Neutral Citation Number: [2014] EWCA Civ 934

Case No: C4/2013/2670

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
His Honour Judge Purle QC
[2013] EWHC 3107 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 10th July 2014

Before :

LORD JUSTICE RICHARDS
LORD JUSTICE FULFORD
and
LORD JUSTICE VOS

- -

Between :

The Queen (on the application of Kardi)	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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- -

Ian Dove QC and Abid Mahmood (instructed by **Fountains Solicitors**) for the **Appellant**
Jim Tindal (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing date : 7 May 2014

- -

Judgment

Lord Justice Richards :

1. The appellant is a national of Tunisia, now 42 years old, with a conviction in France in 1995 for an offence of terrorism. He has been in the United Kingdom since 2000. His claim to asylum in this country was rejected on the ground that he was excluded by Article 1F of the Refugee Convention from the protection of that Convention. It was found, however, that he would be at risk of treatment contrary to Article 3 ECHR if removed to Tunisia. In November 2008 he was therefore granted 6 months' discretionary leave to remain. In May 2009, before the expiry of that 6 month period, he applied for further leave to remain. There was a long delay in reaching a decision on the application. Eventually, however, in March 2012, he was granted six months' discretionary leave to remain subject to restrictions as to employment, residence, reporting and study. That decision was taken in accordance with a policy introduced by the Secretary of State on 2 September 2011 concerning the grant of restricted discretionary leave in Article 1F cases.

2. In May 2012 the appellant brought a claim for judicial review of the March 2012 decision. The claim was heard by His Honour Judge Purle QC, sitting as a judge of the High Court, and was dismissed by him in a judgment given on 23 August 2013. Permission to appeal to this court was granted by the judge himself.

3. There are broadly two grounds of appeal: (1) that the delay in reaching a decision on the May 2009 application for further leave to remain rendered the March 2012 decision unlawful, and (2) that the restrictions imposed by the March 2012 decision are contrary to the appellant's rights under Article 8 ECHR. In granting permission to appeal the judge observed *inter alia* that the case raised important points on a relatively new policy introduced by the Secretary of State affecting those guilty of serious crime. It should be noted, however, that the appeal involves no challenge to the validity of the *policy* on restricted discretionary leave, but only to the way it was applied in the particular circumstances of the appellant's case. The policy itself admits of considerable flexibility in its application.

4. Before considering the grounds of appeal I need to give a fuller account of the relevant facts.

The facts

5. In 1994 the appellant was arrested in France in possession of weapons and ammunition intended to be transported to Tunisia for use in an armed coup against the government. This resulted in his conviction in 1995 for an offence of terrorism. He was sentenced to 5 years' imprisonment but was released from prison in 1998. In March 2000 he entered the United Kingdom on a false French passport and claimed asylum.

6. After a long delay, his claim to asylum was refused in April 2008. He appealed against the decision to the Asylum and Immigration Tribunal ("the AIT") on asylum, humanitarian protection and human rights grounds. By a decision dated 4 August 2008, the AIT dismissed the asylum appeal on the basis that, as the Secretary of State had contended, Article 1F of the 1951 Refugee Convention operated to exclude the appellant from the protection of that Convention, in that the conduct in respect of which he had been convicted in France amounted to acts contrary to the purposes and

principles of the United Nations. The humanitarian protection appeal was dismissed for similar reasons. The human rights appeal, however, was allowed, primarily on Article 3 grounds. The AIT's reasons for that aspect of the decision were these:

> "81. The position that I have to consider, is whether the Tunisian authorities would be aware that the Appellant was convicted in France of attempting to smuggle weapons to Tunisia so that they could be used in an armed coup. I accept Professor Joffé's evidence that the authorities in Tunisia would be aware of this conviction ….
>
> 82. … Professor Joffé in his report believes that the Appellant would be arrested on arrival in Tunisia …. Professor Joffé states at paragraph 113 of his report:
>
> > 'He will then face trial. As suggested above, this may well take place in the military court system where standards of the administration of justice are even poorer than they are in the civilian court system. He is virtually certain to be condemned to a prison term of significant length ….'
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> …
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> 84. I have considered the objective evidence in relation to the treatment of individuals detained in Tunisia, who are suspected of opposing the government ….
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> …
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> 86. The article [by Amnesty International] also states that there have been returnees to Tunisia suspected of involvement in terrorism, who have suffered arbitrary arrest and detention, torture or other ill treatment, and blatantly unfair trials.
>
> …
>
> 88. Taking into account the objective evidence which in my view indicates a real risk of torture and inhuman and degrading treatment, together with Professor Joffé's expert report, it is my view that there would be a real risk of a breach of Article 3 if the Appellant were returned to Tunisia.
>
> 89. Because of my findings in relation to Article 3, I also find that there would be a breach of Article 8. This is not because I find that the Appellant has established family life in the United Kingdom as I do not make such a finding. He has established a private life since arriving in March 2000, and I find that if removed to Tunisia, then he would not be able to re-establish a private or family life, because of my findings that he would be detained with a real risk that he would be subjected to torture or inhuman or degrading treatment."

7. There was no appeal against the AIT's decision. The consequence of the decision was that the appellant could not be removed to Tunisia until conditions in that country changed sufficiently to remove the risk of treatment contrary to Article 3.

8. In those circumstances the appellant was granted discretionary leave to remain in the United Kingdom, valid from 10 November 2008 to 11 May 2009. The grant was in accordance with the Secretary of State's then existing policy on discretionary leave which provided:

> "Where an applicant would have established that they were a refugee under the 1951 Convention or eligible for a grant of Humanitarian Protection but for the fact that they were excluded from that protection, they should normally be granted Discretionary Leave for 6 months …."

9. On 7 May 2009, prior to the expiry of the six month period of leave, the appellant's solicitors applied on his behalf for an extension of leave "for the maximum period permitted". In response to an enquiry by the solicitors, a letter dated 17 July 2009 from the UK Border Agency stated that the appellant's case would be dealt with "in due course". A chasing letter from the solicitors in early January 2010 prompted a response dated 2 February 2010 to the effect that the appellant's case was "among the backlog of older cases, which the UK Border Agency is currently working to conclude", and inviting representations if there were considered to be truly exceptional compassionate circumstances that justified taking his case out of turn. No such representations were made. The solicitors did, however, send a letter dated 19 May 2010 notifying a change in the appellant's address and seeking an explanation of the continued delay.

10. On 2 September 2011 the Secretary of State published a new policy concerning the grant of discretionary leave to persons excluded by Article 1F of the Refugee Convention from eligibility to refugee status. The policy, entitled "Article 1F – Restricted Discretionary Leave", remains in force. Its opening section contains the following summary:

> "1.4 Summary Policy Statement
>
> With effect from 2 September 2011, all cases excluded from the protection of the Refugee Convention by virtue of Article 1F but who cannot be immediately removed from the UK due to Article 3 of the European Convention of Human Rights will be subject to a new, tighter restricted leave policy. Such cases should usually only be granted Restricted Discretionary Leave to remain for a maximum of six months at a time, with some or all of the following restrictions:
>
> - a condition restricting the person's employment or occupation in the United Kingdom;
> - a condition restricting where the person can reside;
> - a condition requiring the person to report to an immigration officer or the Secretary of State at regular intervals; and

- a condition prohibiting the person studying at an education institution.

…

This policy applies to all relevant individuals whether they are seeking leave or renewal of leave to remain, including cases in which a previous grant of leave to remain was for a period longer than six months.

The power to attach conditions to leave is provided by s.3(1)(c) Immigration Act 1971. A person who knowingly fails to observe a condition of their leave commits an offence by virtue of s.24(1)(b)(ii) Immigration Act 1971. Where appropriate, this policy will be enforced by the prosecution of individuals who do not comply with the conditions of their leave."

11. Further details of the policy, including the stated rationale for the imposition of restrictive conditions, are considered below when examining the Article 8 challenge in this case.

12. On 4 January 2012 (misdated 2011) and 8 February 2012 the appellant's solicitors sent pre-action protocol letters threatening judicial review in respect of the delay in dealing with his application of 7 May 2009 for further leave to remain. The letters did not address the provisions of the new policy or make any further substantive representations. A response dated 22 February 2012 apologised for the delay and explained again that the appellant's case had been held in a backlog of cases awaiting determination.

13. On 1 March 2012 the appellant was informed of the decision to grant him restricted discretionary leave to remain for six months pursuant to the new policy. The conditions to which the grant of leave was subject were set out as follows:

"Employment

Restrictions will be placed upon your ability to work, either in a paid or voluntary capacity. Prior to taking up any offer of employment, or voluntary work, you are required to apply for consent to take that post to the casework team at the above address, and including the following details to enable a decision to make [*sic*] as to whether or not to grant permission ….

You may not undertake any paid or voluntary work unless permission has been granted. Permission will only be granted for the one specific job or business activity you are seeking permission for. Any changes in employment (including a change of role, or taking on additional responsibilities or activities) will require a fresh application for consent. Applications for employment will be dealt with within ten working days.

…

Residence

You will also be required to notify the UK Border Agency of your home address, and any changes of address.

Reporting

You will also be required to report on a monthly basis to a local UK Border Agency office. A reporting schedule is attached for your information.

Study

You will not be permitted to take up any courses of study, either by attending in person or remote learning.

These restrictions have been considered in light of your rights under Article 8 of the European Convention on Human Rights, and any interference arising in your private life as a result of these restrictions are considered to be lawful, in pursuit of a permissible aim (specifically in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime and for the protection of health or morals), and proportionate."

As to the reporting restriction, no reporting schedule was in fact attached and none has since been provided.

14. The appellant's solicitors sent a letter before claim dated 21 March 2012 requesting reconsideration of the decision. The letter pointed to the length of time since the appellant's offence, a period during which he had not been involved in any criminal activities or given cause for concern. It argued that he had not previously been subject to any conditions and had not given any indication that he would be a risk to the public or would abscond. It advanced the contention that the restrictions on his ability to work, study and live were a serious infringement of his Article 8 rights, saying that he had struggled to support himself and that "the added requirement for him to seek permission to work will make this task much harder" and would inevitably lead to additional recourse to public funds; and that requiring him to report monthly would also restrict his freedom and ability to work.

15. In a response dated 3 April 2012 the UK Border Agency described the delay in determining the appellant's application for further leave as "regrettable", referred to the explanation given in the letter of 22 February 2012 and said that the appellant's case had then been prioritised and determined quickly. As his application for further leave to remain was made prior to the expiry of his initial period of discretionary leave, his initial leave had continued until determination of the further application. Consequently it was not accepted that he had suffered any particular disadvantage as a result of the delay. The letter went on to state that the decision to grant restricted leave had been reviewed and had been determined to be correct.

16. By letter dated 18 April 2012 the appellant's solicitors requested permission for him to undertake work as a general trader, from his home address. Permission was given by letter dated 10 May 2012. The judicial review proceedings were commenced soon afterwards. There was a subsequent, unsuccessful application for permission to enrol on a course of study, the details of which are considered later in this judgment.

17. On 30 August 2012, just before the expiry of the leave granted on 1 March 2012, an application was made on the appellant's behalf for further leave to remain. A decision on that application has been deferred pending the determination of the present proceedings.

The first ground of appeal: delay

18. The first ground of appeal relates to the delay in reaching a decision on the May 2009 application for further leave to remain. I have found some difficulty in understanding the ground and why it is pursued. On the face of it, nothing can now turn on the delay in reaching a decision on the application, however unjustifiable the delay was. It is common ground that the appellant's discretionary leave to remain, as granted in November 2008, was extended by virtue of section 3C of the Immigration Act 1971 pending a decision on the application for further leave. A decision granting further leave was made in March 2012, well before the judicial review challenge was brought. The decision was made, as in principle it should be, in accordance with the policy existing at the time of the decision. If the decision were quashed it would fall to be re-made in accordance with the same policy, which has not been subject to material change.

19. Mr Ian Dove QC submitted on behalf of the appellant that if a decision had been made earlier, the Secretary of State might have decided that a proportionate approach, given the length of time the appellant had been in the United Kingdom and the absence of any material change in conditions in Tunisia, was not a rolling grant of 6 months' discretionary leave but the grant of indefinite leave to remain or a lengthier period of discretionary leave. That strikes me as a fanciful suggestion. The overwhelming probability is that, whenever the decision had been taken, the Secretary of State would have limited the grant to six months' discretionary leave, as was done in November 2008 and in March 2012. The judge below found that under the policies in force until September 2011 "it is likely that the claimant would have been granted, had the application of May 2009 (and any subsequent applications) been processed timeously, discretionary periods of leave on a rolling six month basis" (paragraph 7). Applying the same reasoning to the period after the introduction of the new policy in September, the judge found that if the delay had not occurred "it is likely that the claimant would have been subject to the sort of restrictions he is now under earlier, that is to say from September 2011 onwards" (paragraph 17), so that the delay caused no prejudice. I agree with the judge on those points.

20. Mr Dove submitted that in the absence of any explanation for the delay the reasonable inference was that a decision was delayed so as to enable it to be taken in accordance with the policy introduced in September 2011 and thus to enable the imposition of restrictions of the kind introduced by that policy. The judge found no justification for inferring that the Secretary of State was guilty of deliberate delay with a view to taking advantage of the new policy. He said that "the delay that occurred had an obvious cause, namely the administrative difficulties, maybe even inefficiencies, of

the UK Border Agency, and not any malign motive" (paragraph 18). Again I agree with the judge.

21. Mr Dove sought to rely on the decision in *R v Secretary of State for the Home Department, ex p. Mersin* (a judgment of Elias J in the Administrative Court on 25 May 2000) concerning the duty of the Secretary of State to give effect to a judicial determination. In that case the claimant's asylum appeal had been allowed by a special adjudicator but the Secretary of State had delayed for many months before making a consequential grant of leave to enter. Elias J held that "if someone has established the right to some benefit of significance, as the right to refugee status and indefinite leave surely is, and all that is required is the formal grant of that benefit (in the absence at least of a change in circumstances since the right was acquired or other exceptional circumstances), then it is incumbent upon the authority concerned to confer the benefit without unreasonable delay". That decision, however, gives the appellant no help in this case. Following the AIT's determination in August 2008 that the appellant's removal would be in breach of Article 3, effect was given to the determination by the grant of discretionary leave to remain in November 2008. That grant of leave complied with the principle in *ex p. Mersin*. The challenge before us relates not to that grant of leave but to the delay in reaching a decision on the May 2009 application for further leave, an issue on which the decision in *ex p. Mersin* has no bearing.

22. The various arguments advanced by Mr Dove in relation to the first ground therefore do nothing to undermine my view that the ground lacks substance and that pursuit of it is pointless in any event.

The second ground of appeal: Article 8 ECHR

23. The Article 8 claim in this case can be seen as an updated version of challenges that were made, unsuccessfully, to the Secretary of State's previous policy of granting discretionary leave for a period of six months without the imposition of further specific restrictions.

24. In *R (C) v Secretary of State for the Home Department* [2008] EWHC 2448 (Admin) the tribunal had found that the claimant's offending disentitled him to the protection of the Refugee Convention and to humanitarian protection but that his deportation to China would place him at risk of treatment contrary to Article 3 for reasons connected with his offending. One of the issues in the Administrative Court was whether the policy of granting discretionary leave to remain for only six months in such a case was contrary to Article 8. It was contended that the limitation of leave to six months at a time resulted in a number of interferences with the claimant's private life, in particular because of the practical restriction on him in terms of travel, the need to apply for permission to marry, the disadvantage he suffered in the employment market because of the uncertainty as to how long he would remain, and similar disadvantages in relation to the setting up of bank accounts and the like. HHJ Jarman QC, sitting as a judge of the High Court, was prepared to accept for the purposes of the case that all of those restrictions, at least cumulatively, did affect the claimant's private life but he held that "where, as here, the claimant has committed what is undoubtedly a serious offence, has been the subject of deportation and the only reason he has not been deported is the very commission of that offence, it is proportionate to adopt and implement a policy of giving discretionary leave to remain for periods of

six months in order to review not only the claimant's conditions but the conditions in the country to which deportation might be sought" (paragraph 39).

25. The same approach was taken by Beatson J in *R (Boroumand) v Secretary of State for the Home Department* [2010] EWHC 225 (Admin). Having noted that the Secretary of State did not accept that the policy necessarily constituted an interference with the right to private life under Article 8, the judge said that he was prepared to accept that the cumulative effect of the restrictions did affect the claimant's private life but it had not been shown that the operation of the system or the delay in determining applications to extend leave meant that the policy operated in a disproportionate manner either in general or in the circumstances of the particular case.

26. In those cases the interference with the right to private life was said to arise simply from the practical effects of a limitation of leave to six months. Under the restricted discretionary leave policy in issue in the present case the interference arises in addition from the specific restrictions imposed pursuant to the policy. Mr Dove relies on the cumulative effect of those restrictions as giving rise to an interference with the appellant's private life. He submits that the Secretary of State has failed to justify that interference: in particular, it has not been shown that the interference is proportionate to a legitimate aim being pursued. He cited a number of authorities on the principle of proportionality, including the decision of the Supreme Court in *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45, [2012] 1 AC 621, paras 44-45, but the principle itself is well known and I do not think that any elaboration of it is needed in the present context. I repeat that the appellant is not making a generalised challenge to the policy itself. The complaint relates to the way it has been applied to the appellant in the particular circumstances of his case.

27. Mr Tindal, on behalf of the Secretary of State, accepts that the grant of restricted discretionary leave in this case does give rise to an interference with the appellant's private life such as to engage Article 8, but he submits that the interference is limited in extent and is proportionate to the aims pursued.

28. The general aims of the restricted discretionary leave policy in limiting the normal period of leave to six months and providing for the imposition of restrictions are explained in the policy document itself, in a passage immediately following the summary policy statement quoted at paragraph 10 above:

> "1.5 The policy imposes a short period of leave and appropriate conditions while removal options continue to be pursued. Cases excluded from refugee protection continue to be a priority for removal even where removal cannot currently be enforced. Such cases will remain under close review by UKBA and will be removed at the earliest opportunity. These reviews will be conducted at six monthly intervals as a minimum, at the time when the Restricted DL expires.
>
> 1.6 The rationale for the imposition of these conditions is:
>
> - Public interest. The public interest in maintaining the integrity of immigration control justifies frequent review of these cases with the intention of removing at the earliest

> opportunity. Therefore we want to ensure close contact and give a clear signal that the person should not become established in the UK.
>
> - Public protection. It is legitimate to impose conditions designed to ensure that UKBA is able to monitor where an individual lives and works and/or to prevent access to positions of influence or trust.
>
> - Upholding the rule of law internationally. The policy supports the principle that those excluded from refugee status, including war criminals, cannot establish a new life in the UK and supports our broader international obligations. It reinforces the message that our intention is to remove the individual from the UK as soon as is possible."

Paragraph 2 of the policy document, reaffirming that restricted discretionary leave should be limited to a maximum of six months at a time, points out that a grant of leave for longer than six months permits a person to leave the United Kingdom and to be readmitted during the validity of the grant of leave, whereas it would be at odds with the aim of the policy to permit such a person to re-enter the United Kingdom. Paragraph 2.1 states that a shorter period than six months should be granted where removal appears to the decision-maker to be reasonably likely within six months.

29. The various elements of the stated rationale are all in principle legitimate aims, though it will be necessary to consider the extent to which they are specifically engaged in the appellant's case. More needs to be said, however, about the stated wish to give a clear signal that the person should not become established in the United Kingdom. The rationale of the previous discretionary leave policy was described by Cranston J in *R (Mayaya) v Secretary of State for the Home Department* [2011] EWHC 3088 (Admin), [2012] 1 All ER 1491, at paragraph 57, as being "not simply to ensure regular reviews so that foreign national prisoners [the specific category of persons in issue in that case] can be removed from the United Kingdom when the opportunity arises", but also "to plant road blocks in the way of foreign national prisoners settling here", though settlement might in practice still occur. In other words, the grant of short periods of leave emphasised the intended impermanence of the individual's stay in this country and made it more difficult to put down roots here and to build up a private life, thus reducing the prospect of removal being prevented on Article 8 grounds when the opportunity otherwise arose. The current restricted discretionary leave policy, by providing for the imposition of specific conditions on the grant of leave, is intended to reduce further the opportunity to put down roots and thereby to reinforce the road blocks planted in the way of settlement here. It does not prevent the establishing of a private life but makes it more difficult and so increases the chance that the delay before removal can be effected does not operate to prevent removal altogether. That is a legitimate aspect of immigration control.

30. In asserting the justification for the restrictions imposed on the appellant, the decision letter of 1 March 2012 referred in general terms to permissible aims recognised in Article 8(2) itself: see paragraph 13 above. But in my view that adds nothing to the analysis, which can and should be conducted in this case by reference to the more

specific aims considered above, all of which are covered by the generality of Article 8(2).

31. Turning then to the appellant's particular case, Mr Dove submits first that the purpose of the policy, in so far as it relates to the creation of road blocks in the way of settlement in the United Kingdom, cannot apply at all to the appellant, since he has lived in this country since 2000 and will have long since established a new life here. I disagree. The purpose remains relevant and legitimate even in relation to a person who has been in the United Kingdom for many years. The appellant's own stay here has been imbued, as Mr Tindal puts it, with a sense of impermanence. Until 2008 he was awaiting a decision on his asylum claim. That claim was then rejected but he succeeded in the tribunal under Article 3 on the basis of the prevailing conditions in Tunisia. He has known since then of the intention to remove him to Tunisia as soon as a change in conditions makes it possible. He was granted 6 months' discretionary leave under the discretionary leave policy as it stood in November 2008 and can have had no legitimate expectation of anything more than successive grants of 6 months' discretionary leave since that time. There was a value in November 2008, and there is still a value, in laying down road blocks to settlement and to the further building up of private life.

32. There is no direct evidence that conditions in Tunisia have been kept under review by the Secretary of State but there is no reason to believe that this has not been done, with a view to removing the appellant to Tunisia as soon as possible. There may of course come a point where the appellant has been in the United Kingdom for so long and/or the prospect of his removal to Tunisia is so remote, that the only course reasonably open to the Secretary of State is to grant him indefinite leave to remain. That point had not been reached, however, at the date of the March 2012 decision under challenge in these proceedings. As at that date the Secretary of State was entitled to continue to approach the matter on the basis of the policy on discretionary leave and to limit the period of leave to six months in accordance with that policy.

33. I should mention that the appellant has placed some reliance on the impact that the limitation of leave to six months has on his ability to establish contact with a child of his. The judge dealt with this in appropriately dismissive terms at paragraph 23 of his judgment. The points made by reference to his child provide no material support for the appellant's case under Article 8. In my view the limitation of leave to six months is not open in itself to sensible objection on Article 8 grounds.

34. In assessing the proportionality of the specific restrictions to which the grant of leave was subject, it is necessary to focus on the position at the time of the decision under challenge: since the challenge depends on the way the policy was applied to the appellant in the light of his particular circumstances, it must in my view be assessed by reference to what the decision-maker knew about those circumstances. As to that, Mr Dove stressed that there had been nothing in the appellant's conduct to give rise to concern during the many years he had already been in the United Kingdom, and no restrictions had previously been imposed upon him. On the other hand, it should be noted that at the time of the decision no representations had been addressed on the appellant's behalf by reference to the terms of the restricted discretionary leave policy and how the policy might be applied to the appellant, though some representations were then made in the letter before claim dated 21 March 2012 and were taken into account in the response of 3 April 2012 confirming the decision.

35. As regards employment, the restriction imposed on the appellant is limited to a requirement to obtain permission in advance for the specific job or business activity to be undertaken. That accords with the approach set out in section 3 of the policy document, which states that "The presumption is that permission to work will be restricted rather than denied outright where any condition is imposed" and envisages a total ban on employment only exceptionally, in cases posing a particularly high public protection risk. The document states that where a requirement for permission is imposed, the precise type of work to be restricted "will depend entirely on the risk factors posed in individual cases", with a presumption that a person excluded from the Refugee Convention by Article 1F should not be permitted to work or volunteer in any of the roles that require standard or enhanced Criminal Records Bureau checks. Having regard to the rationale for the policy, in particular the aim of public protection, I see nothing objectionable about the requirement to obtain permission or the broad indication of circumstances in which permission may be refused.

36. The limited impact of the restriction on the appellant is shown by the fact that permission was granted, on request, for him to undertake work as a general trader. Mr Dove complains about the imposition of the permission requirement in relation to work the appellant had already been doing. The appellant says in his witness statement that he stopped his work as soon as he discovered that he needed permission for it, and that it was extremely difficult to recommence it once permission had been granted; and he suggests that the restriction directly affected the downfall of his business. But the judge dismissed that argument (at paragraph 22 of his judgment) in terms I would endorse:

> "That is unfortunate if true but not made good on the evidence before me because it took him six weeks to ask for permission and the reply came three weeks later. If three weeks is long enough to destroy a business then six weeks is twice as long."

Thus the way in which the permission requirement operated in practice gives no support to the argument that the restriction was disproportionate.

37. The residence restriction is limited to a requirement that the appellant notify the authorities of his home address and any change of address. It is the lightest of restrictions, amply justified by the aims of the policy. As stated at paragraph 4.1 of the policy document, the requirement is "to ensure that the individual can be located when removal is possible". Mr Dove submits that it is unnecessary in this case because no difficulty had been experienced in contacting the appellant during his many years of residence in this country and his change of address was notified voluntarily in May 2010. In my judgment, that history serves to underline how light a restriction this is but it does not make its imposition inappropriate or disproportionate.

38. The reporting restriction requires in principle that the appellant report on a monthly basis to a local UK Border Agency office. I say "in principle" because no reporting schedule was attached to the letter and reporting has not been required in practice pending the determination of the present proceedings. The restriction must be assessed, however, on the basis that effect will be given to it in due course. It is stated in section 5 of the policy document that the restriction "is designed to maintain contact with the individual and monitor compliance with the other conditions", contact management being a priority because these cases remain under review for

removal at the earliest possible stage. The precise frequency and location of the reporting event are said to depend on the imminence of removal, the perceived risk of absconding, the need to maintain contact with the individual to monitor compliance with conditions, and the impact of the reporting requirement on the individual, taking into account the location of the reporting centre, the individual's health and mobility, caring responsibilities and employment. Monthly reporting is given as the norm but the frequency can be modified up or down in the light of the factors specified. Where a person cannot realistically be required to report each time in person, other options are to be considered, such as home visits. All of this shows the scope for flexibility in application of the policy.

39. In the appellant's case the letter before claim asserted that the requirement to report monthly would restrict his ability to work but no support for that assertion was given in the letter or has been advanced subsequently. The argument against the restriction is not now advanced by reference to any specific difficulties to which it would give rise but on the basis that, like the residence requirement, it is unnecessary: in particular, there has been no problem in maintaining contact with the appellant and there is nothing to suggest a risk of his absconding. As in the case of the residence restriction, however, the absence of problems in the past does not make it inappropriate to impose a reporting restriction for the purposes stated in the policy; and the particular requirement of monthly reporting, the details of which can be modified if necessary according to the appellant's circumstances, is not an onerous restriction and cannot in my view be considered disproportionate.

40. The final restriction to be considered is that on study: under the terms of the grant of leave the appellant is not permitted to take up *any* courses of study, either by attending in person or by remote learning. Section 6 of the policy document states that Article 1F exclusion cases should "generally" be subject to such a condition for the following reasons:

> "These individuals are in the UK on a temporary form of leave, pending their removal from the UK when circumstances permit. The rationale for restricting study is that it underlines the temporary nature of the leave. It also reduces pressure on public finances and, for privately funded course, ensures that the person does not occupy spaces that would otherwise be taken up by British Citizens or regular migrants. It is also in the wider public interest to ensure that migrants who are welcome in the UK are afforded the opportunities that come from education, ahead of those on Restricted temporary leave."

41. That may be an acceptable justification for the imposition of a restriction on study in the generality of cases but it is necessary to consider how the restriction bites in the particular circumstances of the appellant's case. On 29 August 2012, months after the present judicial review proceedings had been commenced, the appellant's solicitors wrote to request permission for him to attend college to undertake a course of English for Speakers of Other Languages ("ESOL") to improve his language skills while in the United Kingdom. An accompanying letter from an organisation called "Begin" (Basic Educational Guidance in Nottingham) showed that the appellant had recently arranged an appointment concerning attendance at ESOL classes and stated that the course would normally run from 2 to 10 hours a week for 30 to 36 weeks. The

appellant says in his witness statement that he applied for the course because he wanted to improve his English so as to make himself more employable and improve his skills. No explanation is given as to why he decided on such a move only at this stage, having been in the country for many years; but on the evidence as it stands it is not possible to discount the move as a mere tactical manoeuvre to strengthen his hand in the judicial review proceedings.

42. The request was refused. The UK Border Agency's response, dated 4 September 2012, referred to the terms of section 6 of the policy document and stated:

> "As your client remains subject to the conditions of Restricted Leave, at least until his new application is determined, for the reasons given in the published policy the Secretary of State is not prepared to consent to your client undertaking such studies …."

43. I find it difficult to see how the reasons given in the policy document could justify preventing the appellant from improving his English language skills by enrolment on a part-time, short-term course of the kind proposed. Such a course is consistent with the temporary nature of the leave. In so far as it makes the appellant more employable, it is consistent with the fact that, subject to the permission requirement, it is open to him to undertake employment during the period of his leave. In this context there can be little force in the concern about occupying course spaces that would otherwise be taken up by British Citizens or regular migrants (though it is right to note that the letter from Begin states that "There are a lot of people waiting for ESOL classes"). More generally, I am not persuaded that it is appropriate to prevent a person from taking a basic course in English while present in this country even if that presence is intended to last only until circumstances permit his removal; all the more so where a person has been in the country for many years and there is nothing to suggest that his removal is imminent. Taking everything together, I do not think that the Secretary of State has done enough to demonstrate that an absolute restriction on study is proportionate in the light of the appellant's circumstances as they are now known.

44. It must not be forgotten, however, that the challenge is to the decision of 1 March 2012 granting restricted discretionary leave, not to the subsequent refusal of permission for the appellant to undertake an ESOL course (a refusal that followed from the terms on which leave had been granted). At the time of the decision under challenge there was no hint that the appellant wanted to undertake an ESOL course. Nothing was said about this either prior to the decision or in the letter before claim which led to the confirmation of the decision. A complaint about the restriction on study was advanced at that time only in the most general of terms. On the basis of the information known at the time of the decision, I do not think that the imposition of an absolute restriction on study was open to serious objection, though it might have been better even then to allow for the possibility of an exception on request if the particular circumstances justified it. The appropriateness of the existing restriction will, however, have to be reconsidered in the light of the information available when a decision is made in due course on the outstanding request for a further extension of leave. That a different decision might be reached on that occasion is implicit in the UK Border Agency's letter of 4 September 2012 refusing the application for permission under the existing grant. It is also implicit in Mr Tindal's

acknowledgement, in the course of his submissions for the Secretary of State, that the evaluation of proportionality might have been very different if the appellant had been engaged on a course or had expressed a strong desire to embark on one at the time when the decision was taken: a strong desire to embark on a course has now been expressed.

45. The appellant's submissions in relation to the restriction on study made passing reference to the right to education vouchsafed by Article 2 of Protocol 1 to the ECHR. But no argument was developed to the effect that the appellant could succeed under the Protocol even if he failed under Article 8. Mr Tindal submitted that the Protocol was not even engaged, not least because adult access to education does not come within it; but that argument, too, was not developed. It seems to me that the Protocol is so peripheral to the case as advanced before us that it is unnecessary for me to spend time on it in this judgment. It is sufficient for me to concentrate on Article 8.

46. Perhaps I should add for completeness, though it is a point on which we were not addressed, that in my view the restriction on study is capable of having an impact on private life sufficient to bring it within the scope of Article 8 even though the article is not concerned with "education as such" (see *Patel & Others v Secretary of State for the Home Department* [2013] UKSC 72, [2013] 3 WLR 1517, at paragraph 57).

47. Pulling the various strands together, I am satisfied that the judge was right to dismiss the appellant's claim under Article 8. Whether one looks individually or cumulatively at the limitation on the period of leave and at the restrictions imposed, they give rise to only a limited interference with the appellant's private life and their imposition was justified, in terms of legitimate aim and proportionality, on the information available to the Secretary of State at the time of the decision. The restriction on study will have to be revisited, in the light of the additional information now available, when a decision is taken on the application for further leave, but my concerns on that issue do not provide a basis for striking down the decision of 1 March 2012.

48. In so far as Mr Dove advances a separate argument that the decision of 1 March 2012 should be struck down for inadequacy of reasons, I have no hesitation in rejecting the argument. It is true that the decision letter itself referred only in general terms to the permissible aims set out in Article 8 itself; but the detailed terms of the policy document provide a sufficient explanation of the restrictions that were imposed in the appellant's case. No specifics had been raised at the time which required more elaborate reasons to be given. The substantive debate as to the application of Article 8 in this case has not been hindered by any lack of detailed reasons in the decision letter.

Conclusion

49. I would dismiss the appeal.

Lord Justice Fulford :

50. I agree.

Lord Justice Vos :

51. I also agree.