Neutral Citation Number: [2008] EWHC 232 (Admin)

Case No: CO/854/2006

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/02/2008

Before :

THE HONOURABLE MR JUSTICE FORBES

- -

Between :

THE QUEEN **on the application of Abdul Akim Mohammed RASHID**	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Mr T. Upali Cooray (instructed by Alsters Kelly) for the Claimant
Mr Sam Grodzinski (instructed by the Treasury Solicitor) for the Defendant

Hearing date: 1st February 2008

- -

Judgment

Mr Justice Forbes :

1. **Introduction.** The Claimant is an Iraqi national of Kurdish ethnic origin. In these proceedings he challenges the decisions of the Secretary of State for the Home Department ("the Secretary of State") set out in letters dated 1st December 2005 and 25th October 2006, whereby the Secretary of State refused to grant the claimant either indefinite leave ("ILR") or exceptional leave ("ELR") to remain in the United Kingdom.

2. It is to be noted that the claimant does not assert that he has any current well-founded fear of persecution in Iraq so as to entitle him to refugee status, nor any ground based on the European Convention on Human Rights ("the ECHR") as to why he cannot be returned to Iraq. Rather the claimant has asserted an entitlement to ILR, on the basis that he should have the benefit of either or both of the Secretary of State's following two policies:

   (i) a policy to the effect that the Secretary of State would not, in refusing asylum claims prior to the fall of Saddam Hussein's regime, do so on the basis that an individual from the Government Controlled Area of Iraq ("GCA") could have relocated to the Kurdish Autonomous Zone ("the KAZ Policy"); and

   (ii) a policy whereby individuals from Iraq who were refused asylum prior to the fall of Saddam Hussein's regime were, until 20th February 2003, nonetheless generally granted four years Exceptional Leave to Remain ("the ELR Policy").

   I will return to the background relating to these two policies later in this judgment.

3. **The Facts.** The claimant arrived in the United Kingdom on 31st May 2002 and claimed refugee status. He claimed a fear of Saddam Hussein's regime, based on his refusal to join the Ba'ath Party and on his having fled Iraq after reluctantly agreeing to join the Army.

4. The claimant was interviewed by the Secretary of State on 14th January 2003. His asylum claim was rejected on 16th September 2003. The claimant appealed that decision. At the hearing of his appeal on 26th November 2003, the claimant accepted that his fear of Saddam Hussein's regime no longer existed and he abandoned his asylum appeal altogether. However, he claimed that, because his father had been associated with the Ba'ath party, if he were to be returned to Iraq, he would be at risk of treatment contrary to Article 3 of the ECHR at the hands of Kurds seeking revenge.

5. On 9th January 2004, the adjudicator dismissed the claimant's appeal. The adjudicator accepted that the claimant's father had been a member of the Ba'ath party, but found that the claimant had exaggerated his father's rank and activities for that party so as to enhance his asylum claim. The adjudicator went on to find that there was "no credible evidence that either the (claimant) or his family are at any risk from unspecified Kurdish people seeking revenge": see paragraph 26 of the adjudicator's written determination.

6. The claimant's application for leave to appeal was dismissed by the IAT on 9th March 2004. However, the claimant did not return to Iraq. Instead, on 14th October 2005, his solicitors wrote to the Secretary of State and asserted that the claimant was entitled to leave to remain on the basis that he should have been granted ILR in the light of the Court of Appeal's decision in *R(Rashid) ~v~ SSHD(2005) EWCA Civ 744* (hereafter "*Rashid*"). On 1st December 2005, the Secretary of State refused that claim.

7. Judicial Review proceedings challenging the Secretary of State's decision were issued on 1st February 2006. Supplementary grounds of challenge were subsequently lodged dated 26th March 2006, in which the claimant sought to rely on the decision of Collins J in *R(A)(H) & (AH) ~v~ SSHD (2006) EWHC 526 (Admin)* (hereafter "*A,H & AH*") and the Secretary of State's ELR Policy.

8. On 3rd August 2006, Walker J granted permission to apply for Judicial Review on the papers.

9. On 25th October 2006 the Secretary of State wrote a further letter to the claimant's solicitors, stating that he was not entitled to leave to remain on the basis of the judgment in *A,H & AH*. As I have already indicated, the claimant also seeks to challenge that decision in these proceedings.

10. Before turning to the parties' submissions, it is necessary to summarise the background to the KAZ and ELR policies, although it is to be noted that the claimant is no longer pursuing any claim based on solely on the "KAZ" policy itself (see below).

11. **The Policy background.** Iraqi asylum seekers from northern Iraq – in particular those of Kurdish ethnicity – who had a well-founded fear of persecution in the area of Iraq formally under the control of Saddam Hussein ("the GCA"), might well have had no such fear in the Kurdish Autonomous Zone ("the KAZ") even when Saddam Hussein was in power. However, from around 1991 onwards, the Secretary of State had a policy not to argue that individuals from the GCA could relocate to the KAZ in order to seek protection from Saddam Hussein's regime as a reason for denying them refugee status, i.e. the KAZ Policy.

12. The background to and origins of the KAZ policy were explained in the Secretary of State's evidence in the case of *A,H & AH*. For the reasons explained in that case the KAZ policy had not been adequately disseminated within IND whilst it was still applicable.

13. However, from 20th March 2003, following military intervention in Iraq and the removal of Saddam Hussein and the Ba'ath regime from power, the KAZ policy came to an end because it was redundant. In short, there was no longer any issue of internal relocation away from the GCA to the KAZ once Saddam Hussein's regime in the GCA had been removed.

14. In addition to the KAZ policy, there had also been a policy in place until the fall of Saddam Hussein in relation to the Secretary of State's grant of ELR to Iraqi failed asylum seekers, i.e. the ELR policy.

15. Under the ELR policy, those individuals from Iraq whose claims for refugee status had been refused were, with few exceptions, granted ELR. Primarily, this was because of the Secretary of State's recognition of the severe penalties imposed by Saddam Hussein's regime on those who had left Iraq illegally.

16. Until 20th February 2003, all those granted ELR under the ELR policy were granted such leave for a four year period. On 20th February 2003, in light of the possibility of imminent military action in Iraq, ministers decided that it was appropriate that such leave should be granted for only 6 months.

17. On 20th March 2003, the ELR Policy came to an end altogether, again because Saddam Hussein's regime had been removed from power.

18. It is to be noted that the claimant was never granted the benefit of either policy because, unlike the factual circumstances in the cases of *Rashid* and *A, H & AH*, the claimant's application for refugee status was not decided until 16th September 2003, several months after Saddam Hussein had been removed from power and thus after both policies had come to an end.

19. Recognising the difficulty that this presented to his case, the claimant has sought to argue that he had a public law entitlement to have his asylum claim decided sooner than it was, so that he would have had the benefit of the policies (in particular the ELR policy) whilst they were still in force.

20. The grounds of the claimant's challenge have varied somewhat over time. Three sets of grounds have been advanced, namely the original grounds on 20th January 2006, the "Note of Further and /or Amended Grounds" on 26th March 2006 and the" Amended Grounds" dated 10th September 2007.

21. However, on behalf of the claimant, Mr Cooray confirmed that certain of the claimant's arguments were no longer pursued and that the grounds of challenge upon which the claimant now relies can be summarised as follows:

    (i) the claimant had a legitimate expectation that his application for asylum would be decided within 2 months of it being made or within a reasonable time thereafter;

    (ii) that if his application had been determined within that time frame, the claimant would have received the benefit of the Secretary of State's ELR policy (as already indicated, it appears that specific reliance on the KAZ policy is no longer pursued) and

    (iii) that a number of other Iraqi asylum seekers, who had claimed refugee status after the claimant, had had their decisions made before the claimant and during the currency of the ELR policy; with the result that these individuals ("the other Iraqi asylum seekers") had thus gained the benefit of the ELR policy and that this demonstrates that the Secretary of State acted with such conspicuous unfairness in relation to the claimant's application as to amount to an abuse of power.

22. **The Parties' Submissions**. Mr Mr Cooray referred to paragraphs 8.5 and 8.9 of the Secretary of State's White Paper published in July 1998 entitled "FAIRER FASTER

AND FIRMER – A MODERN APPROACH TO IMMIGRATION AND ASYLUM" ("the 1998 White Paper"), the material terms of which are as follows;

> "**A new covenant**
>
> 8.5 … The real issue is how to run an asylum system which serves the British people's wish to support genuine refugees whilst deterring abusive claimants. The focus should be on creating an efficient system which does both, and one in which the responsibilities of both sides are set out in what amount to a new covenant. This will involve the Government in recognising and fulfilling obligations to;
>
> - protect genuine refugees by scrupulous application of the 1951 Convention:
> - resolve applications quickly:
> - ensure that no asylum seeker is left destitute while waiting for their application or appeal to be determined …
>
> 8.9 Delivering faster decisions is crucial to the success of the overall strategy. The Government is aiming to ensure that by April 2001 most initial asylum decisions will be made within two months of receipt and that most appeals to adjudicators will be heard within a further four months. Both these targets reflect average process times and the Government expects that many cases will be dealt with more quickly. But achieving these targets will depend on a number of factors including the successful implementation of the Casework Programme. The number of asylum cases outstanding which will be affected by changing international circumstances and the extent to which applicants and their advisers unnecessarily delay resolution of an application or an appeal. The Government will therefore keep these targets under review as the implementation of the wider strategy progresses. At present economic migrants abuse the asylum system because its inefficiency allows them to remain in the UK for years. A faster system with more certain removal at the end of the process will significantly deter abuse."

23. Mr Cooray also referred to the January 2001 Public Service Agreement ("the 2001 PSA") between the Home Office and the Treasury, which set a target requiring that 60% of asylum application lodged on or after 1st January 2001 should be decided within 60 days.

24. Mr Cooray stressed that the claimant's solicitors had kept the Secretary of State informed about any change of address and had asked the Secretary of State to arrange the claimant's asylum interview as soon as possible (see, for example, the letter dated 16th August 2002). Mr Cooray pointed out that, in the event, the claimant was not

interviewed until 14th January 2003 and that a further 9 months elapsed before the Secretary of State made any decision on his asylum claim.

25. It was Mr Corray's submission that, having regard to the terms of the 1998 White Paper and the 2001 PSA and the time scale within which the applications of other Iraqi asylum seekers had been dealt with, the claimant had a legitimate expectation that his claim for refugee status would be dealt with within 2 months or a reasonable time thereafter. Mr Cooray stressed that, on the facts of the claimant's case, there had been ample opportunity for the Secretary of State to have dealt with his application during the currency of the ELR policy – just as had been done in the cases of the other Iraqi asylum seekers.

26. In the alternative, Mr Cooray submitted that the Secretary of State had acted with such conspicuous lack of fairness in failing to deal with the claimant's application within the same general timescale as that of the other Iraqi asylum seekers as to amount to an abuse of power: see *R ~v~ Inland Revenue Commissioners, Ex parte Unilever plc (1996) STC 681*, in particular the judgments of Sir Thomas Bingham MR and Simon Brown LJ (as they then were) at pages 690 and 694-695 respectively.

27. On behalf of the Secretary of State, Mr Grodzinski made the uncontroversial submission that it is well established that, save in exceptional circumstances, a claim based on legitimate expectation cannot succeed without a clear and unequivocal representation on the part of the public authority: see, for example, the decision of the Court of Appeal in *R (Association of British Civilian Internees: Far East Region) ~v~ Secretary of State for Defence (2003) 3 WLR 80*, where Dyson LJ said this (at paragraph 72:

> "Thus it is clear that it will be only in an exceptional case that a claim that a legitimate expectation has been defeated will succeed in the absence of a clear and unequivocal representation. That is because it will only be in a rare case where, absent such a representation, it can be said that a decision-maker will have acted with conspicuous unfairness such as to amount to an abuse of power."

28. Mr Grodzinski submitted, (correctly, in my view) that neither the passages in the 1998 White Paper upon which Mr Cooray relied nor the terms of the 2001 PSA, whether considered individually or in combination, could possibly be said to constitute a clear and unequivocal representation or promise to a potentially huge class of asylum seekers that their claims would be decided within 2 months or, indeed, within any particular period of time. He further submitted (again correctly, in my view) that the inclusion of the details relating to the other Iraqi asylum seekers adds nothing to the claimant's main case on legitimate expectation (i.e. that there was a clear and unequivocal representation) save to the extent that, absent such a representation, this is material upon which the claimant can seek to rely in support of his alternative submission that the Secretary of State has acted with conspicuous unfairness such as to amount to an abuse of power.

29. I agree with Mr Grodzinski that the claimant's primary case on legitimate expectation cannot succeed. As Mr Grodzinski pointed out, in *R(S) ~v~ Secretary of State for the Home Department (2007) EWHC 51 (Admin)* (hereafter "*S*") Collins J expressly found that the 1998 White Paper did not constitute an unambiguous promise that applications would be dealt with in any particular timescale and the later decision of

the Court of Appeal in that case (see (2007) EWCA Civ 546) did not arrive at any different conclusion on that aspect of the matter. Thus, at paragraph 21 of his judgment in *S*, Collins J said this:

> "21. It is unnecessary to go into further detail since there was in my judgment no unambiguous promise that applications would be dealt with in any particular timescale. The White Paper was careful not to make any unequivocal promises and it would be rare for aims expressed by politicians or government to constitute promises capable of being regarded as legitimate expectations. …"

I agree with the views expressed by Collins J and adopt them with gratitude.

30. In paragraph 17 of his judgment in *S*, Collins J discussed the 2001 PSA. Although his judgment does not contain any express finding that the 2001 PSA did not constitute an unambiguous promise, whether considered in isolation or in conjunction with the 1998 White Paper, Collins J was clearly of that view, otherwise paragraph 21 of his judgment would not have been expressed in the terms that it was (see above). This is not surprising because, as Mr Grodzinski submitted, it is completely impossible to derive any unambiguous promise made to all asylum seekers that their claims would or should be decided within the 60 day timescale. On the contrary, by setting a target success figure of 60%, the PSA makes it clear that a significant proportion of applicants (i.e. 40%) would **not** have their applications decided within 60 days.

31. I turn finally to deal with Mr Cooray's alternative submission that, when dealing with the claimant's application, the Secretary of State acted with conspicuous unfairness such as to amount to an abuse of power, particularly when contrasted with the timescale within which the applications of the other Iraqi asylum seekers were decided.

32. I agree with Mr Grodzinski that there is no substance in this particular submission. The fact that some claims may have been decided more quickly than the claimant's application does not mean that the time taken to decide his claim was either unfair or unreasonable in all the circumstances. Investigation and determination of the claimant's application took just under 15 months, as described by Mr Forshaw in his witness statement. As it seems to me, in all the circumstances described, far from suggesting that the Secretary of State acted with such conspicuous unfairness as to amount to an abuse of power, that sort of timescale does not even suggest, ipso facto, any degree of unfairness on the part of the Secretary of State.

33. As for the other Iraqi asylum seekers, for the reasons explained in Mr Grodzinski written skeleton argument (see paragraph 37 and footnote 3), virtually nothing is known about the circumstances of those claims. As Mr Grodzinski observed, there might be any number of reasons as to why some cases were decided more quickly than the claimant's including, for example, compassionate circumstances relied on with a view to expediting the decision-making process. In my view, it is quite impossible to conclude, from the very limited information available, that the claimant's application was processed by the Secretary of State with any lack of fairness, let alone with such conspicuous unfairness such as to amount to an abuse of power.

34. **Conclusion**. For the foregoing reasons, I have come to the firm conclusion that this application must be and is hereby dismissed.