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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

C's Application [2009] NIQB 26

IN A MATTER OF AN APPLICATION BY C FOR LEAVE TO APPLY FOR JUDICIAL REVIEW OF A DECISION OF SENIOR IMMIGRATION JUDGE ALLEN TO REFUSE TO MAKE AN ORDER FOR RECONSIDERATION MADE ON OR ABOUT 18 APRIL 2008 AND SENT TO THE APPLICANT'S SOLICITOR ON OR ABOUT 7 MAY 2008

AND IN THE MATTER OF AN APPLICATION BY C FOR LEAVE TO APPLY FOR JUDICIAL REVIEW OF A DECISION OF THE SECRETARY OF STATE TO REFUSE TO TREAT HIS FURTHER SUBMISSIONS AS A FRESH APPLICATION FOR ASYLUM MADE ON OR ABOUT 27 OCTOBER 2008

MORGAN J

[1] These are applications for leave to apply for judicial review in respect of 2 decisions. The first is a decision of the Senior Immigration Judge made on 18 April 2008 when he refused to make an order for reconsideration of the determination on 30 October 2001 by an adjudicator to dismiss the applicant's appeal against the refusal of his asylum application. The second decision is that of the Secretary Of State who refused to treat the applicant's submissions contained in a letter dated 7 October 2008 from his solicitors as a fresh claim for asylum.

Background

[2] The applicant is a Chinese national who came to the United Kingdom on 23 July 2000 and claimed asylum on 24 July 2000. In his affidavits he has claimed that he was the head of a local Falun Gong group and that he had

been arrested in 1999 and 2000 for handing out leaflets. He claims that he joined the organisation on 5 December 1998. He claims that he was imprisoned on both of these occasions and on the first occasion was punched and hit with a belt as a result of which he has a scar at his hairline. He further claims that on 20 June 2000 he attended a Falun Gong demonstration at which police attempted to effect arrests. He successfully evaded capture and went to Shanghai on business. He claims that his parents then told him that police had arrived at his house and evicted them and warned him that he was liable to arrest. As a result of this he decided to leave China.

[3] At the time of his entry into the United Kingdom the applicant was interviewed. He speaks no English and the interview was conducted in Mandarin. He described attending the meeting of 20 June 2000 but said that he had not organised it and was only a member of the organisation. He said that he had just joined Falun Gong on 5 December 1999. He said that he knew the principles of Falun Gong but did not practise the exercises because he had just joined the organisation. He was asked if he had ever been arrested or detained by the authorities and denied this although he said that they had called at his house in order to arrest him twice after the meeting on 20 June 2000. He also submitted a written claim which was completed with the assistance of solicitors. In that form he again denies that he has ever been arrested, detained or charged with any offence. He asserted that he had been a member of the organisation since 5 December 1998. He did not make any complaint in either the interview or his written application that he had been assaulted or maltreated by police. The applicant explained these variations on the basis of misunderstandings by the interpreter and lack of understanding by his solicitors.

[4] The applicant was given temporary admission as a person liable to be detained on 3 August 2000. He was required to live at an address in London and was issued with a document which required him to give notification of any change of address to the issuing office immediately. The applicant's asylum interview took place on 28 September 2000 and on 9 October 2000 he was issued with a notice of refusal of his asylum application which was sent to his London address. It appears that by that time the applicant had moved to Northern Ireland and was staying at an address in High Street, Holywood. It appears to be common case that he had not informed the asylum authorities or his solicitors about the change of address at that time. On 18 January 2001 the Northern Ireland Council for Ethnic Minorities wrote to the immigration authorities indicating that they had been instructed by the applicant in respect of immigration matters and asking that full papers be forwarded to them. They enclosed the SAL 2 which had been issued to the applicant on 7 August 2000 and required him to give notification of change of address. They advised the immigration authorities that he was now living at the Holywood address. Although the documentation makes it plain that the applicant had consulted NICEM the applicant claims to have no recollection of doing so. It

also appears that shortly thereafter he instructed solicitors to appeal the refusal of his asylum application and they did so by a notice of appeal on 26 April 2001. Although the applicant accepts that his signature appears on the notice of appeal he says that he was not aware of the precise nature of the document when he signed it because it had not been explained to him by the friend with whom he was living in Holywood. The appeal was listed for hearing on 30 October 2001. The applicant says that he was never informed of the hearing date.

[5] The applicant has sworn five affidavits in the course of these applications and to some extent these affidavits have been required to deal with issues which have arisen as to the location of the applicant while he has been in the United Kingdom. He says that he moved from Holywood to Belfast in June 2001 but did not apparently tell his solicitors or the immigration authorities, nor did he leave a forwarding address in Holywood. It is, therefore, unsurprising that he may not have been informed of the hearing date of his asylum appeal. He says that he then resided at 3 addresses in Belfast until late 2004. He does not appear to have attempted to make any contact with the solicitors instructed to pursue his appeal during this period although it appears that they ceased business in March 2002. In 2003 he approached local solicitors to enquire about his immigration status but says that he specifically instructed them not to contact the Home Office. In November 2004 a handwritten letter was received by the Home Office apparently on behalf of the applicant saying that he had made a lot of money and now was seeking voluntary repatriation. The applicant denies that this letter was sent by him or on his behalf. The address referred to in the letter was one at which he had resided and he says that the Home Office response of 18 April 2005 was forwarded to him. He instructed solicitors in May 2005 who wrote to the Home Office denying that the applicant had contacted them. The applicant was arrested in April 2007 and at that stage contacted his present solicitors. He now has a temporary admission document.

The first decision

[6] The Home Office letter of 9 October 2000 accepted that the organisation Falun Gong had been recognised as a cult by the Chinese authorities on 22 July 1999 and declared illegal. Activities including distributing or promoting Falun Gong materials or gathering to carry out meditation exercises or to promote or protect Falun Gong anywhere were prohibited. The letter noted that the applicant claimed to have been a member of the organisation since December 1999 and that he did not practise Falun Gong although he knew the principles of it. The determination noted that arrests at demonstrations were normally for a few hours to assist police actions in clearing demonstrators away and that most demonstrators are released within 48 hours. In light of all the evidence the Secretary Of State was not satisfied that the applicant had established a well founded fear of persecution.

[7] When the applicant's appeal came on for hearing on 30 October 2001 there was no appearance by the applicant or his representative. A fax was received from an unknown person indicating that the applicant had moved address without advising the Immigration Appellate Authority. An employee of that authority contacted the solicitors acting for the applicant. Although they indicated that they would call back they did not do so. The adjudicator concluded that the applicant no longer wished to proceed with this appeal and treated it as abandoned pursuant to Rule 32(1)(c) of the Asylum Appeals (Procedure) Rules 2000. He issued a ruling to this effect on 14 November 2001. The applicant's present solicitor eventually obtained a copy of this determination from the AIT on 28 October 2007. On 29 February 2008 the solicitors applied to the AIT for a review of the decision. That application was based first on the contention that notice of the hearing had not been served in accordance with the Rules. In fact Rule 47(2) of the 2000 Procedure Rules provides that until a party gives notice to the appellate authority that his address has changed any document served on him at the most recent address he has given to the appellate authority shall be deemed to have been properly served on him. In this case that was the Holywood address. No issue on this matter was pursued at the hearing. The second contention advanced on behalf of the applicant was that he had not had an opportunity for a hearing on the merits and there had not been sufficient investigation of the applicant's absence from the hearing by the adjudicator.

[8] By virtue of Rule 26(6) of the Asylum and Immigration Tribunal (Procedure) Rules 2005 an immigration judge should make an order for reconsideration only if he thinks:

> (a) The AIT may have made an error of law; and
>
> (b) there is a "real possibility" that the AIT would decide the appeal differently on reconsideration.

Senior Immigration Judge Allen made no order on the application for reconsideration on 18 April 2008 holding that the grounds provided did not show the decision to have been wrong. Accordingly he concluded that the requirement of Rule 26(6)(a) of the 2005 Rules had not been satisfied.

The second decision

[9] On 7 October 2008 the applicant's solicitors wrote to the Chief Immigration Officer setting out the history of the applicant's engagement with Falun Gong while in China and the fact that he was arrested and imprisoned. The solicitors referred to the fact that the applicant had been struck with a belt on the head as a result of which he had a scar at the hairline and had been kicked on the leg as a result of which there were marks on his left leg in

relation to the injury. This was the first occasion on which it was alleged that the applicant had been arrested, detained or beaten by police. The applicant's solicitors also indicated that he did not have any family in the United Kingdom but that he had close friends who had allowed him to stay with them for a number of years without having to pay rent. His mother was the only member of this family and was still in China. He was an only child.

[10] The Home Office responded by letter dated 27 October 2008. They first contended that the appeal to the AIT was in any event out of time. They accepted that the applicant probably did not receive the hearing notice but noted that this was because he had moved address despite the warning given to him that any changes of address should be notified to the Home Office. They pointed to the NICEM letter of 18 January 2001 as evidence of the fact that the applicant knew this. He has accepted in his affidavit that he did know that he was required to notify the Home Office of any change of residence. They pointed out that since the applicant had not maintained contact with the solicitors originally instructed by him they were unable to represent him. They noted the delay between the arrest in April 2007 and the application for reconsideration on 29 February 2008. They pointed out that the applicant had not exercised his right to apply to the High Court to order reconsideration after the refusal by the Senior Immigration Judge. They pointed out that this was a statutory appeals process which should have been followed instead of judicial review. They then considered the additional material to establish whether it constituted a fresh claim. They accepted that the new matters included the arrest, the imprisonment and the infliction of injuries. They also noted the claim under article 8 of the ECHR. It was accepted that these matters had not been considered by either the Secretary Of State or the Adjudicator. It was not considered that there would be a realistic prospect of an Immigration Judge concluding that the applicant would be exposed to a real risk of persecution on return applying the rule of anxious scrutiny. The inconsistencies between his statement and interview record were unexplained. He does not make any case that he was not provided with a proper interpreter when interviewed. There was no medical report to indicate how the injuries were caused or when they were caused. In those circumstances an Immigration Judge could not draw any further inference and in any event looking at the evidence in the round there was no realistic prospect of an Immigration Judge concluding that the existence of two visible scars outweighed the considerable number of other difficulties. In the absence of any detail the case in relation to article 8 of the ECHR was not accepted. In a further letter dated 26 November 2008 the applicant's solicitors pointed out that the first decision which the Secretary Of State should have taken was whether or not to grant the applicant asylum before considering whether to treat the application is a fresh claim. In a reply dated 1 December 2008 the Home Office stated that in light of the fact that the Secretary of State had previously refused the application for asylum on 9 October 2000 it was

hoped that it was clear that the Secretary of State did not consider that it was necessary to alter the decision of 9 October 2000 refusing asylum.

The submissions of the parties

[11] Ms Askin appeared for the applicant and Ms Murnaghan for the proposed respondents. I am grateful to both of them for their careful detailed and helpful skeleton arguments and oral submissions. In relation to the first decision Ms Askin essentially based her case on natural justice. She contended that the adjudicator had failed to carry out a sufficiently extensive inquiry in relation to the non appearance of the applicant as a result of which the process was not fair in that he did not have an opportunity for a hearing on the merits. Consequently she contended that the decision of the Senior Immigration Judge that there was no error of law could not stand. In relation to the second decision Ms Askin submitted that the Secretary of State appeared not to have first considered whether or not on the material available she should grant the applicant asylum. It was accepted by all parties that this is the correct approach under Paragraph 353 of the Immigration Rules. It is only where the Secretary of State decides not to grant asylum that she moves to the next step of considering whether the further submissions amount to a fresh claim. The test is 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 WM (DRC) v Secretary Of State for the Home Department [2006] EWCA Civ 1495). Again there was no dispute between the parties as to the applicable law.

[12] In relation to the second decision Ms Askin made a further submission in relation to the treatment of the medical evidence. She relied in particular on SA (Somalia) v Secretary of State for the Home Department [2006] EWCA Civ 1302 where the Court of Appeal indicated that if there is medical evidence corroborative of an applicant's account of torture or mistreatment it should be considered as part of the whole package of evidence going to the question of credibility and not simply treated as an add-on.

[13] For the proposed respondents Ms Murnaghan submitted that in relation to the first decision the applicant had a statutory right of reconsideration by the High Court pursuant to section 103A of the Nationality Immigration and Asylum Act 2002. The court may make an order requiring the Tribunal to reconsider its decision on the appeal if it thinks that the Tribunal may have made an error of law. Section 103A(3) provides that in the case of an application by an appellant in the United Kingdom the application must be made within the period of 5 days beginning with the date on which he is treated as receiving notice of the Tribunal's decision although the time may be extended where the court thinks that the application could not reasonably practicably have been made within that period. The applicant did

not make any such application and the court should not allow the applicant to evade the statutory scheme by an application for judicial review.

[14] In relation to the second decision Ms Murnaghan accepts that the obligation of the Secretary of State is first to consider whether or not to grant asylum. She points out, and Ms Askin accepts, that persuading the Secretary of State to grant asylum is substantially more difficult than persuading her that there is additional material justifying the case been treated as a fresh claim. Reading the decision letter of 27 October 2008 fairly it is clear that the Secretary of State did not consider that the material justified the grant of asylum and in any event the position has been made explicit by the letter of 1 December 2008.

The leave test

[15] Since these are applications for leave to apply for judicial review it is necessary to consider the appropriate test at this stage. In many cases the applicant need only raise an arguable case or a case which is worthy of further investigation (see Re Morrow and Campbell's Application [2001] NI 261). That will particularly be so where the decision is of an administrative character and there is substantial information or documentation in relation to the process by which it was made and the reasons for it likely to be available to the proposed respondent but not available to the applicant at the time which the application is made. In such a case it would clearly be entirely inappropriate for the court come to more than a preliminary view about the merits and leave may readily be granted. Where, however, the decision is of a judicial or quasi judicial character and is contained in documentation which sets out the detailed reasoning for the conclusion the court may be in a position to come to a clearer view about the merits of the application. In such a case the appropriate test is that applied by the Court of Appeal in Re Omagh District Council's Application [2004] NICA 10 namely whether the applicant has put forward an arguable case with a reasonable prospect of success. In every case it is necessary for the court to examine carefully the issues that may arise before coming to a conclusion as to the appropriate test to apply. It is clearly in the interest of litigants and good administration generally that if the court can properly examine the merits of an application at an early stage it should do so.

[16] In this case there is no dispute about the applicant's background or the reasons for his claim for asylum. The decisions made in relation to it and the reasons for those have been set out in very full correspondence. The proposed respondent draws the attention of the court to inconsistencies in the applicant's account which he explains on the basis of misunderstanding and misinterpretation. On those issues it is proper to take the applicant's case at its reasonable height. Otherwise the issues between the parties are essentially issues of law or the interpretation of documents which have been available to

both of the parties. I have had the benefit of detailed and careful skeleton arguments which have fully identified the issues arising in these applications. The applicant has made 5 affidavits and his instructing solicitor 3 affidavits. Subject to recognising that the applicant's case must be taken at its reasonable height I consider that this is a case in which it is appropriate to determine whether the applicant has made out an arguable case with a reasonable prospect of success.

Conclusion

[17] It is common case that the applicant knew that he was supposed to advise the Home Office of any change of address. Although he did not do so at the time of moving to Northern Ireland he was able to seek advice in Northern Ireland through the Northern Ireland Council for Ethnic Minorities and did so in January 2001. He maintains that he has no recollection of seeking advice but it is clear from the documentation, including his signature, that he did so. Although he maintains that he did not know the nature of the notice of appeal which he signed in April 2001 it is clear that he was well aware of the identity of the solicitors acting on his behalf. He left Holywood in May or June 2001 without giving any forwarding address or information to his solicitors or the immigration authorities. He had placed himself in a position where neither the authorities nor his solicitor could advise him of the date of the appeal hearing on 30 October 2001. Although Ms Askin maintained that the adjudicator should have taken further steps to seek to identify his whereabouts she accepted in argument that any such steps would inevitably have failed to locate the applicant. The reason the applicant did not have an opportunity to have a hearing on the merits before the adjudicator was because he had put himself in a position where he could not be notified of any such hearing. It was not because of any defect in the system. Accordingly I consider that there is no arguable case that the Senior Immigration Judge was wrong to conclude that there was no error of law on the part of the adjudicator in coming to the conclusion that the applicant had abandoned his appeal.

[18] Having come to that conclusion it is strictly unnecessary for me to express any view on the alternative remedy argument. I accept that in this jurisdiction the law is most helpfully set out in re Ballyedmond's Application [2000] NI 174. The traditional rule set out in that case is that although the court may retain its jurisdiction to grant an application for judicial review, where a statutory machinery or other alternative remedy is available the alternative should be pursued, save in exceptional circumstances. I also consider that paragraph 27 of M, R v Immigration Appeal Tribunal [2004] EWCA Civ 1731 strongly supports the view that the legislative purpose of section 103A of the Nationality Immigration and Asylum Act 2002 is the expeditious determination of asylum appeals. The court must be astute to ensure that the process remains fair but there are many cases where the

availability this statutory reconsideration will be fatal to a judicial review application.

[19] I consider that the challenge to the second decision is without merit. The correspondence in particular of 1 December 2008 explained that the Secretary Of State considered first whether she should change her decision of 9 October 2000 to grant asylum. I do not accept that there is any arguable ambiguity in that correspondence. In light of that the applicant cannot maintain an arguable case that she did not come to that conclusion. In relation to the medical evidence I accept Ms Askin's submission that this must be viewed in the round but the letter of 27 October 2008 makes it plain that this was exactly how the evidence was considered.

[20] For the reasons set out above I consider that the applicant has not demonstrated an arguable case with a reasonable prospect of success in either application and accordingly I dismiss the applications for leave in each case.