

CO/12241/2009

Neutral Citation Number: [2010] EWHC 3129 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 11 November 2010

B e f o r e:

JOHN BOWERS QC
(Sitting as a Deputy High Court Judge)

Between:

THE QUEEN ON THE APPLICATION OF HABEL

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

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Ms A Weston (instructed by Birnberg Peirce & Partners) appeared on behalf of the
Claimant

Mr P Greateorex (instructed by the Treasury Solicitors) appeared on behalf of the **Defendant**

J U D G M E N T

1. THE DEPUTY JUDGE: In this case the Claimant arrived in 1998 from France using a false passport and claiming asylum which was refused in 2001. His claim arose in the context of a period of extreme violence in Algeria between the government, the police and armed forces and the FIS, latterly a group called GIA which was part of an insurgency. His claim was refused by the Secretary of State for the Home Department on 26 March 2001.
2. He appealed to an adjudicator and it is important to note that the adjudicator found in his favour in relation to credibility and says this at 58 of the bundle, the adjudicator Mr Griffin and adjudication being promulgated on 2 October 2003.

"The appellant has given a consistent account regarding his problems in Algeria. I was impressed with the way he gave his evidence in court and I have no reason to believe that he is other than a credible witness. It is clear that he is a strong Muslim and a person who is against injustice and violence. This is borne out by his opposition to the extreme policies of the government in banning opposition parties in 1991...

"As a result of his beliefs he has suffered short terms of detention and has been arrested for questioning about his involvement in protests against the government both following the election with the FIS who were banned, and military coup de etat."

His evidence which is at page 57 of the bundle paragraph 12 includes this:

"The authorities arrested the appellant and his brothers and detained him. He was interrogated, hit, tortured during the three days detention. However he was released without charge...

"He was transferred to Boufariq army barracks where he was detained until May. Whilst there he was tortured, fed sporadically, (only bread), sexually abused, and beaten."

3. I have seen the statement that was placed before the adjudicator which begins at page 266 of the bundle. At page 270 in the first full paragraph he says:

"During my time in Hasandei I was subject to verbal abuse and beating. I had a beard. They said that I was an Islamist and proceeded to beat and torture me. They wanted to know what my relationship with the Student League was. I was of course not the only one held. 15 of us were held in a small cell. We were stripped and abused. They put my genitals inside a drawer and slammed the drawer. They put a soapy rag in my mouth which made me choke. I was beaten."

Although there is no specific reference to that part of the statement the appellant's evidence was generally believed. However, the adjudicator found against the Claimant on the basis that if returned he would not be at risk of ill treatment from either the government or the GIA. Paragraph 15 the adjudicator says:

"I find it is unlikely therefore he is regarded by the Algerian authorities as

a threat to the state, a terrorist sympathizer, or someone who is anti-government. Consequently, therefore, there is little likelihood of him being stopped and questioned for these reasons upon his return."

So the adjudicator found against the Claimant and his appeal rights were exhausted on 1 March 2004. There was then no further activity of note save for an application on 30 March 2004, an application for humanitarian protection and discretionary leave to remain, which was refused on 7 September 2007.

4. Three sets of further submissions were made on 7 September 2007, 5 December 2007 and 8 October 2008. On 12 September 2007 a judicial review application was issued which failed. Then on 20 October 2008 an application was made which was refused as totally without merit on 18 November 2008; the refusal being at page 164 of the bundle. Collins J says in his observations:

"The Claimant's attempts to avoid return have been legion. The only new material is Ms Pargerter's report, but it adds nothing of substance, and Mr Mustefaoui's whose statement, for the reasons given in the Acknowledgement of Service (despite the somewhat infelicitous language in the decision letter), the Secretary of State was entitled to reject. Removal can take place forthwith"...

The latest application was rejected by two decision letters which are in the bundle dated 8 October 2009 and 29 October 2009. I merely refer to three points from that.

5. Firstly, paragraph 6 in the first letter, that the majority of the points has been considered previously. Paragraph 13, because there was a delay in forwarding Mr Bendaoud's information to the Secretary of State, his evidence constitutes nothing more than an attempt to re-argue grounds that have already been considered and rejected. In the second letter it states that the addendum report of Miss Pargerter adds nothing of substance. I, of course, have to look at this matter under paragraph 353 of HC395 Immigration Rules. I merely pick out the key parts.

"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:

- (i) had not already been considered;
- (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

In the recent decision of YH 2010 EWCA Civ 116, Carnwath LJ at paragraph 24 says:

"The cause of genuine asylum seekers will not be helped by undue credulity towards those advancing stories which are manifestly contrived or riddled with inconsistencies."

I also bear in mind in looking at the case generally the judgment given by Toulson LJ on behalf of the Court in AK (Afghanistan) and Secretary of State for The Home Department 2007 EWCA Civ 535, paragraph 22 which puts Rule 353 in context as

being aimed at the mischief of an unsuccessful claimant seeking after he has exhausted the appellate process to begin the whole process all over again by making supposedly fresh claims without sufficient cause.

6. I have been addressed very helpfully on a whole series of cases all in writing and some orally and I bear in mind in particular as general background the cases of R v Secretary of State for The Home Department Ex parte Onibiyo 1996 QB 768, R v Secretary of State for The Home Department Ex parte Boybeyi 1997 INLR 130 and The Queen On The Application of Senkoy v The Secretary of State for the Home Department [2001] INLR 555.
7. The most central features which I bear in mind are what has been described by Miss Weston on behalf of the Claimant as the relatively low test which is set out in WM (DRC) the Sectary of State for the Home Department 2007 INLR 126, paragraph 7, where Buxton LJ says:

"First, the question is whether there is a realistic prospect of success in an application before an adjudicator, but not more than that. Second, as Mr Nichol QC pertinently pointed out, the adjudicator himself does not have to achieve certainty, but only to think that there is a real risk of the applicant being persecuted on return. Third, and importantly, since asylum is in issue the consideration of all the decision makers, the Secretary of State, the adjudicator and the court, must be informed by anxious scrutiny of the material that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution."

Linked with that is the statement in AK, the reference to which I have already given which says this:

"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."

8. Also on the issue of credibility, again what appears to be a relatively low test as set out at paragraph 19, the reference being The Queen on the application of Rahimi v The Secretary of State for The Home Department 2005 EWHC 2838 Admin.

"If it is, on the face of it, credible and if, despite the feeling that it might be disbelieved, it is not possible to say that it could not reasonably be believed, then as it seems to me, the decision ought to be based upon that state of affairs. The Secretary of State would be wrong to say, 'I don't believe it and therefore I am not going to regard it as a fresh claim'."

I have also been shown helpfully the Country Guidance in AF (Terrorist Suspects HS (Algeria)) [2009] UKAIT at 23 which specifically states:

"An appellant who can establish he has a history that suggests he may have connections with international terrorism is at real risk of being detained on arrival in Algeria, and investigated.

It is reasonably likely when the suspicion is of international terrorism such a returnee would be passed into the hands of the DRS for further interrogation."

Mr Greatorex on behalf of the defendant says this case does not come close to that.

9. Now the case is essentially based on three matters which although one must look at them separately and in turn, it is important to see how they may inter-relate one with another. The first is a claim by Abdel Kader Bendaoud, that whilst detained by the Algerian authorities in 2006 he was shown a dossier that included the Claimant's photographs and a list of names including the Claimant's. Secondly, that the Claimant was visited on six occasions by an officer from the security service. Thirdly, Miss Pargerter's second report.
10. Reviewing those matters in turn, Mr Bendaoud it must be noticed was himself found to be a credible witness in his own adjudicator's decision which is in the bundle. He says this is at page 71. "On the last day when he was in detention in Algiers by the DRS" – and I am now quoting from paragraph 10:

"My interrogators produced a dossier which had a lot of photographs and details of people in it. Some showed pictures of men taken from both the front and the side like when someone is arrested and other photographs of people who I presumed had not been arrested."

He says he was shown about 25 photographs. At paragraph 11:

"The only person I recognised in the photographs that I was shown was Mourad Habel. I did not say that I knew him because I was scared. The photograph that I was shown was a front image of him."

He says in paragraph 16:

"I did not tell Mourad about this as soon as I returned because I did not want to scare him but I did tell him shortly afterwards."

So that means that the Claimant was told "shortly after" 12 May because at paragraph 15 the statement says that he arrived at Gatwick on 12 May 2006.

11. Mr Bendaoud put in a further statement which is at page 132 of the bundle which gives material about why he did not come forward earlier. There is also a letter at page 131 that he signed dated 12th May 2008 which certifies the matters which are set out in his statement and are signed by him. There is a statement also from Mr Ahmed Habel who refers to the fact that the Claimant his brother suffers from depression,

"...and [he] relies on me for support but he is quite a shy person who keeps things to himself. I sincerely believe that he would be in danger if he were to be deported to Algeria."

Finally, on this point, there is a statement from Mr O'Connor of Birnberg Pierce & Partners who have had conduct of the Claimant's case since 11 January 2009. He says:

"Among the previous solicitors' papers that I received from Mr Ahmed Habel was a letter dated 12 May 2008"

and he then contacted Mr Bendaoud.

12. That statement is dated and signed on 3 November 2010. So that is the first piece of evidence in the fresh claim. The second is within Mr Habel's further statement dated 12 January 2009. He says on six occasions between 20 October 2008 and 20 November 2008 he was visited by, and I quote:

"MI5 and the police when he was in detention. That is at Colnbrook Immigration Removal Centre near Heathrow."

Now 20 October 2008 happens to be the very date when the application was made for judicial review that was subsequently rejected by Collins J. The statement of Mr Habel, at paragraph 6 on page 83 of the bundle, goes on to say:

"They asked me many questions, for example what I knew about Al Qaeda in Algeria, which mosque I prayed at in London, whether I knew jihadists or people who would finance Jihad."

He says at paragraph 10:

"I believe they kept coming to see me because they believe I am in a 'sleeping cell' which I strongly deny."

So that MI5 activity which is neither admitted nor denied by the defendant finished some time ago and overlapped with the period when the previous application for judicial review was on foot but it was not brought to the attention of Collins J in dealing with that application.

13. The third area is Ms Pargerter's report which was considered by Collins J. That is dated 21 October 2007. It is very detailed. It is found between pages 99 and 113. For present purposes I think that the material part for today's consideration is paragraph 8 (iii) on page 111 where she says:

"In light of this increased pressure the regime, (the Algerian regime) is particularly concerned about those Algerians who have been abroad for long periods of time and about their possible linkages to international terrorist networks. This has been evidenced by the arrests and charging of a number of returnees."

Then she sets out in some detail those facts.

The statement which is more material or the addendum report I should say is dated 11 March 2009. It is a supplementary to the previous one, it brings it up to date and at page 123 of the bundle paragraph 1 (ii) says:

"The Algerian authorities are particularly interested in those Algerians returning from long stays abroad, especially those coming from Europe that has traditionally been the main centre of opposition to the regime."

She also offers her views about what might happen to Mr Habel, but it is based on the premise at 1.iv and I quote:

"Given the regime's continuing interest in Mr Habel, they would consider him to be a useful source of information about other Algerians in the UK. It is therefore highly likely that they would try to extract information from him."

14. On this basis Miss Weston argues that there is a realistic prospect of an immigration judge seeing a real risk if one puts together those three new pieces of evidence. She says that in particular since 9/11, the counter-terrorist measures in Algeria and change in the security climate, that the Claimant's personal characteristics includes that he is a strong Muslim who has had a lengthy stay in London. It appears he is considered by MI5 to have associations or contacts which make him a person of interest likely to be information transmission between UK and Algerian security services. She seeks to evidence that with a letter referring to another case, that a British citizen was detained by DRS and questioned including about the Claimant. So she puts together all the three pieces of evidence.
15. Mr Greatorex on behalf of the defendant in relation to the Bendaoud matter says that the evidence and the Claimant's submission is strikingly similar to a previous attempt by the Claimant and that relates to a statement of a Mr Mustefaoui which is at page 180 and was before Collins J. Indeed there are very close similarities in that on page 181 of the bundle in that statement at paragraph 9 the deponent says:

"Whilst I was at the court awaiting my hearing, (that is in Algeria) I was held in the court jail. It was while I was in the court jail that I met a man called Mr Reda Dendani.

Mr Dendani asked me a few questions and I confirmed that I was from the UK and then he asked me if I knew Mourad Habel. I confirmed that I knew him and then he told me that I should inform Mourad if I am released that he should not return to Algeria because it would be dangerous for him."

16. So that is the first thing Mr Greatorex says. The second is that there is a credibility issue here because Mr Bendaoud says that he told the Claimant about this matter shortly after 12 May 2006 and the Claimant failed to mention this for almost three years and the suggestion that he was scared is undermined by the fact that in that period he had made three fresh claims and brought two separate judicial reviews. On no basis, Mr Greatorex says, can this material create a realistic prospect of the Claimant's claim succeeding before an immigration judge.

In relation to the visits from the security service, he says it is standard procedure that the security service neither confirmed nor denied that any visits have taken place. He contends also that whether or not they took place it cannot be assumed that the fact that someone is asked to assist the police or even the security service means that that person is under suspicion or that there is a connection between such a request and the risk of persecution faced by the Claimant in Algeria. He also draws attention to the fact that

the last alleged visit was now some two years ago. If there was any real interest in him some action would have been taken against him.

17. It does seem to me that the arguments are finely balanced here but addressing the matter with the most anxious scrutiny and bearing in mind all of the authorities that I have been referred to it seems to me that the position is as follows. Firstly, there is a realistic prospect that the Claimant would be found to be credible on the matter of the MI5 visits. Secondly, as to Mr Bendaoud it does seem to me that applying the Onibiyo test and the language of paragraph 353 this is a matter that in broad terms has been previously considered. I do not consider that there is anything sufficiently different to admit of a realistic prospect of a different view being taken. Thirdly, given the circumstances of the matter coming to light it is possible to say that it could not reasonably be believed under the Rahimi test. I do accept that the Claimant has had the benefit of new and possibly more vigorous solicitors which brought the matter to light whereas previously it had not. But it does seem to me that all of the circumstances of the Bendaoud matter as submitted by Mr Greatorex render that a matter which could not reasonably be believed. Even if I am wrong on this, and it could reasonably be believed it seems to me the issue in general has already been considered. Fourthly, even bearing in mind my finding in relation to the Rahimi test as to the MI5 visits, this does not mean that the Claimant is in any more danger now, any more risk of persecution if returned now, than at the time of the adjudicator's very careful assessment of the matter. I bear in mind that he does not, in my view, come close to the circumstances referred to in the Country Guidance Case which I fully understand are not exclusive of the circumstances but I think are indicative. I also take into account that in HS v the Secretary of State for the Home Department 2008 UKAIT 48, paragraph 106:

"It is common ground no risk arises on his return to Algeria as a failed asylum seeker."

18. So it does seem to me that what one has is an involvement in Islamic protests a long time ago. I do accept that there may be a fanciful case to go in front of an immigration judge. But applying the test which is appropriate, namely: is there a realistic prospect of success? I do not think that there is, so I dismiss this application.
19. THE DEPUTY JUDGE: Are there any further applications?
20. MS WESTON: I need to apply for permission to appeal.
21. THE DEPUTY JUDGE: On what basis?
22. MS WESTON: I do so, on the basis that this court has found that the matters raised in the Bendaoud's statement, firstly, was something that was already considered, and secondly, could not possibly be found to be credible. I ask the court to accept that those two findings are not reasonably open to this court for this reason. The first is that that statement, the statement of Mr Bendaoud in circumstances in which it was made and the time it relates to cannot reasonably be rejected on the basis of a statement by a person, another person, Mr McFowley(?) raised similar matters, but it does not follow, in my respectful submission. As a matter of fact the Bendaoud's statement was not

before Mr Justice Collins and could not have formed any part of his reasoning. It would be wrong, in my respectful submission, to establish a principle whereby a statement given by somebody, a separate person can act as a foundation for rejecting a statement by somebody else.

Secondly, on the question of credibility, in my respectful submission, it is not possible to find that in principle that no reasonable immigration judge faced with Mr Bendaoud's two statements could find him credible about what happened to him when he was detained. So we say for those two reasons, we would say taking into account those two areas which would be manifestly material, we say that the question of the risk arising from a consequence of both the MI5 matters and (inaudible) which were not envisaged by this court in its conclusions we say it is as a consequence of that permission should be granted.

23. THE DEPUTY JUDGE: Thank you. Do you wish to say anything on that?

24. MR GREATOREX: My Lord, I am reluctant unless your Lordship wishes me to address you. I understand when my learned friend makes the application, in my submission, there is no merit in this it is a straightforward claim and it should be for the Court of Appeal to decide.

25. THE DEPUTY JUDGE: I reject the application for permission. I accept that I did give judgment relatively quickly, but I think that if you look through the judgment what I was indicating was not that the statement of Mr Bendaoud was before Collins J but the basis that the Claimant was of interest to the authorities which appears in Mr Bendaoud's statement is essentially the same matter that appeared before. But even if there is any inconsistency, it seems to me that the overall finding that I make is that notwithstanding all of the material that has been put forward, the only prospect before an immigration judge is a fanciful one and not one that engages Rule 353, namely, a realistic prospect of success. Is there any other applications?

26. MR GREATOREX: My Lord, there was an application for costs. The defendant is publicly funded so we know what that means in practice but we are entitled to an order for costs in the usual form.

27. MS WESTON: I do not have anything to say about that simply that we are seeking detailed assessments.

28. THE DEPUTY JUDGE: Of course. Thank you both very much for your very helpful assistance.