Neutral Citation Number: [2008] EWHC 3251 (Admin)

CO/695/2008

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

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 26th November 2008

B e f o r e:

MR JUSTICE BLAIR

Between:
THE QUEEN ON THE APPLICATION OF LAOLU-BALOGUN
Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

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(Official Shorthand Writers to the Court)

Philip Nathan (instructed by Sutovic & Hartigan) appeared on behalf of the **Claimant**
Rory Dunlop (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

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

1. MR JUSTICE BLAIR: This is an application for judicial review brought by the claimant against the Secretary of State for the Home Department. The case was originally listed for hearing this July, but for reasons of the non-availability of counsel, the matter was relisted for today, 26th November 2008. It was listed for half a day and was listed with another half a day case. It has become clear in the course of argument that this was a very considerable time underestimate. However, I have been assisted by helpful written submissions from both counsel, supplemented by concise oral submissions, during which I hope that the matters which lie between the parties have become clear.

2. Let me begin by setting out a little of the background to this matter. I take the chronology from the claimant's skeleton argument. On 9th October 2003 the claimant, her husband and her six children arrived in the United Kingdom from Nigeria. They had leave to remain as visitors until 25th January 2004. On 23rd May 2005 the claimant sought asylum. That matter was dealt with by way of rejection and the claimant appealed to the tribunal. On 24th August 2005, her appeal was dismissed.

3. The Immigration Judge made various findings, in part as follows:

> "1. The appellant is a national of Nigeria...She has six children with her in the United Kingdom...She entered the United Kingdom on 9th October 2003 with her husband and six children using a six month visit visa. She remained in the United Kingdom as an overstayer together with her children who appear to have been enrolled at fee-paying schools in the United Kingdom and eventually claimed asylum on 23 May 2005 citing her six children as dependents. The basis of her fear, as claimed, was that she feared her husband who had returned to Nigeria from the United Kingdom...
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> 6. The appellant claimed that **her husband was a chief of his tribe and a wealthy man in Nigeria who was a company executive who travelled widely and regularly to the United Kingdom**...
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> 24... I find that she claimed asylum as an after thought after spending a long time in the UK illegally. She is also a well-educated, intelligent woman who would have known perfectly well that her presence in the United Kingdom was unlawful.
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> 25. It is also of note that she appears to have told the Epsom and St Helier NHS ... sometime prior to 4 March 2004 that her plan for her son Emmanuelle, who suffers from sickle cell anaemia, was that he should remain 'long term' in the UK with his uncle and she intended to return to Nigeria. This letter records what I consider to be an unguarded - truthful - disclosure of her intentions at this time and **I find that the main reason for this asylum claim was to obtain long-term health care in the UK for Emmanuelle**...

> 29. ... I am not satisfied that the appellant has a genuine fear of avoiding her husband upon return to Nigeria...
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> 34... **I find that this marriage, to a man who I am told has made regular business trips to the UK while the appellant and her children have been here may well be subsisting**...
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> 40. I have considered all of the evidence before me in the appellant's bundle, which I need not repeat... which is voluminous, that shows clearly that the appellant and her family have become established in the United Kingdom. That the children have done very well at school and the whole family attend church on a regular basis and have made many friend[s] and have become valued members of the community in the United Kingdom. I am not prepared to accept that their removal in these circumstances would be unlawful under the Human Rights Act 1998 as suggested...
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> 42...**The appellants have established the extent of their private and family life in the UK whilst overstaying and knowingly breaching this country's immigration laws**...I have considered very carefully the medical evidence before me put forward by the appellant. **There are facilities available in Nigeria for the treatment of her son's medical conditions and I note that the appellant's husband does appear to be a man of considerable means by Nigerian standards. I am not satisfied that the appellant's husband would refuse to pay for medical treatment for his children in Nigeria**."

So upon that basis the asylum claim was rejected and the appeal dismissed.

4. There were then representations made to the Immigration Appeal Tribunal to have the decision reconsidered. Those were rejected. There was a further application to the High Court to have that decision reconsidered and that was also rejected.

5. Chronologically, the next matter that I should mention is that on 30th October 2007 the Home Office considered and rejected a fresh claim for asylum. That letter is of some importance because it raises for the first time the position under paragraph 395C of the Immigration Rules. This has been central to points argued before me and I shall have to come back to it. The precise chronology of events afterwards does not matter. There were various removal directions which were served and, in the light of representations, these were withdrawn.

6. On 18th January 2008 the claimant's solicitors issued these proceedings on the basis that the defendant had failed to provide the family with prophylaxis. That is a reference to the sickle cell anaemia condition that Emmanuel suffers from. The defendant subsequently deferred removal and undertook to provide that prophylaxis, thereby rendering the claim academic. Removal directions were re-set and this application for judicial review was refused on the papers.

7. The matter came before Sullivan J on 26th February 2008. On that occasion both Mr Dunlop and Mr Nathan, who appear before me, were present. The learned judge, in giving permission, gave reasons, which have been recorded and agreed by counsel and which I have certainly found to be of assistance. Sullivan J said as follows:

> "I readily accept the defendant's submission that it is far too late to consider the failure of the defendant in July 2005 to consider the factors in 395C before deciding to remove the Claimant. However, I think it is arguable that, if 395C has not previously been considered, as the case of **EO** demonstrates that it should have been, the defendant has a discretion to consider the 395C factors subsequently.
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> When 395C was considered in the letter of 30th October 2007, I consider it arguable that it was not considered fully in relation to the claimant's children. The defendant cannot be blamed for that as the claimant was not at that stage relying on 395C. However, when the claimant eventually woke up to the 395C point, it was raised in the letter of 5th February 2008, by which time all the representations dated November 2007 which contained arguably relevant material had been provided. The response of 8th February 2008 was in short order.
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> I consider it arguable that:
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> (a) not having considered 395C before, the defendant had a discretion to do so; and
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> (b) insofar as the letter of 8th February 2008 purports to consider the 395C factors it does not engage sufficiently with the substantive elements.
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> I therefore grant permission on the amended grounds. Those renewed submissions are a complete substitution for the original grounds which are now entirely academic. It is clear there is a settled intention to remove the claimant on the basis of the letter of 8th February, and that is why the whole application is not rendered academic."

8. There is a dispute between the parties along these lines: the defendant suggests that after giving judgment, Sullivan J indicated that the defendant could solve the problems indicated in his judgment by drafting a further decision letter. Mr Nathan, for the claimant, does not recall Sullivan J saying that. It appears to me that such an indication would be consistent with the basis upon which permission was granted by the judge, but it may not greatly matter, because on 9th May 2008 the defendant did indeed draft a lengthy further letter which I shall come back to.

9. With those remarks as to the background by which the matter comes before the court, let me say something as to the particular course that the proceedings took. This morning the claimant sought to adjourn the hearing. The grounds were that it was considered that further material which was in the course of being produced would, or might, show that there had been some kind of conspiracy on the part of the officers of

the defendant to deny the claimant her return to Plymouth, where she is settled. In fact, she returned on 30th May 2008 with her children. For reasons which I need not repeat here, I refused that application for an adjournment.

10. There are a number of grounds the claimant has sought to argue, following the permission given by Sullivan J. The first I need not deal with because the matter, as both counsel agree, has become academic. It has become academic in the light of the 9th May 2008 letter. Therefore, I need not consider that any further.

11. The first of what might be called the "live issues" relates to a right of appeal that Mr Nathan argues the claimant has. This argument, I think it is fair to say, is an argument that has developed somewhat over time. He summarised it in oral submissions as follows: it is submitted that Parliament clearly expected an individual to be entitled to raise paragraph 395C on an appeal before an Immigration Judge. As is apparent from the case of **EO (Deportation Appeals: Scope and Process) Turkey v Secretary of State for the Home Department** [2007] UKAIT 00062, which was a decision of the deputy president of the Asylum & Immigration Tribunal, this fact was not previously recognised or understood and, it is submitted, to deny that right of appeal would be to frustrate Parliament's intentions.

12. At this point I should set out the terms of 395C of the Immigration Rules, which provides as follows:

> "Before a decision to remove under section 10 is given, regard will be had to all the relevant factors known to the Secretary of State including:
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> (i) age;
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> (ii) length of residence in the United Kingdom;
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> (iii) strength of connections with the United Kingdom;
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> (iv) personal history, including character, conduct and employment record;
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> (v) domestic circumstances;
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> (vi) previous criminal record and the nature of any offence of which the person has been convicted;
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> (vii) compassionate circumstances;
>
> (viii) any representations received on the person's behalf.
>
> In the case of family members, the factors listed in paragraphs 365-368 must also be taken into account."

In the case of **EO**, the AIT said as follows:

> "44... where the decision to give removal directions under s10 does not

> clearly demonstrate a proper consideration of the matters set out in paragraph 395C and the exercise of a discretion to make the decision, the decision will be one which is challengeable on the ground that it is not in accordance with the law, and the result should normally be that an appellant's appeal is allowed on that basis only, leaving the Secretary of State to make a new and lawful decision in accordance with the Immigration Rules.
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> 45. Secondly, if the decision was procedurally proper and was one which was open to the Secretary of State to make, the appellant can nevertheless succeed in an appeal by showing that the discretion to make the decision, conferred by s10 of the Act
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> And appearing also in paragraphs 395A to D of the Immigration Rules, should have been exercised differently.
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> 46. We do, however, need to point out in this context that a decision that a person is to be removed by way of directions under s10 does not carry a general right of appeal from within the United Kingdom. That is because s82(2)(g) is not in the list of immigration decisions carrying that right in s92(2)."

13. Mr Nathan submits that the Secretary of State, in the letter of 30th October 2007 that I have mentioned, gave consideration to paragraph 395C. He submits that the position is that the Secretary of State may consider 395C before making a decision to remove, and there is nothing to prevent her considering what to do with the family of the person concerned. He submits that if she undertakes to make a formal finding, which she did in the letter of 30th October 2007, the wording of paragraph 395C dictates that such a formal finding has to be made prior to the decision to remove under section 10. Any decision to remove will be a formal decision under section 10, thereby giving rise to a <u>further</u> immigration decision. He submits that such further decision would fall within section 82(2)(g), and would consequently carry with it a right of appeal.

14. Mr Dunlop, appearing for the Secretary of State, takes issue with those arguments, but before I deal with his submissions, I should say that Mr Nathan also relied upon another decision of the Asylum & Immigration Tribunal, **HH (Criminal Record - Deportation: "war zone") v Secretary of State for the Home Department** [2008] UKAIT 00051. In particular, he relies upon paragraph 25 of that decision. He submits that, by analogy to what he says was the result in that case, there should be a right of appeal under paragraph 395C as well.

15. Mr Dunlop accepts that the claimant was within section 82(2)(g) of the 2002 Act when the decision was originally made in 2005. He submits that everything since then, as regards removal, has been confirmatory. There is nothing that gives rise to a new decision. In that regard he relies, by way of analogy, on **ZT (Kosovo) v Secretary of State for the Home Department** [2008] EWCA Civ 14 at paragraph 17.

16. I have come to the conclusion that Mr Dunlop's submissions on this matter are correct. I do not consider that the case of **HH** is of assistance in supporting the existence of a new immigration decision based on paragraph 395C. There is nothing to suggest that, once the Secretary of State mentions paragraph 395C, a new decision thereby comes into existence giving a new right of appeal. In essence, I accept Mr Dunlop's submission that what the defendant was doing in 2007 was looking at the factors that had arisen after the original decision and concluding that it did not alter the outcome. I would also say that that view appears to be consistent with the reasons that Sullivan J gave when giving permission.

17. The second point which was raised by Mr Nathan is academic in those circumstances, in the sense that if there is no immigration decision to appeal, then whether the appeal will be in-country or out-of-country does not arise. I should simply record that he accepted, rightly in my view, that in any event a decision of Blake J in the case of **Etame v Secretary of State for the Home Department and another** [2008] EWHC 1140 (Admin) is dispositive on this particular point, unless and until overturned by the Court of Appeal.

18. That brings me to the third and last ground raised by Mr Nathan. That relates to the letter of 9th May 2008 itself. In that letter, the Secretary of State confirmed her previous decision. Before coming to the points taken by Mr Nathan, it may be convenient simply to read the conclusion of the letter:

> "62. Since your client's family exhausted all of their appeal rights, there have been four attempts to remove your client and family.
>
> 63. Your client's children have received a lot of support from teachers, pupils and staff at the schools attended by them. These submissions have been frequent and plentiful and all along the same lines: their disposition towards their education; their popularity amongst their peers and staff; and concerns over the effect of the disruption to their education should they be removed. The family have also received a significant amount of letters of support from other members of the public. While notable, this does not provide an objective basis for being granted leave in the United Kingdom when there is no lawful basis for the family to remain here. The Secretary of State is not minded to exercise his discretion to allow your client's family to remain in the United Kingdom.
>
> 64. As demonstrated above, careful consideration has been given to whether your client and her children should qualify for Discretionary Leave in the United Kingdom. The Secretary of State has taken the decision not to exercise that discretion. There is no right of appeal against this decision.
>
> 65. In light of this letter, the challenge which was considered arguable by Sullivan J is now academic."

There was an invitation added to the letter to withdraw the application for judicial

review, which was not taken up by the claimant.

19. On Friday, 21st November 2008, the claimant indicated an intention to challenge this letter on **Wednesbury** grounds and on the grounds of failure to take into account relevant factors. Those matters are set out in some detail in Mr Nathan's skeleton argument and the response to them is in Mr Dunlop's skeleton argument. Before coming to them, I should say that Mr Dunlop has submitted that it is far too late for this new claim to be made. The decision was a decision of 9th May 2008. It was not challenged until 21st November. Because of the view that I have take of the matter, it is not necessary to deal with the delay argument.

20. I should explain the points of substance that Mr Nathan raises with regards to this letter of 9th May 2008. Before I do, he takes issue with a January 2008 e-mail which, as he put it, sets the backdrop to this decision. He says that it shows that at that point in time the matter was considered balanced. I think his submission is that it renders the decision of 9th May 2008 surprising.

21. I have not been able to accept that submission. It seems to me that the e-mail was simply part of the decision-making process. In my judgment, it is important that decision-makers, who have decisions of the greatest difficulty to make (in this case involving a mother and children, who are clearly very promising academically, and in one case suffering from sickle cell anaemia) should be able to debate amongst themselves the very real difficulties that dealing fairly with applications of this kind raise. Therefore, I have to say that I have not found Mr Nathan's attempt to build an adverse argument on that e-mail helpful.

22. In the light of Mr Nathan's submissions, the question is whether the **Wednesbury** argument has legal force. Sympathy has to be left on one side. In order to make good his challenge to the letter of 9th May 2008, he has to show that it was an irrational decision, or otherwise invalidated by a failure to take into account relevant factors.

23. He relies upon the following. First of all, he submits that there was insufficient attention paid to the educational position. I note from the letter that there is a very considerable degree of consideration of Emmanuel's educational potential, including the following:

> "37. Stoke Damerel Community College have submitted representations to say that he is doing well, has a bright future and is popular with other students... It also goes on to state that, in spite of his medical condition, Emmanuel is hard working and never uses it as an excuse to avoid work. The letter raises concerns that his education would be disrupted should he be removed to Nigeria."

These are concerns which it is immediately possible to sympathise with. Nevertheless, those matters were taken into account. There is material that suggests that, particularly for someone of means, as apparently the claimant's husband, and children's father, is, there is the prospect of a proper education in Nigeria.

24. The next matter that is raised by Mr Nathan goes to the sickle cell condition that Emmanuel suffers from. It is right to note that unfortunately there has been a relapse in that condition. In June 2008 he was hospitalised for an 11-day period and it is clear that he was quite ill. However, that came after the letter of 9th May 2008 and the decision-maker cannot be criticised for not taking it into account. The letter does deal in considerable detail with this condition and concludes that medical facilities would be available to him in Nigeria.

25. The final matter that Mr Nathan raises is access to employment. In my view Mr Dunlop is right to make the point that the decision letter of 9th May 2008 is primarily to do with the children. The earlier letter of 30th October 2007 was dealing with the position so far as it related to the claimant herself. My conclusion is that this decision is not susceptible to challenge on public law grounds, either on the basis of **Wednesbury** or on the basis of the reasons which were or were not taken into account. It follows that in my view there are no arguable grounds to challenge it in law. Therefore, the question of granting permission out of time, or giving permission to amend the grounds upon which the judicial review is brought, do not arise.

26. MR DUNLOP: She is publicly funded, is she not?

27. MR NATHAN: Yes.

28. MR DUNLOP: My Lord, I have no applications; I was just going to make a couple of corrections.

29. MR JUSTICE BLAIR: If either of you have any, it will be helpful. Put them on the transcript so that I can remember them when I come to correct the transcript, if that is what anybody wants.

30. MR DUNLOP: Yes, I think your Lordship referred to section 82(1)(g) on a couple of occasions. It is 2(g). The other point is -- perhaps my learned friend would be better off addressing you on this -- I think you made the point about there being insufficient attention to Emmanuel's education, whereas I think his point was that it was insufficient attention to all the children's education. I do not think it affects anything because the same level of detailed consideration was given to the other children too.

31. MR JUSTICE BLAIR: Yes.

32. MR NATHAN: My Lord, I have three applications. The first is for the usual order, in light of the claimant being publicly funded.

33. MR JUSTICE BLAIR: Yes.

34. MR NATHAN: I am grateful. I suspect I will struggle a little bit more with the other two.

35. MR JUSTICE BLAIR: Let me hear them anyway.

36. MR NATHAN: I would seek permission to appeal your Lordship's decision. It was accepted by the Secretary of State in the course of her skeleton argument that there were flaws in the original decision of July 2005. **EO (Turkey)** demonstrates that that decision was not in accordance with the law. We would submit there are arguments potentially to engage the Court of Appeal as to whether it can be right that the Secretary of State can issue removal directions founded on a decision that all recognise to have been made unlawfully. That is the short point, my Lord.

37. MR JUSTICE BLAIR: I am not going to give you permission to appeal, Mr Nathan, but thank you for putting it so concisely.

38. MR NATHAN: The final matter that I raise with your Lordship may not arise because of the issues that were discussed earlier this morning concerning the test case on sickle cell of **Ndeh**, but in case, as a consequence of your Lordship's judgment, the Secretary of State determines that it would be appropriate to detain the family with a view to removal, I would invite your Lordship to extend the stay of removal to allow us to lodge an appellant's notice with the Court of Appeal in the usual way, until such time as an application --

39. MR JUSTICE BLAIR: Remind me, did I get the date of the time in hospital right? It was June, was it not?

40. MR NATHAN: It was June, my Lord. One wonders whether there is in fact a need for a further 395C consideration in light of that, but that will be a matter for us and is not for your Lordship. It is clear that he has had a significant crisis in recent months, but what I would seek, my Lord, is an extension of the stay on removal until such time as the Court of Appeal are able to consider an application for interim relief.

41. MR JUSTICE BLAIR: Sullivan J gave a general stay, did he?

42. MR NATHAN: He gave a general stay until today's hearing.

43. MR JUSTICE BLAIR: What do you say, Mr Dunlop?

44. MR DUNLOP: The ordinary situation -- a situation like this -- where permission is refused by the judge who determined it, is not to grant a stay, because there is no arguable prospect on appeal. If my learned friend can persuade the Court of Appeal otherwise, then he can get a stay from them, but until such time as he can, there are no grounds for granting a stay.

45. MR JUSTICE BLAIR: Mr Nathan, that is the correct analysis. I am not going to grant you a stay. Is there anything else?

46. MR NATHAN: No, my Lord.

47. MR JUSTICE BLAIR: Can I take the opportunity of thanking you both, and those behind you, for your great assistance.