

CO/5280/2006

Neutral Citation Number: [2008] EWHC 1398 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Monday, 9 June 2008

B e f o r e :

MR JUSTICE IRWIN

Between:

THE QUEEN ON THE APPLICATION OF TEKAGAC

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

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(Official Shorthand Writers to the Court)

Miss C Hulse (instructed by Messrs Virgo, London N17) appeared on behalf of the
Claimant

Miss L Busch (instructed by Treasury Solicitors) appeared on behalf of the **Defendant**

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

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1. MR JUSTICE IRWIN: This claimant is a citizen of Turkey and of Kurdish ethnicity. She arrived in the United Kingdom on 22nd October 1999 with her husband, Omer Tekagac. Her husband claimed asylum in October 1999 and included this claimant and their children, who were born between 1987 and 1988, as his dependants on his claim. His claim was refused on 21st July 2000 and Mr Tekagac's appeal was dismissed in 2001, on 25th January. Mr Tekagac's application for permission to appeal to the IAT was refused in March 2001 and he was removed from the United Kingdom in June 2001.
2. The claimant's claim is that she applied for asylum in her own right, with her children as dependants, on 10th July 2000. The case really turns on that central question, namely the date on which she applied for asylum in her own right. The importance of the date is this, that under the scheme promulgated by the then Home Secretary in 2003 this claimant would be eligible for extended leave to remain, provided she fulfils the two basic criteria for the scheme. They are firstly that the applicant applied before 2nd October 2000 for asylum, and secondly, that the applicant had at least one dependent minor other than a spouse on either of the following dates, namely 2nd October 2000 or 24th October 2003 - the latter being the date when the scheme was announced. It is agreed by both parties that this claimant fulfils the second of the basic criteria by reference to the age of more than one of her children. Her application for extended leave to remain was refused because, in a decision letter dated 18th May 2006, it was said the claimant did not fulfil the first condition for the scheme, since her application for asylum in her own right post-dated 2nd October 2000.
3. It is necessary to consider what constitutes an application for asylum, both generally and for the purposes of this scheme. In relation to this scheme itself the terms were announced by a letter from the then minister on 24th October 2003 (Beverley Hughes), in two separate but very similarly worded press releases of 24th October 2003, and in the APU Notice Number 4 of 2003 of which the copy before the court is dated 20th August 2004. In none of those announcements is there any specific stipulation as to the nature of the application for asylum. The general law does not specify any form for such an application and indeed it was agreed in the course of argument that an application for asylum can be made verbally, by simply claiming asylum when confronted by customs officers or by immigration officials or any other representative authority.
4. With that background the primary factual question for the court is: had Mrs Tekagac applied for asylum before 20th October 2000? Well, she says that she did. There is before the court a copy of a letter of 10th July 2000 to HM Immigration Office at the Eastern Docks in Dover. The text of the letter reads simply this:

"Dear Sirs

Re: Mrs Fatma Tekagac Turkish DVE/79488.

We now act for the above client in respect of her application for Political Asylum.

Please forward all correspondence to ourselves in future."

It seems now to be common ground, and indeed it is an unavoidable inference from subsequent correspondence, that that letter was sent and received. The claimant says that the obvious meaning of that letter is a claim on behalf of Mrs Tekagac for asylum. Although the letter announces that Messrs Howe & Co. are to represent her in that claim, the claimant says that is the subsidiary message; the primary message is there is a claim for asylum in her own right. The Secretary of State says the obvious meaning of this letter is to announce a change of representation.

5. In my judgment, the claimant's meaning is to be preferred even on the face of the document. There was no change of representation, or at least there is no evidence before the court that there was. The obvious meaning of the record is that two points are to be conveyed to the recipient: first, that Messrs Howe & Co. represent her, and secondly, that she herself is making a claim for political asylum.
6. It was certainly the intention to make a separate claim for political asylum. Also disclosed to the court is the client care letter written by Messrs Howe & Co. on 10th July 2000, to the claimant. In common with many of the later documents generated by this firm during this period, it is ill-drafted and it begins "Dear Mr Tekagac" not "Dear Mrs Tekagac". However it is clear from the content of the letter that it is really intended to be a client care letter for the wife, not the husband.
7. The Home Office responded to that letter on 21st July 2000 and although there is no direct reference to the letter of 10th July, it does seem clear that this letter of 21st July was stimulated by that of 10th July. The text reads as follows:

"Dear Mrs Fatma Tekagac and 4 children

You have applied for asylum in the United Kingdom as the dependant [singular] of Mr Omer Tekagac on the grounds that he has a well-founded fear of persecution in Turkey for reasons of race, religion, nationality, membership of a particular social group or political opinion.

In the light of all the evidence provided, the Secretary of State is not satisfied that Mr Omer Tekagac has a well-founded fear of persecution and has concluded that he does not qualify for asylum. As his dependant, your application is accordingly refused."

8. That stimulated a further letter from Messrs Howe & Co. to Her Majesty's Immigration Office in the Eastern Docks at Dover. On 7th August 2000 and again written with the reference DVE/79484, the letter reads as follows:

"Dear Sirs

Re: Mrs Fatma Tekagac

Further to our letter of 10th July 2000 we confirm that we act for the above client and dependants in her claim for Political Asylum.

We were confused therefore to receive a letter dated 21st July 2000 refusing our client Asylum as a dependant of her husband. We notified you in our letter of 10th July 2000 that our client intended to claim in her own right.

Kindly withdraw our client's refusal and issue her with an SEF.

We look forward to hearing from you."

If that letter is not a fabrication then it is direct evidence, confirmatory evidence, of an independent claim for asylum made on 10th July. Whilst counsel for the Secretary of State for Home Affairs asks me to treat this letter with great scepticism, she falls short of suggesting it is a direct fabrication. In the absence of it being such a direct fabrication, something which is not advanced and which would require very careful examination, probably including oral evidence, I must presume on the basis that the letter is genuine.

9. Is it possible that it was a genuine letter, genuinely sent but not received? There is no evidence which would lead me to that conclusion, save for the fact that it is not to be found now on Mrs Tekagac's file. What I have also been told in the course of the hearing is that the file of Mr Tekagac no longer remains extant and not all of the documents can be confidently found within the defendant's files. It seems to me that the probability is strong, not only that this letter is genuine and was genuinely sent, but that it was received and misfiled, quite possibly in the file already existing for Mr Tekagac. The most likely explanation for this whole story is that someone receiving that letter did not read it carefully and, even if they did read it, filed it in his file rather than opening a new file.
10. Counsel for the defendant has argued strongly from subsequent documentation that it cannot be right that the claimant's then solicitors made or believed they had made a separate individual asylum claim for her. First, that argument is sought to be constructed on the notice dated 4th August 2000, a notice of refusal of leave to enter with no right of appeal, informing Mrs Tekagac of the conclusion by the Immigration Service that she had no right to remain and that it was proposed to give directions for her removal. Miss Busch for the defendant says any competent solicitor believing that an independent application for asylum had been made on behalf of this client would have responded vigorously to that notice by saying "Stop. We have already made an independent application for asylum on behalf of this client and notice of refusal should not be issued and in particular directions for removal should not be set". I pause to remark that it may very well be that such letters or such messages were passed; they may well be misfiled in the way the original letter I find was most likely misfiled. But even if that is not correct, the inference which the defendants seek should be drawn from the notice of 4th August falls away, in my judgment, when we look at other contemporaneous documentation.
11. First, on 22nd August, Howe & Co. wrote to the manager of the Social Services Department -- I take it in the London Borough of Islington, although that has not survived in the copy to hand. The text of the letter reads:

"We act for the above client in **his** claim for political asylum."

The "above client" being Mrs Fatma Tekagac -- one other example of unhappy drafting from the solicitors. The text resumes:

"Our client applied for Political Asylum as a dependant of her husband Mr Omer Tekagac. He is now detained at HM Prison Rochester. After her husband was detained our client applied for Political Asylum in her own right. Her case is still pending.

We would ask that you assist our client under the terms of the 1991 AIA."

Secondly, on 24th August 2000 there is a fax message to the Islington PA Team from a representative at Howe & Co.. The text of the recipient is manuscript but perfectly clear to read:

"Dear Nick

Re: Fatma Tekagac Turkish national.

Further to our call today I confirm our client has made a claim for Political Asylum in her own right. However due to the backlog it will be several months before Dover Immigration schedule an interview where she will be issued with a SAL.

Yours sincerely,

Simon Ridley."

Next, on 8th September 2000 the court has been provided with both the office copy from the solicitor's office and the received signed copy at the asylum team's office, a letter to the manager of the asylum team reciting a very similar history:

"The client arrived in the United Kingdom on the 22nd October 1999 and was originally dependent on her husband, Omer Tekagac. He was subsequently detained and she applied for asylum in her own right. The date of her application was 10th July 2000. The letter confirming this is enclosed. She has not been issued with a SAL by the Immigration Service. We have not received an interview date as yet."

Finally in this series of documents, there is a letter dated 22nd September 2000 to the Islington Asylum Team:

"Re: Mrs Fatma Tekagac - Turkish national - and dependants.

We enclose herewith the letter our client received from the Home Office, in which it states that our client's appeal as a dependant of Mr Omer Tekagac was refused. Therefore, our client applied in her own right, and as yet there are no appeal papers to send to you. Further to our

submissions we are now awaiting a reply from the Home Office regarding an interview date."

Once again in respect of that letter, both the solicitor's office copy and the signed and delivered letter from the Islington Asylum Team have been disclosed to the court.

12. Unless all these documents are forged, which is inconceivable given the production of the received signed copies, they dispose of the argument as to whether the claimant's then solicitors believed they had applied for asylum for her in her own right. They did so believe. They acted as if they so believed. It is therefore not possible to argue from the notice of 4th August that they did not so believe. That their lack of action must be explained by inefficiency seems obvious.
13. It also disposes of another argument. It was argued on behalf of the defendant that no solicitor would, or perhaps could, apply for asylum in right of a wife, whilst the husband's claim remained alive, albeit awaiting the outcome of an appeal. Clearly beyond any doubt these solicitors did believe that they could, and indeed believed that they had, applied for asylum for Mrs Tekagac in her own right before the appellate process for her husband was complete. That is explicitly clear, for example, from the letter of 8th September.
14. It should also be noted that all of these documents pre-date not by a short distance, but by a long distance, the announcement of the scheme in 2003. It follows that the dates of application and of follow-up application were of absolutely no significance in the course of 2000 and 2001.
15. Early in 2001 the claimant changed solicitors to Messrs Duncan Lewis & Co.. The defendants accept a date for the lodgement of an asylum claim on 12th February 2001 - that is recited in the decision letter of 18th May 2006. The relevant text from the decision letter reads:

"In order to be eligible for the exercise your client's asylum claim must have been lodged before 2nd October 2000. As their asylum claim was lodged on 12th February 2001 they do not satisfy the eligibility criteria for inclusion in the exercise."

The claimant says the date February 2001 is when the defendants opened the file rather than when the claim was actually made and it is perfectly clear that it was on 23rd February 2001 when the new solicitors lodged a completed SEF, a form of withdrawal and other documentation. Why did the replacement solicitors go through those hoops on that date? It seems likely that on the takeover of the case from one solicitor to another they simply got on with it, made an application and treated the matter as a fresh initiative. It is not surprising that they did so. The inactivity on the part of Messrs Howe & Co. was woeful and at that stage, as I have just observed, the date of the asylum application was of no significance.

16. The defendants take the point that throughout the adjudication and indeed the claimant's submissions to the adjudicator during 2001 through into 2002, the claimant's fresh

solicitors treated the date of application for asylum as being February 2001, not July 2000. And so, for example, in the adjudication of 9th February 2002, at paragraph 3B, the date for the application was recited as being 12th February 2001. It is said that if that was an incorrect date it should have been corrected. No doubt that is so, but at that stage the date was of no significance and the natural inference is that that is the reason why no-one troubled to correct the date; it did not seem to matter.

17. In conclusion, in the absence of any evidence to disturb the obvious conclusions from the letters of July and August 2000, and in particular any evidence to suggest that the letter of 7th August is a forgery, it is my conclusion that the application was made in July, re-stated in writing in August, that that was a claim for asylum. Since there is no technical requirement as to the form of such a claim, that Mrs Tekagac satisfies both of the basic criteria for this scheme and that therefore the decision of 18th May 2006 was in error and will be quashed.
18. Miss Hulse, is there more required than that to deal with the problem that has been addressed here?
19. MISS HULSE: My Lord, I do not think there is. I need to make an application for costs. With reference to that application for costs you made various comments this morning. I have got, and I literally got them just as you were walking in, copies of my instructing solicitor's letter to the Home Office, to the Treasury Solicitors, enclosing Howe & Co's letter, plus the attachments of the previous letters, and that is dated 20th January 2007, shortly after she received them herself. So there is no basis for believing and I am sure my learned friend did it innocently but believing that the Treasury had not notice of this for almost as long as we had.
20. MR JUSTICE IRWIN: They came late to the court but the question is of course when the Secretary of State had a chance to consider them. Yes.
21. MISS HULSE: Can I hand those up?
22. MR JUSTICE IRWIN: It would be wise in case there is a time point for me to see them. (Handed) This is two copies of the same short bundle, is it?
23. MISS HULSE: My Lord, yes.
24. MR JUSTICE IRWIN: Let me just look at them if I may. (Pause) So you ask for costs.
25. MISS HULSE: My Lord, yes.
26. MISS BUSCH: My Lord, I --
27. MR JUSTICE IRWIN: You have done valiantly, but it would be hard to resist that.
28. MISS BUSCH: Yes.
29. MR JUSTICE IRWIN: The claimants may have their costs. Thank you both very much.