's application for indefinite leave to remain in the UK. His application was made pursuant to paragraphs 4.5 and 9.3 of a document called the Iraq Policy Bulletin 2/2006, which I shall call the 2006 policy. This policy was issued on 1 August 2006, following the judgments of the Court of Appeal in the case of R (on the application of Bakhtear Rashid) v SSHD [2005] EWCA Civ 744 and the judgment of Collins J in R (A, H, and AH) V SSHD [2006] EWHC 526 Admin. Permission was given by Simon J on the papers on 7 November 2007.

2. The background to the case is as follows. During the period 1991 to 2003 Iraq was essentially divided into two. The Kurdish Autonomous Zone or Kurdish Autonomous Area as it was sometimes known was in the north, and the Government Controlled Area of Iraq, which is usually described as the GCI, was in the south of the country.

3. The claimant arrived in the United Kingdom on 4 November 2002. He is a man of Kurdish ethnicity from the city of Kirkuk, which is within the GCI, albeit close to the Kurdish Autonomous Zone. He claimed asylum on arrival, which was refused on 30 December 2002. The reasoning supporting this decision included, among other things, a finding by the SSHD that the claimant was not credible and that the SSHD could not be satisfied that he was from Iraq. No complaint is or could be made of the refusal letter. It was a perfectly proper decision to make on the information that was available.

4. The claimant's appeal to the adjudicator was heard on 25 September 2003. According to the defendant, at the hearing the claimant produced an Iraqi identity card on the basis of which the SSHD accepted that the claimant was from Iraq. The adjudicator nevertheless dismissed the appeal in a determination dated 4 November 2003 on the basis that his fear of persecution was not objectively well founded.

5. In summary, therefore, the claimant was originally thought not to be from Iraq, but that was in fact wrong. He was from Iraq, specifically from the Government Controlled Area of Iraq, and that was accepted by the defendant by the time of the asylum appeal hearing.

6. In the meantime there had been a development. Prior to February 2003 the SSHD had a policy in place to the effect that failed asylum seekers from Iraq would normally be granted four years' exceptional leave to remain (ELR). This reflected the difficulties that failed asylum seekers were known to face on return to Iraq at the hands of the Saddam Hussain government. This policy came to an end on 20 February 2003, just before the regime was toppled.

7. In 2005 and 2006 the judgments were handed down in the Rashid and AH cases that I mentioned earlier. The substance of these judgments was that the SSHD had failed properly to make known and implement policies in respect of Iraqi asylum seekers, including, in the case of AH, the four-year ELR policy I have just described. It was held that the degree of resulting unfairness was such that it could be properly remedied by the SSHD only by retrospectively giving effect to those policies.

8. Those were the circumstances in which the SSHD issued the 2006 policy on 1 August 2006. Reading from paragraph 1.1:

> "This Bulletin has been produced by the Country Specific Asylum Policy Team, Immigration & Nationality Directorate, Home Office to provide further guidance to decision makers considering the implications of the Court of Appeal judgment in the case of Rashid and the High Court judgment in the cases of R(A (H) & (AH) on asylum or human rights claims made by Iraqi nationals."

9. So far as this case is concerned, the relevant part of the policy is to be found in paragraphs 4.5 and 9.3.

10. Paragraph 4.5 provides, so far as relevant, that for an individual to fall within the scope of the AH case, he or she would need to:

> "I. Have been from the government controlled area of Iraq (GCI) and refused by the Secretary of State between April 1991 and 20 February 2003 (when the practice was to grant 4 years' ELR to claimants from GCI), and
>
> "II. Have not been granted 4 years' ELR."

11. By paragraph 9.3:

> "If the case is found to fall within the scope of the Rashid judgment and/or R(A):H ... then ILR ... should be granted."

12. On 25 September 2006 the claimant submitted an application for indefinite leave to remain on the basis that his application for asylum had been refused by the SSHD on 30 December 2002, that he was from the GCI, and that he should accordingly have benefitted from the four-year ELR policy dealt with in the case of AH. The claimant relied on paragraphs 4.5 and 9.3 of the policy which I have just described.

13. The SSHD responded by a letter dated 18 April 2007, refusing to grant the claimant ILR on the basis that the SSHD had not accepted that he was from the GCI when reaching the decision dated 30 December 2002 and that, although he had been accepted as being from the GCI at the hearing before the adjudicator on 25 September 2003, by this time the four-year ELR policy was no longer in force.

14. Against that factual background, I come to deal with the arguments put forward by the parties. The claimant's case could not be more straightforward. Whatever may have been thought at the time, the claimant in fact is from the Government Controlled Area of Iraq. On that basis, Ms Ward for the claimant submits he falls within the plain wording of paragraphs 4.5I and II of the 2006 policy, and should therefore be granted ILR under paragraph 9.3.

15. Mr Barnes for the Treasury accepted that the SSHD was required to act in accordance with her own policy, save where good reasons are given for departing from it. If on its

true construction the court found the claimant to fall within paragraph 4.5, then he would, as he put it, not seek to persuade the court that the claimant should not benefit from the policy. He did, however, have a supplementary point that the policy can be disapplied with good reason. But in essence the argument came down to one of construction.

16. Mr Barnes says that paragraph 4.5 must be read to mean that the individual has satisfied the Secretary of State at the relevant time that he was from the GCI. The claimant failed to do that in a decision which was lawful in itself, and therefore he falls outside paragraph 4.5 upon its proper construction.

17. In assessing these arguments, it is important to begin with an obvious point. The 2006 policy is just that. It is a policy which the minister can change. It is not framed in terms of a law and it is not to be construed as such.

18. Mr Barnes went further, and argued that it is a matter for the SSHD to construe her own policy and apply it, subject to questions of reasonableness, so that the question for the court is whether or not the interpretation of the policy by the SSHD is one that was reasonably open to her.

19. He relies upon a judgment of this court in Gashi v SSHD [2003] EWHC 1198. That was a case in which a 2002 policy concerned the effect of the Dublin Convention. The court rejected the SSHD's construction of the policy. In his judgment Maurice Kay J, as he then was, went on to refer to authority to the effect that it was a matter for the Secretary of State to construe his own policy and apply it, subject always to the power of the court to intervene on Wednesbury grounds. He continued:

> "Thus, if the true construction of the 2002 policy is as I have held, the question becomes: was the construction placed upon it by the Secretary of State nevertheless reasonably open to him?
>
> "... I find it entirely understandable that the Secretary of State should have such matters in mind. However, the 2002 policy is itself a gloss on the Dublin Convention and, whereas it is appropriate for the Secretary of State to approach the construction of the policy with an eye on potential abuse, that does not entitle him to supplant the plain meaning of the policy with a preferred interpretation which is not a reasonable one."

20. The approach to be adopted in such a case has been the subject of a recent decision of the Court of Appeal in R (Lotfi Raissi) v SSHD [2008] EWCA Civ 72. In that case it was decided that it was for the court to determine the meaning of the policy in question, and that it would do so from the perspective of a reasonable person's understanding of what the policy consisted of.

21. Mr Barnes has pointed out, with force in my view, that policies differ, and that whereas in the Raissi case the policy was one that was self-evidently for public consumption, in this particular case, as the terms of the policy document itself makes clear, the purpose

of the policy is to provide guidance to decision makers within the department. Thus he submits the Gashi approach is applicable here.

22. In this case, however, I need not consider that aspect of the matter further because my view is that whatever approach is adopted the meaning of paragraph 4.5 is clear. Mr Barnes made a point as to the phraseology, and it is true that paragraph 4.5 refers to the fact that individuals would need to "have been" from the GCI rather than "be" from the GCI. But that does not alter the fact that the claimant was from the GCI. Unless the defendant can justify reading some further words into paragraph 4.5 to the effect that the claimant must have been considered by the SSHD as such -- in other words, as coming from the GCI -- he is plainly entitled to the benefit of the policy.

23. The arguments made in that regard by Mr Barnes are as follows. Firstly, he points to annex A to the policy, which provides the templates for decision letters drafted following consideration of a case that is said to fall within the scope of the relevant judgments. This makes it plain at page 7 that in order for an applicant to satisfy the criteria required to fall within the scope of the case of AH, the applicant must have had their case decided by the SSHD between April 1991 and 20 February 2003, and must have been accepted as being from the part of Iraq formerly controlled by Saddam Hussain. That is indeed what annex A says, and it explains the form of the refusal letter that was sent to the claimant in this case.

24. The argument in my judgment is one of substance, but on balance I prefer Ms Ward's answer which is that the annexes only become material when a decision has been reached on the basis of the body of the policy document. On that footing, it appears to me that the assistance that can be given in construing the policy document is limited.

25. Mr Barnes' second and more powerful argument is put in a number of ways. There can be no doubt, he submits, that the scope of the policy is limited to cases that fall within the scope of Rashid and AH, given the repeated reference to those judgments and their scope throughout the policy. In any event, he submits, the requirement that an applicant must have suffered the sort of unfairness occasioned by a failure to apply the policies dealt with in those cases in order to benefit from a retrospective application of the policies in question was so plain that it was not necessary to make it explicit that it only applied to persons who had been considered to have been from the GCI at the relevant time.

26. He submits that that would obviously exclude cases where a claimant had not satisfied the SSHD at the material time that they were from the GCI. The simple reason is that the policies would not have applied to such a person in any event. The interpretation of the policy proposed by the claimant, which would give rise to a benefit to which the claimant is not entitled pursuant to the reasoning in Rashid and AH, would be absurd and contrary to the scheme of the policy given that the policy was expressly implemented to give effect to that reasoning.

27. In this case, he says, the claimant did not fall within the AH case because at the time the policy came to an end it had been determined that he was not Iraqi. So he did not, as it were, get past first base. True it was that the adjudicator subsequently held

differently, but that is simply an example of the system working properly. No unfairness, let alone conspicuous unfairness of the kind that underlay the Rashid and AH cases, exists in this case. See Carnwath LJ in SSHD v R(S) [2007] EWCA Civ 546 para 36, and Moore-Bick LJ at para 71.

28. I have not found the matter easy, but in the result I prefer the arguments of Ms Ward in this regard. The main point that weighs with me is that the 2006 policy was clearly promulgated in the aftermath of Rashid and A, H and AH to make clear how claims would be dealt with in the light of those decisions. A feature of them was the lack of consistency found to have been present in past decision making and the fact that the decision makers were in some instances unaware as to what the relevant policies in fact consisted of.

29. I think Ms Ward was right to submit that the purpose of the 2006 policy was:

> "... to prevent unnecessary argument about who does or does not fall within the scope of the decisions in Rashid and AH, or how far those decisions might extend. This is not a case of the SSHD construing ambiguous words in her own policy, in which the question would be whether the interpretation was one that was reasonably open to her. Rather, as observed by Simon J in granting permission, she appears to have put a gloss on the words of the policy, which cannot be justified by reference to the terms of the policy itself."

30. The result, it has to be said, is artificial. Someone who was not entitled to asylum ends up with indefinite leave to remain in the UK. But that, I think, follows from the decisions in the Rashid and AH cases and the measures taken to put right the shortcomings which were exposed in those decisions.

31. Finally, Mr Barnes submits that even if the claimant falls within the policy, it can be disapplied if good reasons are advanced, a formulation with which Ms Ward agrees. There is good reason in the present case, he submits, relying in effect on his previous submissions.

32. As against that, one comes back to the starting point in this case, namely that the claimant was in fact from the GCI. That is the simple fact of this matter. I emphasise that the position in other cases may well be different, but in this particular case I do not think that the policy should be disapplied in the case of the claimant.

33. It follows that the claim succeeds. I will hear the parties as to the appropriate relief, but would like to thank both counsel for their clear and helpful submissions.

34. MS WARD: I am very grateful. I see my learned friend is taking instructions.

35. For my part, I don't think that I can ask your Lordship's directed ILR be granted. I think I have to ask your Lordship to direct that, as Mr Barnes in fact has suggested, the matter be considered again in accordance with your Lordship's judgment because there are of course the usual security checks to be carried out before ILR can be granted in any case.

36. MR JUSTICE BLAIR: Yes.

37. MS WARD: I have no reason to think that will throw up any problems, but I accept the Secretary of State's right to do that.

38. MR JUSTICE BLAIR: Yes.

39. MS WARD: So I would ask simply that you make that order, that the decision be quashed and the application be reconsidered in accordance with your judgment, and, perhaps unsurprisingly, I would also ask for an order that the Secretary of State pay the claimant's costs.

40. MR JUSTICE BLAIR: Mr Barnes?

41. MR BARNES: My Lord, I do not think I can add usefully to any of that. I would be very content with an order quashing and referring the matter back to the Secretary of State for a further decision in light of your judgment.

42. MR JUSTICE BLAIR: Yes.

43. MR BARNES: And as to costs, I do not think there is very much I can say about that.

44. MR JUSTICE BLAIR: No. I will make those orders. I think I should say for the record that in my view it was entirely reasonable for the Secretary of State to test the matter in the way that she did.

45. MR BARNES: I am grateful, my Lord.

46. MS WARD: My Lord, just one further point. As well as the order for costs, it has been canvassed that I also need an order for the usual in respect of public funding.

47. MR JUSTICE BLAIR: Yes. Of course I make that.