Neutral Citation Number: [2010] EWCA Civ 116

Case No: C4/2009/0800

IN THE HIGH COURT OF JUSTICE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION,
ADMINISTRATIVE COURT
MR JUSTICE CRANSTON
CO/3004/2008

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/02/2010

Before :

LORD JUSTICE CARNWATH
LORD JUSTICE MOORE-BICK
and
LORD JUSTICE ETHERTON

- -

Between :

THE QUEEN ON THE APPLICATION OF YH	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

Galina Ward (instructed by **Messrs. Duncan Lewis & Co**) for the **Appellant**
Alan Payne (instructed by **Treasury Solicitors**) for the **Respondent**

Hearing date : Wednesday 27th January, 2010

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Judgment

Carnwath LJ :

Introduction

1. This appeal raises once again the problem of how the Secretary of State or the courts should respond to "repeat" claims for asylum or human rights protection: that is, claims by those who, having been through the decision-making system unsuccessfully, come back to the Secretary of State with further submissions raising the same or similar allegations, either while still in the country, or (as in this case) having left and returned. In such cases, as Lord Hope said (*BA (Nigeria) v Secretary of State for the Home Department* [2009] UKSC 7):

> "There is obviously a balance to be struck. The immigration appeals system must not be burdened with worthless repeat claims. On the other hand, procedures that are put in place to address this problem must respect the United Kingdom's international obligations." (para 32)

2. Until recently, the guiding authority in this court was *WM (Democratic Republic of Congo) v Secretary of State* [2006] EWCA Civ 1495. But since then, there has been much activity in this court and above. For a review of the cases preceding *BA(Nigeria)*, I refer to my own judgment (sitting as a judge of the Administrative Court) in *R(AS(Sri Lanka)) v Secretary of State* [2009] EWHC 1763 Admin.

3. The cases have been concerned with two apparently similar tests. The first is that used for a number of years to determine whether new submissions give rise to a "fresh claim", under rule 353 of the Immigration Rules. This was based on principles established by case-law (see *R v Secretary of State for the Home Department, ex p Onibiyo* [1996] QB 768). Rule 353 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 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."

4. The Nationality, Immigration and Asylum Act 2002 introduced a more elaborate scheme. It was these provisions, and their relationship to rule 353, that were examined by the Supreme Court in *BA(Nigeria)*. It is unnecessary to consider them in detail here. We are directly concerned with section 94, which enables the Secretary of State to issue "certificates" in certain categories of case, the effect of which is to exclude the right of appeal under section 82. In the present case, we are concerned with the power of the Secretary of State to certify a claim as "clearly unfounded" (s 94(2)).

Other certifying powers relate, for example, to a case where the new application relies on a matter which could have been raised in an appeal against a previous decision, and where there is no satisfactory reason for that not having been done (s 96).

5. The present case was considered by the Secretary of State, and by the judge, on the footing that rule 353 applied. It is now common ground, following *BA(Nigeria)*, that this was wrong. However, the Secretary of State seeks to rely on section 94(2) to achieve the same result. In support we have a witness statement from Mr Ponsford, a Senior Executive Officer with the UK Border Agency, sworn in June 2009, following the Court of Appeal decision in *BA(Nigeria)*. By reference to the terms of the refusal letter, he concludes that "the outcome would have been the same if the caseworker had had to consider the claim as clearly unfounded". Miss Ward, for the claimant, does not argue that, if the reasoning was sufficient to support a certificate under section 94, the Secretary of State is debarred by failure to certify at an earlier time. The first issue in this appeal, therefore, is whether, as applied to the facts of this case, there is any material difference between the two tests.

6. It is to be noted that in *BA(Nigeria)* such a comparison did not fall to be made, because the only issue was whether the case fell within rule 353. The Secretary of State had not sought to argue in the alternative that a certificate under section 94(2) could have been issued. The reasons for this concession owed nothing to the substantive merits, but seem to have arisen from the way the Secretary of State chose to argue the case. As Lord Brown explained:

> "… it is common ground between the parties that the present cases are not certifiable under either of these sections (ss 92 or 94). That, however, as I understand it, is solely because, so far as section 94 is concerned, it applies only 'where the appellant has made an asylum claim or a human rights claim (or both)' (subsection 1). By the same token that, on the Secretary of State's argument, a repeat claim does not fall within those words in section 92(4)(a), so he contends that it does not do so for section 94 purposes. Given, however, as Mr Husain submits and I would accept, that a repeat claim does involve making a claim for the purposes of section 92(4)(a), so too it enables the Secretary of State to certify it as 'clearly unfounded' if he so regards it under section 94. Moreover, consistently with what the House said in *ZT (Kosovo) v Secretary of State for the Home Department* [2009] 1 WLR 348 (Lord Neuberger's views expressed at paragraphs 80-81 of his opinion being determinative on this point), there will be precious few cases in which that test differs from the rule 353 test as to whether a claim has a 'realistic prospect of success'." (para 45)

7. In *ZT(Kosovo)* itself there had been considerable debate about the difference between the two tests. Lord Brown had described the arguments about the suggested differences as "dancing on the head of a pin" (para 73). That robust view did not, as such, have the support of his colleagues; but none ventured any suggestion as to the circumstances in which "the precious few cases" might be expected to arise. The speeches have since been considered in at least two significant decisions of this court: *R(AK(Sri Lanka)) v Secretary of State* [2009] EWCA Civ 447 (per Laws LJ), and *Secretary of State v QY(China)* [2009] EWCA 680).

Five questions

8. Arising from this wealth of authoritative guidance, the arguments before us point to at least five questions on which arguable doubts may be thought to remain:

   i) Is there any material difference between the two tests: "no realistic prospect of success" and "clearly unfounded"?

   ii) What weight in the consideration is to be given to a previous appellate decision?

   iii) Should the Secretary of State apply his own judgment to the relevant question, or should he put himself in the shoes of a hypothetical immigration judge considering a possible appeal?

   iv) On judicial review of the Secretary of State's decision, should the court apply its own judgment to that question, or is it limited to *Wednesbury* review of the Secretary of State's judgment?

   v) What is the "anxious scrutiny" principle, and does it make any difference to the answers to any of these questions?

9. Although there are differences of emphasis in the recent judgments, the answers which emerge are in my view reasonably clear, at least at this level. Taking them in turn:

(i) The test

10. Whatever the theoretical difference between the two legal tests, I agree with Laws LJ that it is so narrow that "its practical significance is invisible" (*AK(SriLanka)* supra para 34), which I take to mean that it can for practical purposes be ignored. I propose to proceed on that basis.

11. In the present case Miss Ward took a slightly different point: that the burden of proof was different. Under rule 353 the starting point is a previous claim followed by an adverse decision; the burden is on the claimant to show something new. By contrast section 94(2) does not necessarily assume a previous decision of any kind; it may be the first claim.

12. I do not see that as a material point of distinction. Under rule 353 the burden is no doubt on the claimant to show that there is something new, but, once that threshold has been crossed, it is for the decision-maker to satisfy himself that the material (new and old) fails to satisfy the relevant test. If nothing else, the "anxious scrutiny" principle (see below) should in practice ensure that the benefit of any realistic doubt will be given to the claimant.

(ii) A previous appellate decision

13. Mr Payne, for the Secretary of State, suggested that the so-called *Devaseelam* guidelines ([2002] UKIAT 00702 - approved by this court in *Djebbar v Secretary of State* [2004] EWCA 804, [2004] INLR 466) were material in considering what weight to give to a previous appellate decision involving the same claimant.

14. I agree that, where some or all of the facts in issue are identical to those determined on a previous appeal, those guidelines may be applicable. But I do not regard them as limiting the relevance of a previous decision. Even where the facts relied on are not identical, the earlier decision may be relevant to more general issues such as the credibility of the claimant. In so far as it throws light on such questions, I see no reason why it should not be taken into account. Of course, the fact that a claimant has been held to lie about one series of events does not mean that he may not be truthful on others. But it justifies caution in considering his unsupported assertions.

(iii) In whose shoes?

15. *WM (Congo)* has been treated as authority that, in deciding whether to treat a submission as a fresh claim, the Secretary of State should in effect put himself in the shoes of an adjudicator or immigration judge. The judge quoted the following passage from the judgment of Buxton LJ:

> "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 [allowing the appeal]. 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 that is only a starting point in the consideration of a question that is a distinctly different from the exercise of the Secretary of State making up his own mind." (para 24)

It was no doubt in deference to such guidance, that the decision-letter of 17th April 2008 (see below) spoke of the view to be expected from "the hypothetical judge".

16. The concept of a "hypothetical judge" deciding an appeal can be a helpful discipline, in so far as it makes clear that the Secretary of State is acting simply as the gate-keeper to a process leading to a possible appeal, and it emphasises the objectivity which that requires. However, it is no more than a guide, not a legal formula. In law, whether under the rules or the statute, the Secretary of State is standing in his or her own shoes in deciding this threshold question.

(iv) The approach of the court on judicial review

17. In *WM* the court emphasised that the court's task was not to reach its own conclusion on the threshold test, but rather to review the rationality of the Secretary of State's conclusion. Buxton LJ said:

> "... in borderline cases, particularly where there is doubt about the underlying facts, it would be entirely possible for a court to think that the case was arguable…, but accept nonetheless that it was open to the Secretary of State, having asked himself the right question and applied anxious scrutiny to that question, to think otherwise; or at least that the Secretary of State would not be irrational if he then thought otherwise." (para 18)

18. As I explained in *AS(SriLanka)* (para 32-41), subsequent judgments following *ZT(Kosovo)* seem to have shifted the emphasis. Thus in *SSHD v QY(China)* [2009]

EWCA Civ 680, the court had rejected the argument that the judge had erred in deciding that the issue of certification was "an issue on which he must reach his own conclusion" rather than "by applying a traditional *Wednesbury* test to the Home Secretary's judgment". Sedley LJ said (of the speeches in *ZT(Kosovo)*):

> "All, it seems to me with respect, considered that, because of the essentially forensic character of the judgment he has to make, the court is generally as well placed as the Home Secretary and so, at least where there are no issues of primary fact, can ordinarily gauge the rationality of a certification decision by deciding whether it was right or wrong."

19. One notes the possible qualification in respect of cases where there are "issues of primary fact". This is perhaps a fair reflection of the speeches in *ZT* itself, as neatly summarised in a footnote by MacDonald (para 12.177 n 11):

> "Lord Phillips, para 23 'where, as here, there is no dispute of primary fact' and Lord Neuberger, para 83 'in a case where the primary facts are not in dispute'. Lord Brown entered no such caveat in his own analysis of the Court's role in judicial review in this context but did express agreement with para 23 of Lord Phillips's opinion."

Logically, however, the existence of such unresolved issues of primary fact is not a reason for the courts deferring to the Secretary of State at the threshold stage. Such unresolved issues are likely of course to make it more appropriate to leave the door open for them to be determined by an immigration judge after a full hearing. The position is not dissimilar to that under the rules of court, where a claim may be struck out not only if it is unfounded in law, but also if it is clear on the available material that the factual basis is entirely without substance (see *Three Rivers DC v Bank of England (No 3)* [2001] 2 All ER 513 para 95, per Lord Hope). In most cases, the court is at least as well equipped as the Secretary of State to decide either question.

20. More recently in *KH(Afghanistan) v Secretary of State* [2009] EWCA Civ 1354 (handed down on the 12th November 2009), Longmore LJ (with the agreement of his colleagues) stated the position in unqualified terms:

> "It is now clear from *ZT (Kosovo) v SSHD* [2009] 1 WLR 348… that the court must make up its own mind on the question whether there is a realistic prospect that an immigration judge, applying the rule of anxious scrutiny, might think that the applicant will be exposed to a breach of Article 3 or 8 if he is returned to Afghanistan. So the question is not whether the Secretary of State was entitled to conclude that an appeal would be hopeless but whether, in the view of the court, there would be a realistic prospect of success before an adjudicator." (para 19).

21. It seems therefore that on the threshold question the court is entitled to exercise its own judgment. However, it remains a process of judicial review, not a *de novo*

hearing, and the issue must be judged on the material available to the Secretary of State.

(v) Anxious scrutiny

22. The expression "anxious scrutiny" derives from the speech of Lord Bridge in *Bugdaycay v Secretary of State* [1987] AC 514, 531, where he said:

> "The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."

23. It has since gained a formulaic significance, extending generally to asylum and article 3 claims (see e.g. *MacDonald* para 8.6). Thus, in *WM (Democratic Republic of Congo) v Secretary of State* [2006] EWCA Civ 1495, Buxton LJ explained that where asylum was 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."

It has now become an accepted part of the canon, but there has been little discussion of its practical significance as a legal test.

24. As I suggested in *AS(Sri Lanka)* (para 39), the expression in itself is uninformative. Read literally, the words are descriptive not of a legal principle but of a state of mind: indeed, one which might be thought an "axiomatic" part of any judicial process, whether or not involving asylum or human rights. However, it has by usage acquired special significance as underlining the very special human context in which such cases are brought, and the need for decisions to show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account. I would add, however, echoing Lord Hope, that there is a balance to be struck. Anxious scrutiny may work both ways. 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.

The present case

25. Within that framework of legal principle, I turn to the present case. I start by summarising the relevant facts, which are set out more fully in the judgment.

Background facts

26. YH is a citizen of Iraq, from the Kurdish Autonomous Zone (KAZ), now the Kurdish Regional Government Area (KRG). He first came to the United Kingdom in November 2000. He claimed asylum on the grounds that he feared ill-treatment by the authorities in the KAZ arising out of his involvement in the illegal sale of a mummy.

This claim was refused by the Secretary of State, and the appeal was dismissed by an Adjudicator on 25th November 2003.

27. She found his story incredible:

> "The chronology of the appellant's account simply does not make sense. In particular I do not understand why he left Iraq before the date of the decree formally banning his trading activities, nor why a warrant would have been issued before that decree; nor why he would not have received the warrant in the 19 days before its issue and his leaving the country. There is also considerable force in the Home Office submission that if the authorities had wanted to arrest him they had ample opportunity to do so between May and September. In these circumstances I attach no weight to the warrant and find the appellant's evidence as to the basis of his fears not likely to be true."

She added however that, had she believed his story, she would not have been able to exclude a real risk of treatment contrary to Article 3 if he were to be returned to the KAZ. She referred to the objective evidence, which made clear that –

> "… although prison conditions in Northern Iraq have improved in recent years following the intervention of the ICRC, there continued to be private undeclared prisons to which there is no access to ICRC officials and there were reports of torture by both the KDP and PUK authorities …"

Permission to appeal to the Immigration Appeal Tribunal was refused on 13th February 2004.

28. In November 2005 YH applied for Assisted Voluntary Return (AVR), which led to him being given £3,000 and returning to Iraq on 21st February 2006. In June 2007 he applied for his case to be reconsidered in the light of the *Rashid* judgment (see *Macdonald's Immigration Law* para 1.38). That application was rejected because the case was not applicable once he had left the UK.

29. On 22 January 2008 he arrived again in the UK, this time concealed in a lorry, and was detained as an illegal immigrant. He immediately claimed asylum. His initial response to questions was recorded on a "Repeat Asylum Applicant. OSCU Referral Proforma." (OSCU is the Operational Support Casework Unit). The answers were recorded as follows:

i) Why did he leave the UK?

> "Because I had a cold/flu and my doctor told me to go and live in a warm country."

ii) Why had he now decided to return?

> "Because of the same problems I had before have started again and I use to live in UK"

iii) Was his reason for claiming asylum the same as the reason for his previous asylum claim?

> "Yes. I used to work with historical things – history and because of that I have problems. I was dealing with historical goods."

iv) Had anything happened to him since he was last in the United Kingdom that might be relevant to his asylum claim?

> "When I got back the problems started again. I was involved in the illegal sale of a mummy and I was arrested and tortured because of it."

30. On 25th January, while still at Aylesbury police station, he asked to be examined by a doctor and to have recorded burn injuries to his right wrist and "chizzle marks" to his right forearm. The report noted that he claimed to have been "tortured four months ago whilst in custody of the Iraq Police". Under the heading "Visible assessment" the doctor's notes record simply "alleged torture marks. Arm. Right.", but offer no further details or medical assessment. He was then transferred to the Oakington Centre.

31. On 24th January the Secretary of State wrote refusing to accept his case as a fresh claim under rule 353. The letter stated:

> "…account has been taken of the fact that, by your own admission, your representations are based on the same reasons as those given in your previous asylum claim, which was refused on 29 January 2003. No evidence has been produced in support of your claim to have been arrested and tortured on your return to Iraq, for what, in any event, would be a criminal matter."

Having referred to the Adjudicator's decision, including the finding on credibility, the letter concluded:

> "…your submissions seek to rely on the reasons put forward in your previous asylum claim and add no new significant information or evidence to support your account of events on your return to Iraq…"

Thus, for the purposes of rule 353, the decision-maker was not persuaded that the submissions, taken together with previously considered material, created a realistic prospect of success.

32. YH's present solicitors were first instructed on 8 February 2008, and visited him in detention on 14 February 2008. Following that initial meeting, their contact details were passed to his family. That led to a scanned copy of an arrest warrant being sent to the solicitors from Iraq, without apparently any explanation of its provenance. On receipt of a translation of that warrant, the solicitors sent a letter of representation on 18 March 2008.

33. This letter marked a distinct shift of emphasis in the case. To do it justice, it is necessary to quote the principal parts in full. Having referred to the circumstances of his failed asylum claim in 2000, the letter continued:

> "Our client remained in the United Kingdom until 2006 when he applied for voluntary return to Iraq. This was because he had become very ill and therefore he wanted to return home as he believed that he was going to die. He therefore wished to see his family who were living in Iraq even though he was still in fear from being persecuted by the authorities.
>
> The Applicant was therefore returned to Arbil with the assistance of the IOM in February 2006. The Applicant had arranged a false ID card when he returned to Iraq so that he would not be recognised by the people who led him to flee in 2000. After the Applicant had been living between Dokan and Sulaymaniah for some months, the individuals who were adversely affected by his previous actions with the Iranian trader learnt about his return. They then started to harass both the Applicant and his family, asking for a payment of $100,000.
>
> Whilst travelling between Dokan and Sulaymaniah, the Applicant was stopped at a checkpoint. He was then asked for his ID and taken to the Asaysh office in Sulaymaniah. The Applicant was held by the security for a total of nine days. During his detention, he was tortured by the guards, experiencing treatment such as being hit with the butts of guns and given electric shocks. The Applicant states that he has suffered a number of physical injuries which continue to affect him now.
>
> The Applicant was released from prison after his family and friends intervened. He was therefore released on bail and told he was required to attend a hearing at a later date. The Applicant fled Iraq because he feared that he would be sentenced to approximately twenty-one years in prison having heard about individuals in similar positions."

The letter asserted that, if returned, YH would be subject to treatment amounting to a breach of his rights under article 3 of the Convention. The warrant was said to provide evidence that he was facing arrest and imprisonment on return. Objective evidence was relied on as showing that conditions in prisons and detention centres in the KRG area regularly involved inhuman and degrading treatment, and torture.

34. Before a reply to that letter was received, YH's solicitors had obtained a report from Middle East expert, Dr. Rebwah Fatah. The report referred to his qualifications and experience, having worked as an expert witness since 2000, produced "a few hundred reports", and advised various professional bodies. His instructions were to "authenticate and translate" the arrest warrant.

35. According to his report, he had read "Mr Hama's statement, dated 17.03.2008". No such statement by Mr Hama (of that date or otherwise) has ever been disclosed, and we were told that none existed. In any event there is no reason to think that his information was materially different from that contained in the solicitor's letter of 18 March, 2008.

36. He set out a translation of the warrant, which sought YH's arrest for crimes under articles 289 and 298 of the Penal Code. He described it as "a very simple document to a degree that limits my tests". As to the fact that the warrant had been received from YH's parents, he thought this "plausible" as "the authorities usually realise that the immediate family usually know the whereabouts of their members". The specified articles of the Penal Code related to producing or using a falsified official document, and were punishable by up to 15 years imprisonment. He concluded that because of the simple form of the document, his tests "could not strongly justify that it is reliable" but he "suggested" that "the document should be taken seriously".

37. The Secretary of State, in two faxed letters of 27 March, faxed at 17.41, repeated the refusal to accept the submissions as a new claim, relying on discrepancies in the account, and noting in respect of Dr. Fatah's report that he could not "conclusively state that the document was reliable". YH was removed by charter flight the same day at 16.00. Subsequent to his removal his solicitors received the original arrest warrant in the post via a friend in Sheffield. They contacted Dr. Fatah who asked for a colour scan, and then produced a slightly amended report, but without material change to his conclusion. This was sent to the Secretary of State on 4 April 2008.

38. The present proceedings were commenced on 27th March, 2008. It is unnecessary to describe their course in detail. The Secretary of State filed an Acknowledgment of Service on 17 April 2008, attaching a further decision letter of the same date, directed principally to a critique of the expert's report. The letter concluded

> "26. Applying the law to the facts, at appeal the new material would not conceivably undermine the adjudicator's rejection of your client's account as incredible and the rejection of his claimed fear of persecution or ill-treatment. As a result nothing in the new material would otherwise lead to a more favourable view being taken by a later immigration judge or raise the prospect of a different outcome.
>
> 27. Consequently, the hypothetical judge, applying the same legal test to the same facts, would in substance arrive at the same result as the Secretary of State. Put another way, taking the material, old and new, as a whole, any appeal based upon it would on any legitimate view be bound to fail."

39. Permission to apply for judicial review was refused by Wyn Willams J after an oral hearing, but eventually granted by this court (Ward and Lloyd LJJ) on a renewed application on 5th August 2008. The court's reasons appear sufficiently from Counsel's note of the judgment, which records the following:

> "… the allegation of torture was a fresh allegation not made in the asylum claim of 2000, it was new…. It is highly arguable it

> amounted to a completely fresh asylum claim which had to be judged on its merits by the Secretary of State and if refused attracted an automatic right of appeal."

The substantive judicial review application was dismissed by Cranston J on 12th September 2008. That is the subject of this appeal.

40. As I have said, Mr Ponsford's more recent statement explains that the reasoning given in support of the rule 353 decision shows that the case was considered to be "wholly without merit", and the outcome would have been the same under the section 94(2) test. He refers to the rejected claim in 2000; the lack of any further material to support the claim to have been involved in sale of a mummy; the history of producing false documents in support of his claims to asylum; the lack of any credible evidence as to how the new warrant had been obtained; the inconsistencies in his most recent story; and the lack of any medical evidence to support his allegation of torture.

41. In the meantime, on 2nd January 2009 the AIT heard YH's out of country appeal against the decision to remove him as an illegal entrant. The appeal was dismissed. The applicant was represented by solicitors. The tribunal was not referred to any further evidence that he had in fact been arrested or suffered maltreatment since his return.

Discussion

42. The problem with YH's story is not merely that of inconsistency, but of inconsistent inconsistencies. The Secretary of State's initial response focussed on a comparison with the previous asylum decision. This was understandable, since his initial answers indicated that the claim was based on "the same problems I had before…" What was said to be new was, not the nature of the problem, which related to his involvement in the illegal sale of a mummy, but that he "was arrested and tortured because of it".

43. The decision-maker was entitled to start from a position of extreme scepticism, given that the previous claim had been rejected by an adjudicator as wholly incredible. There was no reason to expect his credibility to have any greater weight before an immigration judge on this occasion, unless supported by corroborative material or at least plausible detail. Neither was apparent in his initial answers. If anything, they raised more doubts about his veracity. The assertion that he had returned because of "cold/flu" and his doctor's advice to "live in a warm country", curious in itself, omitted the significant fact that he was in fact paid £3,000 to return under the AVR scheme.

44. In his fuller submissions of 18th March, prepared on his behalf by his solicitors, the story has changed completely, but remains almost equally unsupported. He now claims to have returned to Iraq, not merely because of a cold, but because he "believed that he was going to die". But again there is no contemporary corroboration of this, medical or otherwise, nor of how he recovered; nor any reference to his return under the AVR scheme. There is no reference now to his arrest and torture for illegal trading in mummies. The allegation is that he was arrested for possession of a false ID card. The only connection with his illegal trading activities is said to be that he acquired the false ID card in order to evade traders involved in his previous dealings.

45. He claims to have been tortured by treatment such "as being hit with the butts of guns and given electric shocks", and that he remains affected by his physical injuries. It is not clear how this relates to his earlier reference to burn injuries to his right wrist and "chizzle marks" to his right forearm; but in any event there is no medical support. So the allegation of actual torture, on which permission was granted by this court, rests wholly on the contradictory and uncorroborated evidence of a claimant whose evidence had been found wholly unreliable on the previous occasion.

46. The only significant new element is the arrest warrant, and the report relating to it. The judge referred to the guidance in *Tanveer Ahmed v Secretary of State* [2002] UKIAT 00439, which, as he said, established that it is for the claimant to establish the reliability of a document if it is at issue; and that a document should not be viewed in isolation but in the context of the evidence as a whole (para 35). He also referred to *Asif Naseer v Secretary of State* [2006] EWHC 1671 in which Collins J in a similar context had emphasised the importance of "evidence indicating how the relevant documents came into existence and supporting their genuineness" (para 37).

47. Dr Fatah's report falls far short of that test. I accept that it reads as a reasonably objective consideration of the issues, by someone who, on the face of it, appears adequately qualified for the task. There are no obvious errors or deficiencies of approach, which would justify discounting it altogether at the threshold stage. However, it proves very little. It says no more in substance than that the document is sufficiently plausible on its face to justify taking it seriously. There is nothing to indicate how it came into existence, or how it came into the hands of the applicant's family.

48. Given the background of reliance on false documents, the Secretary of State was entitled to approach this document also with scepticism, particularly in the absence of any explanation of how it came into the family's hands. Even if it is accepted at face value, it provides no significant corroboration of the applicant's case. At most it provides evidence that YH is wanted for offences related to falsification of documents, those being offences which are properly recognised under the applicable penal code, and of which YH admits to being guilty. There is nothing to link it with allegations of past or future maltreatment. On its face it is no more than a demonstration that there is a functioning legal process within the KRG.

49. It is true that there is disturbing background evidence of regular maltreatment of prisoners in KRG prisons. However, I did not understand Miss Ward's case to rest on the proposition that, if the warrant were to be accepted as genuine, the mere possibility of arrest and imprisonment under lawful process would be enough to found the applicant's claim under article 3. Her principal complaint, as I understood her, was that the Secretary of State set the standard of proof too high, in effect treating it as no different to the earlier case, whereas the allegation of actual torture was new (as indeed this court recognised when giving permission for the application); and further that the Secretary of State should have allowed time for a proper medical examination to be made to assess the claim. For the reasons I have given, I do not think there was any error in the Secretary of State's approach to the evidence. The solicitor's letter of 18th March 2008 referred to the doctor's notes but made no request for a further examination. Nor, in the absence of any credible evidence of torture, was the Secretary of State under any obligation to make such arrangements (cf. *HK(Turkey) v Secretary of State* [2007] EWCA Civ 1357 para 26).

Conclusion

50. For these reasons I consider that the Secretary of State was entitled to find that the claim was clearly unfounded, and I would have reached the same view. I would therefore dismiss the appeal.

Lord Justice Moore-Bick:

51. I agree.

Lord Justice Etherton:

52. I also agree.