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Case No: CO/11423/2008

IN THE HIGH COURT OF JUSTICE
ADMINISTRATICE COURT OFFICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

28th September 2009

B e f o r e :

MR. TIMOTHY CORNER PC
(Sitting as a Deputy Judge of the High Court)

Between:

The Queen on the application of YN	**CLAIMANT**
Secretary of State for the Home Department	**DEFENDANT**

Allan Briddock (instructed by Beeman Solicitors) for the Claimants

Matthew Barnes (instructed by the Treasury Solicitor) for the Defendant

Hearing date: 5th October 2009

HTML VERSION OF JUDGMENT

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Mr Timothy Corner, QC:

INTRODUCTION

1. This claim was brought as a challenge to the decision of the Defendant ("the Secretary of State"), contained in a letter dated 20th November 2008, not to treat the Claimant's representations as a fresh claim pursuant to paragraph 353 of the Immigration Rules. Following the submission of further evidence, that decision was reviewed and confirmed in a decision letter dated 12th March 2009. It was agreed before me that the letters of November 2008 and March 2009 should be read together and treated as one decision, and the claim treated as a challenge to the decision as contained in both letters.

BACKGROUND

2. The Claimant is a national of Cameroon. He was born on 1st January 1976, arrived in the United Kingdom on or about 9th May 2005, and claimed asylum on the same date

on the basis of his membership of and activities for the Social Democratic Front ("SDF"). The Secretary of State refused the claim for asylum.

3. That decision was upheld by the Adjudicator in a determination dated 28th July 2005.

4. The Claimant's case as reported by the Adjudicator was that the Claimant jointed SDF in 1993, and was an activist. In 1998 he was arrested for handing out publicity, and beaten and tortured before release. He then became involved with a consumers group, ASS, and participated in demonstrations against the government, before fleeing first to Chad and then to Libya. The Claimant said he returned to Cameroon in 2002, and was told that his brother Alphonse, an SDF local councillor, had been killed. This could not, according to the Claimant, have been an accident.

5. The Claimant said a warrant for his arrest had been issued. He continued his political work, and in 2003, organised a large demonstration. He arranged for a CD of SDF material to be distributed as a consequence of which he was arrested, imprisoned, and badly treated.

6. On 16th January 2005, the Claimant said, a break-out took place from his prison. A friend took the Claimant to Douala airport, and he left Cameroon without difficulty.

7. The Claimant called a Mr Kemta in support of his case before the Adjudicator.

8. In his decision the Adjudicator found that the Claimant was not credible, giving 11 separate reasons, and concluding at paragraph 30 as follows;

   " I have given consideration to whether, despite certain exaggerations, there may still be a truthful central core to the appellant's case, but looking at this case in the round, there are so many unrealistic, implausible, and unreliable matters... that I find this not to be the case."

9. In particular, the Adjudicator refused to accept that the Claimant was an SDF activist. Further, he rejected the Claimant's evidence about the death of his brother, and stated (see paragraph 29 (e)) that he was not prepared to place any weight on the suggestion that the Claimant's brother was killed for political reasons. The Adjudicator said (paragraph 29 (h)) that if the Claimant had been an escaped political prisoner, he did not think it likely that he would have been able to leave through Douala airport without problems. The Adjudicator said that the fact that the Claimant was prepared to demonstrate outside the Cameroonian embassy "does not indicate to me that he has any fear of the Cameroonian authorities" (see paragraph 29 (k)).

10. On 12th May 2008 the Claimant made further representations to the Secretary of State, on the basis of evidence that had been obtained for the purposes of responding to the Adjudicator's findings on the Claimant's credibility. The Secretary of State responded by a letter dated 20 November 2008, refusing to treat the further representations as a fresh claim.

11. These proceedings were issued on 26th November 2008. Permission was refused on the papers by Beatson J on 17th December 2008, and the application was renewed by Grounds of Renewal dated 23rd December 2008. Following an adjournment of the oral hearing on 4th March 2009, further documents were submitted by the Claimant, to which the Secretary of State responded in a letter dated 12th March 2009, maintaining his refusal to treat the Claimant's representations as a fresh claim. Permission was granted by Mr Stephen Morris QC, sitting as a Deputy High Court Judge, on 18th March 2009.

THE LAW

Claims for asylum, and Article 3

12. The definition of a refugee for the purposes of the Refugee Convention is contained in Article 1A (2) as applied by the 1967 Protocol, as follows;

    "..owing to a well founded fear of being persecuted for reasons of race religion nationality membership of a particular social group or political opinion, is outside his country of nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence.. .is unable or, owing to such fear, is unwilling to return to it."

13. The standard of proof is whether there is a "real and substantial risk" or a "reasonable degree of likelihood" of persecution for a Refugee Convention reason (see R (Sivakumaran) v Secretary of State [1988] AC 958.

14. Article 3 of the European Convention on Human Rights provides that

    "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

15. The test to be applied by the Tribunal is whether substantial grounds have been shown for believing that the person concerned faces a real risk of being subjected to torture or inhuman or degrading treatment or punishment in the country to which he is returned (see Vilvarajah v UK (1991) 14 EHRR 248).

16. The Asylum and Immigration Tribunal ("the AIT") considered the risk posed as a result of membership of the SDF in FK (SDF member/activist-risk) Cameroon CG [2007] UKAIT 00047, and concluded that

    "In the light of the evidence currently available, membership of or actual or perceived involvement with the SDF at any level is unlikely by itself to give rise to a real risk of persecution but some prominent and active opponents of the government in Cameroon may depending on their particular profile and circumstances continue to be at risk."

Fresh claims

17. An application of this nature made by a person within the jurisdiction is governed by paragraph 353 of the Immigration Rules which provides

    "When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules 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."

18. In considering the second limb of paragraph 353 (ie whether or not the further submissions taken together with the original submissions provide a realistic prospect of success), the court has held that the test is "somewhat modest" (per Buxton LJ at

paragraph 7 of WM (PRC) v Secretary of State for the Home Department and Secretary of State for the Home Department v AR (Afghanistan) [2006] EWCA Civ 1495.

19. Buxton LJ said at paragraph 7;

"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... .the adjudicator 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 "

20. Buxton LJ continued at paragraph 11 to say that when reviewing a decision of the Secretary of State the Court will ask two questions. First, has the Secretary of State asked the correct question, namely whether there is a realistic prospect of an immigration judge, applying anxious scrutiny, concluding that the applicant will be exposed to a real risk on return; and secondly, whether in addressing the first question, both in respect of his evaluation of the facts and his legal conclusions, the Secretary of State has himself applied anxious scrutiny. Buxton LJ went on to say (see paragraphs 16-18) that the Court should not substitute its own view for that of the Secretary of State as part of the review process, and that it would be entirely possible for a court to think that the case was arguable but to accept nonetheless that it was open to the Secretary of State to think otherwise.

21. In ZT (Kosovo) v Secretary of State for the Home Department [2009] UKHL 6 Lord Phillips of Worth Matravers gave guidance about cases either under rule 353 or section 94 of the Nationality, Immigration and Asylum Act 2002 (where the question is whether a claim is clearly unfounded). He concluded (see paragraph 20) that there is no significant difference between asking whether a claim was clearly unfounded or whether it had realistic prospect of success. It is in that context that one reads paragraph 23;

"Where, as here, there is no dispute of primary fact, the question of whether or not a claim is clearly unfounded is only susceptible to one rational answer. If any reasonable doubt exists as to whether the claim may succeed then it is not clearly unfounded. It follows that a challenge to the Secretary of State's conclusion that a claim is clearly unfounded is a rationality challenge. There is no way that a court can consider whether her conclusion was rational other than by asking itself the same question that she has considered. If the court concludes that a claim has a realistic prospect of success when the Secretary of State has reached a contrary view, the court will necessarily conclude that the Secretary of State's view was irrational."

22. Lord Hope considered (paragraph 46) that there was a difference between the questions whether a claim is clearly unfounded and whether it has realistic prospects of success. So far as the "scrutiny issue" was concerned, Lord Hope accepted "as at present advised" (see paragraph 51) the approach of Buxton LJ in WVL, and emphasised in the context of a section 94 claim that the court's function was essentially one of review, as opposed to appeal. Lord Carswell (see especially paragraph 65) agreed with Lord Hope on the "scrutiny issue".

23. Lord Brown of Eaton-Under-Heywood considered the Court's approach in a judicial review of a section 94 certification or of a refusal to accept that further submissions amounted to a fresh claim. He said at paragraph 72

"I entertain no doubt that the correct approach is that conventionally adopted in a judicial review challenge: *Wednesbury* (with, in the present context, anxious scrutiny). It by no means follows, however, that there is any material difference between this approach and that of an appellate court, when, as here, the issue ultimately before the court is: could the AIT on appeal possibly have allowed the claim? To that I shall return."

24. Lord Brown then agreed with Lord Phillips (see paragraphs 73-74) that there is no significant difference between asking whether a claim is clearly unfounded or whether it has realistic prospects of success. At paragraphs 75 and 76 he went on to say that "in this particular context" there is no material difference between a "supervisory and an appellate jurisdiction", and stated therefore that he agreed with what Lord Phillips had said at paragraph 23 of his opinion.

25. Lord Neuberger agreed with Lords Hope and Carswell that the "realistic prospect" and "clearly unfounded" tests could produce different answers (see paragraph 81). In relation to the proper approach to be adopted by a court to a challenge of a certification that a claim is clearly unfounded or that it has no realistic prospect of success he said

"82... As we are in Convention territory, it appears clear that the correct test is, as Lord Brown says, the normal judicial review test, with the addition of anxious scrutiny

83 However, for the reasons given by Lord Phillips, it seems to me that, where there are no issues of primary fact, application of this test will normally admit of only one answer, and a challenge to the Secretary of State's decision will normally stand or fall on establishing irrationality. Accordingly, I agree that if, in a case where the primary facts are not in dispute, the court concludes that... .a claim has 'some reasonable prospect of success', it is hard to think of any circumstances where it would not quash the Secretary of State's decision to the contrary. However, I would again be reluctant to suggest that there is a hard and fast rule to that effect."

26. In R (Theivendran Mohan) v Secretary of State [2009] EWHC 1949 (Admin) I had to consider the test to be applied by the court to a fresh claim case. In that case there was no dispute as to any of the primary facts. It was common ground in that case that, in the light of the guidance in ZT (Kosovo) to which I have referred, I had to decide, applying anxious scrutiny, whether the Claimant would have a reasonable prospect of success on appeal, and that if I decided that he would have such a prospect, the Secretary of State's decision must fail.

27. In the present case there is dispute about primary facts. The parties differed as to the approach to be followed by the Court.

28. The Secretary of State's approach in counsel's skeleton argument, and maintained at the hearing, was that because there was a dispute about the relevant facts, the test which I must apply was whether the view of the Secretary of State that the further submissions, taken together with the previously considered material, did not create a realistic prospect of success for the Claimant, was irrational or "Wednesbury unreasonable", bearing in mind the need for anxious scrutiny.

29. At the hearing, Mr Briddock for the Claimant, who had been instructed only the day before, but who throughout argued his client's case with both rigour and moderation, initially accepted that approach. However, he later indicated that he wished to argue that I should adopt the same approach as in Mohan-ie, myself to consider whether the Claimant had a reasonable prospect of success, as the route to deciding whether the Secretary of State's decision was flawed.

30. I therefore adjourned the hearing for counsel on both sides to make

submissions in writing. In his written submissions Mr Briddock relied on ZT (Kosovo), and submitted that the test was the same whether or not there was a dispute about the primary facts. He said that whether or not there was such a dispute, the role of the Court was simply to ask itself whether or not the fresh representations stand a realistic prospect of success. In deciding that, any dispute of fact would be a factor which the Court must examine.

31. My attention was drawn on behalf of the Secretary of State to a recent Court of Appeal case concerning paragraph 353, R (AK) (Sri Lanka) v Secretary of State [2009] EWCA Civ 447. In that case the Court appears from paragraph 35 to have proceeded on the basis that where there was a dispute as to the facts, the issue was whether the Secretary of State could reasonably take the view that there was or was not a realistic prospect of success.

32. R (AK) (Sri Lanka) v Secretary of State was itself referred to in R (QY) (China) v Secretary of State [2009] EWCA Civ 680. That was a section 94 case, in which the lead judgement was given by Sedley LJ. Sedley LJ considered the issue of the standard of review in certification cases at paragraph 7 onwards. He dealt with ZT (Kosovo), and, having quoted the opinions of Lords Phillips and Brown at paragraphs 23 and 73 of that case said

"10 Of the other members of the Committee, Lord Neuberger (83) Lord Hope (53-55) and Lord Carswell (58) took a similar but more flexible position. All, it seems to me with respect, considered that because of the essentially forensic character of the judgement he has to make, the court is generally as well placed as the Home Secretary and so, at least where there are no issues of primary fact, can ordinarily gauge the rationality of a certification decision by deciding whether it was right or wrong.

11 It may be that it was because Mr Drabble QC, for the respondent, was seeking a result that would allow him to reopen the primary facts (though not before us) that Mr Dunlop for the Secretary of State took the stand he did. But in the present case there was no call for it. The practical effect of ZT (Kosovo) is that judicial review in a 'pure' certification case like the present is akin to review for error of law.

12 To their Lordships' reasons for adopting this position I would respectfully add another which seems to me important. It is that in making a certification decision the Home Secretary acts as judge in his own cause, because to certify a claim when rejecting it is to render an appeal against the rejection extremely difficult to pursue. This too would seem to call for close judicial scrutiny."

33. Sedley LJ continued at paragraph 14;

"Since the above passage was drafted the decision of a different constitution of this court in R (AK, Sri Lanka) v Home Secretary... .has come to our attention. While it does not respond in quite the same terms as we have done to ZT (Kosovo) it is a decision on Rule 353. We have therefore not considered it necessary to invite further submissions in the light of it."

34. Finally, Sedley said, under the heading "Is fresh evidence admissible?" the following;

"15 the fact that members of the House in ZT (Kosovo) reserved the possible need to respect the Home Secretary's primary fact-findings is, however, a reminder that a certification challenge is still by way of judicial review. It ought logically to fasten only upon the same materials as the Home Secretary had, or (I would accept) ought to have had, before her when deciding whether to certify."

35. I do not accept Mr Briddock's submissions summarised at paragraph 30 above. It seems to me that the reasoning of the majority of the House of Lords in ZT was to the effect that the proper approach of the Courts in paragraph 353 cases is on the basis of traditional grounds of judicial review, subject always to the requirement of anxious scrutiny. No member of the House of Lords in that case suggested that the Court's function in a paragraph 353 case was appellate, rather than supervisory.

36. Their Lordships did deal with cases where there was no dispute as to the facts. In such cases, Lord Phillips and Lord Brown considered that the Court can as part of the review process ask itself the same question as the Secretary of State, and rely on that answer to decide any challenge to the Secretary of State's decision. Lord Neuberger was of the view that this would "normally" be the case, but that there should be hard and fast rule to that effect. However, in any event, these views were based on the premise that there was no dispute as to primary facts. There is, it seems to me, no basis for an applying an approach other than that usually taken in judicial review to a case where there *is* such a dispute. Such an approach would in my view be to depart from the usual public law principles whereby it is for a public body to analyse facts and reach its own decision, with the function of the Court being limited to that of review.

37. I do not consider that the QY case requires a different view to be taken. The court in that case acknowledged the distinction made in ZT (Kosovo) between cases where there was and was not a dispute about primary fact. In any event, QY was a case under section 94, not paragraph 353, a distinction recognised by the court in QY at paragraph 14. Nevertheless, it does seem to me that Sedley LJ's reasons for applying "close judicial scrutiny" to QY apply also in a case such as the present, and I have sought to apply such close scrutiny to my consideration of this case.

38. The case of Mohan, on which Mr Briddock relied, was a case in which both parties accepted there was no substantial dispute of fact. The same appears to be true of R (Nirmalakumaran) v Secretary of State [2009] EWHC 1169 (Admin) on which Mr Briddock also relied. I note also that Davis J said at paragraph 24 that "The real challenge.. as I see it is whether the decision reached by the Secretary of State was one properly open to her."

39. Accordingly, the essential question for me is to review the Secretary of State's decision on traditional judicial review grounds, informed always by anxious scrutiny. However, I have also myself reached a conclusion on whether the Claimant would have a realistic prospect of success, in case the approach for which Mr Briddock argued is correct.

SECRETARY OF STATE'S DECISION

Letter of 20th November 2008

40. After referring to the background, including the decision of the Adjudicator, the Secretary of State listed the material that had been submitted by the Claimant's solicitors with their letter of 12th November 2008, and also noted that the Claimant relied on the decision of the AIT in FK (cited above).

41. He then stated

"Careful regard has been given to your submissions but it is noted that your client is seeking to rely on exactly the same reasons that have already been extensively considered and roundly rejected both by the Secretary of State and the Immigration Appellate authorities. In this regard it is noted that the Immigration Judge who dismissed your client's appeal was not satisfied that your client had given a truthful account of his experiences in Cameroon and concluded that his credibility was such,

that he could not be relied upon. Moreover after seeing and hearing your client giving evidence the Immigration Judge was not satisfied that your client was even a member of the Social Democratic Front (SDF)

Nevertheless despite these serious doubts regarding your client's credibility careful consideration has been given to your submissions. In support of this latest application your client's former solicitor IAS submitted a copy letter dated 30 January 2007 , which it is claimed was purportedly sent to the Social Democratic Front Political Party in Cameroon enquiring about the authenticity of Mr YN's membership card and membership cards in general. Also enclosed is a copy of the purported response letter from the SDF allegedly signed by the National Treasurer Augustin Mbami dated 12 March 2007, in which he confirms that your client was a member of the SDF and also confirming that your client was the brother of Alphonse Nfankoua.

However, it is noted that despite receipt of this important piece of evidence, which would have had an important bearing on your client's case, if genuine, one year-two months elapsed before it was submitted to the Home Office for consideration. In addition to the significant doubts drawn from the extraordinary delay in submitting these documents, further doubts have been drawn from the fact that the letter purportedly written by your client's former solicitors is only a photocopy on a plain piece of paper not formal headed paper. In addition no evidence of postage and/or original documents or correspondence from the SDF has been submitted, nor has any independent corroborating evidence that your client was related to Mr Alphonese Nfankoua as claimed. In the circumstances it is not accepted that any of this information or the documents are genuine and as such they take your client's case no further."

42. The Secretary of State then went on to consider the BBC Internet report and other internet publications, and held they were general and did not take the Claimant's case further.

43. The Secretary of State then said

"Careful regard has been given to the copy arrest warrant and judgement which is claimed supports your client's case that he is at risk of serious harm if returned to Cameroon. However, the UKB A is aware of the ease with which such documents can be obtained and as such it is not accepted that they provide independent corroboration of your clients claim."

44. After dealing with a statement that had been submitted by Emmanuel Kemta and concluding that he could not rely on it, the Secretary of State continued

"With regard to the photographs submitted showing various persons demonstrating outside the Cameroonian Embassy-one of which is said to be client. Given that there have been many demonstrations in this country outside the Embassy, it is not accepted that your client's participation in one of those events would mean that he would be recognised and singled out immediately and arrested upon his return to Cameroon. In the circumstances it is not therefore accepted that your client's attendance at a demonstration in this country gives rise to a reasonable fear of persecution for the reasons indicated."

45. The Secretary of State continued by referring to FK, but said that each case had to be considered on its merits. He went on to refer to Rule 353, held that there was no realistic prospect of success, considered whether exceptional leave to remain should be granted, and decided that it should not.

46. In an attempt to resolve the matters said by the Secretary of State to be of concern, the Claimant's solicitors submitted further material to the Secretary of State by letter of 5th March 2009.

47. That information included a letter dated 27th February 2009 from the Claimant's previous solicitors, IAS, explaining the delay in submitting the purported fresh claim, what was suggested to be the original of the letter of 12th March 2007 from the SDF to IAS, and further documents relating to the arrest warrant, including the original of a TNT courier envelope relating to the arrest warrant and court report.

Letter 12th March 2009

48. In his letter of 12m March 2009, the Secretary of State listed the documents now received, and having set out paragraph 353 stated at paragraph 8

"Whether further submissions constitute a fresh claim on asylum or human rights grounds is a matter for the Secretary of State. As set out in the case of WM (PRC) v SSHD and SSHD v AR (Afghanistan) [2006] EWCA Civ 1495, the Secretary of State is to give anxious scrutiny to the question of whether further submissions would create a realistic prospect of success before an immigration judge."

49. The Secretary of State began by considering the issue of delay. He noted at paragraph 11 that the explanation provided by IAS had been considered, and continued

"12 The author of the letter (Mr Sean Ell) explains that he had the file transferred over to him from another officer in April 2007 (although there is no mention of when your client was first in contact with them) but due to your client's state of health they did not meet until June 2007. There followed some discussion about obtaining a medical report.

13 Your client reviewed the case in November 2007, saying that he did not wish to submit the fresh claim until he had checked it. Due to his alleged ill health he did not contact them again until March 2008 when he advised them that he was going to obtain further evidence and he wished to wait for that before submitting the fresh claim. Translations were also requested and received in April 2008. Due to Mr Ell's absence from the office, your client was not seen again until May 2008, when final instructions were taken. The fresh claim was finally submitted in May 2008 "

50. The Secretary of State went on to consider and accept IAS's explanation for not submitting original documents, and then dealt with the explanation for the delay;

"16.. .in considering the explanation for the delay, this is not accepted. The 'One Stop' notice provides an ongoing requirement for claimants to submit any further evidence as soon as it becomes available. Your client was notified of this requirement in the immigration decision ... .dated 7th June 2005 served to your client....

18 While it is therefore understandable that *some* delay could have occurred owing to your client's poor health it does not explain the *excessive* delay. It is considered that had your client believed that the arrest warrant was a genuine item and would fully substantiate his case in order to meet the 'fresh claim' threshold, it should have, and furthermore **could** have, been put forward much earlier. As soon as it became clear that your client would not be able to speak with the IAS, they could have advised him to submit it anyway and to notify UK Border Agency that further instructions were being awaited "

51. The Secretary of State continued at paragraph 19

"However, consideration has been given as to whether an immigration judge would have come to an alternative conclusion had he had sight of these documents at the time of the hearing, heard on 22 July 2005. It is noted that the immigration judge did not believe your client's account, and the lack of evidence in this regard was not fatal to his decision to dismiss the appeal"

52. In relation to the arrest warrant and court report, the Secretary of State said

"20 You previously submitted an internet article on the prison break in January 2005 but as found by the immigration judge (at para 29[h]) your client was able to leave Cameroon at Douala airport without difficulty……. However, at the time of your client's departure the alleged arrest warrant was already outstanding (as it was dated 14 February 2005). It has not been possible to verify your client's statement that the arrest warrant is only valid for the municipality for which it was issued, but in any event, it is not considered credible that he would be able to leave from the airport without any difficulties, even more so following a high profile prison break. The article was considered by the Secretary of State in our letter of 20 November 2008.

21 It is for your client to show that documents he puts forward are reliable. While you have now submitted the original TNT courier package which the documents were received, we are yet to receive an explanation how the arrest warrant and court judgement were obtained.

22 Furthermore, it is well documented that there is widespread corruption in Cameroon and the issuing of genuine documents on false premises is not uncommon."

53. To support the proposition in paragraph 22, the letter set out information from COIS, the US State Department and the Canadian Immigration and Refugee Board Research Directorate.

54. The Secretary of State concluded on the arrest warrant;

"25 Therefore, no weight can be attached to the arrest warrant. Given the severe doubts surrounding the validity of the arrest warrant, and the circumstances which gave rise to the alleged issuing of the arrest warrant, no weight can be placed on the court report either. It is noted that there is no evidence from a lawyer or other expert supporting the authenticity of these documents."

55. The Secretary of State then considered the statement of Mr Kemta. No issue arises as to that part of his decision, and I then turn to what he said about the alleged photographs of the Claimant at demonstrations;

"31 The photographs provided purport to show that a demonstration was held outside the Cameroonian Embassy in London. No date has been provided. However, the signs held up say '23 years is enough.' Paul Biya came to power in 1982 so this puts the demonstration at 2005. However according to the COIS report/research the only demonstration which took place in 2005 was on 20 June 2005 and this was in protest against the death of two students in April 2005 and was not attended by SDF members (see the COIS information enclosed).

32 Even if there was such a demonstration and your client was in attendance, it is not accepted that this would place him at risk. There is no evidence that SDF supporters in the United Kingdom are being targeted (COIS report January 2008). Therefore in light of the lack of interest in the activities of SDF members in the United Kingdom, the photographs do not add anything to your client's case and no weight has been attached to them."

56. Then, having dealt with certain SDF conference minutes, on which the Claimant does not base any submissions, the Secretary of State dealt with the letter of 12 March 2007 from SDF to IAS;

"36 I now turn to the SDF letter, this is on headed paper and appears to be the original document as it is in colour and the endorsement stamp is in blue ink. However a copy of this document was already made available to UK Border Agency and considered that it did not add anything to your client's claim (UKBA letter 20 November 2008).

37 The letter was largely discredited due to the fact that it was a copy and that there was no evidence of how the letter was sent to your client /IAS, however, even taking the letter at face value, it does not materially enhance your client's claim.

38 The letter states that your client was a member of the SDF, a fact which is not sufficient on its own to place him at risk, and states that Mr Alphonse Nfankoua is your client's brother, but this cannot be independent verification of that assertion (as considered in our letter of 20 November 2008). Even if this man was your client's brother, it does not prove that he died as a result of political assassination. This assertion has never been proved, and it is considered that this is speculation in order to overplay the SDF case.

39 Furthermore, as indicated in our original Reasons for Refusal letter of 24 May 2005, paragraph 11-the SDF were known to be submitting letters of support to asylum claimants in the United Kingdom, but according to their own rules, the letters could only be signed by the Chairman, Mr John Fru Ndi. There is no recent evidence from COIS as to whether this position has changed (see the COIS information enclosed). The letter submitted is signed by the treasurer and not the Chairman. Accordingly, the validity of the letter is doubtful."

57. At paragraph 40, the Secretary of State considered an SDF leaflet submitted for the Claimant, and decided it did not take the Claimant's case further. No criticism is made of that part of the decision.

58. The Secretary of State then reached the conclusion that he was not reversing the earlier decisions, and that this was not a fresh claim, taking together points previously made as well as new information.

ANALYSIS

Claimant's submissions

59. It was submitted by Mr Briddock for the Claimant that the whole approach of the Secretary of State was flawed and that he had not applied anxious scrutiny.

60. First, relying on the 20th November letter, Mr Briddock submitted that the Secretary of State had erred, by starting his consideration of the further material submitted with the premise of the Adjudicator's finding that the Claimant lacked credibility. What the Secretary of State should have done was to ask himself whether the new material changed the position with regard to the credibility of the Appellant. The Secretary of State had instead used the Adjudicator's credibility findings not just as a starting point, but as an end point.

61. Next, in the context of anxious scrutiny the Mr Briddock singled out for criticism the way in which the evidence about the arrest warrant had been dealt with. There had been little consideration of the evidence on this matter in the 20th November letter. Although the letter of 12th March dealt with this issue in more detail, the Secretary of State largely relied on the "objective evidence" that there is widespread corruption in

Cameroon and therefore letters are often forged, rather than giving proper consideration to the particular circumstances of this case.

62. Mr Briddock then submitted that the Secretary of State had not asked himself the right question, namely whether there was a realistic prospect of success. The letter of 12th March showed that he had applied the wrong test. Mr Briddock pointed to paragraph 19 of the letter of 12th March, in which the Secretary of State said that "consideration has been given as to whether an immigration judge would have come to an alternative conclusion had he had sight of these documents at the time of the hearing….. " Mr Briddock relied also on paragraph 44 of the 12th March letter, as showing a defect in the approach. First, it is there stated that "for the reasons set out above" there is no realistic prospect. No such reasons were given, suggested Mr Briddock. Secondly, Mr Briddock suggested that the wording of paragraph 44 shows that the test applied by the Secretary of State was whether an immigration judge "would" or "will" now come to a different conclusion.

63. Mr Briddock then submitted that that there was, in fact, a realistic prospect of success, relying on the following main points.

64. First, he criticised the consideration of the issue of delay in the 12th March letter. In particular, said Mr Briddock, one of the main reasons why the Secretary of State concluded that the Claimant was to be criticised for his delay in submitting the further information was the "One Stop" notice. It was not reasonable for a One Stop notice served on the Claimant in 2005 to be used by the Secretary of State in the way that he had, and it could not be said that there was no realistic prospect of an immigration judge reaching a different conclusion.

65. Secondly, Mr Briddock argued that it could not be said that there is no realistic prospect of success of an immigration judge coming to a conclusion on credibility different from that of the previous Adjudicator, on viewing the SDF letter and the various new documents such as the arrest warrant and court documents.

66. At the hearing, Mr Briddock criticised the way in which the Secretary of State dealt in the letter of 12th March 2009 with the photographs of him at the demonstrations. He referred to the statement in paragraph 31 of the letter that "according to the COIS report/research the only demonstration which took place in 2005 was on 20th June 2005" and not attended by SDF members. In fact, Mr Briddock pointed out, the COIS information on which the Secretary of State was relying said only that the demonstration on 20th June 2005 was the only one that "appears" to have taken place in 2005. Despite the fact that it was agreed that the Claimant would encapsulate in the written submissions provided after the hearing the whole of his case, there is no specific reference to the Secretary of State's photographs in those submissions. However, given that the issue was considered at the hearing, I consider it appropriate to deal with this matter on the basis that it still forms part of the Claimant's case.

My conclusions

67. I begin with the criticisms of the Secretary of State's approach.

68. First, I do not think the Secretary of State failed to apply anxious scrutiny. He did not refer to the need for anxious scrutiny in the letter of 20th November, but did so in the letter of 12th March, at paragraph 8, after referring to the case of WM. Merely to refer to the need to apply anxious scrutiny would not save his decision if the Secretary of State had not in fact applied the approach. However, I consider that the decision, and the Secretary of State's reasoning generally, does show the application of anxious scrutiny. I turn to the specific points made by the Claimant.

69. I begin with the criticism that the Secretary of State erred by not considering whether the new evidence made the Claimant's case before the Adjudicator more credible. I think he did. Nothing of substance was said for the Claimant to support this general proposition. I think it is evident from the acceptable way in which the Secretary of State treated each aspect of the new material that he considered it with a view to seeing whether it could improve the credibility of the Claimant's case.

70. Further, the particular case of the arrest warrant which was relied on in this regard by the Claimant does not support a contention that the Secretary of State failed to apply anxious scrutiny.

71. I find the Secretary of State's consideration of the arrest warrant and court report to be acceptable, and that it does not bear the criticism made for the Claimant. It is true that the Secretary of State referred to objective evidence about the prevalence of forgeries in Cameroon. However, that was not the only basis on which he decided against the Claimant on the issue. At paragraph 20 of the 12th March letter he stated, correctly in my view, that it was not credible that the Claimant would be able to leave the country without difficulty if an arrest warrant had been issued for him, and even more so following a high profile prison break. At paragraph 21 he stated, without contradiction by the Claimant, that no explanation had been received of how the arrest warrant and court judgement were obtained.

72. All these factors taken together in my judgement provide ample justification for the conclusion of the Secretary of State in relation to the arrest warrant and court report.

73. Next, I do not accept that the Secretary of State failed to apply the test for a fresh claim of asking whether there was a realistic prospect of success. In both the letter of 20th November and that of 12th March the Secretary of State specifically drew attention to the test of realistic prospect of success-in the 20th November letter, in the last paragraph on the fourth page, and the first paragraph on the following page, and in the 12th March letter, at paragraphs 7, 8, 42, and 43. I think it is plain that the test applied was whether there was a realistic prospect of success before an immigration judge.

74. In that context, I do not think the words of paragraph 19 of the 12th March letter indicate that the Secretary of State was asking himself the wrong question. In order to decide whether the Claimant did have a realistic prospect, the Secretary of State had to consider the possible effect of the new material on an immigration judge's conclusions. That is in essence what is stated in paragraph 19. The Secretary of State was simply addressing himself to the exercise of considering the effect of the new material on the conclusions previously reached by the Adjudicator. Set in the context of the fact that he clearly articulated the realistic prospect test elsewhere, I do not accept that in paragraph 19 the Secretary of State was applying an erroneous approach.

75. I do not accept that paragraph 44 of the 12th March letter assists the Claimant. It is plain from the opening words of the paragraph that the Secretary of State is addressing himself to whether there is a realistic prospect of success before an immigration judge. Further, the Secretary of State was entirely correct to refer to "reasons set out above" for his conclusion that there were no realistic prospects of success. The preceding paragraphs of his letter set out fully the Secretary of State's reasons for reaching the conclusion he did.

76. I turn to the submission for the Claimant that there was, in fact, a realistic prospect of success. In my judgement none of the points made on the Claimant's behalf establishes that the Secretary of State's conclusion that there was no such realistic prospect was unreasonable.

77. Mr Briddock did not attempt to suggest that all of the new material assisted his case. He accepted that as the Secretary of State said, the statement of Mr Kemta, the SDF conference minutes, and the SDF leaflet did not assist his case.

78. To begin with, I turn to the Secretary of State's consideration of the issue of delay. He considered this matter as a preliminary point, before going on to deal with the documents themselves. I find he was entitled to reach the conclusion he did. While an explanation for the delay in submitting the further documents had been provided by the Immigration Advisory Service in their letter of 27th February 2009, it remained the case that (a) it had taken from April 2007 to November 2007 for the case to be put together; (b) there was a further delay to 3r March 2008, when the Claimant had not given instructions as a result of an unspecified illness; (c) it then took until 12th May 2008 for the representations to be made. In my judgement the Secretary of State was entitled to conclude that "While it is ..understandable that *some* delay could have occurred owing to your client's poor health it does not explain the *excessive* delay", and he was entitled in reaching that conclusion to take account of the fact that the Claimant had been served with a "One Stop" Notice.

79. In any event, the Secretary of State went on to consider the possible effect of the submitted documents, dealing carefully with each in turn.

80. So far as the SDF letter is concerned, the Secretary of State's counsel confirmed before me that the Secretary of State did not intend in the letter to accept that the letter in fact came from SDF. I think that is clear from paragraph 39 of the 12th March letter. All that was accepted in paragraph 36 was there had now been supplied the original of the document of which previously only a copy had been produced. No admissions were made about what that original was.

81. In relation to paragraph 38 of the 12th March letter, I think the Secretary of State was entitled to reach the conclusions he did reach. He was clearly entitled to conclude that the mere fact of membership of SDF was not enough to place the Claimant at risk. He was also, in my judgement, entitled to say what he did about the extent to which the letter was "independent" confirmation of the Claimant's evidence about his brother.

82. Further, and in any event, for the reasons the Secretary of State gave at paragraph 39, the letter was not accepted as genuine. As I was reminded for the Secretary of State, in the Secretary of State's original determination of 24th May 2005 it is stated at paragraph 11 that the SDF have said that letters of support could only be signed by Mr Fru N'di. I find it significant that the Claimant has at no stage challenged that assertion.

83. I have already dealt with the consideration of the arrest warrant in the context of the Claimant's submission that the Secretary of State failed to apply anxious scrutiny. I consider the Secretary of State's conclusions wholly reasonable.

84. So far as the photographs of the demonstration are concerned, it is true that the COIS document referred to by the Secretary of State stated only that "it appears" that only one demonstration took place before the Cameroon embassy, namely one not involving SDF members. However, the Claimant had ample time since the 12th March letter and before the hearing in front of me to respond with firm evidence that there *was* a demonstration involving SDF in 2005, and failed to do so. Further, the Claimant's counsel was unable to identify the Claimant in the photographs, and I was told by the Secretary of State's counsel that he had asked for the Claimant to be identified in the photographs as long ago as the permission hearing.

85. Further and in any event, paragraph 32 of the 12th March letter, with whose conclusions the Claimant did not quarrel, assumes that the Claimant was, in fact, at a demonstration.

86. The reality in this case is that the Adjudicator wholly rejected the evidence of the Claimant and his supporter, Mr Kemta. He was unable even to conclude that there was "truthful central core" to his case.

87. In my view, Secretary of State was entitled to conclude that the Claimant had no realistic prospect of success before an immigration judge, taking account of the further material and applying anxious scrutiny.

88. Further, even if the proper approach is as suggested by the Claimant, and it is for me to decide whether there is, in fact, a realistic prospect of success, the Claimant must fail, because in my judgement there is no such prospect. Therefore, even if my judgement as to the rationality of the Secretary of State's decision falls to be made by my own examination of whether there was a realistic prospect of success, the Claimant fails.

89. I have already said that I find the Secretary of State's reasoning unimpeachable on Wednesbury grounds. Further, I agree with that reasoning and adopt it as a basis for finding that there was here no realistic prospect of success. I add the following summary comments about the main points relied on by the Claimant.

90. So far as the arrest warrant and court report are concerned, quite apart from the prevalence of forgery in Cameroon, it is not credible that a person in relation to whom an arrest warrant has been issued, and who has made a high profile prison break, would be able to leave the country via the airport, without difficulty. With regard to the purported SDF letter, quite apart from what the Secretary of State said at paragraph 38 of his letter of 12th March 2009, the doubts about the validity of a letter not signed by Mr Fru N'di that were raised by the Secretary of State in 2005 have never been challenged by the Claimant. In relation to the photographs, the available evidence, un-contradicted by the Claimant, is that there were no SDF demonstrations in 2005, and the Secretary of State's judgement that there was no evidence that SDF supporters in the United Kingdom were targeted was not challenged. I add that I agree with the Secretary of State's conclusions on delay, and that the excessive delay in submitting the new material adds all the more to the doubts about the material and reinforces my conclusion that the Claimant has no realistic prospect of success. All of these points, as well as the points made by the Secretary of State which were not subject to criticism by the Claimant, make clear that the Claimant would not in fact have a realistic chance of success before an immigration judge.

91. Overall, in his decision the Secretary of State considered carefully the further material submitted by the Claimant to see if the Claimant would now have a realistic prospect of success. He decided the Claimant would not. His judgement was one that was reasonably open to him, and it is a judgement with which I agree. Accordingly, this claim must be dismissed.