Neutral Citation No: [2018] NIQB 58 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **KEE10696** *Delivered:* **11/7/2018**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION BY SONAM TSERING CHUDRON FOR JUDICIAL REVIEW

AND IN THE MATTER OF A DECISION BY THE SECRETARY OF STATE FOR THE HOME DEPARTMENT NOT TO ACCEPT THAT THE APPLICANT'S FURTHER SUBMISSIONS AMOUNTED TO A FRESH CLAIM AND/OR HAD A REAL REALISTIC PROSPECT OF SUCCESS BEFORE AN IMMIGRATION JUDGE

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KEEGAN J

Introduction

[1] The applicant seeks judicial review of a decision dated 5 March 2018 in which the proposed respondent decided that the applicant's further submissions did not meet the requirements of paragraph 353 of the Immigration Rules and therefore did not amount to a fresh claim. On 8 May 2018 McCloskey J directed that a rolled-up hearing take place. Mr Peters BL appeared for the applicant and Mr Henry BL for the proposed respondent. I am grateful to both counsel for their written and oral submissions which were of high quality.

Background to the applicant's case

[2] At the outset I must record that the facts relied upon by the applicant in these proceedings are contentious as the applicant's case was rejected after a hearing before the First Tier Tribunal ("FtT") in 2011. An adverse finding was made as to the applicant's credibility and that decision was not appealed. However, in this judicial review, the applicant maintains his original case in an affidavit which was sworn on 30 April 2018. In this affidavit the applicant states that he is ethnic Tibetan. He states that he was born on 28 December 1987. He states that he comes from the area which forms part of the historic Tibet but which was incorporated into the Chinese province of Sichuan following the occupation of Tibet by the Peoples Republic of China. He states that in 2003 his father Doga Chudron was imprisoned on the basis

of his Tibetan nationalism and veneration of the Dalai Lama. This man, the applicant states, has since died in prison. The applicant then states in his affidavit that in the autumn of 2008 he took part in a public protest blocking the road in defiance of a Chinese official delegation that was travelling in his area. He said he spent a month in prison where he was interrogated and beaten as a result of his activities. He then states that, assisted by monks, local population and family acquaintances he made his way across the border separating Tibet from Nepal. He states that early in 2009 he crossed the border on foot, and he remained in Nepal for a number of months living in hiding. He states that in June or July 2009 he travelled to India by bus and he was assisted by an agent who bribed Indian officials who issued him with an Indian ID certificate.

[4] The applicant states that the Indian ID certificate being issued by the Regional Passport Office in New Delhi. At paragraph 15 of the affidavit the applicant states that he did sign papers, handed over photographs and that he attended at the British High Commission for fingerprinting and collecting the visa. A visa was initially refused but was then granted to the applicant to travel to the United Kingdom. The applicant states that he flew to the United Kingdom in May 2010. He says he travelled back to India and Nepal and on 10 September 2010 he travelled back to the United Kingdom. He states he then travelled to Cork and eventually to Belfast where he claimed asylum on 22 November 2010 citing fear of persecution in China on the grounds of race and political opinion.

[5] The applicant further avers that on 24 February 2011 his asylum claim was refused by the Secretary of State for the Home Department who did not accept that he had lived or grew up in Sichuan/Tibet. He explains that his account of events relating to his arrest and his treatment in China was not accepted. The applicant avers that he appealed against the above decision to the FtT. He confirms that on 18 August 2011 the appeal was heard by Immigration Judge Morrison and was dismissed by a decision dated 22 August 2011. At paragraph 28 of his affidavit refers to various parts of Judge Morrison's decision and states as follows:

> "I am now advised that Immigration Judge Morrison was incorrect when she observed at paragraph 18 of her decision that was no country guidance cases in relation to Tibet at the time."

Furthermore the applicant confirms that the judge found that he would be allowed to return to India and this would be a safe country. However, he states that he is "advised that the above decision appears to contain a number of factual and legal errors and inconsistencies. " The applicant also states that regrettably there was no appeal against the decision and he states that this was due to a breakdown of a relationship between him and his previous solicitor.

[6] The applicant then explains that several sets of further submissions have since been lodged with the Secretary of State for the Home Department ("SSHD"). However he points out that these have not been successful. He refers to the set of further submissions which was lodged on 26 June 2017. The applicant states that the SSHD rejected the further submissions on 5 March 2018 by way of decision letter. This is the impugned decision. The applicant states that the decision is flawed for a number of reasons which may be summarised as follows:

(i) The decision-maker did not take into account the issue of the applicant's brother's asylum claim.

(ii) The decision-maker did not take into account the decision of *TG (Interaction of Directives and Rules 2016)* UKUT 00374 (IAC). In his affidavit the applicant states that the SSHD had been referred to this decision which he states is authority for the assertion that India (being a country which has not been subscribed to the Geneva Convention) is not a safe third country to which he can be returned.

[7] Pre-action protocol correspondence was sent by his solicitor to the SSHD on 5 April 2018 .This submission was rejected on 9 April 2018. The judicial review was lodged promptly thereafter.

Legal framework

[8] Paragraph 353 of the Immigration Rules provides:

> "… 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 had previously been considered. The submissions will only be significantly different if the content:
>
> (i) has not already been considered; and
>
> taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection. …"

[9] In the case of *Zhang* [2017] NIQB 92 McCloskey J sets out the legal test at paragraphs [4] to [6] of his decision. In particular McCloskey J cites from *WM (DRC) v Secretary of State for the Home Department* [2006] EWCA Civ. 1495 where the Court of Appeal stated:

> "[10] Whilst, therefore, the decision remains that of the Secretary of State, and the test is one of irrationality, a decision will be irrational if it is not taken on the basis of anxious scrutiny. Accordingly, a court when reviewing a decision of the Secretary of State as to whether a fresh claim exists must address the following matters. …
>
> [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."

The further submissions sent by the applicant

[10] These were provided by way of a pro forma. I pause to observe that the completion of this form is woefully inadequate. There is only one box that is filled by the applicant's representatives under the heading "Briefly tell us what your further submissions are about". This appears to say "proving that Mr Tsering is a member of his family – family book and details of brother who has been granted asylum in France". The form then refers to correspondence which is attached from Mr Tim McQuoid solicitor on behalf of the applicant.

[11] There are two letters attached to the form which explain what the fresh submissions are. These are both dated 26 June 2017. I reproduce the first letter in full as follows:

> "Fresh copy documents are enclosed which reveal that as far as the French authorities are concerned the applicant's brother Zan Re Chudrong is deserving of asylum in France.
>
> The translated document names the applicant names the applicant as his brother and both his mother and father. This is further evidence that the applicant is a Tibetan who has illegally exited from China and according to the country guidance cases is entitled to seek asylum in the UK.
>
> A separate letter is enclosed detailing the reason behind the discrepancies and the pronunciation of the names of birth. The applicant, his father and brother all bear the same reference in the family books, copies of which have been produced in previous submissions.
>
> The 2016 Upper Tier Tribunal case is authority for the assertion that India (being a country which has not subscribed to the Geneva Convention and one which does not recognise Tibet as its full citizen) is not a safe third county to which the applicant can be returned.
>
> The applicant's brother and cousin can come to the UK to give evidence and legal aid assistance is being sought to fund DNA testing to conclusively proof that the two brothers are related.
>
> It is therefore submitted that this evidence constitutes a fresh claim one in which a Tribunal Judge, using the test of anxious scrutiny, would readily see as such. If the Home Office are not minded to grant asylum or humanitarian protection at this stage an in country right of appeal should be granted."

[12] A further letter of 26 June 2017 from Mr McQuoid deals with issues arising in relation to the difference in spelling of the name of the applicant and his family throughout the papers. In addition to the correspondence, some further papers are provided which purport to be asylum papers from France in relation to a relative. Finally additional material was provided which verifies that the translation of the documents is by Flex Translation Services.

The decision-maker's letter

[13] This letter is dated 5 March 2018. A number of salient points can be extracted from it as follows:

(i) The consideration begins by setting out the history of this case. This began with a claim for asylum on 17 January 2011. The decision-maker refers to the fact that the claim was refused in February 2011 and that the appeal was dismissed on 23 August 2011. The decision-maker states that appeal rights were exhausted on 12 September 2011. The decision-maker then says that the applicant lodged further submissions on 3 February 2014 which were refused on 24 September 2015. Further submissions were lodged on 19 October 2015 which were refused on 7 April 2016. Further submissions were lodged on 4 May 2016 which were refused on 9 March 2017. Further submissions were lodged on 3 May 2017 which were refused on 17 May 2017. Further submissions were lodged on 26 June 2017 which are the subject of this decision.

(ii) The decision-maker provides a summary of the further submissions as follows:

- You maintain that your brother has been granted refugee status in France. You maintain that you are of Tibetan descent whose has illegally exited from China. You claim that if returned to India it is not a safe third country.

(iii) The decision-maker then sets out the following evidence in support of the claim, namely:

- Further submissions pro forma, letters from representatives dated 26/6/17,
- E-mails between your representatives and Flex Language Services dated 20 June 2017 to 21 June 2017,
- Civil status family information form in the Chudrong Tsang with English translations,
- Document containing your family members with English translation,
- Permanent residence registration card for Si Lang Ren Ze and Duo Ga

(iv) The decision-maker then states that as a starting point the claim has been considered in the light of the judgment in *Devaseelan* [2002] UK IAT 00702. This is a reference to the first adjudicator's determination which the decision-maker says is an important starting point. The

decision-maker therefore quotes from the decision of the Immigration Judge who found as follows:

> "I accept that there will be many fraudulent visa applications made to the British High Commission in New Delhi every year but what is unusual in this case is the extent of the documentation which was lodged with the application … I have come to the conclusion that they are what they appear to be and are genuine documents. For the reasons stated I have come to the conclusion that the Indian ID certificate and the other documents which were lodged with the application were genuine. These place the appellant in India in mid-2007 where the ID certificate was issued … and contradicts the appellant's account as set out in his witness statement that he left Tibet in early 2009 to spend a year in Nepal and then travel to India by the bus in July 2009 at which stage the agent made the applications.
>
> For these reasons I have come to conclusion that the appellant is a citizen of Tibet who has spent most of his life in the Derge area but that by early mid-2007 he had moved to India and was a monk who subsequently studied … and that he has never had any difficulties with the Chinese authorities as he claimed.
>
> … On the basis of the evidence before me I am satisfied that the respondent has a realistic possibility of returning the appellant to India given the ID certificate which the appellant obtained in 2007. As my conclusion is that the appellant has never encountered any difficulties with the Chinese authorities there is no reason to think that the Indian authorities would have any interest in returning him to either Nepal or China and for that reason my conclusion is that if the appellant is returned to India that he will not face a real risk of persecution.

> As I have come to the conclusion that the appellant's account insofar as it relates to his claimed difficulties with the Chinese authorities is a fabrication that follows that the appellant does not have even a subjective fear of ill-treatment by the Chinese authorities if he were to be returned from India to China."

(v) The decision-maker also refers to the fact that the issue regarding the claim of a brother and cousins being granted refugee status in France was considered in refusal letter of 9 March 2017. The decision maker's analysis of this is that "The fact that the statements received state they have been given refugee status in France holds little bearing in your application. There is no evidence that you are related to these people, and in any event each application is dealt with on an individual basis.

(vi) Further reference is made to the poor quality of the documentation and consequently the integrity of the document is compromised. The following assertion is found in this portion of the letter:

> "Taking these documents at their highest, even if it were that you were the brother of Janyang Tenzin Chudrong Tsang this does not bear any relevance to your claim, as each individual case is dealt with on individual circumstances. Given that you have failed to provide adequate reasoning as to why each of the spellings on official documents vary, it is not accepted that they would stand a realistic prospect of success before an Immigration Judge."

(vii) The decision-maker refers to the country guidance case of *AA (Somalia) v SSHD* [2007] EWCA Civ. 1045 and the dicta at paragraph [68] that:

> "We can see no possible basis for the assertion that a determination in one appellant's case has any binding effect on any other individual."

(viii) The decision-maker then refers to the fact that the Tribunal Judge in 2011 found the applicant to be lacking in credibility and also that the judge found that when the applicant had moved to India he had not

suffered any ill-treatment and this was "a fabrication designed to bring him within the Conventions."

(ix) In relation to the claim of Tibetan descent on behalf of the applicant having illegally exited from China the decision-maker states that the applicant has provided no further evidence to substantiate this aspect of the claim. The decision-maker refers back to the findings of the Immigration Judge that "the appellant did not refer to having been arrested at the screening interview" and that "he also answered no to the following questions about whether he had ever been detained as a suspect terrorist or enemy combatant".

(x) In relation to the issue of India not being a safe country to return to the decision-maker states that the applicant has failed to provide any evidence to substantiate this aspect of the claim. The decision-maker refers back to the findings of the Immigration Judge that the applicant did obtain proper documents in India. This decision-maker states that considering all of the above evidence in the round, it is not accepted that you have demonstrated that you are personally at greater risk from authorities upon return to China or India. The decision-maker states that taken together with the previously considered submissions and the previous findings with regards to credibility, you fail to show that your claim warrants a departure from the findings of the Immigration Judge.

The decision-maker therefore rejects the further submissions.

Conclusion

[14] The first issue is whether or not there has been material not previously considered. In this case there are two categories of material at issue namely evidence in relation to a brother's asylum claim in France and secondly, evidence as to the case of *TG* which the applicant states is relevant but was not considered. If the applicant gets over the first hurdle the question is whether or not this evidence would have a reasonable prospect of success which has been described as more than a fanciful prospect of success before an adjudicator. This, by well-established principles, is a relatively modest hurdle, but nonetheless each case will fall on its own facts. The burden of proof lies on the applicant. The ultimate question for this court, applying anxious scrutiny, is whether (a) there is new material and (b) whether this, considered in tandem with the earlier material and submissions generates a realistic prospect of the FtT deciding that the applicant will be exposed to a real risk of persecution on return to his country of origin. Anxious scrutiny is the *Wednesbury* standard applied to this type of legal challenge.

[15] I have set out the decision maker's letter in some detail at paragraph 13 herein. That is to illustrate how the various issues raised by the applicant have been examined. In my view the letter amply demonstrates that anxious scrutiny has been applied to this case. I am also of the view that the decision maker has asked the correct questions in reaching a determination. The decision of the Tribunal Judge in 2011 cannot be ignored in any assessment of the applicant's case because it established certain facts. Those were in relation to the applicant's antecedents, his history in India and a rejection of his case which is repeated in the affidavit filed in these proceedings. Specifically the immigration judge found that the ID documents were valid and therefore that India was a safe country - See paragraph 13 (iv) herein. The applicant has not presented any new evidence as to these matters in that his affidavit replicates his previous statement. In that context the decision maker cannot be criticised for relying upon these factual findings. However, that is not the end of the matter because the decision maker must also consider the further submissions to decide if the test in paragraph 353 of the Immigration Rules is satisfied.

[16] I now turn to the two specific matters raised by way of fresh submissions and my conclusions are as follows:

Issue 1: the asylum claim in France

(i) This is not entirely new information because it was raised and considered in previous submissions. However, further information and documentation is now provided which must be considered. I have set out the decision maker's consideration above. Applying anxious scrutiny, it is my view that this new information is not such as would persuade the court that the test is met that there is a realistic prospect of this material succeeding before an FtT Judge. The reason for that is not only the difficulty in comprehending the documentation and the inconsistencies in it. While these problems might be overcome in an appeal scenario, the real issue is that there is no evidence as to how this information would affect this particular applicant's claim for asylum. Mr Peters stressed the point that the brother and another relative would come and give evidence, but I agree with Mr Henry that there is no evidence as to what this would be and how their testimony would assist the applicant. I am firmly of the view that this further submission does not satisfy the requisite test. I consider that the decision maker's letter deals with this issue clearly and correctly as explained the forgoing paragraphs. The prospects of success of this material being successful before an immigration judge are fanciful in my view and so this argument fails the test provided for in Para 353 of the Immigration Rules.

Issue 2: The TG case

(ii) In his affidavit the applicant avers that this decision was referred to the adjudicator. It clearly was not as the correspondence of 26 June 2017 simply refers to "a 2016 decision." I reject the applicant's argument that the decision maker should have known what it was from this description. In addition, this decision of the Upper Tribunal does not have the formal designation of a country guidance case. I agree with Mr Henry's analysis that it does not apply to the facts of this case. Fundamentally, *TG* was different in that the applicant did not have any status in India. It follows that the applicant's submission on this point does not meet the requisite test under paragraph 353 of the Immigration Rules in that it does not provide a basis for this court determining that the argument would have more than a fanciful prospect of success at a tribunal hearing.

[17] This case has proceeded as a rolled-up hearing. I am prepared to say that the applicant has surmounted the modest hurdle for leave, but by a narrow margin. However, having considered the substance of the arguments, it is my view that the application must be dismissed.