CO/5943/2007

Neutral Citation Number: [2008] EWHC 3301 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2

Monday, 17th November 2008

B E F O R E:

MR JUSTICE CHARLES

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THE QUEEN ON THE APPLICATION OF ERCAN DURMAZ

Claimant

-v-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

(Computer-Aided Transcript of the Palantype Notes of
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Official Shorthand Writers to the Court)

Mr Peter Collins (instructed by Messrs Spencer and Horne, London E8 1HY) appeared on behalf of the **Claimant**
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Miss Lisa Busch (instructed by the Treasury Solicitor, London WC2B 4TS) appeared on behalf of the **Defendant**

J U D G M E N T
(**As approved by the Court**)

1. MR JUSTICE CHARLES: This is a claim for judicial review and it is a challenge to a decision contained in a letter written on behalf of the Secretary of State dated 10th July 2007.

2. Permission was given on the papers by Wyn Williams J on the basis that in his view it was arguable that in that letter the decision-maker did not apply the correct approach and test to the new claim that was made under Article 8.

3. In this case I have been considerably assisted, first by a generous time estimate and, more importantly, by helpful and clear skeleton arguments from both sides.

4. The claimant's skeleton argument properly and correctly abandons some of the grounds in the original claim form by reference to cases that have been decided on the impact of the Ankara agreement. In short, in the light of those cases, it is very properly accepted that, as has been the case here, someone who has been working in breach of immigration controls and rules is not in a position to take the benefit of that agreement.

5. Very briefly, the background to this matter is that the claimant is a Turkish national who was born in January 1982 and is therefore now in his twenties. He left Turkey in 1999 and arrived here in 1999. In November of that year, shortly after his arrival, he made an application for asylum which was refused in March 2001. He appealed against that refusal and that appeal was dismissed by an immigration adjudicator in July 2002. An application for permission to appeal to the Asylum and Immigration Tribunal was also unsuccessful.

6. In January 2001, and therefore as that appeal process was in train, the applicant also made an application relying on the provisions of the Ankara agreement because he had commenced working in a catering company. That application was refused in December 2002 by a decision letter dated the 15th of that month. It is common ground that that decision was withdrawn on 7th March 2007, followed by a letter on the next day requesting further information from the claimant with regard to his Ankara agreement application.

7. However, some three and a half months later, on 22nd June 2007, the claimant was arrested and detained at his place of work and on 27th June, whilst he was in detention, he was served with a letter which refused his Ankara agreement application.

8. The claimant's representative lodged a fresh claim with the defendant on 27th June 2007, and the response to that letter is the subject matter of this review.

9. The grounds are threefold and the first two in particular, but also to my mind the third, unsurprisingly go back to the test set by the Court of Appeal in WM (Democratic Republic of Congo) v Secretary of State for the Home Department [2006] EWCA Civ 1780 and in particular in the judgment of Buxton LJ. At the first stage of the test as set out by Buxton LJ when considering whether there should be a fresh claim, it is said that the decision-maker did not consider or consider properly whether the claim being advanced was significantly different to what had been advanced previously.

10. The second line of attack is that at the later stage in the test set out and described by Buxton LJ, it is said that the decision-maker failed to properly consider whether or not there was a realistic prospect of success for the claimant before an immigration judge.

11. Thirdly, and I link this to WM under the heading of the need for anxious scrutiny, it is said that the decision-maker did not take properly into account the period of time which the claimant has been in this country and thus the establishment over that period of his private life. That private life is related essentially to his work, it being the case that he does not have close family members here and has not, for example, married or had children.

12. At the heart of the first two grounds is the submission that, and it is correct that, the decision-maker has not set out in the decision letter (a) the test set by Buxton LJ in WM and/or (b), by reference to such an exposition of the test, informed the reader of the letter of the reasons leading to the conclusion that this was not a fresh claim under Rule 353.

13. In this case and others I have made the general comment that it is to my mind surprising that the authors of these letters do not set out the test that they are applying and how they have applied it. The second part is, of course, very important to avoid difficulties flowing from a letter simply being formulaic. But a failure to do that does not mean that the decision-maker has taken a flawed approach and failed to give proper reasons in the decision letter. What has to be done is that the letter has to be read as a whole, and fairly as a whole, to see whether or not the decision-maker has applied the test with the appropriate anxious scrutiny.

14. That rod that the person who wrote the letter has made for the back of the Secretary of State, it seems to me, leads understandably to Wyn Williams J's granting permission in this case, but, with the benefit of the detailed skeleton arguments from both sides, I am quite satisfied that Mr Collins, for the claimant, has been trying to make bricks without straw.

15. As to the first stage, to my mind a fair reading of the decision letter leads the reader inevitably to the conclusion that the decision-maker has accepted that the claim based on Article 8 is based on material that is significantly different to that which was placed before the earlier decision-maker and the immigration judge. Indeed, the history demonstrates that that is quite apparent because the immigration judge and the earlier decisions were not concerned with an Article 8 claim at all. It is also clear from reading the letter as a whole, because the decision-maker goes on to consider the Article 8 claim, that the decision-maker has concluded that that first stage in the context of the Article 8 claim is satisfied. The only criticism that can be made, it seems to me, is that at an appropriate point in the letter the author of that letter does not stop to tell one that. It would, however, in my judgment be unfair to that person to conclude that that was not part of the reasoning process.

16. The second stage requires an approach by reference to reasonable prospects of success before an immigration judge. Again in my judgment the challenge that this has not

been done fails for similar reasons. Here, and in this context this letter is better than many that one reads, the decision-maker says in paragraph 14:

> "We do not consider that your further representations would demonstrate a realistic prospect that a Tribunal would find that your client's removal would give rise to a disproportionate interference with his Article 8 rights. In the circumstances, it is not considered that the prejudice to your client's right to a private life in the UK is sufficiently serious as to amount to a breach of his Article 8 rights."

That paragraph focuses on the essential issue in respect of the claim being advanced as a new claim by the claimant, and answers that question by reference to realistic prospect of success before a Tribunal.

17. To my mind, in the light of that paragraph, it is impossible to assert that the decision-maker did not have in mind that aspect of the test as set by Buxton LJ.

18. The final point raised is argued with the benefit of the decision of the House of Lords in EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41, [2008] 3 WLR 178, which was handed down on 25th June 2008 and therefore after the decision letter. But to my mind it is correctly asserted on behalf of the claimant that delay was and should have been acknowledged as a relevant factor in respect of its impact on firm and fair immigration control before that decision was handed down.

19. In this context, as will be apparent from the timetable I have given, the claimant has been in this country for some time, namely for the period from the end of 2002 to March 2007. He was working without lawful entitlement to do so by reference to the immigration law. His claim under Article 8 is based primarily upon that aspect of his private life. With the benefit of the guidance given by the House of Lords, which the decision-maker of course did not have, and considering three aspects of delay referred to in paragraphs 13 to 16 of the speech of Lord Bingham, coupled with the correct acceptance by the claimant through his counsel that he could no longer advance an argument based upon the claimant's entitlement to work, I have to say that in my judgment no immigration judge properly directing himself could reach the conclusion that Article 8 was satisfied, and would inevitably have to reach the conclusion which underlies paragraph 14 of the decision letter.

20. The decision letter does also, as is pointed out in the skeleton argument put in on behalf of the Secretary of State, expressly consider delay in a number of aspects, both generally and by reference to paragraph 276A-D of the Immigration Rules. It is accepted that the claimant did not and does not qualify under that paragraph.

21. Thus it seems to me that the attack on this decision letter fails for the reasons I have given and I dismiss the claim.

22. MISS BUSCH: Thank you very much, my Lord. We do not actually have a schedule of costs. I wonder if I might ask my Lord simply to order that costs be assessed if not agreed - the claimant to pay the Secretary of State's costs if not agreed.

23. MR JUSTICE CHARLES: There is nothing you can say about that, is there?

24. MR COLLINS: I do not think there is anything I can say, my Lord. I do find it surprising that the Secretary of State comes to a hearing without some indication as to the costs which have been incurred by the Secretary of State.

25. MR JUSTICE CHARLES: Well, do you have a schedule now?

26. MISS BUSCH: No.

27. MR JUSTICE CHARLES: I think when I was acting for the Secretary of State all the time the whisper on the street was that if you have the assessment, the Secretary of State is the only party whose costs go down. But be that as it may....

28. MR COLLINS: I cannot object to the principle, my Lord, because clearly the application has failed, but there is no indication as to how much the Secretary of State's costs are.

29. MR JUSTICE CHARLES: I think what I will do is extract from counsel for the Secretary of State, I am sure she will be able to do this through the lady sitting behind her, that they do inform you within seven days as to what their estimate of costs is and then you can comment on it, so that you can hopefully avoid the need for an assessment.

30. MR COLLINS: Indeed so. I am grateful for that.

31. MR JUSTICE CHARLES: So I will do that. I do not need you to record that in the order as I accept that you will so provide the claimant's solicitors with that assessment.

32. MISS BUSCH: Thank you very much.

33. MR JUSTICE CHARLES: Right. Thank you both very much.
