Neutral Citation Number: [2008] EWHC 2174 (Admin)

Case No: CO/3004/2008

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/09/2008

Before :

MR JUSTICE CRANSTON

- -

Between :

R (on the application of YH)	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**

- -
- -

Galina Ward (instructed by **Duncan Lewis & Co**) for the **Claimant**
Jeremy **Johnson** (instructed by **Treasury Solicitor**) for the **Defendant**

Hearing dates: 26 August 2008

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Judgment

Mr Justice Cranston :

Introduction

1. This case raises the ambit of rule 353 of the Immigration Rules, a rule which is part of the regular diet of judges sitting in the Administrative Court. Rule 353 is the "fresh claim" rule. In essence it governs the handling of additional information after an applicant has had an asylum or human rights claim refused and appeal rights have been exhausted. At issue is whether rule 353 applies to a case such as the present, when a person whose claim for asylum or leave to remain on human rights grounds is refused, leaves the United Kingdom but then returns here and makes another claim. Apparently there is no authoritative ruling on this point. Whether such a person can appeal from within the United Kingdom when the subsequent claim is refused turns on whether or not rule 353 applies. Assuming that rule 353 does apply the second aspect of this case is the more straightforward one of whether the Secretary of State's actions pursuant to it are in any way flawed.

Background

2. The claimant is a citizen of Iraq, from the Kurdish Autonomous Zone (KAZ). He originally arrived in the United Kingdom in November 2000 and claimed asylum on the grounds that he feared ill-treatment by the authorities in the KAZ due to his employment by an Iranian trader and involvement in the illegal sale of a mummy. This claim was refused by the Secretary of State on 29 January 2003 and his appeal was dismissed by an Adjudicator on 25 November 2003. In the course of her determination the Adjudicator gave the following reasons:

> "9.1 The chronology of the appellant's account simply does not make sense. In particular I do not understand why he left Iraq before the date of the decree formally banning his trading activities, nor why a warrant would have been issued before that decree; nor why he would not have received the warrant in the 19 days before its issue and his leaving the country. There is also considerable force in the Home Office submission that if the authorities had wanted to arrest him they had ample opportunity to do so between May and September. In these circumstances I attach no weight to the warrant and find the appellant's evidence as to the basis of his fears not likely to be true.
>
> 9.2 …
>
> 9.3 For the sake of completeness, the appellant's fears, had they been found to be genuine, amount to a fear of prosecution for a criminal offence that he was at the time well aware he was committing … [T]he objective evidence (CIPU report October 2002, paragraphs 5.111 to 5.114) made clear that although prison conditions in Northern Iraq have improved in recent years following the intervention of the ICRC, there continued to be private undeclared prisons to which there is no access to ICRC officials and there were reports of torture by both the

> KDP and PUK authorities … Had I found the appellant's account credible I would on this evidence have been unable to exclude any real risk of treatment contrary to Article 3 if he were to be returned to the KAA (sic)."

Permission to appeal to the Immigration Appeal Tribunal was refused. On 21 February 2006 the claimant signed an IS101PA (Notice of withdrawal of an Application for Asylum/intention not to exercise appeal right/withdrawal of Appeal) and voluntarily returned to Iraq.

3. The claimant returned to the United Kingdom almost two years later. On 22 January 2008 he arrived concealed in a lorry and claimed asylum immediately upon his discovery by the police. The interview conducted with him that day consisted of four questions: (i) why did he leave the UK, (ii) why had he now decided to return, (iii) was his reason for claiming asylum the same as the reason for his previous asylum claim, and (iv) had anything happened to him since he was last in the United Kingdom that might be relevant to his asylum claim? To (i) he answered: "Because I had a cold/flu and my doctor told me to go and live in a warm country." He referred in his answer to (ii) to the problems starting again, and to question (iii) he said: "Yes. I used to work with historical things – history and because of that I have problems. I was dealing with historical goods." In answer to (iv) he referred to his involvement with the illegal sale of a mummy and to having been arrested and tortured because of it. The arrest and torture were no part of his previous claim.

4. The answers were recorded with the pro forma questions on a form "Repeat Asylum Applicant. OSCU Referral Proforma". OSCU is the Operational Support Casework Unit. The next day, 23 January, the claimant asked to see a doctor at Aylesbury police station, complaining of head problems and a heart issue. Then on 25 January, still at Aylesbury police station, again at his request, he asked to be examined by a doctor and to have recorded burn injuries to his right wrist and "chizzle marks" to his right forearm. The report read:

> "[C]laims to have been tortured four months ago whilst in custody of the Iraq Police. [S]uspect is pending deportation and requests injuries are noted as part of appeal. [S]olicitors "Wilkins" will have advised client."

The doctor saw him and recorded "[A]lleged torture marks. Arm. Right." The claimant was transferred soon after to the Oakington Centre to be detained.

5. Meanwhile by a letter dated 24 January 2008 the defendant rejected the claimant's representations – the answers in the interview – and refused to treat them as a fresh claim under paragraph 353 of the Immigration Rules. This letter stated that:

> "…account has been taken of the fact that, by your own admission, your representations are based on the same reasons as those given in your previous asylum claim, which was refused on 29 January 2003. No evidence has been produced in support of your claim to have been arrested and tortured on your return to Iraq, for what, in any event, would be a criminal matter."

Reference was then made to the reasoning of the Adjudicator dismissing the claimant's previous appeal, the finding on credibility, and the letter concluded that:

> " …your submissions seek to rely on the reasons put forward in your previous asylum claim and add no new significant information or evidence to support your account of events on your return to Iraq…"

The letter ended by setting out paragraph 353 of the Immigration Rules and that the decision maker was "not persuaded that the submissions you have made, taken together with previously considered material, create a realistic prospect of success."

6. The claimant remained in detention following this decision. It seems the allegation of torture was repeated at the Oakington Detention Centre and reported to the Secretary of State. In a letter dated 23 February 2008 the Secretary of State said that the claimant had not submitted any new evidence to support his allegation of torture. The Secretary of State refused to give further consideration to the claim on the basis that "full and fair consideration has already been given to your claim of torture", apparently relying on the letter of 24 January 2008.

7. The claimant's current solicitors were first instructed on 8 February 2008 and visited him in detention on 14 February 2008. Following that initial meeting, and the taking of instructions, their contact details were passed to his family, and a scanned copy of an arrest warrant was sent to the solicitors from Iraq. On receipt of a translation of that warrant, on 17 March 2008, the solicitors sent a letter of representation on 18 March 2008. This set out the essence of the claimant's case, being (i) he would be at risk of further arrest on return to Iraq; (ii) he had been tortured in Iraq whilst being held by the security forces for a total of nine days and that, as a result, he had a number of physical injuries which continued to affect him; and (iii) the objective evidence suggested that this was commonplace in the KAZ, and that he would therefore be at real risk of ill-treatment in breach of Article 3 if returned to Iraq. A copy of the arrest warrant was attached to the letter, with a specific request that removal be deferred if the Secretary of State wished for it to be verified, as the original was to be sent from Iraq.

8. No reply to that letter was received until the afternoon of 27 March 2008. By this time, the claimant's solicitors had obtained a report from a country expert, Dr. Rebwah Fatah, who had examined the copy of the arrest warrant and concluded that, while it could not be confirmed to be genuine, it should be "taken seriously". He set out his reasons for reaching this conclusion, which included that it was plausible that the client would come to obtain his arrest warrant as such documents are often sent to immediate family members; that the template was very similar to authentic warrants with which he was familiar; and the relatively unusual nature of the charges specified in it, Articles 289 and 298 of the Iraq Penal Code, supported his account. This report was faxed to the Secretary of State upon receipt on the afternoon of 27 March, at 15.59. The claimant's solicitors added that reference to Articles 289 and 298 of the Iraqi Penal Code corresponded with his account of being arrested whilst in possession of a false ID card. At this stage, the claimant's solicitors were not aware of any response to their letter of 18 March, or indeed of the claimant's imminent removal, having been informed that it was due to take place at 7pm on 28 March. They were therefore awaiting a response before seeking an injunction against his removal.

9. The Secretary of State sent two faxed letters to the claimant's solicitors on 27 March. The first of these, written without sight of Dr. Fatah's report and faxed at 14.28, set out the background, repeated the assertion that the claimant's claim was based on the same reasons as his previously refused claim and referred to a discrepancy between the claimant's answers at interview and his claim as set out in his solicitors' letter. (In his asylum interview he had said that he was involved in the illegal sale of a mummy, in the letter of 18 March 2008 it was said that he had been stopped at a checkpoint and had a false ID). The letter then referred to the Adjudicator's findings that any previous ill treatment was not for a Refugee Convention reason and stated that no reliance could be placed on the arrest warrant since it was not original, was dated after the claimant had left Iraq, did not specify the reasons that it was issued and was not accompanied by an envelope to authenticate the date on which it was received. Criticism was also made of the medical evidence, in other words the report prepared by the police doctor whilst he was at the police station in Aylesbury in January 2008, since that doctor was not qualified to identify evidence of torture.

10. The second letter of 27 March, faxed at 17.41, rejected Dr. Fatah's report on the grounds that he could not conclusively state that the document was reliable. It also stated that "in the absence of an injunction, removal will continue as notified." The claimant was in fact already in the process of being removed, the charter flight having departed at 16.00. His solicitors lodged an application for urgent consideration on the morning of 28 March, believing removal would not take place until 7pm that evening, but received a call from the claimant at 3pm informing them that he was, in fact, back in Iraq. The Secretary of State has apologised for the incorrect information given about the date of his departure and no point arises in relation to it before me.

11. Subsequent to the claimant's removal from the United Kingdom his solicitors received the original arrest warrant in the post via a friend of his in Sheffield. They contacted Dr. Fatah to enquire whether a sight of the original would enable him to make further findings, and he asked for a colour scan. Dr. Fatah then produced a slightly amended report, maintaining his original conclusion, which was sent to the defendant on 4 April 2008. The previous day an application notice for interim relief was issued. On 4 April 2008 Stanley Burton J set a timetable for the Acknowledgment of Service and adjourned consideration of the application for interim relief and the application for permission to claim judicial review. He gave the following reasons:

> "It appears from the BIA's letter of 27 March 2008 that the claimant's credibility was rejected by the Adjudicator. The new grounds contain little objective that would lead to the conclusion that the Secretary of State cannot argue that the decision to reject the fresh claim was at least arguably justified …"

A subsequent application to vary the order was refused. The Secretary of State filed an Acknowledgment of Service on 17 April 2008, attaching a further decision letter. The following points were made in that letter:

> (i) The expert had not mentioned any cases where he had been accepted as an independent assessor of the probity of

> documents, and there was nothing in his skills and experience to show that he was an expert on this matter;
>
> (ii) The expert had referred to a statement from the claimant which had not been disclosed to the defendant;
>
> (iii) The expert himself accepted that his "tests" were not necessarily conclusive;
>
> (iv) It was not clear from the report whether the expert had examined the original arrest warrant;
>
> (v) The expert had said that one of the principal tests related to the quality of the paper on which the arrest warrant was printed – but he made no mention of the outcome of this test;
>
> (vi) The expert had given an explanation for how the claimant might have obtained the arrest warrant. However, the claimant had not himself explained this to the Secretary of State, and the expert did not provide any support for his assertions;
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> (vii) The expert had said that he had not seen a forged arrest warrant which cited articles 289 and 298 of the Iraqi Penal Code, but in the absence of any account of the expert's experience of forged arrest warrants this statement could not be accepted as authoritative;
>
> (viii) The expert himself had said that the result of his tests "cannot strongly justify that [the arrest warrant] is reliable", albeit he added that it "should be taken seriously." The Secretary of State considered these observations to be, at best, equivocal.

Paragraphs 26-27 of the letter concluded:

> 26. Applying the law to the facts, at appeal the new material would not conceivably undermine the adjudicator's rejection of your client's account as incredible and the rejection of his claimed fear of persecution or ill-treatment. As a result nothing in the new material would otherwise lead to a more favourable view being taken by a later immigration judge or raise the prospect of a different outcome.
>
> 27. Consequently, the hypothetical judge, applying the same legal test to the same facts, would in substance arrive at the same result as the Secretary of State. Put another way, taking the material, old and new, as a whole, any appeal based upon it would on any legitimate view be bound to fail.

In reply the claimant's solicitors wrote setting out in particular how the arrest warrant had come into the claimant's possession, the account already referred to.

12. The application for urgent consideration was refused by Wyn Williams J on 28 March 2008. Permission in the main judicial review was refused on the papers by Stadlen J on 21 April 2008, but renewed to an oral hearing before Wyn Williams J on 2 May 2008. At 19.00 on 1 May a further decision letter was faxed to the claimant's solicitors, setting out supplementary reasons for not accepting the expert evidence in respect of the arrest warrant:

> (i) The claimant's solicitors had asked whether sight of the original warrant would assist. In response the expert had asked for a colour scan of the warrant, and this was provided. It followed that the expert had not ever examined the original warrant;
>
> (ii) It followed that the expert had not applied one of his principal tests – namely an analysis of the quality of the paper;
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> (iii) The witness statement and documents that had been provided did not attest to the authenticity of the arrest warrant;
>
> (iv) It was highly unlikely that the security forces in Iraq would release the claimant and then issue a warrant for his arrest;
>
> (v) There was no explanation as to how the claimant's parents had obtained the arrest warrant;
>
> (vi) The suggestion that the claimant's parents had received the warrant with instructions to forward it to the claimant was highly implausible;
>
> (vii) The claimant had failed to mention the alleged events of October 2007 when he made his second asylum claim in January 2008.

13. Because of the late service of that letter Wyn Williams J reserved judgment following the hearing on 2 May 2008. In a judgment dated 13 May 2008 he refused permission: [2008] EWHC 1032 (Admin). In respect of the claimant's contention that rule 353 did not have any application to the case he said:

> "[22] I can think of no reason why the words of rule 353 should not be given their ordinary meaning. On that basis I cannot see how the claims made by the Claimant on 22 January 2008 are not within the rule. Further, and additionally I can think of no good reason why the words of rule 353 should be interpreted differently from their ordinary meaning. The plain fact is that if a person makes a second or subsequent claim which is properly to be regarded as a fresh claim within the meaning of rule 353 he or she will have a right of appeal."

In respect of the contention that the Secretary of State's decision was irrational on the facts, his Lordship said:

> "[35] In my judgment the letters of 17 April 2008 and 1 May 2008 show that the defendant considered the correct legal test when deciding whether or not the claimant's further representations should be treated as a fresh claim and, in my judgment, her conclusion that they should not be so treated is not arguably irrational. The letters contain cogent reasons why that is so.
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> [36] During the course of her submissions Miss Ward was good enough to recognise that the many points which the Defendant had raised about the authenticity and/or reliability of the arrest warrant would provide powerful ammunition with which to confront the claimant in any appeal before an Immigration Judge either by way of cross-examination or submission. In my judgment the points raised by the defendant in the letters to which I have referred go further than that. They demonstrate that an Immigration Judge, properly directing himself/herself, would be almost bound to reach the same conclusions about the warrant as the conclusions reached by the defendant.
>
> [37] The other issue of some importance, of course, is the allegation of torture. In reality the claimant produced no evidence, independent of his own assertion, to support the allegation. The defendant gave her view about this allegation in the letter of 23 February 2008 and she dealt with it again in her letter of 27 March 2008. Nothing about her consideration of this issue was arguably irrational."

14. An application for permission to appeal was refused on the paper by Laws LJ but on a renewed oral application permission to apply for judicial review was granted by Ward and Lloyd LJJ. As is customary the Secretary of State was not represented. I have not yet seen a transcript of the judgment. Counsel for the claimant, Miss Ward, kindly provided a note of the judgment. It appears that the court considered that there was a new aspect to the claimant's further representations which had not previously been considered, namely the allegation of torture, and that, for this reason, they arguably should have been treated as a fresh asylum claim:

> "… The allegation of torture was a fresh allegation not made in the asylum claim of 2000 (sic), it was new. In my judgment, it is highly arguable it amounted to a completely fresh asylum claim which had to be judged on its merits by the Secretary of State and if refused attracted an automatic right of appeal.
>
> The defendant's letter of 24 January 2008 states that "… by your own admission, your representations are based on the same reasons as those given in your previous asylum claim, which was refused on 29 January 2003. No evidence has been produced in support of your claim to have been arrested and tortured on your return to Iraq … Taking all of the above into consideration your representations are rejected and the decision to refuse your earlier claim is maintained." Arguably the

> Secretary of State failed to recognise that this was a fresh claim, and there was evidence in the form of the appellant's assertion. She seems to have treated it as an application under paragraph 353, i.e. as a "fresh claim" on significantly different material. It is arguable that paragraph 353 does not arise here at least until the fresh asylum claim has been properly considered. It is therefore arguable that judicial review should be allowed."

15. In any event the Court of Appeal granted permission under CPR 52.15(3) on both of the grounds advanced in the claim form namely, that the provisions of paragraph 353 of the Immigration Rules should not be applied to the claimant's case at all, and that in any event, the Secretary of State could not rationally conclude that his claim would have no prospect of success before an immigration judge. Before me the claimant seeks orders quashing the decision to treat the claimant's new claim as "further submissions" which must meet the test of paragraph 353 of the Immigration Rules and the various decisions not to treat his new claim as satisfying the requirements of that rule. In addition the claimant seeks orders that the Secretary of State grant him a right of appeal against the refusal of his new asylum claim, the time for lodging such an appeal not to begin until his return to the United Kingdom and to use her best endeavours to facilitate his return here.

The Legal Framework

16. There is a web of statutory provisions governing the right of appeal from a refusal to grant asylum. The right of appeal turns on the making of an immigration decision, such as a refusal to grant or vary leave to enter or remain. Section 82 of the Nationality, Immigration and Asylum Act 2002 reads, in part:

> "**82 Right of appeal: general**
>
> (1) Where an immigration decision is made in respect of a person he may appeal to the Tribunal.
>
> (2) In this Part "immigration decision" means—
>
> (a) refusal of leave to enter the United Kingdom,
>
> …
>
> (d) refusal to vary a person's leave to enter or remain in the United Kingdom if the result of the refusal is that the person has no leave to enter or remain".

17. The grounds on which an appeal against a refusal of leave to enter may be brought include, by virtue of section 84(1)(g) of the 2002 Act, "that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention …" Thus the person refused asylum – who is in effect refused leave to enter – can appeal. However, section 92 limits the extent to which persons may appeal by virtue of section 82(1) while they are still in the United Kingdom. However, that section

allows an appeal from within the United Kingdom if the appellant has made an asylum claim or a human rights claim while in the United Kingdom: s.92(4)(a).

18. If a person makes what is assessed to be a fresh asylum claim, having previously had an asylum claim refused, a refusal of that new claim would, under these provisions, trigger a further right of appeal: see R v Secretary of State for the Home Department ex parte Onibiyo [1996] 1 QB 768, 784 per Sir Thomas Bingham MR. Not every further request for asylum could be allowed to ground an appeal, however, for the obvious reason that serial claims could be made on the same basis, notwithstanding the refusal of the original claim. Statute provides one answer: the Secretary of State may certify an asylum or human rights claim as clearly unfounded and that bars an appeal: s94. The result of section 94 certification is that the right of appeal can only be brought out-of-country. Another possible bar to an appeal lies in section 96 of the 2002 Act, which enables the Secretary of State or an immigration officer to issue a certificate preventing an appeal when the claim to which the new decision relates relies on a matter that should have been raised in an appeal against the old decision.

19. Apart from these statutory bars, there is also the "fresh claims" rule. In Onibiyo Sir Thomas Bingham MR set out what would amount to a fresh asylum claim:

> "The acid test must always be whether, comparing the new claim with that earlier rejected, and excluding material on which the claimant could reasonably have been expected to rely in the earlier claim, the new claim is sufficiently different from the earlier claim to admit of a realistic prospect that a favourable view could be taken of the new claim despite the unfavourable conclusion reached on the earlier claim" (at 783G-784A).

That was a case where the applicant had made a claim for asylum, based on the political activities of his father, but conceded that he himself could not show a well-founded fear of persecution so that his appeal on the claim was dismissed. Subsequently, he made what he indicated was a fresh claim for asylum on the basis of his own association with an opposition political group in his country and supported by material on the human rights situation there. The Secretary of State concluded that this was not a fresh claim so there was no avenue of appeal under the existing statutory provisions. The Court of Appeal held that a person could not be deprived of a right to make a fresh asylum claim, whether or not he had left the United Kingdom, but that in this instance the decision of the Secretary of State that he had not made a fresh claim, and thus had no further right of appeal, was unassailable. Subsequently, the Court of Appeal authoritatively decided that the question of whether further submissions purporting to be a new claim for asylum amounted to a "fresh claim" was a matter to be decided by the Secretary of State with no right of appeal, although the decision was susceptible to judicial review: see R v Secretary of State for the Home Department ex parte Cakabay [1998] EWCA Civ 1116; [1998] Imm AR 177.

20. The test propounded by Sir Thomas Bingham MR for what amounts to a fresh claim reflects rule 346 of the Immigration Rules, introduced in 1994. As amended that read:

> "346. Where an asylum applicant has previously been refused asylum during his stay in the United Kingdom, the Secretary of

> State will determine whether any further representations should be treated as a fresh application for asylum. The Secretary of State will treat representations as a fresh application for asylum if the claim advanced in the representations is sufficiently different from the earlier claim that there is a realistic prospect that the conditions set out in paragraph 334 will be satisfied. In considering whether to treat the representations as a fresh claim, the Secretary of State will disregard any material which:
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> (i) is not significant; or
>
> (ii) is not credible; or
>
> (iii) was available to the applicant at the time when the previous application was refused or when any appeal was determined."

21. In 2004 the rule was amended and renumbered as rule 353: Statement of Changes in Immigration Rules, HC 1112. At the time there was no Explanatory Memorandum for this and other changes to the Rules. For present purposes the key change was omission of the phrase "during his stay in the United Kingdom".

> "Fresh Claims
>
> 353. When a human rights or 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 previously been considered. The submissions will only be significantly different if the content:
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> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.
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> This paragraph does not apply to claims made overseas."

22. The Asylum Instructions, which offer operational, step by step, guidance for caseworkers working for the Secretary of State, contain some ten pages relating to rule 353. One aspect deals with applicants who have been refused leave in relation to their initial asylum or human rights claim before leaving the United Kingdom but subsequently return and raise asylum or human rights issues again. Case workers are told that rule 353 should be applied in such cases. The fact that an appellant has left the country is said not to be material to its application. The document continues that "the importance of applying paragraph 353 in these cases is that if there is either no fresh asylum or fresh human rights claim, then the right of appeal is out-of-country rather than in-country …"

23. In WM (DRC) v Secretary of State for the Home Department [2006] EWCA Civ 1495; [2007] Imm A R 337 the Court of Appeal (Buxton, Jonathan Parker and Moore-Bick LJJ) described the Secretary of State's task in deciding whether there is a fresh claim. She must consider the new material together with the old and make two judgements. First, she must decide whether the new material is significantly different from that already submitted on the basis of which the claim failed. That turns on whether the material has already been considered. If the material is not "significantly different" that is the end of the matter. If the material is significantly different, the Secretary of State has then to consider whether with the material previously considered it creates a realistic prospect of success in a further claim. The Court of Appeal held that the rule only imposes "a somewhat modest test that the application has to meet before it becomes a fresh claim". Since asylum or human rights are in issue the consideration of all decision-makers – the Secretary of State, the adjudicator and the court – must be informed by the anxious scrutiny of the material.

24. The Court of Appeal went on to hold that on a challenge by judicial review to a decision of the Secretary of State under rule 353 a claimant must show that the decision was irrational. A decision would be irrational if the Secretary of State had asked the wrong question or had not applied anxious scrutiny. As the Court of Appeal said:

> "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 [allowing the appeal]. 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." (para 11)

Applicability of rule 353

25. The first issue in this claim concerns whether rule 353 of the Immigration Rules applies to the claimant whose claim for asylum was unsuccessful, who returned to Iraq for some two years, and then entered the United Kingdom again making another asylum claim. If rule 353 does not apply to such cases then the person has a right to appeal in the ordinary way in the event of the claim being refused. If rule 353 applies then should the subsequent claim be rejected and there is no fresh asylum or fresh human rights claim, there is no in-country right of appeal. It appears the issue has not been subject to an authoritative ruling. Rule 353 is typically considered in the Administrative Court in the context of persons making further submissions in support of a claim or adding an Article 8 ECHR claim because of the time taken by the Secretary of State in dealing with them. Apparently the applicability of rule 353 to a subsequent claim is new territory in a situation where someone has left the country and returned and made a claim on what is said to be distinct grounds.

(a) Claimant's submissions

26. The claimant argues that paragraph 353 has no application in his type of case, where his claim is that, following his return to Iraq, he was detained and mistreated in a

manner which had not occurred previously. In her cogent submissions on his behalf, Miss Ward submitted that there is a clear conceptual difference between further representations in this type of case and further representations in support of an existing claim, or against removal on new grounds. She asks, hypothetically, whether any length of time outside the United Kingdom, in whatever circumstances, would be irrelevant. If so, a person who had previously claimed asylum, even one who, at the time, was justified in doing so, but was ultimately unsuccessful due to the passage of time would, if fleeing a different war in a different country, have to satisfy the additional hurdle of being deemed to have a realistic prospect of success on appeal before being able to bring an appeal. She submits that this seems far removed from the situation envisaged by the wording of rule 353 and its consequential bar on in-country appeal rights. Miss Ward's submissions in the context of her hypothetical case have an instinctive appeal.

27. To support her contention Miss Ward advanced two key points. First, she submitted that as a matter of construction rule 353 should be confined in its application. While the phrase "further submissions" in the rule could describe a situation where a person was making submissions further to an earlier claim it was not apt where a person was making submissions on a completely new claim. In other words as a matter of language "further submissions" meant submissions further to an existing claim, but not submissions regarding a new claim in the type of hypothetical case she advanced. Secondly, Miss Ward submitted that to adopt any other interpretation would lead to what she characterised as a logical difficulty: even with so obvious a new claim in her hypothetical case everything had to be referred back to the previous claim. She gave as an example of this logical difficulty the Secretary of State's first letter of 27 March 2008, where in a curiously worded sub-paragraph the fact that the arrest warrant was issued after the claimant made a voluntary departure from the United Kingdom is introduced as part of the reasoning that no reliance could be placed on the warrant. In reply to the Secretary of State's submission, that unless rule 353 was given a broad construction serial applications could be made, each generating appeal rights, Miss Ward pointed to statutory powers such as sections 94 and 96, specially designed to address abuse.

28. Miss Ward bolstered her case by reference to the obligation under European Union Council Regulation (EC) No 343/2003 (commonly referred to as "Dublin II") on Member States to take back an asylum applicant who subsequently claims asylum in another Member State. That obligation ceases if the asylum seeker leaves the territory of the Member State for three months or more (Article 4(5)). Miss Ward suggests that this may be seen, at least in part, as recognition that after a certain period of time a claim being made is unlikely to be properly categorized as the same claim. In her submission it seemed illogical that the claimant was in a worse position than if his previous claim had been made, for example, in France.

29. At a practical level Miss Ward contended that the claimant had advanced a new claim when he returned to this country. Although the claimant answered "yes" when asked on 22 January whether his reasons for claiming asylum were the same as previously, this could not be determinative of the issue, although it was treated as such by the Secretary of State in her decision letters. It was a perfectly natural answer for a person who had suffered mistreatment at the hands of the authorities of the same country he was previously fleeing. It did not mean that the claim was based on the

same facts. It plainly was not because it raised detention and torture. These are fresh allegations, relating to a period after his original claim was refused. In this respect Miss Ward was critical of the truncated form of the questionnaire, with only four basic questions, and of what she said was the leading question which elicited this answer. Claimants should be asked straightforwardly why they were now claiming asylum or other protection. In any event, she underlined the point that the interview followed the day after the claimant had been discovered coming out the back of a lorry after what was no doubt an arduous journey, so that too much store should not be placed on it.

(b) The meaning of rule 353

30. Although laid before Parliament the Immigration Rules do not constitute a statutory instrument. It was not suggested to me that this made any difference as to how the rules were to be interpreted. One begins, naturally enough, with the words. The terms of rule 353 are clear enough as to when it applies: first, a human rights or asylum claim has been refused and, secondly, any appeal relating to the claim is no longer pending. Those conditions are satisfied in this case because the claimant's asylum claim was refused in January 2003 and later that year his appeal to an Adjudicator was unsuccessful. On its face, therefore, the rule applies. Is there any reason that it should not?

31. There is of course the hypothetical situation advanced on the claimant's behalf. To my mind there is nothing incongruent in applying the rule in that type of case. It will be recalled that in that situation a person has had a claim refused, there is no appeal outstanding, and he leaves the United Kingdom. He is caught up in a different war in a different country and arrives again in the United Kingdom making a claim. Why should rule 353 not apply to this type of hypothetical claim? In the first possibility, if the Secretary of State accepts the claim, that is the end of the matter. The claim has been successful. If the Secretary of State does not – the second possibility – she must, in terms of the rule, determine whether it amounts to a fresh claim. If she decides that it constitutes a fresh claim, then her decision on the claim itself can be appealed to the tribunal in the ordinary way under section 92(4). So the person can have the claim examined by an immigration judge. If unhappy with the decision of the immigration judge the person can have it tested further by other judges. The third possibility is if the Secretary of State rejects the claim and also decides that it does not constitute a fresh claim. In that situation her decision on the fresh claim point can be challenged in judicial review proceedings in accordance with the approach laid down in WM. If the judicial review is successful the Secretary of State may well change her mind on reconsideration. All of this seems a perfectly sensible framework to handle a claim in the hypothetical situation advanced.

32. The use of the phrase "further submissions" in rule 353 may be inelegant, on one reading harking back to the claim previously made. However, it is clear that "further submissions" cannot be read as meaning "further submissions in support of an existing claim" for the simple reason that rule 353 applies only when a human rights or asylum claim has been refused and all appeals have been exhausted. In other words rule 353 only applies when there is no extant claim. Moreover, use of the phrase "further submissions" does not appear inappropriate when used in the context of a rule providing a framework for deciding whether or not there is a fresh claim.

The further submissions could be held to constitute a fresh claim but equally be said to relate to a previously rejected claim.

33. The policy background supports what seems to be this sensible reading of rule 353. This goes to a purposive construction of the rule. The policy behind the rule was touched on earlier: to prevent serial unfounded applications for asylum, which would all generate rights of appeal and therefore provide a right to remain in the United Kingdom while the appeals are heard. Within the context of rule 353 Miss Ward seeks to meet this abuse point with her suggestion that the rule applies unless the person leaves the United Kingdom. Leaving cannot be irrelevant for the purposes of rule 353, she says, given that it expressly does not apply to claims made overseas. Moreover, in her submission for rule 353 not to apply the person would have to be away from the United Kingdom for a reasonable period – three months is one possibility, based on the period in Dublin II – and the claim is in some sense new. Certainly a time period would meet the abuses the Secretary of State advanced in argument of the unsuccessful asylum applicant popping over the border from Northern Ireland to the Irish Republic or booking a return flight from the United Kingdom and, on return, making another asylum application with a right of appeal on refusal. Although, in policy terms, this limitation on the ambit of the rule might make sense it would be to rewrite the rule in a substantial way. The rule would need to be read not to apply if the person left the United Kingdom. But for how long: if three months, why not two, or six? There would still be the task of deciding whether the claim advanced on return was a fresh claim. Therefore it seems to me that a purposive construction supports the application of the rule in the hypothetical case advanced to support his argument as to its construction, a fortiori in the claimant's own case.

34. For sake of completeness I need to add that in my view the history of the rule does not help in its interpretation one way or the other. During the argument I was attracted to the Secretary of State's suggestion that omission of the phrase "during his stay in the United Kingdom" in 2004 supported what I have held to be the correct interpretation of the rule. It will be recalled that this change in wording occurred when rule 346 became rule 353. In the Secretary of State's submission, rule 346 was only triggered if the previous application for asylum had been refused during the applicant's stay in the United Kingdom. It would therefore not apply if the applicant had left the United Kingdom after refusal of his claim and then returned and made a new asylum claim. Under the present rule the condition that the refusal of asylum occurred during the applicant's stay in the United Kingdom has been removed. It was said that the obvious intention was that it should no longer be an impediment to the application of the rule that the applicant had left the United Kingdom and returned between the refusal of the previous asylum application and the submission of the fresh representations. On reflection I think that rule 346 cannot be read in the manner contended for by the Secretary of State. That makes unnecessary the various arguments Miss Ward inventively deployed to explain the changed wording in 2004, such as the implications which should be drawn from the Asylum Instructions or what was said in 2007 to be the background to changes then in the Immigration Rules.

Whether application of rule 353 was flawed

35. If rule 353 of the Immigration Rules applies to the claimant's case, the issue becomes the straightforward one of whether the Secretary of State has invoked it in accordance

with established legal principles. In effect there were two aspects to the claimant's further representations, the arrest warrant and the allegation of torture. It appears that the Court of Appeal considered that because the torture allegation was new it arguably ought to have been treated as a fresh claim. Both the torture allegation and the arrest warrant were new, albeit that a different arrest warrant had been relied upon in support of the original claim. The fact that representations about both were new meant that the condition in rule 353(i) was satisfied, that they had not previously been considered. It was still necessary to satisfy the condition in rule 353(ii), that "taken together with the previously considered material [they] created a realistic prospect of success, notwithstanding its rejection." The issue is whether the Secretary of State's decision that they did not create a realistic prospect of success is flawed in public law terms.

36. The claimant's essential points, which on his case have never been addressed by the Secretary of State are firstly, that a new arrest warrant has been produced and has been examined by a country expert, who while understandably not going so far as to assert that it is definitely genuine states that it "should be taken seriously" and gives reasons for this conclusion. Secondly, the claimant having spent two years back in Iraq, returned to the United Kingdom and complained that he had been detained and tortured in Iraq since his return, having never previously made any such claim. He has not been examined other than by a police doctor, to whom he pointed out scars alleged to be caused by torture, but the Secretary of State has refused to take this any further. Thirdly, while his previous claim to be at risk was rejected by the Adjudicator on the grounds that she felt the chronology of his account "simply did not make sense" at a hearing where he was unrepresented, she went on to find that had his account been credible, she would have been unable to evidence any real risk of treatment contrary to Article 3 of the ECHR. It is perhaps convenient to consider the claimant's case in relation to arrest warrant and torture in turn.

(a) Arrest warrant

37. Tanveer Ahmed v Secretary of State for the Home Department [2002] UKIAT 00439, a decision of the Immigration Appeal Tribunal, establishes authoritatively that it is for the claimant to establish the reliability of a document if it is at issue (para 33). A document should not be viewed in isolation but in the context of the evidence as a whole (para 35). In Asif Naseer v Secretary of State for the Home Department [2006] EWHC 1671 an FIR and an arrest warrant were produced. Collins J said that if the Secretary of State reasonably on the material before her took the view that it was not evidence which could be accepted, and therefore would not give a reasonable prospect of success on appeal, she was entitled to do so. His Lordship continued:

> "What is important in circumstances such as this is that there should be evidence indicating how the relevant documents came into existence and supporting their genuineness." (para 37).

A key factor in the decision was that it was not known how the FIR and arrest warrant came into existence and how the claimant's brother obtained them. The Secretary of State was fully entitled to reject their genuineness.

38. In relation to the expert's assessment of the warrant in this case, the claimant's case was that whilst Dr. Fatah had not analysed the paper used for the arrest warrant – an important component of the Secretary of State's critique of his report – he had carried out the other tests referred to in his report. The lack of a test of paper quality was clearly not considered by him to be determinative and could not be a reason for attaching no weight at all to the reasoned conclusions in his report. In terms of another major criticism by the Secretary of State, Miss Ward submitted that it would be an unusual expert report that contained specific reference to cases in which the expert's expertise as an independent assessor of the probity of documents submitted in support of international protection claims has been tested and accepted. In her submission immigration judges would give appropriate weight to the evidence of a person with greater knowledge and experience of the country in question than they have, and in doing so would, or at least should, consider the extent to which that person had previous general experience of assessing the probity of documents. Evidence would not be discounted simply because the particular expert had not previously been found by the Tribunal to have accurately assessed the probity of documents. Moreover, Dr Fatah could not be criticized for relying on the information he was given as to how the claimant obtained the copy of the warrant, an account subsequently communicated to the Secretary of State in a witness statement. Miss Ward then submitted that the points taken against that account were equally inconclusive. It is not at all unclear how the claimant's parents came to be in possession of the warrant: it was sent to their address. It had never been asserted that they were instructed to send it to him. He asked them to send it to him when informed of its existence.

39. Overall, Miss Ward submitted that an immigration judge would only have to conclude that there was a real possibility that the warrant was genuine in order to allow the appeal. The Secretary of State's criticisms of Dr. Fatah's expertise and his failure to carry out one of the tests he referred to were at the least arguably not well founded and were certainly not sufficient to base a rational conclusion that an immigration judge could not accept his overall conclusion. At the time of his removal, the Secretary of State had simply dismissed the evidence of Dr. Fatah on the grounds that it did not "conclusively establish" the genuineness of the arrest warrant. The reasons given subsequently for maintaining this view continued to proceed on the apparent requirement that the evidence be conclusive, and rejected that evidence for reasons that might well not be accepted by an immigration judge after hearing evidence. The evidence did not need to go so far as "establishing" or "confirming" the truth of that account. If an immigration judge would not be bound to reach the same conclusion then it would be irrational to conclude that he or she would be so bound.

40. When the case was before Wyn Williams J, his Lordship said:

> "During the course of her submissions Miss Ward was good enough to recognise that the many points which the Defendant had raised about the authenticity and/or reliability of the arrest warrant would provide powerful ammunition with which to confront the Claimant in any appeal before an Immigration Judge either by way of cross-examination or submission. In my judgment the points raised by the Defendant in the letters to which I have referred go further than that. They demonstrate

> that an Immigration Judge, properly directing himself/herself, would be almost bound to reach the same conclusions about the warrant as the conclusions reached by the Defendant." [36]

I can see no reason for reaching a different conclusion. In my judgment the Secretary of State was entitled not to accept the genuineness of the arrest warrant either on its own terms or the account of how it came into existence. As she was entitled to she considered it against the background of the claimant having previously provided an untrue account in support of an asylum claim, and the Adjudicator having concluded that no weight could be attached to the warrant he produced that time as well. Quite apart from this the Secretary of State was entitled to take the view that the claimant did not have a realistic prospect of establishing, to the requisite standard, that the warrant was genuine. The reasons she gave in the decision letters made clear why she took that view, albeit that some were more fully developed once the claimant had left the United Kingdom. The claimant's own expert was equivocal. Insofar as he provided support for the genuineness of the document, his report was unsatisfactory because it was not at all clear that he was qualified to give an opinion on this issue. There was also the striking feature that he had not examined the original document, even when it became available. Moreover, the Secretary of State was entitled to bring into the equation that the arrest warrant was inconsistent with the account that the claimant had initially given. He had said that he was wanted in connection with the illegal trading in antiques and it was only later that he said it was because of a problem over his identity document. It was also not irrational of her to take the view that there was no adequate evidence indicating how the warrant came into existence. It was highly unlikely that the security forces in Iraq would release him and then issue a warrant for his arrest. He had failed to mention the warrant when he was interviewed in January 2008. And there was the inconsistency between the interview, when his trouble was attributed to the mummy, and the reason advanced later by his lawyers, that he had been stopped with a false ID and this was the basis of the warrant. In summary the Secretary of State took the decision that the arrest warrant was not evidence which could be accepted and I cannot see that her reasons are flawed.

(b) Torture

41. It is the allegation of torture which is the more troubling and which seems to be at the base of the Court of Appeal's concerns. It is certainly the case that it received less attention from the Secretary of State in her replies than the warrant. This reflects the way the claimant's case was put to her by his representatives. No criticism can be made of that. Given the time constraints they took the view that they were unable to obtain expert medical evidence of the torture the claimant was alleging. Thus they focused on the warrant in advancing his case with the Secretary of State. What the claimant therefore seeks is the opportunity to persuade an immigration judge that it is reasonably likely that detention and torture occurred following his voluntary return to Iraq. These are new allegations, of actual detention and torture, which might be supportable by medical evidence which he was unable to obtain before being returned to Iraq in March this year. Contrary to the Secretary of State's assertion, it is said, the claimant was not given the opportunity to give a detailed account of his treatment because the Secretary of State declined to investigate beyond the answers to the four questions asked on the proforma questionnaire on 22 January, despite a further

request to do so from his solicitors. In his submission it is difficult to see what further evidence the claimant could have obtained of having been tortured, given that he was in custody throughout the relevant period, and the Secretary of State refused to investigate further.

42. Having given the matter the most anxious scrutiny I have concluded that the Secretary of State's treatment of the torture allegations was not flawed. I am comforted by the fact that both Wyn Williams J and Laws LJ also concluded that the Secretary of State's decision in this regard was not irrational. In other words my view is that she was entitled to conclude that the further submissions did not amount to a fresh claim under rule 353. That does not mean that in an ideal world the claimant's allegation of torture could not have been better handled. That, however, is not the test. The fact is that the claimant had to make out his case. His account had to be considered in the round. Part of the context in which the torture allegations had to be considered was that the claimant had previously been found by the Adjudicator to have advanced an account in support of an application for asylum which "simply [did] not make sense". Albeit that the adjudicator went on to say that if she had found the claimant to be credible she would have been unable to rule out a real risk of treatment contrary to Article 3, the fact is that she had not found him to be credible.

43. When interviewed on 22 January 2008 the claimant had said that his reasons for claiming asylum were the same as he had given when he first claimed asylum. When he was asked whether anything had happened to him since he was last in the United Kingdom which might be relevant to his asylum claim he had referred to his involvement with the illegal sale of a mummy and to his having been arrested and tortured <u>because of it</u>. Albeit that the interview was short, and conducted on the same day that he was discovered emerging from the back of a lorry, the fact is this was the context in which he advanced the allegation of torture. The Secretary of State rejected it in her letter of 24 January. In part she relied on his account that he had been involved in the illegal sale of a mummy, which was said to be the reason for the torture. Yet that account had been rejected by the Adjudicator. The Secretary of State was entitled to conclude that the repetition of this account, with the added ingredient of torture as a result of the trading in the mummy, would also be rejected unless there was some new evidence to corroborate the allegation of torture.

44. The only new evidence supporting the allegation of torture was the report by the police doctor. It will be recalled that he asked to see the doctors on two occasions when detained in Aylesbury police station. On the first occasion, on 23 January, he had complained of head and heart problems. Two days later, on 25 January, late in the day, he asked again for a doctor to examine and record burn injuries to his right wrist and chizzle marks to his right forearm as part of his appeal against deportation. The police record notes that his then solicitors would have advised him to do this. As a result, it seems, of repeating the torture allegation at the Oakington Centre the Secretary of State in a letter of 23 February said there was no new evidence. As far as the police doctor's note was concerned – "[A]lleged torture marks. Arm. Right" – the Secretary of State took the view that the doctor was not qualified to assess evidence of torture. There is nothing about this treatment of the evidence, such as it was, which was arguably irrational in public law terms.

<u>Conclusion</u>

45. The claim must be dismissed. Rule 353 of the Immigration Rules can apply even in cases like the present when a person departs the jurisdiction and then returns with a subsequent claim. That conclusion follows from its terms but also through a purposive construction of its terms. I reject the claimant's case that in applying the test in paragraph 353 it could not rationally be concluded that he did not meet the requirements set out there. The Secretary of State was entitled to conclude that the claimant's submissions did not have a realistic prospect of success and did not therefore amount to a fresh claim. In her application of rule 353 to the claimant's subsequent claim there was nothing flawed in public law terms. She asked the correct questions and it cannot be said, giving the matter anxious scrutiny, that her conclusions on either the warrant or the torture allegations was flawed. Her decision to refuse the claimant's claim for asylum earlier this year accordingly attracts no right of appeal in the United Kingdom.