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CO Ref: CO/5365/2007

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Administrative Court

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27 June 2008

Before :

Mr Justice Simon

Between :

Frank Uchenna Obienna **Claimant**

and

The Secretary of State for the Home Department **Defendant**

Mr Satvinder Juss (instructed by **Messrs CT Emezie**) for the Defendant
Ms Katherine Olley (instructed by the **Treasury Solicitor**) for the Defendant

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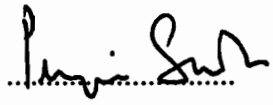
Hearing date: 17 June 2008

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.



MR JUSTICE SIMON

Mr Justice Simon:

Introduction

1. This case concerns the backlog of applications for indefinite leave to remain in this country ('ILR' claims) from those who entered the United Kingdom illegally or who overstayed their leave to remain, but who have had long residence here.

2. A witness statement served on behalf of the Defendant demonstrates that there has been a chronic problem in dealing with these claims. The evidence of Kevin Romano, Deputy Director in the Border and Immigration Agency and Head of Unit of the Liverpool Charged Casework team ('LCC') since May 2007, is that in October 2005 there was a backlog of 32,991 cases and that 2½ years later, in February 2008, there was a backlog of 30,400 cases. Among the backlog is the Claimant's application.

3. The Claimant applies for an order that the Defendant considers and/or grants his ILR claim and/or such other relief as may be deemed appropriate.

Chronology

4. On 1 February 2005, the Claimant's solicitor, Messrs CT Emezie, wrote enclosing the Claimant's application for indefinite leave to remain in the United Kingdom on the basis of his long residence. The letter enclosed a completed form in support of the application.

5. On 17 February 2005 an unsigned reply was sent by the Home Office, Immigration and Nationality Directorate (Managed Migration), in standard terms.

> Thank you for the above application for a variation of leave to remain in the United Kingdom. This letter acknowledges receipt of the application and the payment of £155.
>
> The application will now be passed to a caseworker for consideration.
>
> We aim to complete 70% of postal applications within 3 weeks of receiving them in Immigration and Nationality Directorate (IND). We may not be able to complete applications within 3 weeks of receipt if they need further documents, enquiries or an interview, or if they are complex. We should normally deal with these within 13 weeks at most.
>
> Unless you need to tell us about a change in circumstances (eg change of address or a different Representative), or to ask for urgently needed documents to be returned (such as your passport for urgent travel), there is no need to telephone or write to us about the progress of your application.

> Please note that requests to speed up consideration will only be considered in exceptional circumstances and where there is documentary evidence of a need to travel in an emergency.

6. Over a year later, on 25 May 2006, the Claimant's solicitors wrote enquiring about the progress of the application. The Defendant failed to reply to this letter. On 28 November 2006 the Claimant's solicitors wrote again, referring to their letter of 25 May, and asking for a response to their enquiry. Again, there was no reply. On 17 April 2007, the Claimant's wrote a letter before claim, pursuant to the Judicial Review Protocol, stating that the Claimant had a legitimate expectation that his application would be dealt within the time mentioned in the 17 February 2005 letter. There was no response to this letter. On 21 May 2007 the Claimant's solicitors copied their letter of 17 April 2007 letter to the Defendant's Judicial Review Unit by recorded delivery.

7. In the absence of any response, the present claim was issued on 27 June 2007. The acknowledgment of service and summary grounds of defence were eventually lodged on 11 September. The delay in lodging these documents was said to be due to difficulties in obtaining instructions.

8. Ms Olley (for the Defendant) submitted that the summary grounds comprised the entirety of the Defendant's case, so that it was unnecessary to serve a skeleton argument in accordance with CPR 45 PD.15.2. In my judgment she was mistaken. First, the only authority that she relied on during hearing was not referred to in the Summary Grounds. Secondly, the summary grounds contained the following statements:

> A system is <u>now</u> in place to deal with such cases and applications are being dealt with in a chronological order so far as is reasonably possible unless there are compelling or compassionate reasons for dealing with cases otherwise.
>
> ... The Claimant's application will be dealt with when it reaches the front of the queue and it is submitted that this application should not be used as a means of jumping this queue. (Emphasis added)

This statement did not, in fact, accurately set out the position as at 11 September 2007, as became apparent from the witness statement of Kevin Romano made on 11 February 2008. Thirdly, in the usual case, a skeleton argument is helpful to the parties and to the Court in focussing attention on the real issues at the hearing.

9. The relevant parts of Mr Romano's statement are in the following terms.

> Background
>
> 6. LCC was established in October 2005 to deal with the backlog of paid applications for Further Leave to Remain or Indefinite Leave to Remain from applicants who either entered the country illegally, or had overstayed their leave to remain or enter. The backlog inherited was 32, 991 cases. LCC took

ownership of the backlog on an incremental basis from October 2005, up to full ownership in May 2007. In practical terms this meant that as LCC expanded its caseworker numbers it took ownership of the backlog.

7. The backlog arose because of a lack of resources devoted to dealing with applications for leave to remain from overstayers, or those who had entered the country illegally, therefore committing immigration offences. There was one Immigration Service casework team, based in London, which dealt with these applications. Priority at the time was given to reducing the Asylum backlog.

8. It was necessary to have specialist caseworker knowledge to deal with these cases. This was because the cases in the backlog raised issues which required knowledge of the entire spectrum of immigration casework. Caseworkers would routinely have to consider cases under the Immigration Rules, European Convention of Human Rights, any Home Office concessions or policies. Furthermore, as these cases were overstayers or those who had entered the country illegally, caseworkers also had to initiate enforcement action on cases. This 'end to end' approach to casework was a new initiative, and therefore required caseworkers to have extra training to equip them with the necessary skills.

The System

9. A system was established in May 2007 with the intention of reducing the overall number of cases in the backlog. At the time it was thought that the best way to deal with the backlog was to split the casework function, so that a percentage of caseworkers would deal with cases in chronological order (oldest first), whilst other caseworkers dealt with new intake. New intake was targeted as it was assumed these cases would be less complex in nature and would eventually lead to greater numbers of removals.

10. There was also a third group of cases, which can be called 'expedited' cases. These came to our attention by virtue of their compelling and compassionate nature. These also included cases highlighted by MP's and by the Parliamentary Ombudsman which demonstrated compelling and compassionate circumstances.

11. The rationale was that this three pronged approach would target the oldest cases and the new less complex cases. Therefore, it would be the most effective way of reducing the backlog. It would also ensure that those cases with compassionate circumstances received priority.

> 12. In December 2007 it came to light that the levels of intake, which had not reduced as forecast, combined with the number of cases which it was considered appropriate to expedite meant that our entire caseworker resource was taken up dealing with the new intake and expedited cases. This meant that except for the cases which were expedited the older cases in the backlog were not being dealt with as effectively as had originally been planned.
>
> The Current Situation
>
> 13. The response of the LCC to the above information coming to light was to urgently reassess our system of dealing with the backlog. In December 2007 it was decided to concentrate the majority of our casework resources on dealing with the backlog in chronological order, starting with the oldest first. We will now cease deciding new intake cases. We will, however, continue to deal with the expedited cases, such as the cases with a compelling and compassionate element, and potential vulnerable minors. The 2500 cases already sent to our holds in Liverpool, of which the majority are new intake cases will be decided before the change is applied. It is anticipated it will take approximately three months to clear the files held locally.
>
> 14. The backlog is approximately 30,400 cases.

Argument

10. For the Claimant, Mr Juss, made two broad submissions.

11. First, he submitted that the letter of 17 February 2005 raised a legitimate expectation that the application would be dealt with within a period of 13 weeks. He submitted that, where an explicit statement is made to a limited number of people by a public authority exercising a statutory function as to how it will discharge that function, there is a legitimate expectation, which will be enforced by the Court, as to how it will do so, see for example *R v. North and East Devon health Authority, ex p. Coughlan* [2001] QB 213.

12. Secondly, he submitted that the evidence of Mr Romano, showing the changes in the approach taken to dealing with old claims, demonstrated an abuse of power and conspicuous unfairness to the Claimant. He relied in this context on the decision of the Court of Appeal in *Secretary of State for the Home Department v. R (S)* [2007] EWCA (Civ) 546.

13. For the Defendant, Ms Olley submitted that, on a proper reading of the letter of 17 February 2005, there was no clear representation as to the time by which the application would be dealt with, such as to give rise to a legitimate expectation of the type contended for by the Claimant.

14. In answer to the second point, she submitted that the way in which the applications were dealt with was fair and that the policy was not irrational. In this context she

relied on the decision of Collins J in *R (FH and others) v. Secretary of State for the Home Department* [2007] EWHA (Admin) 1571.

Conclusion

15. Before coming to my conclusion it is convenient to set out some preliminary observations.

16. It is clear that the Defendant has received a very large number of applications for indefinite leave to remain in the United Kingdom under the long residency concession. Each of these applications has to be carefully considered; and this involves both time and the deployment of manpower. There may have to be checks against police and border control records. This was made clear to the Claimant. The Declaration in Part 8 of the Application Form states:

> I understand that all information given by me will be treated in confidence by the Home Office but that it may be disclosed to other government departments, agencies, local authorities and other bodies where necessary for immigration and nationality purposes or to enable them to carry out their functions.

17. There is now evidence that the letter of 17 February 2005 was in a form which was not intended to be used for claims made by people who had entered this country illegally or had overstayed their leave to remain. Such claims were recognised as being complex; and it should have been recognised as unrealistic to indicate that a decision would be made within a matter of weeks. The standard form of letter used in the present case was intended to be used where the application was to extend the leave to remain within the time for which leave had been given - relatively straightforward claims. Ms Olley rightly accepted that the mistake was not directly relevant to the issues with which I am concerned, since the letter would have been read according to its terms. It may however explain what otherwise appears to have been a completely unrealistic assessment of how long it would take before consideration was given to the application.

18. Although the number of applications has placed a considerable burden on the Defendant in terms of resources, a fee was charged to applicants. In February 2005 the fee was £155; by August 2005 it had risen to £355.

19. The steps taken to deal with the applications since May 2005 have been described by Mr Romano in terms which could have been very much fuller. There is still no evidence as to when the Claimant's application may be dealt with. This gives rise to uncertainty; and it was plainly the continuing uncertainty which led to the present claim. The Claimant's solicitors wrote asking for information about the progress of the application on 4 occasions before they began these proceedings. The letters plainly called for a response; yet none was given. This was more than simple discourtesy. It showed either a high degree of inefficiency, a deliberate policy of not replying to such enquiries or recognition that the backlog was so bad that any information would either be so vague or otherwise unsatisfactory that it was better to say nothing. I asked Ms Olley whether her client could give any indication as to when the present claim would be dealt with. Having taken instructions, she said she was unable to do so. The inability or unwillingness (even now) to give any indication as to

when the application may be dealt with (particularly in the light of the terms of the 17 February 2005 letter) is highly unsatisfactory.

20. Mr Romano's witness statement describes the 3 ways in which the backlog of ILR claims were dealt with by the Defendant. Up to May 2007 there appears to have been no system. In December 2007, a system was established by which 2,500 (mostly) recent cases would be dealt with first, followed by consideration of the backlog of cases in chronological order. In the intervening period (between May and December 2007) another approach was taken. This involved the targeting of recent applications on the basis that they were less complex 'and would lead to a greater number of removals'. Again it seems to me that targeting particular claims on the basis that they would yield a greater number of removals was a policy which was open to very serious objection.

21. In the course of argument it was accepted by Mr Juss that the Claimant was not entitled to an order that his claim be favourably considered; and that the claim could only properly be expressed as a claim for the Claimant's application to be considered either in the light of the expectations legitimately raised by the terms of the letter or in accordance with a rational and fair policy.

22. Although the Claimant advances the claim on the basis of (1) Legitimate expectation and (2) Conspicuous Unfairness, it seems to me that the two ways of putting the case are both aspects of an overriding principle usually described as 'Abuse of Power'. In the former case in relation to what was said. In the latter case in relation to what was done or not done.

(1) Legitimate expectation

23. This issue focuses on the terms of the 17 February 2005 letter; and, in particular, whether it raised a legitimate expectation that the claim would be dealt with within the time set out in the letter. The alternative way in which the Claimant puts the case: namely, that the expectation was that it would be dealt with within a reasonable time, does not add much to this part of the argument. The Defendant accepts that there was an obligation to deal with the application within a reasonable time; but argues that it is not for the Court to condemn a period as unreasonable if it is the product of a policy which is rational.

24. In *R v. Secretary of State for the Home Department (ex parte Zeqiri)* [2002] UKHL 3 at §44 Lord Hoffman gave a helpful summary of the principles involved in the concept of legitimate expectation.

> It is well established that conduct by an officer of state equivalent to a breach of contract or breach of representation may be an abuse of power for which judicial review is the appropriate remedy: see Lord Templeman in *R v Inland Revenue Commissioners, Ex p Preston* [1985] AC 835, 866-867. This particular form of the more general concept of abuse of power has been characterised as the denial of a legitimate expectation … In principle I agree that an alleged representation must be construed in the context in which it is made. The question is not whether it would have founded an

> estoppel in private law but the broader question of whether, as Simon Brown LJ said in *R v Inland Revenue Commissioners, Ex p Unilever plc* [1996] STC 681, 695B, a public authority acting contrary to the representation would be acting 'with conspicuous unfairness' and in that sense abusing its power.

25. Applying this approach it is clear that the letter did not make a representation that the Home Office would deal with the application within a finite period, such as to constitute conspicuous unfairness and an abuse of power if it did not. The use of the words 'aim' (in the context of 3 weeks) and 'normally' (in the context of 13 weeks at the most) is the language of expectation and not of representation. When read in its proper context, there is nothing in the letter which would render it 'conspicuously unfair' to the Claimant if the claim were dealt with in (say) 14 weeks or any other longer finite period.

(2) Conspicuous Unfairness

26. It is common ground that the Claimant was entitled to have his application dealt with within a reasonable time. The difference between the parties is as to how this is to be determined. In *Secretary of State for the Home Department v. R (S)* [2007] EWCA (Civ) 547 Carnwath LJ, in the context of asylum claims, said at §51

> ... No doubt it is implicit in the statute that applications should be dealt with within 'a reasonable time'. That says little in itself, it is a flexible concept, allowing scope for variation depending not only on the volume of applications and available resources to deal with them, but also on differences in the circumstances and needs of different groups of asylum seekers. But ... in resolving such competing demands, fairness and consistency are also vital considerations.

27. This passage was considered by Collins J in *R (FH and others) v. Secretary of State for the Home Department* [2007] EWHC (Admin) 1571. That case involved the position of claimants who were 'incomplete asylum seekers'. There had been an initial asylum decision, followed by what were argued to be 'fresh claims' based on further evidence or circumstances requiring fresh consideration by the Secretary of State. It was common ground that there was an obligation by the Secretary of State to deal with the fresh claims within a reasonable period. The delays in some of the cases exceeded 3 years.

28. Having referred to the judgment of Carnworth LJ, Collins J said at §8:

> The point being made is that what is reasonable will depend on the circumstances. It is not possible for the Court to say that a particular period of time should be the limit of what is reasonable.

After reference to a decision of the Privy Council, *Dyer v. Watson and another* [2002] 1 AC 379, Collins J added at §10,

> It follows in my view that a system of applying resources which is not unreasonable and which is applied fairly and consistently can be relied on to show that delays are not to be regarded as unreasonable or unlawful.

29. He continued at §11

> What may be regarded as undesirable or a failure to reach the best standards is not unlawful. Resources can be taken into account in considering whether a decision has been made within a reasonable time, but (assuming the threshold has been crossed) the defendant must produce some material to show that the manner in which he has decided to deal with the relevant claims and the resources put into the exercise are reasonable. That does not mean that the court should determine for itself whether a different and perhaps better approach might have existed. That is not the court's function. But the court can and must consider whether what has produced the delay has resulted from a rational system. If unacceptable delays have resulted, they cannot be excused by a claim that sufficient resources were not available. But in deciding whether the delays are unacceptable, the court must recognise that resources are not infinite and that it is for the defendant and not for the court to determine how those resources should be applied to fund the various matters for which he is responsible.

30. At §19 he distinguished the case of *Secretary of State for the Home Department v. R (S)* (see above), saying

> The court in *S* was satisfied that the PSA led the Home Office to sacrifice fairness and consistency in order to meet the targets. Thus there was a deliberate and unlawful decision to postpone backlog cases (in which was included S's case) dictated solely by the requirements of the PSA. Carnwath LJ regarded this as an unlawful fettering of discretion in that individual cases were not dealt with on their merits. Moore-Bick LJ categorised it as an abuse of power resulting from conspicuous unfairness. The label is I think immaterial. 'Abuse of power' was described by Laws LJ in *R v Secretary of State for Education & Employment ex p Begbie* [2000] 1 WLR 1115 as a unifying principle underlying other well-recognised grounds for regarding administrative acts as unlawful.

31. It seems to me that these observations are relevant to the present case. The Court is bound to recognise that it is for the Defendant to establish a fair and consistent system of dealing with the backlog. Since resources available to Government are finite, the Court should not make decisions which may implicitly require the deployment of further resources to deal with a particular problem, unless it is satisfied that the delays in a particular system are so excessive as to be unlawful.

32. There has been very much less information available to the Court in the present case than was available to Collins J in the case of *R (FH and others) v. Secretary of State for the Home Department*. Nevertheless, on the information which is presently available, I have reached the following conclusions:

> i) From the date of the Claimant's application until May 2007 there appears to have been no system for dealing with an accumulating backlog of applications. The lack of any system was unlawful.
>
> ii) From May 2007 until December 2007, a system was in place; but it operated in a way which was conspicuously unfair, The backlog was ignored in favour of targeting the new intake and expedited cases. When Mr Romano stated (in §12 of his Witness Statement) that all resources were 'taken up in the dealing with new intake and expedited cases', and that
>
> > … This meant that except for cases which were expedited the older cases in the backlog were not being dealt with as effectively as had originally been planned,
>
> he is clearly to be understood to mean that the old cases were not being dealt with at all.
>
> iii) Since December 2007 there has been a system for dealing with the backlog in chronological order. In my Judgment, provided that it is sufficiently resourced so as to avoid excessive delays, this is likely to be fair and consistent; and, in any event, not unlawful.

33. Since there is no particular advantage to the Claimant in making orders in relation to policies which have now been superseded, I decline in the exercise of my discretion, to make the orders sought.

34. I would however wish to add 3 short points.

35. First, I echo the words of Collins J in *R (FH and others) v. Secretary of State for the Home Department* (see above) at §29

> … One serious and matter of complaint has been the continual failure of the Home Office to respond to or even acknowledge receipt of correspondence.

The failure by Government to acknowledge letters which ask relevant questions about matters of importance to the writer is a serious failure in public administration.

36. Secondly, a proper system of dealing with a backlog would include a means by which applicants could be informed how long they may have to wait for a decision. This is particularly so when they have been charged for their application. A highly misleading indication was given in the letter of 17 February 2005. This should be corrected. It should be possible, if only in broad terms, to tell an applicant how long his or her application may take to be dealt with and to provide the name of someone who can act as a point of contact. In this way an applicant will know whether the

current policy is in fact being applied. It would provide an important element of transparency.

37. Thirdly, in the case of *R (FH and others)* Collins J indicated at §30 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.

I would qualify that observation in the present class of cases to this extent: if the application of the policy which is now said to be in place cannot provide any indication as to when an application may be dealt with, then it may be open to question whether the policy is being applied fairly and consistently. The history of the policy as described by Mr Romano raises a legitimate concern as to whether it would be right to confine or exclude future claims.