Fresh Claims For Asylum

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'The obligation of the United Kingdom under the Convention is not to return a refugee (as defined) to a country where his life or freedom would be threatened for any reason specified in the Convention. That obligation remains binding until the moment of return. A refugee (as defined) has a right not to be returned to such a country, and a further right not to be returned pending a decision as to whether he is a refugee (as defined) or not. It would in my judgment undermine the beneficial object of the Convention and the measures giving effect to it in this country if the making of an unsuccessful application for asylum were to be treated as modifying the obligation of the United Kingdom or depriving a person of the right to make a fresh "claim for asylum".'

R v Home Secretary, ex p. Onibiyo [1996] QB 768, 781F-H per Sir Thomas Bingham MR

Introduction

1. As explained in *Onibiyo*, the right to make a fresh claim is inherent in the 1951 Convention. It is now provided for in rule 353 of the Immigration Rules:

> *'When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and,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, creates a realistic prospect of success, notwithstanding its rejection.*
>
> *This paragraph does not apply to claims made overseas.'*

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2. Rule 353A should be read alongside rule 353:

> *'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.'*

3. Further submissions by a person seeking asylum can be met by the Secretary of State ("SoS") in one of three ways:

   a. They are accepted: the person is granted leave to enter or remain.

   b. They are rejected, but they are recognised as constituting a fresh claim for asylum. As a result the person has a right of appeal from the refusal under s.83 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") in the ordinary way.

   c. They are rejected, and the SoS refuses to recognise them as a fresh claim. There is no appeal from the Secretary of State's decision that they do not amount to a fresh claim – but that decision is subject to judicial review in the Administrative Court.

Fresh claims and judicial review: *WM (Congo)*

4. The Court of Appeal set out how the SoS should identify whether further submissions amount to a fresh claim in *WM (Congo) v SSHD* [2006] EWCA Civ 1495, [2007] Imm AR 337 (Buxton LJ).

5. First, the SoS must make a judgment as to whether the submissions contain new material. If the content of the further submissions has already been considered, then the submissions cannot be *'significantly different'*; they fall at this first hurdle (§6).

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6. Secondly, the SoS must form a judgment as to whether the new material, together with the material previously considered, creates a realistic prospect of success in a further asylum claim. That test is *'somewhat modest'* (§7) because:

   a. The question is whether there is a realistic prospect of success in an application before an adjudicator. It is not what the SoS makes of the material, but what an independent tribunal may make of it.

   b. Even the adjudicator does not have to achieve certainty, but only to think that there is a real risk of the applicant being persecuted on return.

   c. The consideration (of the SoS and the adjudicator) must be informed by anxious scrutiny.

7. On a judicial review of the SoS's refusal to recognise a fresh claim, the Administrative Court will not decide the question for itself and substitute its own view, but will apply anxious scrutiny *Wednesbury* review (*WM* §§7-10). Two key questions are (§11):

   a. Has the SoS asked herself the right question (i.e. in relation to the second limb, is there a realistic prospect of success in an application before an adjudicator)?

   b. Has the SoS satisfied the requirement of anxious scrutiny?

8. Buxton LJ's approach was endorsed by a differently constituted Court of Appeal in *AK (Afghanistan) v SSHD* [2007] EWCA Civ 535 at §3.

A new approach: *ZT (Kosovo)*

9. In *R (ZT (Kosovo) v SSHD*) [2009] UKHL 6, [2009] 1 WLR 348 the House of Lords has by a majority held that rule 353 applies even where an asylum claim has been certified under s.94 of the 2002 Act as "clearly unfounded", such that there is no-country right of appeal (see though Lord Hope's dissent, and his warning at §48

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that either rule 353 or the UKBA's Asylum Policy Instructions will need to be redrafted).

10. The House of Lords accordingly had occasion to consider the differences between the "clearly unfounded" and "realistic prospect of success" tests (both for the SoS and for the reviewing Court) under s.94 and r.353. The Committee was divided.

11. As to the difference between "clearly unfounded" and "[no] realistic prospect of success":

    a. Lord Phillips held (§20) that the SoS should apply the same approach in all r.353 cases, whether the first claim had been certified as "clearly unfounded" or not, and *'should, in all cases, treat a claim as having a realistic prospect of success unless it is clearly unfounded'*. Lord Brown agreed (§73): *'For the life of me I cannot see any logical distinction between the two… To try to find room between these two tests is in my opinion to dance on the head of a pin: they are the opposite sides of the same coin'*.

    b. However, Lord Hope was of the view that it is harder for the SoS to decide that a claim is "clearly unfounded" than it is to say it has no "realistic prospect of success" (§46). Lord Carswell was *'not convinced'* that the two amount to the same thing (§62).

    c. Lord Neuberger, despite considerable doubts, could *'see how there might conceivably be circumstances in which a person entrusted with a decision could conclude that a case, which had no realistic prospect of success, might none the less not be clearly unfounded. I must admit to finding it very hard to conceive of such a case in practice'* (§81).

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12. As to the proper approach of the Administrative Court on a judicial review:

a. Lord Phillips at §22 held that whether a claim is clearly unfounded is *'a black and white test'* (following his own judgment in *R(L) v SSHD* [2003] 1 WLR 1230, §§56-58); NB that he considered that the same approach should apply in <u>all</u> fresh claims JRs. Where there is no dispute of primary fact, there can only be one rational answer: *'There is no way that a court can consider whether* [the SoS's] *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'* (§23). Thus, while the JR court is adopting a *Wednesbury* approach, in this context it involves *'the same mental process'* as the court substituting its own view for that of the SoS: §21. Lord Brown agreed with Lord Phillips: §§75-76.

b. Lord Hope, holding the minority view that rule 353 did not apply, did not strictly need to address the question of the correct approach in these cases, but *'as at present advised'* saw no reason to disagree with Buxton LJ's approach in *WM* (§51). As for s.94 cases, Lord Hope at §55 said that Lord Bingham's approach in *R (Razgar) v SSHD* [2004] UKHL 27, [2004] 2 AC 368 should be preferred to that of the Court of Appeal in *L*. Lord Carswell agreed with Lord Hope (§65).

c. Again this left Lord Neuberger with the casting vote. He deftly agreed both with Lord Hope (that Lord Bingham's approach in *Razgar* should be followed: §82) and with Lord Phillips: *'for the reasons given by Lord Phillips... where there are no issues of primary fact, application of this test will, at least normally, admit of only one answer… if, in a case where the primary facts are not in dispute, the court concludes that a claim is not "clearly unfounded" or (which is, of course, the same thing) that a claim has some "realistic prospect of success"* [but cf. his speech at §81!], *it is hard to think of any circumstances where it would not quash the Secretary of State's decision to the contrary. However, I would again be reluctant to suggest that there is a hard and fast rule to that effect'* (§83).

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13. Where does this leave matters? *ZT (Kosovo)* would seem to be good news for applicants:

a. By majority the House of Lords have held that the approach of Lord Bingham in *Razgar* is applicable in all r.353 cases. Although described as review, this effectively amounts to the court substituting its own view: *'In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal'* (*Razgar* per Lord Bingham at §17). This is a more intensive level of scrutiny than that accepted in *WM (Congo)*.

b. The views of Lords Phillips and Brown that "[no] reasonable prospect of success" means the same as "clearly unfounded" are ammunition for arguments that the threshold for recognising a fresh claim is low indeed.

Practical examples

14. The following are examples (only) of when a JR of the SoS's refusal to recognise further submissions as a fresh claim may succeed.

15. ***Asking the wrong question.*** In *AK (Afghanistan) v SSHD* [2007] EWCA Civ 535 the applicant had relied in further submissions on evidence from his mother. The SoS rejected the evidence on the basis that "an affidavit from a family member cannot add probative or corrobative weight" to the claim. In doing so, the SoS failed to examine the evidence *'from the perspective of how it might be considered by an immigration judge'* (§32); a tribunal would certainly not reject it outright on the basis that its maker was partisan (§29).

16. ***Lack of anxious scrutiny.*** In *R (SS (Sri Lanka)) v SSHD* [2009] EWHC 223, Lloyd Jones J held that the SoS's *'formulaic repetition of conclusions in* [a country guidance

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case] *and reliance on conclusions drawn by the IAT in the different circumstances in 2003'* did not live up to the requirement of anxious scrutiny (§49).

17. ***New law.*** In *R (K) v SSHD* (18 March 2009, unreported; abstract of extempore judgment available on Westlaw) the CA held that a fresh claim should have been recognised in light of a new country guidance case.

18. ***New evidence.*** The fact that further submissions included independent evidence supporting the account of an applicant who has had adverse credibility findings was among the reasons why the SoS's refusal to recognise a fresh claim was quashed in *R (PE) v SSHD* [2008] EWHC 1140 (§§65, 69).

Losing a fresh claim JR...

19. NB *R (on the application of PE (Cameroon)) v SSHD* [2009] EWCA Civ 119: even without a fresh claim, an applicant can still appeal the SoS's refusal to revoke a deportation order in-country.

Previous appeals and "One-Stop Warnings": caution required

20. Rule 353 does not require that any new material relied on to support a fresh claim must have been previously unavailable to the applicant (cf. the previous approach under *Onibiyo*). However, as noted by Longmore LJ in *R (BA and PE) v SSHD* [2009] EWCA Civ 119 at [38], the 2002 Act *'provides a protection against abuse of process'*, by allowing the SoS to issue a certificate preventing an applicant from appealing a new claim if it relies on a matter which could have been raised previously in relation to the earlier decision and in her opinion there is no satisfactory reason for it not having been raised then: see ss. 120, 85, 96(1)-(2).

The future for fresh claim JRs

21. Fresh claim JRs have allowed applicants a prized route of access to the High Court. This may change. Clause 50(1)(c) of the Borders, Immigration and Citizenship Bill (now clause 52 in the latest draft) would repeal s.31A(7) of the

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Supreme Court Act 1981, which excludes asylum and immigration JRs from JRs that may be transferred to the Upper Tribunal under the Tribunals Courts and Enforcement Act 2007. The clause has encountered significant opposition in the Lords (where the bill has just passed the committee stage), and any transfers would first require the Asylum and Immigration Tribunals to be integrated into the unified Tribunals Service, which has not happened – yet. But fresh claim JRs are particularly numerous and as such, among asylum JRs, are particularly likely to be transferred.

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