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CO/7816/2006

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

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 23rd September 2008

B e f o r e:

HIS HONOUR JUDGE JARMAN QC

Between:
THE QUEEN ON THE APPLICATION OF C
Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

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(Official Shorthand Writers to the Court)

Mr M Gill QC and Mr D Bazini (instructed by Lawrence & Co) appeared on behalf of the **Claimant**
Mr S Grodzinski (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

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

1. JUDGE JARMAN QC: This is a claim by "C" who challenges the failure of the Secretary of State for the Home Department to grant him humanitarian protection but instead to grant only discretionary leave for a period of six months.

2. The claimant entered the United Kingdom in 1989 and was granted six months' leave to enter as a visitor. He was then granted leave to remain as a dependant on his father who was a work permit holder. That leave to remain expired in the summer of 1993. A subsequent appeal in 1995 against the refusal of leave to remain was dismissed with the result that the claimant became an overstayer. On 5th June 1997 the claimant was convicted of offences of conspiracy to kidnap, conspiracy to falsely imprison and conspiracy to blackmail.

3. The sentencing judge's remarks are summarised in a Probation Service case record. The sentencing judge, Judge Elver, said that all five defendants, with others in this country and China, formed themselves into a gang which he described as a ruthless and heartless one as it affected the victim, Mr Chou. Force was used to remove Mr Chou from a public street to a base room which the claimant and other defendants had already prepared with handcuffs, phones and an imitation gun. The judge was satisfied that the imprisonment of Mr Chou for 11 days, with his hands behind him, making him bark like a dog, phoning and demanding money in China had taken place. His wife was phoned using recordings of beatings of him to make her pay money in China. But for Mr Chou's quick thinking, the claimant and others could have succeeded in their task and others might have suffered.

4. The judge was in no doubt that the defences were manufactured. Mr Chou was subjected to two weeks' cross-examination, having to listen to the telephone conversations again, which to the sentencing judge showed that these defendants had no remorse. He treated them all the same. He said that there must be a deterrent sentence so that all people, immigrants or not, could feel safe on the streets. He gave 15 years' imprisonment on counts 1 and 2 and 14 years' imprisonment on count 3 which was to run concurrently, so the total was 15 years' imprisonment. All were recommended for deportation. Subsequently the Court of Appeal dismissed an appeal against conviction and sentence.

5. On 13th December 2003 the Immigration and Nationality Directorate of the Home Office, acting on behalf of the Secretary of State, wrote to the claimant at Her Majesty's Prison Lowdham Grange. It referred to the recommendation of deportation and the fact that the claimant was the subject of deportation action and liable to be detained under paragraph 2(1) of Schedule 3 of the Immigration Act 1971. Having considered the case, the detention was deemed to be justified under the powers in that schedule. It was decided that the claimant should remain in detention because he was likely to abscond, and the decision to detain him had not been reached on factors set out in that letter.

6. The claimant then applied for asylum in the United Kingdom on the grounds that he had a well-founded fear of persecution in China. On 26th March 2004 the Immigration and Nationality Directorate again wrote to the claimant, setting out in a three page letter reasons why that application failed. It was stated that in order to apply and qualify for

asylum under the terms of the 1951 Geneva Convention relating to the status of refugees, the applicant must show that he has a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. That claim was not upheld because the view was taken that the claimant did not come into any of those categories. Accordingly, it was said that he did not qualify for humanitarian protection.

7. There was also a reference to his being returned to China and the claim that if that occurred there would be interference with family life. Those representations were said to be carefully considered but it was recorded that the only family in the United Kingdom was the claimant's sister and his grandfather, whilst his parents and other siblings lived in the United States. Then reference was made to the conviction which I have referred to, and it was concluded that removal was proportionate in pursuit of that aim of Article 8(2) of the European Convention.

8. The claimant appealed against the decision made in December 2003 to make a deportation order under section 3(6) of the Immigration Act and against the decision made to refuse to grant asylum under paragraph 336 of HC 395 as amended. That appeal was heard by an Adjudicator, a Mr Hollingworth, and he gave his decision on 22nd December 2005 which was promulgated on 4th January 2005. C was represented by counsel. The defendant was represented by an officer. The appeal was heard along with another appeal of a Mr Liang and the decision is a complex and lengthy one running to some 53 paragraphs. The Adjudicator recorded the basis on which the claimant appealed. He indicated that the claimant's claim was that to return home would be a breach of the United Kingdom's obligations under the 1951 United Nations Convention and recorded that it was for an appellant to show that he or she is a refugee.

9. There was then extensive evidence about the position in China. At paragraph 41 the Adjudicator recorded that there was no challenge to the case put forward by C, save as to the issue of whether he would be at risk on return. At paragraph 53 the Adjudicator found that it would be a breach of Article 3 of the European Convention on Human Rights if C was returned to China. The Adjudicator went on:

> "Breach of Article 8 with respect to physical or moral integrity does not therefore need to be invoked. On the basis of the factors which I have set out above and on the basis only of the lower standard of proof in the light of the conduct of affairs in the People's Republic of China I find that the United Kingdom would be in breach of its obligations if the appellants were to be returned."

The basis of that finding was not only that the claimant may suffer double jeopardy on the basis that his activities embarrassed the Chinese authorities but may also face extra judicial reaction.

10. The Adjudicator went on to find, as I have indicated, that the claimant did not come within the qualifications for refugee status. Accordingly, the appeal on asylum grounds was dismissed but the appeal on human rights grounds was allowed.

11. The defendant applied for reconsideration of that latter finding. That reconsideration was carried on in August 2005 by a Mr Ockelton, the Deputy President of the Asylum and Immigration Tribunal, Mr Allen, a Senior Immigration Judge, and Mr Wilson, the Designated Immigration Judge, together with reconsideration of the case of one of the claimant's co-defendants. In that decision it was recorded that the appeals before the Adjudicators were on asylum and human rights grounds. Both Adjudicators rejected the claims in so far as they were based on the Refugee Convention. It was said, with respect to Mrs Sood, who had represented other appellants in that Tribunal hearing, who raised refugee arguments briefly without supporting grounds of appeal, that it was impossible to describe that aspect of the Adjudicator's determination as other than quite obviously correct. It was recorded that Article 33 of the Refugee Convention prohibited a refugee's return to a place where his life would be threatened for a Convention reason, but then continued as follows:

> "The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

12. Article 33(2) of the Convention was referred to, as well as section 72 of the 2002 Act. Finally, in paragraph 4, it was recorded that even without the 2002 Act, however, it was abundantly clear that the offences of which the claimant and others were convicted disentitled them to claiming the benefits of the Refugee Convention against their proposed expulsion. The Tribunal, therefore, went on to reconsider the appeals on human rights grounds. Those grounds were upheld in the claimant's case.

13. On 25th March 2006 the Directorate again wrote to the claimant, this time addressed to the solicitors representing him. Reference was made to the Immigration Tribunal decision. It was noted that the claimant had been convicted of conspiracy to kidnap, blackmail and false imprisonment and was sentenced to 15 years' imprisonment. It was stated in that letter:

> "As a result, he is not eligible for humanitarian protection. In the light of this and the AIT's finding, we are now considering whether your client is eligible for the grant of discretionary leave to remain in the UK. Your client has been convicted of a serious crime in the UK and as a result he is presumed to be convicted of a particularly serious crime and to constitute a danger to the community within the meaning of section 72 of the Nationality, Immigration and Asylum Act 2002."

No further decision was taken by the defendant and accordingly, in September 2006, proceedings for judicial review were commenced.

14. The question of permission came up before Munby J in February 2007. He granted permission but stayed proceedings until 28th February 2007 to enable the parties to agree the terms of an appropriate consent order. It was a matter of concern to the learned judge that despite the decisions of the Adjudicator and the Asylum and

Immigration Tribunal, and despite the claim having been launched in the Administrative Court in September 2006, nothing further had been decided by the defendant. It was observed that the defendant had put forward no defence to the claim, and indeed had indicated that she would grant discretionary leave to remain. The learned judge indicated that the claim was plainly arguable and that the period of stay would allow the defendant to issue discretionary leave to remain in a form acceptable to the claimant.

15. The result of that was that the Directorate did issue such discretionary leave to remain by letter dated 8th February 2007. That set out the entitlements under the leave. In respect of employment it was said that the claimant was free to take a job without permission. He was free to use the National Health Service, the Social Services and other services provided by the local authorities as were needed. It was pointed out that travel abroad during the period of leave would mean that the leave would lapse and that any subsequent application made to return to the country would be considered as an application for fresh leave.

16. On 17th March 2008 a further period of six months was granted. That expired in August 2008. The present position apparently is that further application has been unfortunately misplaced, in the sense of going to the wrong department and has not yet been considered, but the expectation is that a further period of six months is likely to be granted.

17. It is necessary for me to refer to some of the policies and rules, as well as legislation, which are relevant in this case. The first is the Convention Relating to the Status of Refugees and to Article F thereof. That says:

> "The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that --
>
> (a) he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;
>
> (b) he has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee;
>
> (c) he has been guilty of acts contrary to the purposes and principles of the United Nations."

Then in Article 33(2) are the terms which were set out by the Asylum and Immigration Tribunal.

18. In terms of the humanitarian protection policy of the defendant, that was introduced on 1st April 2003 following the abolition of exceptional leave on 31st March 2003. In August 2005 that policy was revised in line with a new policy on the granting of refugee leave. It was stated that although the eligibility criteria had not changed,

people who are granted leave on humanitarian protection grounds on or after 30th August 2005 would be granted five years' leave in the first instance rather than three years as previously.

19. Under a heading saying "Key Points" it was stated that:

> "Persons who face a real risk of treatment which meets the criteria for humanitarian protection will not be granted leave on that basis where they fall into the exclusion criteria set out in section 2.5 of this instruction. These criteria include those whose presence in the UK is not conducive to the public good, for example because of their criminal behaviour and/or their threat to the security of the United Kingdom."

In 2.5 the exclusion criteria are set out, which included the commission of a serious crime in the United Kingdom or overseas.

20. In relation to discretionary leave, again, the criteria for granting discretionary leave are set out at paragraph 2. General considerations are dealt with in 2.6.1 where this is said:

> "Where a claimant would have qualified for refugee status under the 1951 Convention or for humanitarian protection but for the fact that they were excluded from that protection, the reasons leading up to the exclusion will normally determine whether the claimant is entitled to discretionary leave.
>
> Individuals excluded from humanitarian protection on the basis of provisions that mirror Article 1F and/or Article 33(2) of the Refugee Convention, will normally be kept or placed on temporary admission or temporary release, unless Ministers decide, in the light of all the circumstances of the case, that it would be appropriate to grant up to six months' discretionary leave."

In passing, I mention that the reference to "temporary admission or temporary release" was later found to be unlawful in a decision which I shall come to in due course.

21. In dealing with the distinction between the grant of discretionary leave on the one hand and temporary admission or release on the other hand, it was stated that:

> "Where an individual has committed a serious crime in the UK or overseas that does not fall within the category above they will normally be given six months discretionary leave."

22. A European Council Directive 2004/83/EC was made on 29th April 2004. That set out the minimum standards for the qualification and status of third country nationals or stateless persons as refugees, or as persons who otherwise need international protection. In the recitals, the Geneva Convention and Protocol were referred to as providing the cornerstone of the international legal regime for the protection of refugees. Article 12 thereof, under the heading "Exclusion", dealt with the position where a third country national or stateless person is excluded from being a refugee. Then Article 12(2) says:

"A third country national or a stateless person is excluded from being a refugee where there are serious reasons for considering that --

(a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he or she has committed a serious non-political crime outside the country of refuge prior to his or her admission as a refugee; which means the time of issuing a residence permit based on the granting of refugee status; particularly cruel actions, even if committed with an allegedly political objective, may be classified as a serious non-political crimes.

(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble in Articles 1 and 2 of the Charter of the United Nations."

Then Chapter 5 goes on to deal with qualifications for subsidiary protection and Article 17 deals with exclusion from such protection. That provides as follows:

"1. A third country national or stateless person is excluded from being eligible for subsidiary protection where there are serious reasons for considering that --

(a) he or she has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes;

(b) he or she has committed a serious crime;

(c) he or she has been guilty of acts contrary to the purposes and principles of the United Nations as set out in the Preamble and Articles 1 and 2 of the Charter of the United Nations;

(d) he or she constitutes a danger to the community or to the security of the Member State in which he or she is present."

Then the Immigration Rules which were, as is common ground, made to give effect to that Directive provide as follows:

"**Exclusion from humanitarian protection**

> A person is excluded from a grant of humanitarian protection under paragraph 339C (iv) where the Secretary of State is satisfied that:
>
> (i) there are serious reasons for considering that he has committed a crime against peace, a war crime, a crime against humanity, or any other serious crime or instigated or otherwise participated in such crimes;
>
> (ii) there are serious reasons for considering that he is guilty of acts contrary to the purposes and principles of the United Nations or has committed, prepared or instigated such acts or encouraged or induced others to commit, prepare or instigate instigated such acts;
>
> (iii) there are serious reasons for considering that he constitutes a danger to the community or to the security of the United Kingdom; and
>
> (iv) prior to his admission to the United Kingdom the person committed a crime outside the scope of (i) and (ii) that would be punishable by imprisonment were it committed in the United Kingdom and the person left his country of origin solely in order to avoid sanctions resulting from the crime."

23. There was some debate before me as to whether the word "and" in paragraph (iii) should be given some other meaning. Mr Grodzinski for the defendant submitted that, on a proper reading of that, it cannot have been intended that each of those subparagraphs should be read cumulatively. One only has to look at the separate categories and have regard to subparagraph (iv) to realise that an absurdity would be created if such a cumulative interpretation was given.

24. Moreover, says Mr Grodzinski, as that rule was made in order to give effect to the Council Directive, then it should be interpreted with that purpose in mind. In so submitting he referred to the well known **Marleasing** principle and to the case of **Revenue and Customs Commissioners v IDT Card Services Ireland Ltd** [2006] EWCA Civ 29. At paragraph 73 Arden LJ referred in a different context to the effect of a directive in the United Kingdom being governed by the legislation bringing the EC treaties into force in the United Kingdom, namely section 2 of the European Communities Act 1972. Arden LJ went on to refer to the approach of the courts in this country which, when interpreting United Kingdom legislation, was designed to give effect to Community legislation and to construe the legislation here, so far as possible, to make it compatible with the Community legislation. In paragraph 85 Arden LJ referred to the case of **Ghaidan v Godin-Mendoza** [2004] 2 AC 557. In that case Lord Nicholls of Birkenhead said this:

> "But once it is accepted that section 3 [of the Human Rights Act 1998] may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration.

That would make the application of section 3 something of a semantic lottery."

25. So, Mr Grodzinski submits, having regard to the terms of the Council directive, the rule at 339D should be interpreted so that the word "and" should read "or", otherwise the conditions of protection in this jurisdiction would be far more attractive than the other jurisdictions in the community and would give rise to forum shopping. Mr Gill QC, who appears on behalf of the claimant, accepted the force of that argument.

26. In my judgment, the plain construction of rule 339D of the Immigration Rules, having regard to the Council Directive, should be that the categories therein set out, of which the Secretary of State must be satisfied before someone is excluded from the grant of humanitarian protection, is disjunctive and not conjunctive.

I now turn to other authorities which were cited before me. The first case, which I alluded to earlier on, is the case of **R (S and Others) v Secretary of State for the Home Department** [2006] INLR 635. That case involved nine Afghan nationals who hijacked a flight in Afghanistan in order to flee the Taliban. The aircraft arrived in the UK where they claimed asylum. They were charged and convicted of various offences relating to the hijacking. Brooke LJ said this at paragraph 45:

> "That the statutory scheme of immigration control postulated that someone who successfully maintained that their removal would constitute a violation of their European Convention rights should be entitled to leave to enter, for however limited a period, became apparent from the clear submissions addressed to the court by Mr Rabinder Singh QC, who appeared for the respondents. In short, the essence of his argument is that those who do not have the 'right of abode' here must obtain 'leave' in order to enter the country (see Immigration Act 1971, s 3(1)). Asylum and human rights applicants (like everyone else who does not possess the right of abode) are subject to the same statutory controls on entry. This is reflected by the terms of the Immigration (Leave to Enter) Order 2001 (see para 22 above) which provides that both categories of applicant may be granted 'leave to enter', even if in the latter case all they may have established is that they cannot lawfully be removed without an infringement of their European Convention rights."

It was after that authority, as I have indicated, that the temporary admission which was referred to in previous policy was declared unlawful.

27. I was then referred to an authority upon which Mr Gill places heavy reliance, that is **Secretary of State for the Home Department v TB (Jamaica)** [2008] EWCA Civ 977. That was an appeal by the Home Secretary from the judgment of Bean J in which he held that it had been an abuse of process and unlawful for the Secretary of State to refuse to grant to the respondent refugee status and five years' leave to remain in this country, on the grounds that he constituted a danger to the community within the meaning of Article 33 of the 1951 Convention relating to the status of refugees in section 70 of the Nationality, Immigration and Asylum Act 2002. At paragraph 32 Stanley Burnton LJ said this:

> "As a matter of principle, it cannot be right for the Home Secretary to be able to circumvent the decision of the IAT by administrative decision. If she could do so, the statutory appeal system would be undermined; indeed, in a case such as the present, the decision of the Immigration Judge on the application of the Refugee Convention would be made irrelevant. That would be inconsistent with the statutory scheme."

Then at paragraph 36 the learned judge said this:

> "The Secretary of State's action might be castigated as an abuse of power, but I would prefer to avoid pejorative expressions of uncertain denotation and application and to hold simply that the Secretary of State was bound by the decision of the Immigration Judge and that her subsequent action was unlawful on the ground that it was inconsistent with that decision. It follows that the judge's conclusion was correct. The Home Secretary is bound to grant TB the leave to remain to which the Immigration Judge's decision entitled him."

28. I now turn to the submissions made in this case. The first submission by Mr Gill is that the Immigration Rules should be interpreted in such a way as to reflect the Geneva Convention. The concept of a serious offence, submits Mr Gill, should have regard to whether that offence means that the offender is a danger to the community. In doing so he submits that the rules are intended to mirror the Geneva Convention.

29. Mr Grodzinski pointed out that the humanitarian protection, or subsidiary protection, as it is referred to in the Council Directive, is subject to exclusions in Article 17 which I have already referred to. Whilst article 17(1)(a),(c) and (d) reflect the Convention, the addition of (b), namely that he or she has committed a serious crime, is plainly that; an addition which the Council have adopted which is not set out in the Geneva Convention.

30. In my judgment, Mr Grodzinski's submissions are to be preferred. It seems to me that that was plainly a category of exclusion from humanitarian protection or subsidiary protection which has been given effect to by the Immigration Rules already referred to.

31. In Mr Gill's second submission, relying, as I have indicated, on the authority of **TB (Jamaica)** he says that it is an abuse for the Secretary of State now to rely upon exclusion when none was relied upon before. Mr Grodzinski's answer to this is threefold. Firstly, he says that this present case can be distinguished from the case of **TB (Jamaica)** because here the claimant's refugee claim failed before an Adjudicator because the claimant could not bring himself within any of the Convention reasons. The second reason for distinction from the facts of the present case is that there was no appeal from the adjudication, even though the Asylum and Immigration Tribunal had expressly referred to Article 33. Finally, submits Mr Grodzinski, the question in this case and in this review is: what length of leave should be given to the claimant as a result of a finding that to return him to China would be a breach of his Article 3 Convention rights? That was not an issue which was dealt with, or could have been dealt with, by the Adjudicator or by the Asylum and Immigration Tribunal. Indeed,

said Mr Grodzinski, there is nothing inconsistent with what the defendant has decided since those decisions with anything in the decision, and that is to be contrasted again with the **TB (Jamaica)** case.

32. To make good his points he took me to a number of provisions in the 2002 Act. First of all, he referred me to section 82, giving a general right of appeal where any decision is made in respect of a person. Such a person may appeal to the Tribunal. In subsection (2) the phrase "immigration decision" is defined and many categories of such a decision are set out. In section 84, under the heading "Grounds of appeal", subsection (1) provides as follows:

> "An appeal under section 82(1) against an immigration decision must be brought on one or more of the following grounds . . .
>
> (c) that the decision is unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Human Rights Convention) as being incompatible with the appellant's Convention rights . . .
>
> (g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights."

Section 86(2) provides:

> "The adjudicator must determine --
>
> (a) any matter raised as a ground of appeal (whether or not by virtue of section 85(1)), and
>
> (b) any matter which section 85 requires him to consider."

33. Section 87 provides that if the Tribunal allows an appeal it may give a direction for the purposes of giving effect to its decision. That was not done in this case and Mr Grodzinski submits that it should not have been done, and contrasted that situation with a direction given, for example, by the Tribunal in a decision **LS (Gambia)** [2005] UKAIT 00085, because there the issue was whether the applicant should be granted leave to remain as a student, and that was the direction given in that decision. So, says Mr Grodzinski, the power of the defendant to grant leave for a particular period is a decision for him or her, save where it is necessary to give effect to a decision of the Adjudicator.

34. In my judgment, this particular case can be distinguished from the case of **TB (Jamaica)** for the reasons advanced by Mr Grodzinski. The focus of the appeal before the Adjudicator and the Tribunal was very much as to the effect of any return of the claimant to his country of origin, namely China, but the issue of humanitarian

protection and discretionary leave was referred to by the Adjudicator and the Tribunal. It is clear that that claim by the claimant was rejected by both the Adjudicator and the Tribunal. It was not a case, in my judgment, of the Secretary of State simply not referring to a conviction and subsequently attempting to rely upon such a conviction in saying that protection should be excluded. Indeed, the conviction formed the very basis of the claimant's claim to asylum and to human rights protection. As Mr Grodzinski pointed out, it was the finding of the Adjudicator, upheld by the Tribunal, that the claimant would be at risk of double jeopardy for ill-treatment on the basis of that conviction, which means that he has not been returned to China. Had it not been for that conviction, he would have been returned.

35. The third submission of Mr Gill is that if the rules are interpreted in the way that, in my judgment, they ought to be, the policy underlying those rules is overly rigid and therefore unlawful.

36. Mr Grodzinski, in making his submissions, referred to the fact that the justification for giving discretionary leave at six-monthly intervals is self-evident; that is that it allows a review, not only of the claimant's circumstances but also the conditions in the state in question. He referred to the fact that very often the Asylum and Immigration Tribunal will give country guidance, and as an example referred to such a case; that is **JC (Double Jeopardy: Art 10 CL) China CG** [2008] UKAIT 00036. Some detail was gone into by the Tribunal in that case as to the up to date situation in the People's Republic of China and the prosecution there of offenders who had offended in this country upon their return to China. Again, in my judgment, Mr Grodzinski's submissions are well-founded. The only reason that the claimant has not been returned to China is the fact of the commission of his crime in 1997.

37. Next, says Mr Gill, the policy of allowing only six months is unlawful because it means that there is an unwarranted interference with the private life of the claimant contrary to Article 8(1) of the European Convention. That says:

> "**Right to respect for private and family life**
>
> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Mr Gill says that because the discretionary leave is only given for six months at a time there are a number of interferences with C's private life. Firstly, as indicated in the letter which I have quoted, he is restricted in terms of travel. Secondly, he has to apply for permission to marry. Thirdly, he is at a disadvantage in the employment market because of the uncertainty of how long he is to remain. There are other disadvantages

for the same reason, such as his inability to set up and operate bank accounts, to apply for mortgages, to enjoy mobile phone contracts, hold driving licences and pursue courses of education.

38. In relation to the prospect of marriage, the policy of the defendant is currently under review. The present policy is that a claimant can apply for a certificate to marry. The claimant in this case has not applied. He has met, by telephone or other electronic communication systems, a person he refers to as his proposed marriage partner. Mr Grodzinski accepts that discretionary leave to remain means that he could not act as a sponsor to that particular person, but submits that that would be the same if he was remaining for longer. He submits that there was nothing to prevent the proposed partner from applying for visitor's leave under the Immigration Rules, but accepts that it would mean that she could not obtain settlement. Again, he says, that would apply even if the discretionary leave to remain were longer than it is at present. He points out that the claimant currently remains employed part-time in the family business, looking after his grandmother at other times.

39. I am prepared to accept for present purposes that all of these restrictions, at least cumulatively, do affect the private life of the claimant. But, says Mr Grodzinski, even if that is the case, then, as a matter of proportionality, the system of discretionary leave to remain being one of six months when humanitarian protection is not appropriate is an appropriate response. Mr Gill reminds me that for proportionality to be shown by the defendant it must be the minimum possible interference and necessary in order to protect the public. In my judgment, where, as here, the claimant has committed what is undoubtedly a serious offence, has been the subject of deportation and the only reason he has not been deported is the very commission of that offence, it is proportionate to adopt and implement a policy of giving discretionary leave to remain for periods of six months in order to review not only the claimant's conditions but the conditions in the country to which deportation might be sought.

40. Finally, says Mr Gill, the interference which he has mentioned is discriminatory because it is not an interference which will be suffered by other persons who have been convicted of criminal offences upon their release, in particular those of British nationals. Mr Grodzinski makes the point that British nationals are not subject to being eligible to be removed to China and accordingly there is no discrimination. The fact of the claimant's position, again, arises simply from his commission of a serious offence, the recommendation for deportation and the finding that, at present at least, such deportation would carry a real risk of infringement of his Article 3 rights. I prefer the submissions of Mr Grodzinski and in my judgment there is no discrimination in this case.

41. For all those reasons, I am satisfied that the decisions of the defendant were lawful within the ambit of executive discretion and applied properly and I dismiss this claim.

42. MR GRODZINSKI: My Lord, I am grateful.

43. JUDGE JARMAN QC: I am sorry it has taken so long.

44. MR GRODZINSKI: I am sure everyone is grateful for the time my Lord have given to the case. The Secretary of State would ask for her costs of the claim subject to the usual order, namely that there be an assessment under the Community Legal Services Regulation. I understand that the claimant is legally aided, so there would be there would be no realistic possibility of a costs order being enforced, so we would ask for the usual order.

45. JUDGE JARMAN QC: Yes. Mr Gill?

46. MR GILL: My Lord, there is nothing really that I want to say about that. I do have an application for permission to appeal.

47. JUDGE JARMAN QC: We will come to that in due course. So there will be an order for costs to be paid by the claimant to the defendant but not to be enforced without permission of the court.

48. MR GRODZINSKI: My Lord, the associate will be familiar with the usual order.

49. JUDGE JARMAN QC: Yes. And assessment of the publicly funded costs.

50. MR GILL: My Lord, yes. If there is any doubt about the wording perhaps one of us can draft it.

51. JUDGE JARMAN QC: You want to go to the Court of Appeal?

52. MR GILL: My Lord, with great respect --

53. JUDGE JARMAN QC: You say exactly what you want to say.

54. MR GILL: My Lord, the issue, with great respect, relates to some of the arguments advanced in relation to the content of serious offence and the application of the **TB** principle, and the arguments about proportionality of the discretionary leave policy, particularly the analogy with **AXY** in relation to discrimination. All those points, my Lord, are points which deserve serious consideration, not only because with, with great respect, a number of the arguments have not been dealt with in the judgment but also because they affect a large number of people. It must be realistically possible that the Court of Appeal, for the reasons that I have given in my oral submissions today and written argument, may take a different view. Anything other than that would really amount to reopening the submissions I have made earlier. I would not wish to descend into that, my Lord. It is the first such case in relation to these issues, apart from **TB**, that has in fact come before the High Court. I respectfully submit it would warrant consideration.

55. JUDGE JARMAN QC: Do you have anything you wish to say?

56. MR GRODZINSKI: My Lord, my learned friend said that his arguments deserved serious consideration. With great respect they have had serious consideration from this court. The second point is that the arguments affect a large number of people, with which I would not disagree but very many asylum cases on arguments of law which

come before this court would affect large numbers of people so that cannot be a reason. If my learned friend wishes to, he could seek leave from the Court of Appeal.

57. JUDGE JARMAN QC: I am afraid I agree, Mr Gill. I do not consider that there is a realistic prospect on appeal, but obviously it is up to you to persuade the Court of Appeal.

58. MR GILL: Thank you, my Lord.

59. JUDGE JARMAN QC: Thank you both.