Neutral Citation Number: [2009] EWHC 1649 (Admin)

CO/10924/2007

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Tuesday, 28th April 2009

B e f o r e:

TIMOTHY BRENNAN QC
Sitting as a Deputy Judge of the High Court

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Between:
THE QUEEN ON THE APPLICATION OF YANULEVICH

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

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Mr C Jacobs (instructed by TRP Solicitors) appeared on behalf of the **Claimant**
Mr R Dunlop (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

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J U D G M E N T

1. TIMOTHY BRENNAN QC: There is before the court, pursuant to permission granted after an oral hearing by Owen J, an application for judicial review in which the claimant challenges the decision of the Secretary of State to reject as a fresh claim his claim for asylum. That decision was recorded in a letter of 27th November 2007.

2. After various interlocutory and other applications, the Secretary of State issued a further decision letter dated 15th January 2009. The claimant and the defendant are agreed that it would be appropriate for the court to treat this claim for judicial review pragmatically as being a challenge to the rationality of the decision contained in the letter of 15th January 2009 which was made on most, though still not all, of the material which has been produced by the claimant. It is a noteworthy feature of the claimant's approach to his asylum claim that the material which he has advanced has been provided piecemeal on no fewer than four occasions, the last of them in a witness statement dated 17th April 2009, that is to say only ten days or so before the date of this hearing. That last witness statement is strictly irrelevant to the matter which is before the court because the material was not available to the decision-maker.

3. The claimant is a Russian national. As the facts have gradually emerged, they appear to be as follows. On 31st May 2005, the claimant was involved in a violent altercation outside his home in Moscow. It is now known, but was not made clear to the Immigration Judge who first heard his appeal, that he was convicted of a criminal offence and sentenced to a suspended term of imprisonment.

4. The claimant arrived in the United Kingdom on 25th January 2006 with a visitor's visa. He remained for only three days or so before returning to Russia. On 9th July 2006, with the support of the same visa, he re-entered the United Kingdom and on this occasion claimed asylum. Asylum was refused in a decision letter dated 8th August 2006.

5. The claimant appealed. At that stage of the proceedings, the claimant's fear of persecution was said to be based essentially on his overt membership of the Green Party, an organisation which is apparently lawful in Russia, and on political activism of a largely unspecified kind. He told the Immigration Judge that he had never been arrested due to his political activities. He mentioned the altercation on 31st May 2005, but not his subsequent criminal conviction.

6. The Immigration Judge, in summary, found that the claimant's case that he was subject to a well-founded fear of persecution was exaggerated. On a number of occasions in a long decision, he referred to the absence of evidence in support of various aspects of the claim. He accepted that the claimant was involved with the Green Party, but to what extent he did not find it possible to say. He referred to an incident during an earlier interview with the claimant where the claimant had produced a crib sheet containing information about the Green Party on which he sought to rely. The Immigration Judge made this finding:

> "I find that he has greatly exaggerated his role and his use of a crib sheet greatly damages his credibility."

7. The Senior Immigration Judge refused to order reconsideration of this decision. Sullivan J, on 26th March 2007, similarly refused.

8. In a letter dated 21st May 2007, that is less than two months after he had completed the appeal process, the claimant made submissions that he had a fresh asylum claim, presenting evidence which he said that he had not been able to provide before. That evidence included two letters purporting to be from the Procurator of the City of Moscow, recording: that the claimant was the subject of an arrest warrant; that he had been convicted of an offence on 27th June 2005 and sentenced to a suspended term of imprisonment; that he had been complaining about threats by a man called Misharin; and that the Procurator had found no evidence to support those complaints. He also submitted a Green Party membership card and an internet article which asserted, in very imperfect English, an account of the claimant apparently exposing corruption and criminal groups in Moscow and having been attacked on 31st May 2005.

9. In the letter of 27th November 2007, to which I have already referred, the Secretary of State, acting by officials, rejected the new representations and refused to treat them as a fresh claim. An application for permission to apply for judicial review was initially rejected by Lloyd Jones J and the claimant provided a further chapter of information. On this occasion, he produced an article by a man called Filomonov, apparently associated with an organisation called the Independent Media Centre. This too referred to an attack being made on the claimant. There was also a letter from an official dealing with human rights in Russia saying that the claimant's complaints about his conviction had been made to the wrong body. That material, produced on the day before the renewed oral application for permission was sufficient to get him permission to apply for judicial review. In the further letter on 15th January 2009, to which I have referred, the Secretary of State reconsidered the representations and maintained her decision that they did not give rise to a realistic prospect of success.

10. Before turning to look in a little more detail at the Secretary of State's approach, it is convenient to consider the legal framework. The concept of a fresh claim is to be found in rule 353 of the Immigration Rules. The framework is that where a human rights claim or an asylum claim has been refused and the applicant has exhausted his appeal rights, a decision-maker will consider further submissions and, if rejected, will determine whether they amount to a fresh claim. They will amount to a fresh claim only if they are significantly different from material that has previously been considered and, taken together with the previously considered material, create a realistic prospect of success. The threshold, therefore, since the Secretary of State was satisfied, as she must have been, that there was new material, was whether there was a realistic prospect of success.

11. It is common ground that the approach for the Secretary of State is that summarised by Buxton LJ in **WM v Secretary of State for the Home Department** [2006] EWCA Civ 1495 at paragraph 11:

> "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 . . . "

A little earlier in the same judgment his Lordship said that the rule only set a "somewhat modest" test that the application had to meet before it becomes a fresh claim.

12. In **Naseer v Secretary of State for the Home Department** [2006] EWHC 1671 (Admin), Collins J dealt at some length with the proper approach for the Secretary of State on an application such as the present. At paragraph 22 his Lordship said:

> "So the question is, when dealing with what is said to be fresh evidence, whether that evidence is such that, even though the Secretary of State rejects the claim, it can be regarded as creating a realistic prospect of success were there to be an appeal against the rejection. It is obviously right that the Secretary of State, in considering the evidence that is produced, should be able to form a view as to its reliability and the starting point in a case such as this, where there has been a rejection by the appellate authorities of a claimant's account that he has been disbelieved, is the decision of the AIT. That by itself will not mean that anything that he thereafter states or puts forward must equally be disbelieved, but it is proper for the Secretary of State to take that into account in assessing whether the fresh material is indeed such as will provide a realistic prospect of success."

I interpose before continuing my quotation from Collins J's judgment that the point is made on behalf of the claimant here that he was not disbelieved by the Immigration Judge but that the Immigration Judge, in rejecting his asylum claim, had observed that he had exaggerated matters and that on many aspects of the case there was simply no evidence to support his claim one way or the other.

13. Collins J observed at paragraphs 23 and 24 of the judgment in **Naseer** that there are countries in the world where official looking documents can be obtained. At paragraph 24 he said:

> "Again, the fact that it is easy to obtain such documents, and they may look genuine but may well not be, is not something which can be assumed in every case. It is necessary, as **Tanveer Ahmed** itself indicated, to look at all the evidence in the round and to look at the whole case."

At paragraph 31, dealing with the facts of the case of **Naseer**, which are irrelevant to the present issues, Collins J took the following approach:

> "In all the circumstances, this is a case in which, in my view, the Secretary of State was fully entitled to say to himself: 'I have had no proper explanation of how these documents came into existence. I note how useful they suddenly are, produced at this late stage. I note too that there has still been no production of the August 2004 FIR. In all those

> circumstances, I take the view that I am entitled to reject the genuineness of these documents and to take the view that there is no real prospect of success'."

His Lordship then referred to an earlier decision of his own in **Rahimi v Secretary of State for the Home Department** [2005] EWHC 2838 (Admin) and, having looked at the strict test which on one reading of his approach in **Rahimi** was being applied, he said at paragraph 37:

> "It seems to me, on consideration and having regard to the circumstances of a case such as this, that that taken in isolation may indicate too strict a test. As I have said in the context of this case, if the Secretary of State reasonably on the material before him takes the view that it is not evidence which could be accepted, and thus would not give a reasonable prospect of success on appeal, he is entitled so to find. What is important in circumstances such as this is that there should be evidence indicating how the relevant documents came into existence and supporting their genuineness."

Finally, at paragraph 39 he referred to the Tribunal case of **Devaseelan** [2002] UKIAT 00702. He said this:

> "**Devaseelan** makes clear, and in my view the approach is relevant in relation to fresh claims, that where the so-called fresh material could have been put before the previous adjudicator, then the adjudicator dealing with the subsequent claim is entitled to be highly sceptical of such material and to look at it with care and in the light of knowledge of the reliability -- or unreliability perhaps -- of such documents, and is entitled and indeed bound to consider carefully any material, if there is any, which supports their validity."

14. Informed by that approach, the submissions on behalf of the Secretary of State can, in essence, be summarised as follows. The material which the claimant has produced in support of his fresh claim is produced late. It is produced at a time which is highly convenient to the prosecution of his further applications for asylum. It is unexplained in its provenance. It could, in those circumstances, rationally be regarded by the Secretary of State as not giving rise to a realistic prospect of success should the matter be ventilated anew before the Immigration and Asylum Tribunal.

15. I return to consider the facts. In essence, the approach taken by the Secretary of State was that the letters produced from the Procurator, even if real, did not demonstrate that the claimant was in danger of persecution by the authorities in Russia rather than prosecution on the basis of allegations of criminal behaviour. It was considered by the Secretary of State that his political activities were low level and legal and that there was no evidence that he was being politically targeted. It was considered that the claimant's allegation that he had not even known about his 2005 conviction before receiving the letters from the Procurator in October 2006 was implausible. That implausibility is now established by the claimant's recent witness statement, provided some days before

the hearing, in which it appears to be accepted that he was in fact aware of his conviction. He had indeed attended court in relation to it on more than one occasion.

16. The Secretary of State's analysis continued, in summary, along the lines that the claimant's assertion that he would be subject to political persecution was undermined by the fact that this could have been mentioned in relation to the prosecutions at his appeal hearing but was not; that the letters produced had the support of no corroboration as to their genuineness; that the evidence that he was a member of the Green Party took matters no further since the Immigration Judge accepted that he was. Further, various articles taken from the internet did not create a reasonable prospect of success, given the ease of manufacture of such material. It was an odd feature that the article had been produced long after the events which they described and yet at a time which was highly convenient for the claimant's claim.

17. In the challenge advanced to that decision letter, Mr Jacobs makes the point that all of this material is not something which can simply be rejected out of hand on the documents by the Secretary of State. The Immigration Judge rejected the claimant's account on the basis that there was, on a number of material points, no evidence one way or another. The claimant was not represented, he was operating in a language in which he was not particularly fluent, and in those circumstances the Secretary of State ought to recognise that material produced later might still be material which, when fully ventilated before a Immigration Judge, could be accepted by him and provide the evidential foundation which was lacking in the earlier hearing for the claimant to establish a well-founded fear of persecution.

18. In my judgment, the Secretary of State's letter of 15th January 2009 does show the necessary anxious scrutiny of the material. It does look at the claimant's case in the round and gives, as was submitted by Mr Dunlop, robust reasons for taking the view which was taken that the claimant's renewed claim did not have a realistic respect of success. The relevant factors were those which I have set out. In particular, the Secretary of State was entitled to have regard to the comparative apparent unreliability and lack of evidential support of the internet material and to the claimant's failure to mention at his original appeal matters which must have been known to him at the time, and indeed to the way in which the material emerged on a piece by piece basis.

19. In those circumstances, in my judgment, the complaint that the Secretary of State's decision was an irrational one is not made out. This application for judicial review should therefore fail and is dismissed.

20. MR DUNLOP: My Lord, I have no application to make. I am grateful for your Lordship's judgment.

21. MR JACOBS: My Lord, could I ask for a detailed assessment of the claimant's publicly funded costs.

22. TIMOTHY BRENNAN QC: Yes. That is the normal order, is it?

23. MR JACOBS: Yes, my Lord. I do have an application for leave to appeal. The application is made on the basis of my Lord's finding with regard to the effect of the credibility findings of the Immigration Judge. In my submission, this matter is distinguishable from **Rahimi** and **Naseer** and it is in the public interest that the Court of Appeal decide where the line is to be drawn between the two. In my submission, on the **Rahimi** side, the starting point ought to be the credibility findings made by the previous Immigration Judge, and in my submission those findings are far removed from those in **Naseer**, which in my submission is a distinguishing --

24. TIMOTHY BRENNAN QC: I would agree that it is a distinguishing feature. Is the point not that all of these cases, all rationality challenges of this kind, are going to depend on their particular facts? This case did not, as I see it, turn on a finding by the Immigration Judge akin to the disbelieving of the claimant in **Rahimi**, let us say, but is simply a rationality challenge on the whole of the material.

25. MR JACOBS: In my submission, the previous findings are the starting point. As those were positive findings, that would leave the court, in my submission, on the low test. The second point is with regard to the position of the claimant having been unrepresented, and the margin of discretion to be awarded to those who find themselves in that position.

26. TIMOTHY BRENNAN QC: I refuse permission. I see how the argument against my decision could be put but, in my judgment, it does not have a real prospect of success and there is no sufficiently compelling other reason to grant permission.

27. MR JACOBS: I am obliged.

28. TIMOTHY BRENNAN QC: Let me just make a note before we deal with anything else. I am just recording my decision on your application. You need that to go to the Court of Appeal. I am not sure if I expressly granted your detailed assessment of costs. I will do that. Anything else?

29. MR DUNLOP: No.

30. TIMOTHY BRENNAN QC: Thank you both very much for your help.