CO/5555/2007

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

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 15th July 2008

B e f o r e:

SIR GEORGE NEWMAN

Between:
THE QUEEN ON THE APPLICATION OF AL AMRI
Claimant

v

SECRETARY OF STATE FOR THE HOME SECRETARY
Defendant

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(Official Shorthand Writers to the Court)

Mr S Juss (instructed by Riaz Khan & Co) appeared on behalf of the **Claimant**
Mr D Barr (instructed by the 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. SIR GEORGE NEWMAN: Jackson J, having considered this case on the papers, refused permission but on 25th April 2008 Wilkie J granted permission to apply for judicial review. It appears he was concerned that the decision of the Immigration Judge was one which was strongly influenced by the absence of any evidence that a breach of an amnesty granted by the government of the Yemen had occurred.

2. The fair reading of the decision of the Immigration Judge was that he refused the original asylum application, making certain findings as to the former status and position of the claimant but nevertheless, for the principal reason which it appears occurred to Wilkie J, he had refused the claim. Wilkie J also, it appears, was influenced by the fact that the fresh material placed before the defendant included evidence from, as I believe he described them, "some pretty senior people" that persons who served in high ranking positions in the Yemen, in particular in 1994 and thereafter, were at risk if they returned to the Yemen.

3. The risk to people who have been in high ranking positions at the material time is one way of expressing, but in my judgment too broad a way of expressing, what is actually central to the determination of this case; namely the impact which the evidence, such as there is, which suggests that the amnesty is false or that the amnesty has been breached, should have, upon the other material which is also available, pointing in another direction.

4. So far as the Secretary of State is concerned, it is suggested that what troubled Wilkie J was (and that he was only just persuaded to this conclusion) that there was an arguable issue as to whether anxious scrutiny had been given to the application.

5. This being a fresh claim case it is not in contest that paragraph 353 of HC 395 is in point. The issue as identified by Mr Juss, counsel for the claimant, is as follows: was the material sent under cover of a letter dated 10th June 2005 significantly different from the material that had previously been considered? Secondly, if so, taken together with the previously considered material, does it create a realistic prospect of success before an Immigration Judge?

6. For completeness I should add that there has been some complaint about the delay which occurred in dealing with these representations, but no substantive submission has been based upon that delay and it is not suggested that the delay has any bearing on the legality of the decision-making before me.

7. I do not intend to recite the well-known cases in great detail. Obviously they are familiar to this court and familiar to all of us, namely the cases which have elucidated the meaning of paragraph 353 of the Immigration Rules: **WM (DRC) v Secretary of State for the Home Department** [2006] EWCA Civ 1495 and **AK (Afghanistan) v Secretary of State for the Home Department** [2007] EWCA Civ 535.

8. The position as stated by Buxton LJ in **WM** can be shortly summarised to this effect, namely the Secretary of State must make two judgments: first, is the new material significantly different; second, whether taken together with the material previously

considered the new material creates a realistic prospect of success in a further asylum claim. The Secretary of State is entitled, in coming to this conclusion, to take into account previous material and its treatment by the Immigration Judge. In other cases it has been stated that the starting point is the earlier decision of the Immigration Judge which refused an asylum claim. It has been said, and affirmed more than once, that it is a modest test because the issue is whether there is a realistic prospect of success and because success itself requires only a real risk of persecution. It is also well known that the court's position is to determine whether the Secretary of State's decision can be impugned on **Wednesbury** grounds.

9. This case in fact shifts from those essential and obviously well stated propositions, in my judgment, to a slightly different aspect of the exercise which the Secretary of State was concerned to decide. That perhaps is most helpfully reflected in the case of **AK**, to which I have referred, and the judgment of Toulson LJ where he had occasion to look at the operation of the rule and the role of the court, and identified the role of the Home Secretary in terms which the judge relies upon and which are obviously highly material, paragraph 22 going to the essential part:

> "The court has a power and responsibility through judicial review to see that the system is properly applied, but the role of the court is limited to that of review. To allow the same appeal process as applies to the original application would defeat the purpose of the exercise. It follows from the nature and structure of the rule 353 scheme that a decision by a Home Office official whether further representations pass the rule 353 threshold amounting to a fresh claim is a decision of a different nature, and requires a different mind set, from a decision whether to accept an asylum or human rights claim.
>
> (23) Precisely because there is no appeal from an adverse decision under rule 353, the decision maker has to decide whether an independent tribunal might realistically come down in favour of the applicant's asylum or human rights claim, on considering the new material together with the material previously considered. Only if the Home Secretary is able to exclude that as a realistic possibility can it safely be said that there is no mischief which will result from the denial of the opportunity of an independent tribunal to consider the material."

Then there is reference to the case of **WM** and to the judgment of Buxton LJ, in particular his judgment at paragraph 11.

10. In the case of **AK** the whole of the paragraph is not set out, obviously because it was not felt necessary, but, so far as this case is concerned, it seems to me that reference does need to be made to paragraph 11 which begins:

> "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 . . . "

I pause here only to emphasise that at this stage of the exercise the Secretary of State has to determine whether there is a realistic prospect of the Adjudicator applying a rule of anxious scrutiny, concluding that the claimant will be exposed to a real risk of persecution on return. Then Buxton LJ went on in the paragraph to point out:

> "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."

I pause there to emphasise that what the Lord Justice is identifying is the difference between making up your own mind as to the merits or prospects of success of the claim, which is an acceptable part of the Secretary of State's process but it is only a starting point, because it is an issue which differs from the one which actually falls to be decided, and deciding whether there is a realistic prospect of success that an Adjudicator, exercising anxious scrutiny, will consider that there is a real risk of persecution. The judgment then continues:

> "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 requirements 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. The working out of that is conveniently seen when one comes to the emphasis which was given in the case of **AK** in these parts of the judgment. After the question "Did the Home Secretary ask himself the right question?" having stated that the answer was "No", Toulson LJ went on to say at paragraph 28:

> "First, the mother's affidavit. As I have recounted, this was rejected in the letter of 20th June 2005 as having no relevance or reliability for two reasons. These were, first, that the Home Office had only been sent a copy and, second, that:
>
> > 'An affidavit from a family member cannot add probative or corroborative weight to your client's claim.'
>
> As to the first reason, the Home Office was later supplied with the original document. As to the second reason, I have referred to the judge's comment that as a general proposition this was far too sweeping. I agree, but that was all that was said about the content of the affidavit in that letter. There is no trace here of the writer pausing to consider what an independent tribunal might (not would) make of the affidavit and giving

anxious scrutiny to that question."

Then again in paragraph 39, referring to the submissions of Mr Juss, who also appears in this court:

> "He had to ask himself not whether he thought it was likely, but whether an immigration judge might regard the document as genuine after anxious scrutiny, bearing in mind the previous credibility finding in the appellant's favour, which was a point emphasised by the judge in paragraph 21 of his judgment."

There needs to be no more citation from authority or law, as I see it, and I can now turn to a very brief summary of the relevant facts.

12. The claimant was the Chief of Military Engineering in the Yemen. He came to the United Kingdom in May of 2003 in company with his spouse and three children, including the second claimant, his son, who is also a claimant before this court. The essential background is that in 1994 there was a civil war in the Yemen. As I have appraised, only very briefly from the papers, this involved a division between the north and south of that country. Be that as it may, the claimant -- probably in company if not in company similar to the action of many others who have been engaged in the war -- travelled to the United Arab Emirates following the defeat of their side.

13. In May 2003 the enemy of the authorities declared an amnesty. That amnesty is really that which is, in my judgment, essential to the issue which is being raised today. It is central to the issue because there is now a suggestion (and I will come to the evidence for it) that, notwithstanding the existence of the amnesty, there have nevertheless been breaches of the amnesty, or, put in another way, the amnesty itself was nothing more than a false amnesty specifically designed to entice those like the claimant who had left the Yemen to return to the Yemen, where it was the intention of the regime to take measures against them.

14. When it was before the Immigration Judge, as I recited in the very first part of this judgment, the Immigration Judge knew of the amnesty and of course stated, as it is agreed, that in effect by reason of the amnesty he was satisfied that there was no risk to the claimant, a high ranking official, returning to the Yemen because the amnesty, so far as he was concerned, was being honoured, there was no reason to believe obviously that it was false or a device, and he thus concluded that there was no risk to the claimant.

15. The dates when this occurred are, for the record, 14th July 2004, the refusal of the asylum claim; an appeal dismissed on 3rd December 2004; and then application for statutory review refused 14th April 2005. Thus, the important date, 22nd April 2005, was when the father's appeal rights were exhausted. But, his appeal rights being exhausted, he nevertheless was not removed. That is common enough, as we all know.

16. The next event of note is that on 10th June 2005 and 20th June 2005 further representations were received in relation to the claimant's case, and subsequently the

same representations for the son's case which had equally been refused. The two dates, 10th June 2005 and 20th June 2005, are not without significance because there was then a long delay before consideration was given to the fresh representations. This is the delay mentioned but not really made much of, for good reason. It was not until 27th February 2007 that reasons were given for the rejection of the fresh claim by the Secretary of State. Regrettably, the letter of 27th February -- despite the fact that there had been two letters in June 2005, as I have mentioned -- made no reference to the material which had been submitted under cover of the letter of 10th June 2005. That position is particularly unfortunate, bearing in mind that the letter of 20th June, which was given consideration, made reference to the earlier letter of 10th June. But obviously the trail was not followed back since no reference was made to the 10th June letter. Therefore there were various exchanges of correspondence between the Secretary of State and solicitors acting for the claimant. One can move forward to the relevant decision letter in this case being the one which set out to deal with the 10th June 2005 material; that is a letter dated 14th June 2007.

17. For convenience, I must, for the purposes of this judgment, recite what it was that was sent under cover of the letter of 10th June. In particular it was (1) a letter from the Yemeni Human Rights Watch dated 7th June 2005; (2) a letter from Haider A.A Al Attas, former Prime Minister of the Yemen; (3) an affidavit of Saleh Ahmed Obaid, who is a former Deputy Prime Minister and I think the Minister of Defence and Security as well; (4) an affidavit of Mothana Salam Asker and Mohammed Ali Al Kearahy, former counsellors in the Yemeni Defence Ministry; (5) an Amnesty International report of 2005; and (6) an Amnesty International public statement of 8th March 2005.

18. Not having dealt with these documents in the earlier letter, the 14th June letter set about dealing with them. In paragraph 4 of the letter (and this, I am sure, is simply an oversight, having regard to the content of the letter but in the context of the way this matter has proceeded I draw attention to it) it says:

> "The representations from your letter of 10th June 2005 are listed as follows:
>
> • Your letter dated 10th June 2005.
>
> • Letter from Yemeni Human Rights Watch dated
>
> 7th June 2005
>
> • Affidavit of Saleh Ahmed Obaid . . .
>
> [then the affidavit already referred to and the
>
> two international reports]
>
> • Further representations listed in a letter
>
> dated 1st June 2007 . . .

• An article written by Jane Novak . . . "

The one document which was and may be still of some importance which was with the letter of 10th June was the letter from Mr Al Attas which, for reasons which are not really clear, was not referred to in paragraph 4 of the letter of 14th June. As I say, that was probably simply an oversight because the decision itself contains reference to the declaration of Mr Al Attas.

19. It is not in dispute that the Immigration Judge accepted that the claimant was a high ranking official in the Yemeni army, and the court has proceeded upon the basis that he was. It is not in dispute that he was on the losing side. The real question, as I see it, comes down to that part of the decision letter of 14th June 2007 which deals with the 10th June material. For completeness, as Mr Barr quite rightly has relied upon, I ought to begin by referring to the last sentence of paragraph 8 which says:

> "We have now considered these representations and the Secretary of State maintains that he is not prepared to reverse his decision of 29th February and 12th March 2007."

Then really the most material paragraph in this decision letter, paragraph 9:

> "This decision involved a thorough review of the earlier decisions of 29th February and 12th March 2007, the Immigration Judge's determinations and your enclosures of 10th and 20th June 2005 respectively. The Secretary of State maintains that the information contained in your representations does not show how your client in particular would be at risk if he was returned to Yemen. The information from Mr Al Attas's declaration in 2005 is almost an exact copy of the declaration he provided in 2004. This was considered by the Immigration Judge in his determination of December 2004, who noted that it did not mention that an amnesty was granted to the officers who took part in the civil war. The 2005 declaration from Mr Al Attas differs in that a sentence has been added into his latest declaration to cover the omission of the amnesty that was not in his earlier declaration. The Immigration Judge accepted that your client was a high ranking official in the Yemeni army who fled to the United Arab Emirates in 1994 after taking part unsuccessfully in a civil war. An amnesty was granted to all such participants in 2003. The judge did not accept that your client would be at risk if he returned to Yemen, more than 10 years after the end of this civil war. Your representations do not refer to any breaches of this amnesty."

20. The submission of the Secretary of State is that this was a lawful decision, approached by the Secretary of State having in mind the correct and relevant test. The Secretary of State has said that he gave a thorough review of the earlier decisions, and the letter of 10th June in particular, and it is submitted that when you look at paragraph 9 and paragraph 10 which deals with the objective material, there is no reason to conclude either that the conclusion of the Secretary of State is vulnerable on **Wednesbury**

grounds or that this is a case in which there has been a failure to give anxious scrutiny to the case.

21. These submissions require rather close consideration. I take the second sentence of paragraph 9 -- namely "The Secretary of State maintains that the information contained in your representation does not show how your client in particular would be at risk if he was returned to the Yemen" -- to be a statement of the Secretary of State's own view as to the merits of the fresh claim. The Secretary of State, as I have briefly referred to in the authorities, is perfectly entitled to form his or her view on the merits. But it is only a starting point. The next question which has to be addressed is the question whether an Immigration Judge, applying anxious scrutiny, would come to the same conclusion or, more accurately, to consider whether there is a realistic prospect of an Immigration Judge, applying anxious scrutiny, coming to a different conclusion from that to which the Secretary of State has come. Mr Barr submits that, having regard to the way in which the test was put in the earlier letter of 4th February 2007, that is plainly what the Secretary of State had in mind.

22. In many circumstances one would be prepared to accept that that is what the Secretary of State had in mind. But in every case, despite the statement of what the test might be, what ultimately really matters is whether or not it is apparent from the case and from the decision-making process that the question which has been stated to be in mind has been answered in a way in which one is satisfied that it was held in mind for the purposes of the decision. The difficulties I indicated to Mr Barr in the course of argument is that if you then take the next sentence from paragraph 9, namely:

> "The information from Mr Al Attas's declaration in 2005 is almost an exact copy of the declaration he provided in 2004. This was considered by the Immigration Judge in his determination of December 2004 who noted that it did not mention that an amnesty was granted to the officers who took part in the civil war. The 2005 declaration from Mr Al Attas differs in that a sentence has been added into his latest declaration to cover the omission of the amnesty that was not in his earlier declaration, an issue does arise."

As a recital of fact, nobody could complain about that. But if one asks the question: what approach, applying the correct test, has the Secretary of State made or taken in relation to this piece of material, it is quite impossible to decipher the approach. Of course, the Immigration Judge in his determination did have in mind that there was no evidence to the effect from Mr Al Attas that the amnesty was breached or that the amnesty was in some way false, but that is the whole point of the application for consideration of fresh material. Here there was material, and it was being provided to the Secretary of State, and in my judgment it was plain that he or she had to evaluate it. I can see no evaluation.

23. What was required, in my judgment, was an evaluation of the impact of this evidence; an evaluation and statement as to whether or not it could be seen as carrying any weight, and if so what, in the light of the objective material which Mr Barr has emphasised pointed in the other direction. It is impossible to determine what the

Secretary of State's view was. Of course, on a reading of the decision, he was obviously coming down in favour of the objective material. That is what paragraph 10 goes on to say. But he does not say whether he simply considers what Mr Al Attas has said as completely unreliable. In the way in which it is hanging loose in the paragraph of the letter, one might, if one was being slightly cynical, suggest it was being put in that way in order to raise an issue that it was not reliable because it was nothing more than a piece of material added at the request of the claimant's solicitors. But if that is the attitude which the decision-maker took to it then it should be stated. You cannot leave it there hanging opaquely. This is, I emphasise, on the most critical part of the fresh material.

24. But there is rather more than that which gives cause for my concern, because it was not just the material from Mr Al Attas which was before the Secretary of State which carried some evidence about the possible breaches of the amnesty and the character of the amnesty as a deception. There is the affidavit of Saleh Obaid Ahmed. At paragraph 4:

> "I wish to declare that the amnesty announced by the current Yemeni government in May 2003 to encourage us to return to the country is false and a poly by the Yemeni regime to catch us once we are in the country. I and other senior members who form part of the 16 condemned by the existing Yemeni government strongly believe that our lives would be at risk if we were to return to Yemen despite the amnesty in May 2003. We have had reports that the Yemeni authorities have already breached the amnesty and some of those who have returned to Yemen have been persecuted and detained without a charge."

He then expressed the view about the claimants being at risk and then ends:

> "He will not benefit from the false amnesty, which the Yemeni government had announced."

I see no reflection at all of that part of the fresh material in the decision letter. One assumes again that the approach of the Secretary of State must have been to conclude that the impact of the objective material was so compelling that the statements to which I have referred really left the Secretary of State in no real doubt as to whether or not there was a real possibility of success before another Immigration Judge. But more than that, like Wilkie J, I am bound to say I principally have a concern that if one is asking one self whether anxious scrutiny has been applied, I am left firmly of the view that this is a case in which it seems that the decision-maker, having come to his or her own conclusion on the merits, really was not applying anxious scrutiny to what the impact might be on an Immigration Judge of the material to which I have made particular reference. There is no sign of that intellectual reasoning exercise as having occurred.

25. It can also be said, although Mr Barr has made a specific submission in an attempt to better the position, that it is said in the last sentence of paragraph 9:

> "The judge did not accept that your client would be at risk if he returned to Yemen, more than 10 years after the end of this civil war. Your representations do not refer to any breaches of this amnesty."

I think Mr Barr, with grace, has accepted that read literally that is simply not right, because whatever lack of specific material there was to support the contention or assertions, there were plainly references to what was believed to be a number of breaches of the amnesty which had occurred. Thus, the court is invited to include the word "specific" between "any" and "breaches". In certain circumstances one might be minded to assist a decision-maker in a case such as this. But I am bound to say that what it confirms is the concern I have already expressed, namely that inadequate attention was given to the actual content of the contentions made in those statements which were supplied with the letter of 10th June 2005. It may well be that the impact of those statements (it is not for me to say) can be properly considered and lead to the same result, I know not. That is a matter which, as I shall indicate, it seems to me for the Secretary of State to decide.

26. I turn then to what was really put forward as the bulwark of the Secretary of State's position, namely the strength of the objective material. There are many parts of that, and Mr Barr has very helpfully emphasised to the court, for example, that the material seems silent as to the amnesty and the objective material suggests that it has not been breached. There is a 2006 US State Department report which goes so far as to state:

> "There were no politically motived killings by the government or its agents . . . "

And:

> "There were no reports of politically motivated disappearances . . . "

And:

> "The number of political prisoners, if any, was unclear, and human rights activists were unable to provide data on political prisoners or detainees."

Then he relies upon the fact there has been a genuinely contested presidential election, indicating that the political opposition is active. He then refers to Human Rights Watch being unable to give any specific examples of a breach of the amnesty and that such examples that are given are pre-amnesty. He emphasised that none of the material from the claimant's fellow exiles provides specific examples of a breach. They merely assert without particulars that they had heard of breaches and those sources are identified.

27. That is all perfectly fair comment, but here it is in the careful submissions of Mr Barr and I do not see any real reflection of this in the decision letter which I have concentrated upon. Again, in certain circumstances in this court, judges including myself have taken the submissions of counsel in a fresh claim case as being very helpful to the court deciding -- as it should in the exercise of its discretion -- whether there is any point in granting judicial review, even though the points which suggest that the Secretary of State was right were not mentioned by the Secretary of State. As a

result of Mr Barr's submissions I have considered that position. But on balance I am simply not satisfied that the essential exercise which is required, namely the application of the test which requires weighing all the material when considering whether an Immigration Judge, applying anxious scrutiny, could come to a different conclusion as to whether there is a realistic prospect of success has taken place. That is essentially a matter for the Secretary of State. It is not one that I feel in this case this court should undertake with a view to denying the leave.

28. I have no means of applying all the objective knowledge which is available to the Secretary of State in order to set the context in which she can consider these statements. The court is not qualified to enter into such a form of weight bearing and balancing exercise of these factual matters. As was said by Sedley LJ in the case of **Karanakaran** [2000] EWCA Civ 11, as well as in similar terms by Brooke LJ, what is here concerned with is an evaluation of intrinsic and extrinsic credibility, and it means it is conducted by a departmental office and then a challenge by one of the law tribunals. They act not as courts of law. Their role is at best regarded as an extension of the initial decision-maker's decision. The sources of information will frequently go well beyond the testimony of the applicant, include in-country reports, expert testing, and sometimes specialised knowledge. There is no probabilistic cut-off operated. Everything capable of having a bearing has to be given the weight, great or little, due to it. What the decision-makers ultimately make of the material is a matter for their own conscientious judgment, so long as the procedure by which they approach an application is lawful and fair and provided their decision logically addresses the Convention issue. This is dealing with the factual material underlying a case in which Convention issues are in contention. It is an evaluation exercise and not a factual one. The facts, so far as they can be established, are signposts on a road to a conclusion on the reasons. They are not in themselves conclusions. This exercise is one which, in my judgment, should be carried out by the Secretary of State.

29. The submission of Mr Juss is that that is really not on; since she has had so many stabs at it in this case she should not been given another one. I do not accept that, but I think it is essential that in these cases that one starts, as it happens in this case, with a proper decision applying the tests, as I have endeavoured to set them out and identify, to all the material. It is also my conclusion that that is the case since I am bound to say that, whilst I have not studied the objective material, there is objective material, and while it might not point to politically motived actions being taken, I am bound to say that the generic objective material does not really disclose a highly satisfactory situation in which the rule of law probably is paid much heed.

30. That is of course another relevant aspect. You have to take together the general situation as to the enforcement of the law of justice and of human rights, and you have to consider that with the evidence that there may be some action taken against high officials who return to the Yemen. It is probably not an occasion in which it is open to anybody to really take a view that in a situation perhaps as volatile and perhaps as troubled as the Yemen firm evaluations come to the mind. All that, in the privileged position so far as information is concerned by which the Secretary of State stands, is an evaluation which she should carry out. Again, I am in a sense content that that should be the process because more material was submitted in 2008 of this year which is in the

bundle. That can now be considered. There is even material which was submitted this morning on the sitting of the court. I make no comment about that material. It seems to me that, like all the other material in the case, it falls to be considered by the Secretary of State on a fresh consideration of this fresh claim.

31. As a result, it must follow that the decision in respect of this claim must be quashed, and I remit the matter to the Secretary of State to consider it again in the light of all the information which is now material, and in the light of the judgment in which I have endeavoured to assist the Secretary of State in that consideration.

32. Thank you. Any more?

33. MR JUSS: My Lord --

34. SIR GEORGE NEWMAN: You want some costs?

35. MR JUSS: Indeed, my Lord. Your Lordship has found that one has to start with a proper decision. Plainly there have been, to use your Lordship's expression, "a few stabs" and still no proper decision. If I may say so, the judgment that your Lordship has given was expansive on this very question and would be of great assistance, but nonetheless, the Secretary of State has known right from the beginning **-- WM** has been quite a while -- exactly how to apply anxious scrutiny. The plain fact remains, my Lord, that the right exercise was not followed through under paragraph 353 and that is why we are here today. That being the case, I apply for costs for the claimant.

36. SIR GEORGE NEWMAN: Mr Barr, can you resist costs?

37. MR BARR: Unusually, my Lord, I think I can. May I hand up a clip of correspondence. **(Handed)**.

38. SIR GEORGE NEWMAN: Thank you.

39. MR BARR: My Lord, it starts with a letter of 18th May from the Treasury Solicitor which is in effect an offer letter which followed the granting of permission and is in effect seeking to dispose of these proceedings by consent. It is proposing -- there are some draft orders attached -- that the proceedings be withdrawn, that the Secretary of State will reconsider the further representations as they then stood, and offering either to do that on the basis that there be no order for costs or, alternatively, that the parties should argue over costs by way of written submissions. Then the last document in the clip is what I would submit was a rather astonishing reply dated 3rd June. In the second paragraph of that reply --

40. SIR GEORGE NEWMAN: I have read it.

41. MR BARR: What is asserted effectively is that offer was not good enough and the claimants wanted a guarantee of their status; one assumes their refugee status. Not something that was ever going to result from today's hearing. We have ended up today where really --

42. SIR GEORGE NEWMAN: Where you were offering to be back in May.

43. MR BARR: Yes. The purpose of this was to see whether or not the claimants could persuade your Lordship that (a) the decision was wrong, and (b) not that it should be remitted to the Secretary of State but should be sent to the Immigration Appeal Authority. In that sense, the claimants have lost today.

44. SIR GEORGE NEWMAN: The letter seemed to me to show a healthy recognition on behalf of the Secretary of State that these were not quite all that straight in the ship of state so far as this decision is concerned, and you said you would look at it again.

45. MR BARR: Yes.

46. SIR GEORGE NEWMAN: Any reason why you should not pay the costs up to, say, 18th May?

47. MR BARR: I cannot think of any, my Lord.

48. SIR GEORGE NEWMAN: I cannot either. Is it Legal Aid or not?

49. MR JUSS: No, it is privately paid.

50. SIR GEORGE NEWMAN: Is there any reason why you should have anything other than your costs up to 18th May?

51. MR JUSS: The reason I have given, my Lord, is that in all the other cases what I have seen is a remittal to the Adjudicator. Your Lordship will have been entirely able, had your Lordship so willed, to say "You have had three decisions on this. This is a faulty decision. You have had even from the time of the letter of April now, since then, three months to today when the matter could have been reconsidered".

52. SIR GEORGE NEWMAN: Well, I have not done that, Mr Juss. There are any number of reasons why one does not do that in certain cases. One of them is a question of costs. You set up an appeal process when in fact you may well get a decision out of it. You seem to me to be operating from the gloomy pessimism that the Secretary of State is bound to come to the same conclusion to which she came before. In the light of what has gone on, there may well be a decision which goes the other way. I simply do not know. If there is there is a decision which goes the other way then there is simply no reason why we should have an Immigration Judge involved with all the process there. All cases differ. Any good reason why you should have your costs after 18th May? Not really.

53. MR JUSS: My Lord, no, not really.

54. SIR GEORGE NEWMAN: Costs up to 18th May, to be assessed if not agreed. Thank you both very much indeed.