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CO/4334/2009

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

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 21st October 2009

B e f o r e:

ROBERTY JAY QC
(Sitting as a Deputy Judge of the High Court)

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Between:
THE QUEEN ON THE APPLICATION OF PARARAJASINGHAM SATHAKARAN
Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

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Mr P Nathan (instructed by Scudamores Sols) appeared on behalf of the **Claimant**
Ms L Busch (instructed by Treasury Solicitor) appeared on behalf of the **Defendant**

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J U D G M E N T

1. THE DEPUTY JUDGE: The claimant, whom I shall call PS, has a lengthy immigration history. He is a national of Sri Lanka, who arrived in the United Kingdom as long ago as 20th February 2000. He claimed asylum on arrival. After 6 years of decision making and appeals, his first asylum claim was definitively determined in 2006.

2. On 18th September 2006 PS was detained and removal directions served. He made further submissions to the Secretary of State which he said amounted to a fresh claim. Eventually the Secretary of State agreed to reconsider the claimant's representations of 18th September 2006 and to reach a decision as to whether they amounted to a fresh claim.

3. On 18th November 2008 the claimant's solicitors requested that employment restrictions be lifted. After some delay and chasing letters, on 26th March 2009, the Case Resolution Directorate of the United Kingdom Border Agency wrote to the claimant's solicitors in the following terms:

> "On the 19 July 2006, the, then Home Secretary Dr John Reid announced to Parliament that the Immigration & Nationality Directorate (now re-named the UK Border Agency) had a Legacy of some 450,000 electronic and paper case records. The aim is to resolve these case records in five years or less, and by 19 July 2011.
>
> The then Home Secretary set out his priorities as cases where the applicant may pose a risk to the public; can more easily be removed; is receiving public funded support or may be granted leave to remain.
>
> Cases eligible to be considered by the Case Resolution Directorate (CRD) will be prioritised as outlined above. Cases will not be considered out of turn unless there are exceptional circumstances justifying a quicker resolution of the case. I cannot therefore give any indication at this stage where your client's case will be actioned.
>
> I can assure you that we endeavour to conclude your client's case at the earliest opportunity. Please do keep us informed of any changes to your client's personal circumstances. I have included the team postal details to enable effective communication between you and yourselves during this interim period."

The upshot of that letter, although it did not address the issue in terms, was that PS's employment restrictions were not being lifted during pendency of consideration of his further submissions made on 18th September 2006.

4. On 6th May 2009 the present application for judicial review was filed. There were two grounds which the parties are calling ground A and B. Ground B relates to the delay in dealing with PS's substantive asylum claim. I need consider that ground no further because permission has not been granted in relation to it and, in my judgment, it is not arguable.

5. Ground A, the right to work ground, is more straightforward and more meritorious. PS's pleaded point is that under European law he is entitled to work whilst his further submissions and claim for asylum remain under consideration. Beatson J granted permission in relation to ground A on 3rd August 2009.

6. The present application for judicial review was filed in the same month as the decision of the Court of Appeal in ZO Somalia & Ors [2009] EWCA Civ 442, promulgated on 20th May. Mr Nathan, who appears on behalf of PS before me, was junior counsel in one of the linked appeals in the Court of Appeal in that case, and already knew when he prepared his grounds for PS that ground A had been successful at appellate level.

7. In essence the Court of Appeal in ZO Somalia decided that a person making a subsequent application for asylum, as PS did in the instant case, falls within the Reception Directive. This means that someone in PS's position must be afforded access to the labour market, on such conditions as may be laid down in Member States. If a decision on his or her subsequent application, including a decision as to whether or not that application amounts to a fresh claim has not been taken within 1 year. PS obviously satisfies that temporal requirement. On the face of it therefore he benefits from the Court of Appeal's decision in ZO Somalia.

8. The Court of Appeal refused the Secretary of State permission to appeal to the House of Lords in ZO Somalia. No application for a stay has been made to the Court of Appeal, the House of Lords or the Supreme Court. Indeed I have been told that the three successful claimants in ZO Somalia have been allowed to work.

9. Returning to the procedural history of PS's case, on 8th June 2009 the Treasury Solicitor wrote to the claimant's solicitors asking them to agree to a stay of these proceedings pending the determination of the Secretary of State's petition to appeal to the House of Lords, or the Supreme Court. The claimant's solicitors refused to agree a stay. Beatson J was aware of this state of affairs when he granted permission in August. It was open to him to stay the application for permission but he did not do so.

10. Miss Busch, on behalf of the Secretary of State, renews the application for a stay. She submits that the Reception Directive does not apply to someone whose further representations have not been treated by the Secretary of State as a fresh claim. Further, she submits that the overall balance of justice including the good administration of justice favours the grant of a stay. If, as is entirely possible, the Supreme Court were to overturn ZO Somalia, PS's prejudice would be zero. Indeed, if he worked in the interim there would an uncovenanted gain. On the other hand, if the Supreme Court were to refuse permission to appeal or dismiss the appeal itself, the public interest still requires that the Secretary of State should not be or have been required to defend cases such as the present case.

11. I have been referred to two authorities by Mr Nathan: AH Iran is in my judgment not really in point, because there the claimant appellants were facing binding Court of Appeal authority against their position, which was authority which was admittedly potentially en route to the House of Lords. Queen (on the application of) Rama v Immigration Appeal Tribunal [2003] EWHC 27 (Admin), is closer to the present case

although there again was a decision of the Court of Appeal against the claimant. So far as Maurice Kay J (as he then was) appears to be laying down a principle of general application in Rama, that is to be found in paragraph 7 of the judgment, which provides:

> "7. If it were the case that the Court of Appeal or the House of Lords had granted leave to appeal, there is little doubt that the Secretary of State would have agreed to the adjournment that is sought. The position adopted by Miss Giovannetti, however, is that that type of adjournment should only be granted if two criteria are satisfied: (1) that there is uncertainty as to the relevant law, which is likely to be resolved by a forthcoming decision of the higher court; and (2) that the facts of the case which it is sought to adjourn are such that the decision which is awaited is likely to be determinative or substantially affect the outcome of the present case. In my judgment, those are sensible criteria for this court to adopt and I propose to adopt them."

12. Mr Nathan's basic submission is that his client should receive the immediate benefit of binding Court of Appeal authority and that he would be prejudiced if he should await the outcome of proceedings before the Supreme Court.

13. It has been accepted by Miss Busch, on behalf of the Secretary of State, that in the absence of a stay this application for judicial review must succeed. Thus the real point for my consideration is not the merits of Mr Nathan's application for judicial review but those of Miss Busch's application for a stay.

14. I have no hesitation in refusing the Secretary of State's application for a stay in this case. I do so for the following reasons. First, there is no uncertainty as to the relevant law. There is binding Court of Appeal authority directly on point which avails PS. As in Rama (see paragraph 8 of Maurice Kay J's judgment) it is not as though the Court of Appeal in ZO Somalia were divided or granted permission to appeal to the House of Lords. All that Miss Busch can say is that it is entirely possible that the Supreme Court might overturn ZO Somalia, but as matters stand that is an exercise in speculation.

15. Secondly, the Supreme Court has not yet granted permission to appeal to itself. I cannot infer it either will or will not. All I know is that a decision by the Supreme Court on the Secretary of State's application for permission to appeal will be given before the end of this term. This means that any appeal, if permission were granted, would not be heard in the Supreme Court before March or April 2010, with judgment not being given before May 2010 at the earliest.

16. Thirdly it was open to the Secretary of State to apply to the Court of Appeal for a stay of its decision in ZO Somalia, alternatively to make a similar application to the House of Lords. No such application, as I have pointed out, has been made. Instead the three successful claimants in ZO Somalia have been permitted to work. I see no reason for treating PS or anyone else for that matter in a similar position to him any differently.

17. Fourthly, in so far as this is a relevant consideration for my determination, in my judgment the balance of prejudice would be greater for PS than the Secretary of State. I have to assess the issue of prejudice respectively on two competing hypothesis. First, if a stay were granted and the Secretary of State fails before the Supreme Court, PS would have been denied an entitlement to work but potentially for a not insignificant period of time. Furthermore, I cannot ignore the fact that PS has not been working since September 2006.

18. Secondly, if a stay were refused and the Secretary of State were to succeed before the Supreme Court, PS would ex hypothesi have been working without an entitlement to do so. That, in my judgment, does not amount to grave prejudice to the public interest and the Secretary of State could then correct the position by removing PS's entitlement to work following his success before the Supreme Court.

19. In any event one cannot ignore the point that on the existing state of the law, which I am duty bound to uphold, PS has a current entitlement to work which would require, in my judgment, a powerful reason to displace. I see no powerful reason in denying him that entitlement.

20. I have been shown a schedule by Miss Busch which helpfully shows the current status of a significant number of cases working their way through courts involving the same permission to work point. There are quite a large number of similar cases. I have derived little assistance from this list because this is the first case which has reached a substantive hearing. There is some evidence that one or two judges have been granting stays, in the interim, one judge I note on the basis that the claimant in the meantime is being granted permission to work at the same time, but all those decisions were made at the permission stage.

21. It follows that, in my judgment, this is a case where the Secretary of State's application for a stay must be refused and it also follows from that the claimant's application for judicial review must succeed on ground A.

22. I must leave it to counsel to assist in court as to the form of the order which flows from my judgment.

23. MR NATHAN: There are two corrections, if I may, in your judgment? The first in fact my instructing solicitor drafted the grounds for judicial review, I only was instructed when we received the acknowledgement of service.

24. The second point, perhaps ought more fundamental although not particularly so. Under the old procedures of the House of Lords (the Blue Book) there was no provision for applying for a stay to the House of Lords. Paragraph 37 of the Supreme Court Rules now enables individuals to do so in exceptional circumstances, but still suggests that such applications should be made to the Court of Appeal below. Of course the Secretary of State did not make such application to the Court of Appeal.

25. THE DEPUTY JUDGE: I thought in the JFS case the Court of Appeal made an order and the House of Lords on the last day of its existence refused to say that order. But any way...

26. MR NATHAN: May be.

27. THE DEPUTY JUDGE: You are taking the point against you, the Secretary of State having been turned down by the Court of Appeal, could not have renewed his application for a stay before the House of Lords.

28. MR NATHAN: In any event it never made that application to the Court of Appeal.

29. THE DEPUTY JUDGE: No thank you very much. What about your costs?

30. MR NATHAN: My Lord, I would indeed seek costs and also ask for a detailed assessment in terms of costs.

31. THE DEPUTY JUDGE: In terms of your grounds, what orders are the court making?

32. MR NATHAN: My instructing solicitor's grounds sought a right to work. Can I just embellish upon that and suggest that the order should read: "The defendant grant the claimant permission to work within 7 days".

33. THE DEPUTY JUDGE: You need a quashing order of the Secretary of State's refusal.

34. MR NATHAN: The Secretary of State has not actually refused to grant permission to work. In a number of other cases the Secretary of State has provided letters saying that he refuses to make a decision at this stage. In this case there has actually been no decision. I think what we have to have is a mandatory order for the Secretary of State to grant permission to work.

35. THE DEPUTY JUDGE: I will hear Miss Busch on that. Your formulation is that a defendant grants the claimant permission to work. Do you want to identify the basis, namely under--

36. MR NATHAN: Pursuant to paragraph 360 of the Immigration Rules.

37. THE DEPUTY JUDGE: Paragraph 360. Within seven days?

38. MR NATHAN: Yes.

39. THE DEPUTY JUDGE: The letter of 13th May, as I said, was silent on your application for entitlement to work, but that silence in effect refused it, although it did not in express terms. Without express permission your clients does not have the right to work, and that is what you need.

40. MR NATHAN: Yes, I suppose taken that way it may be argued one could deal with this as -- in the cases of ZO and DT, those cases were dealt with by way of quashing orders when the Secretary of State has specifically declined to grant permission to

work. If your Lordship were minded to deal with this by way of a quashing order of the May letter.

41. THE DEPUTY JUDGE: Rather than mandatory order, I was thinking more along the lines of a declaration that the claimant is entitled to permission to work, pursuant to paragraph 360. The Secretary of State fails to provide by that declaration within a reasonable time, and that would not be very long, in my judgment, you would come back for a mandatory order. The only way round this for the Secretary of State would be to obtain a stay of that declaration.

42. MR NATHAN: Can I just raise, I do not think I object strenuously to that. The only reason I would suggest a mandatory order is that the Secretary of State, through my learned friend's skeleton argument, has persisted with a suggestion that Article 11(2) does not necessitate granting permission to work in the same terms as are granted to initial asylum claimants.

43. My concern about that is raised in my skeleton argument. In that appears very clearly to go behind a concession made by leading counsel on behalf of the Secretary of State.

44. THE DEPUTY JUDGE: Is that not the point that the Court of Appeal determined against the Secretary of State?

45. MR NATHAN: I suggest it is. The Secretary of State appears now to be -- no, the Court of Appeal did not actually rule on it. The Court of Appeal did not need to rule on it because of the passage recorded at paragraph 89 of Hooper LJ's judgment in which he says his Lordship said:

> "If contrary to the respondent's submissions subsequent asylum seekers do fall within the ambit of the recession directive, Mr Tam did not argue that the reception directive permitted a member state to exclude a subsequent asylum seeker from the benefits of Article 8."

But then crucially went on:

> "The respondent therefore does not dispute that if a person who has made a subsequent claim is within the ambit of the reception directive, then the Secretary of State is obliged to grant permission to work in accordance with rules 360 of the Immigration Rules."

That was a concession which, in my respectful submission, my learned friend's submissions at paragraphs--

46. THE DEPUTY JUDGE: I interpreted that more as the Secretary of State adhering to a submission which the Secretary of State would maintain before the Supreme Court but the Secretary of State would accept had been decided against him at Court of Appeal level.

47. MR NATHAN: Paragraph 12 of my learned friend's skeleton:

> "If the Supreme Court upholds the decision of the Court of Appeal in ZO, this means that Article 2 of the Reception Directive applies. The Defendant takes the view, however, that even if that Article applies to a person who has made further submissions after his appeal rights have been exhausted... he is entitled to decide that different conditions of access to the labour market are appropriate from those which apply to first time applicants (as provided in paragraphs 360 and 360A of the Immigration Rules)."

That, in my submission, is completely at odds with the concession made by leading counsel to the Court of Appeal.

48. THE DEPUTY JUDGE: That may be an alternative ground which could be ventilated before the Supreme Court.

49. MR NATHAN: They certainly had not ventilated as a ground as yet. It was a concession made in the Court of Appeal and it is the petition in its current format, my Lord, it makes no suggestion that subsequent applicants be treated differently.

50. THE DEPUTY JUDGE: What was the order that the Court of Appeal made in ZO?

51. MR NATHAN: My Lord, I have it to hand, it was a quashing order.

52. THE DEPUTY JUDGE: There had been clear decisions refusing right to work.

53. MR NATHAN: Indeed. The specific order was, my Lord: "In relation to ZO and MM, the Secretary of State's decisions of 15th October 2007 and 26th September 2007 respectively refusing each of them permission to work are quashed."

54. THE DEPUTY JUDGE: The effect of my judgment, the reasons that I have given and the declaration is that the Secretary of State would have to follow it.

55. MR NATHAN: I would say that, if paragraph 12 means anything -- it would appear that the Secretary of State would suggest that paragraph 12 of their skeleton argument would mean that they would not be -- I have made my point.

56. THE DEPUTY JUDGE: Let us see what Miss Busch says. Miss Busch, what does paragraph 12 of your skeleton argument mean?

57. MISS BUSCH: The Secretary of State does take the position that it may be open to him to formulate different conditions to work. One would anticipate at some stage that would be raised before the Supreme Court, at an appropriate stage at which to do so. Leaving all that aside, in my submission, does not matter, if you make a declaration in the lines suggested which respectfully endorse the reference to paragraph 360 of the Immigration Rules is sufficient to deal with the matter.

58. THE DEPUTY JUDGE: What is the Secretary of State going to do in the face of the declaration? Is the Secretary of State going to grant permission to work, or is the

Secretary of State going to think about it and possibly take the line set out in paragraph 12 of your skeleton argument?

59. MISS BUSCH: I should have thought, my Lord, the Secretary of State will in effect adhere to the terms of the declaration.

60. THE DEPUTY JUDGE: I do not want to create any possibility for further litigation. The position, at the moment, is that I agree with Mr Nathan that a concession was made before the Court of Appeal and that means that it is not open to the Secretary of State, at this level, to take any position other than to grant this claimant and I suppose all those in like cases permission to work. Of course it is open to the Secretary of State in the Supreme Court, if so advised, to withdraw, or tailor the concession advanced either a different primary case or a different ordinary case. That is up to the Secretary of State but, in my judgment, it is not up to the Secretary of State to do so before me.

61. MISS BUSCH: My Lord, I have never taken any position other than that we are currently bound by the decision of the Court of Appeal. That is why I have not sought to contest any of the merits of the claim instead made an application for a stay. That represents the Secretary of State's position.

62. THE DEPUTY JUDGE: Right.

63. MISS BUSCH: Therefore, if my Lord does simply make it declaratory relief, I agree it is sensible to refer to paragraph 360 of the Immigration Rules, then I would be most surprised if the Secretary of State would go behind that. I cannot promise there will not be further litigation.

64. THE DEPUTY JUDGE: I do not mind there being further litigation in the Court of Appeal against my judgment. That would be appropriate subject to permission being granted. I do not think it is appropriate for there to be further litigation on this issue. Either the judgment is going to be followed or, to avoid all the difficulty, which may be illusory, I can make an order, can I not?

65. MISS BUSCH: My Lord I hesitate -- I do not want to put myself in a position where I am at risk of being in contempt of court by committing the Secretary of State to something that does not occur. All I can say is that in a normal course of events one would expect the Secretary of State to act in a way which is consistent with a declaration as to what is the legal position. One obviously, it a trite principle, one should always proceed on the basis that public authorities will act lawfully.

66. THE DEPUTY JUDGE: Yes, that is true. Are you going to apply for permission to appeal?

67. MISS BUSCH: I am my Lord, yes.

68. The only other point that I would make is as regards the time within which permission should be granted. Obviously I see Mr Justice McKenna has been making orders, permission for grants to be seven days. We would ask for longer than that. I would ask for 28 days. The reason being, various administrative steps are required to be taken and

papers issued. Simply not realistically given particularly the numbers that are involved, for the Secretary of State to be able to do that within seven days...

69. THE DEPUTY JUDGE: What about this case, why cannot this case be done within 7 days?

70. MISS BUSCH: Even in this case alone, my Lord appreciates administrative procedures take time. I would submit 28 days is a reasonable time.

71. THE DEPUTY JUDGE: If I make a declaration and not an order, the declaration will not have a time limit. I can indicate, however, what I would expect reasonable time for compliance to be and if the Secretary of State has not complied on the following day, whatever time period I specify I will expect the claimant to be back to court. That is subject, of course, to your application for permission to appeal. Let us take this in stages. I have to make a decision then on the form of the order I make. I am going to do all this at the end in one piece.

72. Do you want to say anything about costs?

73. MR NATHAN: My Lord, can I just add a possible alternative. Your Lordship in respect to the order. Your Lordship in the course of argument did allude to the possibility of the losing party coming back and saying: well, it was a deputy judge who came to the conclusion, and we would like to argue it again. The Secretary of State potentially doing so. I wonder in an alternative to the actual order your Lordship makes a ruling, adds to the judgment already given and makes a ruling as to applicability of paragraph 12 in writing the concession made to the Court of Appeal. It may well be that what has already been said in the course of argument, if it is transcribed, would suffice. But given there is this huge raft of cases stayed behind this case and perhaps if I can -- I am afraid I received an email very shortly before coming into court today, if I can read it. It is from the solicitor in one of the cases in which permission to work was granted by His Honour Judge McKenna, and he says that today in the DX he received applications from the Treasury Solicitor to vary two orders granting permission to work. The application relies on the issue the Secretary of State will need to decide the conditions for granting access to the labour market. It also states a substantive hearing is taking place today. This part of the email is in quotes: "At which the defendant will be asking the court to settle a position of stays in these matters once and for all."

74. In the light of that, I wonder, as I said, the easiest approach might well be to make a ruling on paragraph 12.

75. THE DEPUTY JUDGE: If I make an order rather than a declaration that falls aside. There is sometimes advantage in judges making orders rather than declarations, so that the losing party, as it were, knows the position more clearly and can exercise appeal rights. Because it would be undesirable -- there are two possibilities. Either the Treasury Solicitor and the Secretary of State can say: well, this decision was made by a deputy judge, it is not very good after all. Although the Secretary of State has to follow whatever rulings are made in this case, the Secretary of State can argue the same point again before a proper judge. That is possible. Even if I were a proper judge, it would

not make any difference, because whatever I said would be persuasive and not binding. So there is that.

76. MR NATHAN: I hope your Lordships does not feel that I take that view.

77. THE DEPUTY JUDGE: I am sure you do not on this occasion. So, there is that but the need to cause for the Secretary of State, I would have thought, the Secretary of State can take his own advice to pursue the matter before the Court of Appeal, because then you get greater clarity and you avoid a multiplicity of individual cases decided by good judges or bad judges.

78. Any way I have made a decision whether I make an order or declaration. I have made my decision on costs, I have not yet articulated it. The last matter which Miss Busch has not yet been given the opportunity to develop is permission to appeal against my ruling.

79. MISS BUSCH: My Lord, obviously it is permission to appeal against a refusal of an application for a stay. The first point, not a persuasive point but it is a point, is to distinguishing the present case from the decision from Rama. In that case Kay J relied on the fact there had been unanimity both in the High Court and in the Court of Appeal, whereas in the present case that has not happened and no less a person than (as he then was) Stanley Burnton J, now a Court of Appeal judge. So on that business it is possible he could have said that had the matter come to him when he was in the Court of Appeal, was not complete unanimity. Then, secondly, the fact that to which I have alluded, this case has very significant ramifications as regard the labour market, therefore not only affects a very large number of claimants but also affects people in the labour market generally. In my submission, it would be appropriate for the matter to be ventilated before the Court of Appeal in order for them to decide whether or not it is appropriate the implications of their judgment should be put on ice, as it were, pending the matter coming before the Supreme Court.

80. So really I rely upon the practical implications of the judgment being significant enough to themselves to amount to a very point of general public importance.

81. THE DEPUTY JUDGE: Thank you, that is very clear.

82. What I am going to do in this case is as follows. I am going to be make an order that the defendant, Secretary of State, grant the claimant permission to work pursuant to paragraph 360 of HC 395 as amended within 14 days. I am going to make an order that the claimant has his costs against the Secretary of State in any event, the subject of the detailed assessment. If necessary an order in relation to public funding. I will leave Mr Nathan to deal with that matter with the Associate if that is required. The precise form of the wording, I am sure, can be agreed between counsel. Secondly, I am going to refuse the Secretary of State's application for a stay. In my judgment it has no reasonable prospect of success. In my view, this was a clear cut case. It is open to the Secretary of State to make immediate application for permission to appeal and for a stay to the Court of Appeal. If so advised the Secretary of State should do that as soon as possible.

83. Thank you very much, both of you.

84. MR NATHAN: My Lord, there is one further matter. In the light of the Secretary of State already indicating this should settle the matters one way or another -- I paraphrase the email that I read earlier -- can I ask for expedition to be ordered of that transcript.

85. THE DEPUTY JUDGE: There was not a shorthand writer, it went straight onto a tape presumably. Can I check that is not going to create a problem. **(Pause)** That will happen.

86. MR NATHAN: Can I for the sake of the clarity make sure it also includes the decision after your judgment?

87. THE DEPUTY JUDGE: It must include all of that to make sense of the order of the entire decision. I am going to leave it to Mr Nathan, with liaison with Miss Busch, to make sure that the Associate has the precise wording right, particularly in relation to costs. That concludes this case.