Case No:CO/8252/2009

Neutral Citation Number: [2009] EWHC 3730 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Sitting at:
Cardiff Civil Justice Centre
2 Park Street
Cardiff
CF10 1ET

Date: Friday, 18th December 2009

Before:

HIS HONOUR JUDGE SEYS LLEWELLYN QC

- -

Between:

SHARAN RAZAAIE

Claimant

- and -

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

- -

(DAR Transcript of
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Official Shorthand Writers to the Court)

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Ms C Hulse appeared on behalf of the **Appellant**

Ms J Williams appeared on behalf of the **Defendant**.

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Judgment

His Honour Judge Seys Llewellyn:

1. In this case an application was made for judicial review from a decision of the Secretary of State. The claimant is an Iranian national but a Kurd. He entered the United Kingdom on 22 August 2008. He claimed asylum promptly. The asylum claim was refused. The matter was heard by way of appeal on 24 November 2008 and the decision on appeal was to dismiss his appeal and that was promulgated in December 2009. On 31 March he submitted fresh representations in support of his claim for asylum on the basis that the Secretary of State had not before her, nor had the Appeal Court before it, a court summons of August 2008 by an Iranian court and also a CD of the claimant singing pro-Kurdish songs.

2. The decision complained of is the response of the Secretary of State dated 23 April 2009. Since he was an asylum seeker who had made a claim but failed in that claim and his appeal had been dismissed and his rights exhausted, the relevant rule is Rule 353 of the Immigration Rules which provides that where a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules, and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and,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 (1) had not already been considered and (2) taken together with the previously considered material, created a realistic prospect of success notwithstanding its rejection.

3. The fresh material submitted was by letter of 31 March 2009 by solicitors for the claimant and said that:

> "The reasons that the Applicant's second application should be considered as a fresh claim and should generate a further appeal are as follows:
>
> 1. Iranian Court Summons
> 2. Envelope in which document was sent to the United Kingdom
> 3. CD of client singing pro Kurdish songs"

4. The summons was dated what is in western terms 10 August 2008. The reason for attendance to the summons was stated on the face of the summons as being inciting cooperation between members and supporters of dissolved parties and encouraging them by means of singing to riot against the Islamic Republic of Iran. The letter also included a report from Gilgamesh Middle Eastern Language Services Ltd in which it also said, having expressed a number of reasons:

> "Bearing in mind all the points above, I believe this document does meet the criteria for a genuine document."

5. The decision letter of 23 April said, amongst other matters: "Although it is accepted that this CD was not available the theme of the evidence has been fully considered". The letter made reference to the asylum appeal in which the immigration judge had, for a plethora of reasons, concluded that the account of the asylum seeker was not credible, and so at paragraph 35 had stated:

> "I conclude that the whole claim has been based on the DVD or CD which may well have been produced but that it was produced for the express purpose, if it was indeed produced in Iran, of manufacturing a false asylum claim."

It made a reference to a CD which the claimant asserted showed him or identified him singing a song which would bring him to the attention and persecution of the authorities in Iran.

6. The grounds of appeal which appear at page 7 of the bundle before me were that the Secretary of State had failed to deal with the expert opinion on the court summons. I granted leave for the claimants to amend their grounds to read "the Secretary of State had failed adequately to deal with the expert opinion on the court summons", the reason for that being that on 16 October 2008, after these proceedings for judicial review had been initiated, the Secretary of State sent a further letter which read as follows: "Further to our decision on the 26 September 2009 we write to supplement our decision", and it refers to the expert's report, and states as follows:

> "However, having read the report from claimed experts, there is nothing to suggest that their claim that the document is genuine is anything more than their opinion based on their experience of translating documents. The translators have not provided any information to show that they are trained to be able to distinguish a genuine document from a forgery and then inserted in a slightly different font, 'The Report fails to meet any of the requirements of Part 35 of the Civil Procedure Rules and Practice Direction Part 35 3.2'"

7. In the earlier decision letter, dated 23 April 2009, it says "your client claims to have produced a court summons from the Ministry of Justice of the Islamic Republic of Iran for him to attend court on 20 August 2008. It is noted that this was nearly 1 month prior to his Substantive Asylum Interview and in excess of three months of the Substantive hearing and yet this evidence has only just been produced. Considering the document in the round with the accounts previously given by your client, it cannot be accepted as genuine in accordance with TANVEER AHMED (reference given). Your client has been found incredible by the Home Office and the immigration judge and there is no reason to think that this evidence is anything other than a further fabrication in an attempt to bolster his claim for asylum in the United Kingdom. It is accepted that the envelope

which he has submitted was sent from Iran, but it is not accepted that this in any way validates or adds weight to his claim for persecution in Iran. Your client's asylum claim has been reconsidered on all the evidence available, including the further submissions, but it has been decided that the decision of 26 September 2008, as held by the immigration judge on 11 December 2008, should not be reversed."

8. It is now trite law that the Secretary of State, considering the new material submitted on behalf of the applicant, has to ask himself two questions. First,

> "the question is not whether the Secretary of State himself thinks that the new claim 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 the starting point in the consideration of the question which 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 valuation 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 with the answer to both of those questions if in the affirmative, it will have to grant an application for review of the Secretary of State's decision.

I take that from paragraph 11 of WM (DRC) v SSHD [2006] EWCA Civ 1495, a now familiar authority.

9. I think it is helpful to deal with this matter in simple stages. First, Ms Hulse, in a skeleton argument asserts that the CD itself should have been considered and so (inaudible) cannot be on the basis of entry clearance. If I understand her submission correctly, she is saying that the content of the CD itself submitted at the end of March 2009 might lead to a different outcome as viewed by an adjudicator if considered as a fresh claim. Counsel for the Secretary of State, Ms Williams, says that this is a matter not developed at all in the Grounds of Appeal themselves and attempts to extend the Grounds of Appeal. I think it is such an attempt. I think I should not close my eyes to it if it were a permissible argument. I respectfully consider it is anything but permissible. At paragraph 35 the Immigration Judge dismisses the appeal:

> "I conclude that the whole claim for asylum has been based on the DVD and CD, which may well have been produced but that it was produced for the

> express purpose, if it was indeed produced in Iran, for manufacturing a false asylum claim.

It seems to me impossible to say that Secretary of State misdirected himself in the Letter of Decision if (inaudible) by way of expression he was forming the view that that could not reasonably raise a real prospect of (inaudible) if placed before the adjudicator.

10. Secondly, the skeleton argument of Ms Hulse draws attention to the fact that the decision letter of 23 April 2009 drew conclusions adverse to the applicant on the basis of the court summons dated one month prior to his asylum interview and three months before the substantive hearing and yet the evidence has only just been produced; and she would have been entitled to draw attention to the fact that the envelope which had been sent with the fresh claim letter at the end of March to include it on its face bore evidence of having been picked up in this country on 30 January 2009, at a time when the appeal had all gone through.

11. This in itself might be a point where the letter might have been better expressed but (apart from the renewed complaint of counsel for the Secretary of State that this is an enlargement of the grounds of judicial review, which I accept) it seems to me that the Secretary of State was fully entitled to take as his starting point the earlier findings as to the reliability, honesty or credibility of the claimant in approaching the circumstances in which this court summons was produced by the claimant. Its production by the claimant at a given date, and his assertion that that is when he received it for the first time if he had chosen to serve it, would nonetheless be a matter arising for the claimant himself. So, firstly, I view this as an enlargement of the original Grounds of Appeal but, secondly, one which arouses in the mind of this court no concern.

12. The crucial matter in this appeal is the fact that a report has been submitted expressing the belief that the court summons was a genuine document, and two matters are notable in the original decision letter. Firstly, there was no reference whatsoever to that report. The second is that there is no reference whatsoever to the proper test, namely whether there was, in terms of paragraph 11 of WM (Congo) v SSHD [2006] EWCA Civ 1495, a realistic prospect of an adjudicator thinking that an applicant will be exposed to a real risk of persecution on return considering that further evidence. It goes further than that. The decision letter of 23 April expressly treats this as a matter for the Secretary of State himself:

> "Your claim has been found incredible by the Home Office and Immigration Judge. There is no reason to suggest that this evidence is anything other than a further fabrication in an attempt to bolster claim for asylum in the United Kingdom. Your client's claim has been reconsidered on all the evidence available, but it has been decided that the decision upheld by the immigration judge on 11 December 2008 should not be reversed."

The Secretary of State appears to be asking himself a question: "Do I accept that this changes matters?" That is the wrong test. If matters stood there, it seems to me that this application for judicial review would succeed.

13. Matters do not rest there. On 16 October 2009 a further matter was written by way of supplementing the decision to decline the fresh claim for asylum. It does expressly consider the report of the claimed expert. It does expressly consider the correct test, that, based on the above and the consideration already given of the refusal dated (inaudible) along with the reasons for refusal letter dated 26 September 2008 which was upheld by the immigration judge that the evidence does not amount to a fresh claim for asylum because it does not hold a realistic prospect of success if put before the judge.
14. A subsidiary matter arises. Ms Hulse accepts the report submitted with the letter of 31 March 2009 should have been accompanied by a declaration in proper experts' form and did not. She asks that I take into account the letter faxed today from the author of the report, which includes the statement of the experts' belief and understanding of the experts' duty in proper form and which also inserts a paragraph dealing with his experience. That paragraph inserted says:

> "I have been translating what I have known for a fact to be all sorts of authentic legal documents in Farsi which have been legalised by the Iranian Consulate in London and in other (inaudible) since 1980. I should add that the same is also true for many different types of Arabic legal documents which have also been legalised by the (inaudible) over the years. All this has given me a very clear idea of what genuine legal documents in both Farsi and Arabic should look like and provides me with a good yardstick to measure other documents which are submitted to me."

15. Ms Hulse says I should take account of the new material in the context of the larger picture of the duty which rests Secretary of State to give anxious scrutiny to evidence placed before the Secretary of State. It seems to me that, insofar as that letter seeks to enlarge the authority or weight of the original report, it cannot be right for me to take account of it because it was not material which was before the Secretary of State for the Secretary of State to consider. To decide against the Secretary of State on the basis of that would be to criticise the Secretary of State for failing to take account of something which was not before the Secretary of State. Such would simply be illogical in my respectful opinion.

16. I therefore turn to the nub of the matter. I note, as it were in favour of the Secretary of State's submissions, that the original report dated 15 February 2009 stated this:

> "When examining a document such as this, I always start from the inherent assumption that it is genuine and then look for reasons why it

> might not be, rather than assuming that all documents are forgeries and then looking for reasons why they might be genuine!"

If that had been followed by a short statement of opinion that the document, from his experience, was genuine, it seems to me that the objection would have carried greater weight. It seems to me that it would have been entirely proper for the Secretary of State upon the letter to say that there was nothing to show that what was contained in the document was genuine was anything more than based on their experience of translating documents.

17. In my judgment that does scant justice to the matters to be considered by the Secretary of State. First, the author of the report was in fact exercising an analysis according to criteria in which he spelt out and applied in a rational and considered way. Second, in the report before the Secretary of State at all times there has been the report by the author that: "I have seen many forgeries where the entries on a single document contradict each other." Thirdly, while I took the point, as it were potentially in favour of the Secretary of State, that the starting point had been that the documents are genuine subject to analysis, that was no part of the response of the Secretary of State's decision as set out in the letter supplementing the original decision of 16 October 2009.
18. I am uncomfortably aware of an impression that the letter from the SoS of October 2009 is designed to cure the self-evident defect of the letter of 23 April 2009, but I put that uncomfortable suspicion out of my mind. It seems to me that it is conscientiously expressed and that I ought to treat it on its own merits. For the reasons that I have identified, it seems to me that it was inadequate to dismiss the report as no more than an opinion based on their experience of translating documents. It considered the quality and weight of paper for that type of document; the sense of the document; the self-consistency of the document; the official stamps and inks used, of which plainly the author had great experience, and whether there were deletions, overwriting or unnatural blank spaces which might indicate tippexing or other erasure on another document even if one were to discard what the author of the report described, lastly, as the "intangible feel" of whether there was anything suspicious about a document. I have to say, as did Moore-Bick LJ in WM, firstly, that had I been considering this report I would have considered that it merited being placed before an adjudicator as having a reasonable possibility or prospect that an adjudicator may take a different view, and secondly that if the Secretary of State were to give anxious scrutiny to the content and internal force of the report, the Secretary of State ought to have concluded that it was fit to constitute material supportive of a fresh claim worthy of consideration. For those reasons, I consider that the test, as it were, in WM has not been satisfied in this case. I quash the decision of 23 April 2009 supplemented by 16 October 2009, and now any relevant material can be placed before the Secretary of State. It would be sensible for the original of the photocopied, as amended, letter to be placed before the Secretary of State. It may be sensible for the claimant to do that and for the whole matter to be dealt with, rather than an artificially limited consideration of the letter of 31 March 2009, but that is a matter for the claimant and the Secretary of State, not for me. All I do is remit for the Secretary of State to reconsider the application of 31 March 2009 and its enclosures.

HIS HONOUR JUDGE SEYS LLEWELLYN: Is there anything else?
MS HULSE: Can I make an application for our costs to be assessed?
HIS HONOUR JUDGE SEYS LLEWELLYN: To be assessed?
MS HULSE: Yes, my Lord.
HIS HONOUR JUDGE SEYS LLEWELLYN: Ms Williams?
MS WILLIAMS: No objection.
HIS HONOUR JUDGE SEYS LLEWELLYN: Costs to the claimant, to be assessed. Ms Hulse, would you be kind enough… of course, you don't have the template, and I do. In the ordinary way, I would invite a draft of the order to be e-mailed. Perhaps if you would mail not the whole form, but just the two paragraphs, as it were. No 1, decision quashed, and the letter of 31 March and its enclosures etc; second, costs to the claimant to be assessed. And if you could e-mail that into the court and then I will translate it into the Administrative Court JRJ template. Thank you very much for your assistance.