Neutral Citation Number: [2010] EWHC 2501 (Admin)

Case No: CO/260/2010

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
In the matter of an Application for Judicial Review

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 October 2010

Before :

HIS HONOUR JUDGE CURRAN QC
Sitting as a Deputy Judge of the High court

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Between :

THE QUEEN **On the application of JOMA ROSHAN**	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

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Mr Sharaz Ahmed (instructed by **Messrs Asghar & Co**) for the **Claimant**
Mrs Lisa Giovanetti (instructed by **The Treasury Solicitor**) for the **Defendant**

Hearing dates: 6 October 2010

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Judgment

His Honour Judge Curran QC :

Introduction

1. The Claimant is an Afghan national, who entered the United Kingdom illegally. The exact date of entry is unknown, but he claimed asylum on the 20th December 2005. His claim was rejected. The Immigration Judge held that a particular risk of persecution asserted by the Claimant if he were returned to Afghanistan, was not objectively well-founded. The Immigration Judge nevertheless found that such persecution was genuinely feared by the Claimant.

2. He is now a failed asylum seeker whose appeal rights have been exhausted. On 7th January 2010 solicitors on his behalf made further submissions to the Defendant, enclosing various documents, which, they contended, would amount to a "fresh claim" under rule 353 of the Immigration Rules, in that the evidence was significantly different from material which had previously been considered. The Defendant rejected that contention.

3. The Claimant was given permission to apply for judicial review of that decision by Burnett J on 27th January 2010, who, while rejecting claims based upon Article 8 of the ECHR and upon Article 15 (c) of the Qualification Directive, observed that,

> "… it is arguable that an Immigration Judge might take a different view from the [Defendant] with respect to risk in the light of what the Claimant says has happened to his brother."

Some relevant names and terminology

4. Before explaining the reference to what has happened to the Claimant's brother, I should say something about the following ethnic and political groups and individuals whose names require brief explanation in order to follow the evidence:

Hazara – an Afghan ethnic group, which the Claimant is said to belong to.

Hezb-e-Wahadat – an activist Hazara group, opposed to the Taliban.

Haji Mirza – a man who is said to be have been a Hezb-e-Wahadat local commander.

Mohammad Roshan – the Claimant's brother.

The Immigration Judge's findings of fact

5. The hearing before the Immigration Judge, Mrs Baker, was on 6 April 2006. The Claimant was unrepresented. The decision dismissing the appeal was given on 13 April 2006.

6. In general, she found the Claimant and his brother (Mohammad Roshan) to be consistent and credible with regards to their account of events in Afghanistan. She formed the view that they "were telling the truth about the core of his claim." On the issue of the Claimant's age, from his physical appearance and demeanour in court she thought he was at least 18, and she thus had doubts about his evidence that he was only 15. She also expressed doubts as to his credibility on three points of detail in his evidence.

7. The relevant background to the matter is helpfully summarised in her findings of fact. She found that the Claimant's late father had been involved with Hezb-e-Wahadat at some level. Haji Mirza was a local Hezb-e-Wahadat commander in the area where the Claimant and his family lived before the Taliban came to prominence. When the Taliban did assume power in Afghanistan the Claimant's father had been taken away by them and had been forced to give information which "almost certainly resulted" in the killing of the brother of Haji Mirza by the Taliban. She also found that the Claimant's father had been involved in fighting for the Taliban and was killed in that fighting. Haji Mirza subsequently fled to the North of Afghanistan, the Immigration Judge said, but "it is unclear what level of power he had then and even less clear what power he may have now."

8. She found as a fact that the Claimant had no family in Afghanistan apart from an uncle with whom he stayed before leaving Pakistan. Both the Claimant and his brother indicated that their uncle had not wanted them to remain at his home, and the Immigration Judge found that they were no longer welcome at their uncle's home.

9. The judge reached the conclusion that, "… the Claimant genuinely fears Haji Mirza but … this is based upon events which took place before his father died approximately four years ago. The [Claimant] has never received adverse attention from Haji Mirza directly and the most that has happened is that a verbal threat to extract revenge [for the death of Haji Mrza's brother] on his father's family was made before his father died."

The factual basis asserted for a fresh claim

10. The basis of the Claimant's claim now is that since the determination on 6 April 2006, the situation has changed. The Claimant's brother, Mohammad Roshan, who had given evidence before the Immigration Judge, was himself removed from the United Kingdom on 16 June 2009, and was returned to Afghanistan.

11. The solicitors now acting for the Claimant wrote to the Defendant on 7th January 2010, asserting that Mohammad Roshan had been kidnapped and possibly tortured and killed. They enclosed a document in a foreign language which is said to be an Afghan police report confirming that he had been kidnapped by the Taliban. The unattributed translation of this reads as follows:

> "Mohammad Roshan…he was discharged from hotel Chahal Satoon, Kabul to Ghanzi, was kidnapped by the Taliban on 24.06.2009"

It was therefore submitted that the Claimant not only had a continuing fear of persecution from members of the Hizb-e-Wahadat but also from the Taliban.

12. In addition, the Claimant relies upon a newspaper cutting which was not before the Immigration Judge and not available at the date of the Immigration hearing on 6 April 2006. The unattributed translation of this reads:

> "[1st December 2009 purports to be the date of the newspaper] Mohammad Roshan…was deported from England to Afghanistan on 17.06.2009. On 24.06.2009, left Shal Satoon and was on his way to Ghazni province, he has since been missing and if anyone has any information about his whereabouts...' [they are asked to make contact.]

13. The Claimant also relies upon letters from friends and relatives which are typified by that from a man called Hamayoun Rajabi dated 6th January 2010:

> "Around two months ago I was informed by my uncle that he had met with Joma's uncle and he was told that Joma's brother had been kidnapped…The Taliban do not like failed asylum seekers or people who are returned from the UK or America and often these people get punished."

The Law

14. No dispute arose over the relevant principles to be applied in circumstances such as these. Rule 353 of the Immigration Rules is in the following terms:

> "When a human rights or asylum claim has been refused 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."

15. The Secretary of State's task was explained in *WM (DRC)* [2006] EWCA Civ 1495 as follows:

> "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. To set aside one point that was said to be a matter of some concern, the Secretary of State, in assessing the reliability of new material, can of course have in mind both how the material relates to other material already found by an adjudicator to be reliable, and also have in mind, where that is relevantly probative, any finding as to the honesty or reliability of the applicant that was made by the previous adjudicator. However, he must also bear in mind that the latter may be of little relevance when, as is alleged in both of the particular cases before us, the new material does not emanate from the applicant himself, and thus cannot be said to be automatically suspect because it comes from a tainted source.
>
> "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, as [counsel] pertinently pointed out, 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."

16. The task of *the Court* was explained in *WM* in the following way: in *R v SSHD ex p Onibiyo* [1996] QB 768 Sir Thomas Bingham MR, as he then was, giving the judgment of the court, "with some misgivings" concluded that the decisions of the Secretary of State on such matters as this might only be challenged on *Wednesbury* grounds. Less diffidently, the CA in *Cakabay v SSHD* [1999] Imm AR 176 made it clear that that alone was the test. However, although the issue was not pursued in detail, the court in *Cakabay* recognised, at p191, that in any asylum case anxious scrutiny must enter the equation. Whilst, therefore, the decision remains that of the Secretary of State, and the test is one of irrationality, a decision will be irrational if it is not taken on the basis of anxious scrutiny. Accordingly, a court when reviewing a decision of the Secretary of State as to whether a fresh claim exists must address the following matters.

> "11. First, has the Secretary of State asked himself the correct question? 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 … The Secretary of State of course can, and no doubt logically should, treat his own view of the merits as a starting-point for that enquiry; but it is only a starting-point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind. Secondly, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? If the court cannot be satisfied that the answer to both of those questions is in the affirmative it will have to grant an application for review of the Secretary of State's decision."

On the facts in the case of *WM,* which concerned an asylum seeker from the Democratic Republic of the Congo ("DRC"), Buxton LJ said,

> "Were I deciding this matter myself, I would hold that there was a realistic prospect that an adjudicator … would conclude that on the material as a whole there was real risk of WM being persecuted on return [to the DRC.]"

But that conclusion would depend largely on the view that he took of a witness, a Dr Kennes, who was a respected and long-standing expert on the DRC, but whose observations largely did not address the particular position of WM, or might be said to have been speculative. There were two matters of importance in the witness's evidence however: first, a hearsay account of an encounter between a researcher employed by him who was seeking to find out more about WM and his hospital and an adviser to the Interior Minister in the DRC, some three years after the events narrated by WM, was still aware of WM, and told the researcher that WM was "a bad person, a suspect", and that his case was "political". Secondly, that information about persons abroad who were active in political opposition, as was WM, and also about failed asylum seekers, was often transmitted to the DRC by the DRC Embassy in London.

> "The issue of whether the Secretary of State was irrational not to take that view is more difficult. There are undoubted difficulties about all of the new evidence, which the Secretary of State has indicated. I am not prepared to say that he has not given the material anxious scrutiny, and he did not make the mistake of thinking that the evidence was undermined by the previous finding of lack of credibility on WM's part. The evidence comes from a third party who is to be assumed not to be influenced by WM. I have concluded, however, that the Secretary of State's approach indicates that he asked himself the wrong question: the first issue set out in §11 above. Although Dr Kennes' evidence is in general terms, and not substantiated in detail, it is evidence of a type that, because of the difficulties of obtaining information from countries like the DRC, immigration tribunals often do consider. Granted that, *and that the evidence cannot be dismissed as simply implausible*, it is impossible to say that an adjudicator could not properly come to the conclusion that the claim is well-founded; so the evidence's bearing on the case is a matter for the adjudicator, and not for the Secretary of State." [Emphasis added.]

The Claimant's submissions

17. The Claimant submits, *inter alia,* that,

    i) The test is a modest one.

    ii) The test must be conducted with anxious scrutiny since a failure could expose an applicant to persecution. The fact that the Claimant's brother has been, or may have been, kidnapped requires anxious scrutiny.

    iii) The Immigration Judge had found the Claimant to be (essentially) a credible witness and accordingly made findings of fact, which supported the basis of the Claimant's claim for persecution and protection. The Immigration Judge had dismissed the appeal on grounds that there was insufficient evidence of the current situation and found that there was no evidence of risk upon return.

iv) The evidence now relied upon by the Claimant was not available and therefore, not before the Immigration Judge at the appeal hearing. It is evidence which is *'significantly different'* (rule 353 (i)) from the evidence that was before the Immigration Judge.

v) This evidence taken with the credibility findings of the Immigration Judge does create a *'realistic prospect of success'* (para.353 (ii)). Had the evidence of risk on return been available, the appeal would have been allowed. The Claimant does not need to demonstrate that he would succeed at appeal, but that there exists a *'realistic prospect of success'*.

vi) The new material must be considered in the light of previous credibility findings by the Immigration Judge. The probative value to be attached to the fresh material is to be weighed together with the overall findings made by the Immigration Judge on credibility. On behalf of the Claimant is argued that since the "core" of the Claimant's claim was found to be credible, the probative value to be attached to the fresh documents and evidence is substantial, which creates a realistic prospect of success.

Submissions on behalf of the Secretary of State

18. Miss Giovannetti, for the Secretary of State, summarised her case as follows.

i) The credibility of the Claimant, and thus the reliability of the documents he put forward as fresh evidence, was open to doubt. He had been convicted of using a false passport (in an attempt to travel to France) and twice of working illegally. She also pointed to four respects in which the Immigration Judge had not been prepared to accept the Claimant's evidence.

ii) Whilst Miss Giovannetti did not positively assert that these documents were forgeries, she pointed out that documents such as these might be readily obtainable in Afghanistan for payment. They might even genuinely emanate from the sources claimed for them, whilst being quite false in terms of content. Miss Giovannetti drew my attention to the case of *Tanveer Ahmed* [2002] UKIAT 00439 at ¶31 and ¶38 in this respect.

iii) Miss Giovannetti pointed out that the source asserted for both the police report and the newspaper cutting was the uncle of the Claimant already mentioned. Before the Immigration Judge both the Claimant and his brother had asserted then that they had no contact with this uncle, who had long ago sent them away and refused to have them to stay at his home.

iv) Even if the documents were genuine and accurate, however, Miss Giovannetti submitted that they took the Claimant's case no further, as they did not show that the brother had been the subject of a revenge attack by Haji Mirza. They did suggest that the brother had been possibly kidnapped by the Taliban, with whom Haji Mirz was actually in conflict, so that to that extent the material was in fact contradictory of the Claimant's case.

v) The only safe inference to draw was that if the brother had been kidnapped at all, he was kidnapped on a road from Kabul into the interior of the country.

That was a misfortune which might befall any traveller using such a road: Miss Giovannetti drew my attention to evidence from Human Rights Watch as to this.

Conclusion

19. I begin by reminding myself that the following matters are not in dispute:

    i) Since the hearing before the Immigration Judge the Claimant's brother has been returned to Afghanistan.

    ii) Despite what he had said before the Immigration Judge, following the exhaustion of his appeal rights, the Claimant had, in December 2009, been prepared to return to Afghanistan voluntarily (albeit on the basis that he might receive payment for agreeing to do so.)

    iii) The cutting and police report were received by solicitors acting for the Claimant in January 2010. It was then said for the first time that the brother had disappeared, and then that a fresh claim was asserted on behalf of the Claimant.

    iv) There is no reference to Haji Mirza in any of the documents relied upon. By contrast, in some the Taliban are referred to as probable culprits in the kidnapping.

    v) The Immigration Judge had found as a fact that the Claimant had a genuine fear of Haji Mirza, and that Haji Mirza had indeed made a threat to exact revenge on the Claimant's father's family.

20. It is common ground also that the content of the documents has not been previously considered. Indeed, it would have been impossible for the material to have been considered previously, as, *ex hypothesi*, the references to the disappearance of the brother could only have been made after his removal from the jurisdiction.

21. Bearing all these matters in mind, I must first consider the reliability of the documents which are being put forward as the basis of the further submissions. I do not consider that the points made against the Claimant, which Miss Giovanetti originally described as being relevant to his "personal credibility" – his conviction for using a false passport, his illegal working, and such few adverse findings made against him by the Immigration Judge – are matters which cast such a shadow over him as a witness that I should regard the documents he puts forward as intrinsically unreliable. He is not a man who has convictions for forgery or for trafficking in forged documents. He was using a false passport in an attempt to leave this country at a time when he was liable to be removed to Afghanistan. Working illegally is not inconsistent with basic honesty, especially where the worker has no other means, or very limited means at his disposal: at the very least, it is better than supporting himself by resorting to crime.

22. Of course it is *possible* that the documents are worthless, and may have been obtained in one of a number of irregular ways suggested as possible by the Defendant. On the other hand, they may not be worthless. It might very well be, in view of some of the criticisms made by the Secretary of State, that those acting for the Claimant would

advise him to obtain (if he can) certified copies of the original newspaper notice and police report, officially authenticated at source, and certified translations of each, if he is to improve his prospects of success in relying upon them in the future. It may also be that an omission to take such steps could in any future consideration of the matter be regarded as suspicious in itself. Be that as it may, I cannot regard these documents as "manifestly contrived or riddled with inconsistencies" – to borrow the phrase used by Carnwath LJ in *YH* [2010] EWCA Civ 116, at paragraph 24, when considering the need for anxious scrutiny of the basis for a decision (such as removal to a foreign country) which might put an applicant's life at risk.

23. Carnwath LJ used the phrase I have quoted when reflecting upon the fact that whilst anxious scrutiny needs to be given to every factor which might tell in favour of an applicant, there is a balance to be struck, and "the cause of genuine asylum seekers will not be helped by undue credulity towards those advancing stories which are manifestly contrived or riddled with inconsistencies."

24. I do not think that it would be unduly credulous to give these documents some weight. Had the Claimant been responsible for contriving to obtain documents in respect of the kidnap of his brother in order to provide spurious support for what the Immigration Judge found was a genuine assertion of fear by him of persecution either by Haji Mirza, or by members of Hezb-e-Wahadat on behalf of Mirza, it is remarkable that (a) not only does no reference to either appear in the documents; but (b) such reference as there is to the perpetrators of the kidnapping is to the Taliban, their political and military opponents. Whilst this inconsistency was a matter relied upon originally by the Defendant, it seems to me to be arguably more telling a point in favour of the Claimant. It is a point which may require development by each side.

25. In the circumstances, I consider that if in the future this new material, together with the material already considered, is put before an Immigration Judge, who applies the rule of anxious scrutiny, there is a realistic prospect of such a judge thinking that the Claimant will be exposed to a real risk of persecution on return to Afghanistan. The question of the evidence of the brother's disappearance, in combination with all the other evidence, and the inferences which may properly be drawn from the whole of the evidence are matters which, it seems to me, ought properly to be taken into account, with anxious scrutiny, by such a future decision-maker.

26. I therefore grant the application for judicial review in the terms sought by the Claimant. I have already indicated this outcome to counsel, at the conclusion of the argument yesterday. The Claimant is privately funded and Miss Giovanetti rightly conceded that costs should follow the event. There will therefore be judgment for the Claimant with costs.

27. As I released counsel yesterday at the conclusion of the argument having dealt with costs, and the parties have attended today without any representative who has a right of audience, if there are consequential applications (for permission to appeal, for example) the parties must attend upon such date as may be agreed with the Administrative Court listing officer for an adjourned hearing. All relevant time limits will in those circumstances be extended to 21 days after that hearing or further order.