Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of Zonzi) v Secretary of State for the Home Department FCJR [2013] UKUT 00308 (IAC)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Heard at Field House
On 2 May 2013

Determination Promulgated

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Before

UPPER TRIBUNAL JUDGE PETER LANE

Between

THE QUEEN ON THE APPLICATION OF
WILFRED ZONZI

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Applicant: Mr A. Jafar, instructed by Lawrence Lupin Solicitors
For the Respondent: Mr S. Whale, instructed by the Treasury Solicitor

JUDGMENT

(1) Introduction

1. The applicant is a citizen of Congo (Brazzaville) who came to the United Kingdom in 2008 and claimed asylum. He said that in 2007 he had been persuaded to transport to Brazzaville a group of fighters associated with a rebel leader named Pastor N'tumi. As a result, the applicant had been detained by the authorities and would be of serious adverse interest to them, if returned. The respondent refused the asylum claim and decided to remove the applicant from the United Kingdom by way of directions. The applicant's appeal against that decision was dismissed in October 2008 by Immigration Judge Cruthers, following a hearing in Manchester, at which the applicant appeared in person. Following an unsuccessful application for permission to appeal the determination of the Immigration Judge, the applicant became appeal rights exhausted in March 2009.

2. Beginning on 6 March 2009, the applicant has, through his present solicitors Lawrence Lupin, made a number of submissions, accompanied by relevant documentary material, which he has requested the respondent to treat as fresh claims to be in need of international protection. They are as follows:-

   (a) By letter of 6 March 2009 the applicant submitted copies of a writ of summons, with translation; a search warrant, with translation; and an arrest warrant, with translation. The respondent responded to these submissions by letter dated 12 March 2009.

   (b) By letter dated 23 October 2009 the applicant submitted an EMS post express envelope received from the DRC, sent to the applicant; what were said to be the originals of an arrest warrant dated 1 October 2008 (with English translation); a search warrant dated 10 December 2008 (with English translation); an arrest warrant dated 22 December 2008 (with English translation); a search warrant dated 31 March 2009 (with English translation); a summons dated 3 March 2009 (with English translation); an arrest warrant dated 2 April 2009 (with English translation); and a manuscript letter dated 17 April 2009, said to be from the applicant's sister (with English translation). These submissions were addressed by the respondent in a letter of 5 March 2010.

   (c) By letter dated 31 March 2010 Lawrence Lupin Solicitors provided, on instruction, information from the applicant concerning the arrest warrant of 1 October 2008, the search warrant of 10 December 2008 and the arrest warrant of 22 December 2008. The applicant said that these were brought by hand from Congo by an individual who had travelled to Paris and then posted them to a friend of the applicant. The applicant further stated that a government official had served the warrants at the home occupied by the applicant's parents. The summons of 3 March 2009, search warrant of 31 March 2009, arrest warrant of 2 April 2009 and letter of 17 April 2009 were said to have been sent by the

applicant's cousin/extended family member to the applicant's friend in the United Kingdom.

(d) By letter dated 17 February 2012 Lawrence Lupin Solicitors enclosed a statement of evidence signed by the applicant and dated 17 February 2012; letters of 16 January 2012 and 22 January 2012 from David Diangouaye, written from Paris (with English translations); a letter dated 25 November 2011 from the applicant's sister (with English translation); a death certificate dated 25 October 2011 relating to the applicant's father (with English translation); and a further letter from Mr Diangouaye dated 26 October 2009 (with English translation), together with a copy of his passport and his mother's status in France (with copy envelope). His last letter is, in fact, described as an "honour certificate". These materials were considered by the respondent in a letter dated 13 April 2012.

(e) On 23 May 2012 the applicant submitted a "report of special illness or condition" compiled in Morton Hall IRC, in accordance with rule 35 of the Detention Centre Rules 2001 in which it was recorded that the applicant had told a member of staff that he had been tortured in 1998 and again in 2007. The report recorded the applicant as having "faded scars to foot and back". The respondent considered this report in a letter of 24 May 2011.

3. Judicial review proceedings were brought by the applicant against a decision of the respondent taken in respect of the applicant in March 2009. Following the grant of permission, a substantive hearing took before His Honour Judge Alan Gore QC, sitting as a Deputy High Court Judge, on 22 March 2012. On that day, the respondent accepted not to detain or remove the applicant until seven days after she had served him with "a further decision letter on the issue of whether the [applicant] has a fresh claim for asylum in respect of the [applicant's] representations dated 17 February 2012". On that basis, the applicant was given leave to withdraw the claim. I shall have more to say about those proceedings in due course, since they feature as one of the grounds accompanying the present application (see paragraphs 51 to 53 below).

4. The present application originally sought to challenge the respondent's decisions of 5 March 2010, 20 December 2010, 20 February 2012, 13 April 2012 and 25 May 2012. Permission to bring judicial review proceedings was granted by an Upper Tribunal judge on 31 May 2012. Her grant of permission did not address the fact that the challenge to the two decisions of 2010 and that of 20 February 2012 were brought outside the three month time limit prescribed both by the CPR and the Tribunal Procedure (Upper Tribunal) Rules 2008. By consent, the hearing before me proceeded on the basis that the only two decisions directly challenged were those of 13 April 2012 and 25 May 2012; but there was also common ground that, in determining the legality or otherwise of those decisions, regard needed to be had to earlier decisions of the respondent, including those I have just mentioned.

(2) Legal principles

5. The correct test to be applied in considering whether the respondent's decisions are unlawful is perhaps best set out in the judgment of Buxton LJ in WM (DRC) v Secretary of State for the Home Department [2006] EWCA Civ 1495:-

> "First, has the Secretary of State asked himself the correct question? 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, 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 enquiry; but it is only a starting-point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind. Second, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? If the court cannot be satisfied that the answer to both of those questions is in the affirmative it will have to grant an application for review of the Secretary of State's decision." [11]

6. It is at this point convenient to deal with ground 2 of the applicant's grounds of challenge in the present case. This asserts that the respondent adopted a legally erroneous approach to the documentation submitted by the applicant and said to emanate from Congo (Brazzaville), comprising such things as the summons and arrest warrant.

7. In this regard, reliance is placed upon the judgment of Collins J in Rahimi v Secretary of State for the Home Department [2005] EWHC 2838 (Admin). In that case, an appellant, who had lost an appeal before an adjudicator (who did not find him credible) subsequently submitted what was said to be the original of a newspaper report from Afghanistan, together with the opinion of an expert, Dr Giustozzi, who said that the newspaper "could well be genuine" [6].

8. Having cited what were then considered to be the leading authorities on the issue of fresh claims, Collins J considered the submission that the issue in a fresh claim case under paragraph 353 of the Immigration Rules "is whether the material creates a realistic prospect of success and that being so, it must be for the Secretary of State properly to decide whether the evidence is, in his view, evidence which should be believed. It is only if his view is an irrational view that a fresh claim can be entertained" [17].

9. At [18] Collins J considered that this submission "put it too high against an applicant":

> "18. … I think it would be difficult to justify an approach which enabled the Secretary of State to find a matter of fact against a new claim which otherwise would succeed because the material had not already been considered; and there was

good reason, as it happens in this case, for that, because it did not exist until after the relevant decision of the adjudicator.

19. Of course, if it is intrinsically incredible, or if when one looks at the whole of the case, it is possible to say that no person could reasonably believe this evidence, it should be rejected. If it is, on the face of it, credible and if, despite the feeling that it might be disbelieved, it is not possible to say that it could not reasonably be believed, then, as it seems to me, the decision ought to be based upon that state of affairs. The Secretary of State would be wrong to say 'I don't believe it and therefore I am not going to regard this as a fresh claim'.
20. In those circumstances, as it seems to me, this claim is entitled to succeed. That means, of course, no more than that the claimant will be given a fresh right of appeal, if he wishes to exercise it, and it may well be that that appeal will not succeed. But further enquiries can no doubt then be made on both sides into the authenticity of this newspaper report. The Secretary of State after all is just as capable, one would have thought, of finding out from the publishers of this document whether it is indeed genuine, and equally no doubt the claimant, for his part, will be able to make further enquiries."

10. As Mr Jafar points out, the judgment of Collins J in Rahimi was specifically upheld by the Court of Appeal in WM (DRC) (it was a conjoined appeal with that of WM). I consider, however, that the applicant in the present case is wrongly seeking to extract from Rahimi a legal proposition which, particularly in the light of the judgments in WM (DRC), does not in reality exist. It is plain from [17] to [19] of the judgment of Collins J that he was, in effect, rejecting the proposition that the Secretary of State's own view of fresh documentation submitted on behalf of an applicant should be determinative of the issue of a fresh claim. In the light of WM (DRC) such a proposition is plainly incorrect.

11. However, it seems to me to be equally plain that Rahimi is not to be regarded as authority for the proposition that, where an applicant submits documentation which he or she says comes from a third party source (such as the government of another State), that documentation must (unless "intrinsically incredible") give rise to a fresh claim, unless no reasonable judicial fact-finder could believe this evidence, or, to put it another way, treat it as reliable.

12. Such an approach would run counter to the holistic exercise described in WM (DRC). It would also, in effect, involve re-writing paragraph 353, in cases of this kind, by ignoring the word "realistic" in the phrase "realistic prospect of success". What I consider to be the correct position is articulated in the judgement of John Howell QC, sitting as a Deputy Judge of the High Court, in Muhammed Yameen v Secretary of State for the Home Department [2011] EWHC 2250 (Admin):

> "40. … In my judgment it is not necessary for the Secretary of State to be able to conclude that something is itself incredible or incapable of belief for her to be entitled to conclude that there is no realistic prospect that a Tribunal would treat it as reliable. Whether a Tribunal could reasonably treat something as reliable is to be answered in the context of the evidence as a whole and in that connection

it may be important to consider what evidence there is which explains how any document came into existence or any statement came to be made and which supports its reliability…

41. Even if new representations are based wholly or in part on material that is reliable or, at least, on that which an Immigration Judge might realistically treat as reliable, however, that does not necessarily mean that they will amount to a fresh claim. The Secretary of State still has to make a judgment about whether there is a realistic prospect of a successful outcome in the Tribunal proceedings based on such material giving it anxious scrutiny …"

13. What the respondent has to do in cases of this kind is to consider the fresh material, against the background of the earlier judicial findings in respect of the applicant, in order to determine, in all the circumstances, whether the applicant has a realistic prospect of success before a future hypothetical judge. The fact that the applicant may have been disbelieved already in a judicial context is not determinative; nor is the Secretary of State's own view of the new material and the present credibility of the applicant. I shall consider the detailed criticisms levelled against the respondent's approach in the present case in due course. For the present, however, I find that the respondent did not err in law in refusing to treat the applicant's submissions as a fresh claim merely because, although there was not a realistic prospect of success, a judicial fact-finder might rationally have regarded the material as reliable and have allowed the appeal on that basis.

(3) The applicant's specific challenges: by issue

14. It is convenient to consider the applicant's remaining grounds under the following generic headings.

(a) Failing to appreciate that the Immigration Judge had accepted part of the applicant's account of his experiences in Congo (Brazzaville)

15. Ground 3 asserts that the Immigration Judge, in his 2008 determination, found

> "that as a result of [the applicant's] political activities [he] had been detained as claimed, the only aspect of his claim that was rejected was that he was tortured and that he had to escape. The IJ found that [the applicant] was officially released."

16. It is plain from a reading of the judge's determination that ground 3 is misconceived. It completely ignores this vital paragraph:-

> "34. On the evidence overall I do not believe that the appellant was caught up at all in the events of 10 September 2007. It is much more likely in my judgment that the appellant has fabricated an account around an event that is well known in Congo (Brazzaville). My reasons for that conclusion are set out in the paragraphs below."

17. I agree with the respondent that [34] of the determination makes it manifest that the Immigration Judge did not believe any aspect of the applicant's account. That includes his being detained as a direct result of participation in the events of 10 September 2007, when Pastor N'Tumi attempted to return to Brazzaville. If any support were needed for this, it is to be found at [35], where the judge said this:-

> "35. I am not prepared, even on the reasonable likelihood standard, to accept the core of the appellant's evidence at face value because I find that evidence to be very unreliable. Specifically, I do not accept the appellant's claim that on or around 10 September 2007 he was required by some rebels/Pastor N'Tumi supporters to transport them on his lorry. I do not believe that the appellant was in consequence arrested and detained as he claims …"

18. The applicant places reliance on [36] of the determination, where the Immigration Judge, in considering the applicant's account of his alleged leaving detention, said that there was "nothing particularly to indicate that this was not an official release of the appellant. I consider it extremely unlikely on the appellant's description that this was any sort of escape, with the assistance of someone who the appellant knew nothing about …"

19. Mr Jafar submits that this amounted to a finding that the applicant had been detained. I agree with the respondent that it is nothing of the sort. It is merely one of a number of reasons why the Immigration Judge came to the conclusion that the core account was fabricated. The other reasons for that conclusion are dealt with by the judge at [37] to [44] of the determination. In particular, it is noteworthy that at [43] the judge stated that "the evidential difficulties summarised above make it far more likely that the appellant was a witness trying to remember a fabricated story, rather than being a witness who was trying to recall events that had really happened".

20. Finally, the heading to [45] to [51], "Assessment of risk on return – if the appellant's core account is true", would make no sense if, as contended, the judge had, in fact, accepted that the applicant had been detained by the Congo (Brazzaville) authorities.

21. For these reasons I find that ground 3 is based on a fundamental misconception, which underlies much of the substance of the applicant's challenge of the respondent's decisions.

(b) Failure to treat the Immigration Judge's determination merely as a "starting point"

22. Ground 1 asserts that the respondent's decisions amount to an assumption on her part that "because the Immigration Judge has decided a factual point it cannot be re-opened" and that the decisions were "premised on the proposition that because [the applicant] was previously found to be incredible anything he produces will be seen in that light".

23. In his oral submissions, not only did Mr Jafar fail to identify any specific passages of the decision letters that disclose such errors on the part of the respondent; much of

his detailed criticisms of those letters runs counter to the complaint set out in ground 1. I shall come to those detailed criticisms in due course. It is, however, apparent that they include disagreements with observations made in the letters regarding the provenance of the summonses/arrest warrants, alleged discrepancies in those documents and the absence of certain originals. All of this sits uneasily with the proposition in ground 1, that the respondent has, in effect, shut her mind to the possible significance of this material by concluding that because the judge found the applicant to be incredible, the materials must for that reason be regarded as worthless.

24. In any event, an examination of the letters in question makes it plain that the respondent has not fallen into any such alleged error. Thus, for example, in the letter of 13 April 2012, at bundle p 54, which dealt with two letters in translation from Chrysogone D, said to be a friend from Congo, the respondent specifically considered the materials "in line with the case law of Tanveer Ahmed". On the same page we find that the respondent "considered the new evidence does not undermine the credibility findings of the IJ, which therefore remain valid". Such an approach is, of course, inconsistent with the applicant's assertion that the respondent in effect treated those credibility findings as the "be all and end all" of the matter.

25. Similar points can be made of the respondent's consideration of the other materials described at bundle pp.54-55, including the death certificate of the applicant's father and the "honour certificate".

26. By the same token, the letter of 12 March 2009 dealing with the summons/arrest warrant shows specific engagement with the text of those documents, as well as containing specific reference to Tanveer Ahmed, leading to this conclusion:-

> "In view of the above and having regard to the Immigration Judge's findings of adverse credibility, it is concluded that the documents on which he would seek to rely are entirely self-serving and no more than an attempt to frustrate your client's removal."

27. Similar points can be made in respect of the letter of 5 March 2010 (pp.116-117 of the bundle). In particular, at p.117 we find this:-

> "Therefore in relation to the Case Law Tanveer Ahmed and looking at all the evidence in the round, including [my emphasis] the adverse credibility findings of the Immigration Judge, it is considered that no reliance can be placed on these documents in support of your client's claim.
>
> For the reasons provided above it is not considered that your client's submissions would have a realistic prospect of success before an Immigration Judge."

(c) Alleged errors regarding fresh evidence, said to amount to a failure on the part of the respondent to apply requisite anxious scrutiny

(i) The spelling mistake/address inconsistency in the summons/search warrant/arrest warrant

28. The respondent's decision of 12 March 2009 considered (bundle p.137) that the documentation submitted by the applicant showed "inconsistencies in your client's home address in Congo (Brazzaville) and contains spelling mistakes". The applicant contends that the inconsistency in the address of the applicant, being "173" of a particular street in the English translation and "172" in the original French version (172 also being the number mentioned in the summons) was clearly a mistake on the part of the translator of the search warrant. Likewise, the spelling mistake in the translation of that warrant ("scilled with our stamp") has no counterpart in the French version (bundle p.148), where the French word "scellé" (="sealed") is used.

29. The errors noted by the respondent in 2010 undoubtedly demonstrate a lack of care in respect of translating the documents in question. Nevertheless, Mr Jafar still has a point, in that the errors were not ones which infected the French versions.

30. In considering this issue, the following passage from the judgment in Muhammad Yameen is, I consider, helpful:-

> "44. … it is right to note that the Secretary of State accepts that on occasion errors were made in letters sent on her behalf in this case. For example it was stated in one letter that the Claimant had contended that he had tied the *hands* of the terrorist together in the mosque. Throughout his claim has in fact been that he tied the terrorist's *feet* together. That mistake, as the Secretary of State subsequently and correctly pointed out, of itself made no real difference to her reasoning on the particular point in issue. This and other errors made may raise doubts about the care with which the extensive further representations made were considered on occasion. It is self-evident that those charged with making decisions on behalf of the Secretary of State in cases such as this have to work under considerable pressure and they may be faced (as in this case) with voluminous, and sometimes repetitive, further representations. Mistakes may be understandable. But, given the consequences which mistakes may have in this type of case, they cannot be assumed, and they should not readily be judged, to be immaterial."

31. Standing back and looking at this matter in the light of the extensive cumulative decision-making in the present case, culminating in the decision letters of 2012, I do not consider it can be said that the Secretary of State's failure in 2009 to appreciate the lack of errors in the French versions of the documents in question has in any sense made a "real difference to her reasoning". The 2009 letter itself makes it plain that there were other problems regarding the documentation. Indeed, what the respondent regarded as "significant" was that "these documents have only been submitted after your client was notified of his imminent removal". It is also plain, as I have already observed that, at bundle p.137, where the passages in question occur, the respondent also applied the approach drawn from Tanveer Ahmed [2002] UKIAT 439 and had regard to the Immigration Judge's "findings of adverse credibility" in

concluding that the documents in question were insufficiently probative to give rise to a fresh claim.

32. In finding that this issue is, in all the circumstances, of no materiality, I also accept Mr Whale's submission that the decision letter of 5 March 2010, in which there is a consideration of all the materials by then submitted on behalf of the applicant, placed no reliance upon alleged spelling mistakes or typographical inconsistencies. Nor, for that matter, is there any inkling of this issue being material in either of the decision letters of 2012.

(ii) Absence of original documents

33. The applicant submits that the respondent has failed to have regard to the fact that the originals of certain documents submitted by the applicant, following the dismissal by the Immigration Judge of his appeal, were held by his previous solicitors, Fadiga & Co. I do not consider that there is any merit in this complaint.

34. The materials in question were the copy arrest warrant, search warrant and summons, sent under cover of the letter from Lawrence Lupin of 6 March 2009. The respondent's letter of 12 March 2009, however, did not take the absence of originals as a point of materiality, in rejecting the submissions. By 23 October 2009, the originals of the documents just mentioned had, in fact, been sent by Lawrence Lupin, with a letter of that date, together with originals of further warrants etc said to emanate from Congo (Brazzaville). Although various issues relating to these documents were raised by the respondent in the letter of 5 March 2010, the absence of originals is not amongst them. By contrast, the letter of 13 April 2012 notes that certain further documents, namely the letter from Chrysogone D, the letter from Gig Sisiter Sylivie and the father's death certificate, were not submitted. As far as I am aware, it is not the applicant's case that the originals of these documents were ever with Fadiga & Co.

(iii) Provenance of documents

35. The applicant submits that the respondent has not had regard to explanations provided as to the provenance of various documents said to emanate from Congo (Brazzaville). In their letter of 31 March 2010, Lawrence Lupin stated, on instruction, how the arrest warrant of 1 October 2008, the search warrant of 10 December 2008 and the arrest warrant of 22 December 2008 reached the applicant; namely that they were brought by hand to Paris and then sent by post to a friend of the applicant. There then followed a passage, again written on instruction, as to how the documents had been procured from Congo (Brazzaville). So far as concerns the summons of 3 March 2009, the search warrant of 31 March 2009, the arrest warrant of 2 April 2009 and the letter of 17 April 2009, these were said to have been sent from Congo (Brazzaville) to the applicant's friend.

36. There is no merit in the complaint regarding the respondent's approach to these explanations. At paragraph 24 to 32 of the respondent's decision letter of 20 February 2012, the alleged means by which the applicant came into possession of the documents concerned were fully considered by the respondent. The following paragraphs are of particular significance:-

> "27. However, this explanation does not sufficiently demonstrate that the arrest warrants can be relied upon. So while this story may well reflect the journey of how the enclosures travelled from Congo (Brazzaville) to France and then on to the United Kingdom, it is not considered that this satisfactorily demonstrates their authenticity with regards to whether the authorities had issued the documents out of adverse interest in your client.
>
> 28. A recent Country of Origin Information Service request confirms that the Congolese government is highly corrupt, so this evidence, taken together with the adverse findings of the appeal Tribunal (sic) and timing of the documents, entitles us to treat the documents with suspicion.
>
> …
>
> 31. The explanation for how the documents came to be in your client's possession has been carefully considered. While the explanation, superficially at least, explains how the documents purporting to be original arrest warrants for your client, came to be in your client's possession, they do not satisfactorily demonstrate their legitimacy or reliability."

(iv) Applicant's witness statement

37. Amongst the difficulties with the applicant's account, identified by the Immigration Judge, were the discrepancies regarding what had supposedly happened to him whilst in detention, and immediately thereafter. At [37] of the determination, the judge noted that at the hearing the applicant said he had been beaten so much that he could "hardly walk"; whereas at his asylum interview, the applicant had "said nothing about having been badly beaten" or, for that matter, having had to get into the boot of a car. At [38] the judge found it difficult to reconcile the applicant's claims "about having been very badly beaten in detention with his statement at the screening interview that when he was arrested he 'received a shoulder blow'". After the applicant had been supposedly dropped off from the car "he walked for about two hours to the house of his uncle … however, if on leaving detention the appellant was so badly injured that he could hardly walk to the car, it is difficult to understand how, shortly afterwards, he could have walked for two hours to his uncle's house". [39]

38. Under cover of a letter of 17 February 2012, Lawrence Lupin sent to the respondent (amongst other things) the applicant's statement of evidence dated 17 February 2012. Having reiterated his account of being caught up in the events of September 2007, arrested and detained, the applicant attempted to deal with various matters of

concern to the Immigration Judge. These included the assertion (at [10]) that, having been dropped off, he

> "walked for around 2 hours to my uncle's house where I remained until I left the country. I wish to confirm that I was in a very bad physical condition and this journey took me 2 hours when it usually takes 30 minutes. I walked very slowly and I had to stop from time to time to avoid other people to see me waking (sic) in my condition".

39. The applicant contends that the respondent has failed to consider his explanation of how he could walk if, as he had alleged at the hearing before the Immigration Judge, he had been badly beaten in detention. I find that the applicant has not made out this head of challenge. Although there is no express reference in the decision letter of 20 February 2012 to the applicant's witness statement, it is expressly dealt with in the decision letter of 13 April 2012 (bundle p.53), where it is stated:-

> "Your witness statement is essentially a reiteration of your asylum claim. You have sought to clarify several of the inconsistencies that were identified during your appeal hearing. Your explanations have been considered against the findings of the IJ … it is considered your witness statement would not present a realistic prospect of success if placed before an IJ."

(v) Letter from sister etc.

40. The applicant submits that no anxious scrutiny has been given to the other materials sent together with the applicant's witness statement, including a letter from his sister, a friend, his father's death certificate and an "honour certificate". I reject this submission also. The decision letter of 13 April 2012 addresses these documents specifically at bundle pp.54-55. Amongst the points there made is that the honour certificate refers to the applicant having fled to the Democratic Republic of Congo, when the applicant "made no mention of ever having been to the DRC in your asylum interview or your appeal hearing". So far as the father's death certificate is concerned, the respondent observed that it had not been explained how this document was relevant to the applicant's claim to be in need of international protection.

(vi) General observations

41. Upon analysis, many of the criticisms advanced by the applicant involve allegations of failures by the respondent to refer specifically to particular matters, contained in the documentation submitted in connection with the paragraph 353 submissions. For example, although the applicant's witness statement is, as we have seen, referred to specifically, Mr Jafar nevertheless submits that the Secretary of State should, on the face of the decision letters, have dealt expressly with the applicant's explanation that it took him two hours to walk a distance that he would normally have traversed in only 30 minutes, by reason (so it is said) of the injuries sustained whilst the applicant was in detention. I consider that these submissions overstate what "anxious

scrutiny" in this context requires. I respectfully agree with what the Deputy High Court judge said at [35] of Muhammad Yameen:-

> "To amount to a fresh claim, any representations must first be significantly different from the content of the material previously considered. Ms Phelan submitted that it was not sufficient to say that any representations fail to pass this threshold merely because the material they contain has previously has been submitted; its content must have been considered. That I accept. If the Secretary of State or a Tribunal had refused to consider the content of some document for some reason, then that might enable the first threshold to be passed. But the mere fact that a decision maker does not refer to something which has been submitted does not of itself necessarily mean that it has not been considered."

42. In the present case, the respondent has, in fact, plainly considered the contents of the documents in question. What is complained of, rather, is she has not given more by way of an explanation for her conclusions that, taken in the round, those documents, together with the findings of the Immigration Judge, would not give rise to a realistic prospect of success before a hypothetical future judge. In the circumstances, however, this criticism amounts to a requirement to give reasons for reasons. It is, in essence, a "merits" as opposed to a *Wednesbury* challenge.

43. The second general point is that the respondent's decision letters make repeated express reference to the question of whether the materials would give rise to a realistic prospect of success before a judge. Thus, for example, at bundle p.68 we find this in the letter of 20 February 2012:-

> "48. While each individual item has been carefully considered, taken together and cumulatively it is not considered that that (sic) the arrest warrants/summons etc create a realistic prospect of success. An IJ would note the vague assertions and blatant credibility issues, the guidance set out in the CG case of ***LM***, together with the timing and submission of the documents. An Immigration Judge, guided by the principles laid out in ***Tanveer Ahmed*** would not attach any weight to the documents purporting to be arrest/search warrants."

(d) Medical issues/scars

44. As has already been seen, the "rule 35" evidence is somewhat exiguous. It describes an assertion made by the applicant that he was beaten in both 1998 and 2007. Since both events, the applicant "has stated he suffers back pain". So far as "visible scars/injuries" are concerned, there is recorded: "Faded scars to foot and back".

45. I do not find that the respondent's letter of 24 May 2012 demonstrates any failure of anxious scrutiny and/or to consider properly what might be the outcome before the hypothetical judge. At bundle p.41 the respondent correctly noted that the applicant had

> "not submitted any medical evidence to support your claims that these scars are the result of torture. The mere existence of scars does not, in itself, indicate that the injuries

were sustained in the manner you have described or that there is a risk [on] return to your home country".

The letter went on to record that the evidence in the report "has been given anxious scrutiny" but that it was not thought "to create a realistic prospect of success in front of an Immigration Judge".

46. In his oral submissions, Mr Jafar contended that the respondent's consideration of the rule 35 report was insufficiently holistic, in that it did not encompass the other materials that had been put forward since the dismissal of the applicant's appeal. I do not consider that this submission has force. On the contrary, the respondent's letter states in terms that "your asylum and/or human rights claim has been reconsidered on all the evidence available, including the further submissions". In the next paragraph we find it stated that "the new submissions taken together with the previously considered material do not create a realistic prospect of success, namely that an Immigration Judge applying anxious scrutiny would decide that the claimant ought to be granted asylum, humanitarian protection or discretionary leave".

47. I also accept Mr Whale's submission, that the assertion the applicant was beaten in 1998 sits poorly with the claim put to and considered by the Immigration Judge. At [8] of the determination, the judge noted

> "some vague claims as to having been arrested in 1997 [my emphasis] at the time of the coup of President Sassou. He said that he was then held for five days without any charges. These claims seem to form no part of the appellant's current claims as to risk on return".

(e) Claimed membership of MCDDI

48. Although not specifically relied upon by Mr Jafar in oral submissions, the written grounds seek to make something of the applicant's claimed membership of the Mouvement Congolaise pour la Democratie et le Developpement Integral (MCDDI) party in Congo (Brazzaville). At [15] of his determination, the Immigration Judge noted "some very vague claims" in the asylum interview as to the applicant being a member of MCDDI but that

> "he has completely failed to give any further information as to that claimed involvement … (despite having been asked questions about that at his interview) so it is not a claim which I can address any further in this determination".

49. The issue of alleged MCDDI membership is dealt with in detail by the respondent in her letter of 20 February 2012, beginning at paragraph 33. In particular, at paragraph 37, the respondent said this:-

> "You submit that the judge neither accepted nor rejected the account of his MCDDI involvement, but it is clear from his findings that he did not accept it, as he claimed that it was vague. In any event, the judge considered your client's account in the

> context of LM (risks on return) Republic of Congo (Congo-Brazzaville) CG [2008] UKAIT (CG case) where he considered that low level MCDDI members would not be of interest to the authorities. You state that your client would be questioned on return. However, the judge made a finding of fact that your client had taken NO part in the coup of 10 September 2007 and therefore that he was not arrested or detained. It is therefore not considered that there is any reason to believe that your client would not be able to pass through once he had confirmed his identity."

50. That engagement with the issue of MCDDI membership fully satisfies the requirement of anxious scrutiny. The challenge under this head accordingly fails.

(f) Alleged failure to comply with an undertaking given to the High Court

51. At the hearing on 2 May 2013, there was some discussion as to whether the respondent had given any kind of undertaking at or in connection with the hearing before HH Judge Gore QC, sitting as a Deputy High Court judge, on 22 March 2012 in respect of the judicial review proceedings brought by the applicant in relation to the respondent's decision letter of 5 March 2009 (see paragraph 3 above). I do not consider that the respondent has failed to comply with what she told the Deputy High Court judge she would do, which, as recorded in the sealed order of 26 March 2012, was:-

> "not to detain or remove the above-named claimant from the UK until seven days after she has served the claimant with a further decision letter on the issue of whether the claimant has a fresh claim for asylum in respect of the claimant's representations dated 17 February 2012."

52. As we have already seen, that is precisely what the respondent did in the decision letter of 13 April 2012. I am not persuaded that the respondent undertook to do anything different, over and above what is recorded in the order of the court.

53. Ground 4 contends that at the hearing on 22 March 2012 the respondent

> "misled the claimant in court into believing that she would indeed reconsider all the material afresh, otherwise there would have been no reason whatsoever for the court and the claimant to accept that there was an appropriate remedy available in the form of a fresh decision".

I do not find that there have been any misleading statements or other indications by the respondent. It is quite clear that the letters of 13 April 2012 and 24 May 2012 are the last steps in an iterative process of engagement with the various materials which the applicant has put forward since March 2009. The fact that it was the applicant's representations in a letter of 17 February 2012 (enclosing the applicant's witness statement, two letters from a friend, letter for his sister, father's death certificate and the "honour certificate") that caused the application before the Deputy High Court judge to be withdrawn is made plain, not only by the terms of the order I have just cited, but also by these concluding remarks of the judge (taken from the transcript), when dealing with the issue of costs:-

"Thank you, Mr Jafar, no, I do not agree with you. Whatever the rights and wrongs of this may be as a matter of procedural history, although on the one hand you were right to say that proceedings had to be instituted in order to achieve the prevention of the removal of your client from the jurisdiction while the judicial review action proceeded, on the other hand, by reason of your drip feeding of further representations, culminating in the latest substantial new body of material moving the goalposts, this application has become academic.

Therefore, on terms that I will recite into an order in a moment, it is going to be withdrawn and to that extent you have failed."

(4) Conclusion

54. For the above reasons, the application for judicial review is refused. Any representations the parties wish to make on the issue of the costs of these proceedings must be received by the Tribunal not later than 14 days from the date this judgment is sent.

Signed

Upper Tribunal Judge Peter Lane