CO/1905/2008

Neutral Citation Number: [2008] EWHC 3204 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 4th December 2008

B e f o r e:

HIS HONOUR JUDGE PEARL

Between:
THE QUEEN ON THE APPLICATION OF EMMANUEL TEWOLDE TEMEGSEN
Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

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(Official Shorthand Writers to the Court)

Mr Simon Canter (instructed by Messrs CLC Solicitors) appeared on behalf of the **Claimant**
Ms Cathryn McGahey (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

J U D G M E N T
(As Approved by the Court)

1. HIS HONOUR JUDGE PEARL: This is an application brought by the claimant, Emmanuel Tewolde Temegsen, for judicial review of the decision taken by the Secretary of State in a letter dated 26th November 2007. That decision letter is a decision not to treat further representations which are contained in a letter from the now claimant's solicitor, dated 30th March 2006, as a fresh claim applying paragraph 353 of the Immigration Rules.

2. Permission was granted by HHJ Hickinbottom on 28th May 2008 and the matter has therefore come to me and I have heard Mr Canter on behalf of the claimant and Ms McGahey on behalf of the defendant. I have had all the documents presented to me in advance of the hearing and which I have read, with the exception of a skeleton argument on behalf of the claimant, which I read this morning before the hearing commenced. I have also had an additional statement in support of what is called a fresh asylum application from the claimant, which contains four paragraphs.

3. The issue that I must decide is whether the letter dated 26th November 2007 is unreasonable in the light of the Wednesbury test and therefore is open to challenge by way of these judicial review proceedings. There is in fact, in my view of this matter, a short answer to that and it is the answer that I make in the light of reading very carefully the letter of application for, in effect, a fresh claim. In reading that letter as drafted by solicitors, dated 30th March 2006, there is in my view of that letter no basis whatsoever for stating that this letter raises an issue of illegal exit. The letter says:

> "Following our client's most recent application, new evidence has come to light that failed asylum seekers returned to Eritrea are being detained and tortured. As well as that, there is extremely recent evidence (January 2006) that Ethiopia and Eritrea are on the verge of resuming military positions. Finally, we would ask you to consider our client's health conditions in light of the material concerning the humanitarian position, the treatment of failed asylum seekers, and the deteriorating relations between Ethiopia and Eritrea...
>
> We would remind you that our client has been out of the country for four years and has not done his military service. Our client maintains the truth of his statement that he was detained and tortured previously as a result of not answering the call up to military service. However, even if this were not true, there is a real risk that he would now be considered to be a conscription evader or a draft evader, as he left Eritrea without doing military service."

I should read the summary on pages 5 to 6 as well:

> "1. His absence from the country for over four years which had been spent abroad combined with the risk on return to failed asylum seekers and those forcibly removed to Eritrea.
>
> 2. His age, which is likely to lead to his being regarded as a draft evader on return, regardless of whether he was previously detained and tortured as a draft evader.
>
> 3. The humanitarian conditions in Eritrea, given that he suffers from health conditions.
>
> 4. The deterioration in relations between Ethiopia and Eritrea is making the onset of another war likely."

4. In dealing with that letter of 30th March 2006, the Secretary of State in the letter of 26th November 2007 says that she has considered whether or not the submissions amount to a fresh claim. She has taken full account of the submissions, the objective materials and all the known circumstances of the, what is now, claimant's case. The claimant in the letter that his solicitors had sent on 30th March 2006 had attached the decision in IN [2005] UKIAT 00106 but nowhere in that letter had any specific reference been made to that decision.

5. The Secretary of State takes account of the decision in IN and it is from paragraph 8 of the letter that I glean that in fact that case had been submitted by the now claimant because it says:

> "Account has been taken of the case IN (draft evaders - evidence of risk) Eritrea CG [2005] UKIAT 00106, which you submitted in support of your client being at risk of persecution on return [to] Eritrea."

The Secretary of State also deals at paragraph 10 of the decision letter with another case which has been decided subsequent to the 30th March 2006 letter, the case of MA [2007] UKIAT 00059, because MA is the case that specifically deals with the question of illegal exit. The Secretary of State says:

> "According to the case of MA (Draft evaders - illegal departures - risk) Eritrea CG [2007] UKAIT 00059 it was decided that: '*As a person of draft age who exited illegally and is not medically unfit, the Appellant therefore must be regarded as being at real risk on return as a perceived deserter or evader of NS*.'"

6. Mr Canter then states in his submissions, as I understand them, that, having considered the case of MA, in paragraph 10 the Secretary of State applied the wrong test. I will read out what is said in the letter:

> "It is considered that whilst your client is of eligible draft age, having regard to his adverse credibility findings by the Immigration Judge, it is not accepted that your client left Eritrea illegally and you have not shown that your client faces a real risk of persecution or a breach of his human rights in Eritrea on return as a perceived draft evader. It is further considered that your client's removal to Eritrea would not breach his rights under the ECHR if returned to Eritrea."

Mr Canter submits that the wrong test was applied in paragraph 10 because it is not the Secretary of State's view of the matter but rather what it would be considered an immigration judge would realistically reach a conclusion on this particular matter.

7. It is my view that that point is not a good one because of paragraph 27 in the same letter and if one goes to paragraph 27, and one must read these letters as a whole rather than just picking sentences out, it makes it quite clear, and it is my decision on this, that the Secretary of State did apply the correct test because paragraph 27 says:

> "... it has been decided that the submissions you have made do not amount

> to a fresh claim as, although it is accepted that there are some submissions which have not been considered and succeeded under Paragraph 353(i), taken together with the previously considered material they do not create [and the important words] a realistic prospect of an Adjudicator deciding that your client ought to be allowed to remain under 353(ii) for the reasons outlined in paragraphs 7-22."

Which of course includes paragraph 10. Paragraph 27 therefore is the correct approach that was taken. The correct approach returns to paragraph 10. That is incorporated in the conclusion in paragraph 27.

8. So, in summary, I am against Mr Canter on his submissions. I dismiss the application and I do so for the two reasons which I have summarised: first, because the letter which is being challenged of 26th November 2007 is a letter which was a reasonable letter considering all of the matters that were drawn to the attention of the Secretary of State in the letter submitted by the solicitor in May of 2006; and, secondly, in any event, the Secretary of State took on board, on the Secretary of State's own initiative, the new factors which had been introduced in this area as a result of the case of IN, a case that was submitted but without any real submissions on the relevance of the case, and the case of MA. The case of MA is the one that deals with illegal exit, it is dealt with in paragraph 10 and in paragraph 27 and that was in no way an unreasonable approach to be taken. Unless I can assist either of you any further, that is my conclusion on this matter.

9. MR CANTER: Thank you my Lord.

10. MS MCGAHEY: My Lord, I understand that the claimant is in receipt of funding from the Legal Services Commission. In that case I would ask for the usual order that the costs be payable by the claimant but to be determined pursuant to section 11 of the Access to Justice Act.

11. HIS HONOUR JUDGE PEARL: You cannot object to that?

12. MR CANTER: No, my Lord.

13. HIS HONOUR JUDGE PEARL: Thank you very much indeed. Do you want your authorities back or may I hang on to the authorities?

14. MS MCGAHEY: Please feel free to keep them, my Lord.

15. HIS HONOUR JUDGE PEARL: Would you mind?

16. MS MCGAHEY: Not at all.

17. HIS HONOUR JUDGE PEARL: It is very helpful, thank you very much. Otherwise I will leave everything else.