CO/5483/2006

Neutral Citation Number: [2008] EWHC 2880 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
DIVISIONAL COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 28th October 2008

B e f o r e:

MR JUSTICE COLLINS

Between:
SSEMAKULA

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

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190 Fleet Street London EC4A 2AG
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(Official Shorthand Writers to the Court)

Mr G Lee (instructed by Sutovic & Hartigan) appeared on behalf of the **Claimant**
Mr J Auburn (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

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

1. MR JUSTICE COLLINS: This is a claim for judicial review of the refusal by the Secretary of State to treat a claim made by the claimant as a fresh claim for asylum. He comes from Uganda. He originally came to this country in 1997 entering, it seems, unlawfully and using a false name. In late 2004, or at the beginning of 2005, he was arrested, having been stopped for driving under the influence of drink. It was then discovered that he was indeed an illegal entrant. He was removed to Uganda in January 2005. After a fortnight he returned, and again he entered this country unlawfully by using a false identity, a different false identity to that which he had used before. What had not changed was his propensity to drive a motorcar whilst under the influence of drink so he was yet again arrested for that, this time in early 2006, a year or so after he had arrived in the country. Again, his true identity was discovered as a result, and a decision was made that he should be removed. Before that could happen, he claimed asylum.

2. That claim was based upon the allegation that during the fortnight that he was in Uganda he had been detained and tortured. The reason for that was, he said, that whilst in this country he had joined the PRA (the People's Redemption Army) and he had, he said, often spoken with the leader, a gentleman called Mr Kanimandi, who was resident in Sweden. When he had returned to Uganda, he had gone to the offices of the body which was then concerned with those who were sympathetic to the PRA, a body known by the initials FPC, and he wanted to receive training there. He said he was travelling in a car with three others to a suburb of Kampala when he was arrested. He was detained and he was beaten and tortured whilst in detention.

3. Somehow he managed to escape. He was not sure how that had happened, but some members of the intelligence forces, he said, had come for him in the night and taken him to a safe house and put him on a flight to the United Kingdom with an agent. Since he had been required to repay the PRA the costs of his travel, he assumed that the PRA must have organised that. Indeed, when he had secured work in this country unlawfully, he confirmed that he had sent money to the PRA via a lady named Harriet. In fact he had sent money, but he had started sending such money in 2002. Whether the money sent was, in truth, to repay for his escape or whether it was because he was a genuine supporter in this country of the aims of the PRA is not entirely clear.

4. In any event, unfortunately for him he had stated in a bail statement that he fled Uganda due to pressures to be circumcised rather than because he had been subjected to a detention and torture. He was unable to explain to the Immigration Judge who heard his appeal against the refusal by the Secretary of State to grant him asylum why he had told that as an untrue reason for his having left Uganda. He said that he had actually left because he joined what he called the Allied Democratic Forces and had come to the United Kingdom to avoid further difficulties. He had had no problem with the authorities in Uganda when he had been removed from the United Kingdom. He was not known to the authorities there, but he was afraid that a spy must have followed him to the offices of the FPC and that is why he had been arrested.

5. He appeared in person before the Immigration Judge, the hearing being on 9th May 2006. He said that is because he could not afford a representative. He produced no

medical evidence to support his contention that he had been tortured, nor did he indicate to the Immigration Judge that he had received scars as a result of the torture and ill-treatment that had occurred when he was in detention.

6. The Immigration Judge decided that he was not credible. She deals with her findings of fact between paragraphs 18 and 23 of her determination. I do not propose to read them in any detail into this judgment. Suffice it to say that she uses the word "vague" in relation to his account of his arrest and his escape. "Vague" may be a euphemism. The reality is that he was not able to say at all what were the circumstances of his release. Indeed, the story itself is, to say the least, a thoroughly improbable one. In any event, she went on to record that he was unable to give information about the leader of the PRA and she rejected his assertion that the PRA had funded his flight, because on any view he was not involved at any senior level in the party. In addition, not only did he not know who the leader was, his assertion that there were several leaders in Sweden and in the DRC was not accepted. She took the view that it was simply not credible that if he had left Uganda fearing for his life he would not have claimed asylum immediately on arriving in this country. As it was, he entered unlawfully under a false name and only claimed asylum when he was arrested and faced the prospect of being removed yet again.

7. In addition, he had not told the reason he was now giving for his leaving Uganda, having indicated that he was afraid of cultural circumcision. It can hardly be surprising if he appreciated that that really was not a very good basis for claiming asylum, and so the story changed to become one of having been beaten up and seriously ill-treated in detention because of his association with the PRA. So it was that his account was rejected. In my view, it is hardly surprising that the Immigration Judge reached that conclusion. It really was an inevitable conclusion based upon the material which was placed before her.

8. What has given rise to the fresh claim is a report from a Dr Arnold. He examined the claimant at the detention centre where he was being held pending his removal on 5th July 2006 and saw him for approximately one hour. His original report is short and what he said was:

> "The history that he gave, the demeanour and response to my questions, and the physical findings I observed are highly consistent (by the definitions of the Istanbul Protocol on the Reporting of Torture) with his having been tortured.
>
> As of today, I have had sight of none of the relevant documents, with the exception of a photocopied extract of his Colnbrook medical notes for the period of his detention up to July 5. This statement is therefore based on my contemporaneous notes and the incomplete information available to me as of that date. Following receipt of the relevant papers, I would be available to complete the evaluation of the evidence and produce a full medio-legal report."

He would expect, he said, that report to be relevant to his claim to be the victim of

torture and organised violence and to have a well-founded fear of persecution on return.

9. A detailed report was, in due course, produced. It is dated 11th November 2006. Dr Arnold sets out his CV and describes himself as a specialist in the problems of wound healing. He had become Director of Research at the Oxford Wound Healing Institute and he had been a speaker at international conferences and published more than 40 research papers on the problems of wound repair. He had undergone clinical training at the Medical Foundation for the Care of Victims of Torture and had written approximately 70 medico-legal reports. It is to be noted that he is not a psychiatrist and does not purport to be one.

10. It does not seem that he was provided with the documents that he said that he would like to have seen for the purpose of a full report, because he records in the preamble to this report:

> "I have had sight of none of his previous statements, or other relevant documents, such as his immigration interviews, with the exception of a photocopied extract of his Colnbrook medical notes for the period of his detention in this centre up to July 5. This statement is therefore based on my contemporaneous notes and the incomplete information available to me."

So for whatever reason (maybe because the claimant's claim for judicial review had been commenced) these documents were not produced. The application was in fact lodged on 3rd July 2006 but it is fair to say that the claimant was then acting in person. It would seem he contacted his present solicitors in August because an application was made to the duty judge at the end of August 2006 for an injunction to prevent the claimant's removal from the United Kingdom. That application was granted.

11. The claimant already had the advantage of the assistance of his present solicitors, Messrs Sutovic and Hartigan, who have enormous experience in dealing with immigration matters, and it is perhaps somewhat surprising that Dr Arnold was not provided with any of the information that he had considered to be desirable. He records the account that he was given as to the treatment that the claimant had received; the claimant was not in the least vague in the account that he gave to Dr Arnold. He said that he was punched, he was kicked, his hands and feet were strapped to a chair and secured by a band, he was subjected to electric shocks, he was dragged along the floor, kicked and hit with rifle butts, caused to cough up blood, and was eventually freed by army officers. He said that they were sympathetic to the PRA and took him to a safe house.

12. He said that he had had recurrent nightmares in which he saw the death of his parents and his own torture. He suffered intrusive memories and flashbacks of these events. The nightmares had been present since the death of his parents but had become more severe following his own recent detention after his return. He said that he thought his short-term memory and ability to concentrate had been impaired following the torture. He said that he sought psychological help from the clinical staff in detention and was told he would be referred to counselling or to see a psychiatrist but was not aware of

any progress in that matter. As far as I am aware, because no evidence has been produced before me, he has not, despite what we shall see stated by Dr Arnold in his report, sought any such treatment.

13. Dr Arnold identifies the scars and indicates that they are consistent with the account that had been given by the claimant. No doubt that is correct. There is no reason to doubt that view; after all, Dr Arnold is a wound specialist. On the other hand, it is well known to the Secretary of State and to those who have had, over the years, to deal with immigration appeals that the ability to describe what happened to fit in with scars that exist is something which is commonly encountered. The Immigration Judge took the view that the claimant was an intelligent person who was able to express himself clearly and knew what he was doing. It seems to me that, as one knows, scars can result from injuries caused in a number of different ways, and although they can be said to be consistent with an account given of torture, equally they can be consistent with other matters. What might have been rather important was the age of some of the scars; whether they were indeed consistent with all having been caused at the same time or over a very short period of time. We do not have any evidence or any details of that. But the point is made that the scars are consistent with the account that was given.

14. Dr Arnold then dealt with the nightmares and he said that an expert psychological assessment was warranted to establish the severity of the condition and plan any necessary treatment, but he took the view that they were consistent with a diagnosis of Post-Traumatic Stress Disorder.

15. This claim, as I say, was lodged in July, and in fact permission was refused on the papers the following day. There was a renewed application for permission which was adjourned on 13th November and then again on 21st November with directions having been given. It came before Walker J on 14th December 2006. He granted permission on one ground only, namely the question as to whether the diagnosis of Post-Traumatic Stress Disorder meant that what the Immigration Judge castigated as "vague" evidence could be explained by the medical condition. In fact, it is impossible to limit it quite to that extent because as is, I would have thought, obvious, the medical evidence takes in not only the psychological condition but also the physical condition (by which I mean the scars), and both have to be looked at together. However, that is what has been done in the hearing before me.

16. I gather that unfortunately the altogether far too lengthy delay in the hearing of this case is a result of the pressure on this court and the backlog, but it has meant that Dr Arnold has produced a further report dated 6th July 2008 in which he deals more substantially with the PTSD. He confirms that in his view the symptoms the claimant describes are consistent with PTSD. He says at paragraph 5:

> "It is sometimes held, even of expert psychiatrists, which I am not (see below), that the doctor has erred by believing the patient's history of torture, thereby reducing the probative value of the professional report. If I am to be held guilty of credulity in reporting, it would need to be the case that Mr Ssemakula was able (in advance of my visit) to learn and credibly reproduce the symptoms which he described in response to my

deliberately non-directive and general medical questions about his health. I do not consider this terribly likely."

17. I regret to say that it is again the experience of the court, and no doubt of the Secretary of State, that the symptoms of PTSD are all too easy to reproduce, because there is no positive evidence that the sufferings and nightmares and so on that are said to exist do actually exist. Dr Arnold though does indicate, going on in his report, that he was careful to acknowledge that he was not a specialist psychiatrist but he had examined many survivors of torture whose medical evidence had been accepted by the courts, and he had inevitably seen numerous patients with PTSD which had often been previously diagnosed or subsequently confirmed by expert psychiatrists. As a result of his clinical supervision at the Traumatic Stress Service at Maudsley Hospital, he was able to recognise, he believed, and to be able to understand, the symptoms of, and to judge whether an individual was suffering from, PTSD. So be it. But it is important in these cases, first, that a full report is given to the doctor of all the relevant documents -- that did not happen here -- and equally, where there is a real issue such as this, and where the doctor himself recommended that a psychiatrist should be seen, that that should have happened. This has not happened so the Secretary of State had to consider the matter on the basis of the material that existed.

18. The test that the court applies is whether there is a reasonable possibility that an Immigration Judge, when faced with the material put before the Secretary of State, might reach a conclusion that was favourable to the individual. It is not for the Secretary of State to decide whether she would or would not reach the same conclusion, because that is not the appropriate test. On the other hand, obviously, the Secretary of State is entitled, indeed bound, to consider all the material that is produced and alleged to provide the basis for a fresh claim and to decide whether it is indeed such as to persuade her that there might be a reasonable possibility of a favourable result were the matter to go to appeal. If there is material which is, on the face of it, credible, and which produces a factual situation which it is believed might well result in a favourable finding, it is not for the Secretary of State to decide for herself whether she believes that material. But she is entitled to weigh and consider the material that exists and if she forms a view that that material would not lead any reasonable Immigration Judge to a favourable view, then she is entitled to decide that it is not sufficient to amount to a fresh claim. If she reaches that conclusion, it can only be overturned by this court if there has been an error of law based on the usual **Wednesbury** grounds.

19. In this case, as I have indicated going through the background, there was an exceedingly strong case to be made against the account given by the claimant. The starting point for any fresh claim is the previous decision of the Immigration Judge, and any subsequent Immigration Judge would have to take that into account. So much is established by the decision of the Tribunal in **Devaseelan**, which has been approved and has stood for a number of years. The lack of credibility findings do not depend upon the sort of vagueness that might be explicable by those suffering from Post-Traumatic Stress Disorder. They are far more positive than that. This is a dishonest claimant who has told a number of lies and has sought, by dishonesty, to maintain his position in this country. The account that he gave of his detention and his

escape in the fortnight that he was in Uganda is a singularly improbable one, on any view.

20. So what is added by Dr Arnold? Confirmation, first, that the scars are consistent with the account given, but then that is entirely explicable by the account given being tailored to the scars that exist, and there is altogether too little material to rely upon the conclusion that the relevant scars were indeed all occasioned during that short detention in January 2005. So far as the Post-Traumatic Stress Disorder is concerned, again, the indication that that exists is one which may or may not be accurate, but it certainly does not explain and cannot explain the lack of credibility in the account given and the lies that were told. Furthermore, it is perhaps not without significance that the nightmares which were reported by the claimant certainly commenced after his parents' death and that was, for him it seems, a traumatic event and may, if there is Post-Traumatic Stress Disorder of any sort, have been a contributory factor to that and nothing to do with the subsequent alleged torture.

21. It seems to me that, looking at this matter in the round, as I must, the Secretary of State was entitled, in law, to conclude as she did and to reject the claim that was being put forward and not to treat it as a fresh claim. Accordingly, this claim for judicial review must be dismissed.

22. MR AUBURN: My Lord, there is one very brief point. I know there was a period of time when the claimant was not publicly funded, so I would ask for an order for costs in relation to that period. It may well be that the defendant either does not pursue it or does not stand any chance of pursuing it.

23. MR JUSTICE COLLINS: When was that? You mean from when the proceedings were lodged?

24. MR LEE: He was unrepresented, I think --

25. MR JUSTICE COLLINS: He was unrepresented when he lodged the claim, but I think on the history there was an application for interim relief which McCombe J used to dispose of the claim.

26. MR LEE: As I understand it, and I was going to raise this actually because your Lordship referred to it in your judgment --

27. MR JUSTICE COLLINS: Yes, I may be wrong. That is the information I have been given, but I have not reminded myself of the court orders.

28. MR LEE: What McCombe J did was refuse permission and indicate that renewal would not be a barrier for removal.

29. MR JUSTICE COLLINS: That was the day after the claim was lodged.

30. MR LEE: Yes.

31. MR JUSTICE COLLINS: I am assuming the reason why that was done is because the original claim asked for an interim order to prevent any removal.

32. MR LEE: I do not think he was represented when the original --

33. MR JUSTICE COLLINS: No, he was not. That is right, yes, it was a challenge to removal directions dated 4th July.

34. MR LEE: Yes. The sequence of events, as I understand it, is that you have --

35. MR JUSTICE COLLINS: In fact, I think what happened -- correct me if I am mistaken -- is that McCombe J immediately refused permission so that the removal could take place, but your client was disruptive, they say, and the result was that he could not be removed.

36. MR LEE: Yes.

37. MR JUSTICE COLLINS: So it has gone on from there.

38. MR LEE: The intervening event is that there is an injunction of a sort.

39. MR JUSTICE COLLINS: That was 22nd August, I think. There were new removal directions. This time he did seek the help of your solicitors, and they got an injunction from the duty judge, no doubt because they had by then put in an application for an oral renewal.

40. MR LEE: I suspect -- and forgive my back in a moment, my Lord -- the sequence of events was set out in Mr Murphy's witness statement.

41. MR JUSTICE COLLINS: Let us have a look at that.

42. MR LEE: I think they come to it late.

43. MR JUSTICE COLLINS: Paragraph 2. He says that he was asked shortly after 6 pm on 22nd August, presumably because removal was going to be on 23rd August.

44. MR LEE: Yes. The second sentence indicates that they were instructed that day. That was no doubt done under an emergency funding order.

45. MR JUSTICE COLLINS: Yes. Christopher Clarke J was the duty judge. It says that he informed the duty judge about the adverse credibility finding.

46. MR LEE: Yes.

47. MR JUSTICE COLLINS: And the order made by McCombe J.

48. MR LEE: That period would have been funded under an emergency --

49. MR JUSTICE COLLINS: You are perhaps slightly fortunate that the duty judge did what he did in the light of the order made by McCombe J.

50. MR LEE: I was going to raise that because I think your Lordship in the judgment said that it was --

51. MR JUSTICE COLLINS: Yes, that is actually unfair to the Home Office and I will delete that.

52. MR LEE: My Lord, in terms of funding, as I understand it there was that emergency funding for the injunction. There was no representation at the original oral renewal.

53. MR JUSTICE COLLINS: I saw that.

54. MR LEE: He was neither represented nor funded at that stage. Then, permission having been granted, he was advised by Walker J to seek representation. He did so, and here we are today.

55. MR JUSTICE COLLINS: Technically, therefore, he would be liable, to pay the costs of the oral renewal, is what it boils down to.

56. MR LEE: In an oral renewal, my learned friend would perhaps be on stronger ground in seeking the costs of the acknowledgment of service.

57. MR JUSTICE COLLINS: I think not, because those costs are where there has been a refusal of permission. One considers generally, as the Practice Direction indicates, that costs of the oral renewal are not awarded, only costs of the acknowledgment of service. But if permission is granted and subsequently the claim fails, then the order for costs will cover the whole of the proceedings, including any oral renewal if there was. So one is not in the same situation.

58. MR LEE: I accept that, in retrospect.

59. MR JUSTICE COLLINS: I think that there is an entitlement, it seems to me, to the costs, but they would be limited effectively to the costs of the oral renewal when he appeared in person.

60. MR LEE: My Lord, yes.

61. MR JUSTICE COLLINS: Whether they will pursue it is another matter. Maybe it would not be very sensible to do so.

62. MR LEE: My Lord has indicated that perhaps costs in those terms awarded to the --

63. MR JUSTICE COLLINS: I will make an order for costs limited to the costs of the renewal, the time when he was not subject to any Legal Aid order.

64. MR AUBURN: My Lord, as I said, obviously the reality of enforcement --

65. MR JUSTICE COLLINS: You would, I suppose, be entitled to the usual order if you wanted it for the rest, but I do not think there is much point.

66. MR AUBURN: No. But in relation to the other part of it, one never knows.

67. MR JUSTICE COLLINS: He may not be removed for another however many years. Who knows.

68. MR AUBURN: Also I was present at those hearings and I do recollect that there was more than one adjournment because the claimant had produced documents.

69. MR JUSTICE COLLINS: There were two adjournments before Charles J, so they will cover all that.

70. MR AUBURN: Yes.

71. MR JUSTICE COLLINS: But you will have to set out a schedule.

72. MR AUBURN: Yes, my Lord.

73. MR JUSTICE COLLINS: I think I shall direct that that is on condition that you produce a schedule of those costs within 21 days and they will have to be assessed if not agreed.

74. MR LEE: My Lord, can I ask for detailed assessment of my publicly funded costs?

75. MR JUSTICE COLLINS: Yes, of course. Thank you both.