Case No: C4/2010/2063

Neutral Citation Number: [2011] EWCA Civ 193
IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE QUEEN'S BENCH DIVISION
(MR JUSTICE OWEN)
Ref No: CO10212010

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 04/03/2011

Before :

LORD JUSTICE MAURICE KAY, Vice President of the Court of Appeal, Civil Division
LORD JUSTICE MOSES
and
LORD JUSTICE SULLIVAN

- -

Between :

The Queen on the application of MN (Tanzania)	**Appellant**
- and -	
Secretary of State for the Home Department	**Respondent**

- -

Mr Ian MacDonald QC and **Mr Mikhil Karnik** (instructed by **Fadiga & Co**) for the **Appellant**
Miss Joanne Clement (instructed by **Treasury Solicitors**) for the **Respondent**

Hearing date : 21 February 2011

- -

Judgment

Lord Justice Maurice Kay :

1. There was a time when the development of the law by judicial decision progressed at a measured pace and had the appearance of being methodical. Today the pace can be frenetic and it sometimes happens that cases are decided without reference between them because, in the torrent of information, one court is left unaware of what another has decided. Steps are taken to try to ensure that this does not happen but they are not always successful. This appeal is concerned with a recent example.

2. The first issue in this case relates to the test to be applied on an application for judicial review of the refusal of the Secretary of State to treat further representations as a fresh claim pursuant to Rule 353 of the Immigration Rules. Rule 353 provides:

> "When a human rights or an 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."

3. To amount to a fresh claim, the submissions have to be "significantly different from the material that has already been considered". They must also be considered to have "a realistic prospect of success" before a putative Immigration Judge. The consequences are important. If there is a fresh claim, the applicant has an in-country right of appeal to the Tribunal upon rejection of the claim by the Secretary of State. If the Secretary of State refuses to treat the further submissions as a fresh claim, the refusal can only be challenged by way of judicial review. The question then arises: is the challenge limited to *Wednesbury* grounds, albeit on the basis of anxious scrutiny? Or is the judge in the Administrative Court to reach his own decision on whether the further submissions amount to a fresh claim, in particular whether they satisfy the "reasonable prospect of success" test?

4. It is necessary to outline the development of the law in relation to the answers to these questions. The problem first arose before Rule 353 existed in its present form. In *Regina v Secretary of State for the Home Department, ex parte Onibyo* [1996] QB 768, the Court rejected a submission that whether further representations amounted to a fresh claim had to be treated as a question of precedent fact and concluded that the test for reviewing the decision of the Secretary of State was the *Wednesbury* test: per Sir Thomas Bingham MR, at pp 783-785.

5. The next milestone was *WM (DRC) v Secretary of State for the Home Department* [2006] EWCA Civ 1495, by which time Rule 353 had been promulgated. Buxton LJ (with whom Jonathan Parker and Moore-Bick LJJ agreed) trenchantly reiterated the *Onibyo* approach, but added that, whilst the test is one of irrationality, "a decision will be irrational if it is not taken on the basis of anxious scrutiny" (at paragraph 10). He also rejected a submission that the approach should be revisited now that the Nationality, Immigration and Asylum Act 2002, section 94, had enabled the Secretary of State to certify asylum and human rights claims as "clearly unfounded" and the approach to judicial review of a certificate had been expressed somewhat differently in *Razgar v Secretary of State for the Home Department* [2004] AC 368, at paragraph 17, per Lord Bingham:

> "… the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator."

6. Thus, "fresh claim" and the "clearly unfounded" cases were set on different tracks, even though both involved the judicial review of decisions of the Secretary of State which denied an applicant a right or a further right of appeal to the Immigration Appeal Tribunal, as it then was.

7. *ZT (Kosovo) v Secretary of State for the Home Department* [2009] 1 WLR 348, [2009] UKHL 6, was a case in which the Secretary of State had issued a section 94 certificate, after which the applicant had made further submissions. The Secretary of State then maintained her certification. The majority of the Appellate Committee (Lord Hope dissenting) held that the Secretary of State ought to have considered the further submissions under Rule 353 ("realistic prospect of success") rather than section 94 ("clearly unfounded") but that, since the "clearly unfounded" test is more generous to applicants, she would inevitably have come to the same conclusion under Rule 353. It was then held that, on judicial review of the certification, the test was *Wednesbury*, subject to anxious scrutiny, but their Lordships did not speak with one voice on how the test may operate in practice. I shall have to return to what they said. For the moment, I am concerned with the ways in which the Court of Appeal has approached the judicial review of Rule 353 cases after *ZT*. There are two lines of authority.

8. In *AK (Sri Lanka) v Secretary of State for the Home Department* [2009] EWCA Civ 447, the Court was more concerned, in a Rule 353 case, with what their Lordships had said in *ZT (Kosovo)* about the differences, if any, between "clearly unfounded" and "no realistic prospect of success", Laws LJ observing that "these are deep waters" (at paragraph 33). This was but a stepping stone to his lead judgment in *TK v Secretary of State for the Home Department* [2009] EWCA Civ 1550.

9. *TK* had been listed to be heard on 8 October 2009 specifically to address the question of the judicial review test in Rule 353 cases after *ZT* and in the light of some earlier obiter remarks of Sedley LJ in *TR (Sri Lanka)* [2008] EWCA Civ 1549, at paragraph 33, which favoured a move away from the *WM* reiteration of the *Wednesbury* approach. In *TK*, Laws LJ (with whom Wilson LJ and Lord Neuberger MR agreed) in an *ex tempore* judgment held that this Court is bound by *WM* "unless it has been overturned or modified [by *ZT*]" (at paragraph 8). He added:

> "In my judgment, the opinions in *ZT* do not provide binding authority for the proposition that the 'no realistic prospect of success' test in paragraph 353 is one that admits of only one answer, and nor does it provide authority for the proposition that anything other than the *Wednesbury* approach is apt for the court supervision of decisions taken under paragraph 353."

He repeated that view emphatically in a later passage (paragraph 10).

10. Although judgment in *TK* was given on 8 October 2009, the transcript was not approved until 19 February 2010. In the meantime, two other constitutions of this Court had come to the contrary conclusion, apparently unaware of the judgment in *TK*. In *KH (Afghanistan) v Secretary of State for the Home Department* [2009]

EWCA Civ 1354, a Rule 353 case, Longmore LJ (with whom Aikens and Sedley LJJ agreed) said (at paragraph 19):

> "It is now clear from *ZT (Kosovo)* … that the court must make up its own mind on the question whether there is a realistic prospect of success 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 … 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 [immigration judge]."

The judgment contains no mention of *WM*. I infer that it was thought to have been overruled by *ZT*.

11. The final piece of the jigsaw (which, on any view, has some ill-fitting pieces) is *YH v Secretary of State for the Home Department* [2010] EWCA Civ 116, which was heard on 27 January 2010 with judgment handed down on 25 February. The transcript in *TK* was approved between those dates. *YH* had been considered by the Secretary of State and in the Administrative Court on the basis that it was a Rule 353 case but in the Court of Appeal it was common ground that it was really a section 94 "clearly unfounded" case, in the light of *BA (Nigeria)* [2009] UKSC 7. Carnwath LJ (with whom Moore-Bick and Etherton LJJ agreed) appear to have treated the judicial review test for Rule 353 cases and section 94 cases as being the same on the basis that there is no practical difference between decisions being reviewed. Under the headings "In whose shoes?" and "The approach of the court on judicial review", he referred to *WM*, *ZT* and *KH (Afghanistan)* on the basis that they were all confronting the same issue. His conclusion (at paragraphs 18 and 21) was:

> "… subsequent judgments following *ZT (Kosovo)* seem to have shifted the emphasis …
>
> 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."

12. He also made relevant observations (at paragraph 24) on the elusive meaning of "anxious scrutiny". The "subsequent judgments" referred to were his own first instance judgment in *AS (Sri Lanka)* [2009] EWHC 1763 Admin, the judgment of Sedley LJ in *Secretary of State v QY (China)* [2009] EWCA Civ 680 and the judgment of Longmore LJ in *KH (Afghanistan)*. *QY (China)* was a section 94 case. *AS (Sri Lanka)* was a Rule 353 case in which Carnwath LJ expressed sympathy with the *QY* approach but considered himself bound by *WM* in a Rule 353 case where, in any event, the result would have been the same under both tests. *KH (Afghanistan)* was a Rule 353 case decided after judgment in *TK* but, in the circumstances I have described, *TK* was not cited in it.

13. How is this disarray to be untangled in the present Rule 353 case? At first instance Owen J, with far less "assistance" from citation of authority, considered himself bound by *WM* and applied the *Wednesbury* test: [2010] EWHC 1871 (Admin). The first ground of appeal is that he was wrong to do so. Mr Ian McDonald QC submits that the test is now as set out in *YH*. On behalf of the Secretary of State, Miss Joanne Clement submits that *YH* was decided *per incuriam* because *TK* was not cited or considered. My analysis of the authorities is as follows.

14. First, the omission to have regard to *TK* in *YH* seems to me to be immaterial for present purposes. The ratio of *YH* is limited to section 94 cases. Accordingly no question of *per incuriam* in relation to Rule 353 cases arises.

15. Secondly, the clash of recent authorities in relation to Rule 353 cases is really between *TK* and *KH (Afghanistan)*. We have received erudite submissions on the question whether a later decision is *per incuriam* when, at the time of its promulgation, the transcript of an earlier decision has not yet been approved. I tend to the view that the date of the approval of the transcript is not the crucial date. If it were, it would have a potential for uncertainty verging on chaos. If I am right about this, then *KH (Afghanistan)* may be said to have been decided *per incuriam*. However, even if I am wrong, we are left with inconsistent recent decisions of this Court. The first exception to the rule in *Young v Bristol Aeroplane Co Ltd* [1944] 1 KB 718 is that this Court "is entitled and bound to decide which of two conflicting decisions of its own it will follow": per Lord Greene MR, at 729. On this basis I would unhesitatingly follow *TK* because (1) it was identified specifically to address this issue which seems to have been no more than a secondary issue in *KH (Afghanistan)*; (2) I agree with Laws LJ that a careful analysis of *ZT* does not provide authority for the proposition that anything other than Wednesbury is the correct test for review in Rule 353 cases; and (3) to the extent that Longmore LJ in *KH (Afghanistan)* reached the contrary conclusion, he did so on the basis that "it is now clear from *ZT (Kosovo)*". I simply and respectfully disagree that *ZT* bears that reading.

16. Thirdly, to have a differential approach as between Rule 353 and section 94 cases is not illogical. In Rule 353 cases the applicant has already had full recourse to the immigration appellate system. Rule 353 is in the form of an extra-statutory concession. In section 94 cases, the Secretary of State is empowered to deny the applicant access to the immigration appellate system at the outset. A more protective approach to review in that situation is understandable. For my part, I would also consider an assimilation of the tests to be justifiable but, on the authorities, I consider that we are bound to continue to apply *WM* and *TK* in Rule 353 cases.

The facts of this case

17. The appellant is a national of Tanzania now aged 49. She first came to the United Kingdom on 14 January 2000 when she entered with a visa as an overseas student. Once here, she obtained extensions of her leave to remain, the last of which expired on 31 December 2003. In May 2003 she was diagnosed as HIV positive. On 30 December 2003 she applied for leave to remain outside the Immigration Rules on the basis of her HIV status. That application was refused by the Secretary of State on 2 June 2004. She appealed but her appeal was dismissed by an adjudicator on 5 January 2005. The adjudicator concluded that medical treatment for HIV was available in

Tanzania and that the appellant fell far short of the Article 3 threshold. He also found that there would be no breach of Article 8 if she were returned to Tanzania because she would be able to access treatment in Tanzania and her current medication would be available to her there. Upon the dismissal of her appeal, the appellant became an overstayer.

18. The appellant next came to the attention of the authorities on 17 October 2009 when she was arrested on suspicion of motoring offences. Removal directions were set to return her to Tanzania and she was detained in Yarl's Wood Immigration Removal Centre.

19. On 27 October 2009 the appellant made an asylum application, alleging that she was afraid of her deceased husband's family in Tanzania. The Secretary of State refused her application on 23 November 2009. In December 2009 she spent some days in hospital following an overdose of her anti-retroviral medication. She appealed the refusal of asylum to the Asylum and Immigration Tribunal (AIT) but her appeal was dismissed on 23 December 2009. The AIT made adverse credibility findings. An application for reconsideration was refused by the AIT on 30 December 2009 and a further application to the High Court was refused on 15 January 2010. On 16 January 2010 the appellant was assessed by a general practitioner at Yarl's Wood as being unfit to fly but two days later he revised that opinion and said that she was now fit to fly. On 19 January 2010 removal directions were set with a view to returning the appellant to Tanzania on 25 January 2010. On that day, however, the appellant obtained an interim injunction restraining removal. Thereafter permission to apply for Judicial Review was granted.

20. Following the grant of permission to apply for judicial review, on 6 March 2010 the appellant filed further evidence in the form of a report from Professor Cornelius Katona, a consultant psychiatrist. On examination on 4 March he diagnosed moderate depressive symptoms and considered the risk of suicide to be moderate. He considered the depressive symptoms would be likely to worsen significantly in the event of a forced removal and that the risk of suicide would become high if she lost hope of being allowed to remain in this country. He added:

> "[She] would probably be unable to access the specialist care for her depressive illness in Tanzania. As a result her mental condition would deteriorate and she would become increasingly unable to work and support herself … I think it very likely that her worsening depression would also reduce her motivation to obtain antiretroviral medication at all. Without such medication her physical health would be likely to deteriorate catastrophically."

21. The Secretary of State considered the report as "further submissions" pursuant to Rule 353 but by a letter dated 6 May 2010 she again refused to treat them as a fresh claim and she remained intent upon removal.

22. In the letter, the Secretary of State made the following points:

> "Professor Katona's conclusions rely upon an uncritical acceptance of your client's credibility, made in ignorance of

> past findings on this matter by the AIT … he has proceeded to a series of speculative propositions upon your client's behaviour upon return to Tanzania resulting from this, as well as making unfounded assertions that your client would not be able to access treatment in Tanzania …
>
> It cannot … be considered that appropriate treatment is unavailable and inaccessible to your client upon return to Tanzania …
>
> Your client's claimed risk of suicide derives from your client's belief that she will not receive treatment for her HIV in Tanzania … this is not an objectively well-founded fear in the light of the objective evidence that the Tanzanian state is actively involved with NGOs in promoting HIV care in Tanzania …
>
> … Tanzania possesses a psychiatric sector capable of providing your client with the mental health care your client requires to reduce her risk of suicide."

23. In limiting quotation to those conclusions I am forbearing from including reference to the copious objective material and jurisprudence expressly relied upon by the Secretary of State to support her conclusions. Professor Katona, in an impressive CV, does not disclose any knowledge or experience of mental healthcare provision in Tanzania. His distinguished career seems to have been confined to this country, apart from lectures abroad, none of which has been in Africa. I should add that, since the judgment in the Administrative Court, Professor Katona has produced an addendum dated 1 August 2010, the bulk of which appears under the heading "My comments on the Judgment". Mr McDonald accepts that it is irrelevant to our task.

24. On 10 June 2010 the application for judicial review was heard by Owen J in the Administrative Court. The challenge to removal was put on two bases. It was first contended that the appellant had a legitimate expectation that she would not be removed otherwise than in compliance with guidelines published by the British HIV Association. Secondly, there was a challenge to the refusal of the Secretary of State to treat the further representations of 24 January 2009 as a fresh claim. In a judgment handed down on 26 July 2010 Owen J rejected both grounds of challenge. This appeal is now concerned only with the second ground relating to the refusal of the Secretary of State to treat the further representations as a fresh claim.

The issues arising on this appeal

25. The first issue relates to the test to be applied upon Judicial Review of a refusal to treat further submissions as a fresh claim. Owen J applied the *Wednesbury* test. For the reasons I have already set out, I consider that he was correct in so doing. It seems to me that he would also have rejected the challenge if he had concluded that it was for him to form his own view as to whether the appellant would have a realistic prospect of success before an Immigration Judge. In paragraph 40 of his judgment he said:

> "Taking Professor Katona's report at its highest, the case falls far short of the Article 3 threshold. Furthermore the claimed risk of suicide derives from the claimant's belief that she will not received treatment for HIV in Tanzania. That is not an objectively well-founded fear in the light of the objective evidence as summarised [in] the AIT Determination. The objective evidence also demonstrates that Tanzania has mental health facilities capable of addressing her mental health problems, see paragraph 43 of the AIT Determination. Such evidence undermines the unsupported assertion by Professor Katona that she would probably be unable to access the specialist care she needs for her depressive illness in Tanzania."

It is plain that Owen J was himself satisfied that an appeal to an Immigration Judge by reference to the appellant's HIV status and suicide risk would have been bound to fail.

26. The remainder of this appeal is concerned with whether Owen J was correct to hold that the decision of the Secretary of State refusing to treat the further submissions as a fresh claim withstood the *Wednesbury*/anxious scrutiny test.

Was the Secretary of State entitled to find "no realistic prospect of success"?

27. Whatever the shortcomings of her immigration history, it is impossible not to sympathise with an appellant who is not only HIV positive but also afflicted by mental health difficulties. However, it is clear from the authorities that, in both respects and particularly in relation to the issue of suicide risk, the bar to removal is set high.

28. In my judgment, the HIV aspect of the application was always bound to fail. It had been investigated by the AIT only four weeks before the decision of the Secretary of State. The Immigration Judge had concluded that "the objective material shows that medical facilities in Tanzania as regards to both her HIV status and other medical problems … are available on her return to the extent that I do not find it would cause the United Kingdom to be in breach of either Article 3 or 8". To that, the Secretary of State was able to add in her decision letter of 25 January 2010 that the Foreign & Commonwealth Office "have recently confirmed that all HIV medications are provided free of charge by most of the hospitals in Tanzania". The evidence was to the effect that the appellant's HIV was reasonably stable. In short, she came nowhere near being able to satisfy the stringent tests in *D v United Kingdom* [1997] 24 EHRR 423 and *N v Secretary of State for the Home Department* [2005] 2 AC 296. The view of the Secretary of State that the appellant's HIV status afforded her no reasonable prospect of success before an Immigration Judge was one that she was entitled to reach. Indeed, I regard it as having been inevitable.

29. The question of suicide risk has to be considered by reference to the guidance in *J v Secretary of State for the Home Department* [2005] EWCA Civ 629. Dyson LJ, giving the judgment of the court, referred to the established test applicable in foreign cases where Article 3 is in issue. He referred to the speech of Lord Bingham in *Ullah v Secretary of State for the Home Department* [2004] 2 AC 323 at paragraph 24 where he said:

> "… it is necessary to show strong grounds for believing that the person, if returned, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment."

30. In *J* Dyson LJ considered (at paragraphs 26 – 31) that test in the context of suicide risk and propounded six points of amplification. I refer to the third ("in the context of a foreign case, the Article 3 threshold is particularly high simply because it is a foreign case"); the fourth ("an Article 3 claim can in principle succeed in a suicide case"); and the fifth and sixth. The latter two were given prominence in the judgment of Owen J in the present case. Dyson LJ expressed them as follows:

> "30. Fifthly, in deciding whether there is a real risk of a breach of Article 3 in a suicide case, a question of importance is whether the applicant's fear of ill-treatment in the receiving state upon which the risk of suicide is said to be based is objectively well-founded. If the fear is not well-founded, that will tend to weigh against their being a real risk that the removal will be in breach of Article 3.
>
> 31. Sixthly, a further question of considerable relevance is whether the removing and/or receiving state has effective mechanisms to reduce the risk of suicide. If there are effective mechanisms, that too will weigh heavily against an applicant's claim that removal will violate his or her Article 3 rights."

31. In the present case suicide risk had not been raised as an issue before the AIT in December 2009, despite an apparent suicide attempt earlier that month. What struck Owen J as particularly important was that the claimed risk of suicide derived from the appellant's belief that she would not receive appropriate treatment for HIV in Tanzania. As I have said, that was not an objectively well-founded fear. Moreover, there was clear objective evidence that Tanzania has mental health facilities capable of addressing the appellant's mental health problems.

32. In my view, Owen J was entirely correct. The Secretary of State was clearly entitled, bound even, to reject Professor Katona's view about the availability and accessibility of medical facilities in Tanzania in relation to both HIV and mental health. The Professor referred to no objective evidence whereas the available objective evidence had driven the AIT to precisely the opposite conclusion. The assessment of suicide risk by the Secretary of State has to be seen in the context of the appellant's fears about medical facilities in Tanzania not being objectively well-founded. Given the evidence about the availability of treatment, it must follow that the suicide risk is reduced. This is the very territory traversed by Dyson LJ in his fifth principle in *J*. It also overlaps with his sixth principle. These matters were carefully considered by the Secretary of State in her well-reasoned decision letter. Having regard to *J*, she was undoubtedly entitled to come to a decision adverse to the appellant. Whilst suicide risks can never be quantified with exactitude, I know of no case in which, absent a legal flaw, facts on a level with those in the present case have produced a favourable outcome for an appellant. I am entirely satisfied that the Secretary of State was entitled to conclude that an appeal to an Immigration Judge raising suicide risk based

on Articles 3 and 8 would have had no realistic prospect of success, given the evidence and the legal principles established in the authorities to which I have referred. I do not hesitate to say that, if I had concluded that it was for us to come to our own view about these matters, I too would have concluded that an appeal to an Immigration Judge, based on the material that was before the Secretary of State, would not have a realistic prospect of success.

33. I would dismiss the appeal.

Lord Justice Moses:

34. I agree.

Lord Justice Sullivan:

35. I also agree.