OUTER HOUSE, COURT OF SESSION

[2022] CSOH 22

P690/21

OPINION OF LORD BRAILSFORD

In the petition

GIVEN NGAIHAPE KAMUSUVISE

Petitioner

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioner: Caskie; Drummond Miller LLP for AJ Bradley Solicitors
Respondent: Massaro; OAG

24 February 2022

Introduction

[1] The petitioner is an asylum seeker. He seeks reduction of a decision by the Secretary of State for the Home Department dated 26 May 2021, in which she granted his application for permission to work, subject to the restriction that he can only work in jobs included on the Shortage Occupation List (SOL). That decision also amounted to an implicit refusal of the petitioner's request to be granted unrestricted permission to work. The respondent is the Secretary of State who is represented by the Advocate General for Scotland.

Background

[2] In April 2019, the petitioner applied for asylum in the UK. He is a Namibian national. It is not necessary to recite the factual background giving rise to his asylum application, save for that he claims to have been a victim of torture, physical and sexual abuse in his home country. The petitioner applied to the respondent for permission to work on 10 March 2021. Ordinarily, applications for permission to work are granted subject to the restriction that the individual can only take up employment in jobs included on the SOL. However, the petitioner asked the respondent to exercise her "residual discretion" to grant him unrestricted permission to work, with the effect that he could work in jobs not included on the SOL. The reasons for this request were stated as follows:

> "Our client is finding failure to work is impacting on his mental health and his mood. He worries about his case. He is […] not able to live openly in Namibia. He was assaulted there. He bears torture marks as per the enclose [sic] medical report from Dr Dignon. It would help him integrate were he able to obtain work. He does not have qualifications which would enable him to apply for a job on the Shortage Occupation List. Kindly exercise your discretion and grant permission to work on jobs outwith the SOL. This would help him in that it would be easier for our client to find work if he was given permission to apply for jobs outside the SOL. He believes he would be a lot happier and less anxious were he afforded permission to work in occupations outside the SOL. In our submission, as per *IJ (Kosovo)* v. *SSHD* [2020] EWHC 3487 (Admin), the Home Office should have a specific policy in this regard."

[3] Appended to the application was a medical report by Dr Neil Dignon, Consultant in Emergency Medicine. The report was prepared just less than two years prior to the petitioner's application and reported that the petitioner suffered from various mental health issues which were said to relate to his claimed experiences in Namibia.

[4] The respondent wrote to the petitioner on 26 May 2021 granting him permission to work, however this was restricted to jobs on the SOL. The decision prima facie does not engage with the petitioner's request for the respondent to exercise her discretion to grant permission to work outside the SOL. The petitioner's request is neither expressly rejected,

nor are reasons provided by the respondent for deciding not to exercise her discretion. The letter purports to be, in effect, a pro forma response granting permission to work and setting out the various conditions that apply.

[5] In response, on 22 June 2021, the petitioner, via his agents, sent a letter to the respondent pursuant to Court of Session Practice Note No. 3 of 2017 ("the Pre-Action Protocol letter"). The petitioner requested that the respondent reconsider her decision of 26 May within two weeks, failing which he would raise judicial review proceedings to challenge it. He argued that the decision was unlawful because it failed to have regard to the terms of the aforementioned judgment in *IJ (Kosovo)* v *Secretary of State for the Home Department* [2021] 1 WLR 2923. In particular, the respondent failed to consider the particular circumstances of the petitioner viz the terms of the medical report, his mental health problems and the benefit that it was said permission to work in jobs outside the SOL would have on him.

[6] On 11 August 2021, the respondent responded to the petitioner's Pre-Action Protocol letter. She advised that enquiries were made with the relevant team of the Home Office who had considered the application. They confirmed that:

> "…full consideration has been given as to whether it is appropriate to exercise discretion in the applicant's case, and grant permission to work (PTW) outside of the SOL. In your client's particular case, there is nothing in his request that the decision to restrict work to the SOL is unjustifiable. There is very little if nothing at all to distinguish him from other asylum seekers currently awaiting a decision on international protection. Taking all of the above and the representations made on your client's behalf into consideration in the round, PTW unrestricted to the SOL is refused."

[7] Judicial review proceedings were raised on 3 September 2021, which it is not in dispute came eight days outwith the three month time limit prescribed by section 27A of the Court of Session Act 1998. Having heard the parties at an oral hearing on permission, I was

satisfied that the petition had a realistic prospect of success in terms of section 27B of the 1998 Act and granted permission for the petition to proceed. I informed the parties that I did not consider that the time bar point should constitute an impediment at the permission stage. However, the respondent's time bar plea remains a live issue upon which a determination must be reached.

Legal framework

[8] Those without a right of abode in the UK are only entitled to work with the permission of the Secretary of State: section 1(2) of the Immigration Act 1971. It is not in dispute that, generally, asylum seekers are not permitted to work whilst decisions on their asylum applications remain outstanding.

[9] However, once an asylum application has been outstanding for a year, it is open to an asylum seeker to apply to the Secretary of State for permission to work. This is set out in paragraph 360 of the Immigration Rules:

> "360 An asylum applicant may apply to the Secretary of State for permission to take up employment 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 the Secretary of State's opinion, any delay in reaching a decision at first instance cannot be attributed to the applicant."

[10] Any decision by the Secretary of State to grant permission to work will normally be subject to restrictions as contained in paragraphs 360A-B:

> "360A If permission to take up employment is granted under paragraph 360, that permission will be subject to the following restrictions:
>
> (i) employment may only be taken up in a post which is, at the time an offer of employment is accepted, included on the list of shortage occupations published by the United Kingdom Border Agency (as that list is amended from time to time);
>
> (ii) no work in a self-employed capacity; and
>
> (iii) no engagement in setting up a business.

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

[11] It is the restriction in paragraph 360A(i) that the court is concerned with in the present proceedings. In *R (Rostami)* v *Secretary of State for the Home Department* [2013] EWHC 1494 (Admin), Hickinbottom J provided a helpful summary of the background to and nature of the SOL:

> "44. The 'list of shortage occupations published by the UK Border Agency' (the SOL) which informs the restriction on employment set out in paragraph 360A(i) (for initial applicants) and 360D(i) (for subsequent applicants) is a reference to a list of jobs originally developed under the work permit arrangements, and later as part of the eligibility criteria for Tier 2 (General) Migrants of the Point Based System. Under that system, skilled workers may migrate to the UK for up to three years to undertake work for employers with a sponsorship licence, to do jobs in 'shortage occupations', i.e. jobs that cannot readily be filled from the resident labour market. Other than ministers of religion, elite sportspeople and skilled workers moving from an overseas branch of a company to a UK branch, under the Points Based System only those who are able to undertake such employment are able to come to the UK for the specific purpose of work.
>
> 45. The SOL is prepared by the Secretary of State following advice from the Migration Advisory Committee ('the MAC'), an independent non-departmental public body comprising labour market economists and migration experts, commissioned by the UK Government to review the UK labour market to identify where labour market shortages exist in the UK (i.e. as to where there are occupations in which it is not possible to fill vacancies by recourse only to UK nationals, other EU citizens and others with a right to work in the UK), using published methodology which is not challenged in these proceedings. Such occupations are recommended for designation as shortage occupations. It recommended its initial list in September 2008, and has reviewed that list regularly since. The MAC having made its recommendations, the Secretary of State determines the final list. Prior to July 2012, the SOL was incorporated into guidance issued by the Secretary of State, namely the Occupation Codes of Practice: since then, it has been incorporated directly into the Immigration Rules as tables set out in Appendix K (see paragraphs 114 and following below)."

[12] The nature of the jobs included on the SOL is such that it is likely that only very few asylum seekers will possess the skills or qualifications necessary to occupy positions listed on it.

[13] It is not in dispute that the Secretary of State's decision on any application under paragraph 360 of the Immigration Rules is a discretionary one. Moreover, the Secretary of State exercises a "residual discretion" meaning discretion to grant permission to work outside the Immigration Rules. The Secretary of State's current policy entitled "Permission to Work and volunteering for asylum seekers" details the basis of this "residual discretion" at page 16:

> "Where the Immigration Rules are not met, it will be justifiable to refuse an application for permission to work unless there are exceptional circumstances raised by the claimant. If caseworkers consider that the circumstances of an application are exceptional they should refer the matter to a technical specialist to review whether the matter should be considered on a discretionary basis (under our residual discretion flowing from Section 3 of the Immigration Act 1971). Such discretion would allow a grant of permission to work, notwithstanding the requirements of the Immigration Rules. What amounts to exceptional circumstances will depend upon the particular facts of each case. A grant of permission to work on a discretionary basis is expected to be rare and only in exceptional circumstances."

[14] The Secretary of State's policy was most recently updated on 4 May 2021 in light of the decision of Bourne J in *IJ (Kosovo)* declaring it unlawful.

Submissions

(i) Petitioner

[15] The petitioner's submissions comprise four main strands. First, he invites the court to exercise its discretion and extend time for the petition to be lodged. The petitioner relies on various factors in support of his submission viz. (a) the delay in lodging the petition was short being only eight days, (b) it was due to a simple oversight of the petitioner's agent which cannot be attributed to the petitioner, (c) there is no, or little, prejudice to the respondent whilst the potential prejudice to the petitioner is significant, (d) the petition has substantial merit and (e) the alternative remedy which the respondent suggests, a claim by

the petitioner against his agent for compensation for loss of chance, is not a practical proposition.

[16] Second, the respondent erred procedurally by failing to refer his case to a technical specialist. Where exceptional circumstances are raised by an applicant for permission to work, the respondent's policy of 4 May requires that the application be referred to a technical specialist "to review whether the matter should be considered on a discretionary basis" (as quoted above). There is nothing in the respondent's decision or response to the Pre-Action Protocol letter to suggest that the petitioner's case was referred to a technical specialist. The respondent's consideration of his application therefore fell at the first hurdle. As a relevant aside, the petitioner contends that the policy and the Immigration Rules continue to be unlawful, but he does not require to advance a case that goes beyond his own.

[17] Third, the respondent gave inadequate reasons for her decision. She did not engage with the petitioner's representations. Whilst the relevant team state that they gave full consideration to the petitioner's circumstances, the reasons provided are wholly inadequate. The response to the Pre-Action Protocol letter does not cure this deficiency. The respondent asserts that there was little or nothing to distinguish the petitioner's case from other asylum seekers without specifying why this is the case.

[18] Fourth, the petitioner's circumstances are exceptional and ought to have led to a grant of permission to work without restriction to the SOL. There are two factors which make the petitioner's case exceptional, (a) delay and (b) his mental health problems. Delay relates to the two-year delay there has been in issuing a decision on his asylum application. That is longer than the average timescale, albeit it is difficult to ascertain the "norm" given the significant backlog in asylum decisions. The petitioner's mental health problems are

supported by his history of torture and by the terms of the medical report. He pointed out that his inability to work impacted his mental health and it is within the respondent's knowledge that relatively few asylum seekers claim their mental health is materially impacted by this. As to the assessment of "exceptionality", that term must be properly understood as meaning out of the ordinary: *Huang* v *Secretary of State for the Home Department* [2007] 2 AC 167 at paragraph 20.

(ii) Respondent

[19] The respondent maintains the time bar plea. She argues that the court should not extend time for the following reasons. First, the petitioner's agents ought to have been aware of the applicable time limits given (a) they specialise in immigration work and (b) they have knowledge of the decision, it having been sent to their office. Second, the respondent reminded the petitioner of the deadline in her response to the Pre-Action Protocol letter and, in any event, a response was not required before the petition could be lodged. Third, the petitioner's reasons for missing the deadline lack specification. Fourth, the petition does not concern an issue related to the petitioner's asylum application or human rights and he has a potential remedy available against his agent for monetary compensation for loss of chance.

[20] The respondent also relies on the High Court's decision in *Rostami*. She advances six propositions with reference to it. First, it is for the UK to determine the basis upon which foreign nationals should be allowed to work on its territory (paragraphs 23 and 50). Second, the respondent has a wide margin of discretion (paragraphs 23-24). Third, there are powerful public interest factors behind the SOL, being to ensure asylum seekers only have access to jobs the labour market is unable to fill and that there is no incentive for

unmeritorious asylum claims by only giving asylum seekers access to the same labour market as economic migrants (paragraphs 81-83). Fourth, the policy giving effect to paragraph 360 was given careful consideration by the executive (paragraph 84). Fifth, the UK is not unique in restricting asylum seekers' access to the labour market (paragraph 85). Sixth, there is no evidence that the SOL has a "real adverse impact" on asylum seekers distinct from the asylum process more generally (paragraphs 90(i) and 92(xii)). The upshot of this is that the respondent's policy is necessary and proportionate. The respondent considers that the petitioner has not challenged the lawfulness of the policy and rather only challenges the lawfulness of the 26 May decision.

[21] The decision of 26 May should be read with the respondent's Pre-Action Protocol response. Adequate reasons are provided therein in the following terms: "there is very little if nothing to nothing at all to distinguish [the Petitioner] from other asylum seekers currently awaiting a decision on international protection". The respondent's reasons may be brief, but so was the petitioner's application. A reasons challenge can only succeed where the informed reader is left in real and substantial doubt as to the reasons for the decision and what was taken into account in reaching it: *MS YZ* v *Secretary of State for the Home Department* [2017] CSIH 41 at paragraph 44. The reasons the respondent gave were an application of her policy being whether the petitioner's case was "rare or exceptional". The conclusion she reached was open to her and a similar reasons challenge was recently rejected by the High Court (*R (Cardona)* v *Secretary of State for the Home Department* [2021] EWHC 2656 (Admin)).

[22] Esto there is an error in the respondent's reasoning, it is not material. The petitioner does not contend that the respondent's policy is unlawful and the particular circumstances of his case are not "rare or exceptional". The effect of delay meant that paragraph 360

applies to the petitioner's case. It does not make his case exceptional, particularly given there is no time limit for an immigration decision: *EB (Kosovo)* v *Secretary of State for the Home Department* [2009] 1 AC 1159 at paragraph 13. The petitioner's assertion that his inability to work has impacted his mental health is not supported by the medical evidence. It is likely attributable to a number of factors, particularly given most asylum seekers will experience such issues whilst awaiting a decision. *IJ (Kosovo)* is distinguishable given the petitioner does not claim to be a victim of trafficking and his application for permission to work was decided under the updated policy introduced in light of the decision in *IJ (Kosovo*). The respondent was entitled to conclude as she did on the information provided.

Analysis and reasons

Time bar

[23] The parties agree that the petition is prima facie time barred. The question that I must determine is whether, having regard to all the circumstances, it would be just and equitable to extend time. The circumstances I consider most pertinent to this question are as follows. First, the challenge is not limited to a reasons challenge. The petitioner also contends that (a) his circumstances ought to have been considered exceptional (an irrationality challenge) and (b) the respondent's policy and paragraph 360 are unlawful (an illegality challenge). The petition therefore potentially raises a point of general importance and should not be left unresolved: *R* v *Secretary of State for the Home Department, ex p Ruddock* [1987] 1 WLR 1482. Second, the petitioner's alternative remedy faces significant practical difficulties. Third, the respondent does not dispute that she faces limited, if any, prejudice if the petition is allowed to proceed. Having regard to these circumstances, I am satisfied that time should be extended.

Merits

[24] In relation to the petitioner's reasons challenge, I must first determine whether the respondent's response to the Pre-Action Protocol letter is to be considered alongside her 26 May decision. I consider the position to be clear. The petitioner makes no averments why the response should not form part of the reasons for the decision. If he had, I would have reached the same conclusions in light of the observations of Lord Reed in *Chief Constable, Lothian and Borders Police* v *Lothian and Borders Police Board* 2005 SLT 315 at paragraph 65. Whilst the reasons given in the response are late, they are consistent with the 26 May decision insofar as they maintain that the petitioner should be restricted to the SOL. They were also provided directly from the decision-makers of the application through the respondent. Most significantly, the reasons were given prior to proceedings being raised.

[25] Having regard to the reasons given at para [6] above, I am satisfied that they are sufficiently clear and intelligible to be adequate. The petitioner does not dispute that the respondent is entitled to state her reasons briefly: *South Bucks District Council* v *Porter (No 2)* [2004] 1 WLR 1953 at paragraph 35. The respondent concluded that "there is very little if nothing at all to distinguish the petitioner's case from other asylum seekers". It is clear from that statement that the respondent did not consider the petitioner's circumstances to be rare or exceptional, a test that the petitioner was well aware he had to meet. The reasons given by the respondent do not leave the informed reader in real or substantial doubt as to the reasons for her decision: *MS YZ (supra)* at paragraphs 44-45.

[26] There were no procedural failures as claimed by the petitioner. The passage from the respondent's policy he relies on in support of that proposition is clear that referral to a technical specialist will only occur where the caseworker assessing the application considers

there are exceptional circumstances raised therein. In the instant case, the caseworker was not satisfied that the petitioner's circumstances were exceptional. There was therefore nothing to trigger referral to a technical specialist.

[27] On the basis that I have found that the respondent gave adequate reasons for her decision, the petitioner can only succeed if he can demonstrate that the respondent's conclusions were irrational or perverse. For the following reasons, I find that he is unable to do so. Delay has been advanced as an exceptional circumstance in these proceedings, but it was not included in the petitioner's application for permission to work. I must review the respondent's decision based on the information before her at the time of making her decision. Even if it had been, the petitioner's position regarding delay is inconsistent. On the one hand, he submits that the "norm" for a decision cannot be ascertained (Statement 16 of the Petition), and on the other, says that the petitioner's delay is long "comparative to the average" without specification (paragraph 28(b) of Note of Argument).

[28] In his application, the petitioner only relied on his history of torture and mental health issues. The petitioner no longer relies on his history of torture as an exceptional circumstance. Instead, he says this is relevant in supporting his claim to suffer from mental health issues. As the petitioner relies on his mental health issues, the difficulty the petitioner faces is that the medical evidence does not support that this has any relation to his ability or inability to work. The respondent was entitled to find that this was an unsubstantiated assertion. The petitioner's averment at Statement 16 of the Petition that relatively few asylum seekers have identified the absence of work as materially impacting their mental health is also unsubstantiated. In sum, the respondent was entitled to conclude as she did on the information presented with the application.

[29] I am satisfied that the petitioner would be unable to succeed irrespective of whether the Immigration Rules included a reference to the respondent's residual discretion. It is therefore of no consequence to his case whether paragraph 360 of the Immigration Rules is unlawful. In any event, the petitioner has not established that paragraph 360 is unlawful. The court in *IJ (Kosovo)* acknowledged that the respondent's residual discretion allows her to decide cases outside the Immigration Rules. The petitioner has not demonstrated why it is necessary for the Immigration Rules to reflect this and the court in *IJ (Kosovo)* left it to the respondent to amend her policy as she saw fit (paragraph 71). The case of *R (Alvi)* v *Secretary of State for the Home Department (Joint Council for the Welfare of Immigrants intervening)* [2012] 1 WLR 2208 does not assist the petitioner. It concerned wholly different circumstances from the instant case.

[30] For completeness, whilst I note brief reference to article 8 ECHR in the petitioner's pleadings, I do not understand him to be arguing that his article 8 rights have been breached. If he had done so, I would not have been satisfied that he could succeed on this ground either.

[31] I shall accordingly uphold the respondents' fourth and fifth pleas-in-law and refuse the prayer of the petition.