CO/3928/2008

Neutral Citation Number: [2009] EWHC 265 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 27th January 2009

B e f o r e:

HIS HONOUR JUDGE McKENNA
(SITTING AS A DEPUTY HIGH COURT JUDGE)

Between:
THE QUEEN ON THE APPLICATION OF NANOU RASHIR OUIN
Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

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(Official Shorthand Writers to the Court)

Mr G Brown (via video link) (instructed by Greater Manchester Immigration Aid Unit) appeared on behalf of the **Claimant**
Mr C Bourne (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

J U D G M E N T
(As Approved by the Court)

1. HIS HONOUR JUDGE McKENNA: This is the hearing of the claimant's application for judicial review, Lloyd Jones J having granted permission on 4th July 2008. The claimant seeks judicial review of a decision dated 23rd January 2008, a copy of which is at page 29 in the bundle, which was refused and reiterated in supplementary decision letters on 9th April (page 36) and 1st September 2008 (that is in the second bundle, page 3), in which the Secretary of State for the Home Department refused to treat submissions by the claimant as a fresh claim for asylum and/or for leave to remain in the United Kingdom on humanitarian grounds under paragraph 353 of the Immigration Rules as amended.

2. The claimant, whose date of birth is 24th June 1960, is a citizen of Cameroon. She arrived in the United Kingdom on a date in June or July 2004 and sought asylum. She alleges that her husband was a police officer in the Cameroon who, after attending an illegal meeting, was arrested along with the claimant in early 2004. The claimant, but not her husband, was released the next day and indeed it is the claimant's case that she has never seen her husband since that time. The claimant says that after two months she approached a radio station, Radio FM 94, and gave an interview about the arrest in which she says that she was critical of the Cameroonian authorities and that two days later she was arrested for a second time, this time with her sister and, during what turned out to be a period of five days in detention, she says that she was beaten and sexually assaulted whilst her sister, in her hearing, was raped. She claims that she escaped from detention by climbing over a fence after being put on cleaning duties.

3. The claimant's initial claim for asylum was refused by the Secretary of State on 31st August 2004, substantially on credibility grounds. The claimant appealed and her claims were again rejected, this time by an adjudicator on 29th November 2004, after she had arrived at the hearing unrepresented, albeit that she had previously been represented, and without documents and sought an adjournment on the basis that she was not prepared, which was refused by the Adjudicator. The basis for that refusal is set out at paragraph 11 of the Adjudicator's decision, page 101 in the bundle.

4. The claimant's oral evidence was heard and her appeal determined, of course without the Adjudicator having the opportunity of seeing any documentary evidence which the claimant would have wished her to have seen. Again, the credibility of her account was rejected. The claimant's appeal rights were exhausted in or around November 2005. There is then a gap in the chronology until 1st September 2006, when the claimant, by this time represented by Trafford Law Centre, sought to argue that the claimant was in possession of new evidence constituting a fresh claim under paragraph 353 of the Immigration Rules.

5. In support of that application, Trafford Law Centre provided a number of documents. They are listed on the first page of their letter, a copy which is at page 42 in the bundle, and include a witness statement from the claimant dated 25th August 2006 (a copy of which is at pages 45 and 46 in the bundle); a statement from a Mr Menadjou Djakou Rouz Nerhu, (who has been referred to during the course of this hearing as Mr Roux), who was the chairman of the Cameroon Community Organisation (that statement is dated 25th August 2006 and is at page 47 in the bundle); a copy letter and its translation

from an individual called Prince Nasser, dated 5th August 2006, who purports to be the President of the Organisation for Human Rights and for the Protection of the Citizens of Cameroon (that is at 48 and 49 in the bundle); a copy and the English translation of a report of the judgment from the Court of Appeal of Yaounde in Cameroon, dated 5th December 2004, (again that is at 50 and 51 in the bundle); a copy of the death certificate, and an English translation for it, of the claimant's husband, dated 15th December 2004, (pages 55 and 56 in the bundle); death certificates and English translations for the claimant's two children, Mr Ouin Jean and Ms Ouin Ayisatou, together with what purport to be medico-legal certificates confirming their respective deaths (and those documents are at 62 to 70 in the bundle); an extract from a newspaper called *Le Messager*, dated August 2006 (71 and 72 in the bundle); a marriage certificate of the claimant and her husband, dated 14th April 1985 (58 to 61 in the bundle); a medical report dated 12th June 2006 and a witness statement from a locum consultant called Dr Margare Maloba, dated 3rd August 2006 (73 to 74 in the bundle); and then some other information from the US State Department and a UK operational guidance note, which have not formed any part of the submissions before me today. It would also appear that the claimant's representatives also sent a copy and a translation of an arrest warrant, copies of which are at pages 52 and 53 in the bundle, although that arrest warrant is not specifically identified as an enclosure in the Trafford Law Centre letter.

6. The claimant's representatives, Trafford Law Centre, contended that that body of material was reliable and undermined the credibility findings which the original adjudicator had made. In attacking the Adjudicator's findings that the claimant had never been arrested at all, the claimant placed reliance on the arrest warrant, which on its face was issued on 20th September 2004. Within the body of that document, mention is made of the claimant's detention on 15th June 2004, apparently for inciting violence, subversion and in respect of public order issues and her escape from prison, the date for the escape being 16th September 2004, a date by which, of course, the claimant was already in this country and claiming asylum. It is therefore conceded by the claimant, as indeed it must be, that this document therefore, or this aspect, must raise concerns as to the reliability of the document, albeit that the claimant in her statement of 25th August, to which I have referred, sets out an explanation as to what may have happened, namely that the authorities in the Cameroon simply made a mistake. Reliance is also placed on the report and the judgment of 5th December 2004, which on its face confirmed that the claimant had, on 5th December 2004, been sentenced to a term of ten years' imprisonment and there is also reference to a search warrant for what is referred to as "conjugal complicity" for the claimant's attendance at the secret meeting and for her escape from a detention centre. Again, it is conceded that the claimant's access to this document was facilitated by having a relative who worked at the court but nevertheless it is said that there is nothing intrinsically incredible about its contents.

7. As I say, the claimant also relies on the newspaper article in *Le Messager*, the French version of which is at page 71 and the translation of the material passage is at page 72. It is perhaps significant that the typeface for the material section on which the claimant relies is markedly different from the typeface of the rest of the photocopy. The claimant also relies on statements from Mr Roux and Prince Nasser as evidence of the

provenance of the various documents to which I have referred and it is perhaps material that I record that in the letter from Prince Nasser he states:

> "I write to you further to our recent telephone conversation [that is to say to Mr Roux] regarding the information required relating to the deaths of the OUIN children and the position of Mrs OUIN Nanous vis a vis the Cameroon Authorities.
>
> I can assure you that the children committed suicide by drinking perchchloric acid because by then they had suffered enough and had been left all on their own - with no means of supporting themselves. As for [the claimant's] situation - it is a very dangerous one because the Cameroon Authorities are looking for her. I have been to the Court Office in order to obtain information - it was there that I obtained the copy of the Judgment by Default which dates back to 2004 which confirms that [the claimant] has been sentenced to 10 years imprisonment."

8. The Secretary of State in her decision letter of 23rd January 2008 refused this renewed application and refused to treat the submissions as a fresh claim. There followed a letter before claim dated 26th March 2008, bundle 2, page 32, together with a letter from the Cameroon radio station, to which I have already referred, and a certificate dated 8th February 2008, referring to the December 2004 court judgment (that certificate appears in the bundle at page 75 in its French version) and there is also a letter from a relative of the claimant. Following the receipt of the 26th March letter of enclosures, the Secretary of State reconsidered the papers and reiterated her January decision by a letter dated 9th April, which expanded upon the original reasons. To bring matters up-to-date, following the grant of permission to seek judicial by Lloyd Jones J, the Secretary of State again reviewed her decision and reiterated it in the further letter to which I have referred, dated 1st September 2008.

9. I should perhaps say a word about a couple of the documents referred to in the March 2008 letter. In this claim, the claimant places some significance on these items and in particular the letter from the radio station FM 94, because the Adjudicator had rejected the claimant's evidence about such an interview having taken place and on the document, which is a document which is entitled in its French *Certificat des Condamnations a des Peines*, which very curiously is translated on its face as "certificate of condemnations at the sadness". Frankly, that translation on an apparently official Cameroonian document is at best surprising. However, notwithstanding that feature, it has been submitted on the claimant's behalf that there is nothing intrinsically incredible about the content of either of those two documents.

10. I turn briefly to the law, because there is no issue between the parties on this issue. Paragraph 353 of the Immigration Rules (HC 395) as amended provides:

> 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:

(i) had not already been considered; and

(ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.

11. The nature of the test was considered by the Court of Appeal in WM v Secretary of State for the Home Department [2006] EWCA Civ 1495 and indeed, perhaps not surprisingly, both counsel for the claimant and defendant have quoted the same passage at paragraph 11 from the judgment of Buxton LJ which I in turn will now quote from:

> "First, has the Secretary of State asked himself [or rather herself in this case] the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return: see §7 above. 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. Second, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? If the court cannot be satisfied that the answer to both of those questions is in the affirmative it will have to grant an application for review of the Secretary of State's decision."

Of course, I take that guidance fully into account in this case.

12. It is also, I think, common ground that it is for a claimant who seeks to rely upon a document to show that it is reliable per Ahmed Tanveer v Secretary of State for the Home Department [2002] UKAIT 439, paragraphs 33 to 35. In considering, therefore, whether the new evidence amounts to a fresh claim, the Secretary of State must look at the evidence in the round and consider *inter alia* whether each document is one on which reliance could properly be placed by the appellate court.

13. The claimant's case, put shortly, in this application is that the Secretary of State failed to give anxious scrutiny to all of the documents that were produced by or on behalf of claimant, evidence of which is said to be found in the Secretary of State's erroneous reference in the 1st September 2008 letter to the claimant not having supplied translations of the radio FM 94 letter and the *Certificat des Condamnations a des Peines*. It is said, taking all of the material supplied, including the statements of Mr Roux and Prince Nasser, that, whilst it may be that there are certain aspects to some of

documents which taken in isolation give cause for concern, looked at cumulatively they demonstrate a body of material in respect of which the defendant cannot reasonably have taken the view that they could not be accepted and that they would not give a reasonable prospect of success on appeal. The defendant therefore cannot, it is said, have acted rationally when she concluded that the claimant's material did not meet what is the modest test set out in paragraph 353 to which I have referred.

14. I am afraid I do not concur with that viewpoint. It is to be noted that the Secretary of State's various letters are very detailed. The reasoning for the decision which she has come to, both in terms of the original decision and the two reconsiderations, have been to my mind extensively identified in the three decision letters. In the 23rd January letter she concluded that the material would not have created a realistic prospect of success. She gave reasons in respect of each of the documents relied on as to why the document was not to be believed, or rather was not believed to have evidential value. I do not propose to go through those reasons in detail. They are set out in the letter but, for example, the newspaper article is rejected because it is a photocopy and its source cannot be verified and therefore an immigration judge could not reasonably attach weight to it. The statements from the claimant, Mr Roux and Prince Nasser were rejected because they were not independent evidence, they were assertions made by or on behalf of the claimant which could not and were not corroborated and therefore again an immigration judge could not reasonably attach weight to them. The decision letter went on to note that the authenticity of some of the documentation was questionable, giving specific reasons, errors and/or anomalies in the documents, some of which I have referred to during the course of this judgment, in particular the arrest warrant.

15. Following receipt of the further documents from the claimant, further reasons were given in the 9th April letter and, again, the Secretary of State made reference in respect of the additional documents to the ease with which such documents could be obtained in Cameroon and why therefore she did not accept them as independent corroboration, noting also the lack of any adequate explanation for the failure to obtain these documents until after the exhaustion of the claimant's appeal rights. It is also to be noted, almost as a footnote, that the 9th April letter does not make reference to the lack of translation of the documents referred to in this judgment.

16. To my mind, full regard was had to those documents at the stage when the 9th April letter was sent. It reiterates much of the Secretary of State's previous reasons but also adds further material. Thereafter, there is the 1st September 2008 letter, where yet further material is provided to support the Secretary of State's decision to reject the claimant's submissions as being incapable of founding a successful claim. Paragraphs 12 and 13 expand on the previous decision substantially, with paragraph 12 referring to objective evidence about the falsification of documents and paragraph 30 referring to the objective evidence about the circulation of false newspaper reports of the type relied upon by the claimant, whilst paragraph 16 and 17 give detailed reasoning as to why no evidential value should be attached to the arrest warrant. Whilst it is true that paragraphs 18 and 19 erroneously refer to a lack of translations, the paragraphs also make it clear that any translations would not have made any difference and in any event, as I have already recorded, translations were considered at an earlier stage and,

more importantly, the content of the documents themselves was carefully scrutinised and the weaknesses highlighted at an earlier stage. Similarly, paragraphs 21 and 23 explore weaknesses in other documentary evidence and set out the reasoning as to why the statements of Mr Roux and Prince Nasser could not be regarded as evidence from independent witnesses.

17. To my mind the Secretary of State has given detailed reasons why, in addition to rejecting the submission herself, she considers that, when taken together with the previously rejected material, the submissions would not give the claimant a reasonable prospect of success on appeal. To my mind, taking the evidence as a whole, the Secretary of State was entitled to conclude that the new material had no significant evidential value and could not realistically have persuaded an immigration judge to take a different view. In effect, the grounds disclose no more than a disagreement with the Secretary of State's conclusion rather than identifying any material defect in the decision making process. The Secretary of State has asked herself the right question, has given anxious scrutiny to the documentation, both individually and in the round, and reached a conclusion which she was plainly entitled to reach. It follows in my judgment that this claim should be dismissed, which I now do.

18. Mr Bourne, is there anything else?

19. MR BOURNE: My Lord, as to costs, I am not entirely clear as to whether the claimant is still legally aided. I know she has been at some point.

20. MR BROWN: I can confirm that she is still publicly funded, my Lord.

21. HIS HONOUR JUDGE McKENNA: Thank you very much, Mr Brown.

22. MR BOURNE: My Lord, I am grateful for that. I am asked to seek a costs order, obviously subject to the usual proviso as to assessment, in view of her public funding.

23. HIS HONOUR JUDGE McKENNA: Mr Brown, can you resist that?

24. MR BROWN: My Lord, I would seek to resist it merely on the basis that permission was granted on 4th July 2008 by Lloyd Jones J. We were in possession of the two letters of refusal, the initial letter in January and the subsequent letter of refusal. I would submit that the letter of 1st September 2008 does contain errors relating to lack of translation which perhaps should lead, my Lord, to you making no order for costs in this matter. I appreciate what you have said about the effect of the lack of translations in the later letter but I am instructed to resist any application that the claimant does pay the costs. But clearly, my Lord, if you make an order that the claimant do pay the costs, then the usual order, as mentioned by my learned friend, would be the correct one.

25. HIS HONOUR JUDGE McKENNA: Mr Bourne?

26. MR BOURNE: Well, my Lord, it is the Secretary of State's case that all three letters, and each of them, are at least satisfactory. It is true there is a slip in two of them about translations but, as your Lordship found, it is not material. In my submission, the fact

that letter number three gave more is a good feature of letter three as opposed to a weakness of letters one and two.

27. HIS HONOUR JUDGE McKENNA: I think I am inclined to agree, Mr Bourne. So I will make an order that the claimant pay the Secretary of State's costs of the application, such costs to be subject to detailed assessment if not agreed, and is the right order not to be enforced without --

28. MR BROWN: Order of the court.

29. HIS HONOUR JUDGE McKENNA: Order of the court. Is that sufficient for your purposes, Mr Brown?

30. MR BROWN: My Lord, yes, and additionally I would have to ask for an order that the --

31. HIS HONOUR JUDGE McKENNA: Public funding assessment of the claimant's costs. Yes, by all means.

32. Good. Thank you both very much.