CO/8234/2007

Neutral Citation Number: [2008] EWHC 2936 (Admin)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 5 November 2008

B e f o r e:

MR JUSTICE PITCHFORD

Between:
THE QUEEN ON THE APPLICATION OF NENNI

Claimant

v

SECRETARY OF STATE AND THE HOME DEPARTMENT

Defendant

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(Official Shorthand Writers to the Court)

Mr Patrick Lewis (instructed by Fisher Meredith) appeared on behalf of the **Claimant**
Mr David Manknell (instructed by The Treasury Solicitor) appeared on behalf of the **Defendant**

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

1. MR JUSTICE PITCHFORD: This is an application with the permission of the single judge for review of the decision of the Secretary of State of the Home Department to decline to treat representations as a fresh claim under paragraph 353 of the Immigration Rules.

2. The claimant, Abdelaziz Nenni, is represented by Mr Patrick Lewis; and the defendant, the Secretary of State, by Mr David Manknell.

3. The claimant entered the United Kingdom on 6 February 1998 and claimed asylum a month later. He said that he had suffered persecution in his native Algeria and feared persecution and ill-treatment on his return.

4. The asylum application was refused and his appeal was dismissed. He was granted leave to appeal and the matter was remitted to an adjudicator for rehearing. The adjudicator, Mr Talbot, dismissed the appeal in a decision promulgated on 17 March 2003.

5. A further appeal to the AIT was dismissed but the claimant obtained permission to appeal to the Court of Appeal and that appeal was heard on 26 July 2004 and also dismissed.

6. On 14 October 2004 the claimant submitted to the Secretary of State further representations, relying upon evidence obtained from an expert, Mr George Joffé. Those representations were rejected on 9 November 2006. The Secretary of State declined to treat them as a fresh claim. On 18 December 2006 the claimant wrote expressing disquiet that the expert evidence had not been comprehensively addressed.

7. On 10 August 2007 the claimant renewed his application for further consideration, relying on country information.

8. The Secretary of State responded on 15 September 2007 with a further refusal containing a passing reference to Mr Joffé's report. Four days later the claim was issued to which the Secretary of State responded in an acknowledgment of service received by the court on 23 October 2007.

9. Sullivan J gave permission to the claimant to proceed on 7 January 2008, remarking in his observations that the decision letter of 15 September 2007 had arguably failed to engage with the case specific evidence provided by Mr Joffé in his report.

10. As one would expect, the Secretary of State further reviewed her position and on 11 April 2008 through the judicial review unit she issued an 8-page letter descending to particulars of her judgment upon Mr Joffé's report and its implications and her rejection of the assertion of a fresh claim.

11. Thus, I have been addressed by both parties upon the issue whether the decision made on 11 April 2008 was lawfully reached. If it was, then the claimant's recourse to anxious scrutiny of his position is complete. If it was not, then the claimant is entitled to a hearing before an immigration judge.

12. In order to follow the significance of the expert evidence it is necessary to know the background.

13. Before the adjudicator the claimant gave evidence that he was of Berber ethnicity and from Algiers, the capital city of Algeria. He underwent military service between 1992 and 1994. During his service he was approached by two men from the GIA, that is Groupes Islamiques Armés, an armed Islamic opposition to the secular government of Algeria, demanding that he provide a plan of his army base, weapons and other equipment. He reported the incident to his superiors. Following his national service, the claimant returned to civilian life as a security guard. In June 1995 he was arrested on suspicion of involvement in a terrorist attack on his former army base, detained and ill-treated. He was released without charge but in January 1996 he was arrested a second time, this time on suspicion of involvement in a bomb explosion at a bus station near the claimant's home. He was again detained and roughly treated.

14. On release he was required to report to the local police station. When he did he was insulted and accused of being a terrorist. He became depressed and fearful and ceased reporting. His father submitted a medical certificate to the police seeking his release from reporting. While the claimant was away from his parents' home they were visited by the gendarme who told them he was required to continue reporting; if he continued to fail to report he would instead be detained. The claimant fled to the house of a friend in the environs of Algiers about 8 kilometers away. In his statement the claimant said that within several days of fleeing his home he left the country and went to Marseille where he became a stowaway and by that means arrived in the United Kingdom by ship, carrying a French national ID card.

15. The adjudicator in his determination of March 2003 found that the claimant's evidence was basically credible. He did not, however, accept the approach by the two GIA men. This cast doubt on the veracity of his claim to have been the target of specific suspicion. It was more likely, and the adjudicator so found, that the claimant had twice been rounded up in a general sweep and ill-treated.

16. The adjudicator also rejected the initial claim that the claimant had fled to the United Kingdom in fear of the gendarmes. In evidence, the claimant eventually conceded that he had stayed with his friend for some nine to ten months, not, in other words, for a matter of days, and that during three months of that period he had worked openly in his friend's coffee shop. There was, the adjudicator concluded, no question of the claimant being in hiding.

17. As a consequence of his findings of fact, the adjudicator determined that the claimant was not among any category of persons who would be at risk of persecution or Article 3 mistreatment on return to Algeria. Had he been of interest to the authorities he would have been unable to work openly in his friend's café unmolested by the police.

18. The appeal from the AIT to the Court of Appeal also concentrated on risk to the claimant on return to Algeria. Since it was accepted that the claimant had in the past been the victim of ill-treatment, that was evidence of risk on his return. The court examined the AIT's finding that the adjudicator was nevertheless entitled to conclude

that the risk no longer subsisted. The judgment of the court is at neutral citation [2004] EWCA Civ, 1077. Keene LJ, giving the judgment with which the other members of the court agreed, said this:

> "It is beyond doubt ... Both the adjudicator and the IAT in the present case had the past ill-treatment of the appellant very much in mind. They refer to it and they set out the considerations which led them nonetheless to conclude that the appellant would not be at risk in any real sense if returned to Algeria. Those matters can be summarised as being:
>
> (1) The fact that he was not specifically targeted, but was arrested as part of a general round-up after terrorist incidents.
>
> (2) The fact the, although ill-treated while in detention to a degree which breached Article 3, he did not suffer any physical injury on either occasion.
>
> (3) The fact that he was not charged with any offence, but was freed by the authorities after a period of interrogation and detention.
>
> (4) The fact that, even after he ceased reporting to the Gendarmerie in 1997, he remained living in Algiers at a friend's house but not in hiding for something of the order of nine to ten months before leaving the country, and yet experienced no difficulties with the authorities during that time. Indeed, there was no evidence that the authorities were even looking for him during that period.
>
> 23. All those considerations seem to me to be relevant and proper matters for the IAT to have taken into account, alongside the past ill-treatment itself, when assessing whether a real risk to the appellant existed if he were now to be returned to Algeria.
>
> 24. The last of those matters to which have referred seems to me to be particularly pertinent and is indeed part of a larger point, namely that the later of the two periods of detention took place in January 1996 and yet the appellant remained in Algiers for two years before leaving. It is true that for some of that time he was reporting to the police and was verbally abused, but he suffered nothing during the whole of that period that would amount to persecution or to Article 3 ill-treatment. The nine or ten months after he ceased reporting is significant, because of the lack of any interest being expressed in him by the authorities even though he was not in hiding. That passage of time and the attitude [of] the authorities towards him during it were, in my judgment, factors which could properly lead the IAT to conclude that, despite past ill-treatment, there was not a real risk of persecution or Article 3 ill-treatment if he were now returned to Algeria. Such factors can come within the decision-making framework indicated in Demirkaya.

> 25. Moreover, the IAT was entitled to regard that evidence as indicating that the appellant's breach of his reporting requirement would not now give rise to any real risk to him on return. It was open to the Tribunal to conclude that the appellant was not of current interest to the authorities.
>
> 26. I conclude, for my part, that the IAT did not adopt the wrong approach in law to the issues which they had to determine, nor was its conclusion on those issues an irrational one. I can see no error of law in its decision. For that reason I would dismiss this appeal."

19. I now turn to the further representations which followed this judgment. On 14 October 2004 the claimant's solicitors wrote to the Secretary of State a letter enclosing the report of Mr Joffé. Mr Joffé's qualifications to speak as an expert is not in dispute. In their letter the claimant's solicitors wrote, amongst other things:

> "... we believe that the Adjudicator (and the Tribunal and the Court of Appeal) placed too much emphasis on this matter and failed to consider that if Mr Nenni is forced to return to Algeria, he will fall directly into the hands of the authorities and therefore be at risk."

The reference to "this matter" was to the inference drawn by the adjudicator, and subsequently by the tribunal and the Court of Appeal, that the claimant would not be at risk by reason of the fact that he was able to live peaceably 8 kilometers away from his family home immediately before leaving Algeria for the United Kingdom.

20. Having referred to the claimant's instructions and to the general situation in Algeria described by Mr Joffé, his solicitors continued:

> "Most importantly, Mr Joffé explains that Mr Nenni's decision to stop reporting would have been seen, in the eyes of the authorities, as evidence of his involvement in terrorist groups and of evidence that he had probably decided to join them openly and that this would have been recorded on his dossier. He goes on to explain clearly why the local police would have been far too occupied in dealing with the actual violence than finding Mr Nenni, except by sending people to his home, and that they would have anticipated coming across him later.
>
> In Mr Joffé's view, if Mr Nenni was returned to Algeria he would be returned directly to the national authorities and that *'there is no doubt that the border authorities would be aware of his record as a suspected terrorist sympathiser or participant, even if then considered to be of minor importance.'* He goes on to confirm the real risk that Mr Nenni would face when handed over to the border police and, also, if he was able to survive that process, of severe harassment he would face from his local police."

21. The section of Mr Joffé's report which deals with the claimant's personal situation appears at pages 46 to 48 and 50 of his report.

22. Mr Joffé clearly placed reliance on the account given by the claimant in his witness statement even where that account had been disbelieved by the adjudicator for very good reason. However, Mr Joffé also dealt with the interpretation which the police would have placed upon the accepted behaviour of the claimant in ceasing to report, and its probable consequences to his personal safety on return to Algeria. At page 48 of the bundle he said this:

> "Insofar as Mr Nenni had not been demonstrated to be linked to the incidents in the Kouba neighbourhood neighbourhood that he mentions, the police had no interest in holding him but forcing him into the reporting process served both the purpose of isolating him from his suspected collaborators and, perhaps, of identifying who they might be. His decision to cease to report on the fortnightly basis required of him would thus be seen as confirmation that he was involved with terrorist groups and had now probably decided to join them openly.
>
> In other words, although Mr Nenni abandoned reporting to the police out of depression and personal alienation, his action would have been interpreted as confirmation of his true sympathies and this would certainly have been noted on his dossier. At the time, the local police were far too committed to repressing actual violence to direct resources to discovering him, hence the gendarmeri was requested to visit his family home instead. The police would have anticipated coming across him within terrorist groups and would have tried to deal with him accordingly; they would not have been able to carry out a formal search for him.
>
> Were he now to be returned, there is no doubt that the border authorities would be aware of his record as a suspected terrorist sympathiser or participant, even if then considered to be of minor importance. As described below, the very process of obtaining travel documents for him would uncover his dossier and the suspicions and experiences recorded in it. It would be handed onto the border police for them to carry out initial interrogations, with all that that would entail. Even if he were to be able to survive that process, he would then face severe harassment or worse from the local police in Kouba who would also have records of his alleged activities. He would therefore face considerable danger there, both because of his past and because of the new concerns that have surfaced in Algeria since he left."

At page 50 of the bundle, Mr Joffé went on to describe what in his view might happen to the claimant on return:

> "The Algerian authorities could well will be aware of Mr Nenni's expected return as it will be necessary to apply for travel documents for him unless he has a valid passport. If he is successfully returned to Algeria on travel documents obtained from the Algerian embassy in London, the border authorities in Algeria will have been warned of his or her impending arrival because the delivery of such documents is only

> made upon approval from the security authorities in Algiers. It is normal for such persons to be interrogated upon arrival and, if there are grounds for any kind of suspicion, they can be detained in custody. This is the quote 'garde à vue' procedure, usually in Algeria confirmed by a magistrate after twelve days, when it becomes a "mandat de depôt. In practice, the period is often arbitrarily lengthened beyond the twelve days maximum without a magistrate being consulted, since the border authorities, being part of the security system, are effectively unaccountable to the legal authorities."

I should add that it is common ground that the Secretary of State has indeed submitted to the Algerian Embassy a request for travel documents for the claimant, containing his details and the observation by the claimant that the reason for his original entry into the United Kingdom was "problems in country".

23. In her letter of 11 April 2008, the Secretary of State did respond to the contents of Mr Joffé's report. She rightly observed that, in the light of the adjudicator's findings, it was speculation to suggest the adjudicator was wrong to reject the claimant's story about the GIA men. She identified the findings made by the adjudicator which led compellingly to the inference that the claimant was not of current interest to the authorities in Algeria. The Secretary of State appears to have regarded the inference drawn as a complete answer to the evidence of Mr Joffé now being submitted by the claimant. Since the claimant was no longer at risk, he might, at worst, be treated as a failed asylum-seeker, who as a group were not to be treated as a group at risk of persecution or Article 3 ill-treatment (see MM (Algeria Country Guidance) [2003] UKIAT 00089 at paragraphs 14-19.

24. The Secretary of State observed that internal relocation was plainly available as an option, given the claimant's ability to have remained 8 kilometers from his family home unnoticed during the nine to ten months before his departure.

25. Nowhere in the Secretary of State's responses, however, has any attempt been made to address what it seems to me is the central theme of Mr Joffé's evidence, that is the likely fate of the claimant on arrival in Algeria. The conclusion reached by the adjudicator, and explicitly supported by the Court of Appeal, at paragraph 24 of the judgment of Keene LJ, was not the consequence of direct evidence, but of compelling inference from the circumstances as they then appeared to be. The evidence of Mr Joffé presents further circumstances, partly by way of knowledge and partly of opinion, which were not drawn to the attention of the adjudicator. If accepted, they are capable of undermining the inference which, in their absence, could be confidently drawn.

26. The test for a fresh claim under paragraph 353 has been analysed by the Court of Appeal in WM(DRC) v The Secretary of State for the Home Department [2006] EWCA Civ 1495 at paragraphs 4 and 7. The approach I should adopt on review is set out at paragraph 11.

27. It is not now suggested that this material is the same as that already considered. The question for the Secretary of State was, therefore, whether, considered together with the

adjudicator's findings of fact, the new material creates a realistic prospect of success in a further asylum claim.

28. In my judgment, the Secretary of State could not have resolved that question with anxious scrutiny without engaging the merits of Mr Joffé's evidence as I have extracted it from pages 49, 48 and 50 of the bundle.

29. Mr Manknell was driven to concede that she had not addressed that evidence explicitly at any stage.

30. It follows, in my view, that the Secretary of State's refusal to treat the claimant's further representations as a fresh claim was flawed.

31. I have therefore examined the question whether these extracts do present, when considered together with the pre-existing material including the adjudicator's findings of fact, a realistic prospect of an immigration judge himself applying anxious scrutiny, finding that the claimant will be exposed to a real risk of persecution on return.

32. It seems to me that the claimant continues to face real problems. It is one thing to find that the gendarmerie would have been too preoccupied to devote time to find the claimant at his friend's home 8 kilometers away. It is quite another to find that they were so busy they would not have returned to his parents' address to pursue the harassment claimed by the claimant. There is, however, no evidence that the gendarmerie took the elementary step of making further enquiries with the claimant's family. This suggests that the original inference fatal to the claimant's application for asylum will remain unmoved.

33. However, applying as I must anxious scrutiny to the question, the evidence should in my view be evaluated by an immigration judge before any conclusion is reached as to its logical effect.

34. Accordingly, it is my view that the Secretary of State's decision of 11 April 2008 and his previous decisions upon the same subject should be quashed.

35. MR LEWIS: I am grateful, my Lord.

36. MR JUSTICE PITCHFORD: Are there any applications?

37. MR LEWIS: My Lord, there is an application for costs and the relief sought in the application.

38. MR JUSTICE PITCHFORD: Is there any consequential order I need to make?

39. MR LEWIS: My Lord, yes. It is set out in the (inaudible). So it would be:

> "There is a declaration of the defendant's unlawful ----(read to the word)---- claim for asylum and human rights protection."

40. But my Lord that really follows from your question of the decision.

41. MR JUSTICE PITCHFORD: In these cases is it preferable that I don't quash the decision but I make the declaration?

42. MR LEWIS: My Lord I would ask you to quash the decision and then to make the order.

43. MR JUSTICE PITCHFORD: I think Mr Manknell will tell me in a moment what will be the inevitable consequence of my reasons. The only other application would be for costs. I will come back to that.

44. MR MANKNELL: My Lord, in relation to the order it matters not whether it is an order quashing the decision or a declaration that the decision is unlawful. Both probably aren't necessary but either of them would achieve the same end. The practical consequence of the decision will be (inaudible) in court that the Secretary of State will look at the matter again, she will make a fresh decision, but in the light of your Lordship's comments should that decision be negative it will give rise to a right of appeal to the immigration judge.

45. MR JUSTICE PITCHFORD: What I didn't want to do was to make an order which is not necessary. The quashing will be enough.

46. MR MANKNELL: Yes, my Lord.

47. MR JUSTICE PITCHFORD: Now then costs, Mr Lewis. I don't have a schedule.

48. MR LEWIS: My Lord there isn't one. A schedule hasn't been prepared.

49. MR JUSTICE PITCHFORD: Are you publicly funded?

50. MR LEWIS: We are publicly funded my Lord, yes.

51. MR JUSTICE PITCHFORD: So you are seeking an order for costs against the defendant with a detailed assessment if not agree?

52. MR LEWIS: My Lord precisely, yes.

53. MR JUSTICE PITCHFORD: And you want an order that your publicly funded costs also be assessed?

54. MR LEWIS: Yes, that's right, my Lord.

55. MR JUSTICE PITCHFORD: Mr Manknell, did you have a figure to say --

56. MR MANKNELL: I can't oppose an order for the claimant's reasonable costs to be assessed if not agreed.

57. MR JUSTICE PITCHFORD: Then I will make both those orders.

58. MR LEWIS: I am grateful.

59. MR JUSTICE PITCHFORD: I am grateful to you for your help.