

CO/8786/2008

**Neutral Citation Number: [2009] EWHC 1402 (Admin)**  
**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**THE ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand  
London WC2A 2LL

Monday, 8th June 2009

**B e f o r e:**

**MR JUSTICE MITTING**

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**Between:**

**THE QUEEN ON THE APPLICATION OF FIAZ MOHAMMED**

**Claimant**

v

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Defendant**

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**The Claimant did not appear and was not represented**  
**Ms S Broadfoot** (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

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J U D G M E N T

1. MR JUSTICE MITTING: By this claim, the claimant, Mr Fiaz Mohammed, challenges the Secretary of State's decision to refuse to treat his claim to indefinite leave on family grounds as a fresh claim under paragraph 353 of the Immigration Rules and challenges her decision to refuse to grant him and his wife and four children indefinite leave to remain under the family concession policy.
2. There is no doubt that the claimant arrived in the United Kingdom on 24th August 2000 and applied for asylum on the following day. His application was refused on 4th January 2001. There is some issue between him and the Secretary of State on whether or not he received notice of that refusal but in any event he did not appeal against the refusal nor did he claim that the decision to refuse him asylum or leave to remain would infringe his rights under the European Convention on Human Rights. I mention that because one of his subsidiary grounds of challenge is that he has not been afforded a right of appeal against that implied decision. He was in fact afforded a right of appeal against an asylum decision at a time when the Human Rights Act was in force and accordingly was both entitled and required to bring any human rights challenge in the same proceedings as he would have challenged the refusal of asylum if he had chosen to do so.
3. There is also no doubt that his wife and four children arrived in the United Kingdom on 18th October 2003. The basis of the claimant's claim is that from that moment on he lived with her and his four children, all of them being dependent upon him, in the United Kingdom and so, by virtue of his arrival in 2000 and claim for asylum shortly after arrival, and the fact as claimed that they formed part of his family unit in the United Kingdom on 24th October 2003, he was entitled to the benefit of the concession.
4. It is common ground that he satisfies the first two of the requirements of the concession. First, he applied for asylum before 2nd October 2000 and, secondly, his asylum claim having been refused, he has no further avenue of appeal and has not been removed.
5. The contentious issues are two: first, whether or not he returned To Pakistan at some time after the refusal of his asylum claim and before 24th October 2003 and, secondly, whether or not his family formed part of a family unit in the United Kingdom on 24th October 2003. In a short witness statement in support of this claim, his wife describes how she arrived on 18th October 2003 with the four children and records the fact that she was interviewed on arrival and was released to an address in Spring Road, Hayes, in Middlesex. She goes on to state:

"My husband Mr Fiaz Mohammad was also waiting for me at the same address and we have remained together as a family unit. We shared this accommodation from 18 October 2003 onwards..."

Shakeela Kausar, the claimant's wife's cousin, in a short supporting statement, confirms that whilst staying at her address Mr Fiaz Mohammed, the claimant, was also staying with them for at least four to five days a week, even though working in Gloucester. On the basis of those bare assertions the claimant's case is founded.

6. Extensive material provided by his wife paints a radically different picture. At her screening interview, she said that she left Pakistan on 14th October 2003 and had last seen her husband two weeks ago, that is to say in early October 2003. She said that her husband had not claimed asylum in the United Kingdom or sought leave to enter the United Kingdom. When asked where he was "at this time" and why he did not travel with her, her reply was:

"He is in Borgi Bhainse. He said he will follow us."

She gave a detailed description about the circumstances which she said had caused her to leave Pakistan. It included the statement that the police wanted to arrest her husband because he had not reported to his army unit. In a second screening form, completed on 19th October 2003, she described how her husband had given money to an agent to permit her to come to the United Kingdom and identified Ms Kausar as her sponsor and contact in the United Kingdom. It was she and her husband, she claimed, who would provide her with food and accommodation during her stay.

7. She gave as the principal reason for applying for asylum the fact that her husband was being harassed by the army to fight on the Indian border. She described her husband's position in their home in Pakistan, that he was a labourer and that he refused to fight. A detailed typed statement supplemented the two screening forms. They included an account of how her daughter's parents in law had responded adversely to her recent marriage to their son and stated that when her husband went to the police station to report their attitude to the police he returned home helpless. That was clearly something that had happened in the relatively recent past. She described how her daughter was bruised and had bodily scarring. About her husband, she said:

"My husband was required to report to the army next day but he decided that he would not go because the family needed him. The same night my husband took us to Rawalpindi to one of his friend's house. Where we remain till the time we came to the United Kingdom. My husband returned home early morning to our native house."

She then described how her husband had gone to Rawalpindi to see if someone there could provide refuge for him.

8. Those two interviews were, as their dates indicate, just about a week before the date upon which it was necessary to benefit from the concession, that the family should live as a unit in the United Kingdom.
9. In a further statement of evidence form completed on 27th November 2003, three days after that date, the claimant's wife gave further detail about her asylum claim and where her husband was. She said that her husband lived with army officers in the period immediately before departure but nevertheless lived with her, impliedly in their native village, for two to four days, between the monthly periods that he would spend with the army officers. She gave the date of her daughter's marriage as February 2002, although in another document it was given as a date in 2003. She said that her husband had

arranged her journey and when, in response to the specific question why did her husband not come with her, said:

"He couldn't come with us because we could not arrange for him to come with us. My husband did not come with us because we did not listen to him. My husband told me that I will come later and join you. My husband did not come with us as we did not have enough money for him to come with us."

When asked where her husband was now, she replied "in Pakistan, Borgi Bhainse". She reiterated that he had not accompanied her because he did not have enough money to come with her. Some support for those statements about where her husband was is provided by the fact that, although required to report to an immigration office on 20th October 2003 and 17th November 2003 and again on 15th December 2003, he did not do so.

10. Prompted by these proceedings, the Secretary of State gave fresh consideration to the claimant's representations and set out in a detailed letter of 13th February 2009, that which I have summarised in this judgment so far. She concluded that the facts did not give rise to a fresh claim under paragraph 353 and that the claimant and his family did not benefit from the family concession for the reasons which I have given. The reasoning in that letter is in my view entirely unimpeachable. It contains no error of law nor irrationality. It is a complete answer to any way in which the claimant's claim might be put. It covers, as well as the matters to which I have referred, the residual Article 8 claim in familiar terms by referring to the possibility of the return of the whole family to Pakistan, a country which in the light of the rejection of the wife's asylum claim and of her appeal against that rejection by an adjudicator poses no problem for any of the members of this family. In short, the Secretary of State's decision that it was reasonable for them to enjoy family life in Pakistan and not in the United Kingdom is itself unimpeachable.
11. There remains, I suppose, the possibility, implicit in the stark contradiction between the accounts given by the claimant's wife, that the whole basis of this claim is fraudulent, that he has remained throughout in the United Kingdom and she falsely told the immigration officers that she had left him behind in Pakistan. Although it is not necessary to reach any decision upon this issue because the Secretary of State's decision that the material points to the claimant being in Pakistan on the relevant date is unimpeachable, nevertheless, had it been necessary to decide it, I would have rejected this claim, based upon a concession made for sound administrative reasons, on the basis that this family could only bring itself within the concession by relying on blatant fraud by one of its adult members. It seems to me that public policy would permit in those circumstances a departure from a concession which would otherwise have been applied in favour of the claimant and his family. As I say, I do not found my decision on that ground, I found it on the finding that the Secretary of State's decision that the claimant has not shown that he had not left the United Kingdom after the refusal of his asylum claim and was not living together with his family as an unit in the United Kingdom on 24th October 2003 is not open to challenge.

12. For these reasons, this judicial review claim is dismissed.
13. MS BROADFOOT: Thank you, my Lord. I have an application for costs, however, on the usual basis. May I just turn round and check what the situation was in relation to legal aid at one point before --
14. MR JUSTICE MITTING: Yes. Well, he is no longer legally aided now.
15. MS BROADFOOT: That is certainly true, my Lord. If I could just turn round. Obviously we say costs follow the event but in addition, on 20th March 2009, the Treasury Solicitor wrote to the other side saying you have now had our detailed grounds and our evidence -- so this is a month after -- detailed grounds and evidence and please withdraw your claim and we have heard nothing. So he has certainly been on notice of it and warned.
16. MR JUSTICE MITTING: Well, this is a full blown claim, you have won and you are entitled to your costs, simple as that. If there is a public funding in the background then no doubt that can be dealt with at the detailed assessment stage if the issue is raised.
17. MS BROADFOOT: Thank you very much, my Lord.
18. MR JUSTICE MITTING: The claimant will pay the defendant's costs to be assessed on the standard basis if not agreed.
19. MS BROADFOOT: Thank you.
20. MR JUSTICE MITTING: Thank you. As I say, I apologise for bringing you here or not releasing you and dealing with it as a matter simply to be disposed of without more, but I think it is better that there should be a reasoned judgment because the claimant will then have to demonstrate that he has reasonable prospects of success in setting it aside, if he attempts to do so.
21. MS BROADFOOT: Absolutely, my Lord, and we are very grateful for your judgment. Thank you.