Neutral Citation Number: [2008] EWHC 1032 (Admin)

Case No: CO/3004/2008

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

Royal Courts of Justice
Strand, London, WC2A 2LL

13/05/2008

B e f o r e:

THE HONOURABLE MR JUSTICE WYN WILLIAMS

Between:

THE QUEEN ON THE APPLICATION OF YASIN AHMED HAMA **Claimant**

and

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

Miss Galina Ward for the Claimant
Mr Robert Kellar for the Defendant
Hearing dates: 2 May 2008

HTML VERSION OF JUDGMENT

Mr Justice Wyn Williams:

1. The Claimant originates from the Kurdish Autonomous Zone in Iraq (KAZ). On 23 November 2000 he arrived in the United Kingdom and claimed asylum. The basis of his claim was that he feared ill-treatment at the hands of the authorities as he had been unlawfully trading antiquities. He relied particularly on an attempted transaction involving a mummy.

2. On 29 January 2003 the Defendant rejected the asylum claim.

3. The Claimant appealed to an Adjudicator. On 25 November 2003 the Adjudicator promulgated a determination in which she dismissed the Claimant's appeal. She found, in summary, that the Claimant's account of what had occurred in KAZ was incredible and, in any event, if the Claimant's fear was genuine it was a fear of prosecution rather than persecution. He feared that he would be prosecuted relating to activities which the Claimant himself acknowledged were illegal.

4. The Claimant sought permission to appeal but this was refused. On 26 February 2006 the Claimant voluntarily returned to Iraq. He had apparently been advised that a return to Iraq was desirable on health grounds. Recently, the Claimant has asserted that he returned to Iraq in February 2006 because he feared that he was going to die and he wanted to see his family.

5. On 22 January 2008 the Claimant entered the United Kingdom unlawfully. He was immediately arrested and detained. On the same day he was interviewed and he claimed asylum. In the interview he said at one point that the basis of his claim to asylum was the same as the basis previously considered. However, he also said that during the period of his return, i.e. between 26 February 2006 and 22 January 2008 he had been arrested and tortured.

6. On 24 January 2008 the asylum claim was refused. The decision letter conveying that to the Claimant appears to have considered the claim both on the basis of a free-standing independent claim to asylum unrelated to the earlier claim but also on the basis of rule 353 (HC395, as amended by HC1112) of the Immigration Rules.

7. On or about 29 January 2008 the Claimant submitted an "allegation of torture form" to the Defendant. That was considered by letter dated 23 February 2008. The material passage in the letter reads: -

> *"It is our opinion that full and fair consideration has already been given to your claim of torture, and they have been refused. Therefore we are not prepared to give further consideration to your letter without evidence. "*

8. On 14 March 2008 the Claimant was given a letter stating that he would be removed to KAZ by way of charter flight. Removal directions were set that day and served on the Claimant on 17 March 2008. The directions indicated that the removal would take place no sooner than 72 hours and no later than two weeks from service of the directions.

9. On 18 March 2008 solicitors acting on behalf of the Claimant made further submissions to the Defendant. Those submissions were headed "Further Representations under Article 3 of the European Convention of Human Rights". The solicitors enclosed with those representations a number of documents and, in particular, a document which was described as a copy of a writ of arrest for the Claimant (together with a translation) and medical forms from Aylesbury Police Station. The thrust of the further representations was that shortly before the Claimant's departure for the United Kingdom in January 2008 he had been stopped at a check-point, held by the security forces for nine days and during that period he had been tortured by being struck with the butt of a gun and given electric shocks. Thereafter an arrest warrant had been issued and the submission was made that if the Claimant was forcibly returned to KAZ he would be at risk of being subject to inhuman and degrading treatment.

10. On 27 March 2008 at 14:28 the Defendant issued a decision in which he rejected the assertion that the representations of 18 March 2008 amounted to a fresh claim under paragraph 353 of the Immigration Rules. At 15:59 that day further representations were made on behalf of the Claimant and a pre-action protocol letter was also served on the Defendant. At 16:11 the Defendant responded to a request for temporary admission and stated that the Claimant would be removed on 28 March 2008 at 19:00. At 19:41 the Defendant responded to the further submissions and pre-action protocol letter and again rejected the proposition that the Claimant had made further representations amounting to a fresh claim under rule 353 of the Immigration Rules.

11. Unbeknown to the Claimant's Solicitors and, presumably, to those making and issuing decisions on behalf of the Defendant the Claimant was, in fact, removed to KAZ by way of charter flight on 27 March 2008 at 16:00hrs. I deal with this as a discrete issue at the end of my judgment.

12. On 28 March 2008 the Claimant commenced these proceedings. In the Claim Form the details of the decisions to be judicially reviewed are set out in this way:-

> *"(1) The two decisions not to recognise that the Claimant's representations of 18th and 27th March 2008 satisfied rule 353 of the Immigration Rules, and (2) the decision to remove the Claimant from the UK. "*

13. A number of documents were served with the Claim Form. One such document was a report from Dr Rebwar Fatah upon the authenticity of the copy of the arrest warrant which had been sent to the Defendant under cover of the Claimant's solicitors letter of 18 March 2008. The substance of the report was accurately summarised in a section headed "Summary and Conclusions".

> *""28. I have examined the document which is issued by the Kurdish authorities in Sulayimaniya. As it can be seen, this document is very simple and as a result of my tests, which is outlined above, cannot strongly justify that it is reliable. However, I suggest that the document should be taken seriously.*
>
> *29. I understand that no one can confirm the authenticity of documents issued by the Kurdish authorities beyond any doubt. I can only give my opinion of what is reasonable to happen in the region and whether the documents can pass my tests.*
>
> *30. I believe that no document should be taken in isolation with the overall case of the appellant. The document should corroborate the Appellant's overall account.*
>
> *31. It should be clear that as an expert, I do not pass judgment, only give opinions."*

14. Following the issue of these proceedings the Defendant reacted by filing an Acknowledgement of Service and Summary Grounds of Defence. The Summary Grounds amount to a robust defence of the Claim. On the same day that the Acknowledgement of Service was filed, however, the Defendant issued a further decision letter (17 April 2008) which considered in detail the significance and reliability/authenticity of the arrest warrant. As the letter states its purpose was to set out further reasons why the expert report together with other points raised in the letter of 18 March 2008 would not create a realistic prospect of success before an Immigration Judge.

15. This letter provoked an immediate response from the Claimant's Solicitors. On the same date (17 April) 18 pages were despatched by fax to the Treasury Solicitor which constituted the Claimant's answers to the points raised in the decision letter of 17 April.

16. The hearing before me took place on 2 May 2008. At 19:01 on 1 May 2008 the Defendant faxed to the Claimant's Solicitors a response to their letter of 17 April. The letter consists of 38 paragraphs and it is closely argued. The letter was handed to me literally moments before I began the hearing and it had been considered by Counsel for the Claimant for not much longer. It was the service of this letter, so late in the day, which caused me to believe that an injustice might occur if I attempted to give a

reasoned decision on this renewed application for permission immediately. I say renewed because permission was refused on the papers by Stadlen J on 21 April 2008.

17. In her Skeleton Argument in support of the application for permission Ms Ward takes two points. The first point is focused upon paragraph 19 of the Defendant's Summary Grounds. Paragraph 19 reads as follows: -

> *"It is clear that paragraph 353 applies to the circumstances of this case. The Claimant had made an earlier asylum claim in the United Kingdom which had been refused. The Claimant has exhausted his appeals rights against that decision as the time limit for challenging the Adjudicator's determination has long expired. His further submissions raised matters under the ECHR and the Refugee Convention. Paragraph 353 of the Immigration Rules therefore applies to the Claimant's second asylum claim. That he left the United Kingdom in the interim is irrelevant. "*

18. Miss Ward submits that it cannot be correct to assert that the fact of the Claimant leaving the United Kingdom is irrelevant for the purposes of rule 353. She says that since rule 353 expressly does not apply to claims made overseas. Asylum claims cannot of course be made at entry clearance points. She goes on to submit that the application by the Defendant of rule 353 to what she categorises as an entirely new claim of persecution arising after the Claimant has departed the United Kingdom is at least arguably incorrect and permission should be granted to argue this point since it is free from authority.

19. 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 been previously been considered. The submissions will only be significantly different if the content:*
>
> > *(1) had not already been considered;*
> >
> > *(2) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.*
>
> *This paragraph does not apply to claims made overseas. "*

20. In my judgment it is not reasonably arguable that rule 353 does not apply to the current circumstances. A human rights and asylum claim was refused in 2003 and no appeal relating to that claim was pending by January 2008. In my judgment when the Claimant arrived in this country in January 2008 he made further submissions as to why he should be granted asylum and/or his human rights might be adversely affected if he was returned to KAZ. It was then the duty of the decision maker to consider those claims. If the claims were accepted no doubt appropriate decisions would then be issued. If however, the claims were rejected it was incumbent upon the decision maker to determine whether such submissions amounted to a fresh claim. As a matter of fact, as I have said, the Claimant was in this country when he made his further submissions.

21. The significance of the point raised by Miss Ward is this. If the Claimant's representations of 22 January 2008 are considered wholly independently of his previous claim he will enjoy a right of appeal to the AIT in the event of a rejection of those submissions. On the other hand if the representations are within rule 353 no right of appeal lies against a rejection of the claim unless a finding is made that the representations amount to a fresh claim.

22. I can think of no reason why the words of rule 353 should not be given their ordinary meaning. On that basis I cannot see how the claims made by the Claimant on 22 January 2008 are not within the rule. Further, and additionally I can think of no good reason why the words of rule 353 should be interpreted differently from their ordinary meaning. The plain fact is that if a person makes a second or subsequent claim which is properly to be regarded as a fresh claim within the meaning of rule 353 he or she will have a right of appeal.

23. I turn to the second point raised in this application namely that the Defendant acted unlawfully, arguably, in refusing to treat the representations made by the Claimant as a fresh claim.

24. Although the Claim Form specifies that the decisions under challenge are those which were made on 24 January 2008 and 27 March 2008 the hearing before me preceded on the basis that I ought properly to consider all the Claimant's representations i.e. those made before and after the commencement of these proceedings and the Defendant's responses thereto.

25. The correct legal approach is not in dispute. In **WM (DRC) v The Secretary of State for Home Department and Secretary of State for Home Department v AR(Afghanistan) [2006] EWCA Civ 1495** the Court of Appeal considered both the task of the Secretary of State when considering further submissions and the task of the Court when reviewing a decision of the Secretary of State that further submissions did not amount to a fresh claim.

26. In relation to the task of the Secretary of State, and in particular the second limb of the paragraph 353 test (i.e. whether the content of the submissions, taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection) the Court found that the threshold was "somewhat modest". The question for the Secretary of State was whether there was a realistic prospect of success in an application before an Immigration Judge, not more than that. In answering that question, the Secretary of State must be informed by anxious scrutiny of the material which, in essence, means that she should give proper weight to the issues raised and consider the evidence in the round.

27. In relation to the role of this court, the Court of Appeal stressed that the decision (that is the decision as to whether or not there was a fresh claim) was one for the Secretary of State and the decision reached was only capable of being impugned on grounds of irrationality or unreasonableness within the principles in Wednesbury. The issue for me is whether the Defendant's view that all the Claimant's submissions in 2008 taken together with the previously considered material did not create a realistic prospect of the Claimant succeeding before an Immigration Judge was irrational or unreasonable bearing in mind the need for anxious scrutiny.

28. Although there was a good deal of material which it was necessary for the Defendant to consider, the principal issues for her consideration were the authenticity of the arrest warrant and its significance if authentic coupled with the assertion made by the Claimant that he had been the subject of torture during detention. Quite clearly the existence of the copy arrest warrant called into play a factor which was not present when the Claimant's first application for asylum was dismissed as did the allegation of torture. The arrest warrant, in particular, formed the basis for the Claimant's assertion that he would be at risk of torture should he be returned to KAZ.

29. Quite clearly, the Defendant takes the view that the arrest warrant cannot be relied upon as an authentic document. That is a view which she is entitled to reach but, of course, in the context of this challenge the real issue is whether her conclusion that no Immigration Judge would reach a different conclusion is a rational or reasonable one. If, arguably, it is not I ought to grant permission.

30. The first that the Defendant knew of the existence of a document purporting to be an arrest warrant in respect of the Claimant was when a copy of it was sent to the Defendant under cover of the letter of 18 March 2008. In that letter the Defendant was told that the original arrest warrant was currently being forwarded to the Claimant. That carried with it, of course, the implication that it was not then in his possession. The Defendant was also informed that she could have the document verified but that in the event that this was thought appropriate she was requested to cancel the Claimant's removal directions. The significance of the arrest warrant, according to the Claimant's solicitors, was that it showed that the Claimant was wanted by the authorities in KAZ and that he was facing arrest and imprisonment.

31. The Defendant's response to the copy warrant is contained within the letter of 27 March 2008 and in particular, paragraph 10. It is clear, in my judgment, that although the Defendant made the assertion that no reliance could be placed upon the document no attempt was made to grapple with the issue of whether or not there were cogent reasons for concluding that the document was not authentic.

32. If matters had stood still as at 27 March 2008 I would have considered it arguable that the Defendant's treatment of the warrant was flawed and that on the basis of what was written on her behalf a conclusion that no Immigration Judge could have concluded that reliance could be placed upon the warrant was arguably irrational or unreasonable. What has transpired, subsequently, however, is that by a process of written debate between the Claimant's solicitors and the Defendant the issue of the authenticity of the warrant has been subjected to the closest scrutiny as has the report of Dr. Fatah obtained on behalf of the Claimant.

33. In the decision letters of 17 April 2008 and 1 May 2008 the Defendant has identified cogent reasons why she regards it appropriate to conclude that the arrest warrant is not authentic and no reliance should be placed upon it. It would be invidious for me to seek to summarise her conclusions. The letters must be read in full to understand what the reasons are.

34. Just as importantly, it is clear that the Defendant has applied the correct test in assessing whether or not the Claimant's representations amount to a fresh claim. I refer, in particular, to paragraphs 18 to 25 of the letter of 17 April. Indeed, in her written Skeleton Ms Ward concedes as much (see paragraph 12).

35. In my judgment the letters of 17 April 2008 and 1 May 2008 show that the Defendant considered the correct legal test when deciding whether or not the Claimant's further representations should be treated as a fresh claim and, in my judgment, her conclusion that they should not be so treated is not arguably irrational. The letters contain cogent reasons why that is so.

36. During the course of her submissions Miss Ward was good enough to recognise that the many points which the Defendant had raised about the authenticity and/or reliability of the arrest warrant would provide powerful ammunition with which to confront the Claimant in any appeal before an Immigration Judge either by way of cross-examination or submission. In my judgment the points raised by the Defendant in the letters to which I have referred go further than that. They demonstrate that an Immigration Judge, properly directing himself/herself, would be almost bound to reach the same conclusions about the warrant as the conclusions reached by the Defendant.

37. The other issue of some importance, of course, is the allegation of torture. In reality the Claimant produced no evidence, independent of his own assertion, to support the allegation. The Defendant gave her view about this allegation in the letter of 23 February 2008 and she dealt with it again in her letter of 27 March 2008. Nothing about her consideration of this issue was arguably irrational.

38. I have stood back and considered the case in the round and have conscientiously considered whether the Defendant's decision to refuse to recognise a fresh claim as contained within her various letters is arguably irrational. I do not believe that it is.

39. It follows that I do not consider that this is a case in which I should grant permission.

40. I turn finally to the issue of the Claimant's removal. It is not suggested that the removal, in itself, was unlawful. There can be no doubt, however, on the evidence filed, that the Claimant's solicitors were misled by an employee of the Border and Immigration Agency about the date of his removal. I am asked to accept that this was an honest mistake and I do so without hesitation. Having said that, the explanation for this honest mistake can only be a complete failure to record information accurately on the Agency's computer system. That is a very regrettable state of affairs.