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CO/10762/2008

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

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 8th October 2009

B e f o r e :

MR JUSTICE KEITH

Between:

THE QUEEN ON THE APPLICATION OF MUBARAK

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

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Mr G Lee (instructed by Thompson & Co) 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

1. MR JUSTICE KEITH: The claimant, Nusrat Mubarak, comes from Pakistan. She was born in 1968 and therefore is 41 years old. She is an Ahmadi. She arrived in this country on 25th November 2004 with her four young children on a forged passport, her husband having arrived here the previous January. She claimed asylum on her arrival on the ground that she feared persecution in the light of her Ahmadi faith if she was returned to Pakistan. The Secretary of State refused that claim on 19th January 2005. An appeal against that refusal was dismissed by an immigration judge at the Asylum and Immigration Tribunal by a decision promulgated on 17th May 2005. Applications for the Tribunal to reconsider its decision were refused by a senior immigration judge on 6th June 2005 and by Collins J on 12th July 2005.
2. Further representations as to why the claimant should be granted asylum were submitted by the claimant's solicitors to the Secretary of State on 14th August and 7th September 2005. No response was received to those representations, and eventually over 3 years later new solicitors instructed on her behalf submitted further representations to the Secretary of State on 30th October 2008. The letter containing those latter representations enclosed many documents which the Secretary of State had not considered before. That prompted the United Kingdom Border Agency to respond to the representations of 14th August and 7th September 2005. It did so on 7th November 2008, and it responded to the representations of 30th October 2008 on 10th and 25th November 2008.
3. Both sets of representations were rejected. The Secretary of State confirmed that asylum would not be granted and in relation to both sets of representations the Secretary of State concluded that they did not amount to fresh claims. The claimant accordingly has no right of appeal to the Asylum and Immigration Tribunal. On this claim for judicial review, permission to proceed with her claim having been granted by Judge Pearl, the claimant contends that the conclusion that the representations made on her behalf did not amount to fresh claims was flawed. Although her claim relates to the conclusions that none of the representations amounted to fresh claims, the claimant's case in effect is that it was the documents enclosed with the representations submitted on 30th October 2008 which made her representations amount to a fresh claim.
4. Paragraph 353 of the Immigration Rules provides, so far as is material:

"When [an] ... asylum claim has been refused 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 been 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."

In WM(DRC) v Secretary of State for the Home Department [2006] EWCA 1495 (Civ), the Court of Appeal looked at the task of the Secretary of State when considering

further submissions, and the task of the court when reviewing a decision of the Secretary of State that further submission did not amount to a fresh claim. The question for the Secretary of State is simply whether there is a realistic prospect of success in a further appeal to an immigration judge, but not more than that. Buxton LJ said that in considering that question the Secretary of State must scrutinise the material anxiously, giving proper weight to the issues and considering the evidence in the round. As for the court's task, Buxton LJ confirmed that the decision remains that of the Secretary of State and so the determination of the Secretary of State is only capable of being impugned on Wednesbury grounds.

5. The situation of Ahmadis in Pakistan was summarised by Sedley LJ in Secretary of State for the Home Department v IA (Pakistan) [2008] EWCA 580 (Civ) at [2] as follows:

"The Ahmadi faith is a branch of Islam which is regarded by the Sunni majority in Pakistan as heretical. The sect is denied constitutional and legal protection on grounds of blasphemy. It has between 2 and 5 million adherents scattered through Pakistan, many of whom find themselves targeted by – in particular – a militant Sunni fundamentalist organisation named Khatme Nabuwwat (KN). Sometimes the attacks simply have the venal object of driving an Ahmadi family from its land so that it can be seized by others. But there is evidence in other cases, notably where the fugitive has been proselytising, that persecution on religious grounds will follow them, making them refugees unless there is somewhere else in Pakistan where they can safely relocate without its being unduly harsh."

6. It follows that not all adherents to the Ahmadi faith are at risk of ill treatment amounting to persecution, and that reflects an important distinction drawn between what were described as exceptional and unexceptional Ahmadis in Secretary of State for the Home Department v KK [2005] UKIAT 00033. So far as unexceptional Ahmadis are concerned, the Asylum and Immigration Tribunal found at [25] that there was no real risk of ill treatment amounting to persecution if they are returned to Pakistan. An unexceptionable Ahmadi was described at [3] as someone of the Ahmadi faith but who:

"(i) has no record of active preaching and is not a person in respect of whom any finding has been made that there is a real risk that he will preach on return;

(ii) has no particular profile in the Ahmadi faith;

(iii) has no history of persecution or other ill- treatments in Pakistan relating to his Ahmadi faith; and

(iv) has no other particular feature to give any potential added risk to him (e.g by being a convert to the Ahmadi faith)."

7. There are two other features about Ahmadis which recent guidance on their treatment in Pakistan reveals. First, in KK itself at [24] the Tribunal said:

"...there are a number of reports of Ahmadis being the subject of prosecutions under the Penal Code and a number of reports of hostile action (sufficiently serious to be persecutory) against Ahmadis by non-state actors... So far as hostile treatment by non-state actors is concerned, some of these attacks are directed at persons of high profile (such as active preachers) within the Ahmadi community... There may also be random attacks on Ahmadis of no particular profile, merely because they are Ahmadis."

Secondly, the headnote in MJ and ZM v Secretary of State for the Home Department [2008] UKIAT 00033 includes the following:

"In Pakistan as a whole, whilst it is clear that from time to time local pressure is exerted to restrict the building of new Ahmadi mosques, schools and cemeteries, and that a very small number of Ahmadis are arrested and charged with blasphemy or behaviour offensive to Muslims, the number of problems recorded is small and has declined since the Musharraf Government took power. Set against the number of Ahmadis in Pakistan as a whole, they are very low indeed. The courts do grant bail and all appeals against blasphemy convictions in recent years have succeeded.

There is very sparse evidence indeed of harm to Ahmadis from non-state agents (though rather more anecdotal evidence of difficulties for Christians). The general risk today on return to Pakistan for Ahmadis who propagate the Ahmadi faith falls well below the level necessary to show a real risk of persecution, serious harm or ill-treatment and thus to engage any form of international protection."

8. **With that background, it is necessary first to consider the nature of the claimant's case as presented to the immigration judge. She was born into an Ahmadi family. She was expelled from college in 1984 when she was 16 for practising her religion, and she complains of a number of occasions over the years thereafter when members of her and her husband's families were attacked by mullahs from the Khatme Nabuwwat despite moving from town to town. Some of those incidents were reported to the police, but the claimant says that no action was taken. Instead, there were times when her husband and father-in-law were detained by the police, and were only released on payment of a bribe.**
9. Her problems with the mullahs began after her husband came to this country in January 2004. She claims that ever since 1984 she would preach whenever she got the chance, though she had never had any trouble with the mullahs herself. However, after her husband left Pakistan, she moved into her sister's home in Lahore. In February 2004, she began teaching at a school. After a few days, she was called to the headmistress's office where the father of one of her pupils accused of her "misguiding innocent

children". She was violently slapped and fainted. When she reported the incident to the police that evening, she was detained, abused and threatened with being charged with blasphemy. She was only released following the payment of a bribe.

10. Following that incident, she moved with her children to Faisalabad. She joined the local Ahmadi community. On an occasion in July 2004, she was accused by an acquaintance of "misguiding" her friends, and the following day the local mullahs forced their way into her home, vandalising it, stabbing her and attacking her daughter, breaking her leg. It was only as a result of the intervention of her neighbours that the mullahs were unsuccessful in their attempts to drag her out. It was following that incident that she decided to leave Pakistan.
11. The immigration judge found the claimant to be "generally credible". She did not doubt that the claimant had been a committed Ahmadi throughout her life. She accepted the claimant's account of the two occasions when she had been attacked in 2004, though there were features of the claimant's account which the immigration judge thought were exaggerated. For example, she did not accept that any of the claimant's children had been seriously injured. In relation to those two occasions, the immigration judge did not think that either of them (or indeed the claimant's detention by the police) were of sufficient severity to cross the threshold into persecution. Indeed, the immigration judge concluded that the claimant was "an unexceptional Ahmadi" using the definition adopted by the Tribunal in KK.
12. In concluding that the claimant was an unexceptional Ahmadi, the immigration judge said in paragraphs 40 and 41 of her determination:

"I find that the appellant has no record of active preaching and that there is no real risk that she will preach on return. Although the appellant claimed to have been a preacher, her activities consisted of speaking to friends about her faith and allowing them to watch selected television broadcasts in the privacy of her home. I do not find that any indiscreet answers she may have given to the children she was teaching amounted to 'preaching'.

41. The Tribunal's second aspect of unexceptional Ahmadis refers to having no particular profile in the Ahmadi faith. The appellant claimed that she was appointed Secretary [of] Finance of the Ahmadi community at some point between 1984 and 1988, and Secretary Islah-o-Irshad (secretary for preaching) after moving to Nishatabad in the spring of 2004, but she provided no evidence to confirm these appointments or to show her responsibilities. I do not find it reasonably likely that she had any particular profile in the Ahmadi faith."

The immigration judge had already dealt with whether the claimant had been persecuted or ill-treated in Pakistan as a result of her Ahmadi faith, and she concluded by saying that there was no other particular feature which gave rise to any potential added risk to her.

13. It is not entirely clear what the immigration judge was deciding in paragraphs 40 and 41 of her determination. In paragraph 40, she focused on whether the claimant had been preaching because that was one of the indicia of the exceptional Ahmadi set out in KK. But as the Tribunal was to say in MJ and ZM at paragraph 50:

"...the use of the Western descriptions 'preaching' and 'proselytising' was linguistically too narrow to reflect the range of activities in which an Ahmadi could engage and ... 'propagation' was a better description."

If the immigration judge was saying that the claimant's activities were limited to speaking about her faith with her friends and showing television programmes of interest to Ahmadi at her home, that finding does not sit well with the fact that her claim that she had been accused of indoctrinating her pupils was accepted, as was the fact that she had twice been attacked. If random attacks on unexceptional Ahmadi were relatively rare, the fact that she was accepted to have been attacked twice in the space of a few months suggests that her activities might not have been as limited as the immigration judge appears to find. As for paragraph 41, it is not clear whether the immigration judge accepted or did not accept that she held the appointments she claimed. But the fact that she was subjected to what would otherwise have been random attacks rather suggests that her profile as an Ahmadi may not have been as low key as the immigration judge found.

14. It is against that background that it is necessary to consider the documents enclosed with the letter of 30th October 2008 to see whether it was open to the Secretary of State to conclude that an immigration judge would not realistically decide the claimant's claim for asylum in her favour when considering the new documents together with the material previously considered. The new documents consisted of the following:

- (i) Articles in a daily newspaper in Lahore on 25th July and 1st August 2005 referring to the claimant as the principal of a school, and calling for action to be taken against her for preaching her faith and "misguiding" innocent students, failing which the Khatme Nabuwat would be forced to take action itself.
- (ii) An undated postcard to the claimant's husband from the Khatme Nabuwat threatening to seek him out wherever he was and to kill him.
- (iii) A letter with the date but not the year to the claimant's husband from her brother informing him that the Khatme Nabuwat and the police were searching for him, and that the Khatme Nabuwat had issued posters of him and had announced rewards for those with information as to his whereabouts.

- (iv) A document with the date but not the year calling for the claimant's husband to be chastised for preaching his faith and saying that he deserved to die.

- (v) Four articles in daily newspapers in Lahore on 29th March, 3rd April, 7th April and 8th April 2007 reporting that the police had so far failed to arrest the claimant's husband for preaching his faith, in one case calling for exceptional punishment, and in another case reporting that the mullahs of the Khatme Nabuwat might be forced to take action themselves.

- (vi) A report from a hospital in Lahore dated 3rd July 2005, describing injuries to a patient (which the Secretary of State was informed related to the claimant's brother-in-law).

- (vii) A group of documents relating to a complaint dated 26th November 2005 to a judicial magistrate which complained that the claimant's brother had been preaching his faith on 6th November 2005, and that when the complainant tackled him about it, the claimant's brother attacked him. The complaint also complained about the preaching activities of the claimant's husband before he had left Pakistan. This complaint was lodged at a local magistrates' court on 7th February 2006.

In addition to these documents relating to the claimant and members of her family, the letter of 30th October 2008 enclosed additional documents relating to the treating of Ahmadiis generally in Pakistan.

15. The claimant's case is that the documents relating to her and her family show that an immigration judge might realistically decide, when looking at the whole of the evidence, that the claimant was indeed an exceptional Ahmadi, of the kind who should be granted asylum, and that it had not been open to the Secretary of State to take a different view. In those circumstances it is necessary to examine what view the Secretary of State took about the new documents:

- The newspaper articles (docs 1 and 5). The Secretary of State could not discount the possibility that these articles were deliberately placed by supporters of the claimant and her family to bolster her and her husband's claims for asylum. That possibility was based in part on the fact that the originals were not produced, only copies, and the fact that the articles relating to the claimant were 9 months or so after she had left Pakistan and those relating to her husband were over 3 years after he had left.

•The hospital report (doc 6). Assuming it to be a genuine document, there was no evidence to suggest that the injuries referred to had anything to do with an attack on the claimant's brother-in-law because of his religion.

•The judicial complaint (doc 7). The Secretary of State was sceptical about the authenticity of these documents for two reasons. First, it seemed odd that a complaint about an incident involving the claimant's brother on 6th November 2005 should incorporate references to the preaching activities of the claimant's husband before he left Pakistan in January 2004. Secondly, it was surprising that no explanation was given about how this document and the other documents associated with it were obtained, and why (although they were accompanied by an English translation dated 1st May 2007) they were not submitted to the Secretary of State until 30th October 2008.

•The other documents (docs 2, 3 and 4). The Secretary of State attached no weight to these documents. There was no information about how documents 2 and 4 came to be in the claimant's possession, and as for document 3, letters from relatives lacked the independence to be reliable.

16. The important point in relation to these documents is that the Secretary of State did not dispute the fact that, if these documents were genuine and their contents were true, they were capable of casting a completely different light on the immigration judge's findings about the claimant's profile. The Secretary of State's position was that no weight could be attached to the documents because of the ease with which documents of these kinds can be obtained in Pakistan to bolster a claim for asylum. That is unquestionably so: see, for example, R (on the application of Naseer) v Secretary of State for the Home Department [2006] EWHC 1671 (Admin) and R (on the application of Butt) v Secretary of State for the Home Department [2008] EWHC 1256 (Admin). Both cases were concerned with Ahmadis in Pakistan. But in those cases adverse credibility findings had been made against the claimants, unlike the present case in which the claimant was regarded as having been "generally credible".
17. Moreover, although one can understand the Secretary of State's scepticism about some of those documents, documents 1, 5 and 7 cannot be dismissed all that easily. If documents 1 and 5 are genuine, quite a sophisticated attempt has been made to fashion authentic-looking documents, and if they are genuine, the editors of the newspapers must, on the Secretary of State's case, have been bribed to publish untruthful stories about the claimant and her husband. If the group of documents which comprise documents 7 are genuine, a job lot of false documents must, on the Secretary of State's case, have been commissioned on behalf of the claimant and her husband. I do not, of course, say that that could not have happened, but the Secretary of State's decision to

attach no weight to those documents, against the background of accepted attacks on the claimant in connection with her Ahmadi faith, was a strong one.

18. Having said that, the issue is not whether it was open to the Secretary of State to reach the conclusion which he did on the authenticity and genuineness of the documents, but whether it was open to the Secretary of State to conclude that the claimant had no realistic prospect of success if her claim for asylum was referred back to an immigration judge, taking into account the previous material and the new documents. Buxton LJ himself described that as quite a modest threshold. In my judgment, it was not open to the Secretary of State to conclude that the claimant did not have a realistic prospect of success if her appeal was to be reconsidered by an immigration judge. Accordingly, the Secretary of State's decision that the representations submitted on the claimant's behalf on 30th October 2008 did not amount to a fresh claim must be quashed.
19. MR JUSTICE KEITH: Mr Lee, is there any other relief at this stage?
20. MR LEE: My Lord, no, other than an application for costs to deal with the application.
21. MR JUSTICE KEITH: Very well. What do you wish to say about costs?
22. MR AUBURN: In relation to costs, I draw your attention to the matter of the way in which the matter has been litigated, particularly in receiving skeleton and bundles a day before the hearing although the CPR advise that it be provided a week before the hearing, not the day before a substantive hearing.
23. I also draw attention to the fact there was a previous listed date for this substantive hearing which was adjourned and that that was because there were new representations just days before that hearing, and those matters are matters which are relevant to your determination of the issue of costs and I say should be taken into account. Might I say firstly they could lead no order as to costs or alternatively be reduced against the Secretary of State by some proportionate sums.
24. MR JUSTICE KEITH: Thank you.
25. I do not think, Mr Auburn, that the problems that there have been over costs over the last couple of days have caused costs to be incurred which would not have been incurred. They have caused inconvenience to the court, to my clerk and to you, but I think nothing more than that. Nor do I think that the fact that the case had to be adjourned has resulted in additional costs unless you specify what they are, because I have seen from the file that the case was taken out of the list of cases due to be decided that day before that day came. Unless you can point to any particular costs that were incurred as a result of the case being taken out of the list, I am not persuaded that I should make any order for costs other than that the Secretary of State must pay the claimant's costs.
26. MR AUBURN: The application is not made on the basis of a causative relationship between (inaudible) and costs incurred, the application is made simply on the basis that

conduct of the parties is a relevant matter and can be taken into account in your discretion.

27. MR JUSTICE KEITH: I understand. I do not think that the conduct of the claimant in seeking more time for her new solicitors to prepare the case justifies denying her her costs.
28. MR AUBURN: Consequently on that, there is a schedule for detailed assessment.
29. MR JUSTICE KEITH: On a substantive claim for judicial review it is not usual for the court to be asked to assess costs summarily. Is that not right?
30. MR AUBURN: The case lasted a day. It could have been possible, but it is not an option.
31. MR JUSTICE KEITH: It follows therefore that the appropriate order is that the claimant's costs be subject to detailed assessment if not agreed.
32. MR AUBURN: The final matter is in relation to appeal. We would wish to make an application for permission to appeal. We are very grateful to your judgment. I would say that the two short matters: (i) with greatest of respect, part of the reasoning in the judgment reflects a review of the immigration judge's decision. Secondly, the point in relation to documents is a matter of wider importance that very frequently arises and will no doubt will arise on numerous times in the future.
33. MR JUSTICE KEITH: I think my judgment on the documents was specific to the facts of this case. I do not think there is an arguable case for saying that I erred in substituting my view for that of the Secretary of State. So I do not believe there are sufficient grounds to warrant the grant of permission to appeal.
34. MR LEE: My Lord, this is probably overly cautious. Could I also ask for detailed assessment of my legally aided costs?
35. MR JUSTICE KEITH: I think that automatically follows.