CO/7819/2007

**Neutral Citation Number: [2008] EWHC 2121 (Admin)**
**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**THE ADMINISTRATIVE COURT**

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 26 June 2008

**B e f o r e:**

**MR JUSTICE MITTING**

**Between:**
**THE QUEEN ON THE APPLICATION OF ILLIR HOXHA**
**Claimant**

v

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

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(Official Shorthand Writers to the Court)

**Mr Satvinder Juss** (instructed by G Singh Solicitors) appeared on behalf of the **Claimant**
**Mr Sarabjit Singh** (instructed by Treasury Solicitor) appeared on behalf of the **Defendant**

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

1. MR JUSTICE MITTING: This is an application for permission to apply for judicial review, the application having been referred for an oral hearing by Wyn Williams J on 14 May 2008. He declined to deal with the application on paper in the absence of an acknowledgment of service. One has now been served, and the issues are fully deployed in the documents, and as far as the claimant is concerned, have been fully argued by Mr Satvinder Juss.

2. The brief history is as follows. The claimant is a national of Kosovan origin and arrived following the Serbian paramilitary activities there on 30 September 1999. His two brothers, Arben and Festim Hoxha, entered the United Kingdom on 10 October 2000. All three brothers claimed asylum and were reunited in the United Kingdom. The basis of their claim was not that they feared any longer the activities of Serbian paramilitaries -- they had long since been removed by the international forces -- but that they feared reprisals from members or former members of the Kosovan Liberation Army, they having refused to participate in the activities of that organisation.

3. Each of their asylum claims was refused by the Secretary of State, and each appealed to an adjudicator. Although this claimant arrived in the United Kingdom first, his appeal was in fact the last to be heard. The first to be heard was his brother, Arben Hoxha. In a determination promulgated on 11 May 2001, Miss Parker found him to be a credible witness, accepted his account of harassment by the Kosovan Liberation Army, and found that there was a reasonable likelihood that he would face persecution if returned. There was no appeal by the Secretary of State against her decision.

4. The next brother whose appeal was heard was Festim. His appeal was heard by Miss Clough on 16 May 2002. She promulgated a decision on 27 June 2002. She recited the history and, for the purposes of the appeal, accepted that he was from Kosovo, and that neither he nor his brothers had fought or aided the KLA. Her conclusion was, however, that the establishment of new institutions supported by international forces gave a measure of security to citizens living there so that, as at the date of the hearing, there was a reasonable degree of likelihood that the appellant would have a sufficiency of protection from any attacks because of his past history by the KLA or its former members. That, as the Appeal Tribunal pointed out, was an error of approach.

5. He appealed to the Immigration Appeal Tribunal, who by a determination promulgated on 6 December 2002, allowed his appeal. The Appeal Tribunal had the two adjudicators' decisions. In paragraph 9, they recorded that:

> "We were bold enough to indicate that we could see a considerable injustice done if we went on to dismiss the appeal in circumstances in which an older brother had succeeded with his asylum claim."

Mr Juss relies on that observation to indicate that one of the reasons for the Appeal Tribunal's decision to allow the appeal was that perceived injustice. However, in paragraph 10, when the Appeal Tribunal gave its reasons, it was careful to exclude that as a ground for allowing the appeal. The Tribunal's conclusions were:

> "Having considered the brief submissions, we are going to allow this appeal. We have to say that the question of potential injustice is a factor in our minds. But leaving that aside, as we think we ought to, we reaffirm that, in our view, Miss Parkers's decision, that is based on the very careful analysis of the position and the particular consideration of the appellant and his brothers, together with her consideration of the objective material, is impressive and correct."

6. A fair reading of that sentence leads to the conclusion that although they considered the potentiality for injustice in distinguishing between the brothers, they put that consideration to one side and founded their conclusion squarely on their preference for Miss Parker's reasoning that there was a risk of persecution if either of the brothers were returned.

7. This claimant's appeal was not heard until 8 April 2003. The determination was promulgated on 28 April 2003. Miss Gerrard was informed about, and it is reasonable to infer would have been provided with, copies of the determinations of the Tribunal in the other two cases. She noted in paragraph 10 that both Arben and Festim had been granted indefinite leave to remain. She concluded that as between this claimant and his brothers, he had not established family life in the United Kingdom beyond the ordinary relationship that existed between siblings, and so concluded that he had not established family life here. She concluded, in a determination which from my experience of other Kosovan cases follows that of many other adjudicators or immigration judges, that there was no reasonable likelihood that if he were to be returned to Kosovo, he would be persecuted. Accordingly, she rejected his claim.

8. He applied for permission to appeal to the Immigration Appeal Tribunal. Dr Storey rejected his application and there matters rested. By a letter dated 13 February 2004, his then solicitors made a further application for leave to remain in the United Kingdom "outside of the Immigration Rules". They cited the cases of his two brothers, and by that means economically drew attention to the ground advanced by Mr Juss that it was anomalous and unjust that he should be refused indefinite leave to remain, whereas his brothers had obtained it.

9. In a letter dated 10 February 2006, the Secretary of State rejected the application. The Secretary of State dealt with the matter as if representations had been made that there was a fresh claim giving rise to a fresh right of appeal under paragraph 353 of the Immigration Rules. Inevitably, given the facts that I have recited, he determined that the facts were not new; that there was no new material; that the facts had been considered by the adjudicator, who rejected the claim in April 2003. That conclusion, it seems to me, is not one which it is open to challenge, even on the most highly theoretical basis. The claimant accordingly is left with the non-statutory claim.

10. The Secretary of State in the letter dealt with that in paragraph 7 and 8, concluding that the circumstances do not constitute a sufficiently compelling reason for making an exception to the normal practice of removing those who have entered or remained in the United Kingdom unlawfully in the interests of immigration control, and stated that careful consideration had been given to the grant of discretionary relief. The Secretary

of State concluded as regards the latter matter that he had not raised any issues which would give rise to such a grant of leave.

11. By way of addition to the basic claim that it would be unjust to treat the brothers differently, Mr Juss has referred to the delay which has undoubtedly occurred in dealing at various stages with the claimant's applications. The short answer to a claim based on delay is that it is not asserted, let alone demonstrated, that any different outcome would have occurred had the applications been more promptly dealt with. When the claimant arrived in the United Kingdom, unlike in the Afghan cases, the Secretary of State considered Kosovan claims on a case-by-case basis. This claimant's claim was considered on a case-by-case basis not applying any rule of thumb such as was applied in Afghan cases. Consequently, dealing with this case on its individual merits, the delays that have occurred have not led to any change in the approach of the Secretary of State or any adverse change of policy.

12. There remains, therefore, only the assertion that the Secretary of State's decision to refuse to treat the differences between the brothers as a compelling reason for making an exception to the usual rule is irrational or unlawful. I cannot so conclude. These are matters of discretion for the Secretary of State. He was entitled to conclude that all of the facts on which the claimant now relies had been considered by the appellate authority on their merits and his claim rejected. The mere fact that his claim has been dealt with in a way different from that of his two brothers is not, in my judgment, capable of being by itself a compelling reason which would require the Secretary of State to depart from the ordinary balance of immigration control.

13. Accordingly, and for those reasons, in my judgment this claim is not arguable. The Secretary of State was entitled to refuse to treat the claims as fresh claims, and to refuse to exercise his discretion to treat this claimant's circumstances as exceptional and so giving rise to an extra statutory grant of exceptional or indefinite leave. For those reasons, I refuse this application.

14. MR SINGH: My Lord, I would just ask for the defendant's costs of the acknowledgment of service in the sum of £480.

15. MR JUSS: My Lord, I cannot resist that. The claimant has put his case in the way he wanted to.

16. MR JUSTICE MITTING: I assess the defendant's costs of preparing and serving the acknowledgment of service at £480, and order the claimant to pay that sum to the defendant. Thank you both for your well presented arguments.