Neutral Citation Number: [2009] EWHC 1293 (Admin)

Case No: CO/1469/2009

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

Royal Courts of Justice
The Strand
London
WC2A 2LL

Date: Monday 27 April 2009

B e f o r e:

MR TIM BRENNAN QC
(Sitting as a Deputy Judge of the Queen's Bench Division)

B E T W E E N:

- -

The Queen on the application of

MOHAMMED DIYAR SABER
Claimant
and

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

- -

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Miss J Bond (instructed by Messrs Gillman-Smith & Co)
appeared on behalf of **The Claimant**

Miss C Patry-Hoskins (instructed by the Treasury Solicitor)
appeared on behalf of **The Defendant**

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J U D G M E N T

THE DEPUTY JUDGE:

1. This is an application for judicial review brought with permission granted by His Honour Judge Birtles. The claimant (now aged 27) challenges the decision of the Secretary of State, notified to his solicitors in a letter dated 13 February 2009. In that letter the Secretary of State (acting by an official) rejected the claimant's claim that to remove him from the United

Kingdom would constitute a disproportionate interference with his rights under Article 8 of the European Convention on Human Rights as it appears in Schedule 1 to the Human Rights Act 1998. Having rejected that claim, the Secretary of State also determined for the purposes of Rule 353 of the Immigration Rules that the claim did not amount to a fresh claim as there defined, concluding that it did not consist of, or include, material which had not previously been the subject of decision and which gave rise to a realistic prospect of success on some subsequent appeal.

2. Before turning to the reasoning set out in the Secretary of State's letter it is convenient to summarise the chronology of the claimant's position. He arrived in the United Kingdom on 25 August 2001 and claimed asylum. His claim was rejected. There were two appeals (one being set aside), and his appeal was ultimately dismissed in a decision promulgated on 7 October 2002. His claim for asylum (there being at that stage no Article 8 claim advanced) was rejected in circumstances where the adjudicator did not accept the claimant's evidence. At paragraph 27 of that decision (which it is not necessary to read in detail), the adjudicator recorded that he was not satisfied that the claimant had given a credible account of the circumstances in which he claimed to have left Iraq. In paragraph 28 he recorded that the claimant's evidence was in some respects inconsistent. In paragraph 30 he rejected his evidence that he had been the subject of attacks or threats from an Islamic extremist group on account of his lifestyle and opinions. The adjudicator also rejected evidence that the claimant had written a pamphlet which had brought him to the attention of persons who might do him harm.

3. On 5 August 2005 (that is to say nearly three years after that decision), the claimant reported for the last time as required by the terms on which he was present in the United Kingdom. Thereafter, he was treated by the Home Office as having absconded.

4. He did not come to the attention of the Home Office again until December 2008, when he was arrested and detained on suspicion of fraud. In January 2009 he was convicted of offences of fraud and was sentenced by magistrates to six weeks' imprisonment.

5. On 30 January 2009 removal directions were made, providing for the removal of the claimant by charter flight to Iraq. After further written representations, and refusal of those representations, he was removed to Iraq on 16 February 2009. It appears that at the time of his removal there was an application to the Administrative Court for an order preventing his removal. However, it had been made at such short notice that the Administrative Court was unable to deal with it and so he was removed. It has not been suggested in the argument before me that there was anything unlawful in his removal.

6. While those last items of correspondence were in the course of preparation and discussion, there was submitted on the claimant's behalf a letter dated 11 February 2009, which is said to be the fresh claim which this application for judicial review concerns. In short, it was said that in the intervening period, while the claimant had disappeared from the attention of Immigration Control, he had succeeded in establishing a relationship with a British national who has an 11 year old daughter by another man. It was not said in that letter, and is clearly not the case, that the claimant had married. Nor is it suggested that the claimant had himself fathered children in the United Kingdom. The application was supported by handwritten letters from the woman with whom he claimed to have established the relationship, from her mother, and from a mutual friend. The letters from the woman and from her mother both said that the claimant and the

woman were engaged. The mother referred to them as being "engaged"; her daughter referred to the claimant as being her fiance. It is to my mind striking that neither letter referred to the claimant as co-habiting with the woman at the address which she gives in the letter (or anywhere else). Although it is stated by Miss Bond (counsel for the claimant) that her instructions are that they were in fact co-habiting at the time, the omission of any direct statement to that effect is to my mind striking.

7. Against that background, shortly summarised, the matter had to be decided by the Secretary of State. The point at issue was whether the removal of the claimant from the United Kingdom would constitute a disproportionate interference with his private and family life as established during the period when he was subject to, and in breach of, immigration control.

8. In a long letter extending over five closely-typed pages, the Secretary of State rejected those arguments and the arguments that they amounted to a fresh claim for the purposes of Rule 353 of the Immigration Rules. I shall turn in a moment to look at the terms in which she did so.

9. The task of the Secretary of State in deciding whether a claim amounts to a fresh claim is not controversial. It is summarised in the well-known passage from the judgment of Buxton LJ in WM (DRC) v Secretary of State for the Home Department [2006] EWCA Civ 1495, where he said:

> "6. .... the Secretary of State .... has to consider the new material together with the old and make two judgements. First, whether the new material is significantly different from that already submitted, on the basis of which the asylum claim has failed [the same considerations apply to an article 8 claim as well as to an asylum claim], 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 reasonable 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. .... the Secretary of State, in assessing the reliability of new material, can of course have in mind both how the material relates to other material already found by an adjudicator to be reliable, and also have in mind, where that is relevantly probative, any finding as to the honesty or reliability of the applicant that was made by the previous adjudicator. However, he must also bear in mind that the latter may be of little relevance when, as is alleged in both of the particular cases before us, the new material does not emanate from the applicant himself and thus cannot be said to be automatically suspect because it comes from a tainted source."

His Lordship continued in paragraph 7 with the sentence which is always quoted in such cases:

> "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."

10. It is common ground that the task of the Administrative Court on an application such as the present is to assess the rationality of the decision of the Secretary of State that the claim does not amount to a fresh claim. It is not the task of the court on judicial review to re-evaluate the material and to reach its own view.

11. I turn therefore to look at the way in which the Secretary of State expressed the decision in the long letter of 13 February 2009. It would be inappropriate to set out the whole of it. It recorded as a fact regarded as apparently relevant that the claimant had failed to comply with his reporting restrictions and was listed as an absconder. It recorded his arrest on suspicion of fraud and identity card offences, and later his conviction for those offences. It recorded the conclusion that in the claimant's case there were insufficient compassionate circumstances to justify a concession (in context, a concession to the constraints of immigration control) on the grounds of his claimed relationship. It went on to say:

> "Furthermore, it is our contention that it would have been reasonable for both parties to have been aware that [the claimant's] precarious immigration status was such that the future and persistence of their relationship within the United Kingdom would, from the outset, be uncertain. [The claimant's] partner can support any application [the claimant] makes from abroad for entry clearance enabling him to return to this country legally as the spouse/partner of a person settled here."

The letter continued:

> "The first question is whether [the claimant] enjoys a family life in the United Kingdom. [The claimant] established his family life in the full knowledge of his precarious immigration status. Since his family life has been established in breach of the Immigration Rules, it is our view that he does not enjoy a family life in the United Kingdom, then his removal cannot breach Article 8 of the ECHR.

> The second question is whether [the claimant's] removal will interfere with his family life. As I have said previously, I do not accept that he has established a family life in the United Kingdom but even if I did, I do not consider that his removal would interfere with that family life. Even if I were to accept that [the claimant] is enjoying a family life with [the woman] then it is open to her to support any application that he may make to enable him to return her with the appropriate entry clearance.
>
> Even if I accepted that removal would interfere with [the claimant's] Article 8 rights, which I do not, then I consider that this interference is in accordance with law. For the reasons stated above, [the claimant's] application cannot succeed under the Immigration Rules or under any of the UK Border Agency's published policies."

After further rejections of the claimant's claim to have established a family life, the letter goes on to refer to a number of relevant factors by reference to paragraph 395C of the Immigration Rules. They include the Secretary of State's view that the claimant's ties to the United Kingdom were not sufficiently compelling so as to warrant him being permitted to remain in this country. In a later paragraph the letter records that no evidence had been put forward to indicate the claimant's domestic circumstances in the United Kingdom. I have already commented on the absence of evidence as to cohabitation. In a further paragraph the letter recorded that the claimant was convicted of fraud by magistrates and sentenced to a term of imprisonment.

12. Against that background the challenge is advanced on behalf of the claimant first by reference to the modest threshold referred to in Buxton LJ's judgment in WM. Then it is said that the material as to the family relationship which the claimant claimed to have established was not obviously something which should be disbelieved by the Secretary of State; and further (and to my mind more compellingly), that the Secretary of State did not expressly say that she did disbelieve it. In those circumstances it is submitted that the Secretary of State's rejection of the claimant's claim as a fresh claim pursuant to rule 353 should be quashed and that the Secretary of State should be ordered to treat the claim as a fresh claim giving rise to an in country right of appeal; alternatively (and very much as a fall-back position), that the decision should be quashed and that the Secretary of State should be required to re-determine the claim and to give proper reasons for her decision.

13. In response to the claimant's case Miss Patry-Hoskins, on behalf of the Secretary of State, accepts that the letter does not have quite the clarity of reasoning that it would have contained if she had drafted it herself. That may very well be true. The question is, however, whether it has sufficient material in it to show what was the Secretary of State's reasoning and that the decision was not perverse.

14. In R(Durmaz) v Secretary of State for the Home Department [2008] EWHC 3301 Admin,

by reference to the decision letter which was before him in that case, Charles J observed:

> "12. At the heart of the first two grounds is the submission that .... the decision-maker has not set out in the decision letter (a) the test set by Buxton LJ in WM and/or (b), by reference to such an exposition of the test, informed the reader of the letter of the reasons leading to the conclusion that this was not a fresh claim under Rule 353.
>
> 13. In this case and others I have made the general comment that it is to my mind surprising that the authors of these letters do not set out the test that they are applying and how they have applied it. The second part is, of course, very important to avoid difficulties flowing from a letter simply being formulaic. But a failure to do that does not mean that the decision-maker has taken a flawed approach and failed to give proper reasons in the decision letter. What has to be done is that the letter has to be read as a whole, and fairly as a whole, to see whether or not the decision-maker has applied the test with the appropriate anxious scrutiny."

15. Those paragraphs helpfully summarise the approach which I should take to the decision letter in the present case. In my judgment the letter is some way short of being as clear as it should be. That said, it identifies the decision-maker's view that the claimant had established his family life in the full knowledge of his precarious immigration status. It does not reject out of hand the contention on behalf of the claimant that he had established some sort of relationship with the young woman mentioned. It appears to proceed on the basis that there was some sort of relationship. However, it rejects the proposition that the claimant enjoyed a family life here. It records that the decision-maker did not consider that the claimant's ties to the United Kingdom were sufficiently compelling to warrant him being permitted to remain in this country. It records that no evidence had been put forward to indicate the claimant's domestic circumstances in the United Kingdom.

16. In relation to this last point that statement is in my view, if read in context, entirely justified. The sketchy account given in the handwritten letter to which I have referred fell a very long way short of providing information about the claimant's domestic circumstances in the United Kingdom if it was hoped and intended to establish the existence of a family and private life supported by the principles of Article 8.

17. Finally, the letter records the fact of the claimant's criminal conviction for offences of dishonesty.

18. Taking that material as a whole, and reading it with the knowledge which must have been available to, and in the mind of, the decision-maker that the claimant's original asylum claim had been rejected on 7 October 2002 on grounds which included rejection of the reliability of

his evidence, I do not consider that the claimant's contention that the Secretary of State's rejection of his claim as a fresh claim was irrational has been made out. Although there are shortcomings in the may in which the letter is expressed, the decision itself is not shown to have been irrational. In those circumstances this application for judicial review should fail and is dismissed.

MISS PATRY-HOSKINS: My Lord, the claimant does not have the benefit of public funding and therefore the Secretary of State does ask for her costs. I was not anticipating judgment would be handed down so quickly, so unfortunately I do not have a schedule of costs. But I would ask for the principle of costs to be dealt with simply by an order that the claimant pay the Secretary of State's costs. The quantum will have to be dealt with either by agreement or, if there is disagreement, by way of submissions to your Lordship. I would not want to suggest any further hearing. It may well be that, if the quantum cannot be agreed, representations can be made to your Lordship to be determined on the papers.

THE DEPUTY JUDGE: Is there any practical point to a costs order? I am sure that there must be a practice which is followed in these cases. What is it? He has been removed.

MISS PATRY-HOSKINS: He has been removed. Whether or not the costs order is enforced is obviously a matter for the Secretary of State. The Secretary of State will have to make a decision based on the practical considerations your Lordship has identified. It does not mean that the Secretary of State is not entitled to a costs order.

THE DEPUTY JUDGE: That is obviously right as well. But the practice in these cases is to seek, and at any rate record, the making of an order for costs?

MISS PATRY-HOSKINS: Yes.

THE DEPUTY JUDGE: Just in case something happens one day.

MISS PATRY-HOSKINS: Just in case something happens, yes. He may well make an application for entry clearance which is successful -- I have no idea -- and come back to the United Kingdom. We would like to have a cost order against him.

THE DEPUTY JUDGE: Yes, I see that. So you are asking for -- all of this, of course, is subject to submissions on behalf of the claimant -- an order for costs to be the subject of detailed assessment if not agreed, or an order for costs to be the subject of summary assessment and you can put in written submissions on the figures if you cannot reach agreement?

MISS PATRY-HOSKINS: Yes, I think the latter. I think it would be wholly disproportionate for this to be dealt with by way of detailed assessment, in my submission.

THE DEPUTY JUDGE: How quickly can you produce a written submission on the amount if I make the order?

MISS PATRY-HOSKINS: Seven days, my Lord.

THE DEPUTY JUDGE: I will come back on that. Yes, Miss Bond, do you want to deal with the costs, first, and then any other application you may have?

MISS BOND: I think that is the correct application. I cannot think of any other way in which I could improve on it.

THE DEPUTY JUDGE: You accept the principle that she should have an order for costs, do you?

MISS BOND: Yes, although with the claimant out of the jurisdiction it is entirely a matter for him what he does with the costs order that he is required to pay. As my friend has pointed out, it may be that he thinks it is in his interests to pay if he wants to try to secure his entry to the United Kingdom.

THE DEPUTY JUDGE: Yes.

MISS BOND: I am happy with the timetable of seven days and obviously we will have the right to say whether we agree that the figures put forward are reasonable.

THE DEPUTY JUDGE: Yes. I am sitting here this week.

MISS PATRY-HOSKINS: My Lord, we could do it very quickly, I am sure.

THE DEPUTY JUDGE: I would have thought so.

MISS PATRY-HOSKINS: We can certainly do it by the end of this week.

THE DEPUTY JUDGE: These things can often be done really quite quickly. Do you want to have a couple of minutes to see if you can put together a figure?

MISS PATRY-HOSKINS: I will see if that is possible.

MISS BOND: My Lord, the difficulty is that I cannot take any sensible instructions from those who are instructing me who are in a position to know as to whether the figure proposed is reasonable or not. One would imagine that those instructing me might want to have some input. I do not think I will be doing my client a service if I just say --

THE DEPUTY JUDGE: Let us just see what the figure is.

MISS PATRY-HOSKINS: My Lord, I do not think that we can come up with a figure. We could do so, say, by 4pm on Wednesday or something like that.

THE DEPUTY JUDGE: Right. I will dismiss the claim for judicial review. I will make an order that the claimant pay the defendant's costs, to be the subject of summary, not detailed, assessment if not otherwise agreed. If it is not possible to agree the figure, then written submissions on both sides are to be lodged at the court, marked for my attention, by 1pm on Thursday 30 April, and I will then deal with it immediately and make such order as is necessary

before I finish sitting here.

MISS PATRY-HOSKINS: Thank you very much. Obviously if we can get it to my learned friend and her solicitors sooner than Wednesday, then we will.

THE DEPUTY JUDGE: Good. Anything else?

MISS BOND: No, thank you.

THE DEPUTY JUDGE: Thank you very much.

MISS PATRY-HOSKINS: Thank you.
