OUTER HOUSE, COURT OF SESSION

[2010] CSOH 74

P330/10

OPINION OF LORD DOHERTY

in the cause

H. A. (Afghanistan)

Petitioner

For Judicial Review of a decision of the Secretary of State for the Home Department, dated 11 January 2010

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Petitioner: Bryce; Drummond Miller LLP (for Bilkus and Boyle, Solicitors, Glasgow)
Respondent: K.J. Campbell; Office of the Solicitor to the Advocate General

22 June 2010

[1] The Petitioner is a citizen of Afghanistan. He was born in 1987. He entered the United Kingdom illegally on 6 April 2006. He claimed asylum on 11 April 2006. The Secretary of State refused that claim on 2 May 2006. An appeal against refusal was dismissed on 25 May 2006. On 7 May 2006 the High Court of England and Wales refused to review that decision, and the Petitioner's appeal rights were exhausted. On 5 June 2009 further submissions were submitted on the Petitioner's behalf to the Secretary of State with a request that they be treated as a fresh application for asylum. In a decision dated 11 January 2010 an official acting on behalf of the Secretary of State refused the application contained in the further submissions and decided that

they did not amount to a fresh claim in terms of Paragraph 353 of the Immigration Rules. On 16 March 2010 the Secretary of State made removal directions in respect of the Petitioner. Those directions were served on the Petitioner on 25 March 2010. The Petitioner presented a Petition for judicial review of the Secretary of State's decision to refuse to treat the further submissions as a fresh claim. The matter came before me for a First Hearing.

[2] At the outset of the First Hearing counsel for the Petitioner moved for it to be discharged and for an early By Order hearing to be fixed. He explained that he had recently been instructed, and had seen the Petitioner for the first time only that morning. The Petitioner had been released from detention on 9 April 2010. Mr Bryce indicated that as a result of his consideration of the case and consultation with the Petitioner it seemed likely that there would be further submissions which the Petitioner would wish to make to the Secretary of State which would seek to address matters considered in the decision letter of 11 January 2010. In addition to fully precognoscing the Petitioner with the aid of an interpreter he envisaged further (original) documents being submitted and, possibly, an expert report which considered the authenticity of the documents. Counsel for the Respondent opposed the motion for a discharge. He submitted that the decision challenged was the decision of 11 January 2010. Any further submissions made to the Secretary of State would be considered in the usual way, but the lawfulness of the decision challenged required to be determined on the basis of the material placed before the Secretary of State at the time of the decision. The correctness of that proposition was not impugned by counsel for the Petitioner. It appeared to me that it was plainly right. I was not persuaded that there was any good reason why the challenge to the decision of 11 January 2010 should not be disposed of. I refused the motion for a continuation.

[3] Before the immigration judge the Petitioner's claim was that his father used to be a sub-commander for Hezb-e-Islami and was well known. Following Hezb-e-Islami's defeat by the Taliban the Petitioner fled Afghanistan with his parents. They went to Pakistan and then Iran. After the terrorist attacks on the USA in 2001 Hezb-e-Islami members came under pressure to leave Iran. He and his father returned to Afghanistan, but to Helmand Province (which was not their home area). They changed their names. About four months before coming to the UK the Petitioner was admitted to hospital with a fever. He let slip his father's real name to Dr X, who was treating him. Dr X knew who the Petitioner's father was and had accused him of killing Dr X's brother. Some days after the Petitioner's discharge from hospital he and his father were approached by armed government officials. The Petitioner escaped and hid but his father was shot and killed. The Petitioner returned under cover of darkness to his village. He retrieved money that his father had left for him, and money of his own, and arranged to leave the country.

[4] The immigration judge did not find the Petitioner's account to be credible. Amongst other matters he did not accept it as reasonably likely that the Petitioner and his father would have stayed put at home for about a week after they realised that the father's identity had been revealed (particularly as they had $8,500). He was not satisfied with the Petitioner's explanation as to how he had managed to escape the armed officials. He was not satisfied that the Petitioner's father would have kept incriminating documents at home, or that he would have failed to dispose of them as soon as he realised his identity had been revealed. He found incredible the Petitioner's account that the officials removed a small sum of money from the house but that they failed to find the $8,500. The Petitioner's explanation as to how such a large sum of money had been accumulated by he and his father was also incredible. In the result

the immigration judge was not satisfied that the Petitioner had given a credible account of the circumstances in which he came to the United Kingdom. He was not satisfied that the Petitioner's father was a member of Hezb-e-Islami or that he was killed by government officials. He was not satisfied that the Petitioner was forced to flee.

[5] The further submissions were the letter of 5 June 2009 enclosing certain photocopies of letters. The first bore to be a translation into English (from Pushto) of a letter dated 1 March 2008 from Hezb-e-Islami requesting him to join "the Jihad against the infidel invaders and the puppet government of Karzai". It concluded;

> "Give us the weapons and ammunitions which were kept by your father because we need them. Below the details of the weapons:
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> 1) 80 Klashinkov guns
>
> 2) 10 Rocket Launchers
>
> 3) 8 PK guns
>
> 4) 10 TT pistols
>
> 5) 3 Makarof pistols"

The second bore to be a translation into English of a notice by the Taliban that if they found certain people, including the Petitioner, "we will severely punish them to death". The third bore to be a translation into English of a letter from Hezb-e-Islami to the Petitioner dated 23 January 2008 addressing him as "son of Martyred Y" and calling on him to join the Jihad. The fourth bore to be a translation of a letter from the Petitioner's cousin to the Chief Military Prosecutor's Office, Helmand Province narrating the killing of the Petitioner's father, that the Taliban had provoked sentiment against the Petitioner, and requesting that the Petitioner be provided protection. It also bore to contain a translation of a reply from the "Chief Military Prosecution"

indicating that it was not safe for the Petitioner to stay in Mosoqala and that "He can move somewhere else for his safety."

[6] 6/9 of Process is a copy of the decision letter. The Secretary of State considered the further submissions and material together with the previously submitted material but concluded that they did not create a realistic prospect of success. He considered that little reliance could be placed upon the new documents. There was no satisfactory explanation as to how the documents had been obtained, or how it was that they had suddenly become available after appeal rights had been exhausted. The terms of the letters were difficult to reconcile with the Petitioner's account. Corruption was rife in Afghanistan and official documents could readily be obtained for payment making both authentication and reliability problematic.

[7] Paragraph 353 of the Immigration Rules provides:

> "Where 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:
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> (i) had not already been considered; and
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> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.
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> This paragraph does not apply to claims made overseas."

[8] The Petition attacked the Secretary of State's decision on numerous grounds. Mr Bryce restricted the attack to two short points which he submitted could properly be made. If either point was sound the conclusion should be that the decision was irrational.

[9] It was common ground that the task of the Secretary of State under rule 353, and the task of the court reviewing the Secretary of State's decision, had both been authoritatively described by Buxton LJ in *WM (DRC)* v *The Secretary of State for the Home Department* [2006] EWCA Civ 1495. In relation to the task of the Secretary of State Buxton LJ had observed:

> "**The task of the Secretary of State**
>
> 6. There was broad agreement as to the Secretary of State's task under rule 353. He has to consider the new material together with the old and make two judgements. First, whether the new material is significantly different from that already submitted, on the basis of which the asylum claim has failed, that to be judged under rule 353 (i) according to whether the content of the material has already been considered. Second, if the material is significantly different, the Secretary of State has to consider whether it, taken together with the material previously considered, creates a reasonable prospect of success in a further asylum claim. That second judgement will involve judging not only the reliability of the new material, but also judging the outcome of tribunal proceedings based on that material. To set aside one point that was said to be a matter of some concern, the Secretary of State, in assessing the reliability of new material, can of course have in mind both how the material relates to other material already found by an adjudicator to be reliable, and also to have in mind, where that is relevantly probative, any finding as to the honesty or

reliability of the applicant that was made by the previous adjudicator. However, he must also bear in mind that the latter may be of little relevance when, as is alleged in both of the particular cases before us, the new material does not emanate from the applicant himself, and thus cannot be said to be automatically suspect because it comes from a tainted source.

7. The rule only imposes a somewhat modest test that the application has to meet before it becomes a fresh claim. First, the question is whether there is a realistic prospect of success in an application before an adjudicator, but not more than that. Second, as Mr Nicol QC pertinently pointed out, 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. Third, and importantly, since asylum is in issue the consideration of all the decision-makers, the Secretary of State, the adjudicator and the court, must be informed by the anxious scrutiny of the material that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution. If authority is needed for that proposition, see Lord Bridge of Harwich in *Bugdaycay* v *SSHD [1987] AC 514 at p. 531F*."

In relation to the tasks of the court Buxton LJ had opined:

"The task of the court

10...... (W)hilst the decision remains that of the Secretary of State, and the test is one of irrationality, a decision will be irrational if it was 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 S. 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 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 requirements 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."

[10] Mr Bryce's first point was that it was not evident from the Secretary of State's decision letter that he had asked himself the correct question. The submission was that part of the reasoning had been set out on a *pro forma* form; that for present purposes the reasoning outwith the boxed areas should be ignored; and that if one looked only to the remaining reasoning (within the boxed areas) it was not apparent that the correct test had been applied. (Neither Mr Bryce nor Mr Campbell was able to clarify which of the typescript outwith the boxes was pre-printed on the *pro forma*; but it was clear that some of it was so particular to the Petitioner that it could not have been pre-printed).

[11] I have no difficulty in rejecting this submission. The decision letter requires to be read fairly, and as a whole. The course suggested would obfuscate, rather than clarify,

the reasoning of the decision maker. No persuasive justification was put forward for adopting it, and in my opinion it would be wrong to do so. It was not suggested that the reasoning within the boxes was irreconcilable with the reasoning outwith the boxes. Such a suggestion would in my view have been unwarranted. I understood Mr Bryce to accept that if it was right to look at the whole terms of the letter there would be no basis for arguing that the correct test had not been applied. That was a concession which could not have been withheld. Having regard to the whole terms of the letter, I am in no doubt that the Secretary of State applied the correct test. In particular, the section of the letter headed "Protection Based Submissions" begins:

> "Below is a consideration of the protection based submissions that have not previously been considered, but which taken together with the previously considered material, do not create a realistic prospect of success before an Immigration Judge: ..."

The section proceeds to a full and careful consideration of the protection based submissions, and concludes:

> "... (I)t has been decided that your submissions do not amount to a fresh claim. The new submissions taken together with the previous considered material do not create a realistic prospect of success, namely that an immigration judge applying anxious scrutiny would decide that the claimant ought to be granted asylum, Humanitarian Protection or Discretionary Leave for the reasons above and in light of *WM (DRC) v SSHD and SSHD* v *AR (Afghanistan)* [2006] EWCA Civ 1495."

[12] Mr Bryce's second point was brief. On page 6 of the decision letter the Secretary of State had observed: "It is considered that the documents are entirely self-serving...". Mr Bryce submitted that that was incorrect in the circumstances -

the documents did not bear to issue from, or be the result of action taken by, the Petitioner. In treating the documents as self-serving the Respondent was said to have erred in law. Reference was made to *R* v *Secretary of State for the Home Department, ex parte Gurtekin* [2008] EWHC 1545 (Admin) at paragraphs 28 and 29. It followed, it was submitted, that the decision was irrational and ought to be reduced.

[13] Material emanating (in one way or another) from an applicant himself, or from persons closely connected to him, is the sort of material that is most obviously open to the comment that it may be self-serving. Less commonly, the comment might be used of material obtained and provided by an applicant, and bearing to come from a separate source, where the source is not verifiable (cf. DL Petitioner [2010] CSOH 18 at paragraph 36). Here, if the expression was used in the narrower sense the letter from the Petitioner's cousin would be self-serving. If used in the wider sense, the problems with verification of documents from Afghanistan discussed in the decision letter might justify the description being applied to all the new documents.

[14] However, whichever meaning is attributed to the expression where it occurs in the decision letter, I am not persuaded that the issue of whether the documents were self-serving was pivotal to the Secretary of State's decision. Even if description of the documents as "self-serving" was inappropriate it did not form a critical part of the reasoning in the decision letter. I am left in no doubt from the terms of the decision as a whole that the decision would have been the same even in the absence of such an error (cf. *BS(Kosovo)* v *Secretary of State for the Home Department* [2007] EWCA Civ. 1310 at paragraph 8).

[15] The Petitioner maintains that the decision is irrational. The rationality of the decision must be judged by examining its whole terms. There are obvious dangers in

seeking to focus attention solely upon the words which Mr Bryce highlights in isolation from the terms of the decision as a whole.

[16] The context here is that an immigration judge had found the Petitioner's account to be incredible and implausible in several respects (6/3 of Process). The new material was put forward with a view to revisiting some, but not all, of the issues in relation to which the adverse findings had been made. It had only been produced after all appeal rights had been exhausted, and there was scant explanation as to how the material had been obtained or why it had only been produced at the stage it had. Original documents had not been provided. In a number of respects the documents were difficult to square with the Petitioner's claim. Verification of Afghanistan documents is extremely difficult because corruption is common.

[17] Mr Bryce acknowledged that many of the matters of concern which the Secretary of State raised in the decision letter were matters which ought to have been addressed by the Petitioner. He recognised that there were obvious gaps in the material which had been submitted.

[18] Mr Bryce did not dispute that the Secretary of State required to consider the evidence in the round *(Tanveer Ahmed v Secretary of State for the Home Department* [2002] UKAIT00439). He did not take issue with counsel for the Respondent's submission that that had been done by the Secretary of State here. In my opinion he was correct not to do so. When the decision is read as a whole it is plain that the Secretary of State did consider the evidence in the round - the new material and the old material - in arriving at her conclusions that little reliance would be likely to be placed upon the new material by an immigration judge; and that the new submissions taken together with the previously considered material did not create a realistic prospect of success. The conclusion that little reliance would be likely to be placed

upon the new material did not turn upon it being seen as "self-serving" (cf. the *Gurtekan* case: there no *Tanveer Ahmed* test had been carried out by the adjudicator; the new material had not been looked at in the round with the existing material when its reliability had been assessed (see paragraph 23)). Rather, the new material and the existing material were fully considered, and it is evident that in evaluating the material and in reaching her conclusions the Secretary of State subjected the material to anxious scrutiny.

[19] It follows that in my opinion the Petitioner's challenge to the Secretary of State's decision is not well founded. The decision was one which the Secretary of State was entitled to reach. She applied the correct test and subjected the material before her to the anxious scrutiny which was required.

[20] I shall sustain the Respondent's first, second and third pleas-in-law, repel the Petitioner's first plea-in-law, and dismiss the Petition.