Case No: C4/2008/3131

Neutral Citation Number: [2009] EWCA Civ 688
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE ADMINISTRATIVE COURT
(MR STUART ISAACS)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday, 5th June 2009

Before:

LORD JUSTICE LONGMORE
and
LORD JUSTICE LLOYD

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Between:

The QUEEN on the Application of RS **Appellant**

- and -

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

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Mr S Jagarajah (instructed by Messrs Vasuki) appeared on behalf of the **Appellant**.

Ms K Olley (instructed by Treasury Solicitor) appeared on behalf of the **Respondent**.

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Judgment

Lord Justice Longmore:

1. The appellants in this case, whom I will call RS, is a Sri Lankan national who arrived in the United Kingdom on 1 June 2002 and claimed asylum on the basis that he was a Tamil who had been involved with the LTTE and that he reasonably feared persecution if he was returned. His claim was refused on 2 June 2003.

2. On 10 November 2003 an adjudicator dismissed an appeal against that refusal. That was during the ceasefire in the war between the state of Sri Lanka and those Tamils who supported the LTTE. The adjudicator's decision was not itself appealed, and so the claimant's rights of appeal became exhausted on 3 December 2003. On 24 April 2006 removal directions were set for 13 May and the appellant was detained on 9 May with a view to his removal. He then claimed that the security situation had deteriorated since November 2003, so that he was entitled to make a fresh claim for asylum.

3. The Secretary of State for the Home Department decided that there was no fresh claim, and on 12 May 2006 the claimant brought judicial review proceedings -- in a case which had a reference CO/3956/2006 -- against the Secretary of State's decision that his representations did not amount to a fresh claim. Permission to apply for judicial review was refused both on the papers by Mr Kenneth Parker, QC, sitting as a deputy High Court judge, and on 1 February 2007 by Burton J on the renewal of the permission application. Eighteen days later, on 19 February 2007, in further reliance on a claimed deterioration in the security situation in Sri Lanka, the claimant again made further submissions, which again the Secretary of State decided, on 10 May 2007, did not amount to a fresh claim. The next day the claimant filed the present proceedings. On 16 May 2007 he was granted temporary admission to the United Kingdom and on 24 May 2007 the Secretary of State issued a supplementary decision letter maintaining her decision not to treat the claimants' further submission as a fresh claim. It is that letter which was the original subject of the appellants' challenge.

4. On 2 August 2007 Lloyd-Jones J, in the present proceedings, granted the claimant permission to apply for judicial review on the decision letter, dated 24 May 2007. For reasons which are not clear to me, not much then happened, but a later decision dated 18 November 2008 was made by the Secretary of State on her own initiative in the light of case law subsequent to her earlier decision and, specifically, the judgment of the European Court of Human Rights in NA v United Kingdom (Application No. 25904/07) on 17 July 2008 and the Country Guidance cases of AN [2008] UKIAT 00063 and LP [2007] UKIAT 00076. At the start of the hearing below, the appellant applied for permission to amend the grounds of the application so as to challenge this later decision of November 2008. That was not opposed by the Secretary of State, and by agreement the hearing proceeded on the basis that the appellant's challenge was confined to the later decision. The test for determining whether submissions are to be treated as a fresh asylum or human

rights claim in the case of an in-country claim is contained in paragraph 353 of the Immigration Rules which provide:

> "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:
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> (i) has not already been considered; and
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> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

5. In the light of the Court of Appeal decision in WM (DRC) v SSHD and SSHD v AR (Afghanistan) [2006] EWCA Civ 1495 and AK (Afghanistan) v SSHD [2007] EWCA Civ 535 and, in particular, the judgment of Buxton LJ in the former case, it is common ground between the parties that, for the purposes of paragraph 353, 1) the question for the Secretary of State is whether there is a realistic prospect of success in an application before an immigration judge, but not more than that; 2) the thresholds for determining that question is "somewhat modest"; 3) as stated in AK (Afghanistan), the question for the Secretary of State is whether an independent tribunal might realistically come down in favour of the applicant's asylum or human rights claim in considering the new material together with the material previously considered; 4) in answering that question the defendant must be informed by anxious scrutiny of the material; 5) the decision remains that of the Secretary of State. The court can only impugn the defendant's decision on general Wednesbury grounds, although not confined to irrationality: see R (Onibiyo) v SSHD [1996] Q.B. 768, as considered by Buxton LJ in WM at paragraph 8. 6) The court, when reviewing the decision of the Secretary of State, must ask two questions: first, has the Secretary of State asked the correct question which, in an asylum case, is whether there is a realistic prospect of an immigration judge (applying the rule of anxious scrutiny) thinking that the applicant will be exposed to a real risk of persecution on return; second, in addressing that question, has the Secretary of State herself satisfied the requirement of anxious scrutiny? 7) If the court cannot be satisfied that the answer to both of these questions is yes, the application for judicial review of the defendant's decision must be granted.

6. It is also common ground that, following the breakdown of the ceasefire in the war against the LTTE, the test for determining whether an applicant will be exposed to a fresh risk of persecution is that now stated in

R (Sivanesan) v SSHD [2008] EWHC 1146, quoting Collins J in the case of Nishantbar Thangeswarajah and Others [2007] EWHC 3288 at paragraph 16:

> "...whether there are factors in an individual case, or one or more, which might indicate that the authorities would regard the individual as someone who may well have been involved in the LTTE in a significant fashion to warrant his detention or interrogation."

7. Those factors were exhaustively set out and evaluated by the AIT in the cases of LP Sri Lanka and AN Sri Lanka to which I have already referred. Those cases were considered at length in paragraphs 9-23 of the letter of Secretary of State of 18 November 2008. In challenging the decision contained in that letter the appellant has relied heavily on the original adjudicator's findings in 2003. Firstly, that the appellant was a credible witness; and secondly, on the conclusion as contained in paragraph 31 of that determination:

> "I do not agree with the Respondent that the Appellant's level of activity in the LTTE was so low that it would not attract the adverse attention of the authorities. The Appellant claimed and I accept that he gathered information for them, attended to the injured and looked after their food supplies. In his evidence the Appellant said that he was trained by them to operate a hand grenade. I am not persuaded that this is a low level of involvement as claimed by the Respondent."

8. On the appellant's behalf Ms Jagarajah has submitted that the Secretary of State, in her decision letter of 18 November 2008, had ignored, or given insufficient weight to, those findings of the original adjudicator. She further submitted that the Secretary of State had not weighed satisfactorily -- or at all -- the fact that, after identification by a member of the public, the appellant had been detained for four months at the Joseph camp in Sri Lanka and had there been tortured (paragraph 10 and 33 of that original determination). Ms Jagarajah therefore submitted that there is a reasonable prospect that an immigration judge would now come to a different conclusion on the question of asylum in the light of the abandonment of the ceasefire as the position was in both May 2007 and November 2008. Of course, on this application we can have no regard to the fact that recently the war has been declared over. So the question is whether the deputy judge in the present case -- Mr Stuart Isaacs QC, from whose decision Sullivan LJ has given permission to appeal -- was wrong to conclude that the Secretary of State had asked herself the right question and had applied anxious scrutiny to the answer. On the first matter, I agree with that learned judge that the Secretary of State has at least asked herself the right question. That is clear from the last page of the determination, where the question she asks herself is set out at paragraph 16. But, in coming to her answer, she was, of course, obliged to do so with anxious scrutiny. Each of the LP categories was analysed in her letter, albeit

in a slightly mechanical way, and the letter noted correctly that the adjudicator did not find that the applicant was a high level activist; but I have been persuaded by Ms Jagarajah that the absence in the letter of any indication that the Secretary of State has specifically considered the facts of detention at the instance of a member of the public and ill treatment in the Joseph camp for as long a period as four months, together with the absence of any consideration of the likelihood of any record having being made of that detention and being available to the authorities if the applicant is returned, does show that the Secretary of State's decision has not been made after a full and proper consideration of the relevant facts of the case.

9. It is, in my judgment, not fanciful to suppose that a new immigration judge who looked at the matters might come to a different conclusion. In coming to that conclusion of my own I have been much assisted by the judgment of Blake J in R (Veerasingham) v SSHD [2008] EWHC 3044, in which he came to a similar decision in relation to a four-month detention of a young male Tamil. In the course of concluding that the Secretary of State's decision in that case should be quashed, he said this at paragraphs 26 and 27:

> "26. I am conscious that in AN v SSHD the tribunal reached the conclusion that it was intrinsically unlikely that everyone who has ever been detained by the authorities in Sri Lanka, or at least in the last 10-15 years, is now on a computer data base which is checked by the immigration service when failed asylum seekers arrive at the airport and is checked by the police or army when people are picked up at road blocks or in court and in search operations. That may be right, but in this case the claimant is not merely relying on the random detentions on three occasions to which he has been subject but the prolonged detention to which reference has been made. In the absence of any positive evidence that records have been destroyed in anticipation of a peace process, it is not possible to characterise as fanciful or without substance the claimant's case as to his fears.
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> 27. The task of the IJ is not to make an assessment of certainties or even probabilities but to consider whether there is a real possibility or a real risk that his profile will have continued to be recorded and could in appropriate circumstances be made available to anyone interested. This was precisely the approach and conclusion of the European Court of Human Rights in NA v UK and I do not accept the defendant's submission that this application could be dismissed on the basis that in the case of NA the account was that the claimant's father had signed a document of uncertain nature."

10. I fear, therefore, that I cannot agree with the decision of the deputy judge in this case, to whom it is fair to add that the case may have put on a somewhat different basis from that which it has been put before us and who certainly did not have the benefit of the decision of Blake J in Veerasingham. I would therefore quash the decision of the Secretary of State and hold that the current claim does constitute a new claim and would ask counsel for help in framing other relief, if required.

Lord Justice Lloyd:

11. I agree.

Order: Application granted