Neutral Citation Number: [2008] EWCA Civ 14

Case No: C4/2006/2426(A)

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEENS BENCH DIVISION
THE ADMINISTRATIVE COURT
MR JUSTICE COLLINS
[2006] EWHC 3225 (ADMIN)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/01/2008

Before :

LORD JUSTICE BUXTON
and
LORD JUSTICE SEDLEY

- -

Between :

ZT (KOSOVO)	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Satvinder Juss (instructed by Messrs Riaz Khan & Co) for the **Appellant**
Lisa Busch (instructed by The Treasury Solicitor) for the **Respondent**

Hearing date: Wednesday 19 December 2007

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Judgment

Lord Justice Sedley :

The court

1. The court which sat to hear this appeal included Lord Justice Pumfrey. Judgment was reserved over the Christmas vacation. On Christmas Eve, tragically and unexpectedly, Lord Justice Pumfrey died. It was decided that, rather than reconstitute as a full court and rehear the appeal, we should continue as a court of two. We record, however, that Lord Justice Pumfrey had been working on the appeal until very shortly before his death and that our conclusion is one in which he concurred.

This application

2. Although this application for judicial review has taken a complicated course, it now comes before this court for resolution on its merits. It began as an intended challenge to the Home Secretary's refusal to treat representations made on A's behalf as a fresh asylum and human rights claim, his original one having been both rejected and certified as clearly unfounded. The effect of such a decision is that there ceases to be any in-country right of appeal. The claimant's own attempt to appeal to the AIT while he was still here was accordingly rejected as outwith their jurisdiction.

3. McCombe J refused permission to apply for judicial review of the Home Office decision on the papers, and on renewal in open court Collins J also refused permission. On application to this court for permission to appeal against that refusal, Sir Henry Brooke, pursuant to CPR 52.15(3) granted permission to apply for judicial review because he considered it arguable that Collins J had not applied what is now known to be the right test to the Secretary of State's decision not to treat the representations as a fresh claim. But rather than keep it in this court, Sir Henry directed pursuant to CPR 52.15(4) that the case proceed in the High Court. Faced with the prospect of a full hearing followed by another appeal or attempted appeal to this court, the Home Secretary applied to set aside Sir Henry's entire order. Since it was apparent that this was going to require the court to hear most if not all of the argument that was to be heard by the Administrative Court, it seemed to us that the best course from everyone's point of view was to vary the order so that the judicial review application was retained in this court. We have consequently sat as a court of judicial review and heard full argument on both sides.

The claim

4. The claimant is a Kosovar Ashkali: his people are a sub-group of the Roma, a minority widely persecuted and discriminated against throughout eastern Europe. The nature of his claim appears very fairly from the judgment of Collins J, which is here set out in full.

1.1. The claimant in this case is an Ashkali from Kosovo. He married a lady some 17 years ago who was not of his ethnicity and that was concealed from her, it seems, for some three years and from her family until 2002, when they discovered that he was in fact not Albanian but an Ashkali. The reaction by his wife's brothers was to attack him, beat him up and take his wife and children away from him. He did not report this attack to the police because he said that he had been threatened by the brothers with death if he did. They were living in a place, according to him, called the "Ashkali neighbourhood" and the brothers found out his ethnicity by asking around, as he put it.

1.2.He eventually left the country and this followed an attack on him for something quite independent. The family was in the wrong place at the wrong time when someone had been found in possession of a weapon and the result was that he was attacked by the police and his arm was broken. But that seems to have been, as I say, a totally random event when he happened to be in the wrong place. He arrived in this country in August 2003. He managed to contact his wife and she arrived here a year later in August 2004 with the children. His fear is that if he is returned to Kosovo his wife's brothers will again find him and this time are likely to kill him.

1.3.The Secretary of State, on receiving this claim, was obliged to approach it on the basis that Serbia and Montenegro is a state listed in section 94(4) of the 2002 Act and so in general it is a country in which there is no real risk of persecution. I am bound to say that I find that somewhat extraordinary, particularly having regard to the ample evidence that at least Roma and Ashkali are regularly discriminated against and frequently attacked. Be that as it may, I have to approach the matter on the basis that section 94(4) applies, which means that the Secretary of State is obliged to certify the claim as clearly unfounded unless he is satisfied that it is not clearly unfounded. One has to approach the question of the lawfulness of his certification bearing that in mind.

1.4.Mr Singh Juss rightly accepts that in the light of the most up to date reports it is not possible to argue that Ashkalis in general are at risk of relevant ill-treatment simply because they are Ashkalis. On the other hand, because of the discrimination and because of the attitude, if there are any reasons why they should incur the displeasure of the community then there are real risks. They can incur the displeasure of the surrounding community by marrying into that community, so mixed marriages can mean that there is a risk. That is recognised, and indeed that is accepted, by the Secretary of State in his latest letter of 2nd November 2006. But the reason he says that that does not mean that this is a claim which should be accepted as

> one which is not clearly unfounded is because the claimant is not recognisable as an Ashkali merely by his looks. That is a conclusion the Secretary of State was entitled to reach because that is what the claimant himself said in interview. He did say that if he sought a job the paperwork might give him away, but the Secretary of State indicated, and there is no reason to doubt this, that his ethnicity would not be included on any official documentation with which he was provided. Indeed, that is not surprising because of the discrimination that otherwise would exist against him.
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> 1.5.So it boils down to the question whether he is likely to remain at risk as a result of his in-laws having discovered his ethnicity and the attacks that have been made upon him. The Secretary of State answered that by saying that there were no systematic attempts at attack and, furthermore, he did not seek protection from the authorities and that that protection would be available. Furthermore, it is open to him to relocate to another part of the country in order to avoid the community in which his wife's family lived. Mr Singh Juss points out that the UNHCR report of June of this year makes it plain that as a general proposition that internal relocation, in their view, is not a possible option. But that is on the basis that the individual would be recognised to be an Ashkali or a Roma, and the point is that this claimant, it is said, would not.
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> 1.6.These cases are always difficult. They depend upon their own facts. I have to be persuaded that the Secretary of State arguably erred in law in concluding that he was not satisfied that it was not clearly unfounded. In all the circumstances, having regard to what I have set out, it seems to me that it is impossible to reach that conclusion and therefore that there is no arguable case that this claim should succeed. Accordingly, I must refuse permission.

5. On 9 Nov 2006, two days after Collins J's decision, the decision of this court in *WM (DRC) v Home Secretary* [2006] EWCA Civ 1495 was handed down. It was this which prompted Sir Henry Brooke to allow the application. He considered that Collins J had – understandably enough given the timing – not applied the test set out in *WM*. We need not pause to consider such differences as there may be between Collins J's approach and that set out in *WM*. Our task is to apply it ourselves to the relevant material.

6. The initial claim for asylum and human rights protection had been rejected by the Home Office in a fully reasoned letter of 2 December 2005 (DL1) which concluded that relocation within Kosovo was a reasonable and not unduly harsh option for the claimant and his family, and that there was not a significant risk of violation of his Convention rights. Both aspects of the claim were certified (a process to which it will be necessary to return), thereby blocking any appeal so long as the claimant remained

in this country. By a solicitor's letter of 20 January 2006 with material in support, the refusal and certification were challenged and further representations advanced in support of the same claims. No reply had come by 5 April, when a judicial review claim was issued concerning "The failure / refusal of the SSHD to consider fresh representations on behalf of the claimant's application for asylum as a 'fresh claim', following his decision of 2nd December 2005".

7. On 11 May 2006 before McCombe J had considered the desk application, the Home Office sent a reasoned refusal (DL2), dealing with all the new material but rejecting it as not adding to the claim, and concluding:

> "Therefore, the decision of 2 December 2005 to refuse your client's asylum and human rights claims and to certify them as clearly unfounded …… is maintained."

A few days before the hearing before Collins J – for what reason is not apparent – a further refusal letter dated 2 November 2006 (DL3) was sent. Significantly, as it has emerged, both DL2 and DL3, although written on the headed notepaper of the Home Office's Immigration and Nationality Directorate, are signed by a member of the Enforcement and Removals Directorate.

The law

8. Rule 353 provides as follows:

> **Fresh claims.**
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> When a human rights or asylum claim has been refused and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to as fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
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> i) had not already been considered; and
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> ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.

9. The material parts of s.94 of the Nationality, Immigration and Asylum Act 2002 are these:

> (1) This section applies to an appeal under section 82(1) where the appellant has made an asylum claim or a human rights claim (or both).

> (2) A person may not bring an appeal to which this section applies in reliance on section 92(4) if the Secretary of State certifies that the claim or claims mentioned in subsection (1) is or are clearly unfounded.
> (3) If the Secretary of State is satisfied that an asylum claimant or human rights claimant is entitled to reside in a State listed in subsection (4) he shall certify the claim under subsection (2) unless satisfied that it is not clearly unfounded.

At the time of this claim the "whitelist" of states in subsection (4) included Serbia and Montenegro. Montenegro has now seceded from Serbia, and Kosovo is about to do so; but the listing of Serbia includes Kosovo for present purposes. S.94 goes on to permit the differential listing of states according to particular classes of person, but no relevant use has been made of this power. We share the concern of Collins J about the undifferentiated whitelisting of Serbia, but like him we are bound by it.

10. In *WM (DRC) v Home Secretary* this court gave detailed guidance on the implementation of §353. It said among other things:

> "10. ….Whilst, therefore, the decision remains that of the Secretary of State, and the test is one of irrationality, a decision will be irrational if it is not taken on the basis of anxious scrutiny. Accordingly, a court when reviewing a decision of the Secretary of State as to whether a fresh claim exists must address the following matters.
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> First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return: see §7 above. The Secretary of State of course can, and no doubt logically should, treat his own view of the merits as a starting-point for that enquiry; but it is only a starting-point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind. Second, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? If the court cannot be satisfied that the answer to both of those questions is in the affirmative it will have to grant an application for review of the Secretary of State's decision."

The arguments

11. Mr Juss's endeavour to show that potentially powerful elements of his client's case had been overlooked in DL2 were unavailing in the face of a decision letter composed with visible care and dealing with each element of evidence now advanced. But it remained Mr Juss's case that the Secretary of State cannot have done what *WM* requires because had he done so he could not have concluded that the claim was clearly unfounded. This, he submitted, was incontestably a claim which, even if rejected by the Home Office, was capable of succeeding on appeal to an immigration judge. If so, the §353 test was met and no question could arise of the claim being clearly unfounded.

12. The problem which this submission appeared to face was that the decision letter, while not referring in terms to §353, appeared to be reasoning out the §353 question. But, to the surprise not only of Mr Juss but of the court, Lisa Busch in opening the case for the Home Secretary disavowed any such reading. That she did so was wholly to her credit, because her instructions were that this was how the Home Office, both legally and structurally, dealt with the reconsideration of certified claims. It is why, as noted earlier, DL2 and DL3 came not from the Asylum Casework Directorate, as DL1 had, but from the Enforcement and Removals Directorate.

13. Accordingly, Ms Busch's case was that §353 and s.94 are entirely separate in purpose and effect. Where a claim has been refused but not certified, §353 applies on renewal: the Home Secretary will either accept the renewed claim or reject it; and if the latter, will then decide whether it amounts to a fresh claim and is therefore again appealable. Where it has been both refused and certified, it is to s.94 that a renewal has to relate: the Home Secretary will decide whether, in the light of it, to remove the certification. This, Ms Busch submits, is a prior question to the §353 question whether there is a fresh claim. Her written submission continues:

> "A decision … to maintain the certification, however, can only be made on the basis that the claim, comprising <u>all</u> of the material … , was and remains 'clearly unfounded'. In these circumstances, it is simply not necessary to go on to consider whether the material gives rise to a new claim for the purposes of paragraph 353. To do so would be a wholly artificial exercise…."

14. It is thus the Home Secretary's case not that §353 was implemented, albeit silently, in DL2 or DL3 but that it had no bearing on the renewed claim. If, however, she is wrong about this, Ms Busch invites the court in the exercise of its discretion to refuse the claimant relief on the ground that a duly taken §353 decision would have been bound to be adverse to him.

Discussion and conclusions

15. In my judgment, if the Home Office is dealing with renewed claims in certified cases in the way contended for by Ms Busch on the Home Secretary's behalf, it is not dealing with them lawfully. The reason why can be illustrated by a simple example. A claims asylum because of a fear of persecution in his home country for reasons of religion. The claim is both rejected and certified as clearly unfounded. A then claims asylum because of a fear of persecution in his home country for reasons of race. In Ms

Busch's scheme (and, it appears, in real life) the second claim goes directly to an official whose only task is decide whether the claim should no longer be certified. But how is the official to decide this? It is not the same claim: it is a fresh one. To certify it as clearly unfounded is not to maintain the original certification: it is to certify a different claim.

16. Not all fresh claims, however, are based on a new reason for feared persecution. As §353 recognises, and as *WM* confirms, a fresh claim may have the same basis as the original one and much of the same content. The test is whether, whatever the Home Office makes of it, it is now capable of succeeding before an immigration judge. If it is clearly unfounded it will manifestly not be so capable; but, equally, if it is capable of succeeding before an immigration judge it cannot be unfounded. It makes sense that the two provisions interlock in this way, because the §353 test, by establishing what is a fresh claim, clears the way for an appeal and the s.94 test, by identifying a hopeless claim, blocks it. But, for reasons I have given, the two are not simple counterparts, making a decision under the one the mirror image of a decision under the other, if – as here – the renewed claim is routinely treated as a continuation of the original claim without first considering whether it is a fresh claim.

17. In my judgment the process required by the 2002 Act and the Immigration Rules where an application has been rejected and then renewed is essentially the following. First, under §353, the Home Secretary needs to consider whether she now accepts the claim: it is clear from the wording and structure of §353 that this does not depend on its being a fresh claim within the meaning of the rule: the option of acceptance is untrammelled. If the renewed claim is rejected but contains enough new material to create a realistic prospect of success on appeal, the Home Secretary must so decide and her refusal, being a refusal of a fresh claim, can then be appealed. If, however, the Home Secretary lawfully decides that it is not a fresh claim, she does not need to consider whether, having rejected it, she should also certify it as clearly unfounded; for, not being a fresh claim, its rejection is not appealable at all, whether in-country or out. It is only, therefore, to a first claim that the process of certification is relevant. This will, however, include a certified claim which has been varied or added to by a further application while an appeal against refusal is still open or pending. §353 does not apply to such a claim, and it is accordingly here alone that the question of lifting an extant s.94 certificate can arise.

18. Thus, far from a renewed claim such as the present one going straight into the s.94 process, its proper destination is §353. Applying this rule, the Home Secretary should have decided whether now to accept the claim and, if she decided to reject it, whether it was nevertheless a fresh and therefore appealable claim. If it was, the claimant would have secured what he wanted, which was an in-country right of appeal. If it was not, he had no further recourse: his original claim had been certified; he would now have nothing further to appeal; and the Home Secretary would have nothing further to certify.

19. Mr Juss is accordingly entitled, in my judgment, to the relief he seeks, which is a quashing of DL2 in order that the Home Secretary may consider the claimant's renewed application pursuant to §353. I would not exercise the court's discretion to refuse this relief on the ground advanced by Ms Busch, for two main reasons. One is that I do not accept that refusal accompanied by a decision that this is not a fresh claim is a foregone conclusion on the basis of DL2 or DL3 or both. I think this is

something the Home Office must deal with correctly for itself. The other is that more material is becoming available about the situation of Ashkali and Roma in Kosovo, not all of it (as Mr Juss has shown us) making pleasant reading, while Kosovo itself is on the brink of secession from Serbia, with further possible implications for intercommunal relations there. It would be no bad thing if whatever decision is now reached about the claimant and his family is reached on the most accurate and up-to-date information possible.

Lord Justice Buxton:

20. I gratefully adopt my Lord's account of the facts and unusual history of this matter. I agree with the disposal that he proposes, and only add a very few words of my own because the case raises a question, so far as I know not previously considered, as to the handling of a fresh claim application in a case where there has already been a section 94(2) certification.

21. When faced with further submissions in a certification case, such as those contained in the applicant's solicitor's letter of 20 January 2006, the Secretary of State has to consider the new material. I will assume that that process engages §353, though an obligation to give conscientious attention to the material would in my view exist in any event as an aspect of the United Kingdom's international obligations. Because of the existence of the certification, the first issue for the Secretary of State when considering the further submissions is whether the new material undermines the previous decision to certify. If the answer is yes, the Secretary of State then has to decide whether she continues to reject the (now uncertified) claim. The remedy for a decision on that claim adverse to the applicant is appeal. If on the other hand the answer is no, and the certification remains in place, the only remedy for the applicant in respect of that decision is judicial review.

22. All of the decisions just noted are taken in the context of, and in relation to, the original claim, however much expanded by the new materials. If the submissions are, in that context, rejected, §353, that sets the agenda for implementation of the obligation to consider new material, requires the Secretary of State in every case of rejection, certification case or not, to consider whether the new material, read with the old, founds a fresh claim. Apart from cases of the sort suggested by my Lord in his §14, I agree that it is unlikely that a case which remains certified, even after consideration in that context of the new material, will pass the test for a new claim. It is nonetheless a question that §353 still requires to be addressed, however easy it may be to answer it.

23. As my Lord has pointed out, the Secretary of State's case before us was that she had not taken or contemplated that last step, and was fully entitled not to take it. For that reason, and full and well-reasoned as DL2 and DL3 are, I think it would be dangerous to assume in the Secretary of State's favour that those letters satisfactorily answer the question that confessedly they did not address. The applicant should be under no

illusions as to whether a reconsideration of his case will produce a different outcome, but he is entitled to have that decision taken in proper form.