Case No: CO/10201/2010

**Neutral Citation Number: [2011] EWHC 557 (Admin)**
**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**ADMINISTRATIVE COURT**

**Sitting at:**
**Leeds Combined Court**
**1 Oxford Row**
**Leeds**
**West Yorkshire**
**LS1 3BG**

Date: Thursday, 10 February 2011

**Before:**

**THE HONOURABLE MR JUSTICE PARKER**

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**Between:**

**THE QUEEN on the application of T**

**Claimant**

**- and –**

**SECRETARY OF STATE**
**FOR THE HOME DEPARTMENT**

**Defendants**

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**Mr Hussain** (instructed by Messrs Parker Rhodes Hickmotts) appeared on behalf of the Claimant.
**Mr Payne** (instructed by the Treasury Solicitor**)** appeared on behalf of the Defendant.

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**Judgment**

**Mr Justice Parke**r:

1. This is an application for judicial review, for which permission has been granted by Holman J on the application of M M T. The claimant seeks to challenge the decision of the Secretary of State for the Home Department ("SSHD"), refusing to treat his additional submissions as giving rise to a fresh claim under paragraph 353 of the Immigration Rules, HC 395. He further asserts there was a material failure to consider the factors set out in paragraph 395C of the rules.

2. It is common ground that the issue on the application is whether, taken together with material previously considered, the additional material submitted by the claimant gives rise to a realistic prospect of another immigration judge concluding that removal would breach the claimant's Convention rights.

3. As to the factual background, the claimant is a national of Burma who was issued with a student visa in his own name on 8 December 2009. Approximately five weeks later, he travelled to the United Kingdom, entering on 22 January 2010.

4. On 4 May 2010 the claimant claimed asylum, alleging that he had been prompted to do so by a telephone call from his mother telling him that he was wanted by the authorities. At his screening interview the claimant confirmed that he had left Burma on 21 January 2010 travelling on his own passport and that he did not intend to claim asylum when he arrived. He had come as a student.

5. In his asylum interview on 14 May 2010 the claimant said that he had had no difficulty in obtaining a passport and that when he had left Burma he had not been in fear of his life. He had not been a member of a political party or organisation. However, he said that on 10 April 2010 he telephoned his mother who informed him that the police had been coming to his home every day since 1 April 2010 and had asked her to notify the police when he returned home. He had not heard from his mother since that date.

6. By a decision of 27 May 2010 the claim for asylum was refused. In this letter the SSHD referred, firstly, to a statement by the Foreign and Commonwealth Office that it was unaware of any individual facing persecution on account solely of taking part in a demonstration and the applicable country case, TL and Others (Burma) Country Guidance 2009 UK AIT 00017. The SSHD concluded that, applying TL and Others (Burma), even on the basis that the claimant had, as he said, attended three demonstrations he would be considered to be a hanger-on with no real commitment to the opposition and hence at no risk of persecution.

7. The claimant exercised his statutory right of appeal against the decision. In a determination dated 23 July 2010, the tribunal dismissed his appeal with adverse findings as to his credibility. Before the tribunal the claimant stated that he was frightened of the authorities before he came to the

United Kingdom. He did say, however, that he had not taken part in any further political activity since April 2010.

8. In summary, the tribunal made the following conclusions. The appellant's evidence relating to his involvement in the monks' protest and the subsequent interest of the authorities was not credible. During his alleged arrest in May 2008 he was questioned only about helping cyclone victims; the authority had not identified him as being associated with the monks' protest in September 2007 and had no interest in him in relation to any other political activities. He experienced no other problems after May 2008. This, combined with the fact he was able to obtain a genuine passport given the rigorous scrutiny by the Burmese authorities of all prospective travel abroad, demonstrated that he was of no interest to the authorities. The claimant was likely to have been photographed attending three demonstrations outside the Burmese Embassy between February and March 2010. Applying TL and Others (Burma), the claimant's limited involvement in three demonstrations was not sufficient for him to be of any interest to the authorities. The alleged telephone call from his mother on 10 April 2010 was not credible, in particular given his unexplained three-week delay in claiming asylum.

9. On 6 August 2010 the claimant applied for permission to appeal against his determination to the Upper Tribunal. By an order dated 16 August 2010, the claimant was refused permission. The claimant was then detained pending removal on 28 September 2010. On 24 September 2010 the claimant submitted further representations, enclosing a copy of an alleged arrest warrant from Burma and a report from a Dr Mullen. In his further submissions the claimant said that the warrant had been forwarded to him by his mother and he had now joined the Burma Democratic Movement Association.

10. In his report Dr Mullen confirmed that he had considered a scanned copy of the arrest warrant. He expressed the opinion that often arrest warrants were omitted but fails to consider the likelihood of the authorities serving the family or someone they wished to arrest with a warrant thereby warning the suspect of their interest. The primary ground of this application rests on the evidence or the further material produced by Dr Mullen and the position of the arrest warrant. That is dealt with in the decision letter in the following terms. I pick it up at paragraph 4 of the decision letter of 25 September:

> "No explanation has been provided as to when and how your client received these documents and why they have not been produced before now. The timing of your client's submission of these documents only now following service of removal directions on him suggests that your client's actions have been prompted by a desire to frustrate his removal to ^ Mianmar. More importantly, we note that no explanation has been provided in your client's mother's letter as to why she has delayed her

> sending of the purported arrest warrant to him. According to your client's mother's account of events, he was aware of and seemingly had possession of the arrest warrant on 15 July 2010, yet took no action to forward it until September 2010. It is not considered credible that were she in possession of such a significant genuine document your client's mother would have delayed in sending it to him, particularly in view of the earlier alleged visits from the authorities.
>
> 5. We have taken account of Dr Mullin's report and his credentials in relation to his considerable knowledge and firsthand experience of the situation in Mianmar. He does not, however, specifically refer to any case where his expertise as an independent assessor of the probity of documents submitted in support of international protection claims has been tested and accepted. Moreover, there is nothing in Dr Mullin's skills and experience that automatically leave one to presume that his expertise on country conditions allows him to comment authoritatively on matters of documentation and international protection. We have noted Dr Mullin's opinion that there is a real likelihood that the copy of the arrest warrant is genuine. However, we also note that Dr Mullin saw not the original but a scanned copy of the document that was emailed to him. Given the findings made by the immigration judge based on the entirety of your client's account, we are not persuaded that the opinion expressed in Dr Mullin's report would cause us to part from the conclusions that your client is not in need of international protection."

11. The legal framework is now familiar and it is convenient to refer to the most recent authority, namely the R(YH) v SSHD [2010] EWCA Civ 116, in particular paragraphs 20 and 21 in the judgment of Carnwath LJ. At paragraph 20 Carnwath LJ says:

> "More recently in KH (Afghanistan) v Secretary of State [2009] EWCA Civ 1354, handed down on 12 November 2009, Longmore LJ with the agreement of his colleagues stated the position in unqualified terms:
>
> It is now clear from ZT (Kosova) v SSHD [2009] 1 WLR 348... that the court must make up its own mind on the question with whether there is a realistic prospect that an immigration judge applying the rule

> of anxious scrutiny might think that the applicant will be exposed to a breach of Article 3 or 8 of his return to Afghanistan. So the question is not whether the Secretary of State was entitled to conclude that an appeal would be hopeless, but whether in the view of the court there would be a realistic prospect of success before an adjudicator."

12. Then at paragraph 21, Carnwath LJ says:

> "It seems, therefore, that on the threshold question the court is entitled to exercise its own judgment. However, it remains a process of judicial review not a *de novo* hearing and the issue must be judged on the material available to the Secretary of State."

13. Mr Hussain, who has argued the case on behalf of the claimant, emphasises that nonetheless the test is, following WN, still a low one. It is necessary only to show that there would be a realistic prospect of success on a putative future appeal having regard to the new material presented. Furthermore, he urges caution notwithstanding the statements in YH that the court should be careful before it seeks to find reasons of its own why there might be no realistic prospect of success. The focus still has to be on the decision letter and the reasons given there.

14. In short, on the first issue Mr Hussain says that here is credible material from a country expert who has given his opinion that the arrest warrant is likely to be genuine and that the claimant on that footing would be at risk if he were to be returned to Burma. As to this first ground, as is clear from the decision letter the Secretary of State, in line with the well-known guidance given in Tanveer Ahmed [2002] UKAIT 00439, a starred case, particularly at paragraph 31, found that there were substantial shortcomings in that material both as regards form and substance.

15. As to form, although Dr Joseph Mullen gives his qualifications as an expert, it would appear that his actual contact with Burma is, on the face of those qualifications, somewhat restricted. He says that he worked and lived in Burma in 1985 and 1986 as a staff member of the United Nations Food & Agricultural Organisation. It does not appear that he is fluent in Burmese. It appears that he can recognise Burmese characters, but would himself have to be reliant on interpreters or translators in relation to speech and documentation. There appears to me to be nothing in the qualifications that Dr Mullen puts forward that on the face of it would suggest that he has relevant expertise in the evaluation of documentation of this kind. His expertise is set out in relation to knowledge of country matters, but that appears to me to be somewhat different.

16. Furthermore, it does appear on the face of this document that he was reliant on an electronic scanning of the warrant in question. He said that the quality of the reproduction was excellent, but he did form an opinion about the

authenticity of that document only on the basis of secondary material. In a later email (but that of course is not even material before the Secretary of State) he said that looking at the original would not have changed his mind. But it does seem to me that in relation to the form alone, the Secretary of State had a rational basis for concluding that the material was not such as would influence the tribunal to find in the claimant's favour, in other words, would not improve the prospects of success before a putative second tribunal.

17. As to substance, again even approaching the matter on the footing that indeed that it is a low threshold, it appears to me that the Secretary of State in paragraph 5 of the decision letter did raise, albeit in somewhat general terms, the position that the new material did not address intrinsic problems with the warrant for arrest. For example, there was no explanation at all given by Dr Mullen as to the offence or offences for which the warrant had been issued. There was no explanation at all as to the timing of the warrant. There was no explanation offered at all in relation to the warrant and the claimant's case that the authorities had become interested in him because of his participation in demonstrations in the UK. There was no attempt by Dr Mullen to link these two together.

18. There was, furthermore, no explanation as to how the warrant had come into the possession of the claimant's mother and then how it had come through into the claimant's hands, and, in particular, no explanation as to the circumstances in which the Burmese authorities would have been likely to serve a warrant of this nature on members of the claimant's family, thereby alerting him to the fact, if it were such, that he was wanted in Burma in relation to alleged criminal offences.
19. In other words, it seemed to the Secretary of State and it seems to this court that Dr Mullen did not address at all the other aspects in relation to documentation of this kind that are so clearly set out in Tanveer Ahmed. In the absence of addressing those particular questions and tackling the difficulties that the document on its face produced, particularly linking it in any way to the account given by the claimant of his position and his relationship with his family, it did not seem to the Secretary of State and does not seem to this court that that documentation would lead to a realistic prospect of success on any future appeal.

20. The next principal ground related to the alleged failure of the Secretary of State to address the matters under paragraph 395C. Mr Hussain quite fairly did not press this point energetically. In my view paragraph 395C was met in this case by the decision letter of 27 May 2010, which dealt in particularity with paragraph 395C and made it plain to the claimant why none of the factors specified there would preclude his removal from the United Kingdom. The claimant therefore knew when the removal directions were issued the basis upon which they had been taken having regard to paragraph 395C.

21. The court gave permission for the claim to be amended in the light of a development in relation to cases from Burma and in particular the case of JA (Burma) v SSHD that found its way into the Court of Appeal under a reference 2010/0516. As already rehearsed in this judgment, the tribunal

relied upon the leading country guidance case to say among other things that the activities of the claimant in the United Kingdom would not give rise to a relevant risk if returned to Burma.

22. It appears from the statement of reasons in JA (Burma) that in relation to the tribunal decision in that case that what the Court of Appeal calls the King tribunal failed to provide adequate reasons for its conclusion that the Burmese authorities were likely to view the appellant as a hanger-on. For that reason, the matter was remitted to the Upper Tribunal for a *de novo* hearing. However, my understanding, again really based no more than on perusal of those reasons, is that it was accepted in the Court of Appeal that there had been an error of law in the application of the Country Guidance case, namely this was a situation where the tribunal purporting to apply the Country Guidance case had simply not given an adequate explanation as to why that particular appellant fell within the category of hanger-on. There is nothing that I can see, on the face of the statement of reasons given by the Court of Appeal, that would cast doubt on the Country Guidance case law itself, namely how people properly in the character of hanger-on should be dealt with.

23. Therefore, on that footing I see nothing in the statement of reasons in JA (Burma) that would assist the claimant in this case. As recited earlier, the tribunal dealt with that matter, applied the Country Guidance and gave reasons why the claimant here fell within the category of hanger-on and was not at risk. The appeal process on that issue was properly exhausted and there is nothing in the further material that would cast doubt on the soundness of the tribunal's conclusion in that respect.

24. Taking account of my understanding of the position in JA (Burma) on the basis of the documents put before me, I do not, therefore, accept that that is a valid ground of challenge. Nor, on that understanding, do I believe that there would be any useful purpose served in adjourning this matter to see what might emerge from JA (Burma) on reconsideration by the tribunal. It appears to me that the tribunal must now, applying the accepted Country Guidance test, determine whether or not that particular applicant fell within the relevant category and therefore such a determination either one way or another would not be of material assistance on the issues here.

25. So for those reasons, I both reject the matters put forward under Ground 4 and do not grant an adjournment in respect of that. Therefore, I reject all the grounds of challenge and dismiss this application for judicial review.

MR PAYNE: There is going to be an application for costs.

MR JUSTICE PARKER: Yes. What do you say in relation to that?

MR HUSSAIN: The claimant is legally funded, my Lord.

MR JUSTICE PARKER: Yes.

MR HUSSAIN: (Inaudible) in respect of the (inaudible) costs, detailed assessment. In respect of my friend's application for costs, my Lord --

MR JUSTICE PARKER: It's subject to section 11, Access to Justice Act, but there is probably a form of order used to deal with that.

MR PAYNE: Not to be enforced without leave of the court.

MR JUSTICE PARKER: Yes. Thank you very much indeed for your very helpful skeletons and the efficient way in which the material was presented to me and and very succinct oral submissions.

MR HUSSAIN: Thank you, my Lord.