CO/1813/2007

Neutral Citation Number: [2008] EWHC 2733 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 24 October 2008

B e f o r e:

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

Between:
THE QUEEN
ON THE APPLICATION OF ARMAND MARCEL KOIMON

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

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190 Fleet Street London EC4A 2AG
Tel No: 020 7404 1400 Fax No: 020 7831 8838
(Official Shorthand Writers to the Court)

Mr Jan Doerfel (instructed by O'Keeffe Solicitors) appeared on behalf of the **Claimant**
Mr Sarabjit Singh (instructed by Treasury Solicitors) appeared on behalf of the **Defendant**

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

1. THE DEPUTY JUDGE: This is an application for judicial review of a decision by the Secretary of State for the Home Department ("SSHD"), by a decision letter dated 22 February 2007, to reject the claimant's further representations in support of a failed claim for asylum by solicitors' letter dated 12 December 2006, and in particular her refusal to accept them as constituting a fresh claim. The primarily relevant enclosure with that letter was a medical report on the claimant by Dr Virginia Leggatt, which though undated was based on examinations in February of 2006. The application is brought by permission of King J, given at an oral hearing on 12 June 2007, permission having previously been refused on paper by Burton J on 9 March 2007.

2. Rule 353 of HC 395 provides:

> "Where 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 been 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."

3. As the facts underlying this matter are old, I should mention that the current Rule 353 came into force on 18 October 2004, just over six months before the relevant decision of the immigration judge on 4 May 2005, and therefore the old requirement under the deleted rule 346 to show that the material relied on as constituting a fresh claim was previously unavailable is of no application. For this reason, it has not been necessary to go into the somewhat unsatisfactory circumstances (not reflecting ill on the claimant, I should add) in which the medical report of Dr Leggatt, which was demonstrably in existence by March 2006, was not put before the Secretary of State for another nine months. The Secretary of State has not disputed that the report of Dr Leggatt satisfies the first limb of rule 353; the question in dispute before me centres on the second limb.

4. Mr Sarabjit Singh, appearing on behalf of the SSHD, rightly submits that there are in principle three issues for the court on such an application: first, whether the Secretary of State has asked herself the right question; second, whether the Secretary of State has (a) considered matters in the round, and (b) in doing so, applied anxious scrutiny; and third, whether she has nevertheless arrived at an irrational decision.

5. As to what is the right question for the Secretary of State to address, it is well established that the SSHD should not approach the matter by asking what alterations to particular findings of the immigration judge might result from adding the new material to the evidence to be considered, but rather should approach the matter by asking what findings might result from a fresh consideration of the matter taking into account all the evidence, old and new, by a notional immigration judge: see for example Mibanga v

SSHD [2005] EWCA Civ 367. In AK (Afghanistan) v SSHD [2007] EWCA Civ 535 para 23 Toulson LJ expressed the position as follows:

> "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."

6. So when considering the claimant's prospects of success at a fresh consideration, the key word is not "would", but is "might": see also Kurtaj v SSHD [2007] EWHC 221 Admin para 67. The thrust of the submissions made in writing and orally by Mr Jan Doerfel, appearing on behalf of the claimant, is that the SSHD erred in her consideration and evaluation of the significance of the medical report of Dr Leggatt. He says she set too high a test for the report, in that such a report can afford material corroborative support to a claim for asylum even if its conclusions amount to a finding of consistency between symptoms and underlying allegations, rather than a diagnostic finding to the effect that the only credible explanation for the symptoms is that the underlying allegations are true. He submits that this erroneous approach to Dr Leggatt's medical report evinces a failure to attribute the correct standard of proof to the claimant, which is not that of making out his case on the balance of probabilities, but the lesser test of making it out as a reasonable likelihood. It is common ground that the latter is the true standard, and that it applies not only to the ultimate assessment of what risk a claimant faces, but also to establishing the underlying facts relied on by the claimant as giving rise to that risk: see Kaja v SSHD [1994] UKIAT 11038, especially at paragraphs 25 to 33.

7. Mr Doerfel further submits that SSHD treated the report of Dr Leggatt as an "add on", and took some of the adverse findings of the immigration judge as a "given" when assessing it. He submits that the SSHD has treated the report of Dr Leggatt as worthless, whereas it does have some corroborative weight, and that once that is established, it necessarily follows that there is at least a possibility of an immigration judge, on a fresh consideration, reaching a different view on credibility and hence as to the ultimate outcome. Thus Mr Doerfel's submissions go primarily to the first and third of the three questions I have identified, in that he submits that the SSHD's erroneous approach to the medical report demonstrates that she has not asked herself the right question, being that formulated by Toulson LJ in the AK (Afghanistan) case, as well as indicating that she has reached a conclusion which no reasonable decision-maker could.

8. Mr Sarabjit Singh, appearing for the SSHD, supports her approach to the medical report, in particular referring to the judgment of Sir Mark Potter (President of the Family Division) in SA v SSHD [2006] EWCA Civ 1302. He submits that while it is right that the report does have some weight, it is, on a proper analysis, relatively slight. Importantly he further submits, challenging Mr Doerfel's approach, that just because there is some new material of some corroborative weight, it does not always follow that

there will inevitably be a realistic prospect that an immigration judge, considering the matter afresh, might come down in favour of the claimant's asylum or human rights claim.

9. I accept that further submission, and, therefore, although it is accepted that Dr Leggatt's report satisfies the first limb of rule 353 and that it does have at least some corroborative weight, it does not necessarily follow that the claimant is entitled to succeed in any event. Mr Singh also makes a further alternative submission, which I shall briefly deal with later.

The facts

10. The claimant, Mr Armand Marcel Koimon, was born on 13 June 1973. He is a national of Cameroon and his first language is French. It is common ground that at some time he was a police officer in Cameroon, apparently based in Loum. According to his own statement of April 2005, to which I shall come, he is the son of a nurse and a housewife, who obtained a certificate of primary education from the Notre Dame Catholic Primary School, obtained a Baccalaureate from the Technical Lycee of Bangangte, Cameroon, and started studying building and construction at university, before abandoning that course in favour of joining the police. He obtained the appropriate qualification over the period 1998 to 2000, and started work as a properly qualified police officer at the end of that period. He married, and has one daughter born in November 1998.

11. He claims to have entered the United Kingdom using a French passport belonging to someone else, provided to him for the purpose in Cameroon, on 3 April 2005, and then to have returned it to the provider in Cameroon by post. He claimed asylum in the United Kingdom 11 days later on 14 April 2005. He made a written statement in support of his claim on 19 April 2005 with the assistance of solicitors, who in the event did not go on to represent him. It may be found at page 134 of the primary bundle, and is an important document.

12. He was subsequently subject to a lengthy interview on 22 April 2005, although when it came to the hearing in front of an immigration judge, he chose not to adopt the notes of that interview as part of his evidence-in-chief because (he said) they had not been read back to him in his first language, French, either by the Home Office or by his own solicitors. The notes of the interview do not form part of the bundle before me. The Secretary of State refused his asylum claim on 25 April 2005 by a decision letter at page 142. His subsequent appeal was dismissed by an immigration judge on 4 May 2005.

13. Notwithstanding what I have said as to the correct approach under rule 353, the decision letter of the immigration judge is a convenient document to which to refer for a summary of the history of the matter, as well as, of course, for an indication of the conclusions, and reasons for them, which the immigration judge reached at that time on the material which was then available. The judge, Mr Pullig, sets out a summary of the claimant's case, which clearly draws on the written statement to which I have made reference, although it picks up on a number of points from the interview which were

subsequently incorporated into the Secretary of State's decision letter rejecting the asylum claim. It includes a number of passages which deal with answers given to him by the claimant, including a number of questions unsurprisingly directed at the claimant's original evidence as to how he made the journey from Cameroon to the United Kingdom. It is right that I should set out the concluding paragraphs of the decision letter, which I take from paragraph 37 onwards:

> "37. If the conditions in which the appellant was held were such as to have the effect on his health that he claims then I share the Secretary of State's view that it would [be] very difficult for him to climb a wall of five metres or anything approaching it, even in the manner he described, as he would be weak and malnourished after months of detention. I do not believe that this occurred.
>
> 38. Looking at the evidence as a whole I accept as I must that the appellant's credibility is damaged by his failure to claim asylum in France but this only affects one's view of the urgency of which the appellant claims that he left the country and his reasons for doing so rather than, necessarily, the entire account that he gives. However, he did not tell the truth about travelling to France but later admitted that he did and eventually that he knew where he was. This leads to the conclusion that his original denial was to cover up his knowledge of the possibility of claiming asylum there.
>
> 39. He was clearly a policeman at some stage and I accept that he may well have been subjected to some sort of disciplinary action as a result of the incident when detainees escaped from prison. I do not believe what he says about the summons nor that only those from his ethnic group were ill treated. The injury to his finger and mosquito bites do not should that he was detained. On all the evidence it is not reasonable to conclude that the appellant was detained by the special police in Edea and ill treated as he claimed. I do not believe the appellant's account of the escape for the reasons given by the Secretary of State.
>
> 40. I accept that the appellant was a policeman, and thus have been involved in an incident when detainees escaped. It follows that subsequent disciplinary action may have disadvantaged the appellant and may even have led to his dismissal. Given the level of involvement that the family had in the appellant's departure from Cameroon I do not accept that the appellant had to ask his uncle to find out what had happened to his wife at the family home. If the family was as close-knit as the appellant implies, involved procuring his escape from Cameroon. I believe that they would already have known about his wife's circumstances. I therefore do not believe that she was visited by the police seeking the appellant or that she was threatened.
>
> 41. I find on all the evidence that the appellant has not satisfied me that he had suffered persecution for a Convention reason whether of race or

> imputed political opinion or otherwise. If the appellant were generally at risk of a material period of detention in Cameroon it might be possible for him to argue that he would be subjected to treatment violating his rights under Article 3 of the Human Rights Convention. However, for the reasons given above I do not believe that he was detained and escaped in the manner that he described and therefore I do not believe that he is at further risk of detention. There is no evidence to support the appellant's assertion that he might be at risk of his life if he were to return.
>
> 42. For all the reasons I find that the appellant has not satisfied me that he has a well-founded fear of persecution within the Refugee Convention or that he is at risk of death or ill-treatment in violation of his rights under Articles 2 and 3 of the Human Rights Convention. I find that no other Articles of the Human Rights Convention are engaged in principle. For these reasons I dismiss the appellant's appeal."

14. The Tribunal subsequently rejected the claimant's request for a further appeal. In February of the following year, 2006, the claimant was seen twice by Dr Virginia Leggatt of the Medical Foundation for the Care of Victims of Torture. The result was the production of a report which I have at pages 116 and following in the primary bundle, which, as will be apparent from what I have already said, is an extremely important document in the context of this hearing. I shall make reference, as selectively as I can, to passages from that report later in my judgment.

15. The letter of further representations lodged on the claimant's behalf was dated 12 December 2006 and sent by his present solicitors, Messrs O'Keeffe. A copy is in the primary bundle at pages 71 and following. It has a number of enclosures, but in the event that which proved to be the important one is Dr Leggatt's report. By her decision letter dated 22 February 2007 (primary bundle page 27) the SSHD rejected those further submissions both on their merits and as constituting a fresh claim. She has very recently, by letter dated 27 October 2008, sent a supplemental letter confirming expressly what one might have thought was obviously implicit in any event.

16. Dr Leggatt, like any doctor, has to base her report on a combination of symptoms which she is able observe for herself, and matters which are reported to her by her patient. Her report sets out a number of such matters, and perfectly properly so. However, in the context of this case, it is right that I should record what the claimant said about those related matters in his witness statement of 19 April 2005, a document which it appears Dr Leggatt did not see, which was as follows (see primary bundle page 134):

> "[In Douala] they placed me in a cell. It was a very narrow cell. I was alone. I spent one week without eating and also without any news from my family. I was tortured. I was beaten very seriously ... I was given water but no food at all for 7 days. The water was of poor quality. At one point they banged me against the wall where there was a metal bar and I have a small scar on my finger from this beating. I was weak. I had no strength at all ... I thought I was going to die. I was begging them to give me food ...

> 17 ... After a week of not eating, in the 2nd week other detainees started to give me some of their leftover food ... Altogether I was detained in that place for about three weeks.
>
> 18. I was then sent to a disciplinary centre/prison which is like a prison especially for all uniformed officers -- military police etc and also for people who have committed sensitive crimes. I was transferred from Douala to Edea. It was away from my town. All the time I was detained they accused me of being an accomplice. I was detained for a further 2 months or so.
>
> 19. During this 2nd detention I was interrogated all of the time, I was beaten very badly. I would be interrogated one day and beaten very badly in order to obtain a confession then I would be given a few days to think about and it confess. If I failed to confess they would then interrogate me again and beat me once more. This was either with a rubber whip called a fuet or 'matraque', I was beaten very badly on my bottom although as I was clothed there are no scars from these beatings ...
>
> 20. I slept in a cell that was 8ft x 6ft on my own. I was on my own the whole time during this detention. There was a bed in the room with a thin mattress. There was not always water and if there was water it was very poor quality water from the local swamp. There was a very small window in the room. The room was full of ants and mosquitoes and I was badly bitten at night. I still have scars on my feet from these bites. I had a constant stomach ache because of the water and my eyesight has suffered because of being in distress and in poor light ..."

17. Dr Leggatt records, of course, a number of the matters of fact recounted to her by the claimant. There are some which equally I should record:

> "7. He attended this police station as required and was interrogated and beaten and then detained in a small cell. He was detained there in solitary confinement for three weeks. He was interrogated and beaten on alternative days ... He was provided with water but feared that this was not clean. He has had stomach problems since this detention, which he attributes to drinking this dirty water.
>
> 8. On alternative days, he was interrogated. There were always two interrogating officers and he was always beaten using the matraque (a strong, flexible, plastic weapon approximately 30cm long). On each occasion he was beaten two ways: 1) he was restrained, fully clothed, lying face down with his hands pinned behind his back by one officer whilst the other officer beat him over his buttocks using a matraque. 2) he was seated on the ground and restrained by a wooden structure which fixed his ankles. The officers then beat the soles of his feet using a matraque. He attributes scars on his buttocks to the beatings and two scars on his right hand to injuries sustained when resisting these beatings,

when he struck his hand on the metal object attached to a wall.

9. After three weeks, he was transferred to a prison in Edea ... He was given water whenever he requested but he was concerned that this was not clean. The food was of poor quality and he was not fed every day. The cell was dirty and there were many insects. Mr Koimon suffered numerous insect bites. He was not beaten whilst in prison but he had suffered from dental problems for which he was receiving treatment before his detention and he began to have severe dental pain for which he received no treatment in prison.

...

18. Mr Koimon has three scars on the dorsal surface of his right hand, which he attributes to torture during detention ...

19. Mr Koimon has five linear scars on the posterior surface of his left leg and ten more rounded scars over his buttocks. These scars are illustrated on the accompanying diagram [primary bundle page 123]. They were not present before his detention and he therefore attributes them to being beaten, though he acknowledges that the round scars may represent scarring after insect bites."

18. Thus, facts reported to Dr Leggatt materially differed from those put before the immigration judge, in particular as to whether or not the claimant was beaten during the two months he allegedly spent in prison in Edea, and whether or not he bore any scars on his buttocks in consequence of being beaten with a rubber whip or matraque in either Douala or Edea.

19. I make the following preliminary observations as to what is a proper or reasonable approach to assessing the report of Dr Leggatt:

(1) At the risk of stating a truism, the relevance, value and weight of possible corroborative evidence can only be assessed by reference to the primary or direct evidence which it is said to corroborate.

(2) On a fair reading of paragraphs 21 to 25 of Dr Leggatt's report, her use of the phrase "reasonably likely" is to be equated with her use of "consistent", both equating to "is one possible explanation for". Paragraphs 22 and 23, on a fair reading, demonstrate that to be so. These terms are the opposite of "inconsistent", and indicate that the possible connection under consideration cannot be excluded. They say nothing as to the degree of likelihood in comparison to other possible explanations, let alone as to whether any other possible explanations may be excluded.

(3) I accept the SSHD's submission to the effect that the observations about medical reports in this context, made by Sir Mark Potter (President of the Family Division) in the SA (Somalia) case, especially between paragraphs 24 to 31, did not set some new special standard for the future, but were

matters of commonsense with which reporting doctors can be expected to have been aware before as well as after his judgment.

(4) Although the SSHD was entitled to make a point as to the terms of the Istanbul Protocol, as Mr Singh did in paragraphs 25 to 28 of the detailed grounds which he settled on her behalf, and has adopted as his skeleton, and which Mr Doerfel has sought to answer by the e-mail he placed before me this morning, in the context of this case I do not consider that one needs to go beyond a careful reading of Dr Leggatt's own report, especially paragraphs 21 to 25 read in their context, and the ordinary meaning of the word "consistent", in order properly to understand and evaluate Dr Leggatt's report.

20. So what primary or direct evidence of the claimant does or could Dr Leggatt's report corroborate? As to scars on his buttocks, on his first version of events there were none. His second version of events is set out in paragraph 19 of Dr Leggatt's report, which I have just quoted. It acknowledges two possible causes of scars, in particular the round scars being the ones on his buttocks. As to these, Dr Leggatt's conclusion may be found in paragraph 24 of her report, which is that they "are consistent with the explanations he offers for them". The doctor's use of the plural "explanations" makes it clear beyond doubt that she is in no sense making any choice or expressing any preference or degree of likelihood between the two possible causes which the claimant himself has recorded as having acknowledged in paragraph 19. She does not deal with the inconsistency with his earlier statement, although the probable explanation for this is the fact that, unhappily, his earlier statement does not appear amongst the documents listed as having been seen by her.

21. As to the scars on the claimant's legs, none such were mentioned in his April 2005 statement. In the doctor's report, they are dealt with in the same paragraphs which I have just mentioned, in equivalent terms. As to scarring on his feet, in his April 2005 statement he asserted that there were scars on his feet which resulted from insect bites sustained in, to summarise, an infested cell: see page 139 of the primary bundle. It seems that this was not specifically mentioned to Dr Leggatt, although the claimant did describe to her, as she recorded in paragraph 8 of her report (which I have already quoted), that one of the two methods by which he was beaten involved the application of a matraque to the soles of his feet. Having been told that, the doctor's observations are again to be found in paragraph 24 of her report:

> "He has no scars on the soles of his feet but the soles of the feet are known to be resistant to scarring, and so this is not evidence against the history of beating here that he gives."

22. As to abdominal pain, the report conveniently deals with that entirely within a single paragraph:

> "23. He has suffered from Heliobacter pylori infection with associated abdominal pains. Heliobacter pylori infection is known to be associated with disadvantaged socio-economic conditions, overcrowding and living

> in institutions and so it is reasonably likely that this infection results from the overcrowded conditions during his detention. The mild epigastric tenderness found on examination is consistent with the results of such an infection."

23. So far as the claimant's eyes are concerned, in his statement of 2005, paragraph 20, he said: "My eyesight has suffered because of being in distress and in poor light". When seen by Dr Leggatt, he told her that:

> "[he] suffered from no eye problems before his detention but, since then, his eyes have felt permanently gritty and itchy. They tend to water especially if he is looking at a computer or TV screen. They are crusted in the mornings. He has been prescribed spectacles since arriving in the United Kingdom but, despite this, his distance vision is impaired. He reports that objects in the distance tend to shimmer if he looks hard at them. His close vision is better. He has consulted his GP about his eye problems but has been given no treatment and has not seen a specialist."

24. The doctor's conclusions on this topic are at paragraph 21 of her report, where she states:

> "Mr Koimon suffers from watering and soreness of his eyes in the absence of any findings on examination. It has been documented that these symptoms are common in those who have been detained in darkness for long periods. The deterioration of his visual acuity is unlikely to be a result of his detention in darkness."

25. Here, therefore, it is clear that Dr Leggatt was unable to observe any relevant findings on her own examination of the claimant, and therefore, firstly, what she says is entirely dependent on what her patient reported to her, and secondly, in the event she does not appear able to support what the claimant stated in the short passage from paragraph 20 of his April 2005 witness statement which I have quoted.

26. The topic of depression is dealt with shortly in paragraph 22 of Dr Leggatt's report:

> "Mr Koimon has symptoms and signs of depression, which is reasonably likely to be a reaction to his detention and separation from his family. His depression has responded at least partially to treatment with an anti-depressant."

27. Finally, with regard to the scarring on a finger, which was mentioned in paragraph 16 of the witness statement of April 2005 (which again I have already quoted), it may be noted that the immigration judge, implicitly accepting the existence of that injury, said in paragraph 39 of his decision letter that "the injury to his finger and mosquito bites do not show that he was detained". That, on the face of it, would be not only a reasonable but almost an inevitable conclusion, as stated. That matter is not taken materially further by Dr Leggatt, although she does deal with alleged scarring on the dorsal

surface of the claimant's hands which had not been mentioned or relied on in his early statement, and therefore was not dealt with by the immigration judge.

28. Having been through in detail, as it were condition by condition, the matters on which the doctor either did report or might have reported, what was available to her to act on, and what conclusions she felt able to express, I ought to quote the concluding summary paragraph of her report:

> "25. Mr Koimon gives a history of detention in overcrowded, unsanitary conditions and in the dark and of being beaten on his buttocks and the soles of his feet. The eye symptoms of which he complains are consistent with having spent prolonged periods in darkness. His stomach condition is consistent with detention in an overcrowded, unsanitary institution. He has scars consistent with the torture he describes and he suffers from a depressive illness that is reasonably likely to result from his detention and torture."

Analysis

29. On any fair reading or assessment of Dr Leggatt's report, it can be seen that the claimant, through his solicitors, in his letter of further representations of 12 December 2006 seriously overstated the position when saying (primary bundle page 72):

> "Our client has since obtained a detailed medical report which clearly shows that he was tortured while in Cameroon."

30. That overstatement of the claimant's case may explain the SSHD's use of the adverb "completely" in paragraph 7 at page 28 of the primary bundle, which in the context I regard as meaningless in the sense that the adjective "inconclusive", in the context, means the same with or without the adverb "completely" put in front of it. It seems probable that the author of the decision letter desired to match the emphasis -- indeed overstatement -- in the claimant's letter. The relevant sentence reads:

> "In addition, I have had regard to the Medico-Legal Report of early 2006 prepared by Dr Virgina Leggatt, however, it appears completely inconclusive and I disagree entirely with your conclusion that the medical report clearly shows that your client was tortured in Cameroon."

31. Taking fully into account everything Dr Leggatt has said in her report, there are still, on any view, major credibility issues facing the claimant and his human rights and/or asylum claims which are in no way neutralised or explained away -- express it as one will -- by her report. This is not a question of taking any findings made by the immigration judge in 2005 as a "given"; rather, it is simply a recognition of the fact that, on a fresh consideration of this matter, taking into account all of the evidence, old and new, many of the points covered in the immigration judge's judgment of May 2005 would remain. In other words, on a notional fresh consideration, with all the evidence, old and new, before an immigration judge, although that judge would have to take full account of the new evidence and not discount it for the fact that it is new, equally he or

she would not be required to put on blinkers and pretend that difficulties for the claimant which were there previously have gone away.

32. First, the claimant's case faces very serious difficulties with regard to the question of whether or not he was beaten during two months -- out of his total alleged detention of two months and three weeks -- in a prison in Edea. He has made flatly contradictory statements about that.

33. Second, the claimant's case faces serious difficulties with regard to his initial evidence that he flew direct from Douala to England by Air France, and the manner in which he modified that case when cross-examined before the immigration judge in 2005. The fact that he was himself a Francophone gentleman, and that Paris must on his (revised) account of matters have been the first stop, only emphasises the various points properly made by the immigration judge in 2005 about that.

34. Third, as is pointed out on behalf of the SSHD, in paragraph 30(a) of her detailed grounds and skeleton argument, there is the matter of the apparent inconsistency between the claimant's account of how he escaped from prison in Edea and his state of health, had his account of the conditions over the previous two months and three weeks been true. I adopt, simply as a matter of convenience and not because they are in any sense a "given", the words in which the immigration judge dealt with this:

> "If the conditions in which the appellant was held were such as to have the effect on his health that he claims then I share the Secretary of State's view that it would [be] very difficult for him to climb a wall of five metres or anything approaching it, even in the manner that he described, as he would be weak and malnourished after months of detention. I do not believe that this occurred."

35. Fourth, there remains facing the claimant the difficulty posed by his change of evidence with regard to why he was unable to produce the summons which, on his account, set in train the series of events which led to his detention and severe ill-treatment. That too is dealt with in the immigration judge's decision.

36. Therefore, turning back to the three questions which have to be addressed, firstly the Secretary of State did, in my judgment, ask herself the right question. That is so on a fair reading of her decision letter of 22 February 2007, with or without the short supplement of 22 October 2008. In paragraph 4 of the decision letter, when dealing with rule 353, she expressly stated, in setting out the approach to be taken:

> "The submissions will only be significantly different if the content had not already been considered; and taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection." (my emphasis)

37. In paragraph 16 of the decision letter, she wrote:

> "Some of the points raised in your submissions have been previously considered when the earlier claim was determined. They were dealt with

> in the letter giving reasons for refusal of 25 April 2005 and the Adjudicator's determination of 4 May 2005. Your more recent submissions would not have created a realistic prospect of success."

For the reasons I have given, the manner in which SSHD dealt with Dr Leggatt's report does not demonstrate a failure to ask herself the right question.

38. Second, did the SSHD look at the matter in the round? In agreement with Burton J, giving his reasons for originally refusing permission to apply, I find that she clearly did. It is equally clear that she gave the matter anxious scrutiny. This is demonstrated by the terms of paragraphs 5 to 15 of the decision letter.

39. Third, did the SSHD reach an irrational, perverse or ***Wednesbury*** unreasonable conclusion? In my judgment, she did not. Indeed, she reached a conclusion which many, if not most, decision-makers would have made on this material.

40. In these circumstances, I need only revert very briefly to Mr Singh's alternative submission. Though he also dealt with it orally, it is convenient to refer to paragraphs 32 to 35 of his detailed grounds as summarising the same. The immigration judge at paragraph 41 of his decision said this:

> "... If the appellant were genuinely at risk of a material period of detention in Cameroon it might be possible for him to argue that he would be subjected to treatment violating his rights under Article 3 of the Human Rights Convention. However, for the reasons given above, I do not believe that he was detained ..."

41. In the circumstances, if I had concluded in the claimant's favour on the primary matter argued, it would, in my judgment, have given rise to a legitimate sense of grievance on the claimant's part had his application nevertheless been dismissed without an opportunity for a fresh hearing -- without being treated as a fresh claim, to express the same point in another way -- on the basis of Mr Singh's alternative ground. In my judgment, no reasonable decision-maker would have imposed that on the claimant in the face of such an express finding on the part of the immigration judge last time around.

42. For those reasons, if (which is not my conclusion) there was a realistic prospect that, on a fresh assessment, an immigration judge would have concluded that the claimant was genuinely at risk of a material period of detention in Cameroon, I would have considered him entitled to the opportunity to have the matter considered afresh in that fashion.

43. Conclusion

44. However, for the reasons that have occupied the vast majority of my judgment, that is not my conclusion, and therefore this application for judicial review will be dismissed.

45. MR SINGH: My Lord, I am grateful.

46. DEPUTY JUDGE: Firstly, I should say, and it is probably most politely done to Mr Doerfel first, that I am conscious that both of you -- this is not a criticism -- have to a considerable extent relied on your written submissions and been very economical in your oral development of them. Are there any submissions that you have made to me that you were concerned that I have not said anything about? Because if there are, it would be perfectly proper for you to point them out to me, and I may or may not choose to supplement my judgment accordingly. You are under no obligation to say anything, but is there any particular point you feel you have raised that I have not dealt with?

47. MR DOERFEL: My Lord, no.

48. DEPUTY JUDGE: Thank you. The same question to you, Mr Singh?

49. MR SINGH: No, my Lord.

50. DEPUTY JUDGE: Right. Now, you were going to say?

51. MR SINGH: My Lord, that does just leave the issue of costs. Now, ordinarily I would ask for the claimant to pay the Secretary of State's costs. The difficulty in this case, my Lord, is that I understand that the claimant is legally aided, so, my Lord, I would ask for the order to be made, but the order should also say, in my submission, that it is not to be enforced without leave of the court.

52. DEPUTY JUDGE: The usual legal aid restraint on enforcement -- that which was usual when legal aid was usual.

53. MR SINGH: Yes, my Lord.

54. DEPUTY JUDGE: Yes, that rings a bell. You will appreciate, sitting in this jurisdiction, one sees quite a lot of sets of papers per day, but it is right that you have the benefit of public funding, Mr Doerfel?

55. MR DOERFEL: That is right.

56. DEPUTY JUDGE: In which case it is clear that, if I make an order, that restraint will be on. Is there any reason why I should not, given the outcome?

57. MR DOERFEL: Because of late service of the grounds, which we have admitted, I would say --

58. DEPUTY JUDGE: You were very fair about that.

59. MR DOERFEL: Absolutely, so I think that may be well reflected in the question of costs, and also on the extent of that costs order. I know it is not going to be enforced, but I served the papers yesterday afternoon well after 2pm -- the grounds -- after a year of permission having been granted.

60. DEPUTY JUDGE: That is a very fair point. Yes, it would go to the extent of the order, I think. Mr Singh, I am highly sympathetic to that submission. One should not

use costs, as it were, as some sort of headmaster operating a disciplinary jurisdiction, but equally the matter was dealt with desperately late and put the claimants in the position of having to move very, very quickly, which they did admirably in terms of the manner in which they turned it around and so forth, and you were frank enough this morning to say that you were unable to place any explanation for that before me. In those circumstances, the claimants have had to deal with part of the matter at high speed and at short notice, and I am attracted by the idea of specifying that you should have X per cent of your costs with the restraint on, to be assessed, rather than 100 per cent of yours costs as assessed, if it ever happens. It may or may not be academic in the circumstances, but I obviously must make an appropriate decision whether or not it is going to be academic, and I wonder about 80 per cent.

61. MR SINGH: My Lord, just very briefly in response to that, I understand, and of course it is regrettable that the detailed grounds were served so late, but, in my submission, that in itself did not cause any unnecessary costs to be incurred. If the detailed grounds had been served three or four months ago, my learned friend would still have drafted a response, and of course the Secretary of State has legitimately incurred costs all the way through this claim in acknowledging the claim, attending the permission hearing, and now of course attending the substantive hearing.

62. My Lord, in terms of a reduction, I suppose that would be in essence to express the court's disapproval that the detailed grounds were served so late. My Lord, in my submission, that would essentially be stepping into the shoes of the headmaster and punishing the Secretary of State. My Lord, I would submit that, in this kind of case, that probably is not appropriate because the reality of this matter, my Lord, is that the Secretary of State will probably not get her costs. In fact, it is very likely she will not get her costs, but if there was a realistic prospect of the Secretary of State recovering costs, then an order, for example, that she should only get 90 per cent would be a real sanction. But in this case, my Lord, it really is academic. So for those reasons, I would submit, my Lord, that the order I suggested first of all should be made.

63. DEPUTY JUDGE: The Secretary of State has plainly succeeded in this matter and in principle is entitled, therefore, as the successful party to an order as to costs. The order, as agreed on both sides, would be subject to the usual restraint on enforcement, applicable in cases where the claimant has the benefit of a public funding certificate, which this claimant has.

64. There remains one matter, perfectly properly and indeed graciously raised by Mr Doerfel, which is that the costs order, he submits, should reflect the inconvenience to the parties and the disapproval of the court to the fact that, in this case, the Secretary of State's detailed grounds, which were due 35 days after King J gave permission to apply, arrived a matter of days ago, very, very late, and -- albeit as an astute forensic approach -- were then promptly adopted as the skeleton argument as well, and the submission is that the costs order should in some way restrict the amount of the costs recoverable in the event that enforcement was to proceed. I find myself most sympathetic to that application.

65. I warn myself, as I said a moment ago to the Secretary of State's counsel, against the court setting itself up as in some sort of disciplinary or headmasterly role against the parties, and I have reflected on that carefully. I have considered whether to disallow the costs of the detailed grounds, which would be one way of approaching it, they having been served so absurdly late in circumstances, I should have said, for which this morning Mr Singh very frankly accepted there was no explanation he was able to put before me. However that strikes me as itself a bit artificial because the detailed grounds have played such an important part in the hearing, both in their own right and as a skeleton argument.

66. Overall, and having reflected on the matter, it does seem to me proper in these circumstances for the successful party's recovery of costs to be restricted to reflect the fact that a crucial document has, without any justification, been served so very late, and the fact that the claimant has adopted a realistic position in not objecting to the defendant being allowed to put that document in, lamentably out of time, should not affect that. So, for those reasons, I am going to order that the claimant do pay the defendant 80 per cent of her costs, assessed on the standard basis if not agreed, subject to the restraint on enforcement that I have already mentioned.

67. Mr Doerfel, are there any other orders you want?

68. MR DOERFEL: If I may ask for a detailed assessment and an LSC assessment?

69. DEPUTY JUDGE: You may, and you may have them.

70. MR DOERFEL: I am very grateful.