CO/5617/2006

Neutral Citation Number: [2007] EWHC 3381 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Friday, 30th November 2007

B E F O R E:

MR JUSTICE BEAN

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THE QUEEN ON THE APPLICATION OF TB

(CLAIMANT)

-v-

SECRETARY OF STATE FOR THE HOME DEPARTMENT

(DEFENDANT)

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Mr Manjit Singh Gill QC (instructed by Irving & Co) appeared on behalf of the Claimant
Mr Robert Jay QC (instructed by Treasury Solicitor) appeared on behalf of the Defendant

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J U D G M E N T

1. MR JUSTICE BEAN: The claimant was born in Jamaica on 23rd December 1977. In November 1999 he arrived in the UK, was refused leave to enter but was granted temporary admission. Two days later he absconded. He was subsequently arrested for supplying a Class A drug. On 1st August 2003 he pleaded guilty at the Crown Court at St Albans to the drugs supply offence and also to a breach of bail and, was sentenced on 14th October 2003 to a total of four years and three months' imprisonment. That sentence was reduced on appeal to a total of three years and ten months.

2. By letters dated 24th August and 28th September 2004, the Secretary of State signified his intention to make a deportation order against the claimant. The second letter includes the following:

> "You claim that your removal from the United Kingdom would breach the United Kingdom's obligations under the 1951 Refugee Convention. You have not stated any reasons for this claim and we do not accept that it avails you. The decision to make a deportation order against you is maintained."

3. The claimant claimed asylum on 25th February 2005 and also alleged that for him to be deported would constitute a breach of his human rights. On 6th April 2005 the Secretary of State refused both claims. In particular, although the relevant letter is not in the bundle, that must have involved a refusal to grant leave to enter and remain in the UK as a refugee.

4. On 21st April 2005 the claimant appealed to the Tribunal against the decision to refuse asylum and also against the human rights aspect of the decision. It is not spelled out in the documentation before me nor in the determination of the Immigration Judge, but Mr Robert Jay QC for the Home Secretary accepts that the jurisdiction of the Immigration Judge must have arisen under section 82(2)(a)of the Nationality Immigration and Asylum Act 2002 (appeal against refusal of leave to remain) and section 82(2)(j) (appeal against an intended deportation order).

5. The hearing took place before Immigration Judge Goldfarb on 22nd August 2005. The issue, subsequently raised by the Secretary of State in correspondence, of whether the defendant's conviction and sentence in the Crown Court disentitled him to the grant of asylum was not raised. Mr Jay informed me that he has no instructions as to why that was so and it is certainly not apparent from the documents.

6. By her reserved determination promulgated on 12th September 2005, the Immigration Judge allowed the claimant's appeal on both Refugee Convention and Human Rights Convention grounds. The Secretary of State did not seek to have that decision reconsidered or set aside. I should record that the Immigration Judge accepted the claimant as a credible and truthful witness, and in particular accepted his evidence that his life would be in danger if he were returned to Jamaica.

7. On 25th January 2006 the Secretary of State wrote to the claimant's solicitors in the following terms:

"I am writing in connection with your above named client whose appeal to the Asylum and Immigration Tribunal was allowed on both asylum and human rights grounds on 2nd September 2005. The AIT found your client to be a refugee but as you will know Article 33(2) of the Refugee Convention allows a party to the Convention to expel a refugee who 'having been convicted by a final judgment of a particularly serious crime constitutes a danger to the community of that country.' You will be aware that on 1st August 2003 Mr [B] was convicted of being knowingly involved in the supply of heroin and crack cocaine for which he was eventually sentenced to 3 years and 9 months' imprisonment.

Section 72(2) of the Nationality Immigration and Asylum Act 2002 provides that such a person will be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the UK if he is convicted in the UK of an offence and sentenced to a period of imprisonment of at least two years. This clearly covers your client. The presumption that your client constitutes a danger to the community of the UK is rebuttable, see section 72(6).

I am therefore writing to invite you to supply any evidence you wish to put forward on behalf of your client rebutting the presumption set out in section 72(2). You have until 24th February 2005 to do this. Once we have received your reply, or on 24th February 2005 if you do not reply by then, we will decide whether Article 33(2) applies to Mr [B]. We will inform you of our decision in this matter. Whatever decision we reach under Article 33(2), we are not seeking to remove or deport your client from the UK in breach of his rights under the ECHR."

8. On 6th June 2006 the Secretary of State decided to apply Article 33(2) of the Refugee Convention in the claimant's case, refused asylum and leave to enter and remain for the five-year period which the claimant sought and decided that the claimant was entitled to temporary admission only. That last aspect of the decision, namely the grant of not even discretionary leave to remain but temporary admission, became unsustainable when the Court of Appeal delivered judgment in **R(S) and Others v the Home Secretary** [2006] INLR 575, the Afghan Hijackers case, on 4th August 2006. Accordingly, the Secretary of State has granted the claimant periods of discretionary leave for up to six months at a time; the most recently granted period will expire on 17th January 2008.

9. Meanwhile, on 6th July 2006, these proceedings for judicial review were issued. Leave was granted in due course by Lloyd-Jones J. Mr Manjit Singh Gill QC for the claimant submits there are five issues to be determined:

"(1) What is the relationship between Article 33(2) of the Refugee Convention 1951 and section 72 of the Nationality Immigration and Asylum Act 2002? To what extent is the use of presumptions in reliance on section 72 permissible at all?

(2) Whether the decision of the Home Secretary to apply Article 33(2) and section 72 in

January 2006 and the timing and manner of that decision were lawful.

(3) Whether the decision of the Home Secretary to fail to give the claimant five years leave to remain in line with his policy is lawful.

(4) Whether the later decision of the Home Secretary to grant the claimant only six months' discretionary leave to remain is lawful.

(5) Whether, if the presumptions in section 72 may be applied at all, the claimant has successfully rebutted those presumptions, and whether the decision of the Secretary of State that the presumptions have not been rebutted it is unlawful."

10. It seemed to me on reading the papers in this case that Mr Gill's second issue cried out to be decided first, since it was self-contained and might prove decisive. In the event that is what has happened. I have therefore not been addressed on Mr Gill's first issue, which raises quite profound questions.

11. The 1951 Geneva Convention relating to the status of refugees defines a refugee in terms familiar to most lawyers in Article 1A. Article 1F excludes the provisions of the Convention altogether in the case of any person with respect to whom there are serious reasons for considering that he has committed, among other things, a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee. That was found to be the position by the panel of adjudicators in the **Afghan Hijackers** case, but it is not suggested to apply here. The provision on which the Home Secretary has placed reliance in this case is Article 33, headed "Prohibition of expulsion or return ("Refoulement"), which reads as follows:

> "1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> 2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

12. As the Home Secretary's Asylum Policy Instructions to her staff correctly state, where Article 33(2) applies it does not deprive the applicant of the status of refugee, but it does deprive him of the most significant right of a refugee, namely the right not to be returned to his country where his life or freedom would be threatened on prohibited grounds.

13. Section 72 of the Nationality Immigration and Asylum Act 2002, so far as material, provides:

> "(1)) This section applies for the purpose of the construction and application of Article 33(2)of the Refugee Convention (exclusion from

protection).

(2) A person shall be presumed to have been convicted by a final judgment of a particularly serious crime and to constitute a danger to the community of the United Kingdom if he is

(a) convicted in the United Kingdom of an offence, and

(b) sentenced to a period of imprisonment of at least two years.

(6) A presumption under subsection (2) ... that a person constitutes a danger to the community is rebuttable by that person.

(9) Subsection (10) applies where -

(a) a person appeals under section 82 ... of this Act ... wholly or partly on the ground that to remove him from or to require him to leave the United Kingdom would breach the United Kingdom's obligations under the Refugee Convention, and

(b) the Secretary of State issues a certificate that presumptions under subsection (2) ... apply to the person (subject to rebuttal).

(10) The... Tribunal or Commission hearing the appeal-

(a) must begin substantive deliberation on the appeal by considering the certificate, and

(b) if in agreement that presumptions under subsection (2) ... apply (having given the appellant an opportunity for rebuttal) must dismiss the appeal in so far as it relies on the ground specified in subsection (9)(a)."

Paragraph 334 of the Immigration Rules, at the material time, read as follows:

"An asylum applicant will be granted asylum in the United Kingdom if the Secretary of State is satisfied that:

(i) he is in the United Kingdom or has arrived at a port of entry in the United Kingdom; and

(ii) he is a refugee, as defined by the Convention or Protocol; and

(iii) refusing his application would result in his being

> required to go (whether immediately or after the time limited by an existing leave to enter or remain) in breach of the Convention and Protocol, to a country in which his life or freedom would be threatened on account of his race, religion, nationality, political opinion or membership of a particular social group."

14. This Rule was amended in October 2006 to include two new subparagraphs, with the old subparagraph (iii) becoming (v), but it is not suggested that the two new subparagraphs apply in or affect the present case.

15. As Mr Jay submits, Rule 334(ii) is linked to Articles 1(a) and 1(f) of the Convention, whereas 334(iii) on the old numbering is linked to Article 33(2) by the use of the words "in breach of the Convention and Protocol". But I do not accept his submission that the Immigration Judge was only deciding an issue under subparagraph (ii). The Secretary of State had refused to grant asylum. The claimant was appealing to the Tribunal against that refusal with its consequent refusal of leave to enter and remain. Having failed to persuade the Secretary of State that he satisfied all the requirements of Rule 33(4), the claimant had to persuade the Immigration Judge that he had done so. He succeeded. The decision of the Immigration Judge was not simply to grant a declaration that the appellant before her was a refugee, it was to "allow the asylum appeal". At that point, and when there was no application for leave to appeal or reconsideration, the claimant became entitled to leave to enter and remain: see per Brooke LJ at paragraph 46 of the Afghan Hijackers case [2006] INLR 575.

16. As Mr Jay submitted, the key issue is, therefore, was it open to the Secretary of State to apply Article 33(2) to the claimant after the AIT had allowed the appeal on asylum grounds, or was it, as Mr Gill submits, an abuse of process?

17. The principle traditionally said to derive from the 1843 case of Henderson v Henderson is that there should be finality in litigation and that a party should not be vexed twice in the same matter. The fact that a matter could have been raised in earlier proceedings does not necessarily make it an abuse for it to be raised later. As Lord Bingham said in Johnson v Gore Wood [2002] 2 AC 1 at 31, a "broader and more merits-based" judgment is required; and that is surely so in public law just as it is in private law. But the facts of this case, in my view, point compellingly to the conclusion that it is an abuse of process for the Secretary of State not to raise a section 72 point before the Tribunal and then to raise it subsequently, always assuming, of course, that it is a point arising out of past history known to the Secretary of State and not out of subsequent or undisclosed events.

18. Firstly, the statutory scheme under section 72 envisages the Secretary of State raising a previous serious conviction as a preliminary issue under subsections (9) and (10). I accept that, as Mr Jay has pointed out, those two subsections are not couched in mandatory terms requiring the point to be raised at this stage, but they are a clear indication of what is desirable.

19. Secondly, if a section 72 point is raised before the Immigration Judge or tribunal, it becomes one for the judge or tribunal to decide on the merits, whether or not the presumption is rebutted. On the other hand, if the point is only raised later, the decision by the Secretary of State is not appealable under the statute and the applicant therefore only has what Mr Jay fairly conceded is the weaker remedy of judicial review. So failure to raise the point at what I regard as the appropriate stage, namely before the judge or tribunal, does not merely cause extra trouble, delay and expense, it is substantively unfair as well.

20. Thirdly, although there is no evidence that this procedure was adopted for tactical reasons in the present case, if it is legitimate not to raise the point before the tribunal there is a real danger that such points will be held back for tactical reasons.

21. Fourthly, applicants in asylum and immigration cases are regularly given a "one-stop warning". For example, the letter of 28th September 2004 giving notice of intention to issue a deportation order ends with the following rubric:

> "One-stop warning. You must now state any reasons why you think you should be allowed to stay in this country. This includes why you wish to stay here and any grounds why you should not be removed or required to leave."

22. Then, after provisions about time and the address to which the representations should be sent, it goes on:

> "You do not have to repeat any reasons you/your client has already given us but if you do have any more reasons you must now disclose them. If you later apply to stay here for a reason which you could have given us now you may not be able to appeal if the application is refused. This requirement to state your reasons is made under section 120 of the Nationality Immigration and Asylum Act 2002."

23. Unusually, in the present case, the boot is on the other foot; but it seems to me that the same principle should apply to the Secretary of State. (It is true, as those operating the immigration system know only too well, that the one-stop warning is often frustrated by the advancing of fresh grounds which in many cases prove not to be fresh at all. But this is not a fresh claim case, even adapting that phrase to new arguments on behalf of the Secretary of State).

24. It follows for all these reasons that I consider that it was an abuse of process for the Secretary of State to raise the section 72 issue after the Immigration Judge's decision had been given and that the decision of 6th June 2006, refusing leave to enter and remain, was accordingly unlawful and should be quashed.

25. As I have already indicated, that makes it unnecessary to decide Mr Gill's first and fifth issues, and his third and fourth questions fall to be answered "No" in consequence of the decision that I have given.

26. MR GILL: My Lord, I think the appropriate relief then speaks for itself, really. We can no doubt draw up an order reflecting the judgment. I would simply like to point out for the record that although your Lordship did indicate the section 72(9) and (10) is not framed in mandatory terms, nevertheless there are clear indications as to what it signifies as to the appropriate time at which the section 72 point should be taken. That, I assume, was not intended to be any clear rejection of the argument that we would have wanted to put forward had the matter been fully heard; that it is in fact in mandatory terms requiring the Secretary of State to put forward the section 72 point in an appeal process and only in an appeal process. That point may have to be decided another day when it matters.

27. MR JUSTICE BEAN: Certainly. I ought to add this. Section 72(9) and (10) enable the Secretary of State to issue a certificate prior to the hearing, in which case the Tribunal must consider the section 72 issue as a preliminary point before going any further. Even if a certificate has not been issued, it seems to me (obiter, no doubt) that the Secretary of State could raise the point at the hearing and it would then be dealt with by the judge in the course of the hearing, rather than as a preliminary point. But that doesn't arise on the facts of this case.

28. MR GILL: I understand. I'm grateful. The only other issue is the issue in relation to costs and I would ask for detailed assessment of our publicly-funded costs.

29. MR JUSTICE BEAN: You cannot resist that, Mr Jay?

30. MR JAY: No.

31. MR JUSTICE BEAN: Very well, I make those orders. I am very grateful to both of you.