Neutral Citation Number: [2009] EWHC 2300 (Admin)

Case No: CO/4713/2009

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

Leeds Combined Court
The Courthouse
1 Oxford Row
Leeds LS1 3BG

Date: 16th September 2009

Before
His Honour Judge S P Grenfell:
- -
Between :

THE QUEEN ON THE APPLICATION OF DOMINIQUE ESSOMBA	Claimant
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	Defendant

- -
- -

Ms Gita Patel (instructed by **Miles Hutchinson & Lithgow**) for the **claimant**
Mr Simon Hilton (instructed by **the Treasury Solicitor**) for the **secretary of state**

Hearing date: 22nd July 2009
- -
Judgment

His Honour Judge Grenfell:

1. The Claimant, Dominique Essomba, is a 42 year old failed male asylum seeker from Cameroon who arrived in the UK on the 30th December 2002 and claimed asylum on the 3rd January 2003 on the basis of his political opinion illustrated by his membership and support for the SDF (Social Democratic Front Party). He had exhausted all rights of appeal. He now seeks, with the permission of His Honour Judge Langan QC, to challenge by way of judicial review the decision of the Secretary of State dated 14th May 2009 refusing to treat his further submission as a fresh claim in accordance with paragraph 353 of the Immigration Rules on two grounds:

   i) that there is a real risk of persecution if he is returned to the Cameroon

   ii) that the Secretary of State has not correctly applied the test of 'anxious scrutiny' to the further representations.

2. That decision has since been superseded by the Secretary of State's decision of the 16th June 2009 to similar effect, which decision is challenged in the amended grounds on the same basis.

3. The history is as follows. The Claimant's claim for asylum was refused by the Secretary of State on the 3rd March 2003. The appeal against that refusal was dismissed at a remitted hearing on the 23rd November 2004 by R G Handley, Adjudicator, sitting at the North Shields Hearing Centre. On the 21st September 2006 the Claimant's solicitors submitted further representations and evidence on behalf of the Claimant namely copies of documents comprising of: (i) a copy of an arrest warrant dated 4th February 2005[1]; (ii) medical evidence to show that the Appellant's physical and mental health had deteriorated since his appeal. On the 2nd October 2008 the Claimant's solicitors submitted further representations on behalf of the Appellant seeking indefinite leave to remain on the basis of his length of residence in the UK. On the 8th of December 2008 the Claimant's solicitors wrote to the Defendant enclosing an updated report from the Appellant's counsellor Canon David Goodacre along with the mailing envelope which had contained the arrest warrant. The explanation given was that the arrest warrant only came to light in 2006 when the Appellant managed to contact his friend Innocent Fongh on trying to locate his wife and children. His friend had told him about the existence of the warrant and thereafter had sent a copy to him. Also enclosed with this letter was a letter from the Appellant's wife dated 5th February 2007 outlining the problems she faced with the Cameroonian authorities due to her husband's activities and the fact that she had to flee Cameroon and is now presently in Ghana. The Red Cross had been able to trace her there.

4. On the 8th January 2009 the Claimant's solicitors sent further medical evidence from his general practitioner regarding the Claimant's medical condition. A report from the Claimant's consultant was still awaited. The Claimant's solicitors sought to have the Secretary of State consider this fresh evidence as a fresh claim for asylum. In a letter dated 14th May 2009, the Secretary of State refused to acknowledge the further representations and evidence as a fresh claim.

[1] Wrongly translated as '2004' although the date stamp on the original French version plainly showed '2005'.

5. His Honour Judge Langan QC, granting permission to apply for judicial review observed that the significant issue was whether the Secretary of State had confused the produced arrest warrant dated 4th February 2005 with the evidence relied on previously only to the effect that there was an arrest warrant outstanding as at November 2004; that it was unlikely that the court would wish to dwell on the other criticisms of the decision, for example, health, which appeared to be misplaced. Ms Patel, has, therefore, properly concentrated on the provenance of the two documents referred to and has not pursued other aspects of the decision, which, in my judgment are plainly not validly challenged.

6. The Secretary of State has acknowledged in his Defence dated 30th June 2009 that in making the decision of the 14th May the writer on his behalf had indeed confused the produced arrest warrant dated 4th February 2005 with the arrest warrant referred to in the previous adjudications.

7. Further representations were submitted on behalf of the claimant on the 18th June, which sought to raise an Article 8 claim of potential interference with the claimant's enjoyment of a private life in the UK.

8. A further decision was made by the Secretary of State which was communicated by letter of the 26th June. By his Defence of the 30th June the Secretary of State of state contended that the arrest warrant of the 4th February 2005 can properly be discounted in the exercise of his discretion and sets out his response to the Article 8 claim.

9. I heard argument on the 22nd July 2009 when I reserved judgment.

10. I am gratefully adopting the legal framework set out by Mr Hilton, counsel for the Secretary of State.

11. Paragraph 355 of the Immigration Rules provides as follows:

> "Fresh Claims
>
> "When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules 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:
>
> i) Had not already been considered; and
> ii) Taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

12. The leading case on paragraph 353 is the decision of the Court of Appeal in *WM (DRC) v Secretary of State for the Home Department* [2006] EWCA Civ 1495, in which Buxton LJ set out in terms both the task of the Secretary of State when deciding whether further submissions amount to a fresh claim and the test to be

applied by a Court called on to review the Secretary of State's decision. The following principles can be taken from paragraphs 6-11: the task of the Secretary of State under paragraph 353 is to decide whether the new material is "significantly different" from material already considered and rejected. That task is twofold. First, the Secretary of State must ask whether the new material was in fact considered on the asylum claim. If so that is the end of the matter, because the material is not new and cannot constitute a fresh claim. Second, only if the new material has not already been considered, the Secretary of State must consider whether, when taken together with material previously considered, the whole creates a realistic prospect of success on a fresh asylum claim. If the answer is yes, it is a fresh claim under 353. In approaching the second limb of his task the Secretary of State's judgment will involve a judgment on the reliability of the new material, as well as a judgment on the outcome of a fresh asylum claim based on that material. A Court reviewing a 353 decision similarly has a twofold task and must address two matters. First, has the Secretary of State asked himself the right question, namely whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, concluding that the applicant will be exposed to a real risk of persecution on return? Second, in addressing that question, did the Secretary of State satisfy the requirement of anxious scrutiny? If the reviewing court cannot answer both of these questions affirmatively, it will grant the application for judicial review.

13. Ms Patel relies on the emphasis extracted from the following authorities.

14. Toulson LJ in *AK (Afghanistan) v Secretary of State for the Home Department* [2007] EWCA Civ 535 at paragraph 23 put it this way:

> "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."

and at paragraph 39, specifically in relation to the consideration of a new document

> "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 …"

15. The important word is 'might.' Blake J in *Ngirincuti v Secretary of State for the Home Department* [2008] EWHC 1952 Admin summarised the court's task as reviewing "the Secretary of State's assessment overall with anxious scrutiny to see whether the factual issue it goes to could make a difference in the appeal and whether the material could make a difference to the factual issue."

16. The arguments in the present case can be summarised as follows.

17. Mr Hilton submits that there must be some filtering process to enable the Secretary of State to form a judgment on the validity of the evidence; that this was precisely what the decision maker did in the 2nd letter of the 16 June 2009. The matter was considered in detail He formed a judgment which was not irrational; gave reasons why the new material should be discounted; there was a requirement on the Secretary of State to form a view on the validity, in particular, of the documents submitted.

18. The starting point, I agree and as Ms Patel also submits, is with the findings of the adjudicator in his determination of the 23rd November 2004, which can be summarised as follows. The claimant had been consistent in his evidence. This followed the first adjudicator's assessment of him as "overall a credible witness" (paragraph 32 of adjudicator J Reid's determination). The November determination found that the claimant had a business and had been engaged during his spare time in SDF activities. The adjudicator accepted the medical evidence. The claimant had been detained and subjected to ill treatment and torture by the authorities. It was possible that he could have escaped as he described. He had attended a reception where his Dictaphone was discovered. The adjudicator, therefore, accepted the core of his claim. Nevertheless, he found that the claimant was not at risk; there was no finding about the 'Message Radio et Porte' (purporting to be a police message to stop the claimant on account of clandestine activities). The adjudicator concluded with his belief that the authorities would not be interested in the claimant; that the suggestion that there was an arrest warrant outstanding was implausible (no document purporting to be an arrest warrant was before him contrary to what the decision maker appears to have thought when making the 14th May 2009 decision); that such documents are easily obtainable in Cameroon.

19. The essential new evidence in support of a new claim consisted of 2 documents, the purported arrest warrant and the letter from the claimant's wife. Ms Patel submits that the Secretary of State in effect prejudged what an immigration judge would decide in respect of the new material; that he should not have rejected the arrest warrant without giving anxious scrutiny not only to the warrant document but also the Claimant's wife's letter; that there was sufficient prospect of success to regard the fresh material as giving rise to a fresh claim for asylum which should be heard by an immigration judge.

20. In my view, the 14th May 2009 decision maker cannot have applied the required degree of anxious scrutiny to the material before him. Had he scrutinised the November 2004 adjudication and the date stamp of the original French version of the arrest warrant, he would have realised that the adjudicator had not been referring to this document and that it post dated the adjudication.

21. The essential point for consideration and anxious scrutiny, therefore, once the Secretary of State realised the error in the 14th May 2009 decision, was whether the purported arrest warrant could be genuine and the extent to which the claimant's wife's letter lent support to that possibility.

22. I can detect nothing in the subsequent decision letter that leads me to believe that that decision maker had given anxious scrutiny to the two documents in conjunction with one another. Indeed the decision letter makes no mention of the wife's letter at all. Mr Hilton submits that, where it is said that all the material submitted has been taken into account together with the arrest warrant, I should infer that the decision maker

had that letter in mind. When applying the test of anxious scrutiny, given the importance of that letter, I cannot do so. In particular, it is unclear whether or not the writer considered the wife's letter as potentially providing support for the existence of a genuine arrest warrant.

23. I accept Mr Hilton's submission that the Secretary of State is entitled to reject a document where there is good reason to consider that no immigration judge would accept it as genuine. However, he has to be careful to avoid predetermining the genuineness of a document where there is a credible issue raised as to its authenticity. That accords with my reading of the authorities to which I have been referred.

24. In my judgment, there are plainly concerns as to the circumstances in which the purported arrest warrant came to be sent to the claimant and as to when it was sent. Nevertheless, when that document was considered in conjunction with the terms of his wife's letter, there should have appeared to the decision maker of the 16th June that there was raised new material which ought to have the anxious scrutiny of an immigration judge to consider whether or not it gave rise to a real risk that the claimant would be subject to persecution should he return to Cameroon.

25. For these reasons, I consider that the Secretary of State, whilst he asked himself the right question in respect of the fresh material, in particular, the arrest warrant, nevertheless in addressing that question, in my judgment, he did not satisfy the requirement of anxious scrutiny: he was wrong, in the circumstances, to have resolved the issue of genuineness himself; that he should have regarded the fresh material in the form of the arrest warrant and the Claimant's wife's letter as a new claim and referred it to an immigration judge to consider whether the arrest warrant was genuine, whether the Claimant's wife's letter lent any support to the genuineness of the warrant, whether that letter itself gave rise to a real risk of persecution.

26. It follows that I allow the application for judicial review on those grounds.

27. With regard to the argument that there was a new Article 8 claim supported by the fresh material supplied in respect of his community connections in Newcastle, it seems to me that the decision maker was entitled to conclude that his domestic circumstances would not amount to sufficient grounds on their own to put to an immigration judge. Nevertheless, in my view, it would be artificial if the immigration judge were not to consider the whole of the fresh material that has been supplied to the Secretary of State by the claimant's solicitors. In those circumstances, I do not propose to rehearse the evidence and arguments relied on in support of and contrary to that claim.

UPON HEARING Ms Patel of Counsel on behalf of the above-named Claimant and Mr Hilton of Counsel on behalf of the Defendant upon the Claimant's application for permission to proceed with a claim

for Judicial Review of the decision of the Defendant dated the 14th day of May 2009

AND UPON READING the written evidence submitted on behalf of the Claimant and Defendant

IT IS ORDERED that the claim be allowed and that the said decision of the Defendant dated the 14th day of May 2009 be quashed

[This matter occupied the time of the Court from 2pm – 2:05pm]

By the Court

DATE 17th day of Sept 2009

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

HIS HONOUR JUDGE GRENFELL

O R D E R

CO/4713/2009