Neutral Citation Number: [2006] EWCA Civ 1495

Case No: C4/2005/2782 C4/2005/2825

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
COLLINS J
DAVID LLOYD JONES QC
CO/5898/2004
CO/7491/2005

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/11/2006

Before :

LORD JUSTICE BUXTON
LORD JUSTICE JONATHAN PARKER
and
LORD JUSTICE MOORE-BICK

- -

Between :

WM (DRC)	**Appellant**
- and -	
The Secretary of State for the Home Department	**Respondent**
and between	
The Secretary of State for the Home Department	Appellant
-and-	
AR (Afghanistan)	Respondent

Mr Andrew Nicol QC and **Miss Margaret Phelan** instructed by **Fisher Meredith** for **WM**
Miss Shivani Jegarajah instructed by **Hammersmith & Fulham Community Law Centre**) for **AR**
Mr Parishil Patel instructed by **The Solicitor to Her Majesty's Treasury** for **The Secretary of State**

Hearing date : 24 October 2006

- -

Judgment

Lord Justice Buxton:

Background

1. These two matters have been heard together, because they are thought to give rise to the same issues in relation to the proper role of the Secretary of State, and of the court in its supervisory capacity, in relation to failed asylum applicants who produce new material that is said to ground a "fresh claim". The Secretary of State's consideration of such material is governed by rule 353 of the Immigration Rules, which 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.

2. I set out, at this stage only in summary form, the two cases under consideration.

3. WM is a citizen of the Democratic Republic of the Congo who claims asylum by reason of feared persecution on political grounds. The nub of his claim is that in his employment as a laboratory technician at a hospital he was approached by a representative of the then Minister of the Interior and asked to carry out the assassination of various opposition politicians, while patients at the hospital, by injecting them with contaminated vaccines and blood transfusions. He refused, and thereafter feared that he would be sought out by the government. The adjudicator who heard his original claim found it inherently implausible, not least because WM was himself a member of the opposition party, and thus not likely to have been approached to perform this task. The adjudicator also thought that a summons said to have been issued against WM and recently obtained by him was of doubtful provenance; his explanation for how he had lost his travel documents was untrue; and he had given no valid explanation of why, as a French speaker, he had not applied for asylum in Belgium, through which he had passed on the way to the United Kingdom.

4. WM now produces further evidence. The Secretary of State refused to accept the new evidence as grounding a fresh claim, and an application for permission to apply for judicial review of that decision failed before Mr David Lloyd Jones QC (as he then was), sitting as a Deputy Judge of the High Court. Neuberger LJ granted that permission, and ordered that the application for judicial review should proceed in this court.

5. AR is a native of Afghanistan. He claims asylum on the basis that his father was a high officer under the former Communist regime, who was detained and then killed

when the Taliban took over, and he himself was threatened with death if he was located. That caused him to flee Afghanistan, and he fears death if he returns. The adjudicator who heard his appeal gave detailed reasons for her finding that AR's claims were entirely untrue. AR now produces a newspaper report from Afghanistan which, if genuine, may support his account of his and his family's difficulties. Collins J granted AR's application for judicial review of the Secretary of State's refusal to treat the new evidence as the basis for a fresh claim. The Secretary of State appeals to this court with the permission of Neuberger LJ.

The task of the Secretary of State

6. There was broad agreement as to the Secretary of State's task under rule 353. He has to consider the new material together with the old and make two judgements. First, whether the new material is significantly different from that already submitted, on the basis of which the asylum claim has failed, that to be judged under rule 353(i) according to whether the content of the material has already been considered. If the material is not "significantly different" the Secretary of State has to go no further. Second, if the material is significantly different, the Secretary of State has to consider whether it, taken together with the material previously considered, creates a realistic prospect of success in a further asylum claim. That second judgement will involve not only judging the reliability of the new material, but also judging the outcome of tribunal proceedings based on that material. To set aside one point that was said to be a matter of some concern, the Secretary of State, in assessing the reliability of new material, can of course have in mind both how the material relates to other material already found by an adjudicator to be reliable, and also have in mind, where that is relevantly probative, any finding as to the honesty or reliability of the applicant that was made by the previous adjudicator. However, he must also bear in mind that the latter may be of little relevance when, as is alleged in both of the particular cases before us, the new material does not emanate from the applicant himself, and thus cannot be said to be automatically suspect because it comes from a tainted source.

7. The rule only imposes a somewhat modest test that the application has to meet before it becomes a fresh claim. 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 Nicol 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 the anxious scrutiny of the material that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution. If authority is needed for that proposition, see per Lord Bridge of Harwich in *Bugdaycay v SSHD* [1987] AC 514 at p 531F.

The task of the court

8. There is no provision for appeal from a decision of the Secretary of State as to the existence of a fresh claim. The court has therefore been engaged only through the medium of judicial review. The content of such an application was first addressed by this court in *R v SSHD ex p Onibiyo* [1996] QB 768. The applicant in that case argued that whether or not a fresh claim for asylum had been made was a matter of precedent fact, on the same level as for instance a decision on whether an applicant

was an illegal entrant, and thus to be decided, in case of dispute, by the court. The Secretary of State argued that the decision on whether a fresh claim had been made was for him, to be challenged only on grounds of irrationality. Sir Thomas Bingham MR, giving the judgment of the court, inclined tentatively and "with some misgivings" to the latter view, concluding therefore that the decisions of the Secretary of State were challengeable only on "*Wednesbury*" grounds.

9. Commentators for a time regarded that conclusion as still open for debate, but in truth no other answer could have been given to the question posited by counsel in *Onibiyo*. As the Secretary of State rightly submitted, his conclusion as to whether there was a fresh claim was not a fact, nor precedent to any other decision, but was the decision itself. The court could not take that decision out of the hands of the decision-maker. It can only do that when it is exercising an appellate role. With appeal excluded, the decision remains that of the Secretary of State, subject only to review and not appeal. And in any event, whatever the logic of it all, the issue to which Bingham MR gave only a tentative answer in *Onibiyo* arose for decision before this court in *Cakabay v SSHD* [1999] Imm AR 176. There is no escaping from the ratio of that case that, as encapsulated at the end of the judgment of Peter Gibson LJ at p195, the determination of the Secretary of State is only capable of being impugned on *Wednesbury* grounds.

10. That, however, is by no means the end of the matter. Although the issue was not pursued in detail, the court in *Cakabay* recognised, at p191, that in any asylum case anxious scrutiny must enter the equation: see §7 above. Whilst, therefore, the decision remains that of the Secretary of State, and the test is one of irrationality, a decision will be irrational if it is not taken on the basis of anxious scrutiny. Accordingly, a court when reviewing a decision of the Secretary of State as to whether a fresh claim exists must address the following matters.

11. First, has the Secretary of State asked himself 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.

12. That is the approach that we must apply to both of these appeals. However, before going on to that stage of the case I must address an argument raised by Mr Nicol, not so much in contradiction of the general approach set out above but rather as providing a shorter and, as he would think, more reliable path to what might often be the same outcome.

Fresh claims and decisions that claims are "clearly unfounded"

13. Mr Nicol said that the question of whether a fresh claim existed was closely analogous in form to the question that arises under section 94 of the Nationality, Immigration and Asylum Act 2002 of whether a claim is "clearly unfounded". In both cases the decision is made by the Secretary of State. The approach that the courts have developed to the control of the decision under the 2002 Act should therefore be applied by analogy to control of the decision as to whether a fresh claim exists. The question whether a claim has realistic prospect of success is not the same as the question whether a claim is clearly unfounded; but I am content to accept that examination of the two issues is structurally sufficiently similar to allow this argument to pass the threshold of the court. There are, however, formidable other difficulties.

14. First, to the extent that the approach to cases under the 2002 Act differs from the approach of this court in *Cakabay*, this court is precluded by the latter case from adopting it. Mr Nicol said that we were not bound by *Cakabay*, because that was a decision on the former rule 346, which differed in its terms from the present rule 353. But the only significant change between the two regimes is that under rule 346 the Secretary of State was obliged, which now he is not, to exclude from consideration any material that was available at the time of first application, whatever its probative value. That does not affect the substantive issue that was addressed in *Cakabay*, the same under both regimes, of how the court should approach the Secretary of State's assessment of a realistic prospect of success.

15. Second, I would be less than frank if I did not say that now that the issue has been fully explored before us I have some difficulty with the courts' approach to decisions by the Secretary of State as to whether a claim is manifestly unfounded. In *Razgar v SSHD* [2003] Imm AR 529[30] this court approved a passage from the judgment of Richards J at first instance in the following terms:

> Where the lawfulness of the Secretary of State's decision is challenged on judicial review, the court's role, as it seems to me, is to determine whether the decision was reasonably open to the Secretary of State applying, in effect, the *Wednesbury* test but exercising the anxious scrutiny called for in all cases of this kind.
>
> In practice, however, I accept Mr Blake's submission that this comes down to much the same thing as determining whether, on the material before the Secretary of State, the claimant had an arguable case that removal would be in breach of his Convention rights. If the claimant does on proper analysis have an arguable case, then no reasonable Secretary of State could properly conclude that the case must clearly fail.

This approach therefore takes the short cut of the court making the decision itself, rather than reviewing how the Secretary of State took his decision. When the case reached the House of Lords it was accepted that the task was one of review, but the same reality as attracted this court may have been recognised, Lord Bingham of Cornhill saying, [2004] AC 368[17], that

> In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator.

A constitution of this court over which I presided returned to the subject in *Tozlukaya v SSHD* [2006] EWCA Civ 379. The court drew attention to *R(L) v The Home Secretary* [2003] 1 WLR 1230, where at §56 this court said that a claim was either clearly unfounded or it was not: thus a question admitting of only one answer. That led this court in *Tozlukaya* to say at its §44:

> although the court is exercising a supervisory jurisdiction over the Secretary of State's decision, it is in as good a position as he to determine whether the test is met, since the test is an objective one and the court has the same materials before it.

16. That approach was not questioned in argument either in *Razgar* or in *Tozlukaya*. It however raises the following difficulties. First, for a court to say that it can adopt its own view because it is in as good a position, as well qualified, as the original decision-maker is the language of appeal, and not of review. Although courts, for instance this court in *Razgar* at its §34, have stressed that the approach under consideration does not and should not lead to a merits review, it is very difficult to see how that is not the reality of a process in which the court directly imposes its own view of the right answer. If Parliament had intended that that should be the approach it would have provided for an appeal. Mr Patel, for the Secretary of State, was justified in saying that this was not merely a pedantic but more importantly a constitutional issue, that the decision-making power should rest in the Secretary of State, however stringent a review the court might thereafter apply to it.

17. Second, at least one strand in the jurisprudence under discussion is the view adopted in *R(L)* that the question of whether a claim is clearly unfounded can only have one answer: which is therefore going to be the same answer whether it is given by the Secretary of State or by the court. But that is not the case, and is not suggested to be the case, with the process of assessment that is involved in determining whether a claim has a realistic prospect of success.

18. Third, it is with deference too simple to assume, as did this court in *Razgar* and *Tozlukaya*, that the approach in those cases will necessarily lead to the same answer as a review informed by the need for anxious scrutiny. In view of the demands of the latter there may not be many cases where a different result is achieved, but in borderline cases, particularly where there is doubt about the underlying facts, it would be entirely possible for a court to think that the case was arguable (the formulation used in *Razgar*), but accept nonetheless that it was open to the Secretary of State, having asked himself the right question and applied anxious scrutiny to that question, to think otherwise; or at least that the Secretary of State would not be irrational if he then thought otherwise.

19. I therefore consider that not only are we precluded by authority from importing the *Razgar* analysis into this chapter of the law, there are also, with deference, significant reasons for not doing so. Had these issues been more fully explored in *Razgar* and *Tozlukaya* a different view might or might not have been taken in those cases also.

20. The law is therefore as set out in §11 above, which I now apply to the cases under appeal

The cases under appeal

21. Neither Collins J nor Lloyd-Jones QC had the benefit of the close analysis that has been deployed before this court. Neither of them seem to have been shown *Cakabay*. And in addition Collins J was led into an analysis of the judgments in *R v SSHD ex p Habibi* [1997] Imm AR 391 and *R v SSHD ex p Boybeyi* [1997] Imm AR 491, a process that was sought to be repeated before this court. Despite the eminence of the judges who decided those cases, they are now of limited assistance as they predated *Cakabay*. I hope therefore that it will not be thought discourteous if I do not subject the judgments in our cases to detailed analysis, but pass directly to the issues of substance.

WM

22. The difficulties perceived by the adjudicator are set out in §3 above. WM then produced a large amount of further material, including in particular a very lengthy report from Dr Eric Kennes, a respected and long-standing expert on the DRC. Much of the material does not address the particular position of WM, or can be said to be speculative. There are, however, two matters of importance, on which Mr Nicol concentrated. First, Dr Kennes reports an encounter between a researcher employed by him who was seeking to find out more about WM and his hospital and a Mr Gilbert Mayengele, an adviser to the Interior Minister in the DRC. Mayengele, some three years after the events narrated by WM, was still aware of WM, and told the researcher that WM was "a bad person, a suspect", and that his case was "political". Second, Dr Kennes said that information about persons abroad who were active in political opposition, as was WM, and also about failed asylum seekers, was often transmitted to the DRC by the DRC Embassy in London.

23. If reliable, both of these items would seem to be potentially significant in assessing WM's case. The Secretary of State in his decision letter said of the first incident that nothing was known either of the person who reported to Dr Kennes or of Mr Mayengele, and that there was no evidence that this meeting in fact took place; and of the second report that it was speculation, and did not indicate that any information had been transferred in relation to WM.

24. Were I deciding this matter myself, I would hold that there was a realistic prospect that an adjudicator, depending largely on the view that he took of Dr Kennes, would conclude that on the material as a whole there was real risk of WM being persecuted on return. The issue of whether the Secretary of State was irrational not to take that view is more difficult. There are undoubted difficulties about all of the new evidence, which the Secretary of State has indicated. I am not prepared to say that he has not given the material anxious scrutiny, and he did not make the mistake of thinking that the evidence was undermined by the previous finding of lack of

credibility on WM's part. The evidence comes from a third party who is to be assumed not to be influenced by WM. I have concluded, however, that the Secretary of State's approach indicates that he asked himself the wrong question: the first issue set out in §11 above. Although Dr Kennes' evidence is in general terms, and not substantiated in detail, it is evidence of a type that, because of the difficulties of obtaining information from countries like the DRC, immigration tribunals often do consider. Granted that, and that the evidence cannot be dismissed as simply implausible, it is impossible to say that an adjudicator could not properly come to the conclusion that the claim is well-founded; so the evidence's bearing on the case is a matter for the adjudicator, and not for the Secretary of State.

AR

25. The newspaper article (see §5 above) was supported by a report from an expert on Afghanistan, which said, not that it was genuine, but that based on his country knowledge the report and publication were of a type that could be genuine. Collins J set out various reasons why both the article and its provenance might be questioned, but then continued, at his §15:

> Having said that, it is accepted that [the article] is not intrinsically incredible. The adverse credibility findings were indeed based upon material which was appropriate and which it was open to the adjudicator to hold against the claimant. On the other hand, if this newspaper article is genuine, it throws into great doubt the correctness of those adverse credibility findings. Hence it is crucial to whether there is, indeed, a prospect of success in any claim.

I respectfully agree. Here again, if I were making the decision I would hold that there was a realistic prospect of an adjudicator accepting the validity of the article, as a result of which the original decision could hardly stand.

26. I find it easier in this case to apply what is the proper test. I have to say that the necessary level of scrutiny was not applied to this evidence. Mr Patel, who conducted the case very fairly, agreed that because the article, if genuine, changed the whole complexion of the case, the Secretary of State had to tread very carefully before rejecting it to the extent that an adjudicator was not to be allowed to pass judgement on it. Even leaving aside the Secretary of State's (mistaken) complaint that the original of the article had not been produced, and his apparent misunderstanding of the limited but nonetheless relevant evidence of the expert, the delay in AR's obtaining the article and the failure to contact the authors cannot withstand the proper level of scrutiny that has to be applied to them when adduced as grounds for not putting to an adjudicator a document that, as the judge said, was not intrinsically incredible. For that reason, the Secretary of State's decision cannot stand.

Disposal

27. In the case of WM I would allow the appeal against the judge's order and substitute an order that the Secretary of State's decision be quashed. In the case of AR I would dismiss the appeal against the decision of Collins J, and uphold his order that the

Secretary of State's decision in that case be quashed. Both cases stand remitted to the Secretary of State, to be reconsidered by him in the light of the judgment of this court.

Lord Justice Jonathan Parker:

28. I agree

Lord Justice Moore-Bick:

29. I also agree.