Case No: C4/2008/2340

Neutral Citation Number: [2009] EWCA Civ 602
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
(MR JUSTICE PLENDER)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Tuesday, 12th May 2009

Before:

LORD JUSTICE CARNWATH

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Between:

AJ (IRAQ)

Appellant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT **Respondent**

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Mr D Bazini (instructed by the Immigration Advisory Service) appeared on behalf of the **Appellant**.

The **Respondent** did not appear and was not represented.

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Judgment

Lord Justice Carnwath:

1. This is an application for permission to appeal against a decision of Plender J in the Administrative Court. It is a somewhat unusual story. The application is an Iraqi Kurd, who came here in 2000 and claimed asylum. That was refused. I do not need to go into the history of his claims to asylum. He put in further evidence at various stages, but the important thing is that in December 2002 he put in an application under a false name and, as he says, and as I think the judge accepted, he did that because he was destitute and thought that was the only way to get any basic assistance. He was later convicted of an offence of deception in relation to that and was sentenced to 12 months' imprisonment.
2. Unbeknownst to him, under a policy which was applied in those days, as an Iraqi citizen from the Kurd area he would have in fact been granted exceptional leave to remain and so his problems would not have been as grave as they were. He says now that he would not have needed to commit the offence. In addition he might have been told about the provision for hard cases relief. I have been taken to a recent decision by Stanley Burnton J, in which he said that there was a duty on the Secretary of State to inform individuals of that: R (Salih and Rahmani) v SSHD [2003] EWHC 2273. I have not gone into that in any detail because I do not need to for the purposes of a permission application.

3. The relevance of all that is that when, later on at the end of 2005, an application for indefinite leave to remain was refused, a judicial review application was made in January 2006 on the basis that the Secretary of State

had failed to apply the policy. That arose from a case called Rashid v SSHD [2005] EWCA Civ 744, which revealed a failure by the Secretary of State to apply his policy in respect of asylum-seekers from Kurdish Iraq. That was held in the circumstances to have amounted to an abuse of power.

4. That judicial review application was not processed (for various reasons) for some time. At the end of 2006 the claimant was asked to fill in a Consideration Questionnaire, and that was returned by him on 26 December 2006. In that there was a box which said: "Have you ever been convicted of a criminal offence in the United Kingdom or abroad?" He answered that "No". That was clearly untrue. He says now in his statement that the reason he did that was because he was told by someone that it only referred to offences of more than two years.

5. However that may be, in March 2007 amended grounds were put in, which took the points which are now taken and relied on the Rashid policy and also the policy developed in response to a judgment of Collins J in a case called AH v SSHD [2006] EWHC 526 (Admin). The policy was issued in August 2006, and the important part for our purposes is at paragraph 4.4, which says that:

> "For an individual to fall within the scope of (AH) the case would need to --
>
> (a) have been an Iraqi asylum claim from any area of Iraq, refused by the Secretary of State between April 1991 and 20 October 2000 (when the practice was to grant 4 years' ELR to all Iraqis who had been unable to establish a valid claim under the refugee convention); and

(b)not been granted 4 years' ELR.

A person who came within those requirements would be normally granted ILR. However, there is a note at paragraph 8.6 that one should refer to the exclusions and serious crimes in another policy document. That in turn explains that persons will not be eligible for a grant of humanitarian protection if they are excluded for one of a number of reasons, one being the commission of a serious crime. That is defined, *inter alia*, as one for which a custodial sentence of at least 12 months has been imposed in the United Kingdom.

6. The Secretary of State's case at that time, by which I mean the time of the amended grounds in April/May 2007, appears from a document called "Summary Grounds of Defence", signed by Mr Sam Grodzinski. Itsuffers, like many of the documents in this case, in not being dated, but I infer from the material that I have been given that it was dated 18 May 2007. It sets out the history and, significantly, in paragraph 16 says that:

> "The [Secretary of State] recognises that had the ELR policy been applied to [the claimant] as it should have been, he would have been granted 4 years' ELR in January 2001, at a time when Saddam was in power. The [Secretary of State] also accepts that had C been of good behaviour for the 4 year period of his ELR, he would have been granted ILR. However it does not follow from that that C is now entitled to ILR regardless of his subsequent criminal offence."

So the point being taken there is founded solely on the exclusion criteria.

7. Michael Burton J gave permission to apply for judicial review in July 2007. He said:

> "In the light of the apparent concession in paragraph 16 of the Acknowledgement of Service, the claimant's case may be arguable."

8. The claimant's case at that stage, as appeared from the amended grounds, was that it was harsh and unreasonable to apply the strict letter of the exclusion policy in relation to a crime resulting in a custodial sentence of 12 months, in circumstances where the only reason for the commission of the crime was the fact that the claimant was destitute; and, furthermore, that had the Secretary of State properly applied his then policy in relation to the grant of ELR, and indeed, alternatively, informed the applicant of the hard cases relief, the applicant would not have been destitute at all.

9. So that was the issue at that stage. However, on 18 December 2007 there was a further letter written on behalf of the Secretary of State, in which the Secretary of State maintained her refusal on the basis of the criminal offence exclusion, but also added the point that it would not be appropriate to grant ILR to someone who had made a false statement in the questionnaire response. The writer points out in that letter the indication in the questionnaire that if false information is given the claimant may be liable to prosecution and any leave granted may be revoked.

10. The matter came before Plender J on 14 July 2008 and he expressed considerable sympathy for the claimant. He accepted that the claimant would have obtained exceptional leave if the policy had been correctly applied and that he would have been most unlikely to have committed the offence had he been granted exceptional leave, but he then focused attention on the point about the questionnaire. At paragraph 5 of the judgment he said:

> "The question on the questionnaire is…a simple one: "Have you ever been convicted of an offence?", to which the claimant answered, "No". It was as plain as could be that the claimant answered that question untruthfully."

11. He noted that Mr Bazini, for the claimant, had mentioned a policy at that time which referred to 24 months in prison as being something which could disqualify a person from grant of leave, and that Mr Bazini had suggested that the claimant would have discussed this with others in the asylum-seeking community and would have been misled by their replies into believing that a period of imprisonment of less than 24 months would disqualify a person from grant to leave. The judge commented : "Of that I have no direct evidence."

12. In fact there was before him, as I understand it, a statement by AJ himself, in which he does indeed deal with the questionnaire and gives the explanation which Mr Bazini is noted as having given. So in fact it was not simply a matter of Mr Bazini giving that statement. It was evidence before the judge.

13. However, the main complaint that Mr Bazini makes about the judgment is that it deals with this questionnaire point but pays no attention to the issue on which permission was originally granted, which is the reasonableness of the Secretary of State applying his exclusion policy in a strict way to someone who had committed an offence in these very unusual circumstances. The last paragraph of the judgment reads as follows:

> "I now must ask whether the present Secretary of State acted irrationally in refusing indefinite leave to remain in view of the offence committed by the claimant when he made a false declaration on the questionnaire. I have come to the conclusion that the Secretary of State did not act irrationally when so deciding. Others may have acted differently, but in maintaining the policy any

> applicant who completes the questionnaire untruthfully should not be granted the benefit of indefinite leave to remain. The Secretary of State applied a consistent approach in defence of a policy which is not upon the face of it irrational"

14. So, as I understand it, that is simply directing attention to the question of the questionnaire and ignoring the other much more substantial issue. It is also significant that the Secretary of State had not apparently thought the questionnaire point was a matter justifying the grant of ILR at the time that permission was granted in 2007.

15. I do not say that it could not be a valid reason for refusing ILR, but clearly, if the Secretary of State was going to refuse ILR on that basis, she would need to take into account the applicant's explanation for it, and I think would also need to look at the whole story in the round to decide whether the strictness of the policy could or should be mitigated in this very unusual case. At the very least it seems to me that the applicant was entitled to a judgment which dealt with those issues.

16. So for those reasons it seems to me that it would be right to grant permission, although without holding out any hope of ultimate success. I say that conscious of the fact that this case has dragged on for a very long time and this is giving yet a further twist to that process. However, I am not satisfied that the judge has considered adequately the material points which were put in front of him. I note that Maurice Kay LJ refused permission, saying that :

> "Although there may be valid criticism of the judgment…I do not consider that A has a real prospect of success in judicial review proceedings."

I of course respect that view, but it is also, I suspect, possible that the papers before Maurice Kay LJ were as incomplete as the papers were originally before me.

17. Finally I would say this. In granting permission I have accepted Mr Bazini's assurance that he personally will take responsibility for ensuring that there is an adequately referenced skeleton argument setting out the relevant history and a revised bundle which has the relevant documents and not the irrelevant documents in it, in a manageable form, and they should include, so far as relevant, the documents which have been put before me this morning. It really is essential that counsel in such cases should take responsibility for ensuring that that happens. That should have been done before the case got to the appeal level, and certainly at the time of the statement following the refusal of permission by Maurice Kay LJ. It must be done now. However, I do not think it appropriate to hold that failure against the claimant.

18. So for those reasons I grant permission. **Order**: Application granted