Neutral Citation Number: [2009]EWHC 2584 (Admin)

Case No:CO/7907/2007

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 5th November 2009

Before:
Her Honour Judge Hindley QC
(sitting as a High Court Judge)

The Queen On the application of

Tafesse Asefa Alemu	Claimant
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	Defendant

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- -

Grace Brown (instructed by the Immigration Advisory Service) for the **Claimant**
Rory Dunlop (instructed by the Treasury Solicitor) for the **Defendant**

Hearing date: 8 October 2009
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JUDGMENT

1. This is a claim for judicial review of the decision by the Secretary of State, refusing to treat further representations made on the claimant's behalf as a fresh asylum claim. The decision was originally set out in a letter dated 11 June, 2007. Permission was initially refused on the papers by His Honour Judge Mackie QC but then granted at an oral hearing before Mr Justice Irwin. Since that hearing the Secretary of State has reconsidered the decision in accordance with, what was described to me, as common practice, particularly where permission is granted. The Secretary of State confirmed the decision in a supplementary decision letter dated 12 August, 2008. Following a Subject Access Bureau search a draft supplementary

refusal letter dated 15 July, 2008 was disclosed to the claimant. It has been submitted by the claimant that the court should consider the draft letter as well as the decision letter of 12 August, 2008. I have rejected the submission; the contents of the draft letter of the 15 July, 2008 are not relevant in this case.

2. The claimant is an Ethiopian national. He arrived in this country on 16 August, 2000 and claimed asylum. His claim was rejected by the Secretary of State and his appeal against a Notice Refusal of Leave to Enter after Refusal of Asylum and of Removal Directions to his country of Nationality was heard by Mr Michael Oakley, the adjudicator, and on 25 April, 2003 his appeal was rejected. The claimant was legally represented by counsel at the hearing. The claimant was refused permission to appeal to the Immigration and Asylum Tribunal.
3. On 28th of February 2007 the claimant made a fresh claim for asylum. He did so on the basis of two witness statements by Mr Bezu and Mr Amaro who purported to support his case as presented to the adjudicator at the earlier hearing, there was also a letter from the Oromo Community UK dated 16 February, 2005. The Secretary of State refused the claim on 11 June, 2007. The claimant issued his application for judicial review on 11 September, 2007.
4. Since that time the claimant has obtained a report from Lydia Namarra, headed ODAA Expert Report and dated 27th of May 2009. In it the report writer states that it is compiled, "to provide an impartial expert opinion and to assist the Home Office to reach a decision." This report was therefore provided something over a year after the Secretary of State's decision letter was served on the claimant. Given the proximity of this hearing and the leave arrangements of the solicitor with conduct of the case on behalf of the Treasury Solicitor the defendant has not had time to produce a further decision before this hearing. There having already been

2 agreed adjournments in the listing of this matter both the claimant and the defendant wanted to have the matter heard without recourse to a further adjournment.

5. Having heard submissions about the use which could be made of the report during this hearing I decided to consider the Namarra report *de bene esse.* It seemed to me to be right that time and expense of a further decision letter and further judicial review proceedings could be saved if I did so. I have therefore entertained submissions concerning the contents of the report on the basis that if I take the view that it does not materially add to the claimant's prospects of success in a hypothetical future appeal I can make a finding to that effect, or, if I consider that there may be validity in the report, then I shall restrict my judgement to the decision under challenge and thus allow the defendant a proper opportunity to consider the report and respond to it if appropriate.

The Factual Background

6. The claimant, an Ethiopian National, arrived in the UK on the 16 August, 2000 and claimed asylum on the same day on the basis of his membership of the Oromo Liberation Front (OLF). His application for asylum was refused by letter on 14 December, 2001.

7. His appeal was dismissed by an adjudicator in a determination promulgated on 25th of April 2003. The adjudicator noted numerous inconsistencies and implausibilities in the claimant's evidence. It was the claimant's case that his family were also members and supporters of the OLF. He said that his own function was the circulation of information within the OLF, fundraising and motivational work amongst potential recruits. It was his case that he had been detained on two occasions in 1993 and 2000. Further that his father was also detained on two occasions; once in 1993 with the claimant, and again in 1995. It was said that his father was presumed to have died in detention in 1997. The claimant has asserted

that during his detention in 1993 he was beaten to the extent that he received an injury to his testicle such that it had to be removed. There is very recent confirmatory medical evidence to the effect that he no longer has a testicle and that there is a 1 cm scar.

8. The adjudicator noted the following in the claimant's evidence:

a. a failure to mention, prior to the appeal hearing, that he had been imprisoned with his father in 1995 and had been beaten and suffered damage to his testicle to the extent that he had to have it removed;

b. The claimant gave inconsistent accounts of his escape. In the SEF questionnaire he stated that a member of the OLF had visited him in prison and in his interview he indicated that a visitor friend of the OLF arranged his escape. However in his oral evidence he stated that it was the people working at the hospital who had assisted his escape;

c. the adjudicator considered it implausible that the authorities would have taken the claimant to an Adventist hospital where there were a number of OLF sympathisers;

d. The claimant claimed that he had escaped with the help of an agent partly funded by the OLF. The adjudicator did not consider it plausible that the claimant would be singled out for special treatment and that the OLF sympathisers would spend a considerable amount of money to enable him to leave the country, given that he was not an armed fighter;

e. The timing of the injuries detailed in the medical report provided by the claimant conflicted with the claimant's own evidence.

9. The adjudicator made a finding to this effect: *"If the appellant is to be believed in connection with his role in the 0LF that role is clearly only at a low level".*

10. The adjudicator concluded: "*The appellant claims he fears persecution by the state. In view of my adverse credibility findings contained in paragraphs 26 to 31 hereof I conclude that the appellant has not established that he has any subjectively genuine or objectively well founded fear of persecution by the state or its agents"*

11. The claimant applied for permission to appeal to the Immigration Appeal Tribunal which was refused in the determination dated 11 June, 2003. Richard Chalkley, Vice President of the IAT said: "*The adjudicator heard oral evidence from the claimant did not believe the whole of it. He found the claimant not to be credible. His reasons for his findings are clear, logical and supported by the evidence before him. The claimant has been represented by at least two different firms of solicitors and yet only at the hearing did the claimant claim to have been arrested and detained with his father."*

12. In a letter dated 28th February 2007 the claimant's solicitors made their further representations based on: the evidence of two witnesses granted asylum in the UK; that the claimant had been involved with the OLF; a statement from the Oromo Community UK, and of the country guidance case of HA (OLF members and sympathisers-risk) Ethiopia [2005] UK and 00136.

13. In a letter dated 11 June, 2007, the defendant refused the representations and concluded that they did not amount to a fresh claim under paragraph 353 of the Immigration Rules. Subsequent to this refusal the claimant submitted a letter before claim dated 15 June, 2007, requesting that the defendant reconsider the decision to refuse the further submissions. By letter dated the 4 July, 2007, the defendant upheld the letter of 11 June, 2007.

14. On 7 September 2007 the claimant issued proceedings. On 19 October, 2007 the defendant filed and serve an acknowledgement of service. On

26th of November 2007 permission was refused on the papers by HHJ Mackie QC sitting as a High Court Judge, he said: "*The defendant reasonably considered that there was no realistic prospect of the tribunal reaching a different conclusion in the light of the fresh material. Given the conclusion of the Adjudicator in 2003 the further material would have made no difference.*"

15. The claimant renewed his application for an oral hearing and was granted permission by Irwin J on 6 June, 2008. Since then the defendant has reconsidered her position and issued the supplementary decision letter, dated 12 August, 2008, in which she continues to refuse to treat the claimant's representations as a fresh claim The material decision letter is that of 12 August, 2008.

16. Where an asylum applicant has previously been refused asylum in the UK, it is for the Secretary Of State to decide whether further representations should be treated as a fresh claim. Paragraph 353 of the Immigration Rules provides: "*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 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:*

a) had not already been considered; and

b) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.

17. In WM (DRC) v Secretary of State for the Home Department and Secretary Of State for the Home Department v A R (Afghanistan)[2006] EWCA Civ 1495 in relation to the second limb of paragraph 353 Lord Justice Buxton found that the threshold was "*somewhat modest*".

18. In AK (Afghanistan) v SSHD [2007] EWCA Civ 535 the Court Of Appeal affirmed that the question which the Secretary Of State must ask himself is, *"Whether an independent tribunal might realistically come down in favour of the applicant's asylum or human rights claim, on considering the new material together with the material previously considered*." In WM (ibid) Lord Justice Buxton said that in answering that question the Secretary Of State must be informed by *anxious scrutiny* of the material. This means that the Secretary of State must give proper weight to the issues and consider all of the evidence in the round. Lord Justice Buxton also made it clear that the determination of the Secretary of State is only capable of being impugned on Wednesbury grounds. Lord Justice Buxton said that when reviewing a decision of the Secretary of State the court will ask two questions. First, has the Secretary of State asked himself the correct question? As stated, the question is, in an asylum case, whether there is a realistic prospect of an immigration judge, applying the rule of anxious scrutiny, thinking that the appellant will be exposed to a real risk of persecution on return. Second, in addressing that question has the Secretary of State satisfied the requirement of anxious scrutiny? Lord Justice Buxton concluded that 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.
19. It is the claimant's case that the defendant failed to apply the correct test in considering the claimant's further submissions, asked herself the wrong question and failed to apply anxious scrutiny. The question for the court is whether the decision of 12 August, 2009 was lawful.
20. On behalf of the claimant Miss Brown relied on the country guidance case MB (OLF and MTA – risk) Ethiopia CG [2007] UKAIT 00030. In this case it was concluded that: *"OLF members and sympathisers and those specifically perceived by the authorities to be such members or*

sympathisers will in general be at real risk if they have been previously arrested or detained on suspicion of OLF involvement. So too will those who have a significant history, known to the authorities, of OLF membership or sympathy. Whether any such persons are to be excluded from recognition as refugees or from the grant of humanitarian protection by reason of armed activities may need to be addressed in particular cases."

21. **Did the Secretary of State apply the wrong test or ask the wrong question?** In the course of the letter of 12 August, 2008 the Secretary of State said: "Mr Bezu does not provide any evidence that your client was arrested or detained, or that he was known to the authorities. Therefore his evidence would not create a realistic prospect of success before and immigration judge." Later in the letter it is stated that, "when the hearsay evidence of Mr Amaro is taken in the round along with the adverse credibility findings of Immigration Judge Oakley set out in the appeal determination dated April 2003 and summarised above, that evidence would not create a realistic prospect of success before a further immigration judge." The letter goes on, "the evidence provided in both witness statements, when taken together with the material previously considered in the Secretary of State's decision letter dated the 14 December, 2001 and by the immigration judge at your client's appeal hearing, does not create a realistic prospect of success and would not set aside the decision of the immigration judge to dismiss your clients asylum claim."

22. The Secretary of State said in the letter that, "an immigration judge on a further appeal would have to assess that evidence", (referring to that of the witnesses,) "against the adverse credibility findings of Immigration Judge Oakley. Those findings were comprehensive. Immigration Judge

Oakley disbelieved your client for a number of reasons including the following:

a) the fact that your client made no reference in his SEF questionnaire to being detained in 1995 or being tortured so severely is to have his testicle removed but later made those allegations in oral evidence. Immigration judge Oakley considered it implausible that your client would fail to mention these matters in his SEF questionnaire.

b) The inconsistency between your client's SEF questionnaire and his oral evidence as to who helped him escape.

c) The implausibility that the authorities would take him from detention to an Adventist hospital with a number of OLF sympathisers.

23. It was argued on behalf of the claimant that the defendant does not challenge the credibility of Mr Aramo and Mr Bezu and therefore it follows that the new material cannot therefore said to be, "intrinsically incredible". It is argued that if their evidence is accepted, it at least supports the claimant's account of his and his family's long involvement with the OLF and at best supports the claimant's account of detention in 2000. It is submitted that the material necessarily therefore throws into doubt the correctness of the adverse credibility findings of the adjudicator. Miss Brown argued that applying the *modest test* of whether there is a realistic prospect of an immigration judge, applying the rule of anxious scrutiny, accepting that the claimant would be exposed to a real risk of persecution on return, that the defendant asked himself the wrong question.

24. I reject this submission. The issue which the defendant had to determine did not turn on whether the witness evidence was "intrinsically credible" the question is whether the new material, taken together with the material already considered, would create a realistic prospect of success. Plainly the defendant gave careful consideration to the question as exemplified in the passages quoted in this judgement.

25. Examination of the further material placed before the defendant demonstrates in my judgement that the defendant was right to attach comparatively little weight to it.

26. Mr Aramo had no first-hand knowledge of the claimant's detention. The quality of his hearsay evidence must be taken into account. Mr Aramo's evidence is at best a second-hand report and based in part on what appears to have been speculation on the part of a third party whose credibility cannot be assessed. The witness did not appear to have any evidence, even second-hand, of the cause of the claimant's alleged detention. It is right, as Mr Dunlop argued, that if the claimant was in detention for reasons other than OLF involvement, then he does not come within the MB test. The defendant weighed this evidence against the very clear cogent and logical adverse credibility findings of the adjudicator and concluded that it was not sufficiently strong to create a realistic prospect of success in the light of those credibility findings. It was a stark and compelling omission that the claimant failed to disclose until his oral hearing that he had been detained in 1995 and tortured so severely as to have a testicle removed. The defendant was therefore entitled to place considerable weight on this lack of disclosure and decide that the witness's evidence did not mitigate the implausible elements of the claimant's accounts.

27. The adjudicator had expressly accepted that the claimant may have been involved in OLF activities. The new evidence merely showed that the claimant had been involved with the OLF in a fund raising capacity and that he continued to be involved in the Oromo community in the UK. There was no evidence that these activities are known to the authorities in Ethiopia. Therefore this evidence did not add materially to the evidence before the adjudicator.

28. In my judgement the defendant did ask the right question, and did apply anxious scrutiny to this case; the decision letter of 12 August, 2008 was fully reasoned. It is noted that the defendant has reconsidered the case on three occasions.

29. I have concluded that the decision letter of 12 August, 2008 was lawful. I have however gone on to consider the Namarra report in an endeavour to establish whether, on its face, it adds materially to the claimant's prospects of success in a hypothetical future appeal.

30. Miss Brown on behalf of the claimant sought to draw an analogy with the expert evidence given by Dr Kennes in WM. Seemingly, unlike Miss Namara, who provided no reliable credentials, he was said by the court to be a respected and long-standing expert, in that case on the DRC. In WM Lord Justice Buxton said: "*although Doctor Kennes' evidence is in general terms, and not substantiated in detail, it is evidence of a* type *that*, *because of the difficulties of obtaining information from countries like the DRC, immigration tribunals often do consider*." Granted that, and that the evidence cannot be dismissed as simply implausible, it is impossible to say that an adjudicator could not properly come to the conclusion that the claim is well founded; so the evidence bearing on the case is a matter for the adjudicator, and not for the Secretary of State.

31. It was argued on behalf of the defendant that there was no evidence that Miss Namara came into the same expert category. It was also pointed out that she has a personal connection with the defendant in that they are both members of the OLF in the UK, whereas the court in WM noted that the evidence came from a third party who was assumed not to be influenced by the claimant. In my judgment these are powerful considerations in relation to the significance of this material if it were to be considered by the secretary of state.

32. I have concluded that having considered the Namarra report *de bene esse* that it does not on its face, add materially to the claimant's prospects in a hypothetical future appeal.

33. The application is therefore dismissed.

34. I do not require attendance by Counsel or solicitors at the handing down of this judgment in Birmingham, but I invite written submissions if there are to be applications for any consequential orders. These must be sent to me at the Birmingham Civil Justice Centre no later than 10am on 3rd November 2009. Email is acceptable.