Neutral Citation Number: [2010] EWHC 3159 (Admin)

Case No: CO/8204/2007

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3rd December 2010

Before :

HIS HONOUR JUDGE SYCAMORE
(SITTING AS A JUDGE OF THE HIGH COURT)

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Between :

THE QUEEN ON THE APPLICATION OF MOHAMMED BOULEGAHALEGH	**Claimant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

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- -

Miss C.M. Fielden (instructed by **Fadiga and Co**) for the **Claimant**
Mr. Iain Quirk (instructed by **Treasury Solicitor**) for the **Defendant**

Hearing date: 28th October 2010

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Approved Judgment

His Honour Judge Sycamore:

Introduction

1. The Claimant is a national of Algeria who arrived in the United Kingdom on the 8th October 2001 with his wife and four children. His claim for asylum, made on the day of his arrival, was rejected by the Defendant on the 26th November 2001. His appeal against that refusal was dismissed by an Adjudicator on the 10th May 2002. On the 26th June 2002 his appeal to the Immigration Appeal Tribunal was rejected.

2. The Claimant sought permission to apply for judicial review of the decision of the Immigration Appeal Tribunal. This was refused on paper on the 16th October 2002 and again at a renewed oral hearing on the 4th December 2002.

3. In these proceedings the Claimant seeks to challenge the decision of the Defendant made on the 15th September 2007 to refuse the treat the Claimant's further submissions as amounting to a fresh claim pursuant to paragraph 353 of the Immigration Rules (HC 395 as amended).

4. Paragraph 353 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 "When a Human Rights or Asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and,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.
>
> This paragraph does not apply to claims made overseas."

5. On the 15th September 2007 Lloyd Jones J ordered that the Defendant be restrained from removing the Claimant until the Claimant's application for judicial review was determined. The solicitors acting for the Claimant undertook to issue proceedings by the 18th September 2007, which they did.

6. Permission was granted by Christopher Symons QC on the 18th November 2009 having initially being refused on the papers by his Honour Judge Mackie QC on the 21st January 2008.

The Framework

7. The Defendant is required to examine further submissions from an applicant who has previously been refused asylum in the United Kingdom and determine whether they

amount to a fresh claim. Such a determination is of significance, as acceptance of a subsequent application as a fresh claim generates a further right of appeal.

8. The leading case which deals with the task of the Secretary of State under paragraph 353 of the Immigration Rules is the decision of the Court of Appeal in *WM (DRC*) v *The Secretary of State for the Home Department* [2006] EWCA Civ 1495 in which Buxton LJ said:

> "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 judgments. 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".

9. Thus, the Secretary of State must decide whether the new material is significantly different from that already considered. If the new material is not "significantly different" then that is the end of the matter, because the material is not new and cannot constitute a fresh claim. It is only if the new material is significantly different that the Secretary of State is required to consider whether when taken with the material previously considered, the whole material creates a realistic prospect of success in a further asylum claim. If the answer is in the affirmative then it is a fresh claim under paragraph 353 of the Immigration Rules. The consideration by all the decision makers must be informed by the application of anxious scrutiny to the material.

10. The Court of Appeal went on to set out the approach to be adopted when considering a challenge by way of judicial review and held that a decision would be irrational if the Secretary of State had asked the wrong question or had not applied anxious scrutiny:

> "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 … 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."

11. In *R v The Secretary of State for the Home Department, Ex-Parte Onibiyo* [1996] QB 768 Sir Thomas Bingham M.R. said:

> "The acid test must always be whether, comparing the new claim with that earlier rejected, and excluding material on which the claimant could reasonably have been expected to rely in the earlier claim, the new claim is sufficiently different from the earlier claim to admit of a realistic prospect that a favourable view could be taken of the new claim despite the unfavourable conclusion reached on the earlier claim."

Thus, the material must be "new" in the sense that it could not reasonably have been produced in the earlier claim.

Background

12. In considering the Defendant's decision of the 15th September 2007 it is necessary to review the background history. Given the number of applications said to amount to fresh claims I set out a short chronology of events:

8th October 2001	Claimant (and family) arrived and claimed asylum
26th November 2001	Asylum claim refused
10th May 2002	Adjudicator dismissed asylum appeal
26th June 2002	Appeal of Adjudicator's decision dismissed by Immigration Appeal Tribunal
16th October 2002	Permission to apply for judicial review of Immigration Appeal Tribunal decision refused on paper
4th December 2002	Permission refused at renewed oral hearing
30th January 2003	Letter from Claimant's solicitors to Defendant containing further submissions (“**First fresh claim”**). This was rejected by the Defendant on the 17th January 2005. The Claimant relied on an expert report from a Dr Spencer. No application for permission to judicially review this decision was made

16th May 2005	Letter from Claimant's solicitors to Defendant containing further submissions ("**Second fresh claim")**. This was rejected by the Defendant on the 27th November 2006. The Claimant relied on summonses issued by the Algerian Judicial Police against the Claimant. There was no reliance on the earlier report from Dr Spencer, nor was there any suggestion made that it was not properly dealt with in the letter from the Defendant of 17th January 2005. No application for permission to judicially review this decision was made.
14th September 2007	Letter from Claimant's solicitors with further submissions ("**Third fresh claim")**. This was rejected by the Defendant on the 15th September 2007.

13. The decision of the 15th September 2007 was in response to the Claimant's letter of the 14th September 2007 in support of the Third fresh claim and in respect of which the Claimant relied on an expert report dated 14th September 2007 ("the 2nd report") from a Dr Claire Spencer, who is the Head of the Middle East Programme, Royal Institute of International Affairs (Chatham House). This report was an update to an earlier report from Dr Spencer dated 4th October 2002 ("the 1st report") which had been submitted to the Defendant in January 2003 in support of the First fresh claim. It was said on the Claimant's behalf by his solicitors in the letter of 14th September 2007 that the updated report gave rise to a fresh claim:

> "…We submit that Dr Spencer's report in the context of her previous report and contemporaneous political/human rights development, establishes the basis of a fresh asylum/human rights claim in accordance with paragraph 353 of the Immigration Rules…".

It was also asserted that the Claimant had:

> "…A profile which would bring him to the attention of the Algerian Authorities and would likely lead to him being interrogated on return to Algeria".

The Claimant's solicitors also said this in the letter of the 14th September:

> "…Although those particular issues may have been considered by the Adjudicator from submissions presented by Counsel, we would emphasise that Adjudicator in dismissing our client's appeals did not have the benefit of Dr Spencer's report (s) and did not have the benefit of her expertise and sourced references to buttress her views...".

14. The Adjudicator had recorded the submissions made on behalf of the Claimant in the following way:

> "The Appellant says that he is a member of a FIS family; that he has been sought (even though he wasn't at the time of his

escape from Algeria) that his brother has been imprisoned by reason of FIS activity and that as a result he comes within the category of those who are likely to face persecution on return. Mr. Walsh added further glosses to this argument saying (a) the fact that he has been out of the country for so long and having spent a lot of time in Saudi Arabia may make the Algerian Authorities suspicious of his Islamic leanings and therefore the more likely to arrest, interrogate and torture him and (b) the fact that his wife is from Bosnia brings him within the ambit of those who are Arabs who have come from Bosnia and are therefore treated with suspicion by the Algerian Authorities who suspect any from that area as being Arabic Islamic Militants; Mr Walsh also submits that (c) this man's injuries will raise a suspicion that he has been involved in terrorist activities and will therefore cause him further discomfort on arrival in Algeria."

15. The Adjudicator made a number of findings of fact, including the following:

(a) That the Claimant was an Algerian national who left Algeria for Malaysia in 1994, Leaving Malaysia in 1997 and lived in Saudi Arabia before moving to the UK. He said:

"In going abroad [from Algeria to Malaysia and then the UK] this man did not go because of any fear of persecution, there was no such fear."

(b) As to the move from Saudi to the UK he said:

"His flight from Saudi Arabia was not in my view and not on his own evidence, occasioned by any threats of return to Algeria but rather by a desire to organise his own life in a satisfactory manner."

(c) As to the Claimant's involvement in FIS he said:

"I find as a fact that he, together with most of the inhabitants of his home town, were FIS supporters and I do not discount the possibility that he was a security guard at rallies and put up posters. By no stretch of the imagination could this be described as a high profile activist. I do not accept that the Algerian Authorities are looking for him and I do not accept that if he were returned he would be on one of their "wanted lists.""

(d) As to whether the Claimant had a fear of persecution he said:

"I have to say that I do not find that he does have such a fear and if he did I do not find it would be well founded. His activity in FIS was of a very low level, it was ended many years ago…".

16. In rejecting the First fresh claim on 17th January 2005 the Defendant made it clear that the 1st report had been considered. For example the Defendant's letter noted:

> "The report states that it is his absence abroad rather than his membership of FIS that would put him at risk of detention on his return".

The Defendant considered that the 1st report was not significantly different to the information previously submitted to the Adjudicator and indicated:

> "It is considered that this report could have been submitted at the time of your client's appeal".

The Defendant concluded that:

> "Your client has not submitted any new or compelling evidence relating specifically to him if he is returned to Algeria. Accordingly, it has been decided not to treat your client's representations as a fresh application for asylum".

17. The Second fresh claim, which was based on the summons documents, was rejected by the Defendant on 27th November 2006. The Defendant said that it was unable to place reliance on the documents since they lacked credibility.

18. The Defendant responded to the Third fresh claim in the decision letter of the 15th September 2007, the decision in respect of which judicial review is sought, and referred to paragraph 353 of the Immigration Rules, concluding as follows:

> "Some of the points raised in your submissions were considered when the earlier claim was determined. They were dealt with in the letter giving reasons for refusal dated 1 December 2001 and the appeal determination promulgated on 2 May 2002. Further representations were subsequently dealt with in our letters dated 27 November and 6 December 2006 and letter dated 11 September 2007. The remaining points in your submissions, taken together with the material previously considered, would not have created a realistic prospect of success".

19. It was made clear in the decision letter that the Defendant had considered the 2nd Report:

> "...Consideration has been given to the report you have submitted by Dr Spencer…"

20. As I have observed, the judicial review proceedings were issued a few days later. The substantive hearing was postponed pending the determination of a case by the Asylum and Immigration Tribunal ("AIT") (*AF Algeria CG* [2009] UKAIT 00023), which was said to be similar to that of the Claimant. On 18th August 2008 the Claimant submitted a report from another expert, a Professor David Seddon, dated 9th August 2008, after both the date of the decision which is the subject of challenge and the

issue of these proceedings. As such it can have no bearing on the legality of the decision of 15th September 2007.

21. In response to further submissions made by the Claimant on the 18th and 28th August 2008 and to the application for judicial review the Defendant issued a further letter on the 25th August 2009. The Defendant again concluded that the submissions did not give rise to a fresh claim because:

a) The points raised in those submissions had been previously considered.

b) They did not create a realistic prospect of success before an Immigration Judge.

The Claimant has not sought judicial review of this letter nor indeed has permission been granted in relation to it.

22. Although in her skeleton argument and her submissions at the hearing on the 28th October 2010 the Claimant's counsel sought to revisit the approach adopted by the Adjudicator in May 2002 and the previous decisions of the Defendant in relation to the First and Second fresh claims it is clear, as I have already observed, that no applications for permission to apply for judicial review of the decisions on the First and Second fresh claims were made and they cannot now be revisited. In relation to the letter of 25th August 2009, again no application for permission has been made and any application would in any event be now well out of time. The issues to be considered, therefore, relate only to the rationality of the decision of 15th September 2007.

Discussion

23. It is first necessary to consider the significance of the 2nd report and to ask whether the material it contained was material that had already been considered or material which was significantly different from material already considered.

24. As I have already observed the 1st report had been submitted to the Defendant in support of the First fresh claim. A careful reading of both of the reports makes it clear that the content is all but identical.

25. It will be helpful to compare the summary of conclusions in the 2nd report with those contained in the 1st report. It can be seen that the language and conclusions are often identical.

1st Report:

> "In my estimation, Mr Boulegahalegh's forcible return to Algeria would incur him in a heightened risk of prolonged detention and interrogation due to the changed climate prevailing in Algeria since September 11th 2001 and his long period of absence abroad. His marriage to a Bosnian national, and the possible suspicion that he has been living illegally in Bosnia, would additionally prompt the Algerians to act upon the precedent set by the detention of six other Algerian

> nationals married to Bosnian Muslims in October 2001, and their extradition to Guantanamo Bay in January 2002…"

2nd Report:

> "…Algerian authorities in 2007 are now more likely to detain him because of his previously known affiliations with Islamist causes and long absence abroad … that risk has heightened since the advent of Al-Qaeda in the Islamic Maghreb in early 2007..". "the relevance of Mr Boulegahalegh's wife's Bosnian nationality…further to my detailing the arrest of 6 Algerians married to Bosnian Muslim wives in my opinion of October 2002 … heightened interest in Bosnia, in promoting the rise of radical Islamist terrorism within Europe.." " … I therefore conclude that the situation concerning the potential abuses faced by individuals forcibly returned to Algeria remains as described in my report of October 2004…" (emphasis added - the reference to 2004 is in error – it should be 2002).

26. Thus, the submissions in the 2nd Report to the effect that (i) the Claimant's absence abroad rather then his membership of FIS would make him susceptible to detention and interrogation and (ii) the fact of his wife's Bosnian nationality would increase the likelihood of his being suspected of terrorism were points which were made in evidence before and submissions to the Adjudicator and recorded by him. The 2nd Report went no further than the 1st Report, as Dr Spencer expressly confirmed (see paragraph 25 above).

27. The Claimant's solicitors appear to accept that the Adjudicator considered these issues as they indicated in their letter of 14th September 2007 (see paragraph 13 above). No explanation has ever been offered as to why a report from an expert was not obtained at the time of the hearing before the Adjudicator. The 1st report was prepared only a few months after the hearing but it is apparent that submissions to the same or similar effect were made before the Adjudicator on the Claimant's behalf.

28. The Claimant's solicitors in their letter of 14th September 2007 also referred to the country guidance appeal, which was then awaiting a hearing in the AIT, in the case of *AF Algeria CG* [2009] UKAIT 00023. As I have already observed, that case has now been decided and was the subject of submissions before me on the 28th October 2010. In essence the Claimant's case was that he, like *AF*, is a person who would be suspected of links to terrorism. The headnote to *AF* is to the following effect:

> "(i) An appellant who can establish that he has a history that suggests he may have connections to international terrorism is at real risk of being detained on arrival in Algeria, and investigated (ii) It is reasonably likely that when the suspicion is of international terrorism such a returnee will be passed into the hands of the Department du Renseignement de La Securite ("DRS") for further interrogation (iii) The historic evidence about the DRS's propensity to use torture as a means of interrogation, together with the continuing absence of any evidence of accountability or monitoring, strongly suggests

> that, in the absence of evidence to the contrary, the DRS still uses torture and other serious ill-treatment in its places of secret incommunicado detention (iv) In the light of the further report from Dr Seddon, and of both Y,BB and U v Secretary of State for the Home Department [2007] UKSIAC32/2005 and PP v Secretary of State for the Home Department [2007] UKSIAC 54/2006 the tribunal sees no basis for doing other than confirming that HS (Terrorist Suspect risk) Algeria CG [2008] UKAIT 00048 heard before the SIAC cases) was correct and that the risk categories set out therein do not require widening."

29. In *AF* the AIT decided that AF's " profile" in terms of what would give rise to suspicion on his return to Algeria was exceptional relying, in part, on evidence from Dr Seddon who had told the AIT that he had never come across anyone with such a profile before (I observe that the hearing took place in February 2009, after Dr Seddon had prepared his report in respect of Mr. Boulegahalegh). *AF*'s appeal was allowed. It is clear that the Claimant's profile is significantly different from that of *AF*. In particular *AF*, unlike the Claimant had a pattern of travel which was linked to the spread of terrorism. He had, unlike the Claimant, a history of having worked for organisations perceived to be terrorist or fundamentalist in nature. I accept the Defendant's submissions to the effect that this Claimant's circumstances do not come close to the type of exceptional profile which the AIT were concerned with in *AF* and that *AF* does not take matters any further in so far as the Claimant is concerned.

Conclusion

30. The 3rd fresh claim communicated by letter of 14th September 2007 relied on essentially two elements, namely the content of the 2nd report and the significance of *AF*, which was awaiting a decision at the time of the 3rd Fresh Claim, and its similarity to the Claimant's circumstances.

31. In my judgment the submissions of 14th September were not new and were matters which had already been considered. The 2nd report, in my view, did no more than confirm the contents of the 1st report. In essence it was a repetition of what had been put forward before the Adjudicator and what was submitted to and rejected by the Defendant in the First fresh claim. As I have already observed, Dr Spencer confirmed this in the 2nd Report

> " …I therefore conclude that the situation concerning potential abuses faced by individuals forcibly returned to Algeria remains as described in my report of October 2004" (2002).

The only gloss on the earlier report was Dr Spencer's opinion that the risk had heightened since 2007. That in my judgement does not amount to a new submission, rather it is new information about material previously considered and, as such, cannot be said to be "significantly different".

32. I have already concluded that *AF* adds nothing to the Claimant's position. Matters relating to the risks on return to this Claimant and his profile were dealt with by the Adjudicator and by the Defendant in rejecting the First fresh claim and in so far as the letter of 14th September raised the prospect of submissions which were significantly

different in relation to risk and profile by suggesting that the Claimant's circumstances were identical to those of *AF* I have already explained that *AF* does not assist the Claimant and as such that submission cannot be said to amount to a fresh claim.

33. It therefore seems to me, having applied anxious scrutiny, that no rational Secretary of State could have concluded that there were fresh matters that could found a new claim. Indeed, any other conclusion, on the material before me, would in my judgement have been irrational. In those circumstances it was unnecessary for the Defendant to go on to consider the second hypothetical question as to whether the whole material creates a realistic prospect of success. That point did not arise. In those circumstances I am satisfied that the Defendant has given sufficient scrutiny to the case and has reached the only rational conclusion available on the material before her.

34. I add that in my opinion had it become necessary for the Defendant to consider the second hypothetical question then the only rational conclusion would have been that the material could not create a realistic prospect of success. I say that against the background of my observations in relation to *AF*. There is nothing in the Claimant's profile which is exceptional in the terms considered in *AF* and that, taken with the previously considered material, would not give rise to a realistic prospect of success before an Immigration Judge.