OUTER HOUSE, COURT OF SESSION

[2022] CSOH 67

P658/22

OPINION OF LORD ERICHT

In the petition

MIKHAIL BAKUSHEV (AP)

Petitioner

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioner: Winter; Drummond Miller LLP
Respondent: McKinlay; Office of the Advocate General

20 September 2022

[1] The issue in this case is whether the court should grant interim orders allowing an asylum seeker whose fresh claims application has been refused by the respondent to continue to work while a judicial review of the refusal is pending before the court. At a hearing on 19 August 2022, having heard parties, I granted the petitioner's opposed motion for interim orders and gave oral reasons. The respondent sought leave to appeal in view of the importance of the issue to the respondent. I granted leave and now issue this opinion.

Factual background

[2] The petitioner arrived in the UK on 6 September 2006 with entry clearance as a visitor until 5 March 2007. He overstayed and on 5 May 2009 claimed asylum which was refused on 7 October 2009. An appeal was dismissed on 30 November 2009 with all appeal rights exhausted on 19 April 2010. Further submissions were refused on 5 January 2011. An application on human rights grounds was refused on 20 December 2018.

[3] On 19 March 2020 the petitioner lodged further submissions. Rule 360 of the Immigration Rules provides that the respondent may grant permission to work if a decision is not taken by the respondent within one year. In a letter dated 31 March 2021 the respondent granted the petitioner permission to work, restricted to posts listed on the Migration Advisory Committee's Shortage Occupation List ("SOL"). The letter stated *inter alia:*

> "Please note that this Grant of Permission to Work will only last until such time as your Further Asylum-related submissions are decided".

[4] The petitioner obtained work as a carer which complied with his permission. The work was in a post listed in the SOL. The petitioner lodged as productions payslips and also bank statements showing receipt of his wages and payment of his rent to a private landlord.

[5] The respondent determined the petitioner's application on 16 May 2022, but did not notify its determination to the petitioner until a letter dated 29 July 2022 which was received by the petitioner's solicitors on 2 August. The letter of 29 July was a brief covering letter which merely stated "Please find enclosed your above clients' decision paperwork". Enclosed was a letter dated 16 May 2022, but the content of the first page of the letter suggests that it was not written on 16 May but on a later date. The first page stated *inter alia*

> "I am writing to tell you that your further submissions have been rejected.

> Your claim has been recorded as determined on 16th May 2020. However, because of an administrative error we were unable to serve the decision at that time. Your claim has been reviewed prior to service of the decision but no changes have been deemed necessary. I apologise for this delay and any inconvenience it may have caused".

[6] The letter date 16 May then went on to give reasons for the rejection. The last paragraph of the letter stated:

> "**Consequences of staying in the UK unlawfully**
>
> If you stay in the UK without permission to do so:
>
> you can be detained
> you can be prosecuted, fined and imprisoned
> you can be removed and banned from returning to the UK
> you will not be allowed to work
> if you do work illegally, your earnings may be seized and assets confiscated
> you will not be able to rent a home
> you may not be able to claim any benefits and you may be prosecuted if you try to
> you can be charged by the NHS for medical treatment and if you fail to pay this may prevent you from remaining in or re-entering the UK
> you can be denied access to a bank account
> your existing bank account may be closed or frozen and any balance withheld unless you leave
> Driver and Vehicle Licensing Agency can prevent you from driving by taking away your UK driving licence."

The Law

[7] Those who do not have the right of abode in the United Kingdom may work only with permission (Immigration Act 1971 section 1(2)).

[8] Permission to take up employment may be granted under Rule 360 of the Immigration Rules 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. If permission is granted employment may only be taken up in a post which is included in the list of shortage occupations published by the UK Border Agency (the "SOL") (Rule 360A)

[9] Rule 360E provides that:

> "Where permission to take up employment is granted pursuant to paragraph 360C, this shall only be until such time as:
>
> > a decision has been taken pursuant to paragraph 353 that the further submissions do not amount to a fresh claim; or
> >
> > where the further submissions are considered to amount to a fresh claim for asylum pursuant to paragraph 353, all rights of appeal from the immigration decision made in consequence of the rejection of the further submissions have been exhausted."

Rule 360 was considered in depth in *R* (*Rostami)* v *SSHD* ([2013] EWHC 1494 (Admin)). As the policy factors set out in *Rostami* are also relevant to the current case, it is useful to quote from the decision in *Rostami* at some length. The court stated:

> "23 It is common ground between the parties (and uncontroversial) that, as a matter of domestic law, a State has the power and right to determine which foreign nationals should be allowed to work in its territory, and conditions upon which such employment will be allowed. Decisions in exercise of that power involve various competing policy issues such as the need to protect the domestic labour market and the interests of those with a right to seek employment in it; and the benefits of introducing into that market workers with skills in respect of which there may be a shortage. In addition, in the case of an asylum seeker (who cannot leave or be required to leave the UK whilst his application is being determined), they include the potential burden on public finances in terms of welfare benefits if the applicant does not work whilst his application is being determined; the need to avoid encouraging asylum applications from economic migrants;
> and, not least, the rights and interests of the applicant. Some of these policy issues become even more pointed if employment is scarce, or where the availability of public funds is particularly limited; and some become more acute where there are very significant delays in ultimately determining the refugee status of an applicant. The public interest factors have to be balanced, with the rights and interests of relevant individuals, in a sophisticated exercise of judgment quintessentially for the executive of the relevant state …
>
> 79 Therefore, what is the object and purpose of the specific power to impose conditions for granting an asylum seeker access to the labour market, contained in article 11(2)? The obvious main purpose (enforced by the terms of article 11(4): see *Negassi & Lutalo (CA)* at [24]) is to enable a Member State to protect the interests of those who, unlike asylum seekers and other non-EU citizens, do have a right to access the UK labour market …

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).

...

80 As I have explained (see paragraphs 44-5 above), the SOL is a list of jobs identified by an independent non-departmental public body comprising of labour market economists and migration experts (the MAC) using published methodology, as occupations in the UK labour market in which shortages exist which cannot readily be filled by UK nationals or other EU citizens or other available authorised workers. …

81 Paragraphs 360A(i) and 360D(i) of the Immigration Rules, and the SOL which they introduce as a restriction on employment of asylum seekers, **therefore has the main public policy objective of ensuring that asylum seekers are granted access to the UK labour market without adversely impacting on UK nationals and other EU citizens, as they are only granted access to jobs identified as ones which the resident labour market are unable to fill**." (emphasis added)

Submissions for the petitioner

[10] Counsel for the respondent submitted that there was a *prima facie* case and the balance of convenience favoured the petitioner and so interim orders should be granted.

Submissions for the respondent

[11] Counsel for the respondent submitted that although it was competent for it to do so, the court should be slow to grant interim orders in respect of a fresh claims application. Parliament could have provided for suspension of a fresh claims decision during a judicial review of that decision, but had not done so. There was no inherent right to work (section 2 Immigration Act 1971). Rule 360 was the result of a balancing of a number of complex policy matters (*Rostami*). If interim orders were routinely granted in cases such as this one, that would not accord with the intention of Parliament that there should be no suspension.

The test for interim orders

[12] The petitioner seeks reduction of the decision to refuse the fresh claim. The question for the court at this stage is whether, pending the final decision of the court, the decision should stand or be suspended. That is an exercise of the court's inherent jurisdiction to regulate matters between the parties while the court is dealing with a case.

[13] The respondent's position is that the court should not grant interim orders because there is no provision in the Immigration Rules for a fresh claims decision to be suspended during a judicial review of that decision. The respondent compares the position of a judicial review with an appeal to the Tribunal, and argues that because there is provision for suspension in an appeal but no provision for suspension in a judicial review, interim suspension should not be granted in a judicial review.

[14] It must be borne in mind that suspension of a decision in terms of the Immigration Rules and suspension of a decision in terms of the courts' inherent powers for granting interim orders are two different things.

[15] The court has an inherent power to regulate matters as between the parties while a case is before it. The test to be applied is whether there is a *prima facie* case and the balance of convenience. That test applies whoever the parties to the case may be.

[16] There is nothing in Rule 360E which interferes with that inherent power. Parliament has not expressed any intention that the courts' inherent power should be limited, or that that power should be exercised so as to prevent an asylum seeker continuing to work. Any such limitation on the powers of the court, or limitation on how the court should exercise its powers, would require to be expressly stated in legislation. No such limitation can be inferred from the lack of any reference in Regulation 360 to what is to happen during a judicial review: Regulation 360 deals with immigration rules and not rules of court. It cannot be inferred from Regulation 360 that Parliament intended that the test for interim orders in a judicial review should be different, or be applied differently, in immigration judicial reviews from other judicial reviews. It cannot be inferred from Rule 360 that Parliament intended that an asylum seeker should not be permitted to work while a judicial review was in progress.

[17] I turn now to the two stages of the test, *prima facie* case and balance of convenience.

***Prima facie* case**

[18] The petitioner pleads two grounds of appeal. The first is that that the decision-maker erred by conflating the Refugee Convention test and the article 9 ECHR test, and that this is material. In my view the petitioner has demonstrated a *prima facie* case on this grounds.

Indeed, counsel for the respondent accepted that there was a *prima facie* case in respect of this ground, albeit he argued it was a weak one and not material. The second ground is that the decision maker has reached contradictory findings on whether it was accepted what his religion was. Having considered the wording in the decision, in my opinion there is a *prima facie* case in respect of this ground also. There was also discussion before me as to whether, given that the covering letter states that the decision was reviewed prior to service on 29 July, the reliance placed in the decision on the petitioner's right as a Russian to take religious freedom cases under the European Convention of Human Rights to the Strasbourg court was justified in the light of the steps taken between the date of the decision and the date of service towards the withdrawal of Russia from the Convention. It may be that that issue is developed further as the petition proceeds.

Balance of convenience

[19] In my view the balance of convenience is plainly in favour of the petitioner.

[20] If interim orders are not granted then the petitioner would have to give up his employment and the salary from that employment. He would have to give up the tenancy of his home, as it would appear from the wording of the letter that he would not be allowed to rent a home, and in any event would not have the income to pay the rent. He would also, according to the decision letter, be at risk of having his bank accounts frozen and the balance (which would be his legitimate earnings under the permission to work) being withheld from him. He would instead receive National Asylum Support Service support of a substantially lower sum than his wages, and would require to move into NASS accommodation. If these things were to happen to him, but he then won the judicial review, then it would be difficult for the petitioner to be put in the same position as if the unlawful decision had not been

made. He would have lost his job and tenancy because of an unlawful decision, and the respondent does not accept that she should compensate him for that.

[21] Further, the respondent's main policy objective is to ensure that asylum seekers are granted access to the UK labour market without adversely impacting on UK nationals as they are only granted access to jobs identified as ones which the resident labour market are unable to fill (*Rostami* p81). The purpose of including care workers in the SOL is to alleviate the shortage of care workers as such posts are not being filled by the resident labour market. It is difficult to see why preventing the petitioner from continuing with his care job until this case is finally decided would contribute to the respondent's purpose of alleviating the shortage of care workers.

[22] Further, granting interim orders would give effect to the *status quo* which applied before the making of the decision complained of. I do not accept the respondent's argument that the *status quo* which should be preserved is that the petitioner has no right to work. The *status quo* before the decision of 16 May 2022 was that he had a right to work. This judicial review is a challenge to that decision, and the *status quo* before that decision should be preserved until the judicial review is finally determined.

[23] Further, in this case there was considerable delay by the respondent. The respondent now comes to the court and says that that the petitioner ought not to be allowed to work on an interim basis while the decision of 16 May is challenged in this court. That does not sit well with the considerable time after 16 May during which the respondent permitted the petitioner to continue working. The decision was made on 16 May 2022 but was not intimated until letter dated 29 July 2022 received 2 August 2022. That is a period of some 11 weeks in which the respondent allowed the petitioner to continue to work despite having made the decision. Despite this the respondent now comes before the court and argues that

it is important that the petitioner should not be allowed to continue to work. The delay by the respondent is a factor which supports the grant of interim orders.

[24] Counsel for the respondent expressed his client's concern that if interim orders were granted in cases where petitioners wished to keep working pending resolution of their judicial review, then there would be many applications for interim orders. In my view such a floodgates argument has no weight, as justice requires that each case should be assessed on its own circumstances. The requirement to satisfy the test of a *prima facie* case is a suitable safeguard in that respect.

Order

[25] In all these circumstances I decided it was appropriate to grant interim orders and then went on to consider what orders to grant. The petitioner sought interim suspension of the decision of 16 May 2022 and some of the conditions set out under the heading "Consequences of staying in the UK unlawfully" in that letter, namely the prohibition on the petitioner working, allowing seizure of his earnings and allowing confiscation of assets, the prohibition on him renting a home, denying him access to a bank account and allowing the closing or freezing of his existing bank account and any balance being withheld, and for interim interdict from the Home Office imposing these conditions in any further paper work concerning the petitioner. I granted interim suspension of the decision of 16 May 2022. I took the view that it was not necessary for me to grant suspension of the individual conditions as they would be suspended by the suspension of the decision as a whole. I took the view that it was not appropriate for me to grant interdict. I would expect the respondent to comply with my decision without the necessity for any grant of interim interdict (*Craig* v *HMA* [2022] 1 WLR 1270 para [44]-[46]).

[26] For the sake of completeness I note that the respondent did not reclaim.