Neutral Citation No. [2009] EWHC 1756 (Admin)

Case No: CO/9937/2008

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

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M3 3FX

Date: Wednesday, 29th May 2009

Before:

HIS HONOUR JUDGE WAKSMAN QC

- -

Between:

FE (ETHIOPIA) **Claimant**

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

- -

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Mr Karnik appeared on behalf of the **Claimant**.
Mr Blundell appeared on behalf of the **Defendant**.

- -

Judgment

His Honour Judge Waksman QC:

Introduction

1. This is a substantive judicial review application in relation to a decision by the defendant, the Secretary of State for the Home Department, to treat further representations made on behalf of the claimant, Mr E, as a fresh claim for asylum under paragraph 353 of the Immigration Rules. Mr E is an Ethiopian national. His further representations are contained in letters from his solicitors dated 19 June and 15 July 2008 and enclosures thereto. The decision letter in question from the defendant is dated 7 October 2008.

2. There are two essential grounds of challenge: (1) the defendant did not apply the correct legal test when considering the further representations; and (2) the defendant's approach to the further material itself and its significance was irrational and/or it did not apply anxious scrutiny.

Background facts.

3. Mr E was born on 6 September 1977 and accordingly is now 31. He came from a region of Ethiopia known as Oromia. The Oromo people constitute the largest ethnic group in Ethiopia. He arrived clandestinely in the United Kingdom by lorry on 3 November 2006 and claimed asylum on 6 November 2006. The defendant refused that claim by letter dated 5 February 2007. On 21 March 2007 an immigration judge, Mr Timson, heard an appeal against that decision. He dismissed it on 4 April 2007. Reconsideration was then refused by the Senior Immigration Judge on 11 May and again by a High Court judge on 25 September 2007.

4. Following the decision letter of 7 October 2008, removal directions were served on 14 October. This claim for judicial review was issued on 29 October 2008. Permission on paper was granted on 21 November 2008 by Charles J. Mr E's removal has been suspended pending the outcome of this hearing.

5. Mr E's claim to asylum was and is based upon his involvement in Ethiopia and now here, in the activities of the Oromo Liberation Front, OLF. The OLF advocates self-determination for the Oromo people. It was outlawed as an organisation by the Ethiopian government in 1992. Since then, thousands of alleged OLF members of sympathisers have been arrested by the state authorities.

6. Armed elements of the OLF continue to operate within Ethiopia and have on occasions clashed with government forces. The latest Country Guidance case is that of MB, a decision of the Asylum and Immigration Tribunal promulgated on 29 March 2007. That tribunal concluded thus:

> "65. As at February 2007, the situation in Ethiopia is such that, in general:-
>
> (a) OLF members and sympathisers;
> (b) persons perceived to be OLF members or sympathisers; and
> (c) members of the MTA;

will, on return, be at real risk if they fall within the scope of paragraph 66 or 67 below.

66. In the case of OLF members and sympathisers, the Tribunal finds that the conclusions in paragraph 17 of HA continue to be supported by the background country evidence. 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 (see paragraph 3.6.10 of the Operational Guidance Note)."

The decision of the AIT in March 2007.

7. The salient points of this decision are set out in paragraphs 7 and 8 of the defendant's skeleton argument. As considerable reliance was placed upon these findings in the decision letter, it is necessary to set them out here. They read as follows:

> "3. The appellant became interested in the OLF in 2003 while working at the Defence Ministry. A friend called [T] persuaded him to become a supporter. He became a member of a cell and attended meetings. In the ministry as an Oromo he was expected to join parties like the OPDO. The appellant did not join the OPDO and realised the authorities were becoming suspicious of him.
>
> 4. In April 2005 he was given declaration to sign saying that he would not join opposition parties. He left the ministry without permission. In June 2006 he received a letter from the ministry concerning those who left the ministry illegally. The appellant kept a low profile. He attended meetings with fellow cell members in a hotel in Addis.
>
> 5. The police raided the meeting in July 2006. He and his fellow cell members were beaten and detained. The appellant was detained for a month and then transferred to Addis Ababa 3rd Police Station. He was accused of spying for the OLF. The appellant's uncle was well connected and on the 8 October 2006 when being taken to the toilet a guard pointed to the door and the appellant after waiting passed through the door and met his uncle.
>
> 6. His uncle arranged for him to hide at his friend's house and arranged for him to leave Ethiopia. The appellant remained there until 16 October 2006 when his uncle bought a man to the house and took him to the Sudanese border… He then travelled by airplane to a country in Europe. He then travelled by lorry to the United Kingdom."

8. At paragraph 17 the Immigration Judge SAID that he had not found the appellant to be a credible witness. The appellant was clear that having worked for the ministry of defence he was under suspicion. He said that he was followed when he was at work. Despite

this, he continued to take information from ministry files and attended OLF meetings. The Immigration Judge said:

> "I do not find it credible that in such circumstances he would be able to carry out his activities without being detained. The appellant had first said that he was not followed personally but then that he was. In any event this appellant's evidence was that his behaviour encouraged such suspicion that the authorities began to follow him in the work place. In such circumstances I do not find it credible that he would run the risk to himself and to his fellow cell members by carrying on with his activities. I further do not find it credible that the authorities felt that he was of such importance to follow him at work would not do so outside his work place."

9. At paragraph 18, the Immigration Judge said that the appellant had said he had would meet cell members in a hotel but he did not find that credible that the appellant would use such a venue. If he knew he was being followed at work and by arranging meetings in a hotel he could potentially be leading authorities to his cell, when he could quite simply have a few guests to his apartment or house. This was:

> "…in my view not at all plausible when set in the context of this appellant's evidence that he was being followed."

He continued::

> "19. I do not find the appellant's account of his arrest and detention at all credible. Not once was he accused of OLF support or membership despite the fact that the agenda of his meetings was in the room when the last meeting he attended was raided. In such circumstances I do not find it credible that he would not once be accused of OLF support.
>
> 20. The appellant's account of his escape is not, in my view, at all credible. His uncle may well have had connections in Ethiopia but it appears the appellant was simply allowed to walk out of prison. Although I accept that bribery may well occur in Ethiopia in view of the fact that the authorities thought the appellant was of such significance they followed him I do not accept as credible that the appellant who was clearly active in a cell would be able to escape with such ease. The authorities were keen to detain the appellant and question him yet it appears that when he came to his detention he could escape with ease.
>
> 21. I do not accept the appellant was engaged in the spying he said he was or that he has any profile in the OLF. I do not accept the appellant had a well-founded fear of persecution for a convention reason or that his rights under the ECHR will be breached if he were returned to Ethiopia."

So his appeal was duly dismissed.

10. It would appear that a report by Miss Lydia Namarra, dated 19 March 2007, was included in the materials placed before the Immigration Judge. See paragraph 19 of the skeleton argument then prepared for Mr E, which is at page 279 of the bundle. That

first report itself is at page 268 to 275. However, no reference is made to it in the Immigration Judge's decision at all. I should add that in support of his appeal Mr E himself provided a witness statement dated 15 March 2007.

11. It can be seen from the extract from the decision of the Immigration Judge recited above that he rejected as untruthful Mr E's entire account of his alleged OLF-related activities in Ethiopia, his treatment by the authorities there and his reasons for escaping. No other live witness gave evidence in his support.

The new materials.

12. The Further Representations letter, dated 19 June 2008, enclosed two documents. The first is what purported to be a letter to Mr E's mother in Ethiopia from the local police dated 26 May 2007. The material parts read as follows:

> "It is to be recalled that you persistently denied knowing anything when we after receiving order from the Addis Ababa Federal Police to search him in his residential district Worejarso, repeatedly asked you for the whereabouts of your son, [Mr E] who had been caught red-handed working with the Oromo Liberation Front and mysteriously escaped from prison later on. Moreover, when we recently visited your house and asked about the whereabouts of your other son, [Mr L E], who is working with the Oromo Liberation Front and wanted for inciting the local people against the government you claimed knowing nothing. However, the Worejarso District Police Station is hereby issuing this last reminder to you to let us know the whereabouts of your two sons who are active members of the OLF. Otherwise we would not take responsibility for a measure which will be taken against you or properties."

There is at the bottom of the document what purports to be the stamp of the Ethiopian Committee in Britain, and a certificate of translation.

13. The second document was a further report from Miss Namarra dated 21 April 2008. It is not necessary to read all of that report. I confine myself to those extracts relied upon by Mr Karnik in paragraphs 46, 48 and 49 of his skeleton argument. They are as follows: in paragraph 7 of the report Miss Namarra states that she is a representative of the OLF in the United Kingdom and reports to the OLF's office in Washington DC, because there is no office in the United Kingdom. The Washington office is run by the Foreign Relations Committee of the OLF. She was elected as a member of the Central Committee of the OLF at the 3rd General Congress of the OLF in December 2004 and assigned to represent the organisation in January 2005.

14. Paragraph 10 of her report says that she, as the OLF representative in the United Kingdom:

> "conducted background checks on [Mr E] through the Washington DC office. They then made enquiries directly to members of the OLF in Ethiopia. I am able to reveal the identities of our sources, as this would put them at risk. Representatives of the OLF in the area which [Mr E] used to reside have confirmed that [he] is an Oromo national and he joined the OLF members' cell in Bishoftu 2003. Since then he was contributing his out most

> to strengthen the Oromo struggle. According to the information received from the same source, [Mr E] used to be [a] devoted and dedicated supporter of the OLF in his area who was actively participated in several secret missions on behalf of the organisation. Based on the information received from the same source, he was playing a significant role in disseminating political information and educating ideas of the OLF. He had a significant contribution in collecting and transferring tangible information to the organisation. As a result the security forces of the Ethiopian government detained, interrogated and tortured him badly. Further more, [Mr E's] brother was well known, respected and loved person in his working and living area. He was also a member of the OLF who actively participated in several clandestine missions of the organisation in Ethiopia.
> It was also confirmed that his brother was taken by security forces, since to date his whereabouts remain unknown."

15. At paragraph 12, Miss Namarra says that:

> "I firmly believe that, he would be known to the Ethiopian authorities because of his activities in the UK, through the Ethiopian embassy in this country, as they always send spies with cameras to our demonstrations and meetings."

16. Then, enclosed with the second Further Representations letter of 15 July 2008 was the third document. This was a statement from a Dr Trevor Trueman, dated 8 July 2008. He is an English doctor who has spent some considerable time in Ethiopia and who last appears to have been there in 1994. He has made a study of the Oromo people of Ethiopia and the OLF among other things. Attached to his statement was a lengthy report on Oromo asylum seekers, itself dated 7 July. Again, it is not necessary to read the whole of Dr Trueman's statement or indeed his report. I simply quote that part which is cited at paragraph 51 of Mr Karnik's skeleton argument where he says that

> "[the applicant's] account is familiar to me and consistent with the several hundred reports I have read from former detainees…. [His] role in helping to support dismissed students was appropriate for that time. About 500 students were dismissed at Addis Ababa university in 2004. …Being made to sign declarations of support for the government is a much used method of threatening individuals…..
> …Police training camps are known to have been used to detain large number of students and demonstrators. The Third Police Station in Addis Ababa is commonly used to detain political prisoners, in my experience, and according to many reports by Amnesty International. Use of a taxi by [the applicant] and his uncle after they had walked some distance from the Third Police Station is not as unlikely as it sounds because of its location within the capital city."

17. I should also record that Dr Trueman says that on 7 July he spoke to a Mr Al-Humaidy, the chairman of the UK branch of the Union of Oromo Students in Europe, affiliated to the OLF, an executive member of the Oromo Community UK, a board member of the UK branch of the Oromo Relief Association and a member of the OLF. He asked Mr

Al-Humaidy "about his acquaintance with [Mr E] and his knowledge of any involvement [Mr E] had with Oromo activities".

18. He later recites information provided to him by Mr Al-Humaidy to the effect that Mr E was indeed active as a student in the United Kingdom in relation to the OLF.

19. He also says, at paragraph 11.2 of his statement that he knew Ms Namarra for 19 years and that she was elected to the OLF Central Committee at the Congress of December 2004 and was then represented as an OLF representative for London in January 2005. She was obviously not independent but her opinion and that of Mr Al-Humaidy concerning the genuine nature of an individual's involvement would command his respect.

The decision letter.

20. The decision letter is a detailed and lengthy document spanning some eight pages. Its material parts are set out below. Paragraph 4 recites in terms the provisions of paragraph 353 of the Immigration Rules and, in particular this passage:

> "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 has not already been considered; and taken together with the previously considered material, create a realistic prospect of success, notwithstanding its rejection."

21. Paragraph 5 of the letter correctly sets out Mr E's claim as being based on his active membership of the OLF, which was said to lead to a well-founded fear of persecution should he return to Ethiopia. It also describes the three documents accompanying the Further Representation letters, which I have cited above.

22. Paragraph 6 accepts that the three documents have not previously been considered but states that, when taken together with the material that had been in the appeal, they would not have created a realistic prospect of success. Accordingly, the issue to be determined by the decision letter was the question of realistic prospect of success and not, in addition, whether the three documents had been considered before.

23. Paragraph 7 of the letter noted the tribunal's findings that Mr E's account was not credible and that it was not accepted that he had ever been persecuted in Ethiopia or would be likely to face persecution on his return. Paragraphs 17 to 21 of the decision of the Immigration Judge, to which I have referred above, were specifically cited. Paragraph 7 then ends thus:

> "For the reasons given below it is not accepted that the evidence you have provided would have led to the AIT reaching a different conclusion."

24. Paragraph 8 of the decision letter dealt with the police report. It stated that the police report was not to be regarded as genuine because the document was of poor quality, its wording was highly suspicious and self-serving and the terminology was not of a kind that would be found in an official police letter. It was also noted that, if the Ethiopian police wanted to take measures against Mr E's mother, they would not give her advance

warning and that the timing of the letter, being a date shortly after the dismissal of his appeal by the Immigration Judge, was also suspicious. Paragraph 8 then ends thus:

> "It is considered that this letter has been produced after these determinations [that is of the AIT], in a deliberate attempt to challenge the findings of the AIT. It is not accepted that this letter would have led to the AIT reaching a different conclusion."

25. Paragraph 9 and 10 then deal in detail with Ms Namarra's report. Paragraph 9 records that a similar report from her, dated 19 March, was submitted to the AIT. I have noted that above, but I interpose here to say that I do not think that its prior submission was of any real relevance. It appears not to have been referred to. It was at that stage based on only one and not two interviews with Mr E and it contains no information obtained subsequently by Ms Namarra from her OLF contacts as to Mr E's OLF-related activities in Ethiopia. That said, paragraph 9 of the decision letter simply records the earlier report. It does not appear to place any reliance upon that fact, and indeed the further report was accepted as new material. However, paragraph 9 ends thus:

> "Notwithstanding this fact, for the reasons given below it is not accepted that this report would have led to the AIT reaching a different conclusion."

26. Given the challenges made to the treatment in the decision letter of Ms Namarra's later report, there is no alternative but to recite large sections from paragraph 10 of the decision letter. The first sentence says that Ms Namarra claims to be a representative of the OLF in the United Kingdom, but there is no evidence to verify this claim. While she claims to have produced an impartial expert opinion, there is no indication why she could be called an expert or what research she has previously undertaken. The fact that she claims to work for an organisation to assist asylum seekers brings her overall impartiality into doubt. It says that Ms Namarra stated that she had been in the United Kingdom from 1985 and, in the light of this, her experience of recent events must have been based entirely on what she has heard from others. I then quote verbatim the next passage.

> "Ms Namarra claims that '[…] after interviewing Mr Demissie [sic] I am convinced that he is an OLF activist. His information and knowledge about the fundamental objective and the structure of the organisation is accurate and fairly extensive.' It is not accepted that simply having knowledge of the OLF structure and organisation serves as proof of OLF activity or membership. Ms Namarra claims to '[…] have conducted background checks on (Mr E) through the Washington DC office. They then made enquiries directly to members of the OLF in Ethiopia. I am unable to reveal the sources, as this would put them at risk. Representatives of the OLF in the area in which Mr Demissie [sic] used to reside have confirmed that [he] is [sic] an Oromo national and that he joined the OLF members' cell in Bisoftu 2003 [sic].' Ms Namarra goes on to state that the 'same source' has confirmed several other aspects of your clients' account. Since the source of this information cannot be confirmed and is therefore not independently verifiable, it cannot be accepted that this information can be taken as evidence of your client's involvement in the OLF in Ethiopia. Ms Namarra claims that your client was 'kicked, punched, arrested and interrogated and

> ill treated throughout his detention in Ethiopia' however it is considered that this account must be based entirely on what your client himself would have told Ms Namarra. This account was found to be not credible by the AIT and it is not accepted that Ms Namarra's report would have led the AIT to make a different finding."

Paragraph 10 then deals with Mr E's activities in the United Kingdom. It noted that political activities here might be a self-serving attempt to add weight to the asylum claim to create a political profile for himself.

27. Finally, the decision letter dealt with Dr Trueman's reports, in paragraphs 11 to 15. Paragraph 11 recites that Dr Trueman had never met Mr E and based his statement on his reading of documents relating to Mr E's case and a telephone conversation with Mr al-Humaidy. Paragraph 11 also made a point that much, though not all, of Dr Trueman's statement consisted of reasons why he considered that the Immigration Judge had come to the wrong decision. It then went on to conclude as follows that

> "For the reasons given below it is not accepted that this statement and report would have led to the AIT reaching a different conclusion."

28. Paragraph 12 stated that, as Dr Trueman had apparently not returned to Ethiopia since 1994, his experience of recent events there must have been based on what he was told by others.

29. Paragraph 13 then dealt with Dr Trueman's points about whether there had been problems in relation to translation, and it went on to say that no statements or amendments were made in relation to any question of interpretation in relation to the appeal hearing, and there was no problem with the standard of interpretation in his case. It was not accepted that there were any problems in the translations of his account and it was not accepted that Dr Trueman's submission could possible have led to the AIT reaching a different conclusion.

30. Paragraph 14 referred to what Mr Al-Humaidy told Dr Trueman about Mr E's OLF activities here. It stated that, while Mr E may have been involved in political activity here, it had no bearing on his activities in Ethiopia, where he had no profile in the OLF. No evidence was submitted to demonstrate that the Ethiopian authorities had any interest in Mr E here due to his political activities here, which themselves may have been self-serving. Paragraph 14 then ends by stating that it was not accepted that Mr E's political activities in the United Kingdom would lead him to face persecution or a breach of the European Convention on Human Rights on return to Ethiopia.

31. Paragraph 15 refers to the report from Dr Trueman about Oromia in Ethiopia and the OLF, but, as the Tribunal found that Mr E had no profile in the OLF, i.e. in Ethiopia, this report was not directly relevant. Once more, it was stated at the end that it was not accepted that it would have led to the AIT reaching a different conclusion. That is all I need to read from the decision letter.

The law.

32. The applicable legal principles relating to the treatment of fresh asylum claims under paragraph 353 are well known and are not in dispute. First, going to the all-important

decision of the Court of Appeal in the case of WM [2006] EWCA Civ 1495, paragraph 6 of the judgment of Buxton LJ, with whom Sir Jonathan Parker and Moore-Bick LJ agreed, reads as follows:

> "There was broad agreement as to the Secretary of State's task under rule 353. He has to consider the new material together with the old and make two judgements. First, whether the new material is significantly different from that already submitted, on the basis of which the asylum claim has failed, that to be judged under rule 353(i) according to whether the content of the material has already been considered. If the material is not "significantly different" the Secretary of State has to go no further. Second, if the material is significantly different, the Secretary of State has to consider whether it, taken together with the material previously considered, creates a realistic prospect of success in a further asylum claim. That second judgement will involve not only judging the reliability of the new material, but also judging the outcome of tribunal proceedings based on that material. To set aside one point that was said to be a matter of some concern, the Secretary of State, in assessing the reliability of new material, can of course have in mind both how the material relates to other material already found by an adjudicator to be reliable, and also have in mind, where that is relevantly probative, any finding as to the honesty or reliability of the applicant that was made by the previous adjudicator. However, he must also bear in mind that the latter may be of little relevance when, as is alleged in both of the particular cases before us, the new material does not emanate from the applicant himself, and thus cannot be said to be automatically suspect because it comes from a tainted source."

33. Paragraph 7 reads as follows:

> "The rule only imposes a somewhat modest test that the application has to meet before it becomes a fresh claim. First, the question is whether there is a realistic prospect of success in an application before an adjudicator, but not more than that. Second, as Mr Nicol QC pertinently pointed out, the adjudicator himself does not have to achieve certainty, but only to think that there is a real risk of the applicant being persecuted on return. Third, and importantly, since asylum is in issue the consideration of all the decision-makers, the Secretary of State, the adjudicator and the court, must be informed by the anxious scrutiny of the material that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution. If authority is needed for that proposition, see per Lord Bridge of Harwich in *Bugdaycay v SSHD* [1987] AC 514 at p 531F."

34. Then in paragraph 11, Buxton LJ said this in relation to the task facing a reviewing court:

> "First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return: see

> §7 above. The Secretary of State of course can, and no doubt logically should, treat his own view of the merits as a starting-point for that enquiry; but it is only a starting-point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind. Second, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? 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."

Ground 1: The wrong test

35. The decision letter cannot be faulted insofar as it recites the words of paragraph 353 on internal page 1. And paragraph 6 concludes that there is no realistic prospect of success, a clear reference back to Rule 353. But in the consideration of the new materials, and as noted above, paragraphs 7-11 each end with the conclusion that it was not accepted that the relevant evidence:

> "would have led to the AIT reaching a different conclusion"

Paragraph 13 ends in a slightly different way.

36. The complaint is that this was not the correct test. The test is whether there is a reasonable prospect of an immigration judge or AIT, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return. It is clear that the words used in the decision letter do correctly place the focus on the view to be taken by an AIT, as opposed to the Secretary of State's own view on the matter. But it is also clear from the context in the relevant paragraphs and how they conclude, that the AIT referred to was not an or any AIT, but the one which had made the original decision and found adversely against Mr E.

37. Every relevant paragraph refers to the finding of the AIT in March 2007 before going on to conclude that the new material would not cause it to reach a different decision. I have already referred to those paragraphs, but as a reminder I refer to the concluding part of paragraph 8, as follows:

> "As previously noted, your client's asylum appeal was dismissed by the AIT on 4 April 2007 and on 11 May 2007 a Senior Immigration Judge upheld the decision of the AIT. It is considered that this letter has been produced after these determinations, in a deliberate attempt to challenge the findings of the AIT. It is not accepted that this letter would have led to the AIT reaching a different conclusion."

38. Mr Blundell reminds me that paragraph 6 of the case of WM states that, of course, the Secretary of State can have regard to how the original AIT viewed the reliability or otherwise of the applicant. So letters such as the decision letter frequently or even usually refer back to the earlier AIT decision if relevant. But I do not think that this feature affects my analysis of how the last sentence of each relevant paragraph of this decision letter is properly to be read, or the significance of its proximity to the earlier reference back to the original tribunal.

39. The hypothesis seemingly intended is reconsideration by the original AIT in the light of the new material. In my judgment that does not set out the correct approach. The correct approach places the emphasis on a fresh decision by a fresh AIT as to whether a real risk of persecution is made out and not a review by the original AIT. The fact that a new hypothetical AIT must of course have regard to the findings as to credibility of the applicant made by the original AIT does not alter the position. The outcome to be considered is not a different decision (itself suggestive of a reference back to the original AIT) but to the fundamental question of a real risk of persecution, which is the basis of the asylum claim.

40. The second problem with the formulation adopted in the decision letter is that it uses the word "would" - but the "realistic prospect" test connotes not certainty or even the likelihood of a different decision as to a real risk of persecution but simply the lesser hurdle connoted by the words themselves "a realistic prospect." It is not a question, as Mr Blundell contends, of taking a single word out of context. The word in question here, namely "would", is used repeatedly and its sense is not, in my view, saved by the isolated use of the phrase "could possibly" in paragraph 13. Nor do I regard the analysis above as treating the letter as a statute or imposing an otherwise too rigorous examination of the words used.

41. Nor are the problems with this formulation overcome by the fact of the reference to paragraph 353 in the initial part of the decision letter. Had the decision letter not sought to elaborate on the words of paragraph 353 at the end of each of the paragraphs referred to above, it could have escaped an adverse finding in this respect if it could otherwise be shown that it was in fact applying the correct tests, even though express mention was not made of the case of WM. But that is not this case.

42. I would add the following by way of further observation. The importance of the decision of the Court of Appeal in WM is clear and well known. It is set out comprehensively and with complete clarity in the latest edition of the Asylum Policy Instructions: see paragraphs 171 to 172 of the bundle. Moreover, in this case, as in many others, the case of WM was specifically referred to in the Further Representations letter of 19 June, and its effect summarised. So it is not as if it is an undue burden or an unfamiliar exercise for those making decisions on fresh claims, such as that contained in this decision letter, to have specific regard to the relevant tests in WM – or indeed to cite them expressly in the decision letter. Of course, I do not suggest for one moment that any decision letter which fails to recite explicitly the tests in WM is therefore bad. There is no authority to that effect. But if in fact they are recited, then it is at least plain, on the face of the decision letter, that regard is being or is purportedly being had to them. Also, and importantly, it acts as a reminder, if reminder be needed, to the decision-maker of the precise exercise which she must undertake in considering whether the further representations made in that particular case amount to a fresh claim. That does not entail reciting the tests at the end of every paragraph. The present decision letter has perhaps been over-assiduous in that regard, which has not helped the defendant here, since the test so often repeated is not the correct formulation, for the reasons given in paragraphs 39 and 40 above.

43. A further argument made on behalf of Mr E in this context is that the author of the decision letter, having made no express reference to the country guidance case of MB,

did not make it clear that the new evidence was being assessed from the perspective of the risk factors set out in that case in the paragraph to which I have already referred. It is true that the MB risk factors are not set out in the letter, but, given the reasons for rejecting the new material, I do not consider that they need to have been. The police report is dismissed as a fabrication. Miss Namarra's evidence on the key question of Mr E's OLF activities in Ethiopia is impugned due to the lack of identification and verifiability of her sources of information, and Dr Trueman's report is impugned because of the limited nature of what he personally could say and also because much of it was a disagreement with the reasons given by the original AIT for rejecting Mr E's appeal. None of those matters suggest that the decision maker did not have in mind or apply the correct country guidance as set out in MB.

44. However, for the reasons given above in connection with the recitation of an incorrect test, I do find that the Ground 1 unlawfulness is made out in relation to the decision letter.

Ground 2: approach to the further material

45. The essence of this ground is that the defendant irrationally, or without anxious scrutiny, rejected the three new pieces of evidence placed before her. I consider first the evidence of Miss Namarra and its treatment in the decision letter.

46. The principal challenge here is to the defendant's rejection of Miss Namarra's evidence obtained from un-named sources, who provided information to the OLF Washington office which was then apparently transmitted to her, to the effect that Mr E was indeed an active member of the OLF in Ethiopia and that he had been arrested, detained and tortured by the authorities there. This was not a question strictly of expert evidence since Miss Namarra's evidence in this regard and the information here was of an entirely factual nature, i.e. the involvement or otherwise of Mr E in the OLF in Ethiopia. If accepted as evidence, the value or potential value of Miss Namarra's evidence in this regard would be as some corroboration of Mr E's account of his involvement in the OLF in Ethiopia. That account, when unsupported by any corroboration, had been rejected by the AIT as not credible, i.e. not to be believed because implausible. It is not suggested that further corroborative evidence, such as that provided by Miss Namarra, could not give rise to a fresh claim. However, the particular corroborative evidence proffered by Miss Namarra was rejected in paragraph 10 of the decision letter as showing Mr E's involvement in the OLF in Ethiopia. The reason given was that the source of information ultimately provided to Miss Namarra was not identified and could not therefor be confirmed and so was not independently verifiable. Powerful points in favour of the defendant's entire rejection of Miss Namarra's statement in this regard have been made before me by Mr Blundell. It is said that, while the anonymity of sources is not at all uncommon in asylum cases, that is usually in the context of general evidence collated by experts or others as to conditions prevailing, in particular, in particular countries by reference to particular groups, from a number of people, but where those people are not identified. Here it is simply evidence about this particular applicant.

47. It is also said that there is a lack of particularity - for example, evidence from Ethiopia in suitably anonymised or adapted for, which could give details of who were consulted in Ethiopia and how, their particular role and their knowledge of this applicant.

48. I see the force of those points, although the point as to lack of particularity is not one specifically relied upon in the decision letter. Miss Namarra's statement was not wholly un-particularised. It referred to enquiries made of persons in the particular area where the applicant was, and refers to his joining a particular cell Bishoftu in 2003. Nor can Miss Namarra's honesty, in terms of what she said, i.e. her position in the OLF and her communication with Washington and the procedure for obtaining information, be simply disregarded. Her position in the OLF was in fact confirmed by Dr Trueman, and there is at least the reasonable question as to why should lie about those matters, assuming, as I think one must, that if a fresh hearing was conducted by the hypothetical fresh AIT, she would attend for cross-examination.

49. I am also somewhat troubled by the dismissal of Miss Namarra's evidence where she had referred to Mr E being kicked, punched, arrested and interrogated. It is said that "this account must be based entirely on what your client himself would have told Miss Namarra." That statement appears in paragraph 11 of Miss Namarra's statement with the initial words "as I pointed out above." The matter is not entirely free from doubt because those specific words do not appear earlier in the statement, but the only paragraph which refers to ill treatment of Mr E is paragraph 10, the whole of which clearly deals with the information that has been relayed to her through the Washington Office and which refers to interrogation and torturing Mr E badly.

50. So it appears that at least that part of the dismissal of the statement by Miss Namarra did not have proper regard to, in fact, what her own statement was saying. That is of some significance because, having made that observation about the source of the remarks about kicking and punching, the decision letter goes on to say:

> "This account was found to be not credible by the AIT and it is not accepted that Miss Namarra's report would have led to the AIT to make a different finding."

51. Given that I have already found that the correct questions were not asked and that the incorrect formulation of the test appears immediately after the crucial question about Miss Namarra's evidence, it does not appear to me that, with regard to the actual analysis of Miss Namarra's evidence on the point of activities in Ethiopia, as it appears in this particular decision letter, there has been the requisite anxious scrutiny. In saying that, I do not intend and do not make any general observations about if, how or when the Secretary of State can impugn evidence on the basis of unnamed sources. That is far beyond my remit and I deal only with this particular decision letter.

52. On that basis, then, there is further unlawfulness on the part of the defendant in relation to the decision letter.

Conclusion

53. In those circumstances the normal course would be to quash the decision letter and/or make the appropriate declaration, and indeed the last paragraph of the judgment of Buxton LJ in paragraph 11 of WM suggests precisely that. I accept nonetheless that I have a discretion in the matter, and that, in an appropriate case, where it could be said with confidence that the outcome inevitably would be the same absent the unlawfulness, the court would not quash the impugned decision because there would be no point. I am not prepared to take that view in this case, given the interrelationship between the

wrong test used and the analysis of Miss Namarra's report as recited in paragraph 10 of the decision letter, which I have also found to be wanting. In the light of those findings I do not consider it necessary or appropriate to deal with the further challenges made in relation to the decision letter's treatment of the police report or Dr Trueman's evidence. However this matter is to be dealt with hereafter, they will no doubt be considered in the context of Miss Namarra's evidence.

54. I would only say this: I note and agree with Mr Karnik's acceptance that, if the police report stood on its own as a piece of free-standing evidence, it would really be very difficult, if not impossible, to challenge, even on the basis of anxious scrutiny, the decision letter's approach to it and its rejection of that letter as not genuine. And as far as Dr Trueman is concerned, I cannot see how his evidence -- where it is no more than a simple disagreement with a conclusion of the Immigration Judge -- can properly be read as supporting evidence for an applicant given the refusal of reconsideration of the Immigration Judge's decision. Furthermore, his evidence obtained through Mr Al-Hamaidy about Mr E's activities here with the OLF could not, without more, take the applicant very far, given the clear test laid down in MB where the focus is clearly on activities in Ethiopia. The question of activities in Ethiopia is obviously the key question in this case. Beyond making those further observations I do not think it wise to go. I will now hear counsel on the question of relief and any consequential matters. Mr Karnik, I think you first probably.

MR KARNIK: There is an order seeking relief at page 3 of the bundle.

HIS HONOUR JUDGE WAKSMAN: Yes.

MR KARNIK: In essence, however, with a quashing of the decision, in my submission it probably is inappropriate to go further than that in that…

HIS HONOUR JUDGE WAKSMAN: Well, sometimes the view is taken if it has been impugned, it is simply accepted that it should be regarded as a fresh claim and that then allows an income to right of appeal. Now, I don't know what Mr Blundell's position is on that.

MR BLUNDELL: Well, in my submission, given your Lordship's particular comments about the flaws in this decision letter, my submission would be that that would be going too far. What your Lordship has, it seems to me, effectively highlighted are flaws in process by which the Secretary of State purported to exercise anxious scrutiny, and indeed applied the WM test. In those circumstances the appropriate relief, I would say, would be the quashing order, as my learned friend suggests. I cannot object to that.

HIS HONOUR JUDGE WAKSMAN: No.

MR BLUNDELL: But certainly not any form of declaration if it is a fresh claim.

HIS HONOUR JUDGE WAKSMAN: I think Mr Blundell's observations have force, Mr Karnik, and it seems to me what you are about to suggest to me anyway was that one could not go beyond quashing.

MR KARNIK: Given your final remarks, I am struggling to go much further.

HIS HONOUR JUDGE WAKSMAN: I think you are. All right. Well, on that basis, then, does it follow then that any substantive order that I make is simply to quash the decision letter?

MR KARNIK: Yes, my Lord.

HIS HONOUR JUDGE WAKSMAN: Then, right. Now, there was an injunction in place suspending removal. The immediate ground for removal has effectively gone, at least for the moment, because of the adverse decision letter has gone. So what do counsel want to say about that?

MR BLUNDELL: In a straightforward asylum claim such as this, whilst further consideration is being undertaken, it is the normal course that there is no threat of removal…

HIS HONOUR JUDGE WAKSMAN: I am not sure you can even do it actually. I don't think you can. Once a decision letter is quashed … it would be fairly unusual to remove him in the meantime. So then one is back to the usual position, which is that a decision letter will be issued and then at some point If the letter was adverse) removal directions would be given unless there was going to be some further challenge.

MR BLUNDELL: My instructions are that we wouldn't and couldn't remove at this stage. The injunction can be lifted and we simply won't remove.

HIS HONOUR JUDGE WAKSMAN: I think that must be right in the light of the relief granted. The injunction will go. Right.

MR BLUNDELL: There is one other matter.

HIS HONOUR JUDGE WAKSMAN: Yes.

MR BLUNDELL: At the start, and perhaps in your judgment, you noted that it would be anonymised, perhaps inadvertently, but as a result of also reading through the evidence, the claimant's name, full name, has found its way thoroughly into your judgment.

HIS HONOUR JUDGE WAKSMAN: Well, I think the answer to that is that, insofar as there is to be any transcript of the judgment, that can be put right. Do I need to say anything more than that? I don't think so, given the rather empty court at the moment.

MR BLUNDELL: Yes.

HIS HONOUR JUDGE WAKSMAN: There is a lady at the back but I am sure she is not about to broadcast it to the world. All right. Well, thank you for reminding me about that and I shall of course pick that up. The transcript should refer to Mr E. Right. Now, what's next?

MR KARNIK: The matter of costs.

HIS HONOUR JUDGE WAKSMAN: Yes.

MR KARNIK: Our client is legally aided in this matter. A detailed assessment perhaps.

HIS HONOUR JUDGE WAKSMAN: You want your costs, first of all.

MR KARNIK: Indeed, my Lord.

HIS HONOUR JUDGE WAKSMAN: Yes, right. Well, let us deal with the question of costs in principle first. Yes, Mr Blundell.

MR BLUNDELL: My Lord, I certainly don't object to the principle of costs. My learned friend is entitled to that.

HIS HONOUR JUDGE WAKSMAN: Yes.

MR BLUNDELL: I think if he is legally aided it would have to be detailed assessment anyway. We have not sent schedules.

HIS HONOUR JUDGE WAKSMAN: It has to be. I don't think we can do anything else.

MR BLUNDELL: Yes.

HIS HONOUR JUDGE WAKSMAN: So the second order I make then is that the defendant shall pay the claimant's costs of the application for judicial review to be the subject of a detailed… Are we even able to agree costs?

MR BLUNDELL: I think I can only agree with the principle. I don't think I can agree an amount.

HIS HONOUR JUDGE WAKSMAN: So I will say subject to a detailed assessment.

MR BLUNDELL: Yes.

HIS HONOUR JUDGE WAKSMAN: Now, is there anything else?

MR BLUNDELL: I think it only remains for me to stand up at this stage. My Lord, I do ask for leave to appeal in this case. Really on a point of principle. Obviously I have to demonstrate one or two things; either there is a real prospect of success or some other important point.

HIS HONOUR JUDGE WAKSMAN: Yes.

MR BLUNDELL: Can I take the latter point first. My Lord, in my submission there is an important point of principle that arises from your Lordship's judgment. I am at a slight disadvantage given I do not have any written form in front of me, but from the note I took, and with the very greatest respect, it does seem to me that your Lordship's judgment does open and widen the WM test somewhat, and its application in terms of the approach to the wording used by the Secretary of State in this decision letter, and indeed the wording that is often used, and also as with regard to your Lordship's observations about the failure to reference WM and whether or not there was an excess of assiduousness. These are common features in decision letters of the Secretary of State in many cases where there is found to be no flaw and, whilst I do not seek to

suggest that that means your Lordship is necessarily wrong about there being a flaw here, it is a more fundamental, deeper-lying question of principle that is at issue here, and in my submission that is a point on which the Court of Appeal should be entitled to examine.

My Lord, the second point, and for obvious reasons I will deal with far more briefly, is that I do say really flowing from that there is a realistic prospect of success. All I will say on that argument is that the reasoning of the Secretary of State, in my submission, in the context of the case, was reasonable here and it did display anxious scrutiny. I fully appreciate the judgment that your Lordship has just given and I don't push that any further.

HIS HONOUR JUDGE WAKSMAN: Yes, just go back to the first.

MR BLUNDELL: Yes.

HIS HONOUR JUDGE WAKSMAN: Apart from this question of my observations about making reference to WM, what did you say was the widening of the WM test?

MR BLUNDELL: I think I said it was a widening and opening out of the WM test, given the observations about the use of the word "would", and also the comments about the fact that this letter perhaps was overly assiduous in repeating the formula at the end of each paragraph. In my submission that is not a point to take against the Secretary of State, but one indeed in her favour. It is a common feature in these kinds of letters. If this is a flaw then it is flaw that, in my submission, is going to affect an awful lot of cases beyond this one, and if it is serious matter then the logical point of the Court of Appeal should be invited to express an opinion.

My Lord, if you are not with me on leave to appeal, can I effectively have my cake and eat it and ask for an extension of time to 21 days after the final delivery or finalisation of the written transcript for this case. Obviously it is matter that I think the Secretary of State will want to consider a little bit more fully before going to the Court of Appeal if that is necessary. Indeed, even if your Lordship were to grant leave I think we would have to file an appellant's notice and I would be grateful for the extra time if that is the case.

HIS HONOUR JUDGE WAKSMAN: Well, you are going to have to apply to the Court of Appeal for leave. I will supply you with the form stating the reasons for refusal, and if you wait, it can be done today, but in essence I do not accept that my judgment has in any way widened or opened up the test set out in WM. I made observations to the usefulness for making reference to that decision. I expressly stated that that was not something that was a matter of law and indeed there was no authority to that effect, and equally, my observations about being over-assiduous cannot be read as meaning that this was something that was bad in law or on the other hand something that had to be done in every case.

I will not grant you permission, but do you want to say anything about the extension of time Mr Karnik?

MR KARNIK: (Inaudible)

HIS HONOUR JUDGE WAKSMAN: All right, so the time to serve notice of appeal, and of course the application for permission goes at the same time, will be 21 days from receipt by the Treasury Solicitor of an approved transcript. Now, in that regard what would be actually be very useful from both of you would be copies of your skeleton arguments electronically, because there are chunks of both of them that I have recited it and it would save the parties that do the transcribing an enormous amount if they could have them simply put in. In that regard can I just give both of you details of my judicial email address, and I am more than happy for you to simply send them to me and then I can have them to deal with them. Right. Now, is there anything else? Thank you both very much indeed for your extremely helpful oral and written submissions and, as I say, an approved transcript will be produced in due course.

Order: Decision of the Defendant made in the letter dated 7 October 2008 is hereby quashed. Defendant to pay claimant's costs.