Neutral Citation No. [2011] NIQB 100

Ref: TRE8359

*Judgment: approved by the Court for handing down (subject to editorial corrections)**

Delivered: 28/10/2011

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

JR63's Application [2011] NIQB 100

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

TREACY J

Introduction

[1] The applicant is an Iranian national who applied for asylum in the United Kingdom on 15 February 2006 under the "fresh claim" provisions of the Immigration Rules. He challenges the decision of the Secretary of State for the Home Department that his representations, contained in this application, do not amount to a fresh claim thereby leaving him with no further right of appeal and facing imminent removal from the UK.

[2] The applicant brought judicial review proceedings on 29 October 2009 against the respondent on the question of delay in deciding his application for permission to work in the UK. In response, the respondent made a decision dated 21 December 2009 by which he found that the Applicant's representations of 15 February 2006 did not amount to a fresh claim.

Grounds of Relief

[4] The applicant claims, *inter alia,* the following relief:

> (a) An Order quashing the determination of the respondent dated 21 December 2009 refusing the applicant's fresh asylum and human rights claim and determining that it does not amount to a fresh claim under para. 353 of the Immigration Rules;

(b) A Declaration that the said decision is unlawful, ultra vires and of no force or effect;

Grounds of Relief

Ground (a) Failure to apply "anxious scrutiny" and irrationality

[5] In his evaluation of the facts and in the legal conclusions drawn from those facts in reaching the decision now challenged, the respondent has not applied "anxious scrutiny" to the applicant's Article 2 and Article 3 claim. Specifically, he considers the document submitted by the applicant marked "Certificate". The respondent characterises this document as a "summons" which was not claimed by the applicant — and proceeds to compare the characteristics of the document with those which might be anticipated in a summons from the Iranian authorities. He finds on the basis of this comparison of the applicant's document with court-produced documents that an immigration judge would conclude that little weight could be placed on the document.

[6] The respondent mis-characterises the document submitted by the applicant which is stated to be a document from an Iranian lawyer, but not a court document. The respondent fails to apply anxious scrutiny, as can be seen by his reliance upon the irrelevant material employed in analysing the document. He makes conclusions based on this analysis which is unsupported by evidence and irrational in an anxious scrutiny context.

Ground (b) Error of fact

[7] The decision of the respondent is premised on the document submitted by the applicant being a court summons from Iran. In arriving at this understanding the respondent errs in his findings of fact, as the document does not purport to be a court summons. This error of fact is entirely material to his conclusions on the likely weight to be placed on the document by an immigration judge. As this conclusion is based on a material misunderstanding of fact it amounts to an error of law.

Background

[8] The applicant made an application for asylum in January 2004 which was refused – his appeal rights were exhausted by November 2004. On 15 February 2006, he made a "fresh" application for asylum under para353 of the Immigration Rules.

Statutory Framework

[9] Para 353 of the Immigration Rules governing fresh claims provides:

> **"353. 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:**
>
> **(i) had not already been considered; and**
>
> **(ii) 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.**
>
> **353A. Consideration of further submissions shall be subject to the procedures set out in these Rules. An applicant who has made further submissions shall not be removed before the Secretary of State has considered the submissions under paragraph 353 or otherwise.**
>
> **This paragraph does not apply to submissions made overseas."**

Parties Submissions

[10] The respondent accepted that new material had been introduced by the applicant however it decided that the applicant's fresh claim did not create a realistic prospect of success before an immigration judge.

Relevant Test

[11] The relevant test for a court reviewing a refusal of a fresh claim application is examined by the Court of Appeal in England and Wales in ***WM (DRC) v SSHD*** **[2006] EWCA Civ 1495.** The Court affirms at para9 that the test is one of *Wednesbury* reasonableness. It states:

> **"9. Commentators for a time regarded that conclusion as still open for debate, but in truth no**

> **other answer could have been given to the question posited by counsel in *Onibiyo*. As the Secretary of State rightly submitted, his conclusion as to whether there was a fresh claim was not a fact, nor precedent to any other decision, but was the decision itself. The court could not take that decision out of the hands of the decision-maker. It can only do that when it is exercising an appellate role. With appeal excluded, the decision remains that of the Secretary of State, subject only to review and not appeal. And in any event, whatever the logic of it all, the issue to which Bingham MR gave only a tentative answer in *Onibiyo* arose for decision before this court in *Cakabay v SSHD* [1999] Imm AR 176. There is no escaping from the ratio of that case that, as encapsulated at the end of the judgment of Peter Gibson LJ at p195, the determination of the Secretary of State is only capable of being impugned on *Wednesbury* grounds."**

[12] At para 11 of the same judgment the Court held that the correct question was not the Secretary of State's view of the case but rather whether there was a realistic prospect of an immigration judge, applying "anxious scrutiny", finding in the appellant's favour. Further, in evaluation of the facts and in respect of the legal conclusions drawn from those facts the reviewing court would ask whether the Secretary of State had met the requirement of "anxious scrutiny". Para 11 states:

> **"11. 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: see §7 above. 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."**

[13] The term "realistic prospect of success" was considered by the House of Lords in ***ZT (Kosovo)*** **[2009] UKHL 6** in which it was held that the Secretary of State should hold a case to have a realistic prospect of success unless it was clearly unfounded. In respect of certification decisions, Lord Phillips said:

> **"22. The test of whether a claim is "clearly unfounded" is a black and white test. The result cannot, for instance, depend upon whether the burden of proof is on the claimant or the Secretary of State, albeit that section 94 makes express provision in relation to the burden of proof-in R (L) v Secretary of State for the Home Department [2003] 1 WLR 1230 , paras 56–58 I put the matter as follows:**
>
> > **56. Section 115(1) empowers—but does not require—the Home Secretary to certify any claim 'which is clearly unfounded'. The test is an objective one: it depends not on the Home Secretary's view but upon a criterion which a court can readily re-apply once it has the materials which the Home Secretary had. A claim is either clearly unfounded or it is not.**
> >
> > **57. How, if at all, does the test in section 115(6) differ in practice from this? It requires the Home Secretary to certify all claims from the listed states 'unless satisfied that the claim is not clearly unfounded'. It is useful to start with the ordinary process, such as section 115(1) calls for. Here the decision-maker will (i) consider the factual substance and detail of the claim, (ii) consider how it stands with the known background data, (iii) consider whether in the round it is capable of belief, (iv) if not, consider whether some part of it is capable of belief, (v) consider whether, if eventually believed in whole or in part, it is capable of coming within the Convention. If the answers are such that the claim cannot on any legitimate view succeed, then the claim is clearly unfounded; if not, not.**

> **58. Assuming that decision-makers—who are ordinarily at the level of executive officers—are sensible individuals but not trained logicians, there is no intelligible way of applying section 115(6) except by a similar process of inquiry and reasoning to that described above. In order to decide whether they are satisfied that the claim is not clearly unfounded, they will need to consider the same questions.** ***If on at least one legitimate view of the facts or the law the claim may succeed, the claim will not be clearly unfounded.*** **If that point is reached, the decision-maker cannot conclude otherwise. He or she will by definition be satisfied that the claim is not clearly unfounded. Miss Carss-Frisk for the Home Secretary has properly accepted that this is the correct approach.**
>
> **23. Where, as here, there is no dispute of primary fact, the question of whether or not a claim is clearly unfounded is only susceptible to one rational answer.** ***If any reasonable doubt exists as to whether the claim may succeed then it is not clearly unfounded.*** **It follows that a challenge to the Secretary of State's conclusion that a claim is clearly unfounded is a rationality challenge. There is no way that a court can consider whether her conclusion was rational other than by asking itself the same question that she has considered. If the court concludes that a claim has a realistic prospect of success when the Secretary of State has reached a contrary view, the court will necessarily conclude that the Secretary of State's view was irrational."**
> (Emphasis added)

[14] Lord Carswell, noting the draconian nature of the power to certify, summarised the test at para58 of ***Kosovo***:

> **"...in order to justify its exercise the claim must be so clearly lacking in substance that it is bound to fail."**

[15] If therefore any reasonable doubt exists as to whether a claim may succeed the claim is not clearly unfounded and the SOS cannot so certify. To justify certification the SOS must be satisfied that the claim is *so lacking in substance that it is bound to fail***.** The reasoning behind the imposition of such a stringent test is obvious.

Discussion

[16] Grounds (a) and (b) upon which relief is sought are effectively an irrationality challenge based on the net assertion that the respondent fell into reviewable error in its alleged mischaracterization of the "Certificate" as a Court document.

Conclusion

[17] It may well be the that the precise characterisation of the document at issue does not negate the central thrust of the decision which is that a new IJ would place little weight on this document in regard to the applicants claimed fear of persecution on return to Iran. However in light of the affidavit evidence filed on the applicant's behalf and the strict test to be applied adumbrated in *Kosovo* the present case just about surmounts the modest threshold for leave.