Neutral Citation Number: [2008] EWHC 3064 (Admin)

Case No: CO/10249/06

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/12/2008

Before :

THE HON. MR JUSTICE BLAKE

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Between :

Dawit Tekle	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**

- -
- -

Michael Fordham QC and Adam Tear (solicitor advocate),
(instructed by **Duncan Lewis and Co**) for the Claimant
Jenny Richards.
(instructed by Treasury Solicitors) for the Defendant

Hearing dates: 1st December 2008

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Judgment

The Hon Mr. Justice Blake :

Introduction

1. The claimant in this case, Mr Tekle, is an Eritrean national who had a mother of Ethiopian nationality and a father who was Eritrean. He applied for asylum in this country in November 2001 claiming to have arrived here on false documents shortly beforehand following the deportation of his Ethiopian mother from Eritrea and the detention of his father as a member of a political movement out of favour in Eritrea. He claimed to have been born in July 1985 but from other data that he supplied about his education, the immigration judge who heard his appeal concluded that he was somewhat older than that and was about 19 in 2002, making him about 25 today.

2. His application for asylum and human rights protection was dismissed and certified because of his failure to disclose the existence of a false travel document. It was considered on appeal by an immigration judge and dismissed on the 31st May 2002.

3. In April 2004, his solicitors made a fresh application for protection based on a UNHCR paper of January 2004 explaining the difficulties that had been faced by young men of mixed ethnicity and of military service age in Eritrea. Further, it has been plain that there are real difficulties in obtaining citizenship and relevant travel documents for Eritrean nationals of mixed ethnicity who cannot present valid Eritrean travel documents to the diplomatic authorities of Eritrea in London. The representations made the point that in 2004 there had been no removals of failed Eritrean asylum seekers to Eritrea in that year.

4. On the 7th July 2005 his solicitors sought an update as to what was happening on this fresh claim. They wrote again on the 31st August 2006 requesting an update and making further submissions in relation to the inability of the claimant to return to Eritrea or to be removed there. They subsequently sent a pre-action protocol letter seeking to challenge the delay in processing the claimant's case. In due course an application for judicial review was lodged but pursuant to the order of Mr Justice Sullivan dated 23rd May 2007 it was stayed pending the judgment in the Administrative Court in the "legacy test cases" which were due to be heard and determined.

5. On the 5th July 2007 Mr Justice Collins delivered his judgment in the case of *R (FH and Ors) v Secretary of State for the Home Dept* [2007] EWHC 1571 Admin. The judgment in *FH* deals with the problem that had occurred whereby past inefficiency and inadequate resources in the Home Office had led to a very significant backlog of cases accruing between 1998 and 2006. In paragraphs [13-17] of the judgment the following points are explained:-

   i) In 1998 it had been the policy of the government that by April 2001 asylum claims would be dealt with in about 6 months from start to finish.
   ii) In 2001 there were arrangements made with the HM Treasury for targets to meet this aim for new cases. Initial decisions in such cases were to be made in 2 months but the result of this was that old cases were put on hold and faced longer delays.

iii) By 2006 a backlog of some 400-450,000 individuals whose asylum claims had failed but who had not left the country had arisen. Included in that number where many whose subsequent applications had not been determined. Subsequent estimates have suggested this figure may be somewhat high.

iv) A statement was made to Parliament in July 2006 to the effect that the government planned to deal with the backlog within 5 years or less. The Home Office would prioritise those who represented a risk to the public then focus on those who can more easily be removed, those receiving support and those who may readily be granted leave. All cases will be dealt with on their individual merits.

v) Following that announcement a scheme of processing backlog clearance cases was established with the four priority groups indicated and a narrowly defined category of exceptional circumstances failing which cases would be determined in order within no defined period but the aspiration was to clear the backlog by 2011.

6. Although he recognised that the origins of the backlog were a failure by government to administer the system efficiently Mr Justice Collins concluded that it was not for the courts to interfere with the priorities set by the executive with which Parliament must be treated to have been content in dealing with a backlog clearance. There was an implied obligation to deal with asylum cases within a reasonable period of time but what is reasonable depended upon the circumstances, the numbers facing government, the resources and such like. That meant that challenges to the delay in processing cases in the order of three years or so would not be a legitimate ground of challenge and had no prospects of success. At [30] he concluded in the following terms :-

> " it follows from this judgment that claims such as these based on delay are unlikely save in very exceptional circumstances to succeed and are likely to be regarded as unarguable. It is only if the delay is so excessive as to be regarded as manifestly unreasonable and to fall outside any proper application of policy or *if the claimant is suffering some particular detriment which the Home Office has failed to alleviate* that a claim might be entertained by the court"
>
> (emphasis supplied)

7. Following the judgment in *FH*, the Claimant's solicitors wrote on the 7th August 2007 to the effect that the claimant had been living in the United Kingdom for a considerable period of time without access to funds and living off the goodwill of others and that the application was now made to vary the conditions of his temporary admission to include permission to work.

8. On 8th October 2007 the Home Office had written to the claimant's solicitors acknowledging his submissions about the ability to voluntarily return or be removed to Eritrea, but stating in the standard terms of their response letter to such cases

> "in the light of the above and having carefully tested the merits of your client's application taking into account the aforementioned submissions and

individual facts of his case it had been decided in the circumstances your client has raised are not exceptional. The problems your client claims to experience does not render his claim exceptional as other applicants awaiting a decision are also experiencing such conditions. I cannot therefore give any indication at this stage when your client's application for further leave to remain will be actioned. Your client's immigration status and any entitlements in this country will remain unchanged until such time as a decision is made on any applications or representations that may be outstanding in his case".

9. In respect of the application to work the Home Office replied:

> "I am sorry to inform you that we are unable to grant the applicant permission to work at this stage therefore your client may not take employment in the United Kingdom, nor may your client be self employed or engaged in business or professional activity".

In November 2007, the solicitors pointed out that in the Home Office statistics for 2006 once again there were no removals of Eritrean nationals to Eritrea. It was further submitted:

> "if the claimant cannot be removed some form of leave is given to the claimant pending a change in his situation. The claimant cannot simply be left to his own devices in the United Kingdom without any further assistance when he cannot return to Eritrea voluntarily if he wanted to nor could he be returned there. The claimant is in a true state of limbo. This is an issue that the defendant's policy on dealing with incomplete asylum applications has failed to consider properly. The claimant is not in receipt of support and is fending for himself for an indeterminate period of time."

10. On the 14th November 2007 Mr Justice Sullivan refused the claim for judicial review of priority treatment.

11. On the 15th May 2008 on a renewed application for permission to seek judicial review the application was refused by Mr Justice Collins in respect of the challenge to the defendant's four year failure to determine the fresh claim but granted in respect of the challenge to the decision refusing permission to work.

12. In the amended grounds in support of such a challenge reliance was placed on paragraph [29] of the decision in *FH* where Mr Justice Collins himself said

> "since a substantial delay is at least for the next 5 years or so likely to occur in dealing with cases such as these steps should be taken to try and ensure that *so far as possible claimants do not suffer because of that delay*".

(emphasis supplied)

13. On the 5th June 2008 following the grant of permission and the request by Mr Justice Collins that the matter be further considered, the Home Office drew attention to paragraph 360 of HC 395 which provides:

> "Right to Request Permission to Take up Employment
>
> An asylum applicant may apply to the Secretary of State for permission to take up employment which shall not include permission to become self employed or to engage in a business or professional activity if a decision at first instance has not been taken on the applicant's asylum application within one year of the date on which it was recorded. The Secretary of State shall only consider such an application if in his opinion any delay in reaching a decision at first instance cannot be attributed to the applicant."

14. Paragraph 360a adds:

> "if an asylum applicant is granted permission to take up employment under Rule 360 this shall only be until such time as his asylum application has been finally determined".

The decision letter continued that since the appeal rights were exhausted in June 2002:

> "unless and until the further submissions are considered by the Secretary of State and accepted as amounting to a fresh claim under paragraph 353 your client is not an asylum applicant and remains a failed asylum seeker. A person who has pending submissions under paragraph 353 is not an asylum applicant and does not therefore fall under the terms of paragraph 360 of the Immigration Rules. The Secretary of State therefore maintains the decision to refuse your client permission to work."

15. It is clear that the Home Office were responding to the application to take employment merely by reference to the immigration rules applicable in such cases. The position under the rules may be summarised as follows:-

i. The Secretary of State may grant permission to work where there has been delay of 12 months in determining an asylum claim where the delay is not attributable to the claimant.

ii. Once granted the permission to work extends to the time when the claim is finally determined by disposal on any appeal.

iii. Where a claim has been finally disposed of on appeal, the period of time in which a fresh application to take employment can be made

only runs from the start of the time when it is decided that the further representations amount to a fresh claim.

iv. More than twelve months delay in determining fresh applications that have been decided amount to a fresh claim can again lead to permission to take employment that will again extend to the final determination of the fresh claim on appeal.

16. The matter came on for hearing on the 17th July 2008 before Mr Goudie QC sitting as a deputy High Court judge for the Queen's Bench Division, but it was adjourned for further consideration and skeleton arguments in the light of human rights point raised by the claimant.

The submissions of the parties:

17. Essentially the claimant submits the following:-

i) It is irrational for the defendant to apply Rule 360 to applications for permission to seek employment in cases where there is a deliberate decision to defer consideration of whether the fresh claim is indeed a fresh claim in accordance with the priorities set out in 2006 in the backlog clearance policy.
ii) A policy founded upon expectations of determining cases within a reasonable period of time cannot be applied without more to cases where there is very substantial delay now rising to some four and a half years since the fresh application was lodged.
iii) The ability to take remunerative employment is an aspect of the private life of the claimant within the meaning of Article 8(1) ECHR that he is entitled to have respected while he remains in the United Kingdom.
iv) Whilst Article 8(1) gives him no right to work upon demand or upon the mere lodging of an asylum application it is a weighty consideration in favour of the grant of permission, absent justification, when the delay has extended into periods applicable in the present case and the claimant cannot be removed from the UK to Eritrea.
v) No justification has been given by the Secretary of State of the decision to refuse permission to take employment until the case has been finally resolved in accordance with the priorities in the back log clearance.
vi) Where human rights are a relevant consideration in the exercise of discretion justification is required and the court should review the sufficiency of the justification on the basis of proportionality.

18. The claimant has not vouchsafed any details of his personal circumstances other than those that can be gleaned from the bare outline of the narrative history set out above. He does not claim to be destitute. It is understood that throughout the period from 2001 to today he has lived in London and he is staying with a friend and is dependant upon the friend's charity. The claimant accepts that in the event of homelessness he would be eligible for accommodation and support under section 4 Immigration and Asylum Act 1999 as amended. If he were to make such an application he could be transferred anywhere in the country where there was an available roof over his head; support would only be by way of vouchers for his

food requirements and he would prevented from being granted cash for needs that may not be covered by the vouchers (see s.4 (11) of the Act).

19. The claimant invites the court to draw its own inferences from the position of a young man of some 25 years of age who for the past seven years has had no resources of his own, is prevented by refusal of permission from obtaining any resources of his own, employing his skills and personality in remunerative employment and prevented from leading something equivalent to a normal life whilst his eventual outcome is considered by the Home Office.

20. No evidence has been filed on behalf of the defendant. In her decisions she had merely relied on the fact that the claimant could not make out an exceptional case for priority consideration of his further claim; he did not and could not comply with the immigration rules relating to permission to work unless and until it was decided that his 2004 representations amounted to a fresh claim.

21. Shortly before the present hearing there was filed on behalf of the defendant a supplementary skeleton making the following points:-

i) It is denied that there was a right to work or that a failure to give permission to work constitutes a failure to respect the right to private life.

ii) Reliance was placed upon the decision of HHJ Mackie QC sitting as a Deputy High Court Judge in *R (Min Min and Omar) v SSHD* [2008] EWHC 1604 (Admin) where His Honour concluded that failed asylum seekers awaiting decisions on applications of fresh claims cannot rely upon the terms of the Council Directive 2003/EC/9/2003 (The Reception Directive) Article 11 (2) and were thus not entitled to be granted permission to work after a delay of 12 months of processing of an application for asylum. The case is shortly to be heard on appeal by the Court of Appeal. At [37] of his judgment HHJ Mackie concluded that there were no compelling human rights or fundamental rights issues that required him to interpret the Directive so as to include fresh claims.

iii) If justification were nevertheless needed it is submitted that it is provided by the policy of the rules endorsed by previous decisions of this court that economic migration should be discouraged. The courts had previously recognised that a grant of permission to work in cases of delay for seeking reconsideration would be an incentive and likely to encourage asylum applications from those without a well founded fear of persecution seeking to circumvent the managed migration route slowing down the processing of applications made by genuine refugees and undermining the integrity of the managed migrating system. It was further pointed out that the system provided a safety net in the case of destitution that was not relied upon.

22. On both sides the case has been argued as one of general principle rather than particular individual circumstances. For the claimant it is submitted that it is irrational, unlawful and a disproportionate failure to respect his human rights for the defendant not to permit the claimant to get on with his life in an important aspect of it, whilst he is the victim of delays entirely generated by the defendant's policy towards second applications for asylum and backlog clearance. He has now been in this country for at least seven years. He has been waiting four and a half years for a reconsideration of his position. He comes from a country in which

removal has proved impracticable if not impossible to someone in his circumstances with no travel documents. He has a credible asylum claim in the light of his mixed ethnicity and the recorded ill-treatment given to certain other cases of failed asylum seekers from Eritrea of military age. He faces the prospect of having to wait until 2011, a further three years before there is any expectation that his cases will be determined; this is manifestly excessive delay. He should not suffer both the delay that results from the policy judgments made by the defendant and the detriment of being unable to work.

23. For the defendant it is submitted that any question of high policy with respect to deterring unfounded applications for asylum is a judgment for the Secretary of State alone, it is a judgment that has been held in previous cases to be rational. There are now both EU restrictions upon such a policy in the case of first time asylum applicants and potentially human rights arguments that in an appropriate case could be met by the destitution policy. But there is no other individual factor entitling this claimant to be treated differently from any others awaiting an application for reconsideration. Any generosity in respect of ability to take employment risks undermining the rigours of the system as presently operated.

Are human rights engaged ?

24. Mr Fordham QC for the claimant points to the founding principles of the nature of private life identified in the case of *Niemietz v Germany* 72/1991/324/396 decision of the court 16th December 1992 16 EHRR 97 where at [29] it said

> "the court does not consider it possible or necessary to attempt an exhaustive definition of private life, however, it would be too restrictive to limit the notion to an inner circle which the individual may live his own personal life as he chooses and to exclude there from entirely the outside world not encompassed in that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings. There appears furthermore to be no reason on principle why this understanding of the nation of "private life" should not be taken to exclude activities of professional or business nature since it is after all in the course of their working lives that the majority of people have a significant if not the greatest opportunity of developing relationships with the outside world".

25. The defendant by contrast draws attention to the decision of the House of Lords in *R(Countryside Alliance and Ors) v Attorney General and Ors* 2007 UK HL 52 reported at (2008) 1AC 719, see the speech of Lord Bingham paragraphs 11-15 and the speech of Lord Hope, paragraphs 54 and 58. The effect of these paragraphs is that however broad the concept of private life may be there is a limit to it and a certain threshold has to be reached. Not all laws having some immediate or remote effect on the individual's possibility of developing his personality by doing what he wants to do constitutes interference with the individual's private life within the meaning of the Convention.

26. In the case of *Sidabaras v Lithuania* [2006] 42 EHRR 6, the court was concerned with a far-reaching ban on former members of the KGB from entering certain public employment or private professions. The court concluded in response to rival submissions whether the issue was within the ambit of Article 8 as follows:-

> "47. Nevertheless, having regard in particular to the notions currently prevailing in democratic states the court considers that a far reaching ban on taking up private sector employment does effect 'private life'. It attaches particular weight in this respect to the text of Article 1(2) of the European Social Charter and the interpretation given by the European Committee of Social Rights and to the text adopted by the ILO it further reiterates that there is no water tight division separating the sphere of social and economic rights from the field covered by the convention… 48. Turning to the facts of the present case the court notes that as a result of the application of Section 2 the applicants have been banned from 1999-2009 from engaging in professional activities in various branches of the private sector on account of their status as former KGB officers. Admittedly the ban has not affected the applicants ability to engage in certain types of professional activity. The ban has however, affected their ability to develop relationships with the outside world to a very significant degree and has created serious difficulties for them in terms of earning their living with obvious repercussions on the enjoyment of their private lives."

27. Miss Richards for the defendant points out that the final conclusion on a violation on the ECHR was a discrimination violation taking Article 14 with Article 8 rather than a pure violation of Article 8 alone. She further points out that Lord Bingham in the passages noted in the *Countryside Alliance* case describes this as an extreme case. It undoubtedly was.

28. I accept Miss Richards' submissions that the authorities relied upon by the claimants are somewhat abstract statements of high principle that do not deal with the particular consideration that arise where human rights are applied in the immigration context. It is not necessary to lengthen this judgment with the recitation of all the principles that have been developed in this respect since the landmark case of *Abdulaziz and Cabales v United Kingdom* (1985) 7 EHRR 471. On the one hand states have a wide discretion as to control of their frontiers and their formulation of their immigration policies. On the other, in exercising their immigration functions states must respect family and private life rights enjoyed by those subject to their jurisdiction.

29. However, whilst asylum seekers who have not been granted permission to enter the country cannot be compared to lawful long term migrants let alone home nationals in respect of rights to social assistance and ability to take employment they cannot be excluded altogether from the ambit of any such rights as may properly arise simply on account of their status. The court has stressed that according to Article 1 of the ECHR these are human rights that apply to all people

irrespective of status who are within the jurisdiction of the contracting state as undoubtedly this claimant is. Thus in the case of migrants who were staying without authority in the United Kingdom but who wished to marry and required the authority of the Secretary of State to do so, the claimants were entitled to respect of their unqualified human right to marry under Article 12 ECHR: see *R (Baia) v SSHD (Nos I and 2)* [2008] UKHL 53 [2008] 3 WLR 549.

30. In the case of *R(on the application of S) v Secretary of State for the Home Department* [2007] EWCA Civ 546 the Court of Appeal were concerned with unfair priorities in the determination of claims for indefinite leave to remain by those who had been unfairly deprived of the opportunity of obtaining discretionary leave to remain by reason of delays by dealing with their initial asylum application. The Court of Appeal did not finally need to base its decision on consideration of Article 8 but at paragraph 59 of his decision Lord Justice Carnwath indicated that he expressly agreed with the penultimate paragraph of Mr Justice Collins's decision in that case below. There he said :-

> "A delay of four and a half years is on any view excessive, people cannot be expected to put their lives on hold particularly if they are young. The claimant was when he arrived in genuine need of protection and he has been condemned to a cruel limbo of worry and uncertainty over his future. He has now been here for over 7 years".

31. The issue in that case concerned the grant of ILR to provide certainty to his immigration status but the claimant had been permitted to work and indeed had established himself as a good worker. Moreover I recognise by contrast it has not been decided that the present claimant was in need of protection when he arrived or now. However, the reference to "people cannot be expected to put their lives on hold" is significant for two reasons. First, it may throw light on what Mr Justice Collins himself considered to be a detriment in the case of *FH*. Second, it has been endorsed by no lesser authority than the House of Lords as an aspect of Article 8 rights in the case of *EB(Kosovo) v Secretary of State for the Home Department* [2008] UK HL 41 reported at 2008 3WLR page 178. Lord Browne of Eaton-under-Heywood agreeing with the principle speech of Lord Bingham in that case said [37]

> "it is unreasonable to expect the applicant to put his life on hold and not to develop or deepen relationships whilst he remains here".

32. Lord Bingham himself accepted at paragraph 14 and 15 of his speech in that case that delay in immigration decision making is relevant to the strength of an Article 8 case because:-

i) The applicant may develop during the period of any delay closer personal and social ties and establish deeper roots than he could have done earlier. The longer the period of delay the likelier this is to be true.

ii) The precariousness that would attend any social relationships undergone during the period of waiting diminishes with the passing years and if months pass without a decision to remove being made and months become years and years succeed years it is to be expected that the sense of impermanence will fade and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so.

iii) Undue and extensive delay may weaken the strength to be otherwise afforded to strict policies in support of immigration control.

33. The other members of the Appellate Committee agreed with this observation of Lord Bingham either without qualification or subject to the delay being excessive and unacceptable: see Lord Hope [27], Lord Scott [30], Lady Hale [32], Lord Brown [35]-[39].

34. Following the guidance in this case, I conclude that there is no right to a decision within any given period of time and no right to permission to work arises merely because of expiry of a particular period of time. However undue delay that is the responsibility of the Home Office's inefficiency both increases the right to respect to private life that is carried on of necessity during the period of delay, and can be said to diminish the strength of immigration control factors that would otherwise support refusal of permission to work.

35. I accept Mr Fordham's submission that the ability to take employment is an aspect of private life. The right to work generally is a human right set forth in the Universal Declaration of Human Rights 1948 and the European Social Charter. As the European Court pointed out in *Sidabaras* (loc cit [26] above) the scope of the term private life set out in Article 8 (1) should be developed taking into account these related requirements of international requirement or commitment.

36. In my judgment, the positive prohibition on being able to take employment, self employment or establishing a business, when placed alongside the inability to have recourse to cash benefits, restricts the claimants ability to form relations either in the work place and outside it. When such a requirement is imposed on someone who cannot be removed from the United Kingdom and it is maintained against someone who has been physically resident in the United Kingdom since the fresh claim was made 4 ½ years ago this restriction can thus be said to be an interference with right to respect for private life. As Lord Bingham himself had memorably said in *Huang v SSHD* [2007] UKHL 11 [2007] 2 AC 167 at [18] "human beings are social animals. They depend on others". The ability to develop social relations with others in the context of employment, as well as the ability to develop an ordinary life when one is in possession of the means of living to permit travel and other means of communication with other human beings is thus an aspect of private life.

Justification

37. The fact that a prolonged refusal of permission to take employment may be an interference with the right to respect for private life, does not mean that it is unlawful. Such an interference may be justified in the greater interests of the

economic well being of the country and the rights and freedoms of others. It is trite that immigration policy may promote such considerations.

38. I note that no adverse question of national security, public safety, prevention of disorder or crime, or protection of health and morals arises in this case. If the claimant had been convicted of criminal wrong doing or otherwise considered a potential danger he would have been afforded priority in the determination of his fresh claim. Equally, if he had a transparently hopeless case, was readily removable from the United Kingdom or had been in receipt of public assistance he would have qualified for priority consideration.

39. I recognise that relevant guidance can be found in the case of *R v Secretary of State for the Home Department (Ex parte Jammeh & Ors)* 30 July 1998 (unreported) where the Court of Appeal concluded that there was a substantial public policy in deterring asylum seekers to make unmeritorious claims by rewarding second claims with the right to work pending appeal. It was for the Secretary of State to determine what policy should be in the light of the balance to the economic gain from removing people from benefits and assisted accommodation versus the disadvantages of impact upon immigration policy and its implementation.

40. However, I do not accept that that judgment and the policy considerations that underlie it can be applied directly to resolve the issues in the present dispute. There are the following material differences and considerations:-

    i) The EU Reception Directive now lays down minimum standards for support of asylum seekers including the right to access the labour market in the event of delay in considering their claims. The preamble to the directive indicates the need for such minimum standards was said to be inspired by respect for fundamental rights and in particular full respect for human dignity (which is one of the core values protected by human rights instruments). I accept of course that this court has held the Directive does not apply to give automatic rights on second applications, and the terms of the preamble and other human rights considerations did not require a contrary decision.

    ii) In *Jammeh* the Court of Appeal was considering the broad deterrent effect of attracting fresh asylum claims by offering the ability to work in the event of delay in final determination of claims. The present case deals with a more limited class. It is merely concerned with those who are already here and make a second claim whose determination is unduly delayed. A person who might be tempted to come to the United Kingdom to make a false asylum claim simply because of the prospects of seeking employment would not be encouraged by any more generous policy in this respect. That person would be dealt with speedily under the new claim processing guidelines and would never reach the period of 12 months. In any event right to seek employment would apply throughout Europe and therefore there would be no particular benefit to coming to the United Kingdom for this purpose.

iii) There is now a variety of legislative techniques to fast track and certify late claims from asylum, claims from apparently safe countries, claims that have no apparent substance and the like. It seems likely that such direct measures of immigration control are more likely to discourage unmeritorious fresh claims for asylum made solely in order to access the labour market after 12 months.

iv) Since J*ammeh* all relevant decision making in this field is now subject to the statutory duties to the Secretary of State to respect human rights under the Human Rights Act 1998. I have concluded that in the present combination of circumstances the continued restriction does amount to an interference with the right to respect to Article 8 and so justification should be compelling and proportionate both responding to a pressing social need and be no more than necessary in all the circumstances (see *R (Daly) v SSHD* [2001] UKHL 26 [2001] 2 AC 532 at [27]).

v) In my judgment, the most significant factor is that whilst the Court of Appeal were considering the rationality of a policy of denying claimants the ability to work straight away, where processing large numbers of claims led to inevitable delay of some sort, the present case is concerned with a deliberate policy to create delays for very substantial periods of the re-examination of claims in order to clear a backlog created by previous failures of the administration. It is the deliberate decision to defer the consideration of these claims for five or more years and the decision not to decide whether they amount to fresh claims before considering the merits of them that prevents the claimant accessing the policy of the rules which is to afford permission to work after 12 months on a first claim or a subsequent claim recognised to be a fresh claim.

vi) Indeed causing decisions on whether a further claim is indeed a fresh claim within the meaning of the Immigration Rules to be deferred for some four and half years and then decided on at the same time as the merits of the claim somewhat undermines the purpose of paragraph 360 of HC. The SSHD accepts the role is applicable to further claims as well as first claims. Deciding both issues together somewhat undermines the distinction between delay in considering a claim and delay in considering first whether the claim is a fresh one, on which reliance is placed by the defendant.

vii) As noted in *EB (Kosovo)* (above) the longer a person remains in the United Kingdom the more significant such factors will be. What is an acceptable consequence of strict immigration control for a period of up to 12 months or even up to two years may become less acceptable after three four or five years. The claimant has now been in this country for seven years and has been waiting the outcome of his second application for four and a half years and may have to wait a further two years. He cannot be expected to put his life on hold.

Detriment

41. I now return to whether the indefinite maintenance of this prohibition is capable of being a detriment to the claimant of the kind referred to Mr Justice Collins in *FH*. The claimants in that case had already been granted leave to remain that carried the ability to work whilst their claims were being further considered and so the question of whether they could have applied for permission to work did not arise.

42. At [4] and [5] in his judgment he noted particular problems that had been caused to claimants whose applications for FLR had been outstanding for up to four years at the time of marriage: one wanted confirmation of his right to work and it had not been given speedily; another wanted permission to marry whilst he was waiting. Once these specific problems had been sorted out, he observed that the claimants could not point to any real detriment, but dismissed the claims subject to the final observations at [30] in his judgment which have been already quoted above.

43. The *ratio* of the decision was therefore that the policy was not to be struck down as irrational by reason merely of the delay in considering the claim but there should be no other detriment to the claimant. The observations about detriment were part of the reasons for the decision and not extraneous obiter dicta.

44. Other judges have had to consider the question of pure delay in decision making on fresh claims for DLR or ILR within the overall context of immigration control. Underhill J in *R (Ghaleb and others) v SSHD* [2008] EWHC 2685 (Admin) 17th October 2008, unreported was concerned with whether Afghans who benefited from the ruling in *R(S) v SSHD* [2007] EWCA Civ 546 [2007] Imm AR 781 were entitled to priority in reconsideration of the claims for ILR that the CA concluded they were entitled to. He followed Collins J in *FH* and other judges in concluding that a judgment on recourse allocation and the ordering of priorities within limited resources could not readily be declared to be unlawful or irrational by this court. On the individual claims for higher priority, he noted that most of the claimants had not established exceptional circumstances such as the need to travel abroad within the terms of the policy. Although it was not the basis of the application before him, at [42] to [43] he commented that there may be other ways to accommodate an applicant's wish to travel to visit distressed relatives abroad while a claim was under consideration, for example by endorsing a travel document permitting travel abroad and re-entry without losing a place in the queue. There was some evidence of difficulties in developing such a scheme but he concluded:

> "in a particular case the Secretary of State may have to face those difficulties if she is unable or unwilling to side step them by expediting decision of the substantive application for ILR"

45. In the present case there are no logistical difficulties in granting someone discretionary permission to seek employment after a certain period of time has elapsed since a fresh application had been lodged and remains to be decided, even if there is no right to work on lodging the application or under the Reception Directive.

46. In the case of *Obienna v SSHD* [2008] EWHC 1476 (Admin) 27th June 2008 Simon J again upheld the system of priorities, but concluded at [36]-[37] that some indication may need to be given of when a decision can be expected.

47. I concur with the conclusion of Mr Justice Collins and note of caution of Mr Justice Underhill and Mr Justice Simon that the legality of a system of priorities for backlog clearance does not mean that the defendant can treat claimants with detriment other than the very uncertainties created by delay if there are other practical solutions. I conclude that denying a claimant an ability to seek employment for some prolonged and indefinite period is capable of being a detriment in circumstances where it can be said to be an interference with the right to respect for private life.

Conclusions

48. Ms. Richard's submissions on the overall justification of the present policy, in the event that it needed justification were as follows:-

    i. The claimant is in no different position from anyone else awaiting a decision under the backlog priorities and there should be consistency of decision making with respect to such policies.

    ii. The defendant was entitled to conclude that the policy is necessary to prevent the encouragement of purported fresh claims that would prolong stay and enable such people to work.

    iii. It would treat failed asylum seekers more favourably than initial asylum applicants.

    iv. The claimant is not destitute.

49. In my judgment none of these factors barely outlined without supporting evidence in a skeleton argument, can justify the present policy on permission to work by those making fresh applications who are subject to delays of four years plus.

50. In response to the four points outlined above, I would observe:

    i) Not everyone in the backlog clearance program and who has waited four years or so for a decision has been prevented from working. Those like the claimants in *FH* who have been granted discretionary leave to remain but are awaiting ILR decisions should be able to work. Others may not be willing or able to seek employment. Whilst there should be consistency in treatment and many others may be in the claimant's position, this does not excuse the defendant from adopting a more refined policy to the problem where the delay is a result of her department's historic inefficiencies and present policy choices.

    ii) The defendant may well believe that a blanket policy of denying access to the labour market may have deterrent effect on those here, but as previously noted, policies that interfere with human rights must be proportionate. There is no evidence as to why other statutory restraints on late and groundless claims would not be sufficient to deter such claims, or

indeed the application of policy criteria for expediting groundless claims where removal is relatively easy and uncomplicated. I recognise that the defendant doesn't want to devote too many resources to determining whether a case is in some way an exceptional case, but to some extent that is presently required, and an early screening decision on whether a fresh claim either is or is likely to be a fresh claim would be both consistent with present priorities and performs something that in any event would need to be considered before the case is disposed of, so it is not an additional extraneous administrative burden.

iii) There is no disadvantage as respects first time claimants. The point in the skeleton argument was wrong and not pursued in oral argument. The claimant is not seeking the right to work from the point of lodging a fresh claim.

iv) There is a legal duty under Article 3 to prevent destitution and street homelessness. This is not a destitution case, but absence of destitution cannot be an answer to justification in the present class of case: over four years, not removable and such like.

51. In my judgment, none of the reasons relied on for justification of this blanket policy suffice to do so, whether the refusal is viewed as an interference of a human right to respect for private life or as mitigating or merely as a detriment arising from delay. There are other ways to address abuse by ill deserved claims, and there comes a point when the delay is such that any general deterrent effect that may remain in the interests of immigration control is so weakened in comparison with the requirement to put the life on hold without any indication of when it will be started again, that the generic reliance on policy will not do.

52. The question of precisely when and it what circumstances the maintenance of the prohibition on employment ceases to be justifiable depends on a policy judgment that it is not open to the court to make. Absent any obligation that may be found to arise under Article 11 of the Reception Directive that is the subject of an appeal to the Court of Appeal, I accept that the Secretary of State is not bound to permit access to the labour market simply because 12 months have lapsed since a fresh claim has been submitted for decision. I note in *Baia* (loc cit above [29]) that an 18 month period was required before asylum seekers were granted permission to marry and this was considered disproportionate (see per Lady Hale at [42]-[44]). Whether the prohibition should be relaxed after two, three or four years, whether a total period of continuous stay in the United Kingdom should be the basis of assessment, how far the practical ability to remove is a relevant criterion, whether claims outstanding after 12 months should be addressed by a sifting of potential merits, whether a specific date for decision could or should be given are all policy choices for the executive and not matters for this court in the first instance.

53. I further can give the claimant no individual relief on his personal application in the absence of anything further being known about his circumstances.

54. What I can and do declare for the reasons given in this judgment that the present policy is unlawfully overbroad and unjustifiably detrimental to claimants who have had to wait as long as this claimant has. I will hear counsel on any other

orders that may need to be made if they are not agreed. I would expect the policy to be reviewed and reformulated the light of this judgment within approximately three months.