Asylum and Immigration Tribunal
AD (Qualification Directive – family member) [2007] UKAIT 00065

THE IMMIGRATION ACTS

Heard at Field House
On 18 May 2007

Before

Senior Immigration Judge Allen

Between

AD

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Slatter, Counsel, instructed by Times Immigration Consultants
For the Respondent: Mr P Tranter, Home Office Presenting Officer

There is no definition of 'family member' in Part 11 of the Immigration Rules. It is accordingly appropriate to refer to the definition in Article 2(h) of Council Directive 2004/83/EC.

DETERMINATION AND REASONS

1. The appellant is a national of Afghanistan. He appealed to an Immigration Judge against the Secretary of State's decision of 13 October 2006 to remove an illegal entrant from the United Kingdom. The Immigration Judge dismissed his appeal, finding his claim to lack credibility.

2. Reconsideration of the Immigration Judge's decision was sought on the following basis. Firstly, it was argued that the Immigration Judge should have found that the respondent's decision was not in accordance with the Immigration Rules, in particular 339Q(iii) of HC 395, having apparently accepted that the appellant's brother was related to him as claimed, and that the appellant was a minor, having been born on 22 May 1989. Accordingly it was argued that as a family member of his brother, who

had been granted indefinite leave to remain in the United Kingdom as a refugee, he was his family member within the meaning of paragraph 339Q, and accordingly entitled to a United Kingdom residence permit.

3. It was also argued in the grounds that the appellant was, both at the date of the Secretary of State's decision and at the hearing before the Immigration Judge, a minor, and therefore, since the respondent had not considered or applied his own policy with respect to minors, the decision in question was not in accordance with the law. Further, it was argued with regard to Article 8 of the Human Rights Convention, that the Secretary of State when processing the appellant's claim had not followed his own policy as set out in paragraph 350 of HC 395 or extra-statutory policies for the processing of claims for minors. Rather than the claim having been accorded priority and considered expeditiously, it had taken nearly three years for the claim to be decided, and no finding had been made by the Immigration Judge as to whether the time it took for the Secretary of State to process the claim fell outwith his own policy concerning such claims. It was argued that, if what the Immigration Judge said at paragraph 66 meant that the Secretary of State had not failed to process the claim in accordance with the law, this lacked adequate reasoning. These matters had clear relevance to the assessment of proportionality. Reconsideration was ordered.

4. The hearing before me took place on 18 May 2007.

5. Mr Slatter argued that with regard to the first matter raised in the grounds for reconsideration, it was open to the Immigration Judge to find that the relationship of brothers fell within paragraph 339Q.

6. Mr Tranter expressed concern as to whether a grant of ILR could be seen as a grant of humanitarian protection and treated in the same way. Also, with reference to the grounds, he argued that the case was on all fours with the decision in AA [2007] EWCA Civ 12 concerning consideration of the policy for minors, so the same conclusion should be arrived at in this case as in that. Although the Secretary of State had disputed the appellant's age, the Immigration Judge had accepted that he was a minor, so the applicable policy would be to grant discretionary leave, and the possibility arose of a direction under s.87 of the 2002 Act. That would negate the loss of an in-country right of appeal in that regard. He would accept that the Tribunal was bound by AA and since there were matters of policy, it was a matter for the Secretary of State to reconsider with regard to Article 8 and the policy. Mr Slatter did not disagree.

7. I agreed that it was appropriate for the appeal to be allowed to the extent that the application of the Secretary of State's policy and Article 8 are outstanding before the Secretary of State, although it is clear that the asylum conclusions should stand.

8. With regard to the first point, whether the appellant met the requirements of the Immigration Rules, namely that of paragraph 339Q of HC 395, it is perhaps helpful to set this out in full:

> 339Q(i) The Secretary of State will issue to a person granted asylum in the United Kingdom a United Kingdom Residence Permit (UKRP) as soon as possible after the grant of asylum. The UKRP will be valid for five years and renewable, unless compelling reasons of national security or public order otherwise require or where

there are reasonable grounds for considering that the applicant is a danger to the security of the UK or having been convicted by a final judgment of a particularly serious crime, the applicant constitutes a danger to the community of the UK.

(ii) The Secretary of State will issue to a person granted humanitarian protection in the United Kingdom a UKRP as soon as possible after the grant of humanitarian protection. The UKRP will be valid for five years and renewable, unless compelling reasons of national security or public order otherwise require or where there are reasonable grounds for considering that the person granted humanitarian protection is a danger to the security of the UK or having been convicted by a final judgment of a serious crime, this person constitutes a danger to the community of the UK.

(iii) The Secretary of State will issue a UKRP to a family member of a person granted asylum or humanitarian protection where the family member does not qualify for such status. A UKRP will be granted for a period of five years. The UKRP is renewable on the terms set out in (i) and (ii) respectively.

(iv) The Secretary of State may revoke or refuse to renew a person's UKRP where their grant of asylum or humanitarian protection is revoked under the provisions in the Immigration Rules."

9. It can be seen from the statement of the appellant's brother that he came to the United Kingdom on 14 June 2001 and applied for asylum on arrival. His application was considered by the Secretary of State and he was granted four years exceptional leave to remain, and subsequently granted indefinite leave to remain on 3 February 2006. It can be seen from (iii) of paragraph 339Q, set out above, that a United Kingdom residence permit will be issued by the Secretary of State to a family member of a person granted asylum or humanitarian protection where the family member does not qualify for such status in his own right. The question then arises, however, who is a family member. The amended Immigration Rules are silent on the point.

10. There is however a definition of 'family members' in Article 2(h) of Council Directive 2004/83/EC. This arises in the context of Article 23 of that Directive which, insofar as relevant, states as follows:

'Article 23
Maintaining family unity

1. Member States shall ensure that family unity can be maintained

2. Member states shall ensure that family members of the beneficiary of refugee or subsidiary protection status, who do not individually qualify for such status, are entitled to claim the benefits referred to in Articles 24 to 34, in accordance with national procedures and so far as is compatible with the personal legal status of the family member.

Insofar as the family members of beneficiaries of subsidiary protection status are concerned, Member States may define the conditions applicable to such benefits.

In these cases Member States shall ensure that any benefits provided guarantee an adequate standard of living.

…."

11. The definition of family members under Article 2(h) is as follows:

> "Family members' means, insofar as the family already existed in the country of origin, the following members of the family of the beneficiary of refugee or subsidiary protection status who are present in the same Member State in relation to the application for international protection:
>
> - the spouse of the beneficiary of refugee or subsidiary protection status or his or her unmarried partner in a stable relationship, where the legislation or practice of the Member State concerned treats unmarried couples in a way comparable to married couples under its law relating to aliens,
>
> - the minor children of the couple referred to in the first indent or of the beneficiary of refugee or subsidiary protection status, on condition that they are unmarried and are dependent and regardless of whether they were born in or out of wedlock or adopted as defined under the national law;"

12. It can be seen therefore that on the face of it no assistance is obtained by the appellant from the definition set out in the Directive. In the absence of any definition of family member in paragraph 339Q or in that part of the Immigration Rules, the definition in Article 2 of the Directive's definition of family member must be seen as having indirect effect in establishing who is and who is not a family member. It is perhaps surprising that no definition of 'family member' is to be found in paragraph 339Q of HC 395 or elsewhere in that part of the Immigration Rules. I conclude that the appellant is not a family member of his brother within the meaning of paragraph 339Q.

13. Otherwise I consider Mr Tranter is right to attach the weight that he does to what was said in AA [2007] EWCA Civ 12. This appeal, as was said by Keene LJ at paragraph 1, concerns the law and policy relating to unaccompanied minors who arrive in the United Kingdom and seek asylum but whose claim under both the Refugee Convention and the Human Rights Convention is rejected. Reference is made at paragraph 6 to the Home Office Operational Guidance Note on Afghanistan of February 2003 at paragraph 7 which states as follows:

> "Unaccompanied asylum seeking children who have no claim to stay in the United Kingdom and who would, had they been adults, have been refused outright, should continue to be dealt with under UASC policy and given ELR to age eighteen or four years for those under fourteen, unless there are adequate reception arrangements in place."

14. Of course, as Mr Tranter pointed out, the Home Office did not accept the appellant's claimed age, but equally as he also accepted, the Immigration Judge did, and therefore the policy was clearly relevant. It is the case therefore, as the Court of Appeal stated at paragraph 16 in AA, that the Immigration Judge should have found that the Secretary of State's decision was not in accordance with the law and the appeal should have been allowed under s.86(3)(a) of the Nationality, Immigration and Asylum Act 2002. Accordingly, I allow this appeal on the ground that the Immigration Judge's decision was not in accordance with the law, and direct the Secretary of State to reconsider whether discretionary leave to remain should now be granted, taking into account as he will need to do, the apparent breach of his policy on processing claims by minors.

15. On this basis the appeal is allowed.

Signed Date
Senior Immigration Judge Allen