Case No: CO/1883/2009

Neutral Citation Number: [2009] EWHC 2328 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Leeds Combined Court
1 Oxford Row
Leeds
West Yorkshire
LS1 3BG

Date: Friday, 24th July 2009

Before:

HIS HONOUR JUDGE KAYE QC

- -

Between:

THE QUEEN ON THE APPLICATION OF BS — **Claimant**

- and -

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

- -

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Mr Hussain appeared on behalf of the **Claimant**.
Mr Edwards appeared on behalf of the **Defendant**.

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Judgment

His Honour Judge Kaye QC:

1. I have before me a rolled up application for judicial review which was lodged on 26 February 2009. On 23 June 2009 HHJ Vosper QC, ordered that there be a rolled up hearing of permission and, if granted, the substantive hearing and that the defendant file an acknowledgement of service by 7 July 2009 with costs reserved. It is that ordered hearing which is before me, the matter having started in London and having been transferred to Leeds by Deputy Master Knapman on 15 July 2009. In fact the acknowledgment of service was filed on behalf of the defendant (the Secretary of State for the Home Department) late, but nobody takes any point on that.

2. The case involves a consideration of paragraph 353 of the Immigration Rules which states:

> "When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
>
> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

3. The facts of this case, so far as relevant, can be briefly stated. The claimant is an Iranian national and an Iranian citizen who was born on 22 June 1984. He appears to have left Iran by lorry by night of 10 December 2006 and arrived in the United Kingdom on 14 December 2006. He claimed asylum in Liverpool on 15 December 2006. That claim was refused, the reasons being set out in a letter from the Home Office dated 26 January 2007. The claimant then appealed to the Asylum and Immigration Tribunal ("AIT"). The basis of the claimant's application and also his appeal to the AIT is summarised in the decision and determination of the AIT which was dated 13 March 2007. In brief, the claimant was a convert to Christianity and feared that if he returned to Iran, particularly where he was likely to evangelise or proselytise his Christianity, he would be at risk of persecution on account of his faith.

4. The starting point for the AIT was that, as a Muslim convert to Christianity (which the claimant is, as the letter from the Home Office referred to dated 26 January 2007 set out) was in reality likely to be able to practice his new faith up to

a point -- for example, by weekly attendance at church. The real issue in this case is the degree to which the claimant would be at risk in the event he evangelised or proselytised his faith, the point being, as was emphasised in the case of FS (Iran - Christian - Converts) Iran CG [2004] UKIAT 00303 at 157, that whilst the ordinary convert to Christianity is not likely to be in danger of return to Iran, but:

> "…the more active convert, Pastor, church leader, proselytiser or evangelist [was likely to be regarded] as being at a real risk. Their higher profile and role would be more likely to attract the malevolence of the licensed zealot and the serious adverse attention of the theocratic state when it sought, as it will do on some occasions, to repress conversions from Islam which it sees as a menace and an affront to the state and God."

5. The claimant's appeal to the AIT failed. It failed for a number of reasons, not least -- and most significantly -- that because the immigration judge, Immigration Judge Berkley, simply did not believe the claimant and his evidence. He accepted, and it is noteworthy, that a convert from Islam to Christianity, if that person proselytised his religion in Iran, would be at real risk of ill treatment from the authorities. He also accepted that human rights abuses are wide spread in Iran (see paragraph 13 of his findings). But he did not find the claimant to be credible in what he said. In particular, he doubted the claimant's knowledge of Christianity and he doubted the genuineness of his alleged conversion to Christianity. He had not then been baptised, although the judge noted that his baptism was intended later in that same month, but he regarded his alleged conversion to Christianity in Iran as "a fabrication" (see paragraph 15). He did not provide any witness to support his claim to his conversion even though he had applied for an adjournment to call the pastor, which application was rejected. It has to be said that the claimant was unrepresented at the AIT. He made a further application for reconsideration which was refused on 26 October 2007, and made an application for judicial review which was also rejected by Owen J.

6. On 19 June 2008 the claimant submitted a fresh claim to the Home Office. This time he was represented, and is now represented, by solicitors, Messrs Parker Rhodes. They wrote a long letter to the fresh claims department at the Home Office which was accompanied by a signed statement by the claimant dated 16 June 2008 and a number of documents and CDs in support of his application. They pointed out in their accompanying letter that the claimant resided at the Rotherham Pentecostal Church in Rotherham and that he wished to make a fresh claim for asylum.

7. The fresh claim was essentially based on two matters. First, the existence of four court judgments against the claimant from courts in Iran, the potential impact of which, it is said on his behalf, put him at a real risk of persecution and punishment if he were to return to Iran. The second matter on which the claimant relied was, as it was put in the letter of 19 June 2008:

> "During his time in the UK our client has continued to proselytise his Christian religion, becoming involved in church activities and in particular with the Youth movement of the Pentecostal faith."

There is then set out a number of matters in support, in particular that the claimant had used his skills in computers to develop the church internet website; he had become part of the church community in Rotherham preparing for services and church performances by developing PowerPoint services; he had been on visits to primary schools in the region developing Christian learning for the very young; he had been seconded to a secondary school discussing human rights issues and a number of other matters to which I shall return in a moment.

8. That application was considered by the Secretary of State or on her behalf, and by a letter dated 26 November 2008 (which is the decision letter that forms the subject matter of the application) the Secretary of State considered that the fresh material, taken together with the material previously considered, would not create a realistic prospect of success so as to entitle the claimant to make a fresh claim within paragraph 353 of the Immigration Rules.

9. The court's duty in dealing with matters of this nature is summarised in a number of cases as to which there is no real dispute between the parties as to the relevant legal tests and the approach that this court must take. In WM (DRC) v SSHD [2006] EWCA Civ 1495, Buxton LJ said this at paragraph 6:

> "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 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. If authority is needed for that proposition, see per Lord Bridge of Harwich in <u>Bugdaycay v SSHD</u> [1987] AC 514 at p 531F."

10. My attention was also drawn to a more recent case in <u>R (AK (Sri Lanka)) v SSHD</u> [2009] EWCA Civ 447; [2009] WLR (D) 198, where Laws LJ said this:

> "The judge's analysis of the term 'further submissions' is, with respect, less than satisfactory. As I understand his reasoning, he concludes that material put forward by an applicant giving renewed support to a human rights or asylum claim after a first refusal will only amount to 'further submissions' if two conditions are met. The first is that the material must be 'additional' -- that is, I take it, new by comparison with what had been said before; the second that it must be substantial -- there must be "some substance" to it. As for the first of these, the structure of the Rule shows that "further submissions" may contain nothing new. It requires the Secretary of State, having received further submissions, to decide whether they are 'significantly different from the material that has previously been considered'. Necessarily,

> therefore, the material advanced may amount to 'further submissions' whether they are 'significantly different' (that is, new) or not. The judge's second requirement, that there must be 'some substance' to the submissions, is apt to invite arid debate in marginal cases as to whether any submissions properly so called have been advanced at all. I think we should be alert to discourage the elaboration of satellite issues of that kind.
>
> In my judgment 'submissions' merely means representations -- short or long, reasoned or unreasoned, advanced on asylum or human rights grounds. If the representations are unreasoned, or barely reasoned, they will no doubt be readily and summarily dismissed by the Secretary of State. Unlike the judge I do not consider there is any real risk that this approach will commit the courts to 'the refined analysis required by *WM (DRC)*'. Indeed I doubt whether the process of decision-making under Rule 353 which that case outlines is accurately described as 'refined analysis'."

11. The learned lord justice then continued with the quote from paragraph 6 from WM (DRC) (above) and continued:

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

12. I therefore ask myself the first question whether the new material is significantly different from that already submitted? The Secretary of State came to the conclusion that it was not. Clearly the claimant was regarded as still having the continued credibility problems that he had in front of the AIT. Before the AIT, as paragraph 8 of the tribunal decision noted, the claimant had asked for an adjournment to obtain further documents from Iran, including a purported arrest

warrant and summons. He said that those documents had been sent to him. They had not arrived. They were therefore not put before the tribunal.

13. In the letter of 19 June 2008, submitted by solicitors on his behalf, they confirmed (in contrast to what had been stated to the AIT) that "at the time of his appeal our client had in his possession four court judgments against him from the courts in Iran". It was then said that, not having legal advice, he was unaware that he could have produced them. However, it is not his awareness or otherwise that mattered; what mattered was the fact that it is quite plain that he had lied to the tribunal. He had told the tribunal chairman, as I have indicated that the warrants and summons had been sent to him but that they had not arrived. It now appears from the letter sent to the Secretary of State that the four court judgments had already arrived and that they had been in the claimant's possession at the time of his appeal. It is hardly therefore surprising that the Secretary of State, in the letter written on her behalf of 26 November 2008, appeared to be singularly unimpressed as regards of that part of the alleged fresh material.

14. The second broad basis, however, of the claimant's alleged fresh claim was based on his conversion to Christianity. Here the Secretary of State plainly reached the view -- based on a fair reading of the letter, which is I think what I am obliged to do -- that the claimant's alleged conversion to Christianity was still in some considerable doubt. As the Secretary of State noted in the letter of 26 November:

> "Even though it is accepted that in the time since his arrival in the United Kingdom your client may have increased his knowledge of the Christian faith taken in the round it is not accepted that he would be at risk on return to Iran."

15. The Secretary of State then reached the conclusion that, although the claim had been reconsidered on all the evidence available, it had been determined that the submissions did not amount to a fresh claim. One aspect, however, that was not considered in that letter, at least in expressed detail, was the point that had been made in the letter from the claimant's solicitors of 19 June 2008 that the claimant had continued to proselytise his Christian religion. He had become involved in church activities and in particular in the youth movement.

16. A number of letters put forward on his behalf emphasised that the claimant was a born again Christian and that he was an integral part of the church's evangelistic outreach. He produced evidence of his baptism. In further letters in his support from third parties, not on the face of it prevented by the claimant's apparent lack of credibility, there were given some examples of the claimant's activities in this respect. It was pointed out, for example, by a Mrs A Berts, that he evangelises at every opportunity. A Mr Ball pointed out that he was happy to work in the community with the homeless and generally round the church with all ages. A letter from the Reverend E Anderson pointed out that he frequently attended the Christian church, that there was little doubt he was a genuine Christian believer, and that he not in any way shammed his convictions. Mr J Weston, in a letter of 11 December 2007, pointed out he was a committed evangelical Christian and worked at his faith by working in the church: for example, setting out chairs,

cleaning etc, and, more particularly, by evangelising in the local community of Rotherham and accompanying the pastor on his visits to schools around the Rotherham area, evangelising and sharing the truth and teachings of the Christian faith. A letter from Mrs D Lees pointed out that the claimant was working within the church and for Christian evangelism in the local areas and local schools around the Rotherham area. A further letter from a Mr George Jack, the pastor of the Rotherham Pentecostal Church, dated 26 June 2008 and therefore one which may not have been seen by the Secretary of State but that is nevertheless before me, points out that the claimant has been involved with evangelising within the local area where there is a mixed culture. A further earlier letter, which equally may not have been sent to the Secretary of State and is also not referred to in the letter of 19 June, points out that the claimant helped the pastor with visits to Christian Union meetings at local schools and recently attended one of the local comprehensive schools, again with the pastor to talk to children attending school assemblies and about human rights. To be fair, the latter two points are touched on in the statement that was included with the letter of 19 June. In it the claimant says, amongst other things, this at paragraph 18:

> "This material is new material and if it had been available at the time of my earlier case would have added weight to my asylum claim and shown that I was not only a practising Christian but was also a proselytising Christian assisting in preaching and putting forward the word of God."

17. The Secretary of State might be forgiven for viewing this material, or such of it as was brought to the attention of officials, with some degree of scepticism, particularly having regard to the very firm and trenchant words of the AIT judge about the claimant's lack of credibility. There is no doubt that the decision letter shows that that was a factor that understandably played significantly on the mind of the officials who were reconsidering the claimant's case. For example, in relation to the court judgments the official said:

> "Given your client's failure [to produce the documents at the previous hearing] and his overall lack of credibility, it is argued that these court judgments do not in fact further your client's asylum claim."

18. As to the Christianity point, the Secretary of State simply did not accept that he would be at risk on his return to Iran. The grounds for so stating are not entirely clear. On the previous page of the letter, more in the context of the court judgments, the Secretary of State also in referring to the claimant's assertion that he was not aware of the potential impact of the court judgment due to his lack of legal representation, said it was not considered credible given that his claim for asylum was based on a well-founded fear of persecution in Iran on account of his Christian religion. The judgment that he has now provided stated that "he was to be convicted in Iran for spreading the Christian religion and proselytising; proselytising and selling illegal anti-Islamic books; proselytising and selling

Christian books and for attending Christian meetings and spreading the Christian religion."

19. What the Secretary of State however does not seem to have done is to have put the evidence about proselytising with the new evidence, even new assertion, by the claimant that, in short, not only had he increased his knowledge of the Christian faith and not only had he been now baptised since the previous tribunal hearing but he had also been actively engaged in the community in evangelising and proselytising and that there was evidence to support that, albeit as Mr Edwards, counsel for the Secretary of State, with some force described, it was all about low-level activity. It does not appear to me that the Secretary of State put that together with the evidence of the arrest warrants and summonses. The Secretary of State appears to have tended to treat the two issues as somewhat separate. At least that is the impression I get from the letter.

20. I entirely accept that the evidence of the claimant's proselytising is extremely thin and might be said to relate to relatively low-level activity. I also note that a number of the letters that are put forward on his behalf -- albeit apparently signed by different people -- appear to have been written by the same person: see, for example, the letter from Mrs Berts on page 53 of the bundle provided and the letter from Mr Ball on pages 54 to 55 -- at least they appear so to my untutored eye. Although I accept and note there is no evidence either way The letter from the Reverend Anderson is unsigned, and the letter from Mr Weston and Mrs Lees on pages 57 and 58 of the bundle appear to have been typed on the same typewriter, albeit using a slightly different format. These may be matters for investigation, I know not. But at least, on the face of it, there is some evidence from an untainted source that supports the claimant's claim that he was proselytising. It may be that the claimant was prompted by the failure of his previous claim to the tribunal. It may be, as I put to both counsel during argument, that the claimant indeed had a genuine road to Damascus experience, either shortly before the tribunal hearing or after (or not at all). It does seem to me that the Secretary of State's officials in the letter of 26 November, whilst they considered and accepted that the claimant may well have increased his knowledge of the Christian faith, did not necessarily take into account his evangelising in the community. They did not therefore consider whether, as Mr Hussein submits, this was a case where he must or might be be regarded as "more active convert" (see paragraph 157 of FS and others), and in these circumstances, bearing in mind the rule imposes only a somewhat modest test and that I nevertheless have to consider these matters as does the Secretary of State with anxious scrutiny, it does seem to me that there must be some niggling doubt, certainly in my mind, about these matters, and accordingly I reach the conclusion that the material put forward to the Secretary of State was indeed fresh material and was significantly different from that already submitted, the significance being that, taken in the round, the claimant had been baptised, was living at the church, was actively involved in evangelising and proselytising since the tribunal hearing.

21. Does that create a realistic prospect of success? I have already indicated that the Secretary of State reached the conclusion that that material did not create a realistic prospect of success, but I have already pointed out that the Secretary of State does not seem to me to have taken on board, or at least so far as the letter

was concerned clearly set out, what view was taken about the fact that it was asserted that the claimant had continued to proselytise his Christian religion and that that was likely to place him at risk. Mr Edwards submitted with some force that the claimant does not even begin to get into the risk category. As it seems to me, the decision letter did not consider that aspect, and in not considering that aspect an error was made, and an error therefore which is liable to be reviewed, bearing in mind my jurisdiction is one of review only of what has gone before. Certainly, however -- although not necessarily for the conclusion that I have reached -- given that the tribunal chairman on the previous occasion accepted that a convert from Islam to Christianity (if that person proselytised his religion in Iran) would be at real risk of ill treatment from the authorities as I have previously quoted, it does seem to me that on the material now presented, certainly if it comes up to proof and if the persons who wrote letters of support gave evidence before a tribunal and were believed, then there is a real prospect of success before a differently constituted tribunal. Accordingly, for these reasons I propose to grant permission for review and, since this is also a rolled up substantive hearing, I propose to allow the claim, with what consequences precisely I shall consider with counsel in a moment.

22. Mr Hussein first seemed to want the Secretary of State simply to look at the matter afresh in the light of that consideration and, if reject the application, then he could go off to an Immigration Tribunal. Later he said he somewhat changed that and was asking me to direct that the matter should be referred directly to the tribunal. Subject to anything counsel may say again in a moment, my present inclination -- I put it no higher than that -- is that this seems to me to be a matter the Secretary of State's officials may not have given full consideration to the particular aspect that I mentioned as set forward in the claimant's solicitor's letter of 19 June. It may be better therefore that the matter should go back to the Secretary of State for a further and fresh consideration.

Order: Permission for review granted; claim allowed

MR HUSSAIN: I have nothing to add, I think that is probably, in light of your Lordships comments, appropriate to costs.

MR EDWARDS: It is entirely a matter for your Lordship if the case was so egregious that you think there is no point in sending it back and we're going to give him his appeal, then it's for the court to decide that; if not, it is for the Secretary of State.

HIS HONOUR JUDGE KAYE: I do not think it is so egregious; I think I have already pointed out some of the difficulties that this claimant may have, but it does seem to me that this is case which might benefit from a re-look, as it were.

MR HUSSAIN: One other thing is, the name of the applicant, if it could be anonymised to "BS".

HIS HONOUR JUDGE KAYE: I don't have any problem with that.

MR HUSSAIN: That is usually the standard. That is something I perhaps should have asked for at the beginning of the proceedings. The claimant is publicly funded, my Lord. I ask for the usual order in respect of costs.

HIS HONOUR JUDGE KAYE: You may have it.

MR HUSSAIN: (inaudible).

HIS HONOUR JUDGE KAYE: I am very grateful to both of you for the assistance that you have given.