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| **Neutral Citation No: [2023] NIKB 87** | *Ref:* **COL12250** |
| | *ICOS No:* **22/109359/01** |
| ***Judgment: approved by the court for handing down (subject to editorial corrections)**** | *Delivered:* **11/09/2023** |

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**KING'S BENCH DIVISION**
**(JUDICIAL REVIEW)**

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**IN THE MATTER OF AN APPLICATION BY JR265**
**FOR LEAVE TO APPLY FOR JUDICIAL REVIEW**

**IN THE MATTER OF THE NATIONALITY AND BORDERS ACT 2022**

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**Mr Hugh Southey KC with Mr Richard McLean (instructed by Brentnall Legal Ltd) for the Applicant**
**Dr Tony McGleenan KC with Mr Philip Henry (instructed by the Crown Solicitor's Office) for the Respondent**

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**COLTON J**

***Introduction***

[1] The applicant in this case is a citizen of Eritrea.

[2] He fled Eritrea in June 2016. He eventually arrived in Belfast on 24 August 2022 where he has claimed asylum. His affidavit in support of the application sets out his torturous journey in the intervening years which involved stays in Sudan, Turkey, Greece, Serbia, Romania, France, Belgium, Germany and Dublin.

[3] At the time these proceedings were issued there had not yet been a decision in respect of his application for asylum.

[4] By these proceedings he seeks a declaration that section 12 of the Nationality and Borders Act 2022 ("the 2022 Act") is incompatible with his rights under articles 8 and 14 of the European Convention on Human Rights("ECHR"), contrary to the Human Rights Act 1998.

[5] In particular, the focus of his challenge is the provision in section 12 for two types of refugees, namely Group 1 refugees and Group 2 refugees. Group 2 refugees do not have the same entitlement as Group 1 refugees.

[6] The applicant contended that the effect of this legislation is to unlawfully discriminate against Eritrean nationals who claim asylum in the United Kingdom.

***The application***

[7] Proceedings were lodged on 19 December 2022 and the matter proceeded as a leave hearing on 21 April 2023.

[8] At the hearing on 21 April 2023, the proposed respondent argued as a preliminary issue that the applicant did not have sufficient standing to take these proceedings. It was argued that the application was premature.

[9] The argument on standing was based on a submission that the applicant was not a "victim" within the terms of section 7 of the Human Rights Act 1998. Therefore, he did not have sufficient standing to challenge the compatibility of section 12 of the 2022 Act with the ECHR.

[10] At the time of the hearing the claim was based on the applicant's expectation that he would be granted refugee status and he would thereafter be categorised as a Group 2 refugee.

[11] The applicant accepted that as at the time of hearing neither of these two decisions had been made but it was argued that the applicant could claim to be a victim where there was a "real risk" of the legislation applying to him.

[12] After the hearing the court was informed that the applicant had been notified by the Home Office to the effect that "should your asylum claim be successful, then it is our intention to recognise you as a Group 2 refugee."

[13] As a result it seems to the court that the applicant can establish standing for the purposes of this challenge as he has now been formally confirmed as a Group 2 refugee.

[14] More importantly, since the hearing the proposed respondent has drawn the court's attention to a ministerial statement issued on 8 June 2023 in the following terms:

> "**Statement**
>
> Provisions within the Nationality and Borders Act 2022 (NABA), which came into force on 28 June 2022, set out the framework to differentiate between two groups of

refugees who ultimately remain in the UK; 'Group 1' and 'Group 2.'

The primary way in which the groups are differentiated is the grant of permission to stay; Group 1 refugees are normally granted refugee permission to stay for five years, after which they can apply for settlement, whereas Group 2 refugees are normally granted temporary refugee permission to stay for 30 months on a 10-year route to settlement.

The differentiation policy was intended to disincentivise migrants from using criminal smugglers to facilitate illegal journeys to the UK. This was the right approach. Since then, the scale of the challenge facing the UK, like in other countries has grown – and that is why the government introduced the Illegal Migration Bill. The Bill goes further than ever before in seeking to deter illegal entry to the UK, so that the only humanitarian route into the UK is through a safe and legal one. The Bill will radically overhaul how we deal with people who arrive in the UK illegally via safe counties, rendering their asylum on human rights claims (in respect of their home country) inadmissible and imposing a duty on the Home Secretary to remove them. This approach represents a considerably stronger means of tackling the same issue that the differentiation policy sought to address; people making dangerous and unnecessary journeys through safe countries to claim asylum in the UK.

We will therefore pause the differentiation policy in the next package of immigration rules changes in July 2023. This means we will stop taking grouping decisions under the differentiated asylum system after these rule changes and those individuals who are successful in their asylum application, including those who are granted humanitarian protection, will receive the same conditions. Our ability to remove failed asylum applicants remains unchanged.

Individuals who already received a 'Group 2' for humanitarian protection decision under post-28 June 2022 policies will be contacted and will have their conditions aligned to those afforded to 'Group 1' refugees. This includes length of permission to stay, route to settlement, and eligibility for Family Reunion. On 23 February 2023

> the Home Office announced the streamlined asylum process model for a small number of cases of nationalities with high asylum grant rates; Afghanistan, Eritrea, Libya, Syria, Yemen. Because this model focuses on manifestly and well-founded cases, positive decisions can be taken without the need for additional interview. No one will have their asylum application refused without the opportunity of an additional interview. Those claims made by 28 June 2022 and the date of introduction of the Illegal Migration Bill (7 March 2023) will be processed according to this model. This will also include claimants from Sudan, Sudanese legacy claimants already being processed in-line with established policies and processes and will be decided in-line with the Prime Minister's commitment to clear the backlog of legacy asylum claims by the end of 2023."

[15] In light of this development the court made a further case management direction on 11 July 2023 inviting the applicant to submit written submissions on the issue of whether these proceedings are now academic and whether there is utility in proceeding to a judicial review.

[16] The court received written submissions on behalf of the applicant dated 5 August 2023 and an affidavit from the applicant's solicitor dated 7 August 2023.

[17] The applicant does not accept that the matter is academic.

[18] In support of this submission, the applicant argues that section 12 has not been repealed. The Minister's statement confirms that the policy of differentiating between Group 1 and Group 2 refugees has merely been paused.

[19] On the specific issue as to whether the matter is academic between the parties, the applicant points out that he was granted refugee status as a Group 2 refugee on 17 May 2023. As a consequence it is argued that the applicant was subject to differential treatment between 17 May 2023 and 8 June 2023. It is therefore submitted that the subsequent decision to suspend differential treatment does not deprive the applicant of the right to bring proceedings.

[20] In relation to the ongoing categorisation of Group 1 and Group 2 refugees, notwithstanding the Minister's statement, the affidavit from the applicant's solicitor refers to an asylum decision on behalf of a client in relation to a claim made after the Minister's statement. That related to a decision made on 4 July 2023 in which a claimant was recognised as a 'Group 2' refugee. In subsequent correspondence concerning that particular applicant the Home Office confirmed on 26 July 2023 that the claimant was no longer being treated as a Group 2 refugee and that she would be given the same conditions as a Group 1 applicant.

[21] By way of correspondence dated 30 August 2023 the solicitor for the proposed respondent wrote to the office in the following terms:

> "The Home Office instructs that whilst the intention to pause the differentiation policy was announced in a written ministerial statement on 8 June 2023, the pause was not implemented via a change to the immigration rules until 17 July 2023. Consequently, there will have been a small number of differentiation decisions made in the interim period. The client, who is not a party to these proceedings, referred to in Mr McKenna's affidavit was one of those cases. The Home Office are now in the early stages now (sic) of contacting individuals who were previously recognised as Group 2 refugees so that it can vary their permission to stay to match those of Group 1 refugees."

***Academic application?***

[22] Is this matter now academic between the parties? The court takes the view that it is. Mr Southey argues firstly that there is a degree of uncertainty about the applicant's status in terms of any differentiation between Group 2 and Group 1 refugees. In my view, this argument is untenable. The ministerial statement and the subsequent correspondence from the proposed respondent makes it clear that there is no longer any question of differential treatment between him and other refugees who were afforded the status of Group 1 refugee.

[23] The fact that he was in a state of uncertainty in this regard between 17 May 2023 and 8 June 2023, in my view, is insufficient to establish any interference with his article 8 rights, upon which the article 14 claim is purportedly founded. In my view, this falls well short of constituting an interference with the applicant's article 8(1) rights even assuming that the difference in status falls within the scope of the right to respect for the applicant's private life under article 8(1) ECHR.

[24] The applicant's single ground of challenge is founded on a differentiation of treatment between Group 1 refugees and Group 2 refugees. He can point to no practical disadvantage he has suffered as a result of his original status as a Group 2 refugee. It is clear that that differentiation in treatment no longer applies to the applicant and as a consequence I consider that this issue is academic as between the parties.

***Public Interest***

[25] That, of course, is not the end of the matter. In accordance with the well-established authority *R v Secretary of State for the Home Department, ex p Salem*

[1999] 1 AC 450 it is open to the court to consider a point that arises if there is "a good reason in the public interest for doing so."

[26] In the court's view no such good reason exists in this case. It is clear that the mischief which section 12 purported to address is being dealt with in a different way. The differentiation which is at the heart of this challenge no longer applies to this applicant, or indeed, to other potential applicants in a similar situation. In those circumstances the court does not consider that there is a good reason in the public interest for determining the issue which arises in this application.

***Conclusion***

[27] The court therefore concludes that as a result of developments since the hearing of this application the issue that arises is academic between the parties. Furthermore, it does not consider that there is any good reason in the public interest to determine the point that arises in the application.

[28] For these reasons the application for leave to apply for judicial review is dismissed.