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

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 10 September 2008

B e f o r e:

MR JUSTICE BLAKE

Between:
THE QUEEN ON THE APPLICATION OF AK,CK and WA
Claimant

v

(1) SECRETARY OF STATE FOR FOREIGN AND COMMONWEALTH AFFAIRS

(2)SECRETARY OF STATE FOR DEFENCE
Defendants

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(Official Shorthand Writers to the Court)

Miss N Lieven QC (instructed by Leigh Day Solicitors) appeared on behalf of the **Claimant**
Mr N Giffin QC (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

J U D G M E N T
(As approved)

1. MR JUSTICE BLAKE: There are before the court three related applications for permission to move for judicial review to challenge an ex gratia scheme concerning locally employed staff who work for the British armed forces and civilian missions in Iraq. The scheme was adopted in October 2007. The three claimants are referred to by initial letters, pursuant to orders made by the court previously.

2. WA is a case where permission has been refused on the papers by Stanley Burton J, as he then was, and the application is renewed. In the case of AA and CK, pursuant to earlier directions, the permission applications have come directly to this court. I am conscious that I am only dealing with permission and the question is whether there is a seriously arguable case that the relief that the claimants seek might be granted in respect of their complaints about the scheme.

3. I have concluded, after considerable assistance from counsel for the claimants, Miss Lieven, in her written and oral submissions, and also the written submissions from Mr Giffin for the two Secretaries of State who are joined in this matter, that this is not a case in which I consider it appropriate to grant permission in any of the three cases.

4. I now seek to give my reasons briefly for reaching that conclusion. At this hearing I assumed, without deciding, that the appropriate standard to be applied to this challenge is a heightened Wednesbury standard, having regard to the content of the scheme and the context in which it was adopted. Secondly, it has been common ground, and I therefore assume without deciding, that on the particular facts of these three claims there was no obligation by way of duty of care enforceable in law owed towards any of these three claimants, either in domestic law, common−law, or international obligation.

5. The relevant facts are as follows. All three claimants had been employed, at various times, by the British Army in Iraq and in the case of CK also by civilian contractors operating on behalf of the British Army. All had ceased to be so employed before they made their applications for consideration under the scheme. All three had left Iraq and his employment in fear for their lives and moved to Syria. All three have had their cases considered by the United Nations High Commissioner for Refugees, and have been recognised as falling within the mandate of the UNHCR as refugees.

6. They are in Syria today in circumstances where there appears to be no direct threat to their physical safety or lives, but having regard to the fact that the Syrian Government does not apply the 1951 Refugee Convention, they are not entitled to the normal benefits according to recognised refugees, particularly with regard to immigration status, employment, and the like, etc. So it would appear, at least for the purposes of the present application, that all three claimants are in Syria in circumstances of some uncertainty as to their future, both economic and social, and their ability to remain there in the long term.

7. It is necessary then to turn to the scheme that is the subject of this challenge. It appears to be common ground that in the summer of 2007 there was concern in the press, and elsewhere, about the fate of those non−British nationals who had been employed either by the army, or by other significant agencies of the British State, consular or otherwise, in Iraq. Certainly since about 2005 it appears that the risk to those who were so

employed in Iraq was increasing. There is before the court a grim list of rising statistics as to casualties: those who have been kidnapped, tortured and murdered in 2005, 2006 and 2007. The strong inference is that the fate that these people came by was as a consequence of being so employed. This would have singled them out for adverse attention by hostile forces in Iraq, and the atrocious nature by which that hostile response is given effect is sadly well−known.

8. What followed was that in August 2007 the Secretary of State for Defence in an interview recognised that some reflection needed to be given to whether an exception should be made from the normal consequences that follow when either service from locally recruited staff abroad is terminated, or where obligations to those seeking asylum in this country are usually only engaged when a person has reached the territory of the contracting state party to the 1951 Convention (see the House of Lords decision in the case of European Roma Rights Centre [2004] UKHL 55 [2005] 2 AC 1

9. On 9 October 2007, the Secretary of State for Foreign Affairs announced that it had been decided that a scheme would come into existence. The purpose and nature of that scheme is set out in the full statement, but the following extract is indicative of what the scheme was about:

> "Locally engaged [Iraqi] staff working for our armed forces and civilian missions in Iraq have made an invaluable contribution, in uniquely difficult circumstances, to the UK's efforts to support security, stability and development in the new Iraq. We are hugely grateful to them for their contribution, which continues to be essential to delivery of our mission in Iraq.
>
> In recognition of that, we have decided to offer those staff, on an ex gratia basis, assistance which goes above and beyond the confines of what is lawfully or contractually required. Assistance will be based on objective criteria, taking into account determinable and relevant factors. It is offered in recognition of the service by these courageous Iraqis in direct support of HMG's efforts to help the Iraqi Government and people build a peaceful, stable and prosperous Iraq."

10. Brief details of the scheme, who qualified and what the criteria were, were then announced. Much greater detail of those matters were set out in a further statement by the Secretary of State for Foreign and Commonwealth Affairs, on 30 October 2007, where he said the following:

> "As I made clear in my statement of 9 October, we owe our Iraqi staff an enormous debt of gratitude for their dedicated service. HMG has directly employed many thousands of Iraqis since 2003 and has had indirect employment relationships with many more. Both fairness and realism demand that we focus on that sub−set of staff who have had the closest and most sustained association with us, in circumstances which we judge to be uniquely difficult. We have therefore established clear and transparent eligibility criteria which are, as far as possible, objective in nature.

> In addition, the operational effectiveness of our armed forces and civilian missions, which depends in large part on the continued contribution of our Iraqi staff, must continue to be paramount. We need to preserve our ability to recruit and retain qualified Iraqi staff as we continue to discharge the obligations and responsibilities set out in the Prime Minister's statement of 8 October. Both the overall policy, and the design of the scheme in respect of serving staff, have been decided with this in mind.
>
> Finally, we have taken into account the need to ensure that any assistance scheme, in particular in respect of admission to or resettlement in the UK, is practical, realistic and preserves the integrity of immigration and asylum policy. For these reasons, we have sought to ensure that admission to the UK is managed as far as possible in line with existing processes and programmes.
>
> The assistance detailed in this statement is offered ex gratia and goes above and beyond the confines of what is lawfully or contractually required. It does not recognise an obligation, or imply a commitment, to assist locally−employed staff in other countries or theatres of operation, past, present or future. It reflects our judgment that the circumstances in which Iraqi locally−employed staff have served have been uniquely difficult."

11. There are then set out the criteria for admission to the scheme. It is not necessary to lengthen this judgment by setting out the criteria in full. It is sufficient to note that to qualify for admission under the scheme a person has normally to be a direct employee of the UK armed forces, or other identified agencies of the British State. There is a further requirement of 12 months, or more, continuous service in order to be eligible. There are also requirements as to the circumstances in which someone left the scheme, and there are requirements to have been employed for a period after 1 January 2005, and in respect of former staff who have left employment before August 2007.

12. In the present cases all three claimants failed to qualify under the scheme. When they applied they were informed of this by those responsible in Iraq for administering the scheme. AA and WA did not qualify because they had not been employed for 12 months, or more, by the British armed forces. They both had been employed as interpreters by the British armed forces. Both had left after a period of less than 12 months. WA explains in his witness statement that he had been the subject of attacks and threats in performing his duties. There was an issue as to whether he mentioned those matters when he resigned and relocated to Syria.

13. In the course of argument the case of AA appeared to be the paradigm case reflecting the complaints of the claimants as to the rigidity of the scheme, at least in respect of the requirement for a minimum 12 months' service. AA had been employed as an interpreter from the beginning of December 2006 to April 2007. It appears that his father was also employed as an interpreter with the British armed forces, but one day when the father was returning from work he was kidnapped by terrorists. He was

brutally tortured. The details of his torture were recorded and apparently played back to AA, who was threatened that if he continued to work a similar fate awaited him. He accordingly fled to Syria. There is no doubt that that simple narrative was well−known to the armed forces at the time. The decision on the claim form that he submitted records that, but nevertheless because he had not been employed for the necessary 12 months he fell outside the scheme and could not be offered asistance under it.

14. The case of CK is a little different in that he was not employed as an interpreter, but as a laundry assistant. He had been originally employed directly by the British armed forces before 2006. He was subsequently employed by Crown Agents for a period and then from the summer of 2006, until about March 2007, he was employed for nine months by a contracting agency, rather than directly. He fell outside the scheme, although he had completed 12 months employment, because his direct employment with the British armed forces fell before the period that was considered by the scheme in order to be eligible. His indirect employment was not considered to be sufficient to come within the scheme, which was limited, by enlarge, to direct employees of the armed forces or the British State.

15. It is apparent that there were a small class of indirect contractors at a senior level who were working with consular officers who were eligible for consideration under the scheme. That would not have included CK, whose work as a laundry assistant was not of the type that brought him within the context of the scheme. He was refused admission to the scheme because of the nature of his employer, but it is also pointed out that if his eligibility ever fell for reconsideration the nature of his employment also would not be such as to put him within the scheme.

16. Essentially the submissions of the claimant are these: it is submitted that the purpose of the scheme is principally, or fundamentally, to recognise the risk that those who worked for the British State in its various forms in Iraq are, or have been, subjected to, certainly for the period from January 2005 onwards. It is then said that any criteria that cuts off people from consideration under the scheme because of the failure to work for 12 months, or the failure to work directly for the British armed forces, as opposed to a contractor, is irrational in that it undermines the very purpose of the scheme which is protection.

17. In support of the submission that protection of those at risk is the purpose of the scheme, the claimants referred to documents recently disclosed to them under a Freedom of Information Request. They were disclosed on 1 September 2008 and were therefore not before the judge refusing permission in the case of WA. The covering letter makes it plain that these are only four of 18 documents which might be relevant to the subject matter of the request and public interest immnuity questions applied to the other class of documents, including cabinet minutes.

18. The first three documents were written either by the Border and Immigration Agency of the Home Office, or officials in the Foreign and Commonwealth Office, and were designed to contribute to the formation of policy on this question between 5 September 2007 and 8 October 2007. The announcement, as previously indicated, was made to the House on 9 October. The last document appears to have been created between 9

October and 30 October, and it is a document originating from the Foreign and Commonwealth Office.

19. The high point of the claimant's case as to the purpose of the scheme, in reliance upon those documents, is an FCO document of 25 September, which under the heading "Issue and Objectives" records the high level of threat to locally engaged staff and the public attention, to which that problem has given rise, and then identifies the following:

> "The objective, therefore, is to develop a scheme for protecting and/or assisting those LE staff in Iraq who most need such help, or are most likely to do so in the future."

It goes on:

> "Such a scheme should, as far as possible, observe and balance the following main requirements:
>
> - it should be generous enough a)to maintain HMG's reputation as a caring and committed employer of local staff in our overseas networks/deployments, and b) to respond to perceptions that we have a moral obligation to many of our Iraqi staff, over and above our legal duty of the care;"

Then various other factors are noted, including it should be affordable, it should not undermine operational effectiveness:

> - any criteria used to identify sub−sets of staff who will qualify for assistance should be clear, consistent and legally defensible
>
> − it should not provoke an increase either in new asylum applications made by Iraqis, or in legal challenges from failed asylum seekers."

There is an assessment of numbers and trends and a great deal more detailed discussion of the merits of such policy, and any criteria that should be adopted. I have read the whole of that document. I note that in the section dealing with criteria for assistance there was concern that criteria for assistance should not be explicitly based on risk. It looks at criteria other than risk and looks at the pros and cons of some of those criteria, including length of service options of 6, 12 or 24 months. On that particular topic the document notes the advantages:

> "It would reward those staff who have given the greatest service to HMG..."

and goes on to refer to other programmes operated by other governments. It recognises the demerits of such criteria:

> "Risks: might exclude staff who were forced out of their jobs by threats before attaining the minimum length of service."

It considers numbers and matters of that sort.

20. It is apparent that if this scheme were designed wholly, or mainly, to give protection to those who are at risk, then it could not consistently, with the purposes of such a scheme, exclude people who are at risk by reason of service for the British armed services, but who had only been employed for 11−and−a−half years, as opposed to 12 months, or who had only been employed by a contractor, as opposed to directly. It is unlikely that those who were causing the risk to these individuals would consider those two factors to be of any relevance at all as to whether they should be attacked or ill−treated.

21. However, if the policy is not to be regarded merely as a form of extra−territorial grant of asylum to any person who has had a relevant connection with the British armed forces, and is put at greater risk by reason of connection, then there is much greater room for adopting criteria which will no doubt create hard cases as to who qualifies and who does not. Read as a whole in the light of the debate that led to its formation, I conclude that the scheme reflects a balance between the demands of difficult competing considerations, some of which have already been indicated in the quotations given in this judgment so far.

22. I have assumed that the rationality of the policy is to be critically examined, but I reach the conclusion that there are no grounds whereby this policy is likely to be condemned as unlawful because it is discriminatory, arbitrary, inconsistent with it declared function, or so unfair or unreasonable in its application that no properly self−directing minister could have reached it. Although I accept that the policy was inspired by the undoubted fact of very serious risk to those locally employed civilians who worked for the British State, certainly after the period of January 2005 that is identified as the period of deterioration of safety, the scheme is not overall designed to protect all those who are at risk, but to give a balanced approach between protection and other considerations and in the end deliberately gives assistance to only a limited class of staff.

23. In my judgment questions of the length of the employment relationship, and the nature of the relationship in terms of proximity to the British State and the nature of the work done has some nexus to risk, although may not have been decisive of it. It would be open to conclude that those who work longer at a more senior and more direct level are somewhat more likely to be vulnerable to attack. But this is not designed to be a definition of risk and the scheme does not therefore make the erroneous assumption that no one else is at risk. If that had been the case, it would clearly have been vulnerable to attack for the reasons advanced by the claimants. If it is not, then, in my judgment, it is not so vulnerable because there was, it is conceded for the purpose of these proceedings, no legal obligation to protect those at risk who fled abroad. There was no legal duty to adopt this or any similar scheme.

24. It may very well have been the case that a political judgment would have been made that adopting broad and generous criteria created threats to other considerations such as immigration control, or operational effectiveness, that there should be no such policy at all. These are highly sensitive questions of political judgment which are not for judges

to make. The court will supervise and, in certain circumstances, critically review such policies, particularly where threat to life is the context of the policy. However, even on the highest level of anxious scrutiny that this court is able to perform, without overstepping its constitutional functions in this regard, this policy is not vulnerable to challenge. Although it can be said of the length of service criteria: "Why exclude someone of six months, or nine months, or ten months, or eleven months," it is a feature of any policy dealing with sensitive issues that there will be limits and people will fall outside it. This is a well−known fact in the context of immigration: see AL (Serbia) v SSHD [2008] UKHL 42 at [10] [44] and [51]. It is a line to be drawn for the application by officials who need to know who comes within and who does not.

25. Therefore, as long as the policy is not simply an attempt to encapsulate risk in a practical guidance, a bright line of 12 months' employment is not irrational. To some extent, it can be said that it is an encouragement to continued service in difficult conditions to require someone to work for more than a day, or a week, or a month, and matters of that sort. Therefore there is certainly some element, as the Ministry's statement says, of reward for service given, rather than simply protection of those who are at risk, even for a short period.

26. I have carefully considered whether the criteria adopted could be said to be vulnerable on the grounds that they are discriminatory within the meaning of either domestic or international obligation, that is to say they directly, or indirectly, apply a prohibited class of race, religion, sex, sexual orientation, disability, age, and other such matters. However, the criteria of 12 months' employment certainly does not fall foul of such an approach, and therefore is no basis for condemning it as such.

27. Whether the precise identity of the employer and the distinctions between contractor and direct employed in an otherwise analogous case of senior level staff operating as interpreter would itself be said to be discriminatory, perhaps falls for another day. In my judgment there are sufficient differences between CK's status and those of people who are contemplated as coming within the policy as not to make any such direct comparison relevant for the purposes of this challenge.

28. The claimant's submission in the end was: what is wrong with the policy is that it makes no provision for exceptional consideration of the hard case. I have indicated that the preparation of the policy contemplated such hard cases and ministers must have been aware of such hard cases, but concluded that it was better to have the certainty of an objective criteria that could be directly operated upon by those public servants who are called to court to operate it, rather than to have criteria which were unclear because they are fundamentally discretionary.

29. The claimants point out that some aspects of uncertainty dependant on fact finding comes into the policy because for those who come within the policy they are essentially offered two choices: a financial package, so they can then relocate themselves from Iraq, or a package whereby they can come to the United Kingdom through an existing immigration scheme known as The Gateway Scheme. Under this scheme facts must be required into to determine refugee status. The United Kingdom operates it the UNHCR abroad to identify refugees who are not directly owed obligations, because they are not

in the United Kingdom, but who can be brought to this country and their claims to asylum considered here. Those subordinate considerations do not affect the fundamental nature of the scheme where it was considered to be in the public interest for clear and objective criteria to be adopted. In those circumstances, I conclude that it is unarguable that this was a policy that it was not open for the ministers to adopt.

30. Clearly no one who is aware of the background threats that civilian staff have faced, and no doubt continue to face, in very difficult circumstances in Iraq, could be unmoved by their plight, but, of course, this court is not concerned with its own subjective response to these problems. It is for the Secretaries of States concerned to address those concerns in the way they deem it fit.

31. I have enquired as to whether there is any discretion available to a responsible Minister to receive representations by those who had to flee Iraq at risk of their lives who could be considered outside our international refugee law obligations, outside our Immigration Rules, and outside the terms of this policy.

32. I understand that it would be open to the Secretary of State for the Home Department, as ultimately responsible for immigration policy, to consider such representations and if there were factors that she considered to be sufficiently compelling or exceptional, it is always open to her, outside the structured policies, to reach a conclusion which might be favourable. That is not surprising and it probably would be unlawful for a Secretary of State to fetter her statutory discretion about the admission of people who are subject to immigration control. Of course how such discretion is exercised is entirely a matter for the Secretary of State. It is certainly the case that a person who simply fails to comply with the policy cannot, for that reason, expect to be the beneficiary of a favourable exercise of discretion. The policy was no doubt designed to draw a line between hard cases.

33. Nevertheless, there are particular factors in the case of AA which, in my judgment, would strongly suggest that there needs to be some further consideration of this claim. I have indicated, at the outset of this judgment, that I have proceeded on the basis that there is no continuing obligation owed by the United Kingdom under international or human rights law to any of these people. It is not argued that there is. In the case of AA, however, not only is it accepted that he terminated his service after his father was brutally murdered and tortured in the most distressing manner, but he is also presently married to a British citizen woman settled in this country. It was suggested in the decision document dealing with his case under the policy that he applied exceptionally for a visa to join his spouse in this country. The full details of that immigration history are not before the court.

34. Save that it has been informed that that application was refused. This is possibly something to do with the spouse's ability to maintain support under the Immigration Rules. Those facts indicate that by contrast to the other cases there are continuing obligations owed by this country to AA and his family, at least in the field of Article 8. If a British citizen settled in this country has a family member abroad in a precarious situation (although I do not seek, in any way, to determine the precise context of those obligations) there is a nexus there which requires continuing consideration of, at the

very least, the proportionality of separation of spouses in those circumstances. Rather than having to await the outcome of an appeal, I would hope that the Secretary of State would be able to keep an eye on this particular case where there are these two compelling factors that are different from the other two cases.

35. Otherwise I conclude that this is a challenge to the policy as a whole, not to the exercise of the discretion to depart from the policy and, for the reasons I have attempted to give summarily, this is a challenge on which permission is refused because there are no reasonable prospects of success.

36. MR GIFFIN QC: I am instructed not to make any application for costs.

37. MISS LIEVEN QC: There are two things: first of all, I understand we need detailed assessment of our publicly funded costs.

38. MR JUSTICE BLAKE: You can have that.

39. MISS LIEVEN QC: Secondly, could I request an expedited transcript? I think I have to say that in court. Hopefully it will filter through.

40. MR JUSTICE BLAKE: Yes, I will certainly have to have a look at it before it is approved.