Case No: C4/2008/2792

Neutral Citation Number: [2010] EWCA Civ 1550
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
QUEEN'S BENCH DIVISION
(MR JUSTICE BLAIR)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 8th October 2009

Before:

LORD NEUBERGER (THE MASTER OF THE ROLLS)
LORD JUSTICE LAWS
and
LORD JUSTICE WILSON

- -

Between:

R (TK) — **Appellant**

- and -

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

- -

(DAR Transcript of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Ms Shivani Jegarajah (instructed by K Ravi Solicitors) appeared on behalf of the **Appellant**.

Mr Steven Kovats (instructed by the Treasury Solicitors) appeared on behalf of the **Respondent**.

- -

Judgment

Lord Justice Laws:

1. This is an appeal with permission granted by Sir Richard Buxton on 23 April 2009 against a judgment of Blair J given on 12 November 2008. By that judgment he dismissed the appellant's application for judicial review of decisions of the Secretary of State which rejected further representations made on the appellant's behalf as not amounting to a fresh asylum claim. The case involves a question as to the correct approach of the court to a challenge directed to a decision by the Secretary of State that no fresh claim has been made. Granting permission, Sir Richard Buxton said this:

> "On the substance of the matter, the applicant has drawn attention to the observations of Sedley LJ in RT (Sri Lanka) [that should be TR] to the effect that the court has to decide for itself, as a matter of precedent fact, whether or not there was a fresh claim. That was not the view of the judge, who applied the approach of this court in WM (Congo) [2006] EWCA Civ [1495] and Cakebay [1999] Imm AR 176 at 195, that the court has still to apply the Wednesbury test, albeit illuminated by the rule of anxious scrutiny. That is not, as was suggested in TR, an attitude of 'deference', but simply the application of orthodox principles of administrative law. However, there now apparently being differing views between different constitutions of the court as to the proper test to apply to this very important question, I grant permission to enable the issue to be properly reconsidered."

2. Where a failed asylum seeker or person claiming to enter the United Kingdom on human rights grounds makes further representations to the Secretary of State, the question whether those representations are treated as a fresh claim is important because if they are the claimant will enjoy appeal rights against an adverse decision. The criteria by which further representations fall to be treated as a fresh claim or not are given by paragraph 353 of the current Immigration Rules, which has now been considered in many cases. That paragraph provides:

> "When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules 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.
>
> This paragraph does not apply to claims made overseas.
>
> 353A. Consideration of further submissions shall be subject to the procedures set out in these Rules. An applicant who has made further submissions shall not be removed before the Secretary of State has considered the submissions under paragraph 353 or otherwise.
>
> This paragraph does not apply to submissions made overseas."

3. The appellant is a Sri Lankan Tamil. He arrived in the United Kingdom aged 17 on 30 June 2001 and immediately claimed asylum which was refused. On 7 August 2002 his appeal was allowed by the adjudicator. On 10 April 2003 the Immigration Appeal Tribunal allowed the Secretary of State's appeal essentially on the basis that the security position in Sri Lanka had much improved. The appellant was no longer at risk and there was no separate Article 3 claim on medical grounds. The appellant's application for permission to appeal to this court was refused on 8 May 2003. On 11 July 2003 the appellant advanced further representations on the footing that he was making a fresh claim. There was then a gross delay, rightly described by Sir Richard Buxton granting permission as deplorable. At length on 1 June 2007 the Secretary of State determined that the July 2003 representations did not amount to a fresh claim within paragraph 353 of the Rules. The judicial review papers in the case were lodged very shortly afterwards on 5 June 2007. In their further representations of July 2003 the appellant's solicitors had submitted (with some chapter and verse in support) that the security situation in Sri Lanka, notwithstanding its earlier improvement, had deteriorated rapidly in the few weeks just gone. They also relied on fresh medical evidence relating to their client. On 25 February 2008 the Secretary of State wrote a further decision letter. It was accepted that the situation in Sri Lanka had deteriorated but not that the appellant would be at risk of persecution, and so the merits of the new representations were rejected and it was again concluded that there was no fresh claim within paragraph 353.

4. The decision letter of February 2008 expressly took account of the tribunal decision in LP (Sri Lanka) [2007] UKAIT 00076 which had addressed the deteriorating situation in Sri Lanka. Following the late service of amended judicial review grounds the letter of 25 February 2008 became the focus of the

judicial review challenge, as Blair J was to acknowledge at paragraph five of his judgment. At paragraph 12 of the judgment the learned judge below stated that at paragraph 21 of the letter of 25 February 2008 the Secretary of State "had asked herself the correct question". This is what the Secretary of State had said:

> "Anxious scrutiny has been given to the decision in LP and the effect it has on your client's case, but it has been determined that the findings by the Tribunal in LP in addition to the most recent country information, when taken together with material previously considered in your client's case, would not create a realistic prospect of success before an immigration judge."

5. Blair J also cited the Secretary of State's own conclusions on 25 February 2008 as to the merits of the appellant's claim in light of the up to date material. These are essentially to be found in paragraphs 11 and 19. Paragraph 11:

> "Given the above findings of the Adjudicator and the subsequent decision by the Immigration Appeal Tribunal, it is considered that your client will be of little interest to the authorities on his return to Sri Lanka. We believe that your client's position in the LTTE was of insufficient standing for him to now elicit the interest of the authorities. It is further considered that your client has been away from Sri Lanka for over 6 years and therefore it is unlikely that he would be of any interest to the authorities on his return. This would be the case even if there remained a record of your client's detention."

Paragraph 19:

> "It is accepted that since 2003 the situation in Sri Lanka has deteriorated, with the main incidents of insecurity reported in northern and eastern districts. Having considered the objective country information, including the latest Country of Origin information reports, it is considered that your client would not be at risk of persecution. Your client is not of a sufficiently high profile to merit any adverse attention from the authorities upon return. There is nothing in the material provided that would lead the Secretary of State to believe that there is any interest in your client from the Sri Lankan authorities. Your client does not fall within the categories at risk and no evidence has been provided to demonstrate that he would be at risk now. In any event, bearing in mind your client's long

> absence from Sri Lanka it is considered unlikely that he would now be at risk because of his ethnicity or claimed involvement with the LTTE."

After that paragraph the Secretary of State turned to consider the question of a fresh claim and arrived at her conclusions in paragraph 21 which I have read. At paragraph 22 of his judgment the judge below concluded that the Secretary of State's judgment on the fresh claim issue could only be impugned on Wednesbury grounds and that the Secretary of State, having asked herself the right question, brought to bear a sufficient anxious scrutiny in seeking to answer it. Accordingly, held the judge, there was no basis for judicial review.

6. On the first issue before us -- what is the proper approach of the court to a challenge to the Secretary of State's conclusion that new representations do not constitute a fresh claim within paragraph 353? -- we should notice the factual points emphasised by counsel for the appellant before the judge as summarised by him. I need set out only paragraphs 13 and 14 of the judgment:

> "13. Against that background, he [that is, counsel] relies on the following factors in particular. Firstly, he points at the lengthy detention to which the claimant was subjected, namely eight months; secondly, he points to the admitted ill-treatment that the claimant was subjected to; thirdly, he points to the allegation that the claimant was a 'Black Tiger'; fourthly, he points to the fact that the claimant has been a member of the LTTE; and fifthly, he points to the scarring which supports the claimant's version of events.
>
> 14. Of these, particular mention should be made of the reference to a 'Black Tiger', the name for a specially trained suicide bomber. As regards this, the claimant's evidence before the Adjudicator was that he had been accused of being such. The Adjudicator did not make a specific finding of fact in that regard, but of course, as Mr Gillespie points out, he accepted the claimant's story generally. On the other hand, as Mr Singh submits to me, if the claimant had been seriously suspected of being a specially trained suicide bomber, it is most unlikely that a bribe would have secured his escape."

7. I turn then to the first issue in the case. Sir Richard Buxton was prompted to grant permission by a perception that what had been said by Sedley LJ in TR (Sri Lanka) [2008] EWCA Civ 1549 and other authority of this court, notably WM (DRC) [2007] IAR 337 and Cakebay [1999] IA 176, involved contradictions. There is no doubt in my judgment that these latter authorities proposed a Wednesbury test for the question of whether the Secretary of State

has erroneously failed to treat new representations as raising a first claim – See WM paragraphs 8-12, 18, 28 and 29 and Cakebay at page 195. Ms Jegarajah did not accept that this learning shows the Wednesbury approach tempered by anxious scrutiny is the right one, but I have to say it seems to me to be the plain effect of the reasoning in those cases. I should set out what was said by Sedley LJ in the TR case at paragraphs 32-34:

> "32. Although, given what has happened to his relatives, I entirely understand the appellant's subjective fear of LTTE violence if he is returned, this case concerns the question whether his fear is objectively well-founded. For the reasons given by Keene LJ I am driven to the conclusion that the appellant has no fresh claim capable of superseding the adverse decision on this issue reached by the adjudicator in 2003. I do so, however, not by standing back and asking simply whether a rational Home Secretary could have decided that there was no fresh claim, but by taking a close look at the components of the claim and of what they arguably amount to. If the court, doing this, comes to the same conclusion as the Secretary of State, well and good.
>
> 33. If not, then a difficult question will arise whether the difference of view justifies intervention. This case, for the reasons that have been given, does not concretely raise that question but Ms Chan for the Secretary of State has accepted that the Secretary of State's margin of appreciation may be slenderer in the present class of case, that is to say in fresh claim cases, than in other judicial review contexts. This is so for at least three possible reasons which I mentioned when granting permission to appeal in this case: first, the Home Secretary acts as judge in her own cause in reaching the decision under attack; secondly, the matters ordinarily relevant to whether a claim is a fresh claim are matters which a court is for the most part at least is as well equipped as the Home Secretary to deal with; thirdly, in many of these cases, and the present is a strong example, we are concerned with what are potentially matters of life and death.
>
> 34. This was essentially, as I read it, the approach both of Munby J in the present case and of Mitting J in the case of Sinnarasa v SSHD [2005] EWHC 1126 (Admin). It means, as I said when I granted permission to appeal, that there is in reality not a great deal of room for deference in the judicial exercise. The primary question for the court is whether, whatever the Secretary of State thinks of it, there is here a fresh claim capable of succeeding before an immigration judge. As I have said, the difficult

> question of the margin of appreciation is not for us today. But the approach, as Ms Chan herself aptly put it in response to my question, is that it is anxious scrutiny in action."

8. These observations were, I think, obiter. In any event we are bound by WM unless it has been overturned or modified in their Lordships' house. Ms Jegarajah was at pains to refer to the opinions in ZT (Kosovo) [2009] 1 WLR 348. That was a judicial review of a certificate granted under section 94(2) of the Nationality Immigration and Asylum Act 2002 to the effect that an applicant's claim was clearly unfounded. There was an issue whether the decision maker should have proceeded under section 94(2) or, on the particular facts, considered submissions made by the claimant under paragraph 353, the fresh claim rule. A question arose as to whether the test, "clearly unfounded", in section 94(2) was the same as or different from the test 'no realistic prospect of success' in Rule 353. Lord Phillips considered that effectively the same test was intended. So did Lord Brown. However, Lord Hope at paragraph 46 and Lord Carswell at paragraph 62 did not; and it is fair to say that my Lord, Lord Neuberger, was perhaps equivocal. On the view taken by Lord Phillips and Lord Brown, the test, clearly unfounded, imported a black and white approach to which in any given case there could only have been one answer, and the same would apply in relation to realistic prospect of success. In my judgment the opinions in ZT do not provide binding authority for the proposition that the 'no realistic prospect of success test' in paragraph 353 is one that admits of only one answer, and nor does it provide authority for the proposition that anything other than the Wednesbury approach is apt for the court supervision of decisions taken under paragraph 353.

9. The matter fell to be considered in a later case in this court, AK (Sri Lanka) [2009] EWCA Civ 447, in which as it happens the first judgment was given by myself; Thomas LJ and Mann J agreed. It is necessary only to notice that there is there extensive citation of the ZT case which arose for consideration on a particular issue in AK. After setting out extracts from the opinion I said this:

> "33. These are deep waters. In my respectful view their Lordships' opinions in *ZT (Kosovo)* disclose two distinct approaches to the comparison between "clearly unfounded" (s.94(2)) and "[no] realistic prospect of success" (Rule 353). The first (Lord Phillips and Lord Brown) is that the tests are interchangeable. The second (Lord Hope, Lord Carswell and Lord Neuberger) is that a case which is clearly unfounded can have no realistic prospect of success, but the converse is not true: there may be a case which has no realistic prospect of success which, however, is not clearly unfounded. I venture to suggest that that represents the limit of the

> difference between their Lordships. Both of these two approaches are I apprehend consistent with the further proposition, expressed by Lord Neuberger at paragraph 83, that a case which is *not* clearly unfounded will be one which has a realistic prospect of success.
>
> 34. I do not consider, with great deference, that the reasoning in *ZT (Kosovo)* is of great assistance in setting the bar, as it were, for the impact of the "realistic prospect of success" test in Rule 353. For what it is worth I should have thought that there is a difference, but a very narrow one, between the two tests: so narrow that its practical significance is invisible. A case which is clearly unfounded is one with *no* prospect of success. A case which has no realistic prospect of success is not quite in that category; it is a case with *no more than a fanciful* prospect of success. "Realistic prospect of success" means only more than a fanciful such prospect. Miss Giovanetti accepted this interpretation.
>
> 35. Adopting that approach, I would hold that a reasonable Secretary of State might conclude that the material contained in the appellant's fresh submissions – relating to her deteriorating health (including the suicide attempt, whether it was determined or not) and her increasing dependence on her sister – would enjoy more than a fanciful prospect of success before the AIT on an Article 8 appeal."

In those passages my conclusion was that there were two approaches in their Lordships' house but that the view of Lord Carswell and Lord Hope was to the effect that the tests propounded different approaches. It is implicit in this reasoning that in relation to paragraph 353 the court's supervisory role is fulfilled by a Wednesbury approach albeit tempered by the demands of anxious scrutiny. That seems to me to be the conclusion that was there reached, and it is of course consistent with earlier authority contained in WM and Cakebay.

10. What then is the consequence of that conclusion for the purpose of the present case? It seems to me that the issue upon which Sir Richard Buxton granted permission to appeal falls to be resolved by the court's firmly holding that the correct approach is the Wednesbury approach, and for my part I would do so.

11. That however is not the end of the case. We are required to approach these matters with anxious scrutiny albeit consistently with the public law test limited by the Wednesbury rule. In this case it seems to me that the Secretary

of State has not given reasons why in her view the appellant would enjoy no realistic prospect of success before the AIT. If realistic prospect of success means only a prospect of success which is more than fanciful, the Secretary of State has not made it clear that she has adopted that approach. But in relation to reasons Mr Kovats sought to defend the letter by submitting in effect that proper reasoning on the realistic prospect issue may be supplied by paragraphs in the letter earlier than the critical passage at paragraph 21. That, I think, will not do. The Secretary of State's earlier reasoning goes to her overview of the new representations, and it is as it happens to be noted that the decision letter omits express reference to the detention and ill treatment of which complaint was made. In my judgment the standard of reasoning on the second but critical issue arising under Rule 353 was not supplied in the Secretary of State's decision letter in this case.

12. For that reason and that reason only in my judgment the appeal is good, and I would allow it and quash the decision. If my Lords agree the consequence is that the matter would go back to the Secretary of State for a further determination as to whether or not this is a fresh claim.

Lord Justice Wilson:

13. I agree.

Lord Neuberger MR:

14. I also agree.

Order: Appeal allowed