Neutral Citation Number: [2008] EWHC 3219 (Admin)

Case No: CO/7322/2006

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 December 2008

Before :

HHJ HICKINBOTTOM
Sitting as a Deputy Judge of the High Court

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Between :

PN (GAMBIA)	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

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

Laura Dubinsky (instructed by **Luqmani Thompson**) for the **Claimant**
Robert Palmer (instructed by **the Treasury Solicitor**) for the **Defendant**

Hearing dates: 25 November 2008

Judgment
As Approved by the Court

HIS HONOUR JUDGE HICKINBOTTOM:

1. The Claimant PN is a Gambian national, who entered the United Kingdom on 15 April 2005 in the following circumstances.

2. Mr N was a business man in Gambia, running a prosperous taxi firm in Banjul. He was a member of the opposition United Democratic Party ("UDP"), in which he played a minor part. Pertinently, he is the cousin of S who was the Chief Editor of the Independent newspaper in Gambia: and the two men and their families lived in different apartments of the same house near Banjul.

3. In 2002, Mr S's newspaper was attacked: and in 2004 he was arrested and questioned, but subsequently released. In April 2005, men came to the Banjul house where Mr N and Mr S lived, asking for the latter who was not there. Mr N left the building and telephoned Mr S to warn him, while the visitors destroyed furniture in the house. Mr S fled Gambia for Senegal, where he claimed asylum. He does not appear to have been politically active (and has certainly not been active as a journalist) since then.

4. Later that month Mr N came to the United Kingdom to visit his cousin (Mr S's brother). At that time, Mr N did not believe himself to be in danger in Gambia - neither the earlier incident nor Mr S's subsequent flight had led him to that belief - and had no intention of claiming asylum. However, three weeks after his arrival in the United Kingdom (i.e. in May 2005), he was told on the telephone by his family that the same men who had come before seeking Mr S had come to his home again at night to threaten him (Mr N), wrecking the furniture again and burning out the cars in his taxi

business.

5. The visitor's visa on which Mr N entered the United Kingdom ran to 2 September 2005 when his leave to remain expired. He overstayed. On 23 September, he was arrested for possession of drugs, although not charged: and the following day he was detained and served with notice that he was liable to administrative removal. On 28 September he claimed asylum, which was refused by the Secretary of State on 7 October.

6. Mr N appealed on asylum and human rights grounds. Immigration Judge Pullig accepted Mr N's credibility and substantially his account of events (Paragraph 34 of his determination dated 18 October 2005). However, he dismissed the appeal on the following material findings which are helpfully and uncontentiously set out in Mr Palmer's Skeleton Argument (at Paragraph 18):

(i) The objective evidence showed that the Government was intolerant of the press and intimidated journalists. However there was no evidence that family members of opponents of the regime were at risk in any way. Nor was there evidence that those involved in opposition politics were at risk of persecution or Article 3 prohibited treatment.

(ii) There was no issue arising in respect of events concerning Mr N which took place up to the time of his departure. He clearly believed that there was nothing to fear on his own behalf or on behalf of his family. He was married with a wife and children living at home. Even if, as a matter of principle, the authorities were prone to attack members of the family of opponents of the regime, then Mr N certainly had no subjective fears at that time.

(iii) Mr N had not been told why the second attack had taken place but he had come to the conclusion that it was because of his involvement with the UDP and because he was known to be involved with that party and not the Government party.

(iv) Mr N did not regard Mr S's involvement with a newspaper as being necessarily connected with his own concerns arising from his membership of the UDP.

(v) The Claimant himself had not been subjected to any ill-treatment - nor had his family - only his property had been damaged.

(vi) Mr N had accordingly failed to demonstrate that his fear was objectively well founded.

7. The AIT dismissed Mr N's application for reconsideration on 24 October 2005, and his rights of appeal were consequently exhausted. Mr N however remained in the UK until, on 7 July 2006, directions were made for his removal on 21 July.

8. By letter of 20 July 2006, Mr N made further representations to the Secretary of State, including a brief report from a country expert (Mr Andrew Manley) and press articles showing Government pressure on journalists in Gambia. The removal was deferred: but on 9 August the Secretary of State rejected the submissions and refused to treat them as a fresh claim ("the first decision letter"). The Claimant now accepts (or at least does not challenge) that refusal.

9. On 21 August 2006, new directions were set for the Claimant's removal on

3 September. Further submissions were made on behalf of Mr N on 31 August, importantly enclosing a full report from Mr Manley dated 30 August. I will return to that evidence. The submissions were refused on 2 September 2006 in a short letter, again on the basis that they did not amount to a fresh claim ("the second decision letter").

10. This judicial review, challenging that refusal, was lodged on 4 September 2006.

11. However on 14 September, the Secretary of State issued a further decision letter directed towards Mr Manley's evidence ("the third decision letter") which prompted a supplementary report from Mr Manley dated 7 October.

12. On 8 December 2006, Davis J gave leave to bring the judicial review following an oral reconsideration of Owen J's refusal on the papers.

13. There was then a hiatus whilst a date for the substantive hearing of the judicial review was awaited: but, on 6 June 2007, a further supplementary report from Mr Manley was filed, to which the Secretary of State responded on 7 April 2008 indicating that the report added nothing new ("the fourth decision letter").

14. Mr Manley sadly died in the summer of this year. However, on 18 June 2008, the Claimant's solicitors served further evidence from a second country expert, Prof Arnold Hughes, Emeritus Professor of African Politics at Birmingham University and a particular specialist on Gambia. The Secretary of State's final decision letter ("the fifth decision letter") was sent on 10 November 2008, which indicated that, after anxious scrutiny, the submissions had been refused and they did not amount to a fresh claim.

15. At the hearing before me, the Claimant sought permission to amend his claim to seek to judicially review the decisions of the Secretary of State in the second to fifth decision letters not to consider that the further submissions filed from time to time amounted to a fresh claim. Because the relevant provisions (Paragraph 353 of the Immigration Rules HC395) require consideration of whether new material "taken together with the previously considered material" creates a realistic prospect of success, his claim in substance turns on whether the Secretary of State's fifth decision letter of 10 November 2008 properly rejected the Claimant's submissions taken as a whole and properly determined that they did not amount to a fresh claim. The application to amend the claim to put it on this footing was unopposed, and I formally grant permission to amend.

16. The relevant law is well-rehearsed. Paragraph 353 of the Immigration Rules provides:

> "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 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."

17. Building on The Secretary of State for the Home Department v Boybeyi [1997] Imm AR 491 and Rahimi v The Secretary of State for the Home Department [2005] EWHC 2838 (Admin), in WM (DRC) v The Secretary of State for the Home Department [2006] EWCA Civ 1495, Buxton LJ said of Rule 353 (at Paragraphs 7 and 9-10):

> "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 Mr Nicol QC 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 ….
>
> … A court when reviewing a decision of the Secretary of State as to whether a fresh claim exists must address the following matters.
>
> First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary 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 inquiry; 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. Second, 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."

18. I emphasise the requirement for the Secretary of State to ask herself the correct question. Of course, she has to take a view on the evidence herself in considering whether the asylum claim should succeed. However, if that view is that it should not, in determining whether the material amounts to a fresh claim, it is not her own view that matters - but what an immigration judge would make of the material. If there is a realistic prospect of an immigration judge, applying anxious scrutiny to the new evidence taken together with material earlier relied upon, thinking that the applicant

will be exposed to a real risk of persecution on return, then the Secretary of State must treat the submission as a fresh claim that, if refused, will give rise to a right to appeal to the AIT. If she does not, she errs in law.

19. Mr N seeks to judicially review the 10 November 2008 refusal of the decision-maker on behalf of the Secretary of State to treat his representations as a fresh claim on two grounds. First, it is submitted on his behalf that the decision-maker erred in simply dismissing the expert evidence of Mr Manley and Prof Hughes that Mr N was at risk on return because of his association with Mr S, and particularly he was at risk of being detained and questioned at the airport on arrival in Gambia. The decision-maker effectively found that the evidence was not capable of bearing material weight. Second, he erred in asking himself the wrong question: instead of asking himself whether there was a realistic prospect of persuading an immigration judge that there was a real risk of persecution on return, he simply asked himself whether he himself considered there to be such a risk. I will deal with these grounds in turn.

20. In relation to new evidence, Miss Dubinsky relied solely upon the expert evidence of Mr Manley and Prof Hughes, which of course has to be considered in the light of all the other available evidence. Both clearly have the qualifications and expertise to be a country expert on Gambia. Prof Hughes is particularly eminent in the field.

21. Miss Dubinsky especially relied upon the expert evidence that:

(i) Known associates of journalists opposed to the Government are at heightened risk:

> "[In view of the history of Mr S and his continuing public silence, t]he

logical assumption can only be that [Mr S] is worried about the potential consequences such activity may have for himself *or relatives* currently on Gambian territory." (Mr Manley report 30 August 2006, page 2: emphasis added).

"It is not unreasonable to conclude that journalists *and their known associates* are now at a potentially heightened risk" (Mr Manley report 30 August 2006, page 7: emphasis added).

"[Mr N] is clear in his view that he would be exposed to mistreatment or worse at the hands of state operatives, if returned to the Gambia under current circumstances. He appears equally certain that this situation is due to his known family connections to Mr S, who remains in hiding, most likely outside the Gambia's borders." (Mr Manley report 30 August 2006, page 9).

"In general, I take the view, based upon long personal experience of the evolution of the Gambia media since 1989, and lengthy discussions with people who know more than I do, that close relatives of journalists who - for whatever reason - expose themselves to official opprobrium in the way Mr S clearly did, are potentially open to reprisals in a West African microstate run by President Jammeh and his close associate." (Mr Manley report 7 October 2006, page 1).

(ii) The second attack (on Mr N's property) resulted from his association with Mr S:

"[I]t is unlikely that an individual with [Mr N's] business orientated and relatively apolitical profile would be targeted in such a manner, including the effective destruction of a viable business, on any basis other than his relationship with Mr S (Mr Manley report 30 August 2006, page 3).

"I cannot recall any other incident of the precise kind described by [Mr N], where it did not become swiftly clear that a well-known business enmity of some kind was at work. There is no suggestion that this was the case here. My understanding is that to present no arrests have been made in connection with the attack on the appellant's house whilst he was in the UK. Clearly in his own mind, the only other reason for these events is his association with Mr S and by implication with The Independent, which was specifically and successfully targeted for elimination by the presidency and the NIA from the start of 2006." (Mr Manley report 30 August 2006, page 9).

"Common sense, and my personal knowledge since 1989 of how the local economy of the Gambian coastal 'tourist strip' works in local terms, makes it clear to me that the personal and material damage inflicted upon the claimant were almost surely not the result of a business dispute, for example. The only other reason that can logically be intuited is that it was an explicitly political signal from regime elements (with or without

direct presidential approval), that not merely Mr S but, by implication, his relatives had transgressed a line that was either defined at presidential level, or assumed by individual operatives on their own initiative to have been this defined. I can see no other explanation for the stated events... I still regard my analysis of intimidatory damage to Mr N's property and business as valid."" (Mr Manley report 14 May 2007, page 1-2).

(iii) Mr N was more likely to be targeted for attention because of his position as breadwinner of the extended family:

"[Because Mr N is the] economic lynchpin of an extended family of which Mr S will also have been a part [and would be] an obvious target for a 'message' to be sent both to the fugitive journalist and to others in his position. The destruction of the appellant's home and (at least some of) his business assets would send a very effective message to political opponents and media operatives alike" (Mr Manley report 30 August 2006, page 9).

"[As] the key male wage earner in the extended family, [Mr N] would be an attractive target for state operatives wishing to maintain a state of intimidation against an individual who had already gone into clandestiny…. There is a genuine risk of further action being taken against this claimant, by government operatives, if returned under these circumstances." (Mr Manley report 7 October 2006, page 1-2).

(iv) Mr N would probably be detained and questioned on arrival back in Gambia:

"It is very likely that [Mr N] would be detained and questioned on arrival, especially given his own links to S." (Mr Manley report 30 August 2006, page 10).

"… NIA [the National Intelligence Agency] activities at Banjul's Yundum airport have increased steadily in the past four to five years…. A failed asylum returnee to Yundum is very likely to be detained and either debriefed or interrogated, either by immigration officers or, if they are regarded as more significant, by NIA personnel. On the balance of probabilities, N would fall squarely into the latter category." (Mr Manley report 14 May 2007, page 2).

"…. [T]he Gambian government has been quite capable of re-opening otherwise long-forgotten offences from past years….. The well-documented brutal and unrestrained behaviour of the NIA and kindred official agencies would understandably make Mr N fear for his safety if he too were returned to the Gambia. Detention frequently has been accompanied by physical violence during interrogation…. Individuals

may be detained indefinitely and released only when the NIA decides." (Prof Hughes report 16 June 2008, page 3).

22. Mr Palmer criticised the evidential value of this evidence on the following main bases.

(i) The starting point for a decision maker who is considering whether further representations amount to a fresh claim is to make a thorough assessment of the findings of the immigration judge in connection with the original claim, because any tribunal hearing an appeal in relation to the fresh claim would take the conclusions of the immigration judge who dealt with the original claim as a starting point in its consideration (R (Sivanesan) v The Secretary of State for the Home Department [2008] EWHC 1146 Admin at [42]). As I indicate above, Mr N had not been told why the second attack had taken place but Immigration Judge Pullig considered that he had come to the conclusion that it was because of his involvement with the UDP and because he was known to be involved with that party and not the Government party. Furthermore, the Judge appeared to find that Mr N did not regard Mr S's involvement with a newspaper as being *necessarily* connected with his own concerns arising from his membership of the UDP (Paragraphs 35-36 of his determination dated 18 October 2005).

ii) It was of course open to Mr N to obtain further evidence that the second attack resulted from his association with Mr S, including any relevant expert evidence. However, any expert evidence would have to engage with the findings of the immigration judge, which would be the effective starting point for the expert too. Unfortunately, Mr Manley does not appear to have received or considered the judge's determination and reasons. In his report of 30 August 2006 (his main report), he says that he

has "addressed the likelihood of the appellant's account *(which I have been informed has been accepted by an Immigration Judge)* reflecting his family relationship with Mr S" (emphasis added). In response to a direct question from the solicitors then instructing him, Mr Manley was unable to confirm that he had had sight of the judge's reasons (report 14 May 2007, page 3, paragraph 5). Further, Mr Manley never interviewed Mr N. With some justification, Mr Palmer submitted that that must severely undermine his evidence in relation to the second attack, about which the immigration judge did hear evidence and made some findings. Whilst he does not appear to have made an overt finding that the second attack was unrelated to Mr N's association with Mr S, he appears to have found that Mr N himself had come to the conclusion that it was because of his involvement with the UDP and because he was known to be involved with that party and not the Government party: and he did not regard Mr S's involvement with a newspaper as being necessarily connected with his own concerns arising from his membership of the UDP (see Paragraph 6(iii) and (iv) above).

iii) In particular, in his report of 30 August 2006, Mr Manley says:

> "[Mr N] is clear in his view that he would be exposed to mistreatment or worse at the hands of state operatives, if returned to The Gambia under current circumstances. He appears equally certain that this situation is due to his known family connections to Mr S, who remains in hiding, most likely outside The Gambia's borders….
>
> Clearly in his own mind, the only other reason for these events is his association with Mr S and by implication The Independent...."

The immigration judge found that Mr N did not consider the second attack resulted from that association - and (Mr Palmer submits) Mr Manley was simply in no position

properly to counter that, certainly not without seeing the immigration judge's reasons and/or interviewing Mr N.

iv) Neither Mr Manley nor Prof Hughes was able to provide any evidence of any family member of any journalist who had been singled out for discriminatory treatment - even in terms of damage or threats to property, yet alone threats or injury to the person - in Gambia.

v) Mr Manley assumed that Mr N was "the economic lynchpin of the extended family of which Mr S will also have been a part, [making him] an obvious target for a 'message' to be sent to the fugitive journalist and to others in a similar position": although there was no evidence that Mr N occupied such a position within the extended family.

vi) The risks to journalists and (insofar as any risk attached to them) their associates were raised during the 2006 election campaign; but thereafter fell again. The election was on 22 September 2006. Mr Manley himself stated in his 7 October 2006 report that he was "not as yet aware of any further reported action against the press since President Jammeh's re-election…, despite a pattern of intimidation in the months leading up to the election" (page 2).

vii) Given that Mr S is no longer writing or publishing anything, the authorities would have no continuing interest in him - or his associates.

viii) It is unlikely that the Gambian authorities would assume that Mr N had any information about Mr S or his whereabouts, given Mr N has spent over three years out of the Gambia. Indeed, they appear to have had no interest in him even in 2005 when he left: he left without hindrance or questioning, even though Mr S had been driven out of the country only weeks before.

ix) In relation to possible arrest and detention at the airport on return, neither suggest that, even if Mr N is subject to questioning and detention, that he will suffer persecution or treatment prohibited under Article 3.

23. Mr Palmer submitted that, in the circumstances, the decision-maker was driven to conclude that the expert evidence failed to provide any "objective evidence" that Mr N was at risk on return, but was at best speculative: and he could not have come to any conclusion other than that to which he did come, i.e. "that there was a complete lack of evidence upon which an Immigration Judge could realistically come to the conclusion that the Claimant was at risk of persecution on his return as a family member of an exiled (now long exiled) journalist".

24. Patently, the expert evidence is not as weighty as it might be - Mr Palmer's submissions have some considerable force in this regard - but I do not accept that it was open to the decision-maker to write off the evidence completely as having no weight.

25. The only task at this stage is to consider whether the WM threshold has been reached for a fresh claim, and not to consider the merits of that claim beyond that low threshold.

I was referred to a number of helpful cases concerning the correct approach to expert evidence in these circumstances. In HK v The Secretary of State for the Home Department [2006] EWCA Civ 1037 the expert evidence had clear limitations, but the Court of Appeal found that it would not be appropriate to dismiss it completely as "not of assistance" or as "speculation", even though in that case the expert gave opinions on specific aspects of the claimant's case of which she had no direct knowledge. In SA v The Secretary of State for the Home Department [2007] EWCA Civ 1390, a case with similarities to Mr N's case, the expert evidence as to the likelihood of the claimant being identified by the Syrian authorities as being hostile to the Syrian regime was again held to be such that it could not be dismissed as not amounting to evidence at all. Whilst of course any evidence (including that of an expert) needs to be given proper consideration - and, if it is of no evidential weight in relation to the relevant issues, it can and should be disregarded - it is important that expert evidence is given appropriate respect.

26. In this case, there are obvious unsatisfactory features of the expert evidence. Reference was made to some in the judgement of Davis J on the grant of permission in this case. Although further expert evidence has since been filed, no one could pretend that the evidence has been made entirely satisfactory. For Mr Manley to give an indication of Mr N's views on various matters (e.g. that he considers that the second attack was due to his association with Mr Se) cannot be justified in the light of the immigration judge's findings and the fact that Mr Manley neither saw those findings nor interviewed Mr N. It is also difficult to see how his opinion that Mr N was breadwinner of an extended family which included Mr S could have been based upon his general knowledge of Gambia, without reference to the particular circumstances of that family itself - about

which he appears to have had no evidence. Mr Manley's reference to the subjective fears of relatives of other journalists can have no real bearing on the objective position upon which Mr Manley was supposed to be opining.

27. However, Mr Manley undoubtedly had the appropriate qualifications and experience to be a country expert on Gambia. Any possible doubt as to that was removed by the second paragraph of Prof Hughes' report, which commends Mr Manley's evidence: Prof Hughes is without doubt an eminent expert in the relevant field.

28. And, as an expert, Mr Manley gave evidence that, amongst other things:

(i) The second attack was probably an attack at government instigation because of Mr N's association with Mr S, the Chief Editor of an anti-government newspaper that was later burned out and forced to stop publishing, who fled the country following threats and damage to his property. Although this opinion was given without interviewing Mr N and without Mr Manley having seen the immigration judge's determination, the judge only made findings as to what was in Mr N's mind - not as to the actual cause of the second attack. Further, he found that Mr N did not regard Mr S's involvement with a newspaper as being *necessarily* connected with his own concerns arising from his membership of the UDP.

However, in my view these deficiencies only go to the weight that should properly be given to Mr Manley's opinion. I accept that they may significantly reduce that weight - but they do not render the evidence of no possible weight or value. It is not mere speculation. In the light of the other available evidence (including the evidence that the group of men involved in the second attack were the same as involved in the first), it

would be open to an immigration judge to accept this evidence, and find that the second attack resulted from Mr N's association with Mr S. That finding would be a significant new element in the consideration of whether Mr N faced a real risk on return to the Gambia.

(ii) Even after this length of time (during which Mr S has been quiet, and Mr N has been abroad), Mr N faces probable arrest and detention on arrival in Gambia, and then questioning by the NIA. The evidence of Mr Manley as to the possible consequences of such questioning may be somewhat opaque and unsatisfactory ("the NIA are frightening to deal with"): but Prof Hughes says that detention is frequently accompanied by physical violence, with detention being indefinite and not subject to court intervention. Prof Hughes says, "The well-documented brutal and unrestrained behaviour of the NIA and kindred official agencies would understandably make Mr N fear for his safety if he too were returned to the Gambia" (report, page 3). Whilst this evidence is very far from overwhelming, it cannot properly be said that, on the basis of it (together with the other available evidence), no immigration judge could find that Mr N would be exposed to a real risk of persecution or prohibited treatment under Article 3 on return.

29. Much of Mr Palmer's submissions went to the limited nature of the weight of evidence, rather than to the absence of such weight. For example, the fact that there is no evidence of any previous discrimination against the relatives of an anti-government journalist in Gambia does not assist the Claimant's case: but it does not rob the expert evidence that the Claimant is at risk as the relative of such a journalist of all possible weight. Similarly the passage of time since Mr S was active and since Mr N was in Gambia: and the absence of evidence that there has been anti-journalist activity since the 2006 election. These reduce the weight that might be given to the opinion of the

experts as to the risk to which Mr N would be subject on return to Gambia, but they do not mean that that expert evidence can be entirely dismissed as evidence to which no immigration judge could reasonably give any weight at all.

30. In summary, therefore, I consider the expert evidence is fraught with unsatisfactory elements that undermine the weight any immigration judge would give it. Indeed, I accept that this case may be close to the borderline of the WM threshold. However, that threshold is low - and, having considered the evidence with appropriate care, I cannot say that, on the basis of all of the evidence now available, there is no realistic prospect of an immigration judge, himself applying anxious scrutiny, thinking that Mr N will be exposed to a real risk of persecution on return to Gambia. In coming to the opposite conclusion, I consider the Secretary of State erred in law.

31. In the circumstances, I can deal with the second ground briefly.

32. In Paragraph 7 of his letter of 10 November 2008, the decision-maker sets out the WM threshold test as being "whether further submissions would create a realistic prospect of success". Given that the requirement to "[look] at the evidence as a whole" is set out in the previous paragraph, this effectively sets out the correct test.

33. However, whether the decision-maker has applied the correct test is a matter of substance: and certainly looking at the letter as a whole it is difficult to say that he did apply that test. The reference to Prof Hughes' evidence either establishing or not establishing propositions (see, e.g., Paragraphs 8 and 12) is suggestive of the decision-maker coming to his own view on the merits: and there is an absence of language that is suggestive of the discrete exercise of considering what an immigration judge might

make of the evidence. The later reference to Paragraph 353 of the Immigration Rules (in Paragraph 13) does not entirely allay concern that he did not ask herself the right question: nor does reference back to the important fourth decision letter (of 7 April 2008) which (in Paragraph 14, towards the end of the letter) does set out the correct test in terms. To say the least, some parts of the decision letters could have been better phrased, more clearly to show that the decision-maker had in mind the WM threshold test in deciding that the new material did not amount to a fresh claim.

34. However, in the event, I need not decide whether the correct test was in fact applied: because, if it was, then for the reason I have given, the decision-maker erred in its application. Applying the low threshold test in WM, he ought to have accepted the representations submitted on behalf of the claimant up to the fifth decision letter as a fresh claim under Paragraph 353.

35. For these reasons, I will grant the application and formally quash the second to fifth decision letters, i.e. the decision letters of 2 and 14 September 2006, 7 April 2008 and 10 November 2008.

36. Mr N should not however draw false encouragement from this judgment. I have stressed that the WM threshold is low. I have merely found that there is a realistic prospect that an appeal may succeed. I have pointed out unsatisfactory aspects of the expert evidence upon which the Claimant relies, and it will be for an immigration judge on any appeal to consider the appropriate weight to give to this evidence.

37. In relation to costs, I will hear submissions. However, subject to those, I would propose to make the usual order, namely that the Defendant shall pay the Claimant's costs of the

application to be the subject of a detailed assessment if not agreed.