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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY ASTRIT ZEKAJ FOR JUDICIAL REVIEW

_____

GILLEN J

[1] The application

In this matter the applicant is a national of the former State of Yugoslavia. The respondent is the Secretary of State for the Home Department. The applicant challenges a decision by the respondent made on 10 January 2006 ("the impugned decision") refusing indefinite leave to the applicant to remain in the United Kingdom pursuant to the respondent's policy published as "APU Notice 4/2003". The reasons given by the respondent for the decision were as follows:

> "The terms of the exercise do not apply to a family where the principal claimant or any of the dependants has fraudulently made (or attempted to make) a claim for asylum in the United Kingdom in more than one identity. Our records show that you have fraudulently applied for asylum in more than one identity."

[2] Background facts

(i) The applicant asserts that he fled the conflict in Kosovo and travelled to the UK in late July or early August in 1999 with his wife Ardjana Zekaj.

(ii) On 3 August 1999 he lodged a claim for asylum in the UK at the Home Office premises in Croydon in the name of Petrit Leknickcaj. Since this is an important factor in this case, I shall quote in full the applicant's account as set out in his affidavit of 4 April 2006:

> "6. On 3 August 1999 I went to the Home Office premises in Croydon and lodged a claim for asylum in the UK. I made this application in the name of Petrit Leknickcaj – a name which was not my own. Despite using a false name, I provided the Home Office with my correct nationality and date of birth and my wife's details were given correctly. I believe that I was photographed and fingerprinted on that occasion.
>
> 7. I made a claim in a false identity because I was frightened that I might not be given protection in the UK and was concerned that information I gave to the Home Office might be relayed to the authorities in the former Yugoslavia. I had been advised by other Kosovars that I met in London when I arrived that it would be best to give a false identity. I had no legal representative at that time to advise me otherwise."

(iii) On 25 August 1999, the applicant made a further claim for asylum to the Home Office in Croydon, this time in his correct name, giving the same nationality and date of birth that he had previously given. He also again gave the correct identity details of his wife. He admits in his affidavit of 4 April 2006 that he did not tell the Home Office that he had made a claim under a false name 22 days previously, but he asserts he was not asked that directly. Of this circumstance he states at paragraph 9 of his affidavit:

> "My purpose in making the new claim was to give my details accurately and truthfully, and I assumed that the claim and the false name would simply not be proceeded with. I had no knowledge of Home Office systems and was unused to dealing with any similar form of administrative system."

(iv) In September 1999 the applicant moved to Belfast and there obtained representation from Martin Brennan solicitor. In an affidavit of 21 June 2006, Mr Brennan deposed, inter alia:

> "1. On 20 September 1999 Astrit Zekaj instructed me in relation to an application for refugee status under the 1951 United Nations Convention relating to

> the status of refugee. I duly processed the application of Astrit Zekaj for refugee status which was refused by the Home Office on 20 January 2000."

(v) It is clear from a letter of the Immigration and Nationality Directorate ("IND") of 2 December 1999 that the Secretary of State concluded that the applicant did not qualify for asylum and that he had not fulfilled the requirements of the 1951 UN Convention ("the refusal letter"). In terms the Secretary of State did not accept that it was not possible for him to return safely to Kosovo.

(vi) Still represented by Mr Brennan, the applicant then appealed against the Home Office decision before a Special Adjudicator. That appeal was lodged on 24 January 2000 and on 22 May 2000 the appeal was dismissed. The applicant's appeal rights were exhausted by 5 June 2000.

(vii) Mr Brennan's affidavit indicates that after 7 June 2000 the applicant transferred instructions to the Law Centre (NI). On 5 June 2000 the legal officer Ms Grimes of the Law Centre wrote to the Immigration Office indicating that they were now representing the applicant.

(viii) On 24 September 2000 Notices of Intention to Remove were issued in respect of the applicant and his wife followed by the setting of the removal directions on 26 October 2000.

(ix) The removal directions were faxed to the applicant's legal representative on 26 October 2000 and in response an appeal was lodged on 3 November 2000. This was subsequently withdrawn on 23 November 2004.

(x) On 5 June 2001 the Home Office wrote to Martin Brennan requesting an explanation for the multiple applications for asylum. Reference was made to the application of 3 August 1999 in the name of Petrit Leknickcaj and the subsequent application of 25 August 1999 in the name of Astrit Zekaj. There was no response to this letter. The reason for the lack of response has been a matter of some dispute. Mr Brennan in his affidavit indicated that upon receipt of that letter he advised the Home Office by letter of 8 June 2001 that he no longer acted for the applicant and that he had transferred instructions to the Law Centre (NI). He indicates that he referred a number of files to the Law Centre (NI) because legal aid was unavailable. He has no record of having forwarded the letter of 5 June 2001 to Law Centre (NI) and adds "in the absence of any record I believe that a copy of the letter was not forwarded to Law Centre (NI)". It is relevant also to observe that at this stage in his affidavit Mr Brennan adds:

> "I have re-inspected the file of papers relating to the asylum application of Astrit Zekaj and there is no

> reference on same to Astrit Zekaj informing me that he had used a different name with the Home Office. I believe that the first indication I received of the use by Astrit Zekaj of any other name was by letter from the Home Office dated 5 June 2001."

(xi) Ms Anjanie Bisnath is a senior case worker employed by the respondent in the Asylum Support Case Management Programme of the IND. In an affidavit of 23rd June 2006, she deposes that on account of one of the Home Office files in relation to the application currently being unavailable, she is unable to confirm whether or not following the letter from Martin Brennan to the Home Office dated 8 June 2001 there was any response or communication made by the respondent with Law Centre (NI). I am not satisfied therefore that the letter of 5 June 2001 was drawn to the attention of the applicant.

(xii) In the course of a letter of 28 June 2001, the Home Office informed the applicant that the Secretary of State had reviewed his decision of 2 December 1999 refusing the applicant's claim for asylum. The applicant was informed that the Home Office had taken into account the evidence relevant to the claim in the name of Petrit Leknickaj but remained of the opinion that the applicant did not qualify for asylum for the reasons stated in the refusal letter of 2 December 1999. Accordingly the decision to refuse asylum was maintained.

(xiii) In the affidavit of Ms Fidelma O'Hagan of the Law Centre dated 23 June 2006 she asserts that upon re-inspecting their file of papers relating to the applicant, it is clear that the Home Office did not send a letter to the Law Centre (NI) requesting an explanation as to why the applicant had used a previous name. She confirms that if she had received the letter, particularly given the contents of it and the deadline involved, she would have responded to it immediately.

(xiv) An appeal from the decision of the 28 June 2001 was lodged on 6 August 2001.

[3]The Ministerial Concession

On 24 October 2003 the Home Secretary announced a concession in respect of families who have been in the United Kingdom for three or more years to be considered for the grant of indefinite leave to remain on an exceptional basis outside the Immigration Rules. APU Notice 4/2003 ("the concession") provides the criteria for that concession to be operated. More relevant, that notice reads as follows:

"**One-off exercise to allow families who have been in the UK for three or more years to stay.**

Introduction

This note sets out the criteria for granting indefinite leave to remain or enter exceptionally outside the Immigration Rules as a result of the concession announced by the Home Secretary on 24 October 2003 to allow families who have been in the UK for three or more years to stay (the 'concession' henceforth).

Basic criteria of the concession

The basic criteria for deciding whether or not a family will qualify for the exercise are:

- The applicant applied for asylum before 2 October 2000; *(this applicant clearly qualified under this criterion*) and
- The applicant had at least one dependant aged under 18 (other than a spouse) in the UK on 2 October 2000 or 24 October 2003 (*the applicant qualified under this criterion*)

Application for asylum

The initial claim for asylum must have been made before 2 October 2000 (*again the applicant qualified under this criterion*)

Families will be eligible for the concession where the application

(i) has not yet been decided,

(ii) has been refused and is subject to an appeal,

(iii) has been refused and there is no further avenue of appeal but the applicant has not been removed,

(iv) has been refused but limited leave has been granted.

> Families will not be eligible if after refusal of that initial claim they have been removed or have made a voluntary departure.
>
> ……
>
> Exclusions
>
> The concession will not apply to a family where the principal applicant or any of the dependants …..
>
> - Have made (or attempted to make) an application for asylum in the UK in more than one identity.
>
> ……..
>
> Multiple identities
>
> Applicants who fraudulently made or attempted to make a fresh claim for asylum, in a different identity are excluded. The exclusion category does not cover applicants who changed their name/other details during the consideration of their claim providing they did not attempt to mislead IND into believing they were applying as a new individual (i.e. they did not pretend they were a different person from the person who made the original claim)."

(xvi) On 30 September 2004 a letter from the applicant's legal representatives informed the respondent that the applicant might qualify for the family concessions for indefinite leave to remain. A questionnaire was then completed on 18 October 2005 by the applicant. In the course of that questionnaire the applicant answered "yes" to the question "have you or any of your dependants ever made (or attempted to make) an application for asylum in more than one identity". A further question requested full details of an answer "yes" to that question. The respondent replied in answer to that question:

> "When we first approached Croydon to claim asylum I made a claim under name of Petrit Leknickcaj as I was afraid to give my real name."

(xvii) On 10 January 2006 the impugned decision was made to the effect that the terms of the exercise did not apply to a family where the principal claimant or any of the dependants had fraudulently made (or attempt to

make) a claim for asylum in the United Kingdom in more than one identity. The letter concluded:

> "Our records show that you have fraudulently applied for asylum in more than one identity."

The applicant's case

[4] Mr Stockman who appeared on behalf of the applicant in the course of a comprehensive skeleton argument augmented by oral submissions made the following points:

(i) There were two strands to his application. First, that the Secretary of State had acted irrationally in interpreting the policy. Secondly, relying on the authority of R v Secretary of State for the Home Department, ex parte Asif Mahmood Khan 1984 1 WLR 337, that the Secretary of State had a duty to exercise his discretion fairly and that the applicant had a legitimate expectation that the Minister had reached his decision based on the criteria set out in the concession . It was Mr Stockman's submission that he had misapplied the new policy.

(ii) That the concession was intended to deal with individuals who had made serial claims for asylum in false names thus avoiding removal from the UK. The second claim made in this instance by the applicant he submitted was not fraudulent and indeed he had nothing to gain from making a fraudulent claim. He reminded me that the applicant had not followed through the first application eg. did not attend for interview or process the claim thereafter. Counsel urged that the applicant had not been seeking to mislead IND in the new application having given precisely the same date of birth/fingerprints etc. as in the original claim.

(iii) Relying on R v Home Secretary, ex parte Khawaja 1984 1 AC 74 ("Khawaja's case"), Mr Stockman submitted that on this application to the court for judicial review it was the court's duty to inquire whether there had been sufficient evidence to justify the decision-maker's belief that the fresh application was fraudulent and that the duty of the court was not limited to enquiring merely whether there was some evidence on which that decision might have been made. Whilst conceding that Khawaja's case dealt with the interpretation of a statute, namely the definition of a legal entrant as defined by Section 33(1) of the Immigration Act 1971, he asserted that the consequences flowing from this concession policy were so serious that an analogous approach ought to be adopted by the court in this instance.

(iv) Counsel argued that the concession excluded applicants who fraudulently made or attempted to make a fresh claim for asylum. He

rejected the argument of the respondent that "fresh" in this context simply meant a different claim . Mr Stockman referred to the phrase "fresh claims" under Rule 353 of the Immigration Rules HC 395 which declares:

> "When a human rights or asylum claim has been refused and any appeal relating to that claim was no longer pending, the decision-maker will make any further submissions and, if rejected, will then determine whether they amount to a fresh claim."

Counsel submitted therefore that in the context of immigration legislation and materials, the phrase "fresh claim" clearly refers to subsequent claims. In this case he submitted that the second and subsequent claim had not been fraudulent.

The respondent's case

[5] Ms Connolly, on behalf of the respondent ,in the course of an equally compelling skeleton argument and oral submission, made the following points:

(i) The applicant clearly came within the exclusion to the concession because he had made two separate asylum applications at separate locations in separate names on separate dates. These applications were neither linked nor continued one from the other. It was her submission that the first was self-evidently fraudulent and insofar as the second misled the respondent into believing that the applicant was a different person from the first application, it was also fraudulent.

(ii) The applicant had the benefit of legal advice at least for the second application and yet had chosen to withhold the information about the first application from his solicitor and also from the immigration authorities. It was disingenuous now to suggest that he had simply failed to understand the significance of the first application and did not process it any further.

(iii) The decision-maker had lawfully and properly concluded that the applicant was within the relevant exclusion after active investigation into what amounted to multiple identity claims. The concession had been properly interpreted.

(iv) Khawaja's case dealt with a statute and its interpretation. Consideration of this concession should be in the context of a policy which did not merit such rigorous scrutiny. The decision-maker in this instance

had been exercising a discretion on foot of a policy document. Counsel submitted that Khawaja was therefore an irrelevant authority in this context.

(v) Finally as an alternative, Ms Connolly submitted that the phrase "fresh claim" in essence meant a different claim. It was her argument that both the first and second claims were therefore fresh claims and either or both could be considered fraudulent for the purposes of the concession.

Conclusions

[6] I have come to the following conclusions in this case:

The document which is the subject of construction in this case, namely APU notice 4/2003 "one-off exercise to allow families who have been in the UK for three or more years to stay" is one of a number of policies which has served to grant leave to remain to categories of asylum seekers who have been waiting a considerable period for their claims to be assessed. This concession, announced by the Home Secretary on 24 October 2003, allows asylum seeking families who had been in the UK for three years or more to stay under certain conditions. The exclusions that had been referred to earlier in this judgment are the issue at large in this case. It is important to appreciate that this document is a policy document and is not an Act of Parliament. I consider that the proper approach to be adopted is that taken by Auld J in R v Secretary of State for the Home Department, ex parte Engin Ozminnos (1994) Imm AR 287 at 292 where he said:

> "The internal policy document against which the exercise of this discretion is to be measured, is not a statutory document. It is not to be subjected to fine analysis so as to interpret it in the way one would a statute."

Similarly in R v Secretary of State for the Home Department ex parte Pearson (1998) AC 539 to 576 Lord Browne-Wilkinson said at 576H:

> "….. It is not right to adopt such a technical approach to statements made by a Minister in Parliament relating to policy matters. If judicial review of executive action is to preserve its legitimacy and utility, it is essential that statements of administrative policy should not be construed as though settled by Parliamentary counsel but should be given effect for what they are, viz. administrative announcements setting out in layman's language and in broad terms the policies which are to be followed."

[7] On the other hand such an approach must be tempered by the principle that consistency and avoidance of arbitrariness are basic tenets of good administration. Decision-makers cannot ignore policy with impunity. In R v Secretary of State for the Home Department, ex parte Urmaza (1996) COD 479 Sedley J(as he then was) said:

> "A decision maker can be held in public law to his policy, with departure requiring the articulation of a good reason, given (i) the principle of consistency (and avoidance of arbitrariness), (ii) the duty to have regard to relevancies, (iii) the avoidance of over-rigidity, and (iv) the need to give effect to legitimate expectations."

[8] In the context of this policy document, I consider that persons such as the applicant have legitimate expectations that the Secretary of State in reaching his decisions will not stray outside the general terms of the policy or make a decision based on grounds not included in the criteria therein set out. I consider this to be particularly so when, as in this instance, the consequences for the applicant are potentially so severe in that he is likely to be held and thereafter removed.

[9] I am satisfied therefore that whilst a broad and purposive approach to the language of the concession must be adopted, nonetheless it is necessary for the decision-maker to be satisfied that a fraudulent claim, and not merely a false representation, has been made. A false representation is merely a representation that is inaccurate and does not necessarily connote fraud. Where fraud is alleged however, the standard of proof will have to be higher (see MacDonald, Immigration Law and Practice 6th Edition at para. 3.71). The standard of proof is that which applies generally in civil proceedings, namely proof on the balance of probabilities, the degree of probability being proportionate to the nature and gravity of the issue. I consider that in cases such as this, which involve the grave issue of personal liberty, the degree of probability required will be high.

[10] On the facts narrated before me, I am of the opinion that the Home Office did not err in deciding that this applicant had fraudulently made or attempted to make a fresh claim for asylum in a different identity. I am of this view for the following reasons:

[11] The applicant freely acknowledges that he made two separate asylum applications on two separate dates. The first was manifestly untruthful and in my view amounts to a fraudulent attempt to gain admission under a false name. The fact that he supplied his proper date of birth/fingerprints does not materially dilute the essential deception that he sought to practise.

[12] The second application is infected by the first and was a deliberate attempt to mislead the respondent into believing that he was a fresh claimant separate and distinct from the applicant who was the subject of the earlier application. No attempt has ever been made by him to make any linkage or connection from one application to the other. Someone who practises an initial fraud perpetuates that fraud by wilfully ignoring the original deception in an attempt to pretend it has not occurred.

[13] The applicant claims that at the time of the first application he had no legal representative to advise him. I do not accept that this applicant required any legal advice to be aware that this was a deliberate attempt to perpetuate a fraud on the Home Office. Moreover he did on the second occasion, a short time later, have legal advice and yet, as appears from the affidavit of Mr Brennan, he withheld the information about the original fraudulent claim. Moreover when he attended on 25 August 1999 for interview, he again did not avail of the opportunity to rectify the deception that he had practised. It is clear from his affidavit that he realised that his original application was "wrong" and I have no doubt that he must have appreciated that it was equally wrong to institute a fresh claim whilst the former claim was still outstanding notwithstanding the fact that he did not seek to process it further. I am satisfied that in this case there was not only a deception by virtue of a silence about material facts on the second occasion, but that the second application was in itself a fraudulent claim in the wake of an already existing earlier claim. This is a circumstance easily distinguishable from the instance of material non disclosure dealt with by Girvan LJ in Paul Udu and others for Judicial Review (neutral citation no.[2005]NIQB 81 where an illegal entrant did not say anything that was directly deceptive in his visa application form in failing to declare that he was coming into the UK to see his family. The contrast with the present case arises because the applicant had acted fraudulently in the first instance and was well aware that his second application amounted to an express multiple application. I am satisfied therefore that the evidence available justified the respondent adopting the approach that occurred in this instance and that the concession was properly interpreted and properly applied.

[14] Whilst it is not necessary for my decision to form a conclusion on the argument by the respondent that each of the two claims made in this instance was a "fresh" claim, nonetheless it may be of assistance for future cases that I should indicate my views. I am satisfied that this particular argument by the respondent was not sustainable. In my view" fresh" connotes a comparison with that which has previously been raised and therefore in this instance applies only to the later claim. It is appropriate in my view to draw an analogy with the concept "fresh evidence". Of that concept, Hill J in Timmins v Timmins (1919) p. 75 at 80 said:

> "Fresh evidence ….. means evidence of something which has happened since the former hearing or has come to the knowledge of the party applying since the hearing and could not by reasonable means have come to his knowledge before that time."

[15]In my view therefore a fresh application means an application which has occurred since the original application was made. This coincides with the Oxford English dictionary meaning of the word fresh namely "new, novel, not previously known …. additional, other, different". Mr Stockman's reference to the Immigration Rules at Rule 353 is apposite and this policy document should be interpreted in similar vein.

Whilst the policy does not require to be scrutinised as a statute, nonetheless the phrase "fresh claim" does have a particular connotation within the context of the Immigration Rules and legislation and I am satisfied that the reference in the policy carries a similar resonance to the reference in the Immigration Rules.

[16] However as I have indicated this does not avail the applicant in this case because I am satisfied that a fraud was practised in the fresh claim in the wake of the deception practised in the first claim. I therefore dismiss the application .