Judgment Approved by the court for handing down.

Neutral Citation Number: [2007] EWCA Civ 1326

Case No: C4/2007/0998 & C4/2007/0427

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QBD, ADMINISTRATIVE COURT
MR JUSTICE OUSELEY
CO/2900/2005 & CO/3623/2006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/12/2007

Before :

LORD JUSTICE CARNWATH
LORD JUSTICE WALL
and
SIR PETER GIBSON

- -

Between :

C4/2007/0998

THE QUEEN ON THE APPLICATION OF MIFAIL RUDI	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

AND

C4/2007/0427

THE QUEEN ON THE APPLICATION OF TI (KOSOVO)	
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	

- -
- -

C4/2007/0998
Mark Henderson (instructed by Messrs Howe & Co) for the Appellant
Samantha Broadfoot (instructed by **Treasury Solicitors**) for the Respondent

C4/2007/0427
Manjit Gill QC & Jonathan Adler (instructed by Messrs Palis) for the Appellant
Steven Kovats (instructed by **Treasury Solicitors**) for the Respondent

Hearing dates : Thursday 6th December, 2007

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Judgment

LORD JUSTICE CARNWATH :

Introduction

1. These two appeals from Ouseley J concern issues arising from the Home Secretary's treatment of asylum and human rights claims made by claimants who arrived in this country from Kosovo in 1999 as unaccompanied minors.

2. Central to both cases, as originally formulated, were arguments over the effect of the concessionary "Family ILR Exercise" (as the judge described it), which was announced originally in October 2003. (I shall refer to it simply as the "Concession".) The effect of the Concession, in its form as extended in August 2004, was that claimants of similar age and background to the present applicants, who arrived from Kosovo in identical circumstances, but with their parents, became entitled to Indefinite Leave to Remain. However, the applicants, who had been unfortunate enough to lose all contact with their parents during their flight from Serbian persecution, were for that reason alone excluded from the Concession. This was said to be unfairly discriminatory, contrary to Article 14 of the Convention, and to common law principles of equal treatment.

3. On that aspect the cases have been overtaken, at least in part, by an appeal by a claimant in similar circumstance: *AL(Serbia) v Home Secretary* [2006] EWCA Civ 1619. That appeal was decided by this court on 28th November 2006, after the hearing before Ouseley J, but before he issued his judgment. An appeal to the House of Lords is now pending. One of the questions in the present appeals is the extent to which that judgment leaves open issues for argument in this court.

4. First, it is necessary to give a brief account of the facts of the two cases.

The facts - MR

5. MR was born in January 1983 in Kosovo, of Albanian ethnicity. In 1999, he and his family were forced to flee to Macedonia by Serb ethnic cleansing. He became separated from his parents, and does not know what happened to them. He travelled to the UK in August 1999 (at the age of 16), accompanied by a cousin. His claim for asylum failed, and his appeal was dismissed, because of changes in Kosovo since his departure. He made a human rights claim, but that was also rejected, and an appeal failed (in July 2002). He had been cared for by local social services until he became 18 (in January 2001). He then obtained fulltime work as a bricklayer, and was able to pay for his own accommodation and support.

6. In February 2005, he asked to be considered under the Concession, but that was refused on 1 May 2005. That refusal is the subject of the present judicial review proceedings. In the meantime he was detained with a view to removal on 15 April 2005, but removal directions have been deferred pending the resolution of these proceedings. He was released in May 2005 but initially tagged. He has been unable to work since then.

The facts - TI

7. TI was born in March 1985. He fled to Macedonia after a Serb attack on his village, after which he did not see his parents again. He arrived in the UK with a cousin in July 2000, and claimed asylum. Asylum was refused on 14 October 2003, and his appeal on asylum and human rights grounds was dismissed in February 2004. There was no further appeal. He made a claim under the Concession in March 2006, which was refused. He applied for judicial review of that refusal, and also asked the Home Secretary to treat the grounds of the application as a fresh human rights claim. That also was refused by letter dated 12 July 2006, and the judicial review claim was amended to include a challenge to that refusal. TI lives with his Slovakian girl friend. He has worked intermittently.

The issues in the appeals

8. The issues fall under two groups, relating to (a) the scope of the Concession, and (b) the fresh claim. The second group is relevant only to TI.

Scope of the Concession

9. Both appellants accept that we are bound by the decision in *AL(Serbia)* to hold that the restrictions on the scope of the Concession, at least in its original form, were compliant with the Human Rights Convention. However, they argue, through Mr Henderson for MR (his arguments being adopted by Mr Gill for TI) that changes made in 2004 materially altered the position, by including within its scope young adults of the same age as the appellants; and that the significance of this change was not fully understood or considered by the court.

10. In the skeleton arguments before us, there was also some learned debate about the scope of the common law principle of equal treatment, which it was suggested might raise different questions to the Convention issues covered by *AL(Serbia)*. However, when pressed from the Bench, Mr Henderson accepted that the common law principle, whatever its true scope, was no more favourable to the present appellants than Article 14. Accordingly, arguments under that head cannot provide them with a viable route round the obstacle of *AL(Serbia)*.

Fresh Claim

11. Mr Gill raises three further issues, peculiar to the treatment of TI's fresh claim application:

    i) *"The near-miss point"*

    When assessing proportionality under Article 8, the decision-maker wrongly failed to take into account the extent to which the claimant fell within "the spirit or rationale" of the Concession, even if not "within its precise letter".

    ii) *"The past denial of benefits point"*

    The decision-maker wrongly failed to take into account the substantive and procedural benefits which the claimant would have enjoyed if he had been

granted "his rightful period of exceptional leave to remain" prior to his 18th birthday on 5th March 2003.

iii) "*The misdirection issue*"

The decision-maker applied the wrong test in deciding whether to allow the fresh claim.

Scope of the concession

The Concession as extended

12. To understand this issue it is necessary to summarise the effect of the Concession and the amendments to it. Reference may be made to the judgment below for a fuller exposition.

13. The first announcement was made by the Home Secretary on 24 October 2003. As originally formulated, a family would be granted ILR outside the Immigration Rules if the application for asylum had been made before 2 October 2000, and the applicant had at least one dependant who had been living in the UK since 2 October 2000, and was "currently" (that is, on 24th October 2003) aged under 18. In that form the policy could not have assisted the appellants, even if they had parents, since they were over 18 by October 2003. However, in August 2004 the scope of the Concession was extended. It would now apply to someone who had a dependant under 18 in the UK *either* on 2 October 2000 or on 24 October 2003. Accordingly, it extended to adults of the same age as the two appellants, but only if they had parents in the country in October 2003.

14. A closing date of 31 December 2004 was initially imposed on the extended Concession, but this has since been abandoned. The SSHD has indicated that cases which fall outside the scope of the Concession will also be considered, but only in "truly exceptional" circumstances.

AL(Serbia)

15. The background to AL's appeal was very similar to those of the present appellants, although the case came to this court by a different route. He was born in April 1984 in Kosovo, but left in March 1999, after threats from the authorities, and he then became separated from his parents. He arrived in this country in January 2000, and claimed asylum. His claim was refused, but he was granted exceptional leave to remain (ELR) until 28 April 2002, his eighteenth birthday. On 4 April 2002, he applied for an extension of his leave to remain, but this was refused. After an unsuccessful appeal, the Administrative Court ordered reconsideration of one issue: whether his removal would be contrary to Article 14 (with Article 8) of the Convention. After the remitted appeal was dismissed by the AIT, permission was granted for the appeal to this court.

16. It is right to note, for the purposes of the present arguments, that the court did not distinguish between the original 2003 form of the Concession, and the extended 2004 form. This is apparent from Neuberger LJ's description of the Concession (para 7), and from his summary of the justification given for it (para 23-4). The latter passage referred to the Home Office press release, dated 24th October 2003, which explained

the background of the original Concession, and then to a letter "sent a few weeks later" to Members of Parliament by a junior Home Office minister (Mr Browne MP). Mr Henderson rightly points out that, while the Press Release referred to the original form of the Concession, the letter was sent out, not "a few weeks later", but several months later in August 2004, at the time of the extension.

17. Neuberger LJ also referred to the "more detailed explanation" put before the court as to the reasons for the Concession. There were four main points, in summary: (i) the cost of providing support while the large backlog of asylum applications was processed; (ii) the time and expense involved in handling multiple applications from different members of the same family; (iii) the administrative difficulty of getting all the members of a family together for removal; (iv) recognition that families who had been settled here for some years, and particularly their children, would have developed ties in the community (paras 26-28).

18. As I read the judgment, Neuberger LJ accepted that Articles 8 and 14 were potentially engaged by the appellant's claim, but that, whatever comparison was made, the difference of treatment between those with and without parents was justifiable (paras 32-5, 49). This was less for social considerations, such as attachments in the community, which might apply equally to those without parents (para 34), than for "practical and economic reasons":

> "…the practical and economic reasons for the policy did not apply to asylum-seeking individuals who were on their own to the same extent as they applied to members of asylum-seeking families. Unaccompanied minors, like other individuals, could not have made sequential asylum applications (resulting in extra costs and administrative problems) in the same way as members of an asylum-seeking family. For similar reasons, the removal of an unaccompanied minor once he or she is 18, like any other individual, self-evidently does not engage many of the practical and procedural difficulties (with the consequential cost implications) which could arise in relation to family units." (para 33)

19. As for arguments based on anomalies he said:

> "… while the policy can undoubtedly operate as something of a blunt instrument, it appears to me inevitable that any policy of this type will produce anomalies. Unless the policy had given every asylum-seeker in this country in October 2000 the right to remain, it was necessary to limit its scope. Limiting its scope to families is, at least on the face of it, understandable for the reasons already discussed. Decisions, in such a context, as to cut-off dates, what precisely constitutes a family unit, and as at what date someone has to show he is a member of the unit, are not, of course, wholly immune from judicial scrutiny. However, because personal circumstances are almost infinitely various, it would have been impossible to identify qualifications which produced no perceived anomalies. Particularly if the

> qualifications were to be (as they are) few and simple, which is plainly a desirable feature.
>
> "… the policy was not predicated on the view that, by definition, each individual falling within [its] terms would have a stronger … case for the grant of leave to remain than any individual falling outside [its] terms…" (paras 35-6)

20. Ward LJ agreed with that legal analysis, with some regret:

> "I confess to having some sympathy for the appellant. But for an accident of history and his misfortune to become separated from his family as they fled from Kosovo, he can justifiably say that he would have arrived here as a member of a family, may well have at that time be able to claim asylum as part of the family and so would have fallen within the concession. As it is he, like those fortunate enough to arrive with their parents, has attended school here, made his attachments here and lived a good industrious life here. To send him back to Kosovo is tough. That, however, is a social judgment, not a legal one. I agree with Neuberger L.J's legal analysis. To compare an unaccompanied minor with a family is not, I fear, to compare like with like. Even if it is, the difference in treatment can be objectively justified by the Secretary of State." (para 52)

The argument in this case

21. Mr Henderson rested his case principally on the difference between the original 2003 policy and the 2004 extension, an aspect not specifically considered by the court in *AL (Serbia)*. In his skeleton, the argument was summarised thus:

> "… no justification had been offered for the decision to discriminate on grounds of parentage when it was decided to grant settlement to young adults in 2004… Contrary to the SSHD's claim that he had established 'clear objective differences' depending on the presence or absence of parents, … nothing in the SSHD's reasoning or evidence justifies the stark difference of treatment between A and someone of the same age who arrived at the same time but had not lost his parents."

22. He contrasts the full statement of the reasoning behind the original policy with the lack of any clear statement for the extension. The only reason put forward for the change, in Mr Browne's letter, was "to remove a number of anomalies" identified during the exercise and by consultation. But the practical effect was to include in its scope a new group of young adults for which no special justification was offered. His argument was reinforced by reference to material which was either not available to, or at least not apparently considered by, the court in *AL(Serbia)*. This material was in a response to questions from Ouseley J, in which Mr Waite for the Secretary of State had explained the broad view taken of "the family unit" in practice; all that was required was the existence of a family unit in October 2003:

> "…the fact that an individual might have left the family home did not exclude that dependant, provided that the family remained living in the UK."

Thus a young adult living independently, in precisely the same circumstances as TI or MR, could be entitled to ILR simply because he had a parent in some part of the UK, even if their lives had become wholly separate.

23. In my view, these arguments do not provide a basis for distinguishing *AL(Serbia)*. That is a considered decision, on facts virtually identical to the present, that the distinctions drawn by the Concession are not inconsistent with the Convention. It was concerned with the Concession in its amended August 2004 form, and took account of the justifications offered at both stages. I do not see how the authority of the decision on the Concession in that form can be undermined by the court's possibly mistaken conflation of the two stages. Nor do I see how the answers to Ouseley J's questions can alter the position. The mere fact that a lawful policy is applied flexibly does not make it unlawful, or lead to any enforceable expectation that it should be extended still further. Mr Henderson might perhaps have argued the case differently in *AL(Serbia)* and his arguments no doubt can be deployed in the House of Lords. But they do not detract from the binding effect of the decision in this court.

24. Accordingly, I would reject this ground of appeal, which is common to both appellants.

The fresh claim

25. I turn to the arguments of Mr Gill on behalf of TI relating to the decision not to accept a fresh claim. I have already summarised the three heads of the argument: (i) the near-miss point; (ii) the past denial of benefits point; and (iii) the misdirection point. They are linked. The misdirection is said to lie in the unduly subjective approach adopted by the decision-maker, and his consequent failure to consider how the matter might have been seen by an immigration judge (adopting the approach explained in *WM(DRC)(2) v Home Secretary* [2006] EWCA Civ 1495). The other points are said to be relevant to the way the matter would have been looked at by the immigration judge. Together, it is said, they would have added up to a realistic prospect of a successful claim.

26. The principal difficulty faced by these arguments, in my view, is that they pay no regard to the terms of the decision in July 2006, or the basis on which the claim had been argued at that time. The decision-maker gave clear reasons for deciding that the claim did not meet the relevant criteria, and for rejecting the arguments then put forward. He did not of course have before him the guidance in the later decision in *WM(DRC).* However, even if he had purported to adopt the mantle of a hypothetical immigration judge, there is no reason to think that he would have reached a different decision. It would have been wholly artificial for him to do other than assume that the hypothetical judge, applying the same legal test to the same facts, would arrive at the same result. He did not deal with the loss of benefits point because it was not part of the case before him.

27. Thus, I see nothing in the misdirection point. Nor am I persuaded that either of the other points provides a basis for challenging the decision.

The near-miss point

28. This argument is, in my view, based on a misconception. The Secretary of State is of course entitled to have a policy. The promulgation of the policy normally creates a legitimate expectation that it will be applied to those falling within its scope unless there is good reason for making an exception. So much is trite law. It is also trite law that the existence of the policy does not excuse the decision-maker from due consideration of cases falling outside it. However, the law knows no "near-miss" principle. There is no presumption that those falling just outside the policy should be treated as though they were within it, or given special consideration for that reason.

29. Authority to that effect, if it is needed, is to be found in *Mongoto v Home Secretary* [2005] EWCA Civ 751. Laws LJ referred to the argument that the applicant could derive "analogical support" from the Concession, even though it did not in terms apply to him. He described this as a "spurious" argument. The Home Secretary was entitled to have a policy to assist particular categories of would-be entrants, but it would be quite wrong for the courts to build "expectations approaching enforceable rights on the back of such a policy" for those to whom it did not apply (paras 24-5).

30. Mr Gill submits that *Mongoto* has been overtaken by later authority; and that in any event the issue is not the creation of quasi-enforceable rights, but the relevance of the spirit or rationale of the policy to questions of proportionality under Article 8.

31. The two cases on which he principally relies do not on analysis support the argument:

    i) *Shkembi v Home Secretary* [2005] EWCA Civ 1592 was a case about fairness, not substance. It was held that the tribunal had acted unfairly in refusing an adjournment to enable evidence to be obtained of a statement by the then Home Secretary, Mr Blunkett, as to the purpose and effect of the Concession. The Court expressly declined to encourage any expectation that the evidence would assist the claimant's case. The most that can be said is that the court was prepared to assume that the statement might be relevant even though the claimant did not fall within the strict words of the Concession. It is not a decision to that effect, and *Mongoto* does not appear to have been cited.

    ii) In *SB (Bangladesh) v Home Secretary* [2007] EWCA Civ 28, this court observed that the tribunal had been right to regard the fact that the claimant "only just failed to qualify for admission" as a factor in her favour. It approved a statement by Collins J in *Lekstaka v Home Secretary* [2005] EWHC 745(Admin) (para 38) that:

        > "… one is entitled to see, whether in all the circumstances, this case falls within the spirit of the Rules or the policies, even if not within the letter."

        It is important to note that the court's observation was not essential to its decision, and *Mongoto* was not referred to, let alone questioned. Collins J's statement, on which the court relied, seems unexceptionable. It is saying no more, as I read it, than that the practical or compassionate considerations which underlie the policy are also likely to be relevant to the cases of those who fall just outside it, and to that extent may add weight to their argument for

> exceptional treatment. He is not saying that there arises any presumption or expectation that the policy will be extended to embrace them.

32. In conclusion on this point, I agree respectfully with Ouseley J's summary:

> "… I accept that there may be cases in which the rationale for a policy may inform the judge of the significance of a particular point; there may be lacunae, but that is very different from treating a policy as the basis for extension by analogy or comparison… There is not a near-miss penumbra around every policy providing scope for its extension in practice to that which it did not cover…" (para 79)

Denial of benefits

33. This argument takes as its starting point the decision of this court in *AA(Afghanistan) v Home Secretary* [2007] EWCA Civ 12. The legal context of that case was different. It had been agreed that the tribunal's decision was wrong in law because the Department's representative had failed to draw to its attention the applicable policy relating to minors. The question was whether the claimant should be deprived of a remedy because, by the time of the court's decision, he had reached majority and was therefore outside the scope of the policy. It was decided that the failure to deal with him under the policy had deprived him of potential substantive and procedural benefits, and that consideration of such losses might be relevant to the exercise of the Home Secretary's discretion as to whether and for how long the claimant should be granted leave to remain (see para 23, per Keene LJ).

34. Mr Gill submits that the same reasoning is applicable by analogy. The normal practice, at the time TI came to the country, was for a minor to be given exceptional leave to remain (ELR) until his 18th birthday. This is illustrated by the treatment of TI's older cousin. He was initially granted ELR which expired on his 18th birthday. But he was then able to apply for an extension, to remain lawfully until that was decided, to work in the meantime, and even to reapply under Article 8. Furthermore, on reaching majority, he would also have been entitled, if he needed it, to various forms of support, such as assistance from the local authority under sections 23C and 24B of the Children Act 1989. TI, inexplicably, was treated differently. He was never granted ELR, and therefore lost the chance of receiving such benefits. That loss, by analogy with *AA(Afghanistan)* was a potentially material factor in considering whether he had established a basis for a fresh claim under Article 8, and was wrongly left out of account.

35. The short answer to this point is that it was never suggested to the Home Secretary in 2006 that this was a material factor in the claim. In *AA(Afghanistan)* the claimant had established an error of law, and was entitled to a remedy unless it was clear that it would achieve nothing. The court's decision amounted to no more than recognition of the possibility that the decision-maker might regard the loss of benefits as a factor justifying more favourable treatment. That is far from saying that it would have been a breach of Article 8 for the decision-maker to fail to do so; still less, that the decision-maker could be criticised for failing to take that aspect into account of his own motion. In any event, whatever the theoretical arguments, I agree with Ouseley J

(para 81-2) that the evidence does not establish that TI has in fact lost any practical benefits of substance.

Conclusion

36. I conclude that the appellants' attempts to find a way round *AL(Serbia)* are doomed to failure in this court. Battle must be renewed in the House of Lords.

37. Like Ward LJ, I reach that conclusion with some misgivings. Viewed from the perspective of the Home Secretary, I can understand the practical and economic considerations which were held sufficient to justify the distinction between those with family links in this country and those without. But viewed from the perspective of the claimants, the picture must seem very different. They appear to be penalised, as compared with their colleagues who left Kosovo in apparently identical circumstances, for the sole reason that they have lost their parents. In effect they are being made to suffer twice over.

38. Furthermore, the strict application of this distinction has resulted in claimants such as MR, who before May 2005 was able to support himself as a full member of the community, being held in uncomfortable limbo for over two years while the legal issue is resolved. No-one before us seemed able to give a precise indication of the scale of the problem which is thought to justify maintaining the distinction. We were given no reliable figures as to how many potential claimants there are in the same position as these appellants. I hope that, before the matter proceeds to the House of Lords, the Home Secretary has an opportunity to reconsider whether the policy factors underlying the present distinctions are sufficiently weighty to justify the perceived unfairness and the human cost to those left outside the Concession.

39. On the issues before the court, the appeals must be dismissed.

Sir Peter Gibson :

40. I agree.

Lord Justice Wall :

41. I also agree.