

CO/2174/2006

Neutral Citation Number: [2007] EWHC 2971 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 27th November 2007

B e f o r e :

SIR GEORGE NEWMAN

Between:

THE QUEEN ON THE APPLICATION OF HUSSAIN

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

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(Official Shorthand Writers to the Court)

Mr B Tattersall (instructed by Dean Manson Solicitors) appeared on behalf of the **Claimant**
Mr A Payne (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

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

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1. SIR GEORGE NEWMAN: This is an application for judicial review. Permission was granted by Walker J. The challenge is made to the refusal of the Secretary of State to treat further submissions made by the claimant and advanced in March 2006 as a fresh claim under paragraph 353 of HC 395. The dates of the relevant refusal are 2nd March 2006 and 12th March 2006.
2. The circumstances relied on by Mr Tattersall for the claimant are that between August 2003 to February 2006 the claimant had advanced a claim of risk on return to Pakistan as an Ahmadi, alleging that his wife and family were in Pakistan and that he had last seen them in Rabwah in August 2003. His asylum and human rights appeal proceeded upon that essential factual basis, but it was determined against him in February 2004. The Adjudicator concluded that there was sufficient evidence to satisfy the Adjudicator that he was an Ahmadi, but specifically rejected a case which was advanced to the effect that he had played a prominent role in some part of the Ahmadi organisation. That was found to be a fabrication.
3. He nevertheless sought leave to appeal against the decision and that was refused by the Tribunal in May 2004. He then informed the Secretary of State, as part of fresh representations, that his son had been detained by the authorities in Pakistan since July 2004 and various other documents and material were attached.
4. The Adjudicator in his decision, promulgated on 22nd February 2004 (it was a one-stop asylum and human rights appeal) noted, firstly, that despite the fact that the claimant had adduced evidence confirming his membership of the Ahmadi community, there was no corroborative evidence confirming that he had occupied a prominent position or been forced to leave Rabwah, or had appealed to higher authorities for protection; and secondly, that the Council in the United Kingdom, the Ahmadiyya Council, could confirm that the post allegedly occupied by the claimant did not exist. The Adjudicator concluded that the claimant's alleged stabbing in 2001 was incredible, that he provided no satisfactory explanation for how he had left his family in Pakistan, given his evidence that he was a successful businessman, and generally the Adjudicator concluded that he was not a reliable witness, having regard to the discrepancies in his evidence concerning the number of times and ease with which he attended the mosque.
5. It is important to summarise those parts of the Adjudicator's determination which, on analysis, despite events which I have yet to retail, seem to the court, and accepted by Mr Payne for the Secretary of State, remain. They are that the claimant is an Ahmadi and that he may have experienced some difficulties in Rabwah, and, it follows, had come from Pakistan.
6. Apart from that, all the other conclusions to which the Adjudicator came have, in effect, become redundant, because what occurred was this. In February 2006, the new solicitors acting for the claimant, shortly after the claimant had been detained with a view to removal, came forward with a completely different factual set of circumstances which was:

"Our client has instructed us that his wife and five children live in

Germany who have claimed asylum there since June 1993. He also claimed asylum there but his case was refused and he was subject to removal. And left in fear voluntarily to Pakistan, tried there to establish but was attacked and persecuted. He then arrived in the UK and claimed asylum on 17th August 2003. His previous representatives Thompson & Co allegedly prepared his story and misled him to hide the facts. He has therefore no-one in Pakistan to return to and his life is at great risk there."

It is obvious, therefore, that the fresh representations said to amount to a fresh claim which have been before the Secretary of State, and now which are before this court, flatly contradict substantial elements of the account which was pursued for a number of years, first to the Adjudicator then to the Tribunal in the application for leave to appeal, and thereafter until he was detained with a view to removal.

7. The conclusions of the Adjudicator to the effect that he was unreliable as a witness have been amply borne out by what can only be the accepted dishonesty on his part as to what has occurred. The attempt by the solicitors to lay the blame at another firm of solicitors who "prepared his story and misled him to hide the facts" is such an extreme allegation that this court is not prepared, without elaboration and support, to accept it as a credible explanation for what has occurred.
8. As a result, Mr Tattersall, with a measure of realism, adopted forensically an approach to the argument which meant the acceptance of the dishonesty amounted to a concentration upon what might be said to be left of the claimant's case. He says, and it is obviously right, that neither the Secretary of State nor the Adjudicator nor the Tribunal ever considered, before the new account was given, circumstances which included the family being in Germany -- on his account a family who were granted asylum -- and the fact that he had no family which had been identified in Pakistan, because his case beforehand had been that he had left them in Pakistan.
9. In this sense the matter is somewhat unusual, and it may be that it was this unusual reversal of a factual position which caused Walker J to grant permission. But I am satisfied that the real issue which I have to determine is, in accordance with authority: first, has the Secretary of State asked himself the correct question, in this instance whether there is a realistic prospect of an Immigration Judge, applying the rule of anxious scrutiny, thinking that the claimant will be exposed to a real risk of persecution on return? Next, the court must be satisfied, addressing the question, as to whether the Secretary of State has met the requirement of anxious scrutiny.
10. The core of the claimant's case must be, as it is now available to him, is that being of the Ahmadi faith he is at risk on return to Pakistan, and that his wife and his children are not presently in Pakistan. But contrary to the suggestion that they are in Germany with the benefit of asylum status, the evidence is that they are in Germany with a limited status relating to a right to work.
11. On further analysis, it seems to me that the two elements of the case upon which Mr Tattersall must rely are the existence of what he says is fresh objective evidence and the position made out in the case of **IA and Others** in the Tribunal, a case which is now on

appeal, I am informed, to the Court of Appeal. What Mr Tattersall submits is that the position so far as Ahmadis in Pakistan are concerned has changed since the case was originally considered; he says change to such a degree as to give rise to a realistic prospect that an Adjudicator might conclude that this claimant, an Ahmadi, if returned to Pakistan, will be at risk of persecution.

12. Mr Payne submits that this is to elevate the recent developments in the consideration of the risk of Ahmadis on return to Pakistan to a higher level than is justified, either from the objective material or the judgment of the Tribunal. I have been taken to the case of **IA** and to various paragraphs. First of all, my attention has been drawn to what can be regarded as the headnote which is as follows:

"Contrary to what is said in **KM (Pakistan)** [reference given], **MM (Pakistan)** [reference given], **KK (Pakistan)** [reference given], **MC (Pakistan)** [reference given], and **AZ (Pakistan)** [reference given], Rabwah does not constitute a safe haven for any Ahmadi at risk of persecution elsewhere in Pakistan and should not, without more, be treated as an appropriate place of internal relocation."

13. As this court is well familiar, it has been the current approach of the court to these cases that a person shown to be at risk of persecution in Pakistan was one who normally, it was felt, could be relocated in Rabwah, that being an enclave. But the development of the position is that it was seen by the Tribunal that a person who had no family who was relocated to Rabwah would not be in a satisfactory position. Equally, as I see it, from the paragraphs of the judgment that have been referred to, the Tribunal is satisfied that not every Pakistani Ahmadi is at risk of persecution and is a refugee. The incidents of actual harm to Ahmadis is, on the evidence, not high in Rabwah and, on the evidence, is not high elsewhere in Pakistan. The Tribunal saw the issue though as whether some Ahmadis who are at risk of persecution can be expected to relocate to Rabwah.
14. The difficulty for the claimant, on the basis of the claim which can presently be relied upon, is that there is no reason to conclude that because he is an Ahmadi he is at risk of persecution in Pakistan, indeed anywhere in Pakistan. It was open to the Secretary of State, as I see it, to conclude, on the material that he had and after the exercise of anxious scrutiny, to reach the conclusion that he was not at risk.
15. The consequence of the case of **IA and Others** is, in my judgment, helpfully summarised in paragraph 4 of Mr Payne's supplemental skeleton that:

(i) In relation to Ahmadis who have a well-founded fear of persecution in their home area, Rabwah:

(a) should not be presumed to provide a viable internal flight alternative;

(b) may provide a viable internal flight alternative for Ahmadis who have family in Rabwah; and

(ii) The up-to-date objective evidence indicates that the incidence of actual harm to Ahmadis is not high."

In this case the Secretary of State, as I have indicated, was, in my judgment, entitled to conclude that there was no well-founded fear of persecution and no basis for concluding that he would be at risk if returned to Pakistan.

16. I must now turn to one other aspect which was, as I have surmised, probably the reason why Walker J granted permission. It is the impact of a state of affairs where a claimant such as this completely alters his case in order to advance what is undoubtedly, so far as the contentions are concerned, a new and fresh case, accepting in so doing that he has lied in the past. Mr Tattersall, I think, with some support, suggests that it is acknowledged in these cases that people lie, and that the position must be that the matter must be investigated according to such facts as can be accepted. That is, in my judgment, what, in effect, has occurred here and that is what the Secretary of State has done.
17. Finally, it is said by Mr Tattersall that if this is not a fresh claim and he can be returned to Pakistan, should it not be regarded as a case in which the claimant should be returned to Germany because of the facts which I have summarised in connection with the family who are now in Germany. In my judgment, this submission is hopeless. The obligation to take back an asylum seeker under Article 16.20 ceases when the asylum seeker has left the territories of a member state for a period of at least three months. On the basis of the claimant's case at present, he returned from Germany to Pakistan before travelling from Pakistan to the United Kingdom in August 2003. It is not clear when he left Germany. He has not established any travel to the United Kingdom within three months of leaving Germany. Any obligation to take back an asylum seeker under Article 16 ceases after the responsible member state has implemented the provisions necessary for the applicant to return to his country of origin, and where within three months of an asylum application having been lodged with the United Kingdom no request is made to another member state to take back the asylum seeker, responsibility for determining the application for asylum automatically rests with the United Kingdom. In this case no application to Germany under the Dublin Regulation has ever been made. There is therefore no basis for challenging the United Kingdom's assumption of responsibility. There is no possibility of returning the claimant to Germany without the agreement of the German authorities. The Dublin Regulations have, in my judgment, no application in this case and there is no basis in law for the defendant to request the German authorities to accept the return of the claimant.
18. For all those reasons, this application for judicial review is refused.
19. MR PAYNE: There are just two matters, my Lord. Firstly, although you were not taken to it, my Lord, if you could turn to page 33 of the claimant's bundle.
20. SIR GEORGE NEWMAN: Page 33 in heavy print?
21. MR PAYNE: My Lord, yes, the ones in circles in the bottom corners.

22. SIR GEORGE NEWMAN: Yes.
23. MR PAYNE: This is another application for a fresh claim dated 13th November. You dealt with paragraph 2 which is on page 34, the evidence regarding the residence permits.
24. SIR GEORGE NEWMAN: Yes.
25. MR PAYNE: Just what I wanted to make clear, if you go back to page 33, there is an application. You see the second paragraph, the reference to Legacy case.
26. SIR GEORGE NEWMAN: Yes.
27. MR PAYNE: Perhaps you could refer to it in your judgment. If this application is maintained under the Legacy Case Resolution Programme, wasted costs will be sought because there is absolutely no merit whatsoever in that application. In my submission, this application did not have any merit. Legacy is all about the cases which back in 2001 --
28. SIR GEORGE NEWMAN: It is not yet maintained as a Legacy case, is it?
29. MR PAYNE: No, it is not. He arrived in 2003 and he was before an Immigration Judge within months. What I do not want is another fresh claim and this happen again.
30. SIR GEORGE NEWMAN: You want to bolt the door as firmly as you can?
31. MR PAYNE: Yes, otherwise we are just going to be back here in a few months time. This is privately funded and we are going to be applying for costs of this application.
32. MR TATTERSALL: I did not maintain that. Although it was in the letter it was not part of my skeleton argument, it was not part of the argument today. I would certainly not advise those instructing me to proceed in that.
33. SIR GEORGE NEWMAN: Having regard to the fact you say that, Mr Tattersall, and the fact that it has not been pursued, I would regard it as an abuse of process if it was now raised.
34. MR PAYNE: Thank you very much, my Lord. We do ask for our costs. The claimant is privately funded.
35. SIR GEORGE NEWMAN: Can you resist that, Mr Tattersall?
36. MR TATTERSALL: I have not seen a schedule of costs.
37. SIR GEORGE NEWMAN: Let us say, shall we, if not agreed to be assessed.
38. MR TATTERSALL: I think so, my Lord.
39. SIR GEORGE NEWMAN: Thank you very much indeed.

40. MR TATTERSALL: My Lord, very briefly, this is no reflection on the merits of this case in a sense but your Lordship will be aware there are a lot of these Ahmadi cases coming up for judicial review, some of which succeed and some of which do not. I am beginning to wonder if it may be something that the Court of Appeal should look at again and on that basis could I ask for permission to appeal. I am not expecting it, but I am going to ask.
41. SIR GEORGE NEWMAN: No, because, as I said, I am opposed in many respects.
42. MR TATTERSALL: I accept that, my Lord.