CO/4950/2008

**Neutral Citation Number: [2008] EWHC 2772 (Admin)**
**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**THE ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 8 October 2008

**B e f o r e:**

**SIR GEORGE NEWMAN**

**(SITTING AS A JUDGE OF THE HIGH COURT)**

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

**Claimant**

v

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Defendant**

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(Official Shorthand Writers to the Court)

**Miss N Mallick** (instructed by Stuart Karatas Solicitors E8 2PB) appeared on behalf of the **Claimant**
**Mr B Jaffey** (instructed by the Treasury Solicitors) appeared on behalf of the **Defendant**

J U D G M E N T
(As approved)

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1. SIR GEORGE NEWMAN: On 22 May 2007, Walker J granted the claimant permission to proceed with a claim for judicial review. It was an oral renewal and the judge stated in the course of a judgment, which is accurately recorded in a note taken by somebody from the Treasury Solicitors that it was limited in its terms. So far as they can be seen from the note, it was limited to an issue as to whether the Secretary of State had, by that date, exercised her discretion in connection with a claim for compassionate consideration under the ILR family policy.

2. At that day Mr Jaffey appeared, as he does now, and his recorded argument was that even if the decision letters had not dealt with it, the acknowledgment of service had dealt with the matter and itself stood as a decision. As to that, Walker J stated:

> "Mr Jaffey submits that even if not considered earlier the SS [Secretary of State] is making a decision in paragraph 17 of the AOS [acknowledgment of service]. There is an arguable case that paragraph 17 is not doing anything of the kind. Setting out previous decisions, with no reference made to the point relied on by the Claimant so far as terms of the amended concession as the Claimant is only a few weeks out. Nor does paragraph 17 go into the nature of the Claimant's health conditions. The only mention of her health is at the end where it says "the Defendant has considered the Claimant's circumstances arising out of her medical condition and concluded that removal will not breach the UK's obligations under Article 8 of the ECHR."

3. Paragraph 17 appears at page 43 of the bundle, and it contains the assertion that there are no exceptional compassionate circumstances to warrant a grant of ILR outside the policy. In any event, as explained elsewhere in the grounds, the defendant considers the claimant's circumstances arising out of her medical condition, and concluded that removal will not breach the United Kingdom's obligations under Article 8 of the ECHR.

4. The position, as it was before Walker J, has charged because, conscious of the possibility that the arguable position might give rise to a successful complaint, the Secretary of State has moved the position on and on 26 July 2007 issued a further decision letter. In paragraph 9 of that letter, having dealt by way of preamble to the events, as they were before, Walker J commenced as follows:

> "In this regard, your client's submissions relate to her medical condition, ..."

Paragraph 10 commences:

> "Careful consideration has been given as to whether those submissions disclose exceptional compassionate circumstances. ..."

Thus the first position taken on behalf of the Secretary of State is that whatever might have been the merits of the point in respect of which permission was obtained, there is

no point now because the identified failure has been met by the letter of 26 July 2007.

5. By way of a response to that, and as part of, in effect, an application to amend the grounds, Miss Mallick said, "not so". She submits "not so" because even though it deals with the medical permission, it is not a proper exercise of discretion in the circumstances of this case. The Secretary of State has not dealt with other factors which should have been embraced within the exercise of discretion on compassionate grounds, namely the length of stay, which is in play in this case, the existence of children of the claimant and the history, which demonstrates that the cutoff date in relation to the ILR family concession, namely 2 October 2000, was only exceeded by some seven weeks, because it was at that time that the application for asylum was made by the claimant's husband.

6. As Mr Jaffey correctly points out 2 October 2000 is not an arbitrary date, it was not simply selected because a date for bringing down the draw bridge was required. The date was selected by reference to the protection offered by the Human Rights Act available after that date. The earlier history perhaps ought to just receive a short recital. The family entered on 19 November 2000. The husband of the claimant made a claim for asylum, which was refused, then she made a claim for asylum in her own right, and that was refused. There was then a claim to be included within the ILR family concession, and that was refused on 31 March 2005. On 12 June 2006, a new policy was announced in connection with the ILR concession. It seems clear that it was the announcement of the new policy which gave rise to the repetition of the claim to be included within the policy. No criticism can be leveled at the claimant for that, or her legal advisors. That is exactly what the policy, as announced, contemplated. So there was, as I shall have to make clear by reference to dates of letters or faxes, a request for discretion under the policy, or inclusion within the policy.

7. As to the terms of the policy, it is not necessary, on this occasion, for the court to recite the basic criteria, other than to note that the basic criteria includes a requirement that the applicant has applied for asylum before 2 October 2000. That criterion cannot be met. It is accepted that it was not met. Thus, there is no question that the basic criteria was not met, but there was a claim made after that date, which was made not long after, as I have said, seven weeks. It seems neither here nor there to the merits of an exercise of discretion in relation to the policy. What needs to be considered in connection with the policy is whether there were any other reasons which, by reference to the Human Rights Act, and any application made in connection with those rights, could protect the claimant or family, for example, under Article 3 or Article 8.

8. As to that, there were claims in connection with Article 3, in particular, and Article 8 by inference. They were dealt with, they were rejected and there is no appeal, or there is no matter before the court in connection with those determinations. However, the policy also included what is called the "Discretionary consideration" and the policy reads as follows:

> "This note sets out the principles which will ordinarily be applied in operating this policy. Consideration will be given to exercising discretion to grant ILR, however, where ILR does not fall to be granted under the

terms of the policy set out here".

There is clear indication, despite the basic criteria not applying so far as the claimant is concerned, but there is nevertheless a discretion to be exercised:

> "Such discretion will be exercised only in the most exceptional compassionate cases. Families who believe that their circumstances merit consideration on this basis must provide full details and supporting evidence."

Thus the first question, as it seems to me, is: What were the circumstances which were put forward as meriting consideration, on the basis that the discretion should be exercised, because there were most exceptional compassionate circumstances in the case? What were the details and the supporting evidence which were put forward. As to that, one needs to go back to the correspondence. By a letter, dated 24 July 2006, which was faxed on 26 July 2006, the solicitors for the claimant wrote in relation to sadly the serious condition from which the claimant then suffered, and still suffers, namely thyroid cancer, and the fact that she was currently undergoing treatment. It went on to point out that her medical condition was life threatening, there was a risk of self-harm, she would not be able to afford medication if she was returned to Turkey, and so forth: all matters which fell within an Article 3 case.

9. At the end of that letter the ILR material case was then raised, which was to this effect:

> "It is also submitted that the Secretary of State has revised and extended the Amnesty early July. The revision was intended for those applicants whose case fell just outside the relevant dates (shortly after the 2 October 2000 to reapply. The Home Office has granted leave in at least one case of this kind. Our client's husband arrived on the 19 November 2000 and his claim was recorded the same day.
>
> The Secretary of State made it clear that each case is decided on its merits. We submit that the particular facts of this particular case are exceptional. The Secretary of State is requested to exercise discretion in this matter.
>
> We respectfully request that the removal directions be deferred pending the determination of these representations."

The strict reading of that part of that letter is that it amounts to a repetition of a claim to be included within the ILR family concession, on the lines in which it had originally been made and rejected in March 2005. It is fair to say, as Miss Malik points out, that the letter also said:

> "We submit that the particular facts of this particular case are exceptional. The Secretary of State is requested to exercise discretion in this matter."

10. The letter, from which I have just quoted, was responded to on 27 July and it was treated as a letter in which representations, on behalf of the claimant, were being made

for her to be considered as a fresh application for asylum, and/or human rights. The letter deals at length with the history of the matter, the history which I have briefly referred to of appeals, processes and the like. It deals with the request that the client be granted leave to remain based upon a medical condition, and her continued fear of persecution upon her return. It says that all the points were considered when the earlier claim was determined. They were dealt with in the letter giving reasons for refusal of 15 March, the appeal determination of 17 August and our refusal letter of 2 May, which addresses the issues. It deals with the medical report and the evidence submitted. It reaches a conclusion in connection with the medical evidence, which leads to the Secretary of State informing the claimant that the removal of the claimant and her family would not be in breach of the United Kingdom's obligations under Article 3 and 8 of the ECHR.

11. The letter, on its face, mainly only really dealt with the first part of 24 July letter. That point was quite correctly taken up by the solicitors for the complainant on 27 July when they wrote saying:

> "Thank you for your letter received by fax transmission this afternoon. Your respond dealt with all aspects of our application except the amnesty [the ILR concession]."

This letter then refers to the concession, as it existed. That it extended to families, and the grounds upon which it did. The fact that the date of 2 October had only briefly, as it were, been exceeded by some seven weeks. Then it referred to removal directions, which were then in place, the length of time that people have been here, and the submission that the case fell to be considered under the Amnesty:

> "Failure to apply Amnesty in this case evinced such a degree of unfairness as to amount to a misuse of power, and therefore required the intervention of the courts."

12. The letter of 27 July, picking up the failing of the Secretary of State to deal with the ILR claim, did not express in terms, which, in my judgment, were sufficient to draw to the attention of the Secretary of State, that what was being requested was an exercise of discretion on compassionate grounds within the last paragraph of the policy that I have set out, with the details, and circumstances relied upon being identified of all the Secretary of State's.

13. To this point, therefore, it seems to me that had I been required to consider the arguability of the position as it fell out before Walker J, I would have concluded that the matter had been dealt with in accordance with the representations, as they have been submitted. Given that Walker J opened the door to the possibility that that was not the case, what one therefore has to do is to look at the response (page 68 of the bundle) and see that, in terms, it indeed deals with the matter on the basis that this was a basic criteria application (which I will call it for convenience) and it concludes against the claimant, as indeed it had been the case on 31 March 2005.

14. Therefore one now proceeds to consider, taking it to be in the claimant's favour, that there had been inadequate consideration of the range of discretionary powers, which were available to the Secretary of State, what position presently prevails. The position, which presently prevails, is that the letter of 26 July 2007 has, in the paragraphs which I have already identified only by reference to their initial clauses, grappled with the case which it was taken was being advanced, namely submissions relating to the client's medical condition.

15. I am bound to say, having regard to the terms of the note of the judgment of Walker J, one can see why those advising the Secretary of State took the view that the real argument, which they were now having to face, was that the medical circumstances had not been adequately considered, if at all. Because if you look to the note that we have again the judge stated:

> "Nor does paragraph 17 [that is a reference to the acknowledgment of service] go into the nature of the Claimant's health conditions. The only mention of her health is at the end where it says that:
>
> 'the defendant has considered the claimant's circumstances arising out of her medical condition and concludes that removal will not breach the UK's obligations under Article 3(8)."

So the ground shifts again. Miss Malik, in her persuasive argument, comes to the court today and says:

> "Still adequate because they have dealt with the medical condition, but they have not dealt with the overall circumstances of this case, which also include the length of stay and the children, and the fact that the family only arrived shortly after the cutoff date."

I am bound to say I simply can see no force in that submission at all.

16. The failure to make reference, even if there was any basis for suggesting that there had to be a reference to these matters, in my judgment was perfectly adequately answered by the fact that the Secretary of State has throughout maintained that the length of stay, and the children, and the fact that they only arrived after the cut-off date, did not give rise to any exceptional circumstances which fall for decision. That was as it was in the first place.

17. I do not see how the length of stay, the children, the cut-off date, and so forth, can qualify, certainly in this case, as giving rise to compassionate circumstances when they are the very circumstances which are going to arise in any case where the 2 October cut-off date has been exceeded, there will be a length of stay, there are likely to be children, and so forth. They are not the sort of circumstances which are susceptible, in the normal run, certainly in this case, as I see it, as capable of comprising exceptional circumstances. What we see, so far as compassionate circumstances are concerned, quoting from the Enforcement Instructions and Guidance:

> "any compelling compassionate circumstances will be considered with the

> gravity of the circumstances being given due weight. Examples of compassionate circumstances might include ill health, medical treatment, the inability of a person to look after him/herself and reliance upon persons in the UK. A person's age is not in itself a realistic or reliable indication of a person's health, mobility or ability to care for him or herself. For ill health to be a barrier to removal on its own it must reach a threshold set out in M v the Secretary of State for the Home Department UKHL 31. Then under children the presence in the United Kingdom of dependent children under 18 years of age must be taken into account when deciding whether removal of an immigration offender is the appropriate action to take."

18. There cannot be any question here that the Secretary of State has not had in mind the children as dependants. They have been part and parcel of the representations which have been made to the Secretary of State. Of course there may be circumstances when looking at the whole range of factors in a particular case it might be right to conclude that exceptional, compassionate circumstances have been made out. However, in my judgment, that is not so here. It is incumbent upon a person who is legally represented, and is presenting representations to the Secretary of State, as the policy states, to set out what it is that is being relied upon. In my judgment it is not an unreasonable reading of the matters, which were being urged upon the Secretary of State, for it to have been concluded that it was the health which was relied upon as comprising exceptional compassionate circumstances.

19. As I have said, I find it inconceivable that in this case it was not within the mind of the Secretary of State in the matter that the case involved the removal of children and people who have been here for some time, and the cut-off date had only just been missed. All those matters have been properly considered in a context related to this claimant's case. Even if, looking at it in the round, one was to ask himself whether the overwhelming position presented by these circumstances was such that the case merited yet further consideration, one can see precisely how the formulation would take place.

20. The position of the Secretary of State, in my judgment, has been perfectly plain, although perhaps grey and slightly opaque, when dealing with the letter of June 2006. So far as the policy is concerned, no doubt in all fairness, as Walker J identified, it required being specifically addressed. However, it has now been specifically addressed and, in my judgment, I can see no basis upon which the exercise of discretion, which has now taken place, can be impugned on the grounds that it has not covered everything which was raised.

21. For those reasons, this application for judicial review fails. I ought to, for completeness, say that Mr Jaffey, who appeared for the defendant, agreed that it was in the interests of justice that the claim for judicial review ought to be considered as though there had been an amendment to the grounds in order to cover the July letter. Also to any other incidental earlier points that arose in support of the challenge to the July 2007 letter, in order to avoid yet further matters being raised on those grounds. I am satisfied, therefore, that this case must fail. The application is dismissed.

22. MR JAFFERY: My Lord, can I make an application for the Secretary of State's costs, but only from 26 July, once the further decision letter was raised? Could I just show your Lordship the correspondence that has taken place with the Treasury Solicitor about the failure of the claimant's solicitors to respond to 26 July and further decision letter? Your Lordship has that letter starting from page 90 of the bundle.

23. MISS MALLICK: There is only one difficulty. There is no schedule of costs that has been served on us. I am going to be in some difficulty in responding to what is being claimed by the Secretary of state.

24. SIR GEORGE NEWMAN: Is there a schedule?

25. MR JAFFERY: The Secretary of State has not prepared a schedule.

26. SIR GEORGE NEWMAN: No schedule. It is simply asking for an order. That would mean an assessment.

27. MISS MALLICK: Very well, my Lord.

28. MR JAFFERY: In the bundle at page 90 there is a letter from the Treasury Solicitor, dated 30 July, which is four days after the Secretary of State's further decision, following the order of Walker J, which says in the second paragraph:

> "There is no basis whatsoever for this claim to be continued. If your client fails to withdraw, then my client will apply for the substantive hearing to be listed on an expedited basis or alternatively an order that Mrs Kara can be removed before a substantive hearing. The costs of those steps will be sought from your client."

There was no reply to that letter. A further letter was sent at page 91, which says:

> "I write further to my letter of 30th July to which I can trace no response. I look forward to receiving your substantive reply within the next 14 days."

29. We have already heard from the claimant's solicitors in recent days with preparation to the bundle. There has never been any response to that correspondence. In those circumstances where there has been the clearest warnings, in my submission there should be an order for costs but from that date only.

30. MISS MALLICK: We are in some difficulty. The legal representatives unfortunately have had difficulty in keeping in touch with the client as she has only recently got back in touch with the instructing solicitors. They could not take the type of instructions they would need in order to withdraw an application for judicial review. Of course when one is granted permission--

31. SIR GEORGE NEWMAN: When did they get back in touch?

32. MISS MALLICK: I am having difficulty in obtaining instructions on that point. I will also say this: We have lost this application for judicial review, but these are asylum seekers who do not work in the United Kingdom. Mrs Karas, the claimant, has been having medical treatment. She continues to have medical treatment. My Lord, it may well be that an application for costs has been made in this case, and you may well grant it, but the funds simply are not there to meet the costs.

33. SIR GEORGE NEWMAN: What is the basis of your funding today?

34. MISS MALLICK: We are not LSC funded. The solicitors have acted pro bono. We have had a significantly reduced fee for me to attend here today. My Lord, the solicitors have acted pro bono, because the claimant has so desired us to pursue this judicial review to today's hearing, and not been paid for it. That is the only thing I would say. Any claim for costs in this case unfortunately, in my submission, is going to be futile, because the claimant simply does not have any money. Those are my submissions, my Lord.

35. SIR GEORGE NEWMAN: Miss Malik, it is difficult for you, in the absence of your instructing solicitor being here, but you seem to be telling me about the import of contact between your instructing solicitors and the claimant.

36. MISS MALLICK: My Lord, it seems to me--

37. SIR GEORGE NEWMAN: You know what I mean by that? You are telling me, "We are only here because the client would not give up". That is, in effect, how you put it, but I am not so sure that that is probably right.

38. MISS MALLICK: I am not meaning to put it in that way.

39. SIR GEORGE NEWMAN: That is how it has come across.

40. MISS MALLICK: What I am saying is that the instructing solicitors in this case have instructed me at the last minute. You have had correspondence, no doubt, to say I was only instructed some time last week to act in this matter. I received the papers on the 3rd--

41. SIR GEORGE NEWMAN: Who was here before Walker J?

42. MISS MALLICK: Ms Manassi-Starkey, another counsel. I have only newly come into this matter.

43. SIR GEORGE NEWMAN: You have appeared pro bono, or on a very reduced fee?

44. MISS MALLICK: What I have done is being done to assist the court. I have not been paid.

45. SIR GEORGE NEWMAN: Have you got a brief fee?

46. MISS MALLICK: I have not got a brief fee for the amended grounds and skeleton argument. I have a brief fee for attending the hearing today. The instructions I had were to attend the court hearing.

47. SIR GEORGE NEWMAN: That is private funding?

48. MISS MALLICK: Private funding on a significantly reduced fee.

49. SIR GEORGE NEWMAN: Do you mind putting it down on a piece of paper, or telling me what it is?

50. MISS MALLICK: I do not mind putting it down on a piece of paper. It is the amount of fee I would get for an AIT hearing.

51. SIR GEORGE NEWMAN: Just give me what you are being paid today on a piece of paper. (same handed)

52. MISS MALLICK: My Lord, I do have some of the documents that show that they have had to get money from Turkey to subsist. It is a Western Union transfer.

53. SIR GEORGE NEWMAN: I do not need them. Mr Jaffey, what do you want to say?

54. MR JAFFERY: The financial circumstances are not relevant to the order for costs. It may be an important fact about enforcement, or whether the Secretary of State tries to enforce. As to the claimant's solicitors, it is very concerning that they simply do not respond to the Treasury Solicitor's letters. If they do not have instructions, then they should write back and say, "We do not have instructions" and come off the record, in which case we could have listed this case for a disposal hearing. It would have been resolved that much more quickly and saved the court time.

55. SIR GEORGE NEWMAN: You are asking for an order that the solicitors show cause why they should not pay costs?

56. MR JAFFERY: My instructions are that given the sums of money involved it will not be worth the trouble. I do not make any application.

57. SIR GEORGE NEWMAN: I have to say, in relation to this application for costs, that it is entirely reasonable, in the light of the correspondence which has passed after the July 2007 letter in which the Treasury Solicitor sought agreement to the claim for judicial review being withdrawn, that it is really very much in the interest of everybody, including the public interest, that solicitors on the record should behave responsibly in connection with such correspondence. They should apply to it. It is not good enough that counsel, Miss Malik, who has come today and done her best in a difficult case and addressed argument, for which I commend her in her face of difficulties, should simply be left without anybody from the solicitors having to maintain that they were not able to take instructions. They should have written saying they could not obtain instructions. As it seems obvious to me today, the claimant herself is in court. Is that correct?

58. MISS MALLICK: Yes, that is correct, my Lord.

59. SIR GEORGE NEWMAN: The claimant herself is in court and she has not had the benefit of a solicitor here. She has not got the benefit of a solicitor in connection with this application for costs. The court simply does not even know whether the question was ever put to her in a way that was required, namely, "There is a letter; you have a decision; you are on risk. If you do not succeed you may well go down for costs." There is nothing which assists in any of that. We have by reason of the absence of the solicitors and the absence of any correspondence from her, Miss Malik and the client exposed to these undesirable circumstances.

60. I would have been minded to make an order, which is not now sought, that the solicitors should explain themselves and should come and give an explanation to the court as to why they should not be responsible for the costs incurred since the date of the letter written in July 2007 by the Treasury Solicitor. I feel definitely some unease that the person who it should be assumed is responsible for this state of affairs is the claimant. I am told not surprisingly that she does not have any money and that the money, which has obviously been put up in order to pay a modest brief fee to Miss Malik, has been obtained, no doubt, from funds being sent from Turkey. It may be that those who have funded the matter from Turkey should be regarded as in some way responsible for the costs.

61. I think for the record it is plain that if the Treasury Solicitor, in all the circumstances, wants an order for costs in respect of the costs incurred after the letters referred to, then by all means let the Treasury Solicitor, or the defendant, have such an order. I would express concern if that was to lead to the claimant herself being responsible for these sums, and not those people who are funding this from Turkey, or the solicitors who have acted for this matter and have instructed Miss Malik to attend today.

62. MR JAFFERY: I have taken instructions again whilst your Lordship has spoken. In the light of what your Lordship has said, the Secretary of State does consider that the proper course would be to invite the solicitors to explain their conduct. That might be the most appropriate course to protect the public interest, as well as protect the claimant if these solicitors have contained (?) the error. I would invite the solicitors to show cause. That is not a step the Treasury Solicitor normally takes, as it can end up costing the Treasury Solicitor.

63. SIR GEORGE NEWMAN: I know. I only say that in the alternative to, if you like, try and avoid costs. You might do better to have an order, because at least it puts the burden on the solicitors to do something, as opposed to failing to reply to any other letter you might write.

64. MR JAFFERY: Is your Lordship prepared to make a show cause order?

65. SIR GEORGE NEWMAN: I am prepared to make a show cause order.

66. MR JAFFERY: In the light of what your Lordship has said, the Secretary will take steps to consider whether or not good cause has been shown.

67. SIR GEORGE NEWMAN: Thank you very much. Thank you, Miss Mallick, for all your efforts.