Case No: CO/10617/2009

Neutral Citation Number: [2010] EWHC 2792 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/11/2010

Before :

MR C. M. G. OCKELTON
(SITTING AS A DEPUTY HIGH COURT JUDGE)

- -

Between :

ISMAEL ABDULLA OMAR	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Mr Alexander Goodman (instructed by **CLC Solicitors**) for the claimant
Mr Jeremy Johnson (instructed by the **Treasury Solicitor**) for the defendant

Hearing dates: 29 July 2010

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Judgment

MR C. M. G. OCKELTON :

1. This "fresh claim" case raises two issues of general application. The first relates to the ambit of the "fresh claim" procedure. The second is what the remedy should be when a claimant succeeds in obtaining Judicial Review of the Secretary of State's decision in relation to his further submissions.

The basic facts

2. The claimant is a national of Iraq: he is an ethnic Kurd, from Fallujah. He arrived in the United Kingdom, apparently in 2002, and claimed asylum. His asylum claim was refused, but he was granted limited leave to remain. On 30 January 2007 he was granted indefinite leave to remain.

3. The next month he was convicted of offences of unlawful wounding and having a bladed article with him. He was sentenced to imprisonment for two years and six months. On 24 July 2008 the Secretary of State served notice of intention to make a deportation order against the claimant. He appealed. His appeal was dismissed by the Asylum and Immigration Tribunal on 29 October 2008. On the claimant's application, there was an order for reconsideration, but on reconsideration the Tribunal's determination was affirmed. The decision was sent out on 9 January 2009.

4. On 17 February 2009 the European Court of Justice gave its decision in Elgafaji v Staatssecretaris van Justitie, case 465-07; and on 27 February the claimant's solicitors made submissions to the Secretary of State based on that decision. It is these submissions that the claimant asserts amount to a fresh claim. The Secretary of State's decision rejecting those submissions as a fresh claim is dated 17 June 2009. That is the decision under challenge here. The claim form was issued on 16 September 2009. By then the Court of Appeal had handed down its decision in QD (Iraq) and AH (Iraq) v SSHD [2009] EWCA Civ 620.

Subsidiary (or humanitarian) protection and Iraq

5. The Qualification Directive, 2004/83/EC, came into force on 20 October 2004 and had to be implemented in Member States by 10 October 2006. Its purpose, as set out in Article 1, is:

> "to lay down minimum standards for the qualification of third party nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted".

6. As that provision makes clear, the Directive is not confined to those who are entitled to be treated as refugees. In addition to asserting to the rights of those entitled under the Refugee Convention, it introduces a notion of "subsidiary protection" for those who, whilst not being refugees, would face a real risk of suffering serious harm if returned to their country of origin. "Serious harm" for these purposes is defined in Article 15 as consisting of:

> "(a) Death penalty or execution; or

> (b) Torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
>
> (c) Serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."

7. The provisions of the Directive relating to subsidiary protection were the subject of modifications to the Statement of Changes in Immigration Rules, HC395, introduced from 9 October 2006 by Cm6918. As Longmore LJ pointed out in FA (Iraq) v SSHD [2010] EWCA Civ 696 at [16], the Immigration Rules are not law. It is therefore arguable that these provisions have not been formally transposed into United Kingdom law at all. But, in any event, they are directly applicable. A certain amount of probably unnecessary confusion is introduced by the United Kingdom's decision to use the phrase "humanitarian protection" instead of "subsidiary protection". But that change of name does not indicate any change of substance.

8. The wording of Article 15(c) therefore appears in a paragraph of the Immigration Rules headed "Grant of Humanitarian Protection". The paragraph is numbered 339C, and is twice broken into subparagraphs; on each occasion there are four of them, numbered (i) to (iv). A reference to paragraph 339C(iv) in cases of this sort is to the last of the second set of subparagraphs, which contains the relevant text.

9. It has already been the subject of a number of judicial decisions. The Asylum and Immigration Tribunal, in different constitutions, made what appears to have been the first substantial attempt in two cases reported as HH Somalia [2008] UKAIT 00022 and KH Iraq [2008] UKAIT 00023. The latter specifically was held by the Court of Appeal in QD (Iraq) and AH (Iraq) to be exhaustively wrong. I mention it in this context only because of the Tribunal's observation at [29] – [31] that Article 15(c) goes further than the European Convention on Human Rights. It follows that a person may be entitled to subsidiary or humanitarian protection in circumstances in which not only the Refugee Convention but also the Human Rights Convention would not assist him. I do not think that proposition has subsequently been seriously doubted.

10. The European Court of Justice's first foray into the area was its decision in Elgafaji v Staatssecretaris van Justitie. This case also concerned a proposed removal to Iraq, on this occasion from the Netherlands. After reviewing the facts and the wording of Article 15(c), the Court referred to recital 26 in the preamble to the Directive, according to which "risks to which a population of a country or a section of the population is generally exposed do normally not [sic] create in themselves an individual threat which would qualify as serious harm". The Court continued as follows:

> "37 While that recital implies that the objective finding alone of a risk linked to the general situation in a country is not, as a rule, sufficient to establish that the conditions set out in Article 15(c) of the Directive have been met in respect of a specific person, its wording nevertheless allows by the use of the word 'normally' for the possibility of an exceptional situation which would be characterised by such a high degree of risk that substantial grounds would be shown for believing

that that person would be subject individually to the risk in question.

38 The exceptional nature of that situation is also confirmed by the fact that the relevant protection is subsidiary, and by the broad logic of Article 15 of the Directive, as the harm defined in paragraphs (a) and (b) of that article requires a clear degree of individualisation. While it is admittedly true that collective factors play a significant role in the application of Article 15(c) of the Directive, in that the person concerned belongs, like other people, to a circle of potential victims of indiscriminate violence in situations of international or internal armed conflict, it is nevertheless the case that that provision must be subject to a coherent interpretation in relation to the other two situations referred to in Article 15 of the Directive and must, therefore, be interpreted by close reference to that individualisation.

39 In that regard, the more the applicant is able to show that he is specifically affected by reason of factors particular to his personal circumstances, the lower the level of indiscriminate violence required for him to be eligible for subsidiary protection.

40 Moreover, it should be added that, in the individual assessment of an application for subsidiary protection, under Article 4(3) of the Directive, the following may be taken into account:

- the geographical scope of the situation of indiscriminate violence and the actual destination of the applicant in the event that he is returned to the relevant country, as is clear from Article 8(1) of the Directive, and

- the existence, if any, of a serious indication of real risk, such as that referred to in Article 4(4) of the Directive, an indication in the light of which the level of indiscriminate violence required for eligibility for subsidiary protection may be lower.

…

Having regard to all of the foregoing considerations, the answer to the questions referred is that Article 15(c) of the Directive, in conjunction with Article 2(e) of the Directive, must be interpreted as meaning that:

- the existence of a serious and individual threat to the life or person of an applicant for subsidiary protection is not subject to the condition that that applicant adduce evidence that he is specifically targeted by reason of factors particular to his personal circumstances;

> - the existence of such a threat can exceptionally be considered to be established where the degree of indiscriminate violence characterising the armed conflict taking place assessed by the competent national authorities before which an application for subsidiary protection is made, or by the courts of a Member State to which a decision refusing such an application is referred reaches such a high level that substantial grounds are shown for believing that a civilian, returned to the relevant country or, as the case may be, to the relevant region, would, solely on account of his presence on the territory of that country or region, face a real risk of being subject to that threat."

11. When two further Iraqi cases came before the Court of Appeal in QD and AH, the Court had the task of deciding how those words should be applied. At [25], and after setting out the passage of Elgafaji that I have cited above, the Court said this:

> "25 In this way the ECJ has sought to reconcile two things which Advocate-General Maduro in his Opinion (§31) had described as seeming "prima facie irreconcilable" – an individual threat arising from indiscriminate violence. The Court did not, as it might have done, decide that "individual" was there simply to exclude persons who enjoyed some form of protection from the violence faced by the population generally. Nor, however, has the judgment introduced an additional test of exceptionality. By using the words "exceptional" and "exceptionally" it is simply stressing that it is not every armed conflict or violent situation which will attract the protection of article 15(c), but only one where the level of violence is such that, without anything to render them a particular target, civilians face real risks to their life or personal safety.
>
> 26 While this formulation leaves open a very large area of factual judgment, it answers, so far as can be done, the second difficulty mentioned above."

12. After discussing other issues, the Court formulated the issues as follows:

> "40 We would put the critical question, in the light of the Directive, of the ECJ's recent jurisprudence and of our own reasoning, in this way:
>
> Is there in Iraq or a material part of it such a high level of indiscriminate violence that substantial grounds exist for believing that an applicant such as QD or AH would, solely by being present there, face a real risk which threatens his life or person?
>
> By "material part" we mean the applicant's home area or, if otherwise appropriate, any potential place of internal relocation."

13. I should add for completeness that the Immigration and Asylum Chamber of the Upper Tribunal published on 20 September 2010, after the hearing before me, its decision in HM and others [2010] UKUT 331 (IAC). The relevant paragraphs of the headnote are as follows:

> "iv. Following Elgafaji, Case C-465/07, and QD (Iraq) [2009] EWCA Civ 620, in situations of armed conflict in which civilians are affected by the fighting, the approach to assessment of the level of risk of indiscriminate violence must be an inclusive one, subject only to the need for there to be a sufficient causal nexus between the violence and the conflict.
>
> v. The degree of indiscriminate violence characterising the current armed conflict taking place in Iraq is not at such a high level that substantial grounds have been shown for believing that any civilian returned there, would, solely on account of his presence there face a real risk of being subject to that threat.
>
> vi. If the figures relating to indices such as the number of attacks or deaths affecting the civilian population in a region or city rise to unacceptably high levels, then, depending on the population involved, Article 15(c) might well be engaged, at least in respect of the issue of risk in that area, although it is emphasised that any assessment of real risk to the appellant should be one that is both quantitative and qualitative and takes into account a wide range of variables, not just numbers of deaths or attacks.
>
> vii. If there were certain areas where the violence in Iraq reached levels sufficient to engage Article 15(c) the Tribunal considers it is likely that internal relocation would achieve safety and would not be unduly harsh in all the circumstances."

The claimant's claim in detail and the Secretary of State's decision

14. The Asylum and Immigration Tribunal had accepted that the claimant came from the southern part of Iraq, in which Kurds are a minority. His father had supported Saddam Hussain's Ba'ath party. There was an incident in 1995, and the claimant had some scars from it. The claimant had said that following that incident he lived and worked in the area for seven years, but in 2002 he was asked by the Ba'ath party to help in an attack, taking a bomb to the northern part of the country. He failed to attend a Ba'ath party meeting, and was detained in a prison inside party headquarters. When he was given details of his mission he decided to leave Iraq and claim asylum in the United Kingdom. It is clear that the Tribunal regarded the claimant's account of the events immediately before his arrival in the United Kingdom as entirely lacking in credibility. Although the Tribunal refers to "the incident in 1995", it is not easy to see any acceptance of the claimant's claim that in that incident the family car was held up by Kurdish activists and his father and brother were killed. So far as concerns the facts ascertained on judicial enquiry, therefore, the position is that the claimant is a Kurd from the south of Iraq, with a family connection with the Ba'ath party. There

was an incident in 1995, but the claimant failed to establish that he had had any further difficulty, despite living and working in the same area.

15. The grounds for reconsideration were that the Tribunal had failed to take into account the Secretary of State's policy on removal to war zones, identified in HH (Iraq) CG [2008] UKAIT 00051. On reconsideration it was appreciated that that policy had no applicability to the claimant's case, because the decision had been made after the withdrawal of the policy. At the hearing the appellant's representative made submissions on the claimant's eligibility for humanitarian protection. The Senior Immigration Judge dealt with that as follows:

> "12… Even on the assumption that it is still open to her to challenge the panel's decision for failing to deal with such a possibility, KH (Article 15(c) Qualification Directive) Iraq CG [2008] UKAIT 00023 places a formidable difficulty in her way. The judicial head-note reads:
>
> > (6) Neither civilians in Iraq generally nor civilians even in provinces and cities worst-affected by the armed conflict can show they face a "serious and individual threat" to their "life or person" within the meaning of Article 15(c) merely by virtue of being civilians.
>
> 13 That is essentially this appellant's position, on the panel's finding of fact: as Miss Allwood (who appeared for him) accepted, he could only succeed in a claim for humanitarian protection on the basis of "serious harm" as defined in Article 15(c) of the Qualification Directive… Only if Miss Allwood were to persuade me that this leading, and recent country guidance decision should no longer be followed would there be any reasonable prospect of success.
>
> 14 While Miss Allwood was able to refer to a number of individual incidents of atrocity taking place in Iraq since the hearing in KH (1 February 2008) she had to concede that there was nothing to show that (contrary to the general perception that the human rights situation has if anything improved there since then) it has got so significantly worse that KH should no longer be followed. The "Amnesty International Report 2008" to which she referred, in fact deals with the situation in 2007. While it was not available for consideration at the date of the hearing in KH, the reference to a "growing humanitarian crisis" on which Miss Allwood relied, does not suggest anything specific in the situation as of 1 February 2008 which had been unknown to the Tribunal at that time.
>
> 15 It follows that this appellant could not succeed on humanitarian protection either."

16. The submissions made on behalf of the claimant on 27 February 2009 (i) re-assert the claim; (ii) refer to a newly-prepared expert's report and to the available background

material as supporting that claim; and (iii) refer to the decision in Elgafaji. The submissions under the last head are, save where their author quotes directly from the decision, somewhat incoherent. They draw attention to no particular features of the case, and conclude as follows:

> "**Submissions:**
>
> We submit that should the Secretary of State or Tribunal correctly applied the Qualification Directive on the claimant's case the outcome of the case would have been different. It is an accepted fact that Iraq is a "war zone" and the claimant is an Iraqi national. His return to Iraq taking into account his family background and ethnicity would expose him to a "real serious risk of harm" including "torture" and "arbitrary killing" contrary to Article 2 and 3 of the ECHR 1950.
>
> We submit that the above evidence constitute a "fresh claim" as the evidence is credible and significant. The "fresh evidence" combined with the previous claims has a real prospect of success taking into account lower standard of proof required for humanitarian protection under Article 15(c) of the Qualification Directive.
>
> In the light of above and all circumstances we request the Secretary of State to grant our client humanitarian protection in the UK. The grant of humanitarian protection in this case is in line with the Article 15(c) of the Qualification Directive and the above mentioned case laws."

17. The Secretary of State's decision of 17 June 2009 rejects the claimant's submissions. So far as concerns the expert's report and reference to the background material, the rejection is essentially on the basis that, if the report had been before the Tribunal, it would not have made any difference, given the fact that the appellant had not tendered any credible evidence to show any difficulties after 1995. On humanitarian protection, the letter says this:

> "Consideration has been given to your submissions regarding the interpretation of Article 15(c), however it is noted that the application of this directive was relevant to your client's appeal on a humanitarian protection issue. The issue being raised at appeal was whether the conflict situation in Iraq, or in the part of Iraq that your client would have to reside in on his return, would present a serious and individual threat to his life or person if he was returned. It was determined by the Tribunal that such a risk does not prevail in your client's case and even if subsequent case law has adopted a different interpretation of Article 15(c) Directive, it is not accepted that this alters your client's situation in being able to safely return to Iraq. There is not a policy for suspending returns either to the main part of Iraq or the Kurdish regional government area of Iraq either on humanitarian, security or any other grounds and Iraqi nationals

> raising asylum or human rights grounds are not being granted humanitarian protection on the basis of the general country situation."

18. The letter then refers to Elgafaji, and continues:

> "The European Court of Justice emphasised that, in order for someone to qualify for protection on the basis of indiscriminate violence, the level of violence would need to be so high that anyone, irrespective of his or her personal circumstances, returned to the country or part of the country in question, would be at risk "solely on account of his presence in the territory of that country or region". The ECJ recognised that such a high level of indiscriminate violence will be "exceptional". The judgement whether levels of indiscriminate violence in a particular country or part of a country reach such a high level is one for the authorities and the courts of member states.
>
> Although this case provides clarification of the test for Article 15(c), the judgement does not alter or supersede the assessment of the level of indiscriminate violence in Iraq referred to in the determination of your client's appeal. Reports of security breaches in Iraq do not demonstrate that there would be a consistent pattern of gross and systemic violation of rights under Article 3 of the ECHR. The current evidence also does not suggest that the level of violence and insecurity in Iraq amounts to a serious risk of unlawful killing. As highlighted in the quoted country guidance case of KH [2008] UKAIT 00023, in no part of Iraq are levels of indiscriminate violence such that they place all civilians at individual risk. Therefore in the absence of a heightened risk specific to the individual, an ordinary Iraqi civilian from any part of Iraq will generally not be able to show that they qualify for humanitarian protection on the basis of indiscriminate violence. It has been concluded that your client has failed to demonstrate a heightened risk specific to him and therefore he does not qualify for humanitarian protection on this basis."

19. Judicial Review was sought on three grounds. The first was that the Secretary of State had applied the wrong test in determining whether the expert's report, taken with the other material in the case, created a realistic prospect of success before an Immigration Judge. The second was that the decisions in Elgafaji and QD and AH themselves created a realistic prospect of success. The third was that the Secretary of State had erred in failing to grant the claimant a right of appeal against the decision contained in the decision letter.

20. The application was dealt with on the papers by Sales J. He granted permission on the second ground, but refused it on the others. He said this:

> "This case involves a proposed removal to Iraq. Whilst the decision letter of the Secretary of State dated 17 June 2009 is

carefully reasoned, permission should be granted on Ground 2 in light of the subsequent decision on the meaning and effect of Art. 15 of the Qualification Directive, *QD (Iraq) and AH (Iraq) v SSHD* [2009] EWCA Civ 620, which indicates that the letter may arguably proceed upon a misdirection as to the effect of Art. 15 and the decision of the ECJ in *Elgafaji*. It is arguable that, as in *QD and AH*, the possibility of ruling in the Claimant's favour on the basis of Art. 15 cannot be ruled out in advance of detailed consideration by the AIT.

Permission is refused in relation to Ground 1 (whether the Claimant's further representations and the report from Sheri Laizer constituted material amounting to a fresh claim, apart from any misdirection in relation to Art. 15 of the Directive), for the reasons set out in the Acknowledgement of Service. The Secretary of State addressed the correct test in the decision letter. The Claimant's case as to the individual risk he might suffer if returned to Iraq had been considered in detail in the previous Tribunal rulings of 29 October 2008 and 5 January 2009 and found not to be credible or made out, and the reasoning in the decision letter of 17 June 2009 in relation to the new material is clear and compelling. In particular, the facts that the Claimant had remained in Iraq for some 7 years after the alleged attack against his family in 1995 and had not experienced any serious problems from his father's alleged enemies within the Kurdish community were very powerful indicators that he was not subject to serious individualised risk, and the findings of lack of credibility of the Claimant's claims to have been recruited to mount an attack in Northern Iraq (based on their vagueness and lack of plausibility) were clearly and compellingly open to the Tribunal and the Secretary of State. There is no good arguable case that the report of Sheri Laizer would give rise to any realistic prospect of a different outcome before an Immigration Judge in relation to these matters or in relation to the Claimant's general claims under Ground 1. The same is true of the Claimant's own latest witness statement, which essentially repeats points made previously, without providing any substantial grounds to support different conclusions in respect of them.

Permission is refused in relation to Ground 3, as a ground distinct from Ground 2. If Ground 2 is made out, the Claimant will be entitled to relief. If Ground 2 is not made out, nothing in the claim gives rise to any distinct arguable ground of legal error on the part of the Secretary of State. It does not appear that (if lawfully made) the decision in the letter of 17 June 2009, deciding that there was no fresh claim, itself constituted an immigration decision under s. 84 of the 2002 Act, giving rise to a right of appeal under s. 82(2). But even if it did, it is a matter of construction of the 2002 Act itself whether it creates a

> right of appeal (a matter of law, irrespective of whether the Secretary of State acknowledged that or not), and it is unnecessary to pursue Judicial Review proceedings to debate that issue – instead, an appeal should be brought and the Tribunal will rule upon the extent of its jurisdiction."

21. No further submissions have been raised with regard to Ground 3. I have before me the application for Judicial Review in accordance with Sales J's grant, and a renewed application for permission on the basis of Ground 1. Mr Goodman accepts that if he succeeds on Ground 2, I do not need to consider his application in relation to Ground 1.

Fresh claims

22. Paragraphs 353 and 353A of the Immigration Rules are as follows:

> "353. When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules 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 a 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:
>
> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.
>
> This paragraph does not apply to claims made overseas.
>
> 353A. Consideration of further submissions shall be subject to the procedures set out in these Rules. An applicant who has made further submissions shall not be removed before the Secretary of State has considered the submissions under paragraph 353 or otherwise.
>
> This paragraph does not apply to submissions made overseas."

23. In accordance with the decision of the Court of Appeal in FA v SSHD, it is clear that the principle of equivalence requires a reference to "an asylum or human rights claim" to be read as including reference to a claim for subsidiary protection. So much is indeed urged by Mr Goodman in his skeleton argument. There was some dispute about this at the hearing, but it seems to me that the position is clear. Indeed, paragraphs 353 and 353A are in their own separate part of the Rules, Part 12 (placed, rather oddly, between Part 11 and Part 11A. The heading of Part 12 is 'Procedure'. Paragraph 326A provides that

> "The procedures [note the plural] set out in these Rules shall apply to the consideration of asylum and humanitarian protection".

It would be difficult to establish that a Part of the Rules headed 'Procedure' was unaffected by that provision.

24. The refusal to treat further submissions as a fresh claim is not itself a decision that can be the subject of a statutory appeal. That was established by the decision of the Court of Appeal in Cakabay v SSHD [1999] Imm AR176. The decision not to treat further submissions as a fresh claim can be challenged only by Judicial Review. I shall have to consider below the role of the Court in such a challenge, but I must deal first with submissions made in detail only after the hearing by Mr Goodman, to the effect that paragraph 353 is not applicable in the present case.

25. The submissions were made after the hearing because the Court of Appeal was due to give judgement in ZA (Nigeria) and SM (Congo) v SSHD [2010] EWCA Civ 926 on the day after the hearing, and the parties therefore had liberty to make submissions in writing. Over the long vacation it was evidently difficult to adhere precisely to the timetable I had set, but in preparing this judgement I have taken into account Mr Goodman's submissions, Mr Johnson's reply, and Mr Goodman's rejoinder.

26. In order to set the scene, it is necessary to state briefly the issue which ZA and SM was intended to decide. Appeals to the Tribunal lie only against such decisions as are specified for that purpose in the Statutes. So far as relevant for present purposes, those decisions are listed primarily in Section 82 of the Nationality, Immigration and Asylum Act 2002 (as amended), and also in Sections 83 and 83A. If a decision there listed is made by the Secretary of State, it carries in principle a right of appeal, although there are exceptions and limitations set out in sections 88 to 92. Where there is a right of appeal, however, the Secretary of State may, by the exercise of powers in Sections 94-97, certify the applicability of one of those sections, so removing or limiting a right of appeal where it would otherwise exist. It follows that, where there is a right of appeal, the right of appeal can be exercised unless there has been certification.

27. In BA (Nigeria) v SSHD [2009] UKSC 7, the Secretary of State had received further submissions on behalf of the claimant, who had already been subject to the making of a deportation order against him. The Secretary of State regarded the submissions as not raising anything new. He therefore purported to deal with the submissions under paragraph 353. However, where a person has been subject to the making of a deportation order, the fresh submissions have to be seen as an application for revocation of that order. And refusal to revoke a deportation order is one of the decisions carrying a right of appeal, listed in Section 82 of the 2002 Act. As was in due course decided by the Supreme Court, therefore, paragraph 353 was inapplicable to BA's case. The rejection of the submissions necessarily involved the making of a decision carrying a right of appeal, which could be exercised unless there was certification, which there had not been.

28. That is uncontroversial. But observations made in particular by Lord Hope had led in some quarters to the view that the Supreme Court had decided that the introduction of the certification procedure under Sections 94-97 of the 2002 Act had wholly replaced

the procedure envisaged by paragraph 353. It was said that the impact of the Supreme Court's decision was that the Secretary of State was no longer entitled to decline to make a decision carrying a right of appeal on the strength of paragraph 353: such a decision had to be made, and it would then be appealable unless certified.

29. The Court of Appeal considered that argument, on appeal from a divisional court where it had been rejected, in ZA and SM. Lord Neuberger MR, with whom Laws LJ and Sullivan LJ agreed, held that the observations falling from their Lordships in BA (Nigeria) were not to be read in the way in which the appellants contended. What had been decided was that paragraph 353 did not apply where there had been a new decision that, under the statue, carried a right of appeal; and, *a fortiori,* paragraph 353 could not apply where the Secretary of State's decision on the further submissions necessarily had to be in the form of a decision carrying a right of appeal.

30. In the course of his judgement, the Master of the Rolls drew some distinctions between the process of certification and the process under paragraph 353, which he expressed as constituting part of his reasons for saying that the process of certification could not wholly have replaced the process under paragraph 353. Mr Goodman draws attention to paragraph [21], where the effect of Cakabay v SSHD is summarised: if further submissions are rejected, it is because they are "not a claim at all". At paragraph [25], the Master of the Rolls said this:

> "25 Section 94(2) differs from rule 353 in that it is concerned with hopeless, or "clearly unfounded" claims, whether original or renewed, whereas rule 353 covers only purported renewed claims, i.e. further submissions, which merely repeat previous rejected claims by the same claimant. So section 94(2), unlike rule 353, can apply not only to a renewed claim (or purported renewed claim) but also to the original claim made by a particular claimant. That, no doubt, is the reason why section 94(2) envisages a claim to which it applies being treated as a valid, albeit hopeless, claim, which has to be considered on its merits: hence its machinery involves the Secretary of State certifying that it is clearly unfounded, so as to prevent an appeal. On the other hand, as rule 353 is concerned with purported claims which repeat earlier, rejected, claims, it envisages that such purported claims are not to be considered or treated as claims at all."

31. Mr Goodman's submission is that the Court of Appeal's decision in ZA and SM is that paragraph 353 is confined to repeat claims: in respect of claims that are merely unmeritorious, it is the certification procedure that must be used. Mr Goodman goes on to submit that the submissions made in the present case were entirely new and could not be regarded as repetitions of any claim previously made. Paragraph 353 was therefore inappropriate.

32. Mr Johnson submits that if that is the position, the claim based on the Secretary of State's alleged error in treating the submissions as not being a fresh claim is misconceived. In any event, however, Mr Johnson submits that the Court of Appeal was not confining paragraph 353 to repeat claims in general: the observation was, however, germane to the facts of the case before the court. Mr Johnson lists the

following as indications that the Master of the Rolls was "proceeding on the conventional basis that Rule 353 applies not just to submissions that precisely repeat an earlier claim, but also to obviously untenable submissions that are made following an earlier rejected claim (even if the submissions do not simply repeat the earlier claim)":

(1) in paragraphs [7] and [8], there are observations based on R v SSHD ex parte Onibiyo [1996] QB 768, the origin of paragraph 353, with no indication that the paragraph is now to be read in a narrower sense;

(2) references at paragraphs [19] and [23] to Section 53 of the Borders, Citizenship and Immigration Act 2009, point to decisions under paragraph 353 "wholly or partly on the basis that the submissions are not significantly different from material that has previously been considered": Mr Johnson emphasises the phrase "or partly";

(3) a passage from the speech of Lord Carswell in ZT (Kosovo) v SSHD [2009] UKHL 6 at [59], cited by the Master of the Rolls at [35]:

> "A claimant may seek to adduce further material in support of his claims, which may or may not constitute a significant addition to those which he had earlier submitted without success. To meet this situation Rule 353 was made…".

Mr Johnson's submission is that if the Court of Appeal had intended to restrict the ambit of paragraph 353 in the way asserted on the claimant's behalf, it would have done so clearly and unambiguously, rather than leaving the new law to be derived in the manner suggested by Mr Goodman.

33. I do not accept Mr Goodman's submissions on this point. There is one simple answer to them, which is that the claimant had indeed made a claim based on Article 15(c) prior to his further submissions. That claim was made to the AIT in the course of the reconsideration of his appeal, and, as I have indicated above, was considered, albeit briefly, by the AIT and rejected. There is no proper basis upon which it could be said that raising the same issue again in submissions a few weeks later, was not a repeat of the claim.

34. Even if that were not the case, it does appear to me to be inconceivable that, if the Court of Appeal had intended to change the understanding of the law in the way suggested, they would have done so in such an obscure manner. That is particularly the case because one of the reasons identified by the Master of the Rolls for supposing that no change in the law had been intended by the Supreme Court in BA (Nigeria) was that the Court was dealing with "an area which is much litigated, and where it is therefore obvious that very clear guidance is needed" (at [54]). I am perfectly confident that Mr Goodman is reading more into the Master of the Rolls' words than they merit. The point being made was simply that there are distinctions between cases that are amenable to certification and cases that may be dealt with under paragraph 353, and one of those distinctions is that a claim may be certified as unmeritorious even where the claimant has had no previous dealings with the Secretary of State.

35. I am fortified in this view by considering what the implications would be if Mr Goodman's view were to be accepted. Not only would there be constant difficulty in deciding precisely whether a claim which contained an element of repetition was one which was sufficiently repetitious to fall within the parameters of paragraph 353, but there would also be the difficulty of deciding how to give a right of appeal to a claimant who Mr Goodman says should have one. The present case may serve as an example. The claimant is the subject of a decision to make a deportation order against him. That decision has survived attack before the Tribunal. The Secretary of State's position is that it was correct, and that it is not affected by the further representations. It is difficult to see why the Secretary of State should now be required to withdraw it, as he would have to do if he is to make another decision to the same effect (otherwise, a successful appeal against the second decision would still leave the first unimpaired; and without a second decision there can be no second appeal).Yet if Mr Goodman is right, the Secretary of State would be obliged to withdraw it on the making of the further representations. A decision upheld by judges would fall at a word from the claimant.

36. For all these reasons it appears to me that the decision of the Court of Appeal in ZA (Nigeria) and SM (Congo) does not have the effect of restricting the ambit of paragraph 353. This was a case in which the Secretary of State was, other things being equal, entitled to adopt the procedure under that paragraph.

The role of the Court in Judicial Review of fresh claim decisions

37. WM (Democratic Republic of Congo) v SSHD [2006] EWCA Civ 1495 held sway for some years as authority that the role of the Court in Judicial Review of the Secretary of State's decision not to treat submissions as amounting to a fresh claim was, in essence, that traditionally assigned in Judicial Review proceedings. But it is clear from the most recent decisions that the Court must now adopt a role which goes beyond that of mere review. The position is set out as follows by Carnwath LJ (with whom the other members of the Court agreed) in R (YH) v SSHD [2010] EWCA Civ 116:

> "18 As I explained in AS (SriLanka) (para 32-41), subsequent judgments following ZT (Kosovo) seem to have shifted the emphasis. Thus in SSHD v QY (China) [2009] EWCA Civ 680, the court had rejected the argument that the judge had erred in deciding that the issue of certification was "an issue on which he must reach his own conclusion" rather than "by applying a traditional Wednesbury test to the Home Secretary's judgment". Sedley LJ said (of the speeches in ZT (Kosovo)):
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> "All, it seems to me with respect, considered that, because of the essentially forensic character of the judgment he has to make, the court is generally as well placed as the Home Secretary and so, at least where there are no issues of primary fact, can ordinarily gauge the rationality of a certification decision by deciding whether it was right or wrong."

> 19 One notes the possible qualification in respect of cases where there are "issues of primary fact". This is perhaps a fair reflection of the speeches in ZT itself, as neatly summarised in a footnote by MacDonald (para 12.177 n 11):
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> "Lord Phillips, para 23 'where, as here, there is no dispute of primary fact' and Lord Neuberger, para 83 'in a case where the primary facts are not in dispute'. Lord Brown entered no such caveat in his own analysis of the Court's role in Judicial Review in this context but did express agreement with para 23 of Lord Phillips's opinion."
>
> Logically, however, the existence of such unresolved issues of primary fact is not a reason for the courts deferring to the Secretary of State at the threshold stage. Such unresolved issues are likely of course to make it more appropriate to leave the door open for them to be determined by an immigration judge after a full hearing. The position is not dissimilar to that under the rules of court, where a claim may be struck out not only if it is unfounded in law, but also if it is clear on the available material that the factual basis is entirely without substance (see Three Rivers DC v Bank of England (No 3) [2001] 2 All ER 513 para 95, per Lord Hope). In most cases, the court is at least as well equipped as the Secretary of State to decide either question.
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> 20 More recently in KH (Afghanistan) v Secretary of State [2009] EWCA Civ 1354 (handed down on the 12th November 2009), Longmore LJ (with the agreement of his colleagues) stated the position in unqualified terms:
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> "It is now clear from ZT (Kosovo) v SSHD [2009] 1 WLR 348… that the court must make up its own mind on the question whether there is a realistic prospect that an immigration judge, applying the rule of anxious scrutiny, might think that the applicant will be exposed to a breach of Article 3 or 8 if he is returned to Afghanistan. So the question is not whether the Secretary of State was entitled to conclude that an appeal would be hopeless but whether, in the view of the court, there would be a realistic prospect of success before an adjudicator." (para 19).
>
> 21 It seems therefore that on the threshold question the court is entitled to exercise its own judgment. However, it remains a process of Judicial Review, not a de novo hearing, and the issue must be judged on the material available to the Secretary of State."

38. The Judge decides whether the material creates a realistic prospect of success before another Judge. It does not appear to me that the Court's approach should be affected by an assertion, for example, that the Secretary of State's fault was to fail to look at

all relevant material, rather than in assessment of the material he did consider. In either case, the Court is to examine all the material that was before the Secretary of State when he made his decision. Nor, in the evident view of Carnwath LJ, does the existence of a dispute on primary facts affect the principle: if there is a real dispute as to the primary facts, the prospect of success before a Judge may be more realistic.

Discussion and decision

39. I look, therefore, at the material that was before the Secretary of State in order to reach my own view on whether, taken together with that already considered, it created a realistic prospect of success in an appeal. That is the same as asking whether on the basis of that material it is realistic to say that a Tribunal, asking itself the question put by the Court of Appeal in QD and AH, might answer it in the affirmative. (The Court of Appeal's judgement postdates the decision under challenge here, but the Court was merely explaining and applying the ECJ's decision, which predates it.)

40. It is undoubtedly true to say that the claim as put to the Secretary of State in the further submissions was exiguous. When stripped of irrelevant references to protection under the European Convention on Human Rights it is barely more than a sentence. But that sentence comes almost at the end of a letter that had raised a number of issues, largely of fact, and had referred to an 'expert report' that was itself of considerable length.

41. I do not consider that it is remotely arguable that the material put before the Secretary of State in February 2009 created a realistic prospect that a Tribunal would regard the claimant's story of what happened in 2002 as credible, or that, having apparently lived in his home without difficulty from 1995 to 2002, he was now entitled to protection under the Refugee Convention. For that reason I shall refuse permission on ground 1. The reasons given by Sales J after consideration on the papers are, if I may say so with respect, entirely sound, and I adopt them with gratitude.

42. But the claim under Article 15(c) is different. Elgafaji, QD and AH and now HM make it clear that a claimant from Iraq who is not a refugee, and is not protected by the ECHR, may have considerable difficulties in demonstrating that he is entitled to protection under Article 15(c). As I read them, however, none of those authorities indicate that the question is to be decided without proper and individual consideration of the claimant's own case. Indeed, paragraph 40 of Elgafaji, which I have set out above, indicates not merely that an individual assessment is necessary, but that the level of risk requisite to meet the requirements of Article 15 may vary with the characteristics of the individual claimant.

43. In the present case the claimant's individual characteristics are that he is an ethnic Kurd whose father actively supported the Ba'ath party, that is to say opposed the Kurdish cause. That may (and the expert report says it will) mean that in order to achieve any measure of ordinary or secure life the Claimant would, on return to Iraq, need to live in relatively confined areas, where he might find others of similar backgrounds. The fact that he could do so, and thus greatly reduce the risk of any targeted attack, is no doubt sufficient to deprive him of the possibility of protection under either Convention. But if that is right it may well be necessary to see what is the risk of harm from indiscriminate violence not in Iraq, or even Fallujah, as a whole, but in the area where the claimant will be living.

44. It is, therefore, not sufficient on the facts of this case to treat Article 15(c) as raising questions only in relation to Iraq as a whole, or to civilians in Iraq, without distinction, as it seems to me the decision letter does. The material before the Secretary of State was sufficient to show that more was necessary. The specific material is again somewhat thin, but (in the absence of any substantial evidence to the contrary) it could properly be said that there would be a basis for saying that the claimant's background constitutes a 'serious indication of real risk' even though he has not suffered in the past, and that the presence of what the expert report calls 'insurgent groups', active in areas such as that where the claimant would be living, may raise the risk to the claimant of indiscriminate harm in such areas to an unacceptable level.

45. It may well be that the prospects of success for the claimant are low, but when they are properly considered on an individual rather than a universalist basis they are in my judgment not so low as to be unrealistic.

Remedy

46. Having reached that conclusion I turn to the second general issue that I identified at the outset, which is what is the appropriate remedy. Mr Johnson, noting that the claimant seeks an order that the Secretary of State be compelled to treat the representations of 27 February 2009 as a 'fresh claim', submitted that that would go too far: if it granted Judicial Review, the Court should limit itself to quashing the decision under challenge, leaving the Secretary of State to make a new and lawful decision in response to the representations in due course, and not dictating what that decision should be.

47. In the vast majority of areas of the Judicial Review jurisdiction, that submission would be indisputably correct. It would also have been correct in the area of fresh claims whilst the Court's role was guided by the judgment of Buxton LJ in WM (DRC). But things are different now. Success in a 'fresh claim' case, where the Court has carried out the process set out above, means not merely that the Secretary of State's decision was defective by the usual public law criteria, but that the Court's view, on the material before the Secretary of State, is that there was a realistic prospect of success in an appeal.

48. The decision must be quashed, and it is for the Secretary of State, not the Court, to re-make it. The question for the Secretary of State remains that posed by paragraph 353. But the result of successful Judicial Review proceedings is that instead of the Secretary of State having to estimate what might be the view of a judge on the merits of the material before him, there is a judicial view of those merits. The process of deciding the Judicial Review claim means that, at any rate where there is no other relevant material postdating the Secretary of State's decision, 'fresh claim' cases as a class are cases in which, if the Claimant is successful, it can be said that no decision other than one recognising that the submissions constituted a fresh claim is now reasonably open to the Secretary of State. The mandatory order sought by the claimant ought in principle to lie.

49. The reservation expressed in the last paragraph is important, because for many reasons the situation now may not be what it was when the decision under challenge was made. Generally speaking, however, it ought to be recognised that a judgment in

favour of the claimant in a 'fresh claim' case amounts to a decision that the material did constitute a fresh claim, and the new decision of the Secretary of State should reflect that, unless there are very good reasons to the contrary. And in considering the force of any such reasons in countering the effect of the Court's judgment the Secretary of State would do well to note two things. The first is that the history of the case will necessarily show that there has already been a wrong assessment of it. The second is that disputed questions of primary fact, particularly where the facts are likely to be fast-moving or frequently changing, are quickly and cheaply dealt with by evidence on an appeal to the Tribunal.

50. Although the claimant may be entitled in principle to a mandatory order, it should not be sought save in cases where it is clear that there has been no relevant change in facts between the date of the original decision and the date on which the order will have effect, and it should be generally unnecessary to seek it, because the Secretary of State will act in accordance with the tenor of a judgment of the Court. In case of difficulty, the successful claimant will no doubt have the assistance of the court in enforcing the judgment.

Conclusion

51. For the reasons I have given, there will be an order quashing the decision under challenge.