CO/585/2007

Neutral Citation Number: [2008] EWHC 206 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 30th January 2008

B e f o r e:

MR JUSTICE STANLEY BURNTON

Between:
THE QUEEN ON THE APPLICATION OF OMAR

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

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(Official Shorthand Writers to the Court)

Mr P Nathan (instructed by Duncan Lewis & Co) appeared on behalf of the **Claimant**
Miss S Broadfoot (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

Judgment
As Approved by the Court

1.1. MR JUSTICE STANLEY BURNTON: This is a case in which there has been a grant of permission to apply for judicial review. The claimant is, or claims to be, a citizen of Somalia. She claimed asylum. Her claim for asylum was comprehensively rejected to the extent that the Adjudicator rejected the credibility of the claimant, and indeed was not satisfied that she was of the ethnic origin she claimed to be. Since that date, she has submitted what is represented to be a fresh claim. The fresh claim has not been the subject of a decision by the Secretary of State. She has also sought permission to work.

1.2. The primary issue now between the parties is whether she has lawfully been refused permission to work by the Home Secretary, relying on paragraph 360 of the Immigration Rules. The question has been raised as to whether that paragraph and the policy under which it is strictly applied is consistent with the European Directive 2003/9/EC of 27th January 2003 laying down minimum standards for the reception of asylum seekers.

1.3. So far as the existing permission is concerned, it was given on the basis of the delay on the part of the Home Secretary in addressing and determining the fresh claim. It is accepted by both sides, and I recognise the helpfulness of both sides in this, that that permission was granted under a misapprehension as to the law which has now comprehensively been set out in a decision of Collins J in **FH and Others**, a decision which both sides accept is correct. As applicable to this case, it is realistically recognised on behalf of the claimant that her claim as originally formulated is doomed to failure. Both sides consent in those circumstances to the grant of permission by Bean J being set aside. Having regard to the consent in the particular circumstances of this case, it seems to me, notwithstanding the provisions of Part 54, this is a case in which a grant of permission can be set aside and I do so.

1.4. That leaves the substantive question between the parties, and that is whether Immigration Rule 360 is compliant with the Directive and whether the application of Rule 360 in this particular case is compliant with the Directive.

1.5. I start from two premises. The first premise is that where a question is raised as to the correct interpretation of European legislation (and I include Directive legislation), this court should only determine the issue if it is quite clear as to the proper interpretation of the legislation in question. If there is a realistic doubt as to its effect, the appropriate course in a case such as this would be to grant permission and to make a reference to the European Court. That is my first starting point.

1.6. The second is this. It is the experience in this court that there are many, many applications for asylum in cases where there has been a comprehensive, cogent and lawful rejection of an asylum application on bases which are alleged to constitute a fresh claim and which do not in fact constitute a fresh claim when critically examined, either by the Home Secretary or bought the court. A fresh claim must put forward material which creates a realistic prospect of success before an Immigration Judge, having regard to the decision which has already been taken. I do not say thsta this is such a case, but it is the case that the decision already taken in this case, as I have already indicated, was adverse to the claimant.

1.7. In this case it is submitted that the making of what purports to be a fresh claim does constitute a claimant an asylum seeker for the purpose of the Council Directive, until that claim has been determined, either in the sense that the Home Secretary decides that it is not in fact a fresh claim (assuming there is not a judicial review of that decision) or if he decides it is a fresh claim, in which case he either allows it or, if he rejects it, must grant a right of in−country appeal.

1.8. In my judgment, in interpreting the Council Directive I should bear in mind that background fact. Of course, when someone applies for asylum at first instance (that is to say where a claim has not previously been considered), that person is an asylum seeker but, in my judgment, it would defeat any proper system of dealing with asylum applications if the mere fact that some wholly unverified alleged fresh claim were put forward resulted in someone being an asylum seeker for the purpose of the Directive and the Immigration Rules. Different considerations arise if, on proper examination, the fresh claim is indeed a fresh claim, but I would be loath to interpret either the English legislation or the European legislation as conferring rights on someone whose asylum claim has been rejected and is therefore relying on some supplemental and frequently illusory grounds in order to obtain a different decision from that which was originally made.

1.9. It is more convenient in this case to begin by reference to the Directive itself. Article 2 contains a definition of an application for asylum, which does not call for consideration. But "applicant" or "asylum seeker" is defined to mean a "third country national and stateless person who has made an application for asylum in respect of which a final decision has not yet been taken". That cannot be said of the claimant. She is a person who has made an application for asylum in respect of which a final decision has indeed been taken. It seems to me that therefore she is not an asylum seeker or applicant within the meaning of the Directive. I do not find that conclusion surprising, notwithstanding her current and outstanding contention that she has a fresh claim, for reasons I have already indicated.

1.10. That approach to the interpretation of the Directive is supported by Article 3 which defines a scope as being applicable:

> " . . . to all third country nationals and stateless persons who make an application for asylum at the border or in the territory of the member state as long as they are allowed to remain on the territory as asylum seekers . . . if they are covered by such an application for asylum according to the national law."

I emphasise the words "if they are covered by such application for asylum according to national law". There is no pending application for asylum according to national law. It may be that that only applies to the family members referred to in Article 3, but again the claimant is someone who has made an application for asylum. It having been rejected, she at the moment is not allowed to remain on the territory as an asylum seeker because her claim has been rejected and therefore she is not lawfully within this country.

1.11. I have been referred to section 77 of the 2002 Act but, in my judgment, the same considerations apply to the claim for asylum referred to in that provision, otherwise it would be the case that anyone could prevent removal simply by asserting a fresh claim immediately before removal, irrespective of the substance or merits of that fresh claim.

1.12. Article 11 of the Directive refers to employment, and refers to a decision at first instance not having been taken within one year of the presentation of an application for asylum. That decision was taken in this case. It was taken in respect of the original claim for asylum and therefore paragraph 2 cannot apply. Access to the labour market is not to be withdrawn during appeals procedures, but that is irrelevant to the present claim. Paragraph 3 does provide that access to the labour market is not to be withdrawn pending an appeal until such time as a negative decision in the appeal is notified. Again, there has already been a negative decision on the appeal, and it would be odd, assuming that there was already access to the labour market, if that provision were to apply in circumstances where, according to the Immigration Rules, there is in fact no fresh claim, and therefore can be no appeal against it although one has been asserted.

1.13. In those circumstances, in my judgment, there is nothing in the Directive which is inconsistent with the provisions of paragraph 360. It is accepted that paragraph 360 was properly applied in the present case. Having regard to the view I take as to the Directive and to paragraph 360, therefore, I would refuse permission in this case.

1.14. MR NATHAN: My Lord, I am slightly concerned by the preamble to your Lordship's judgment. I should point out that at page 38 of the bundle, Collins J −− I appreciate your Lordship was not addressed on the merits of the claim.

1.15. MR JUSTICE STANLEY BURNTON: I should have said that. I will add it to my judgment. I am not suggesting that this is such a claim, but the implication of this application for judicial review is that all persons, whether meritorious or not, are entitled to work and that is, for reasons I have already given −−

1.16. MR NATHAN: Perhaps just for the record it could be noted that contrary to the IAT's interpretation of the Immigration Adjudicator's determination, Collins J did correct that point and said "I accept that the Adjudicator did accept that the applicant was a member of the Benadiri clan".

1.17. MR JUSTICE STANLEY BURNTON: I am sorry, I missed that.

1.18. MR NATHAN: That is the heart of the claim because at the time of the appeal before Collins J such membership was not sufficient. The point is that country guidance came out two months before the fresh claim letter which said that such membership was, and that is the basis for the fresh claim.

1.19. MR JUSTICE STANLEY BURNTON: That is entirely my fault for speaking out of memory rather than going to the documents and the transcript will be corrected.

1.20. MISS BROADFOOT: I do not necessarily accept that that is the correct interpretation. That is an observation of Collins J in his refusal of leave to the IAT. I

do not say anything else about it. There is some scope for debate as to whether or not the Adjudicator comprehensively rejected that point as well. The AIT took one view, Collins J, in his observations refusing leave to appeal, took another view without hearing argument. I would simply say that that is perhaps not clear.

1.21. MR NATHAN: That sounds, my Lord, like we may be back here.

1.22. MR JUSTICE STANLEY BURNTON: I do not think it matters. I have not made my decision on the merits or otherwise of the claim for asylum. I made my decision on the basis that a sensible and factual interpretation of the Directive does not require that anyone who simply asserts a fresh claim is entitled to work.

1.23. MR NATHAN: My Lord, the only other matter is, rather than going into the detail which I am sure your Lordship would not want to hear, I would seek permission to appeal. I can go into the details of which I seek that permission, if necessary.

1.24. MR JUSTICE STANLEY BURNTON: Miss Broadfoot?

1.25. MISS BROADFOOT: My Lord, I oppose that. In my submission, it is entirely clear that the Directive does not apply in these circumstances.

1.26. MR JUSTICE STANLEY BURNTON: I think you should seek leave from the Court of Appeal.

1.27. MR NATHAN: I think I have to make the application.

1.28. MR JUSTICE STANLEY BURNTON: Absolutely. You have dealt with this very fairly, both of you.

1.29. MR NATHAN: My Lord, I do not know if my learned friend has an application. I would also ask, if possible, for a transcript to be ordered.

1.30. MR JUSTICE STANLEY BURNTON: You may certainly have a transcript. You are Legally Aided. You may have a transcript at public expense.

1.31. MR NATHAN: If it can be expedited it would be helpful because technically we have to lodge the appeal within seven days. It is seven days for an appeal against a refusal of permission.

1.32. MR JUSTICE STANLEY BURNTON: If that is right, I will expedite it.

1.33. MR NATHAN: I am grateful, my Lord. I would ask for detailed assessment.

1.34. MR JUSTICE STANLEY BURNTON: The associate has told me that this is down as an application to amend the grounds of judicial review. My impression was that it was an application for permission based on the amended grounds.

1.35. MR NATHAN: The order to amend the grounds was made by Bean J on 21st November.

1.36. MR JUSTICE STANLEY BURNTON: So you had permission?

1.37. MR NATHAN: We had permission to amend the grounds.

1.38. MR JUSTICE STANLEY BURNTON: I am sure the associate is happy to hear that. Thank you both very much.