

CO/10603/2005

Neutral Citation Number: [2008] EWHC 1600 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Wednesday, 18 June 2008

B e f o r e:

MR JUSTICE MITTING

Between:

THE QUEEN ON THE APPLICATION OF Z_

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT_

Defendant

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(Official Shorthand Writers to the Court)

Ms Amanda Weston (instructed by Luqmani Thompson) appeared on behalf of the
Claimant

Mr Robert Palmer (instructed by Treasury Solicitor) appeared on behalf of the **Defendant**

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

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1. MR JUSTICE MITTING: By this claim, the claimant challenges the Secretary of State's refusal to treat various representations made over the years as amounting independently or together to a fresh claim under paragraph 353 of the Immigration Rules.
2. The undisputed facts are that the claimant is a citizen of Togo and served for a time, beginning almost certainly in December 1992, as a gendarme in the state security forces of that country. He arrived in the United Kingdom on 18 September 2002 and claimed asylum two days later. He went through the usual process of Home Office interview and self-certifying form. His claim for asylum was rejected by letter dated 10 October 2003. He appealed to an adjudicator, who rejected his claim on credibility grounds. It was not disputed before the adjudicator that Lieutenant Colonel Z, the Chief of the Presidential Bodyguard at the time, was injured seriously in a coup d'état on 25 March 1993 and subsequently died of his injuries in Paris.
3. The claimant's case was that he was one of the sons of Lieutenant Colonel Z, that he had served without incident in the gendarmerie before and after his father's death, but when the subject of his father's death began to attract attention in Togo, again in 2001 and 2002, himself began to enquire into it, and in so doing attracted the adverse attention of the Togolese governmental authorities, culminating, he claimed, in his being tipped-off that the authorities were looking for him and would arrest him, and escaping from Togo via Ghana and arriving ultimately in the United Kingdom. He gave a detailed account of the enquiries that he made into his father's death -- a detailed account which contained features which the adjudicator found to be implausible.
4. The adjudicator's decision was of good quality and his reasoning was set out in great detail. He undoubtedly directed himself correctly as to the law. The first finding which the adjudicator had to make, and on any view essential to the outcome of the appeal, was who the claimant was. Was he, as he claimed, a son of Lieutenant Colonel Z or was he not? In paragraph 30 of his determination, the adjudicator found:

"I accept therefore that it is a possibility that the appellant is the son of Lt-Col [Z]; however in view of the other possibilities that there are, and the unexplained discrepancy over the different names given for the wife of Lt-Col [Z], I do not consider that the appellant has shown that it is reasonably likely that he is the son of the Lt-Col. Because it is the central core of the appellant's claim, it follows that I do not accept that the appellant has shown that it is reasonably likely that either the events that he has described happening to him and his family in Togo did occur, or that he is at risk of persecutory treatment were he to be returned to Togo now."

5. In that passage the adjudicator correctly accepted the centrality to his decision of his finding about the identity of the claimant. It was itself in significant part founded upon the discrepancies which he identified between the name given for the wife of Lieutenant Colonel Z in public documents at the time, DZ, and the name given by the claimant of his mother, AA. Unknown to the adjudicator, and on the premise that

documents subsequently produced are or might be genuine, Lieutenant Colonel Z had eight wives, of whom one was the wife named by the claimant. Subsequent to the adjudicator's decision under cover of a letter of 31 August 2004, a raft of documents were produced setting out, and setting out in detail, the family groupings of Lieutenant Z's descendants and his wives, and producing a document which, on its face, was a birth certificate of the claimant, naming Lieutenant Colonel Z as his father.

6. The Secretary of State's case in correspondence and currently about those documents has not been to challenge their authenticity or to suggest that on Tanveer Ahmed grounds no or little account should be taken of them. The way in which Mr Palmer puts it today is that no point is taken for present purposes about the authenticity of those documents. Accordingly, the Secretary of State can be taken to have treated the evidence produced in August 2004 about the claimant's identity as giving rise to a real possibility that an immigration judge would now reach a different conclusion from the adjudicator. The Secretary of State's case has always been that that makes no difference because the adjudicator went on to make findings on the alternative premise that the claimant was indeed who he said he was. I make it clear at this stage of the judgment and before going on to consider the remaining matters that I find that a difficult argument. In a case in which a claimant says that he was targeted in significant part because of who he was, his identity is self-evidently a critical factor in his claim. An adverse determination, saying in effect that he has not told the truth about his own identity, is bound to influence the view of an adjudicator or immigration judge when considering a detailed account about what he says happened to him in part because of who he was.
7. Accordingly, and applying the well-known jurisprudence in WM (DRC) v the Secretary of State [2006] EWCA Civ 1495 at paragraphs 7 and 11, that material by itself went a long way to establishing that an adjudicator or immigration judge might realistically take a different view from that taken by the adjudicator originally.
8. The adjudicator went on to consider the appeal on the alternative basis that the claimant was who he said he was. He rejected the claim for a number of detailed and cogent reasons. It is not necessary for me to set them out here, but they amounted to a detailed analysis of the detail of the claimant's claim as to what happened to him, and the finding of discrepancies within the various accounts that he had given, and of implausibility in aspects of many of them. He noted, and it is of particular significance, that the account which the claimant gave was at least consistent with accounts published in two newspapers in Togo. These discrepancies and implausibilities have never been explained by the claimant or his representatives. The Secretary of State's case has always been, when representations have been made, to assert, correctly, that the claimant has not addressed these difficulties, and that of all the material produced by him, they remain to this day unexplained. There is force in that view.
9. Of greater significance in the adjudicator's reasons was the fact that the claimant's wife, who he said had herself been arrested and detained and kept in deplorable conditions in prison in Lomé before escaping, neither gave evidence herself nor provided a written statement in support of his appeal. The explanation given to the adjudicator, noted in paragraph 48 of the decision, was that she had given birth to her first child a fortnight

before. That may have been an adequate explanation for her inability or failure to attend the hearing, but it was not, and could not be, an adequate explanation for failing to provide a statement, as the adjudicator noted.

10. Ms Weston tells me today, in observations that have never been made in correspondence to the Secretary of State, that she is separately represented; that there are features of her case that she does not wish her husband to know. Consequently, the decision either was taken or is still being taken that she will not provide material in support of her husband's claim. I will return to that at the end of this judgment.
11. In addition to producing material which, if true, established the identity of the claimant, the claimant's solicitors obtained and produced to the Secretary of State two letters: one from a former gendarme, Mr Nyakossi, and one from a former Minister of the Interior, Mr Boko, which lent support to the claimant's case. In particular, that of Mr Nyakossi, confirmed that he and the claimant had been gendarmes together, that the claimant had fled in 2002, and that his widowed mother and his wife were imprisoned by the Togolese National gendarmerie, at whose hands his wife received inhuman treatment. The Secretary of State did not in terms reject this account. What she did was to make familiar and entirely proper observations about the approach which would be likely to be taken by an immigration judge on receiving them, namely that they would have to be looked at in the round in the light of all other information, and that applying the case of Tanveer Ahmed, little weight, if any, might be given to them. Indeed, the Secretary of State went on to assert that because no evidence had been provided as to the provenance of the letters, their authenticity was not accepted. She went on to deal with the claim, however, on the alternative basis that they were genuine.
12. In support of the authenticity of the letters, the claimant's representatives obtained from a Mr Manley (who from the reports to which I have been referred clearly has considerable knowledge of affairs in Togo) a report which asserted in a laconic single sentence that he had checked the provenance of the letters and was satisfied that they were genuine. Subsequently, and not yet considered by the Secretary of State, further documents have been produced which, if authentic, would lend support to the provenance and authenticity of the letters. As at this stage, however, all that I am doing is reviewing the decision of the Secretary of State on the information which he or she had at the time when he or she considered the representations for the purposes of paragraph 353.
13. The claimant relies finally upon the general observations of Mr Manley, the upshot of which is that there was a high degree of political tension in Togo when the claimant fled, and that fact, together with detailed facts or claims relating to his circumstances, tended to support the truthfulness of what he said. In the end, Mr Manley's evidence is helpful to the claimant, but only insofar as it supports his claim that what he said was essentially true.
14. This is, at the end of the day, a finely balanced claim. There is, as I have observed, much force in the Secretary of State's observations, repeatedly made, that the claimant has not addressed the detailed discrepancies and implausibilities found to exist by the adjudicator, and that until and unless he does so convincingly, he does not have a

realistic prospect of disturbing the adjudicator's finding that there was not a reasonable likelihood that his claim was true.

15. The Secretary of State's current position has force. It is that, notwithstanding that he may be who he says he is, nevertheless unless his account is capable of belief, there is no reason to think that, if returned to Togo, he would be at risk. Nobody suggests that merely because he is a descendent of Lieutenant Colonel Z he is a risk. Accordingly, as always, the truthfulness of his account as originally given is at the heart of his claim.
16. Against that, my judgment is that a case which depends first and foremost upon the fact-finder's determination of who the claimant is, a case in which that fact has been determined against him for good reason, but is now shown by other evidence to be an erroneous or arguably erroneous finding, is a very different claim from that originally considered. It is difficult to conceive that, however the adjudicator's view was originally expressed, he would not have approached the discrepancies and implausibilities in the claimant's account differently if he had accepted his basic claim as to his identity. In that context, the letter from Mr Nyakossi, despite the proper Tanveer Ahmed reservations of the Secretary of State, is capable of being of some significance. Those two facts, taken together, against the background of Mr Manley's evidence that there was political tension in Togo in August and September 2002, could lead an immigration judge now to find that the core element of the claimant's claim was true, and so that his claim to refugee status might succeed.
17. For those reasons, although I find the issue to be very finely balanced, in the end I come down in favour of the claimant's claim that the Secretary of State should have accepted the fresh representations as giving rise to a fresh claim under paragraph 353, applying the low threshold test in WM.
18. I am not to be taken in this judgment as indicating that, in my view, this claim should or will succeed, merely that there is a realistic prospect that it may succeed. One factor which an immigration judge will, like the original adjudicator, undoubtedly pay considerable attention to is the position of the claimant's wife. If, in truth, her evidence in support of her husband's claim, and indeed ultimately her own claim to asylum, is not given simply because she does not wish her husband to learn everything about what happened to her when detained, as she claims, in Lomé, there are means by which that difficulty can be addressed: either by her providing a statement which asserts that she does not wish to state it, but that she was indeed detained, and which describes the circumstances in which her husband came to leave Togo and she came to leave Togo; or perhaps by evidence being given in a session from which her husband voluntarily absents himself. By either of those means, the very obvious gap in the claimant's appeal, rightly found by the adjudicator to be of high significance, can be filled. If not filled, it may well be that an immigration judge will draw the same adverse conclusion as did the adjudicator.
19. Ms Weston, any consequential orders?
20. MS WESTON: My Lord, I am concerned because I have given my Lord information now which is rightly, and I appreciate my Lord's comments, appearing in the judgment,

and I would ask for an anonymity order in respect of the claimant, and any references to [the claimant's name] be replaced by the letter Z. It may not happen that this judgment --

21. MR JUSTICE MITTING: This is routine in asylum cases. I cannot see any reason why it should not be done, Mr Palmer, can you?
22. MR PALMER: No, my Lord.
23. MR JUSTICE MITTING: I make an order that in all public documents the claimant is known as Z.
24. MS WESTON: And could that be reference to Lieutenant Colonel Z as well, my Lord, in the judgment?
25. MR JUSTICE MITTING: Mr Palmer, I think it will have to be, will it not?
26. MR PALMER: Yes, my Lord.
27. MR JUSTICE MITTING: Lieutenant Colonel of the same name perhaps. Alright, Lieutenant Colonel Z.
28. MS WESTON: I am grateful. That just leaves the question of costs, and we would seek our costs against the Secretary of State. I know it was finely balanced and I appreciate my Lord's very careful judgment, but these are times where the Legal Services fund is so heavily circumscribed that a victory ought to be reflected in not having to pay.
29. MR JUSTICE MITTING: Mr Palmer, loser pays?
30. MR PALMER: I cannot resist that, my Lord.
31. MS WESTON: The only other matter is detailed assessment.
32. MR JUSTICE MITTING: The defendant will pay the claimant's costs, to be the subject of a detailed assessment if not agreed. There will be a public funding assessment of the claimant's costs.
33. MS WESTON: I am most grateful and, as always, I am very grateful to the court for the careful consideration given to the papers and the subject matter in this case.