Case No. CO/4991/2007

Neutral Citation Number: [2009] EWHC 809 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Date: Friday, 20th March 2009

B e f o r e:

MR JUSTICE PLENDER

- -

Between:
THE QUEEN ON THE APPLICATION OF X (IRAN)

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

- -

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Mr Alasdair Mackenzie (instructed by TRP Solicitors, Birmingham) appeared on behalf of the **Claimant**
Mr Stephen Whale (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

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J U D G M E N T

1. MR JUSTICE PLENDER: This is an application for reconsideration of a claim for asylum made pursuant to paragraph 353 of the Immigration Rules, which 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:
>
> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

2. It is clear from the wording of that paragraph that a fresh claim is to be considered only if two conditions are satisfied cumulatively: first, the fresh claim must be one that has not already been considered and, second, the fresh claim must be one which taken together with material that was previously considered, creates a realistic prospect of success, notwithstanding its earlier recommendation. In the case of WM v Secretary of State for the Home Department [2006] EWCA 1495, Buxton LJ said the term "realistic prospect of success" establishes a somewhat modest standard to be satisfied.

3. In this case, the Secretary of State, when considering the claimant's present submission, came to the conclusion that there was not a fresh claim. I am urged to regard the Secretary of State's decision as one which could be overturned only in the event of perversity and such that no reasonable decision-maker could have reached that result. There is, as will be appreciated by now, a certain tension between that traditional definition of perversity and the somewhat modest threshold described by Buxton LJ. Properly analysed, it seems to me the question that I have to ask is whether the decision of the Secretary of State that the somewhat modest threshold has not been satisfied is a decision which could not properly have been reached.

4. The facts of the case are as follows. The claimant is an Iranian national. He was born in September 1972. He entered the United Kingdom in April 2003. He applied for asylum at once. This was refused by a communication that he received in April 2004. Removal directions were set in May 2004. He appealed in June 2004. His appeal was refused. He was refused permission to appeal to the Immigration Appeal Tribunal in February 2005. There then followed correspondence on a fresh claim in July 2006. It was in the course of this correspondence that the claimant disclosed that he had then but recently been converted from Islam to Zoroastrianism. He applied for judicial review of the Secretary of State's decision by leave granted by Sullivan LJ. Permission was granted and has come before me today.

5. The basis upon which Sullivan LJ granted leave and the basis upon which the claim had been pursued before me are one and the same. It is said that the combination of the

claimant's conversion to Zoroastrianism and his former record of his disaffection with the Government in Iran will in combination expose him to a risk of ill treatment.

6. In support of this argument based on the combination factor, I was referred to FS (Iran) [2004] UKIAT 00303. I must therefore ask whether the combination factor presents a fresh claim and whether the combination factor gives rise to a realistic prospect of success in the event of a fresh hearing.

7. The claimant's disaffection with the Government in Tehran came to light in 1999, when he was engaged in political activities of a relatively minor kind, including having material for which he was subjected to punishment and to a torture, the nature of which has not been disclosed. It is also said there was a further incident in 2002, which led to the Iranian authorities coming to his house and seeking the claimant. The claimant relies upon an arrest warrant which he says was issued for his arrest, although the Adjudicator considering his claim considered that the family would have had the arrest warrant and would have sent it on. The Adjudicator disbelieved the evidence of the incident in 2002 while accepting that of the incident in 1999.

8. It is submitted on behalf of the Secretary of State, firstly, that the claimant has changed his case or, as Mr Whale put it, there has been a shifting of the goal posts. I accept that this is so but do not attach the significance that Mr Whale does. In part there has been a change in the claimant's position simply because there has been a change of circumstances, one of them being, on the claimant's account, a recent conversion to Zoroastrianism. Secondly, the fact the first claim ceased to be presented as the one before us, and is presented attractively, does not itself indicate that the more attractive and later presentation of the case is to be discounted. Secondly, it was submitted for the Secretary of State that it was only on 5th July 2006 that the claimant's conversion was first mentioned. There was no reason to suppose, says Mr Whale, the conversion will come to light in Tehran.

9. Dealing with the first of those issues first, it seems to me that the failure to mention the conversion until 5th July 2006 is not only a point against the claimant. Had the claimant manufactured the allegation of conversion in order to support a false claim to remain in the United Kingdom, one might have expected him to mention it earlier. On the other hand, if he were sensitive to the possible consequences of mentioning his conversion to Zoroastrianism at an earlier date, one might have expected him to maintain a discretion about it until July 2006, as indeed he did.

10. As for the question whether the conversion to Zoroastrianism will come to light in Iran, I have been referred to a passage in the judgment of the Immigration Appeal Tribunal in Secretary of State for the Home Department v FS [2004] UKIAT 00303 at paragraph 159. I think it helpful to read an extract that from paragraph. It reads as follows:

> "We regard it as appropriate to assess the risk to these Appellants on the basis that their conversion would become known to the authorities, to friends, family and colleagues. They will probably be asked why they have been abroad, either when seeking travel documents or on return; they may be asked at some stage in that process about conversion. The

> Secretary of State's reliance on the concept of "taghieh" is not warranted on the evidence about these Appellants. Were they to lie about their conversion and say that it was not genuine, done only for temporal advantage or to deceive the United Kingdom authorities, taghieh might well be relevant; but there is no finding that they would so behave, if returned. We do not regard it as right or sensible, in the absence of a finding of fact to that effect upon the evidence, that it should be assumed that a convert would deny his religion to officials when asked. There are also many later occasions when their religion could well be asked for, eg marriage, civil dispute, or seeking employment..."

11. For the Secretary of State, Mr Whale submitted that there is nothing in that case to support the proposition that as a matter of fact a person's conversion will be discovered by the Iranian authorities. It seems to me, however, that the crucial thing in the present case is not the faith to which the claimant converted but the fact that he converted from Islam and so committed an act of apostasy. It must be for the appellate authority to determine in due course whether and to what extent it is likely that his apostasy and conversion will come to the light of the Iranian authority's investigations.

12. On the question of the claimant's political activities in Iran, I note that there really is no dispute between the parties as to the claimant's arrest in 1999 and his treatment there. I acknowledge that the passage of ten years may in ordinary circumstances strengthen the impression that this claimant is safe, but in the case of the events in 2002 there appears to be on the face of it a misunderstanding by the Adjudicator of the nature of arrest warrants in Iran which may have led the Adjudicator to an error. In any event, it must be recalled once again that what we confront in this case is the argument that the claimant faces ill treatment on the basis of a combination of factors. It is the combination of his conversion from Islam together with his former political activities, which, by his account, may be put together by the Iranian authorities and may cause them to subject him to serious ill treatment, as by his account they have done once already. As Lord Bridge has reminded the courts, in these cases in which one has to predict the possibility of ill treatment by an individual who is to be returned to a country abroad, the court must apply the most anxious scrutiny. To this, as I have observed, Buxton LJ has added that the standard to be met by a person whose claim is to a fresh claim with a realistic prospect of success is somewhat modest. Putting together all the evidence, together with these two standards, I conclude that the claimant has succeeded in this case and the right course is that there should be reconsideration of this case by a tribunal.

13. MR MACKENZIE: My Lord, I am most grateful. In terms of the order that we seek from your Lordship, that is in the claim form at page 3. We invite the court to quash the defendant's decision of 20th March 2007. Obviously that will have to be amended to include the later decision. Sorry, does your Lordship have that?

14. MR JUSTICE PLENDER: Yes, I do not think that my bundle is numbered as yours has been. My page 3 is part way through your skeleton argument.

15. MR MACKENZIE: I am sorry to hear that, my Lord. Does your Lordship have section 6 of the claim form?

16. MR JUSTICE PLENDER: Somewhere in an unruly bundle I probably do. Detailed ground of resistance, I find. Draft order.

17. MR MACKENZIE: Can I hand up a copy? **(handed)**

18. MR JUSTICE PLENDER: An order quashing the defendant's decision. A declaration that the claimant is to be treated as having made a fresh claim. A mandatory order. Well, as you know, Mr MacKenzie, the High Court does not ordinarily grant a mandatory order because the Secretary of State can be relied upon without a mandatory order.

19. MR MACKENZIE: I am sure she can.

20. MR WHALE: Can I just take some instructions on the terms of the order, because obviously the premise that the 8th July 2008 decision should be quashed, subject to anything behind me, seems to be something I cannot quarrel with. As to whether the order should go further than that, may I just take some instructions?

21. MR JUSTICE PLENDER: Yes. It may help if I say that it may be that what Mr Mackenzie really needs is the first and last numbered points: an order that the decision of 20th March 2007 should be quashed and then we come to the question of costs. Mr Mackenzie is probably legally aided and so it may be a question of determining which government department should be billed for this litigation.

22. MR MACKENZIE: Well, I should pause while my learned friend takes --

23. MR WHALE: May I just --

24. MR JUSTICE PLENDER: Yes, do. **(pause)**

25. MR MACKENZIE: My Lord, I think -- sorry. **(pause)**

26. MR WHALE: May I? My Lord, we would just ask that the order quash the -- it is actually the 8th July 2008 decision -- that is the operative one, the most recent one -- and that there be an order that the Secretary of State pays the claimant's costs, subject to anything that might need to be added about Legal Services Commission, and that you do not go any further than that because it will follow from the quashing that the Secretary of State will reconsider the matter and what the court, I am sure, would not want to do, and ought not to do, is tie the Secretary of State's hands.

27. MR JUSTICE PLENDER: Quite right. As I already indicated, a mandatory order against the Secretary of State, as I said, would be most unusual.

28. MR WHALE: Indeed, and between the three of us, and indeed between anybody in the room, we may have a good guess as to what the reconsidered decision will be, but it must be a decision for the Secretary of State.

29. MR JUSTICE PLENDER: It must be, and I am not going to speculate about what it might be but I am going ask the two counsel to agree on the form of order and, if you can agree and get it to me, I shall sign it.

30. MR MACKENZIE: Indeed.

31. MR JUSTICE PLENDER: It will be along the lines we have discussed and it will save me time if you would kindly, between yourselves, draw up the order and satisfy yourselves that there is no disagreement between you.

32. MR MACKENZIE: Indeed, my Lord. Would your Lordship like to receive that this afternoon or can it wait?

33. MR JUSTICE PLENDER: It can wait until Monday morning.

34. MR MACKENZIE: I am grateful. May I simply make one other point, which I perhaps should have made at the outset. It might be advisable for the court, in light of the facts that have come to light in the course of this case, to order that the claimant not be identified by name in any publicly available version of the judgment and therefore perhaps that he should be known as A or as MA.

35. MR JUSTICE PLENDER: Yes. We can call him X (Iran).

36. MR MACKENZIE: Indeed, my Lord.

37. MR JUSTICE PLENDER: X being a cross, of course. I do not know about Zoroastrianism symbolism yet.

38. Thank you both very much for your assistance.