Neutral Citation Number: [2009] EWCA Civ 447

Case No: C4/2008/2314

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
THE HON MR JUSTICE CRANSTON

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/06/2009

Before :

LORD JUSTICE LAWS
LORD JUSTICE THOMAS
and
MR JUSTICE MANN

- -

Between :

The Queen on the Application of AK (Sri Lanka)	**Appellant**
- and -	
The Secretary of State for the Home Department	**Respondent**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Mr Simon Cox (instructed by **Fisher Meredith**) for the **Appellant**
Ms Lisa Giovanetti (instructed by **The Treasury Solicitor**) for the **Respondent**

Hearing date : 14 May 2009

- -

Judgment

Lord Justice Laws:

INTRODUCTION

1. This is an appeal, with permission granted by Elias LJ on a renewed application on 17 March 2009, against the judgment of Cranston J given in the Administrative Court on 10 September 2008 by which he dismissed the appellant's application for judicial review of the Secretary of State's decision on 18 February 2008 to proceed with her removal from the United Kingdom. She was removed on the same day to Sri Lanka, where at present she remains. The case has a convoluted procedural history, as I shall show. The principal issue concerns the proper interpretation of paragraph 353 of the Immigration Rules (HC 395) dealing with "fresh claim[s]" to enter or remain in the United Kingdom on asylum or human rights grounds. It is headed "Fresh Claims" and 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 "When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and,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."

Then 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."

The importance of Rule 353 is that where the Secretary of State determines that the further submissions do amount to a fresh claim, the subject enjoys a statutory right of appeal to the Asylum and Immigration Tribunal (AIT) against the Secretary of State's substantive adverse conclusion on the merits. If she determines otherwise, there is no such right of appeal.

THE FACTS

2. The appellant is a Sri Lankan Tamil born on 28 September 1969. She is a single woman. She entered the United Kingdom unlawfully on 17 December 1992 and claimed asylum on 23 December 1992. That application was not determined until 29 June 1995 when it was refused by the Secretary of State. Her appeal was dismissed on 14 November 1996. On 6 December 1996 she was refused leave to bring a further appeal to the Immigration Appeal Tribunal (IAT).

3. At that time, of course, the Human Rights Act 1998, giving effect in domestic law to rights guaranteed by the European Convention on Human Rights (ECHR) still lay in the future; it was to come into force on 2 October 2000. On 16 May 2002 a human rights claim to remain in the United Kingdom was put forward on the appellant's behalf. It was something of a scattergun application: ECHR Articles 2, 3, 5, 6, 8 and 14 were relied on. The application was refused by the Secretary of State on 23 September 2003. The appellant appealed. Her appeal was heard by Mr Adjudicator Boardman on 11 December 2003. At the hearing only Article 8 (which guarantees respect for private and family life) was relied on, and accordingly the Adjudicator's determination was confined to Article 8 considerations. The determination was promulgated on 23 December 2003. In it the Adjudicator recorded the evidence about the work the appellant had been doing in the United Kingdom (which included a BSc in business information technology and a one-year placement with General Technology Ltd), and described her domestic circumstances thus:

> "15. The Appellant has lived with her siblings ever since she arrived in the UK. Initially she lived with her brother. He went to live in Canada in 1999. The Appellant has lived with her sister since then. She also has several first cousins and an uncle in the UK. They frequently meet at family functions and social activities.
>
> 16. The Appellant has made several friends in the UK, through work and university education, and associates with them very frequently.
>
> 17. The Appellant is a Hindu, and practises her religion fully. She worships each week at the Tooting Hindu Temple. She has made several friends there. She also helps there in several ways, including youth educational and cultural activities.

...

> 20. The Appellant says that she has no close relatives in Sri Lanka. All her 8 siblings are living abroad. Her parents and 2 siblings are in Canada; one brother is in Australia; another is in Switzerland; one is in Germany; 2 are in India; and of course the sister she is living with is in the UK."

4. The Adjudicator's conclusions are important, because a principal question in the case is whether material put forward on behalf of the appellant since his determination constitutes, or is capable of constituting, a fresh claim within paragraph 353 of the Immigration Rules. One needs therefore to understand what was the scope of the Adjudicator's decision on the original claim (that is, the "scattergun" application of 16 May 2002). Mr Adjudicator Boardman found that the appellant had not established family life in the United Kingdom for the purposes of Article 8. He held (paragraph 28) that the appellant's association with her brother, and particularly her sister with whom she was currently living, amounted "at most to the normal emotional ties of members of a family"; but these were insufficient for Article 8. He accepted (paragraph 29) that the appellant had established a private life in the United Kingdom, and her removal to Sri Lanka would interfere with it. However (paragraph 30) he also found that the Secretary of State's decision of 23 September 2003, rejecting her application to remain, was proportionate to the legitimate aim of immigration control. He set out no less than fourteen factors which he had taken into consideration. Nine of them militated in her favour (they included the duration of her residence here and her domestic circumstances) and five against. It is to be noted, in light of what was to come, that there is no reference in the determination to any mental health difficulties suffered by the appellant.

5. And so the appellant's appeal was dismissed. Her application for leave to appeal to the IAT was refused on 29 March 2004. However she was not removed from the United Kingdom, and on 12 April 2005 an application was put forward on her behalf by the Legal Advisory Service seeking indefinite leave to remain. Reference was made to the appellant's long residence in the United Kingdom (over twelve years). The application letter stated among other things that "[s]he is now supported by her relatives. She has no one to go back in Sri Lanka and well settled in mind to live here with her relatives." The application was rejected because the prescribed form had not been used. The proper form was then completed, signed by the appellant, and submitted on 29 April 2005. In the body of the form the appellant stated:

> "I have no one in Sri Lanka now. Since arrival living with my sister in this country and established a well settled private and family life for me in the UK. [*sic*]"

6. There is also among the papers a letter from the sister with whom the appellant is living, addressed "To whom it may concern". It bears an earlier date, 14 March 2005. The sister stated:

> "I confirm that I have been supporting [the appellant] by providing accommodation which includes meals and pay her a weekly allowance for her miscellaneous expenditure."

As I understand it, this letter was submitted to the Secretary of State at some stage in the course of this correspondence, which continued with a further letter from the Legal Advisory Service dated 19 November 2005. That stated:

> "During her thirteen years stay in this country, she obtained a degree in information technology and leading a peaceful life [*sic*]. She has her sister and other relatives here and well settled as a family with all of them. She has no one in Sri Lanka..."

7. There seems to have been no response from the Home Office. The next document is a letter dated 18 December 2006 from a newly instructed firm of solicitors, Jeya & Co. It was expressed to be in support of the appellant's "application to remain in the UK on the basis of long residence". The solicitors relied on the length of her residence here – "over 14 years". They said "she has not drawn on public funds, having the support of her sister and cousin". They referred to the Adjudicator's decision, and claimed that it would not be proportionate to remove the appellant now, given the further passage of time. Of particular importance is a letter, enclosed by Jeya & Co, from the appellant's general practitioner, Dr Nicholas-Pillai. It was dated much earlier: 11 November 2004. It described a history of post-traumatic stress disorder, loss of appetite, loss of weight, flashbacks, nightmares and other matters. It said she was depressed and exhibited typical signs of post-traumatic stress syndrome, and "needs continuous treatment and social support".

8. There is then a letter from the appellant herself dated 3 July 2007, referring to "a large number of close relations in this country, [including] my sister..." and stating:

> "My health has deteriorated over the past fourteen years, which has led to depressions and other ailments, I have been losing appetite with weight loss and my doctor suspects that I may be suffering from anorexia."

The Legal Advisory Service wrote again on 11 September 2007, in terms requesting that the application for indefinite leave to remain be considered "under the Long Residence Ground within the Immigration Rules" (a reference, as I understand it, to paragraph 376B of the Rules). They said "[the appellant] is now supported by her sister" but made no reference to her mental health.

9. The letter of 11 September 2007 completes the relevant correspondence. On 17 January 2008 a decision letter was prepared within the Home Office. It is of the first importance to note that no consideration was given in this letter (nor at any other time since the refusal of the appellant's application for leave to appeal to the IAT on 29 March 2004) to the question whether any of the communications sent to the Secretary of State from April 2005 onwards constituted a fresh claim within the meaning of Rule 353. On the same day, 17 January 2008, a decision was also made (by a person with the rank of Deputy Director) to implement what has been referred to as the "same day removal" procedure pursuant to paragraph 60.5 of the Home Office Operational Enforcement Manual. This procedure, which is applied where there is a documented risk of suicide or other self-harm, meant that the appellant would be removed from the United Kingdom on the same day as she was notified of the decision to remove her, in contrast to the normal practice under the Manual which is to allow 72 hours from the time notice is given. The ordinary procedure affords the subject an opportunity, if s/he acts speedily enough, to mount a legal challenge to his/her removal. But it was decided to apply the same day procedure in the appellant's case "in view" – as it was put – "of the medical circumstances": presumably a reference to Dr Nicholas-Pillai's report, and perhaps the letter of 3 July 2007 from the appellant herself. The Secretary of State had no other knowledge of the "medical circumstances".

10. Thus on or by 17 January 2008 a decision – at least a provisional decision – had plainly been reached to reject the appellant's outstanding application for indefinite leave to remain and to remove her to Sri Lanka. But the letter prepared on 17 January (which I will describe shortly) was not served on the appellant at the time it was written. A month passed. On 18 February 2008 the appellant reported to the Home Office premises at Becket House as she was required to do. She was detained, and what is called a "mitigating circumstances" interview was conducted. The purpose of the interview seems to have been to ascertain whether there were any facts or circumstances which might compel revision of the provisional decision to reject the appellant's claim and remove her.

11. At the mitigating circumstances interview the appellant produced a letter from another doctor, Dr Sakthi, dated 13 June 2006. Thus as with Dr Nicholas-Pillai's letter, the Secretary of State only saw this document long after it was written. Dr Sakthi stated:

> "[The appellant] has been suffering from marked anxiety and agitation along with depressive features. These episodes of anxiety have been worsening over the last two months. She is unable to concentrate, sleep or eat and is clinically displaying psychosomatic symptoms suggestive of deep-seated anxiety."

At the same interview the appellant also stated that she had attempted to take her own life two months previously, having taken an overdose of painkillers. She said she was being supported by her sister, on whom she was dependent. The

interviewing officer or officers were sufficiently concerned about the risk of suicide to refer the case up the line to an inspector. He decided that the removal should proceed. The decision letter drafted the month before was dated 18 February 2008 and served on the appellant. It was not amended or altered in any way to take account of what the appellant had said in the mitigating circumstances interview.

12. The terms of the decision letter are of some importance. It was addressed to the Legal Advisory Service, and stated to be in reply to their letter of 11 September 2007 and also to the representations of Jeya & Co of 18 December 2006. In it the Secretary of State considered and rejected the appellant's claim to stay as a long-term resident under the Rules: there is no complaint about that and I need not go into it. Express consideration was then given to the question "whether it would be appropriate to allow your client to remain in the United Kingdom exceptionally outside of these rules". It is plain that the Secretary of State was thereby addressing any possible entitlement which the appellant might enjoy to remain here in the exercise of her rights under ECHR Article 8. Reference was made to Dr Nicholas-Pillai's letter, to the fact that no up-to-date medical report had been provided, and to the availability of relevant medical facilities in Sri Lanka. It was accepted that "during [the appellant's] time in the United Kingdom she may have established a private life" – a grudging acknowledgement, given the Adjudicator's plain acceptance in 2003 that private life was made out. The letter proceeded to state that any interference with her private life could be justified, and

> "[I]t is our view that any interference with your client's family and/or private life is necessary and proportionate... Specifically we have weighed up the extent of the possible interference with your client's private/family life, and with particular regard to her length of residence, against the legitimate need to maintain an effective national immigration policy."

13. And so the appellant's removal went ahead on 18 February 2008. There followed an application on the appellant's behalf for permission to seek judicial review. The grounds concerned only the circumstances of her removal, and not the substantive decision to reject her claim to remain. It was asserted that the Secretary of State was in breach of her own policy instructions in authorising and effecting removal as she did. Judicial review permission was refused after a hearing by Griffith Williams J, and in this court by Sedley LJ on the papers. On an oral renewal Buxton LJ also refused permission, but suggested that fresh judicial review proceedings might be formulated in order to challenge, not the mechanics of removal, but the decision to remove itself. Such an application was duly launched. Hence the proceedings before Cranston J (brought with permission granted by Buxton LJ on 30 July 2008), and now the appeal in this court.

14. There is a postscript to the facts. A further letter from the Secretary of State in August 2008 asserted that no "fresh claim" within Rule 353 of the Immigration Rules had been put forward. Now, the very question whether the material put before the Secretary of State on the appellant's behalf since the Adjudicator's determination of 23 December 2003 does or might amount to such a fresh claim is at the core of this appeal. But as I have said that question was not considered at all in January/February 2008, when the decision letter was drafted and served. The Secretary of State has not contended in these proceedings that her failure to consider the question then, if it was an unlawful failure, was cured by this later letter. The appellant, therefore, has never had to confront any such argument, or other reliance on the August letter. In those circumstances I think it right to leave it out of account in resolving this case. Cranston J took the same view (paragraph 19 of his judgment).

THE ISSUES

15. Before the judge below two grounds of challenge to the decision of 18 February 2008 were relied on. The first was that the Secretary of State had taken no account of the facts put before her officials by the appellant at the "mitigating circumstances" interview, in particular her attempted suicide two months previously. As I have said, the decision letter drafted the month before was assigned the date 18 February 2008, but not amended or altered in any way to take account of what the appellant had then said, or to notice the contents of Dr Sakthi's letter, which the appellant had then produced. Secondly it was said that the Secretary of State acted perversely in failing to decide that a fresh claim had been put forward under paragraph 353.

16. In this court these questions have in effect been amalgamated. The two issues we have to decide, as I would formulate them, are rather different from those which Cranston J was called on to resolve. The first is whether, as at 18 February 2008, "further submissions" had been made to the Secretary of State since the Adjudicator's determination of 23 December 2003, such as to require consideration to be given to the possibility that a fresh claim had been advanced within the meaning of Rule 353. That issue was not considered by the Secretary of State on 18 February 2008, or at all until the later letter of August 2008 which for reasons I have explained I would leave out of account in resolving this appeal. The second issue is whether a fresh claim was indeed advanced on the appellant's behalf after 23 December 2003; or at least whether a reasonable Secretary of State might have so concluded. Both of these issues raise points as to the proper interpretation of Rule 353, and its application to the facts of the case.

THE PROPER CONSTRUCTION OF RULE 353

17. For convenience I will set out the Rule again:

> "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."

The First Issue and the Proper Construction of Rule 353 – "Further Submissions"

18. Thus the application of the Rule is triggered by the making of "further submissions". The meaning of this expression is critical to the first issue as I have formulated it. This was considered by the learned judge below, who said:

> "30. ……It seems to me that whether there are further submissions must be decided in the light of the circumstances of the particular case. 'Further' simply means additional. There needs to be additional information before Rule 353 is engaged. Use of the word 'submission' indicates that something more is required than an insubstantial and unsubstantiated assertion. There must be some substance to the additional material for it to constitute a further submission. That does not mean that the additional information has to be in any way elaborate. In the light of new country information, for example, Rule 353 might be easily triggered by a simple assertion. It is a question of fact whether additional material constitutes a further submission. But further submission, in the terms I have indicated, there must be. Not to require this approach would mean that the process could be frustrated by the need to engage in the refined analysis required by *WM* [sc. *WM (DRC)* [2006] EWCA Civ 1495, [2007] IAR 337], notwithstanding the most elaborate previous consideration of a person's case, by an insubstantial and unsubstantiated assertion on the eve of removal."

WM/DRC is an earlier decision of this court on Rule 353 to which I will refer further shortly.

19. The judge's analysis of the term "further submissions" is, with respect, less than satisfactory. As I understand his reasoning, he concludes that material put forward by an applicant giving renewed support to a human rights or asylum claim after a first refusal will only amount to "further submissions" if two conditions are met. The first is that the material must be "additional" – that is, I take it, new by comparison with what had been said before; the second that it must be substantial – there must be "some substance" to it. As for the first of these, the structure of the Rule shows that "further submissions" may contain nothing new. It requires the Secretary of State, having received further submissions, to decide whether they are "significantly different from the material that has previously been considered". Necessarily, therefore, the material advanced may amount to "further submissions" whether they are "significantly different" (that is, new) or not. The judge's second requirement, that there must be "some substance" to the submissions, is apt to invite arid debate in marginal cases as to whether any submissions properly so called have been advanced at all. I think we should be alert to discourage the elaboration of satellite issues of that kind.

20. In my judgment "submissions" merely means representations – short or long, reasoned or unreasoned, advanced on asylum or human rights grounds. If the representations are unreasoned, or barely reasoned, they will no doubt be readily and summarily dismissed by the Secretary of State. Unlike the judge I do not consider there is any real risk that this approach will commit the courts to "the refined analysis required by *WM (DRC)*". Indeed I doubt whether the process of decision-making under Rule 353 which that case outlines is accurately described as "refined analysis". Buxton LJ (with whom Jonathan Parker and Moore-Bick LJJ agreed), dealing with the Rule's operation once "further submissions" have been received, said this:

> "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."

For present purposes I would respectfully emphasise Buxton LJ's statement that "[i]f the material is not 'significantly different' the Secretary of State has to go no further". A bare assertion, or something akin to it, is very unlikely to be "significantly different". I do not consider that a relatively broad approach to the meaning of "further submissions" is likely to embroil the Secretary of State, or the court on a judicial review, in an elaborate or "refined" examination of the submitted material to see whether or not it meets that description.

21. As I have said (paragraphs 9 and 14) it is a signal feature of this case that the Secretary of State never considered whether a fresh claim was being advanced on the appellant's behalf between the refusal of her application for leave to appeal to the IAT on 29 March 2004 and her removal from the United Kingdom on 18 February 2008. She did not ask herself whether the material placed before her in that period amounted to "further submissions" within the Rule. The first issue as I have formulated it requires us to consider whether it did. Strictly (since we are exercising the power of judicial review and not a statutory appellate jurisdiction) the question is, no doubt, whether a reasonable Secretary of State might have apprehended that what was put before her did not amount to further submissions. In my judgment it is clear that further submissions, attributing a broad sense to that phrase in the manner I have described, were indeed being advanced; and a reasonable Secretary of State must have appreciated as much.

22. In fairness I apprehend that the Secretary of State may have been misled or distracted by the repeated references in the correspondence from April 2005 onwards to the Appellant's putative claim to remain on the grounds of long residence. On its own that would disclose a separate claim under Rule 276B, which I accept would fall outside Rule 353. On any view of Rule 353 the fresh claim constituted or allegedly constituted by the further submissions must be advanced on asylum or human rights grounds; that is the whole scope of the Rule. However the correspondence during the relevant period plainly placed reliance on human rights grounds. So much is implicit in the Legal Advisory Service's letters and the letters from the appellant herself, her sister and the doctors; and is made express in the form signed by the appellant on 29 April 2005 and the solicitors' letter of 18 December 2006 (with its reference to proportionality).

The Second Issue and the Proper Construction of Rule 353 – "had not already been considered"

23. The second issue as I have described it is whether a fresh claim was indeed advanced on the appellant's behalf after the IAT's refusal of leave to appeal on 29 March 2004; or more properly – again since we are exercising the judicial review jurisdiction – whether a reasonable Secretary of State might have so concluded. This issue proceeds on the premise, which in dealing with the first issue I have

held to be established, that "further submissions" within the Rule were placed before the Secretary of State.

24. As is plain from the terms of the Rule itself, and underlined by Buxton LJ's judgment in *WM (DRC)*, there are two steps in the Secretary of State's consideration of the question whether further submissions thus placed before her constitute a fresh claim (though the second step only arises if the first is resolved favourably to the claimant). First she must ask herself whether the further submissions have already been considered. If not, she must secondly ask herself whether "taken together with the previously considered material [the further submissions enjoy] a realistic prospect of success".

25. The first of these steps, it may well be thought, requires very little to be said as to the construction of the Rule: the further submissions will either have been already considered or not, and whether they have been is purely a matter of fact. That is so; but again it is important to have in mind the signal feature of the case that the Secretary of State never asked herself whether any of the material put forward between the refusal of her application for leave to appeal to the IAT on 29 March 2004 and her removal from the United Kingdom on 18 February 2008 had been so considered.

26. In the circumstances I should very briefly address the requirement in the Rule that the content of the further submissions "had not already been considered". Clearly, no particular form is required in which new material to be put before the Secretary of State has to be cast. And such new material may assert a human rights or asylum claim in a different category from what was claimed the first time (for example, a claim under ECHR Article 3 where only Article 8 had been earlier advanced, or a claim based on fear of religious persecution where political persecution had been advanced before). Or the same category of claim may be persisted in, but new facts asserted to support it.

27. So much is no doubt obvious. In this case, however, the Secretary of State failed to recognise that new material, not previously considered, was being advanced. The appellant's claims of deteriorating health, and of increasing reliance on her sister, though interspersed with the long residence claim and sometimes obliquely stated, must in my judgment have told the reasonable and fair-minded reader that new facts, not previously considered, were being advanced to support the appellant's Article 8 case. And the proof of the pudding, to use a tiresome metaphor, is in the eating. As I have shown (paragraph 12) the January/February 2008 decision letter in fact confronted the Article 8 case, or at least part of it. It referred to Dr Nicholas-Pillai's letter. The references to the appellant's "private/family life" go some way towards accepting that the appellant enjoyed a family life in the United Kingdom; but that was contrary to the Adjudicator's express conclusion. There is express reference to proportionality, and (twice) to Article 8 itself. So the Secretary of State paid attention, at least to some extent, to previously unconsidered facts put forward in further submissions in support of an

Article 8 case. But she failed to recognise that that put the case in Rule 353 territory.

The Second Issue and the Proper Construction of Rule 353 – "a realistic prospect of success"

28. As I have shown the second step in the Secretary of State's consideration of the question whether further submissions placed before her constitute a fresh claim requires her to ask herself whether "taken together with the previously considered material [the further submissions enjoy] a realistic prospect of success [sc. on an appeal to the AIT]". Mr Cox for the appellant goes so far as to submit that on the material before her (and now before us) a reasonable Secretary of State, notwithstanding that she herself would reject the claim on the new material, must have concluded that this question fell to be answered in his client's favour. Had I accepted that submission (and my Lords agreed) I should have ordered the Secretary of State to return the appellant to the United Kingdom so as to facilitate the in-country right of appeal which she would in those circumstances enjoy. But I do not think Mr Cox's case can be pressed so far.

29. It is convenient first to consider the jurisprudence. In *WM (DRC)* Buxton LJ stated:

> "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... 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."

There is no suggestion that any less "anxious scrutiny" is required in the case of a human rights claim than in one seeking asylum.

30. I should refer also to the decision of their Lordships' House in *ZT (Kosovo)* [2009] UKHL 6, [2009] 1 WLR 348: Mr Cox says it supports his submission that the term "realistic prospect of success" in Rule 353 places only a modest hurdle in the way of an applicant who seeks to have further submissions treated as a fresh claim. In that case the appellant's claim to enter the United Kingdom on asylum and human rights grounds was certified by the Secretary of State as "clearly

unfounded" under s.94(2) of the Nationality, Immigration and Asylum Act 2002. The appellant advanced further submissions. The Secretary of State maintained her certification under s.94(2). In judicial review proceedings this court quashed the Secretary of State's decision, holding that she should have applied Rule 353 and considered whether the further submissions amounted to a fresh claim having a "realistic prospect of success".

31. Their Lordships agreed with this court's conclusion that the Secretary of State had erred in failing to proceed under Rule 353. The Secretary of State's appeal was allowed, however, on the footing (I venture to summarise) that this could have made no difference to the result. Their Lordships' reasoning contains a number of comparisons between the two tests, "clearly unfounded" (s.94(2)) and "[no] realistic prospect of success" (Rule 353), and it is these to which Mr Cox draws our particular attention.

32. Lord Phillips of Worth Matravers made plain his view that the two tests were the same:

> "20. It is possible that the Secretary of State does not treat 'no realistic prospect of success' as constituting a test that is quite so extreme as 'clearly unfounded'... If so I consider this difference of approach to be unjustified and undesirable. If further submissions advance a sufficiently strong case to justify an in country right of appeal in the one case I cannot see why they should not do so in the other. In short I consider that the Secretary of State should apply the rule 353 procedure in respect of cases that have been certified under section 94 and should, in all cases, treat a claim as having a realistic prospect of success unless it is clearly unfounded."

Lord Brown of Eaton-under-Heywood was clearly of the same opinion, saying at paragraph 73 "[f]or the life of me I cannot see any logical distinction between the two". Lord Hope of Craighead's approach was a little more opaque:

> "46. As for the question whether there is any material distinction between a claim which is not held to have 'a realistic prospect of success' and one which is 'clearly unfounded', I think that the answer to it is that it is a question of degree... Of course the greater includes the less. One cannot say that a claim which is clearly unfounded will have a reasonable prospect of success. But the reverse is not so."

Lord Carswell did not consider that the tests were the same:

> "62. Some of your Lordships take the view that the test of 'clearly unfounded' in section 94 and a 'realistic prospect of success' under rule 353 amount to the same thing, so that it is immaterial which provision is applied. I am not convinced that this is correct. One can envisage situations - though they may be rare - in which the tests would not produce the same result and Lord Hope has illustrated the lack of congruity between the tests in para 46 of his opinion. The possible difference is not, however, a matter of great consequence. The *Yogathas* decision underlines the importance of preserving the strictness of the clearly unfounded test. Whatever the difference may be, it follows from the strictness of that test that a claimant to whom it is applied could not satisfy the 'realistic prospect of success' test."

Lord Neuberger's reasoning requires careful attention:

> "80... My initial opinion was that there was no difference between the effects of the two expressions, and that they were in practice mirror images of each other. In other words, it seemed to me that, as a matter of ordinary language, if a claim is clearly unfounded then it has no realistic prospect of success (and *vice versa*), and if it has a realistic prospect of success then it is not clearly unfounded (and *vice versa*)...
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> 81. However, having considered what Lord Hope and Lord Carswell say on this point, I can see how there might conceivably be circumstances in which a person entrusted with a decision could conclude that a case, which had no realistic prospect of success, might nonetheless not be clearly unfounded. I must admit to finding it very hard to conceive of such a case in practice. In the end, however, each set of facts must be considered by reference to the provision which applies to them. Accordingly, I am persuaded that it would be wrong to lay down as a general proposition that, if a particular set of facts would have no realistic prospect of success under rule 353, then that set of facts must, as a matter of law, be clearly unfounded under section 94. As Lord Hope points out, different expressions have been used by the drafters, and the two provisions are intended to apply in different types of circumstances.
>
> ...

> 83... I agree that, if, in a case where the primary facts are not in dispute, the court concludes that a claim is not 'clearly unfounded' or (which is, of course, the same thing) that a claim has some 'realistic prospect of success', it is hard to think of any circumstances where it would not quash the Secretary of State's decision to the contrary. However, I would again be reluctant to suggest that there is a hard and fast rule to that effect."

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. The facts may require further investigation. Article 8 can require what may be a difficult judgment to be made. Albeit that the Secretary of State may maintain her existing conclusion against the appellant (and she will wish to reconsider that in the light of this judgment), she may on reflection decide that there is enough to justify further scrutiny by the AIT.

CONCLUSION

36. For all these reasons I would allow the appeal. If my Lords agree, counsel will no doubt assist us as to the form of order to be made.

Lord Justice Thomas:

37. I agree.

Mr Justice Mann:

38. I also agree.