OUTER HOUSE, COURT OF SESSION

[2011] CSOH 8

P825/10

OPINION OF LORD STEWART

in the cause

M.A. (ASSISTED PERSON)

Petitioner;

for

Judicial Review of a decision of the Secretary of State for the Home Department to refuse to treat further representations made on his behalf as a fresh asylum claim in terms of paragraph 353 of the Immigration Rules (HC 395)

Petitioner: Devlin, Advocate; Drummond Miller LLP
Respondent: Olson, Advocate; Office of the Solicitor to the Advocate General

19 January 2011

[1] This Petition for Judicial Review of a United Kingdom Border Agency determination called before me for a First Hearing on 11 November. The hearing was adjourned part heard and continued to a conclusion on 12 November 2010. I granted the Petitioner's motion made at the bar, unopposed, to amend the Petition: at page 8 paragraph (iv) between the words "Bewran website existed or that" and the words

"(paragraph 46)" by inserting the words "it was a news gathering organisation." At the hearing Petitioner's Counsel moved me to sustain the Petitioner's Plea, to repel the Respondent's Pleas and to reduce the UK Border Agency's determination of 20 March 2010. Counsel for the Respondent made the counter-motion and moved for dismissal of the Petition. Having made *avizandum* my opinion is that the Petition should be dismissed.

History of claim for Asylum etc

[2] On 7 April 2009 at a Shell filling station at Pembury on the A21 London-Dover road the Petitioner was arrested on suspicion of illegal entry into the United Kingdom. On 8 April he claimed asylum. His screening interview with an Immigration Officer took place on 9 April 2009. He had an Asylum Interview on 30 April 2009. By Notice of Immigration Decision/Reasons for Refusal Letter dated 8 May 2009 issued by a member of Asylum Team 2 Glasgow, UK Border Agency, on behalf of the Respondent, the Petitioner was refused asylum and ordered to be removed from the United Kingdom. The Petitioner appealed to the Asylum and Immigration Tribunal in terms of the Nationality, Immigration and Asylum Act 2002 section 82 on grounds specified in the 2002 Act section 84(1)(a) and (g).

[3] The Petitioner's appeal was heard at Glasgow on 18 June 2009 by Immigration Judge Blair. The Petitioner was represented by Ms L A Mulholland, solicitor, of Messrs Quinn, Martin, Langan, Solicitors, Glasgow. There was no appearance for the Respondent. Certain documents were submitted in support of the Appeal. By Determination dated 20 June and promulgated on 7 July 2009 under cover of Notification Letter dated 3 July the Immigration Judge dismissed the appeal. The

Petitioner did not appeal or apply for review and reconsideration in terms of the Nationality, Immigration and Asylum Act 2002 sections 103 and 103A. The Petitioner was recorded by the Respondent as being "rights of appeal exhausted" on 17 July 2009.

[4] Two months later, by letter dated 14 September 2009, the Petitioner's solicitor made further representations to the Respondent in relation to the Petitioner's claim for Asylum. Additional documents were enclosed. The further representations were considered in terms of the Immigration Rules, Rule 353. By decision letter dated 20 March 2010 a member of Asylum Team 1 Glasgow, the UK Border Agency, acting on behalf of the Respondent determined that the decision of 8 May 2009 upheld by the Immigration Judge on 3 July 2009 should not be reversed; that the Petitioner's submissions did not amount to a "fresh claim" in terms of Rule 353; and that the Petitioner had no basis to stay in the United Kingdom and should make arrangements to leave without delay.

[5] The UK Border Agency determination of 20 March 2010 is the decision which the Petitioner now seeks to bring under Judicial Review. The Court granted first orders on 4 August 2010 and assigned 11 November 2010 as the date of the First Hearing.

Basis of claim for Asylum etc and Reasons for Refusal

[6] The Petitioner's claim for Asylum has been treated as (a) an application for Asylum based on a well-founded fear of persecution in the Islamic Republic of Iran due to political opinion; (b) an application for Humanitarian Protection based on fear that if returned to the Islamic Republic of Iran the Petitioner will face a real risk of death or torture etc; (c) a claim that requiring him to leave the United Kingdom or

removing him to the Islamic Republic of Iran will be in breach of ECHR Arts. 2 (right to life) and 3 (right not to be tortured etc.)

[7] No issue has been taken with the Petitioner's claimed birth date 29 May 1988. It is accepted that the Petitioner is from Iran. The Respondent does not contest that the Petitioner is an Iranian national of Kurdish ethnicity. The Petitioner claims that Kurdish Sorani is his mother tongue. He claims to have left Iran on 20-22 March 2009 and that he travelled to the United Kingdom on foot, by car and by lorry, arriving in the United Kingdom on 7 April 2009, the day of his arrest. The Petitioner claims that his departure from Iran was precipitated by an event that occurred on 18 March 2009.

[8] The claimed event on 18 March 2009 involved the Petitioner and his cousin travelling in his cousin's car carrying Kurdish Democratic Party of Iran [KDPI] literature which had been smuggled from Iraq. The cousin was driving. The car was intercepted by Iranian security forces. The security forces opened fire. The cousin was shot and wounded and subsequently shot dead. The Petitioner escaped. He claimed that his identity card was left in his cousin's car and that the authorities must have found it, discovered his identity and traced his home address. I assume that the setting for the claimed event was the border area of north-west Iran.

[9] For the avoidance of doubt the Petitioner does not submit that Kurdish ethnicity and sympathy for the KDPI would by themselves found a claim for Asylum etc. The Respondent for her part accepts that, if the Petitioner's account of the event of 18 March 2009 is true, the Petitioner is entitled to have a well-founded fear of persecution in the Islamic Republic of Iran due to political opinion.

[10] The reasons for rejecting the Petitioner's initial claim for Asylum etc were, to put it shortly, that his account was disbelieved. Among other things, it was not accepted that the Petitioner's cousin introduced him to the KPDI and got the Petitioner involved

in working for the KDPI; it was not accepted that the Petitioner came across the Iranian security forces in the mountains on 18 March 2009 as claimed; it was not accepted that the Petitioner left Iran in the manner he claimed; and it was not accepted that the Petitioner travelled to the United Kingdom in the manner he claimed. It was found that that there was no evidence that failed asylum seekers who had exited Iran illegally were subject to ill-treatment on return to Iran.

Reasons for refusing the Petitioner's appeal to the Asylum and Immigration Tribunal

[11] At the appeal heard by Immigration Judge Blair on 18 June 2009 the Petitioner challenged the assessment of his credibility made in the Reasons for Refusal Letter. In support of his case he produced: "Statement in Chief by the Appellant" (commenting on the Reasons for Refusal Letter); fax copy attestation by KDPI in Europe (in French) together with certified translation; CV of translator Isabelle Capaldi; article from www.bewran.com website (in Kurdish Sorani) together with certified translation; CV of translator Kasim Kerim; copy birth certificate of deceased cousin together with certified translation and report by Dr A M Kakhki. The Respondent was not represented at the hearing. Ms Mulholland led evidence from the Petitioners. The Immigration Judge clarified the Petitioner's evidence in relation to the website article and the birth certificate [§§ 17-22]. The Immigration Judge did not consider the Petitioner credible. He considered that the Petitioner had fabricated his account and that the Petitioner was not at any risk of harm on return to Iraq (*sic*) [§§ 27, 52].

[12] The Immigration Judge made certain findings favourable to the Petitioner [§§ 28, 31, etc]. Even so, weighing competing factors and considering the whole evidence in the round he formed the view that the Petitioner had fabricated his

account [§ 31.] The Immigration Judge's reasoning gave detailed consideration to the copy document bearing to be, on the evidence of the Petitioner and the report of Dr Kakhki, a copy birth certificate of the deceased cousin with the details of death entered on it [§§ 15-19, 33-43]. In the whole circumstances the Immigration Judge considered the document to be a fabrication [§ 43]. The Immigration Judge gave consideration to the document bearing to be a printout from the Bewran website, said to be a report of the cousin's death, and its translation [§§ 21-22, 44-47]. He considered the report to be a fabrication [§ 44]. The Immigration Judge gave consideration to the fax copy KDPI attestation dated at Paris 2 June 2009 [§§ 48-50.] The translation stated:

> "We, the undersigned, representatives of the PDKI in Europe, hereby testify that Mr [*the Petitioner*] is a sympathiser of our party and that as a result of the oppression exerted by the regime of the Islamist Republic or Iran over him, he was forced to leave Iran. His return to his country will put his life in danger..."

The Immigration Judge could not be satisfied that the attestation was reliable [§ 48.]. He stated: "As with the website I was given no evidence as to whether the KDPI has an office in Paris or whether this was an organisation which was prepared to provide attestations to those who seek them [§49]." The Immigration Judge gave consideration to the Petitioner's evidence about how the attestation was obtained and the content of the attestation. He stated that it did not appear to him that if the attestation were genuine it would have been expressed in such vague terms and would have provided so little information [§ 50.]

Petitioner's further submissions to the UK Border Agency under Rule 353

[13] The documents submitted in support of the further submissions of 14 September 2009 were: Summons with certified translation; Letter of Warning with certified translation; email exchange between Petitioner's solicitor and Kaweh Beheshtizadeh 16 June-29 July 2009 with attachment dated 27 July 2009; email exchange between Petitioner's solicitor and Kaweh Beheshtizadeh 26 August-28 August 2009.

[14] In relation to the first two items (Summons and Letter of Warning) the solicitor's further submissions letter stated:

> "... [*The Petitioner*] was advised by his family after he arrived in the United Kingdom that a Summons was issued to his home in June 2009. He advises that he did not understand the importance of this document to his asylum claim and therefore did not ask his family to post this to him until July 2009. They thereafter posted the Letter of Warning to [*the Petitioner*.] Please find enclosed Summons and Letter of Warning from Iran together with certified translations."

The translation of the Summons bears to show that by Summons of the Public and Criminal Court of Sardasht served on 9 June 2009 the Petitioner (or someone with the same name) was summoned to attend at the Revolutionary Court of Sardasht, Islamic Republic of Iran, on 6 July 2009 at 10.30 am, the reason for attendance being stated as "To give some explanations." The translation of the Letter of Warning bears to show that by Letter of Warning of the Public and Criminal Court of Sardasht served on 28 July 2009 the Petitioner (or someone with the same name) was summoned to attend at the Revolutionary Court of Sardasht, Islamic Republic of Iran, on 30 July 2009 at 09.30 am, the reason for attendance being stated as "To give some explanations. Attend this court on the set time to give some explanations in Relation

to the clash with officers." On this basis the Summons pre-dated the hearing in front of the Immigration Judge and the Letter of Warning post-dated it.

[15] In relation to the other items, exchanges of email correspondence, these bear to show that on 16 June 2009 the Petitioner's solicitors contacted Kaveh Behesty otherwise Kaweh Beheshtizadeh Chairman of the UK Committee of the KDPI stating the solicitors' understanding that the Petitioner had already contacted Mr Beheshtizadeh directly with a view to having Mr Beheshtizadeh or a representative attend as a witness on the Petitioner's behalf at the Asylum and Immigration Tribunal hearing on 18 June 2009. On 29 July Mr Beheshtizadeh sent an unsigned "support letter" dated at London on 27 July 2009 as an email attachment stating *inter alia*:

> "I, the undersigned, chairman of the Kurdistan Democratic Party of Iran in the UK, hereby testify that Mr [*the Petitioner*] was a sympathiser of our party and is a member of the KDPI in the UK. Mr [*the Petitioner*] was forced to leave Iran because of the oppression perpetrated against him by the regime of the Islamic Republic of Iran. His return to Iran will put his life in danger..."

[16] By email dated 26 August 2009 the Petitioner's solicitors contacted Mr Beheshtizadeh asking for "detailed information" with a list of questions apparently directed at gathering specific and reliable information to support the Petitioner's account. What bears to be Mr Beheshtizadeh's email reply stated *inter alia* that "I am unable to answer some of your questions such as any incident when Mr [*the Petitioner*] was acting for the Party, that caused him to leave Iran...for security reasons." The email detailed the checks that were carried out before the Petitioner was informed, on 20 July 2009, that he had been admitted to membership of the KDPI in the UK. The email further stated:

"I do not have access to all [*the Petitioner's*] details and activities in Iran. Only our political bureau has access to those information [*sic*] and they will not reveal them under any circumstances."

The Immigration Rules

[17] The Immigration Rules 1994 (HC 395 as amended) made under the Immigration Act 1971 section (2) provide:

"**353.-** Where a human rights or asylum claim has been refused 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".

UK Border Agency's reasons for rejecting the Petitioner's further submissions under Rule 353

[18] The UK Border Agency decision letter of 20 March 2010 sets out the legal tests for making a Rule 353 determination and for assessing the reliability of documents under reference to *inter alia* the terms of Rule 353, the requirement for "anxious scrutiny", and the cases of *WM (DRC)* v *Secretary of State for the Home Department* [2006] EWCA Civ 1495 and *Tanveer Ahmed* [2002] UKIAT 00439* [§§ 8-12.]

[19] At paragraph 13 the decision-maker stated:

> "In the determination of 03/07/2009 Immigration Judge Blair made several findings in relation to your client's claim that he was a fugitive from the Iranian authorities because of his suspected involvement in transporting documents for the KDPI. He stated that he was not satisfied your client had given a credible account."

There followed a bullet point summary of the Immigration Judge's findings. The paragraph ended: "In concluding the Immigration Judge rejected your client's claim on asylum, humanitarian and human rights grounds."

[20] At paragraphs 14 and 15 the decision-maker compared the effect of the further information from Kaweh Beheshtizadeh with the attestation bearing to be from the KDPI in Paris previously considered by the Immigration Judge. The decision-maker stated that the new information "goes no further than" the original attestation, despite the request to Mr Beheshtizadeh to confirm details of the activities the Petitioner carried out in Iran etc. On this issue the decision-maker's determination was: "It is considered that an Immigration Judge, when applying the rule of anxious scrutiny, would reasonably be likely [*sic*] to give weight to the fact that the KDPI are still unwilling to support your client in this matter." In relation to Mr Beheshtizadeh's statement about the risk on return the decision stated:

> "... he doesn't quantify why your client would be at risk on return to Iran and as such it is considered that this statement carries little weight. It is considered that an Immigration Judge, when applying the rule of anxious scrutiny, would be reasonably likely to give weight to this failing in the letter of support."

The decision-maker continued, at paragraph 16: "Given that your client's claimed activities in Iran have not been accepted it is considered an Immigration Judge, when

applying the rule of anxious scrutiny, would be reasonably likely to give weight to this failing in the letter of support."

[21] In relation to the Summons and the Letter or Warning the decision-maker stated at paragraph 17:

> "The court documents submitted are of a basic template design onto which your client's details have been hand written...and could easily have been produced using a computer or a photocopier. It is considered that an Immigration Judge, when applying the rule of anxious scrutiny, would be reasonably likely to give weight to this matter when determining the reliability to be placed on these claimed court documents."

At paragraph 18 the decision-maker noted that the Iran COIS quoted a Danish report to the effect that summonses can easily be obtained illegally and that it is easy to forge summonses. The decision-maker continued: "It is considered that an Immigration Judge, when applying the rule of anxious scrutiny, would be reasonably likely to give weight to this matter when determining the reliability to be placed on these claimed documents."

[22] At paragraph 19 the decision-maker made a general point about the effect of documents produced by the Petitioner:

> "Given that there is a clear finding that your client has fabricated documents to bolster his asylum claim it is considered that the reliability to be placed on further documents your client produces, without any independent verification of their reliability, is reduced. It is considered that an Immigration Judge, when applying the rule of anxious scrutiny, would be reasonably likely to give weight to this matter when determining the reliability to be placed on these claimed court documents."

Taking all issues into consideration alongside the Immigration Judge's findings regarding the Petitioner's lack of credibility, the decision-maker, at paragraph 21, did not accept that an Immigration judge, when applying the rule of anxious scrutiny, would be persuaded to reverse the finding of Immigration Judge Blair on the basis of the documents submitted.

Submissions for the Petitioner

[23] Mr Devlin, Counsel for the Petitioner, submitted that the decision-maker had erred in law in that (1) he failed to satisfy the requirement of anxious scrutiny in relation to the material previously considered and (2) he failed to ask himself whether an Immigration Judge applying the rule of anxious scrutiny to the further submissions together with the previously considered material might have reached a different conclusion.

[24] Counsel accepted that the decision-maker had set out the law correctly at paragraphs 8 to 12: but, he said, it was one thing to state the law, quite another to understand and apply it correctly. The recent decision in *R (YH)* v *Secretary of State for the Home Department* [2010] EWCA Civ 116, read in isolation, might seem to have somewhat emptied the rule of anxious scrutiny of content [§§ 22-24 *per* Carnwarth LJ]. The rule of anxious scrutiny applies where what is at issue is a risk that the applicant will be killed or tortured. Because of the gravity of such risks, the rule involves a disinclination to overlook minor flaws in, or to adopt an unduly benevolent view of, the adverse decision under consideration [*R* v *Ministry of Defence ex p. Smith* [1998] QB 517 at 537G-H *per* Simon Browne LJ]. The rule also involves an inclination to allow the benefit of any reasonable doubt to the applicant [*ZT (Kosovo)* v *Secretary of State for the Home Department* 2009 1 WLR 348

(certification case) at § 23 *per* Lord Phillips of Worth Matravers]. "Anxious scrutiny" properly understood, said Counsel, involves a balanced approach, an approach which is fair and objective and devoid of imbalance of any kind; and it involves looking critically at the previously considered material. It must be incumbent on the decision-maker to make an assessment of the relative strengths and weaknesses of the first Immigration Judge's reasoning for the purpose of determining whether the additional information makes or could make a difference when considered by another Immigration Judge. A decision will be irrational if it is not taken with anxious scrutiny [*WM (DRC)* v *Secretary of State for the Home Department* [2007] Imm AR 337 at § 10 *per* Buxton LJ.]

[25] Counsel submitted that the case law on the approach to be adopted by the Court, as it should now be understood, was helpfully summarised by Lord Tyre in *IM Petitioner* [2010] CSOH 103 at paragraphs 9 to 11: it was for the Court to make up its own mind; and if the Court concludes that an appeal to another Immigration Judge might succeed, it must uphold the challenge. This approach might seem to be contrary to constitutional theory which allowed an area of discretion to the administrative decision-maker: but the case law was highly persuasive [*ZT (Kosovo)* v *Secretary of State for the Home Department* [2009] 1 WLR 348 at § 23 *per* Lord Phillips of Worth Matravers, at § 75 *per* Lord Brown of Eaton-under-Heywood, at § 83 *per* Lord Neuberger of Abbotsbury; *KH (Afghanistan)* v *Secretary of State for the Home Department* [2009] EWCA Civ 1354 at § 19 *per* Longmore LJ; *R (YH)* v *Secretary of State for the Home Department* [2010] EWCA Civ 116 at §§ 17-21 *per* Carnwarth LJ]. At this point Counsel gave way to allow Respondent's Counsel to say that there was no dispute about the law.

[26] Counsel for the Petitioner continued that the Petitioner's case was not one that could be characterised as "manifestly contrived or riddled with inconsistencies" [*cf. R (YH)* v *Secretary of State for the Home Department* [2010] EWCA Civ 116 at § 24 *per* Carnwarth LJ]. Significantly, the Immigration Judge made the finding that "in many important respects the account of the appellant has been consistent since he claimed asylum" [§ 29]. The Immigration Judge also accepted that the Petitioner had some knowledge of the KDPI; that the KDPI is targeted by the Iranian authorities; that KDPI literature is moved from northern Iraq to Iran; and that one of the places mentioned by the COIS in relation to these activities is Sardasht, the village from which the Petitioner claims to come. The Immigration Judge was satisfied that the KDPI attestation did, in very general terms, support the Petitioner's claim that he was involved with the KDPI and that he had to leave Iran because of repression [§ 48]. The Immigration Judge also found that the Petitioner's account of his escape from Iranian security forces was "not inherently implausible"; and he accepted that the Bewran website article did refer to the shooting of someone with a name very similar to that of the appellant's cousin on the date claimed by the appellant [§ 44]. The Immigration Judge acknowledged that the details contained in the "birth certificate" were consistent with the Petitioner's claim that his cousin had died [§ 39]. He recognised that Dr Kakhki, from the summary of his qualifications, was an Iranian lawyer with relevant expertise [§ 39.]

[27] Counsel submitted that the decision-maker's approach, as evidenced by his rehearsal of the Immigration Judge's findings at paragraph 13, lacked balance. If the decision-maker thought fit to detail facts adverse to the Petitioner, he ought, applying the rule of "anxious scrutiny", to have drawn attention also to points in the Petitioner's

favour. Of the several findings in favour of the Petitioner (*supra*), the decision-maker mentioned only one.

[28] Further, the decision-maker's list of eight negative findings was repetitive. On a proper analysis the Immigration Judge had made only two primary findings, if findings they could be called, adverse to the Petitioner, namely that the Petitioner had not given an explanation satisfactory to the Immigration Judge as to why a copy, rather than the principal, of the cousin's "birth certificate" had been produced; and that the Petitioner had not given an explanation satisfactory to the Immigration Judge of how he, the Petitioner, had become aware of the Bewran website article. These were precisely the sort of subjective judgements on which another Immigration Judge might reasonably come to a different conclusion, particularly in the light of the additional information.

[29] Moving to the Immigration Judge's assessment of the documents themselves, Counsel for the Petitioner submitted that the burden lies with the Respondent to prove wrongdoing; that there is only one civil standard of proof, proof on the balance of probabilities, which is flexible in its application; that the more serious the allegation the higher the quality of evidence required for proof; and that proving fabrication of documents calls for evidence at the upper end of the scale [*RP (proof of forgery) Nigeria* [2006] UKAIT 00086 at § 14 - a decision on Nationality, Immigration and Asylum Act 2002 section 108; *OA (alleged forgery; section 108 procedure) Nigeria* [2007] UKIAT 00096 at § 26; *R (N)* v *Mental Health Review Tribunal* (CA) [2006] QB 468 at § 62; *NA & Others (Cambridge College of Learning) Pakistan* [2009] UKAIT 00031 at § 98.]

[30] Counsel continued that the primary findings in this case did not justify the Immigration Judge's secondary or inferential findings of "fabrication". At worst for

the Petitioner the Immigration Judge's primary findings about the copy "birth certificate" at paragraphs 39 to 42 were neutral, consistent equally with the document being genuine. The same was true of such primary findings as were made about the website article at paragraphs 20 to 22 and 44 to 47. From this basis of primary fact the Immigration Judge's reasoning in support of his inferences of fabrication was tenuous, to say the least. Nothing in the evidence provided the required proof of fabrication. Applying the rule of anxious scrutiny the decision-maker should have been alive to the questionable quality of the reasoning. Instead, he took an unduly benevolent view and founded strongly on the findings of fabrication. Yet, clearly, these were findings that the primary evidence could not safely bear and that another Immigration Judge might not have made or might not make.

[31] The Immigration Judge made much of the fact that Petitioner stated on the one hand that he had found the Bewran website article by looking on the internet and on the other hand that he could not read Kurdish Sorani, the language of the website [§§ 22, 45]. The Immigration Judge should not have drawn an adverse inference without putting the matter fairly and squarely to the Petitioner for his explanation: not to clarify a matter of such importance was inconsistent with the rule of anxious scrutiny. On a point of detail, it was questionable whether another Immigration Judge would treat the discrepancy as to the age of the cousin's child - reported on the website to be three months instead of the three years claimed by the Petitioner - as "significant" [§ 47.] The standards of accuracy expected of news agencies like Reuters could not be attributed to media of this sort.

[32] Counsel also questioned the decision-maker's uncritical acceptance of the Immigration Judge's comments on the first KDPI attestation. At paragraph 48 the Immigration Judge stated: "However as I do not consider that information in the

website or the birth certificate is reliable the reliability of [*the KDPI attestation*] I considered to be serious in weakened [*sic*]." It was not legitimate, Counsel said, to stigmatise the third document simply because of doubts about the other two, assuming that was what the Immigration Judge intended to convey. Further the last sentence of paragraph 50 - "It did not appear to me...that if the letter was genuine, it would be expressed in such vague terms..." etc - was essentially speculation as to the terms in which the KDPI would issue genuine letters of support; and it was not legitimate to speculate against an asylum seeker in that way.

[33] In support of his second submission Counsel for the Petitioner argued that there was nothing in the decision-maker's reasoning to suggest that he had even considered whether a different Immigration Judge might take a different view. The decision-maker had treated his own view of the merits as the starting point - and as the end point.

[34] In relation to the correspondence with Mr Beheshtizadeh Counsel submitted that there was no real attempt on the part of the decision-maker to engage with the content. The Immigration Judge, at paragraph 48 of his determination had said:

> "... there were in my view other quite distinct problems with the [*KDPI*] attestation in any event such that overall I could not be satisfied that the attestation is a reliable document."

Three supposed problems were listed at paragraphs 49 and 50, namely that (1) there was no evidence "that the KDPI has an office in Paris"; (2) there was no evidence "whether [*the KDPI*] was an organisation which was prepared to provide attestations..."; and (3) it was lacking in credibility that:

> "the letter which the appellant claims could only be obtained after the KDPI made a specific inquiry into him, made no reference at all to the activities of

> the appellant in Iran or of his cousin or of the claimed killing of this man. It did not appear to me to be reasonably likely that if the letter was genuine, it would be expressed in such vague terms or that had it been genuinely issued by the KDPI that it would have provided so little information in the support of someone who came looking for help from them and who claimed to be one of their sympathisers."

Counsel submitted that each one of the supposed problems was addressed by the additional material.

[35] Importantly the decision-maker did not question the genuineness of the correspondence between the Petitioner's solicitors and Mr Kaweh Beheshtizadeh; nor did he question the standing of Mr Beheshtizadeh, who communicated on headed writing paper in his capacity as Chairman of the UK Committee of the KDPI. It was clear from Mr Beheshtizadeh's detailed email of 28 August 2009 that the KDPI in Europe did have its political bureau in Paris; it was clear that the KDPI was an organisation that was prepared to provide "support letters" once the Paris bureau had checked the supplicant's credentials with the KDPI in Iraqi Kurdistan; it was clear that the Paris bureau had genuinely faxed the original attestation submitted to the Immigration Judge; it was clear that Mr Beheshtizadeh himself did not have direct access to the records; and it was clear that there were understandable security reasons why the KDPI as a matter of policy would not wish to provide details of the activities of individual members and sympathisers in Iran. The information met the criticisms advanced by the original Immigration Judge: yet at no point did the decision-maker ask himself the question whether the additional material might cause another Immigration Judge, applying the rule of anxious scrutiny, to reach a different

conclusion on the merits of the Petitioner's claim. The decision-maker's failure in this regard was inconsistent with his own duty to exercise anxious scrutiny.

[36] In reply to Counsel for the Respondent, Mr Devlin added that the findings of fabrication were tenuous: if one finding was removed what was left became even more tenuous. That should have been taken into account by the Border Agency decision-maker exercising anxious scrutiny. Even a *Wednesbury* test would have been satisfied. The Immigration Judge had made much of the fact that a photocopy of the birth certificate had been produced. There was no requirement to produce originals. There was no indication that the Immigration Judge would have been in a position to validate an original, if produced. If the findings of fabrication were based to any extent on special knowledge, the Immigration Judge had a duty to declare it.

Submissions for the Respondent

[37] Mr Olsen, Counsel for the Respondent submitted (1) that the decision-maker's decision was immune from a *Wednesbury*-type challenge because he had made no error in the process of determination and (2) that the decision-maker's decision was correct.

[38] The Respondent's considered position, as stated by Counsel for the Respondent, is that courts dealing with Rule 353 applications would now be invited to apply the *YH* standard of review [*YH (Iraq)* v *Secretary of State for the Home Department* [2010] EWCA Civ 116 at §§ 17-21 *per* Carnwarth LJ]. It is not for the Court to review the decision-making process. It is rather for the Court to judge the substantive decision. It is for the Court to decide whether the decision is correct. The decision of the Inner House in *FO (Nigeria)* v *Secretary of State for the Home Department* [2010] CSIH 16 should not be followed. *FO* was a Rule 353 Judicial Review presented and

decided on traditional *Wednesbury* lines. In *FO* it was submitted, it was not disputed, and the Court accepted, that the scope of such a challenge was as discussed in *Onibiyu* v *Secretary of State for the Home Department* (1996) Imm AR 370 at 381 and *WM (DRC)* v *Secretary of State for the Department* (2007) Imm AR 337 at 341-342. The decision in *FO*, 19 February 2010, predated the decision in *YH*, 25 February 2010. The Court in *FO* did not have the benefit of the citation of authorities or the arguments presented in *YH*. The *YH*-type approach had been applied in a number of Outer House decisions: *JS (Jamaica)* v *Secretary of State for the Home Department* [2010] CSOH 75, 23 June 2010, Lord Malcolm (certification case); *SY (DRC) Secretary of State for the Home Department* [2010] CSOH 89, 9 July 2010, Lord Doherty; *IM (Libya)* v *Secretary of State for the Home Department* [2010] CSOH 103, 30 July 2010, Lord Tyre; *NM (Iran)* v *Secretary of State for the Home Department* [2010] CSOH 146, 3 November 2010, Lord Pentland.

[39] Counsel submitted that the Petitioner had approached the matter as if the current process were an appeal against or a review of the Immigration Judge's decision, arguing that the Immigration Judge was wrong to make the findings that he did. The approach was misconceived. The Court should not go through the previous (Immigration Judge's) decision and analyse it in its entirety. Counsel submitted, and Counsel for the Petitioner agreed, that the "*Deevasalan* Guidelines" applied [*Deevasalan* v *Secretary of State for the Home Department* [2002] UKIAT 000702 at §§ 37-42.] In *Djebbar* v *Secretary of State for the Home Department* [2004] EWCA Civ 804 at paragraph 28 Judge LJ (as he then was) giving the judgement of the Court had approved the guidelines saying:

> "28. ...The second application is a fresh application, requiring proper consideration on such merits as it may enjoy, approaching the issues

> contemporaneously. Although it is indeed a 'fresh' application, a second or subsequent application is not and is not deemed to be a first application, and it is not properly to be treated as if it were. Re-litigation of issues which have already been resolved is contrary to the public interest, and nothing in the process suggests that the first application should or must automatically be treated as irrelevant to second applications arising in cases like those with which we are presently concerned. If the first application may be relevant, then the extent of its possible relevance and the proper approach to it should be addressed as a matter of principle. That is what the [*Devaseelan*] guidance purported to provide."

In England the application of the *Deevasalan* Guidelines had been extended to cases where there is a material overlap of evidence [*Ocampo* v *Secretary of State for the Home Department* [2006] EWCA Civ 1276 at § 25 *per* Auld LJ.]

[40] The true issue was whether the Respondent had correctly determined the Rule 353 "fresh claim" application. For the Petitioner's claim to have realistic prospects, the Petitioner had to be believed. The findings of the Reasons for Refusal Letter, issued on 8 May 2009 following the Asylum interview, were to the effect that the Petitioner's account was not credible. The Petitioner then appealed to the Asylum and Immigration Tribunal and produced three documents to the Immigration Judge to corroborate his account. None of the documents corroborated the Petitioner's account: rather, they were presented in a way which, on the Immigration Judge's assessment, further damaged the Petitioner's credibility.

[41] The "birth certificate" (with details of death endorsed) produced to the Immigration Judge was a copy. The short point was that copies are easy to fabricate; and that the Petitioner's explanations for non-production of the original failed to

satisfy the Immigration Judge. Indeed the Immigration Judge found the evidence given in that connection to be incredible. The Immigration Judge was unable to treat the copy produced as reliable evidence of its contents. In any event, at best for the Petitioner all that the document showed was that the cousin had died. The document did not and could not provide corroboration of the core event.

[42] Equally, in the absence of satisfactory evidence about the background to its production, the claimed Bewran website article did not and could not provide corroboration of the core event. The Immigration Judge was, properly, unable to treat that document as satisfactory evidence of its contents. Again, the Immigration Judge found the evidence given by the Petitioner about the website to be incredible and damaging to the Petitioner's credibility generally. It was not fair criticism that the Petitioner was given no opportunity to address the particularly damaging implication of his own evidence that he personally had discovered the article without being able to read the language of the website.

[43] Counsel for the Respondent conceded that the additional information from the KDPI did make some difference. In the light of the additional material a decision-maker would be entitled to look back at the original material with considerably less scepticism. It was no longer possible to say that the original material was not genuine. But of itself that did not tilt the balance. Crucially, the new material still failed to provide corroboration of the core event of 18 March 2009 on which the Petitioner relied. The second attestation was in virtually the same terms as the first. Admittedly, in both the first and second attestations, the KDPI did state that the Petitioner's life would be at risk if he were to return to Iran: but they did not say why - there were no specifics. On this central point the second attestation added nothing to the first. Counsel submitted, and Counsel for the Petitioner agreed, that the principles for

assessing documents in the asylum context are as set out in *Tanveer Ahmed* v *Secretary of State for the Home Department* [2002] Imm AR 318. Counsel referred to paragraphs 30 to 33 where the Tribunal drew attention to the prevalence of forged, official-looking documents: but also stated that whether or not a document is forged is not determinative. The onus of proof is on the applicant and "[t]he only question is whether the document is one upon which reliance should properly be placed." The principles were summarised at paragraph 38:

> In asylum and human rights cases it is for an individual claimant to show that a document on which he seeks to rely can be relied on.
>
> The decision-maker should consider whether a document is one on which reliance should properly be placed after looking at all the evidence in the round.
>
> Only very rarely will there be the need to make an allegation of forgery, or evidence strong enough to support it. The allegation should not be made without such evidence. Failure to establish the allegation on the balance of probabilities to the higher civil standard does not show that a document is reliable. The decision-maker still needs to apply principles 1 and 2.

That case was decided on the Immigration and Asylum (Procedure) Rules 2000, Rule 39 (2). The provision had now been superseded by the Asylum and Immigration Tribunal (Procedure) Rules, Rule 53 (2), which is to similar effect as regards the burden of proof.

[44] Counsel for the Respondent continued that the Court was entitled to take into account that the original "birth certificate" had still not been produced. The situation as regards the "birth certificate" and the Bewran website article was found by the

Immigration Judge to be unsatisfactory - and nothing had changed. There remained no adequate explanation at the point in time when the decision-maker made his decision.

[45] Counsel for the Respondent developed his second submission - that the decision-maker's determination was correct - by first of all rejecting the proposition that the decision-maker had somehow inappropriately listed only the Immigration Judge's findings of fact adverse to the Petitioner: the decision-maker's paragraph 13 was a realistic summary of the problems facing the Petitioner.

[46] At paragraph 14, said Counsel, the decision-maker correctly identified that the additional information from the KDPI went no further than the letter of support that was submitted to the Tribunal. If the Immigration Judge had made an error, as it turned out, in his assessment of the authenticity of the first attestation, the error was immaterial. The Petitioner's case was that he and his cousin had been intercepted while transporting KDPI literature. The KDPI attestations fell very far short of providing corroboration for that claim. The fact that the first attestation might now be assessed as genuine did not disturb the conclusions reached about the other documents. The Immigration Judge's view of the original attestation was not a significant part of his overall assessment of the Petitioner's credibility.

[47] Counsel continued that the "birth certificate" issue was clearly significant for the Immigration Judge in relation to the Petitioner's credibility. The Immigration Judge was clearly unimpressed by the Petitioner's reasons for non-production of the original. The language issue around the Petitioner's access to the article on the website was a significant problem for the Petitioner from the Immigration Judge's perspective. The Court should approach the new evidence looking at all the material including the Immigration Judge's findings on credibility. The Court was not bound by these findings but was entitled to take them into account.

Discussion

[48] If an initial claim is rejected by the UK Border Agency, as it was in this case, there is no restriction on the right of appeal against the relative "Immigration Decision." The appeal is to an Immigration Judge sitting (now) in the First-tier Tribunal, Immigration and Asylum Chamber. Further submissions, if rejected by Agency, cannot be appealed to the Tribunal unless the Rule 353 test is satisfied. Rule 353 involves a two stage process for the Border Agency, namely (1) a decision whether to accept or reject the claim in light of the further submissions and (2) in the event of rejection, a decision as to whether the further submissions amount to a "fresh claim" applying the "significantly different" test. If there is a "fresh claim", the gate opens for an appeal to an Immigration Judge again - and the applicant cannot be removed from the United Kingdom pending determination of that appeal [*ZT (Kosovo)* v *Secretary of State for the Home Department* [2009] 1 WLR 348 at 358D-H *per* Lord Hope of Craighead.] In the instant case the Respondent concedes that the content of the Petitioner's further submissions is new, so that the first limb of the "significantly different" test is satisfied. The contentious issue is about the second limb of the test, namely whether the content of the further submissions "taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection".

[49] The machinery of Rule 353 means that the Border Agency's view of the merits in rejecting the applicant's further submissions is necessarily the starting point for the Agency's consideration of the question whether the applicant should, effectively, have leave to appeal [*WM (DRC)* v *Secretary of State for the Home Department* [2006] EWCA Civ 1495 at § 24 *per* Buxton LJ.] It is not clear that the Border Agency

decision-maker in the present case addressed the first-stage question, whether to accept or reject the claim, distinctly. The point is not material because the matter was approached by Petitioner's Counsel and responded to by the Respondent's Counsel on the basis that the decision on the second-stage question is the decision which is impugned. This approach - going straight to the second-stage question - makes sense for the Petitioner on the assumption that demonstrating a "realistic prospect" before an Immigration Judge is less of a challenge than satisfying the Court on judicial review principles that the Border Agency's rejection of the further submissions was unlawful. [50] The second-stage question has been described as a "threshold question" signifying that it represents the bar which the applicant has to cross to access an appeal to the Asylum and Immigration Chamber. Counsel were agreed that the proper approach to assessing the lawfulness of the Border Agency's determination of the second-stage question is as set out in *YH (Iraq)* v *Secretary of State for the Home Department* [2010] EWCA Civ 116 at §§ 17-21. At paragraph 21 Carnwarth LJ (with the agreement of his colleagues) said:

> "It seems therefore that on the threshold question the court is entitled to exercise its own judgment. However, it remains a process of judicial review, not a *de novo* hearing, and the issue must be judged accordingly".

Accepting, without deciding, that this is good law, I propose to exercise my own judgement in relation to the "threshold" question namely "whether the fresh material taken together with the previously considered material creates a realistic prospect of success." The thinking behind this approach is, rightly or wrongly, that there is only one correct answer to the question; and that there is therefore no territory reserved to the Border Agency for the exercise of its judgement from which the Court should consider itself excluded. A potential disadvantage for applicants in this approach is

that, notwithstanding an error in the Border Agency's decision-making, an application for review by the Court may now be refused on the view that the result reached was correct in substance [*ZT (Kosovo)* v *Secretary of State for the Home Department* [2009] 1 WLR 348.] Understandably, after a period of equivocation, the Secretary of State has chosen to accept *YH (Iraq)* as the law [*cf. SY (DRC)* v *Secretary of State for the Home Department* [2010] CSOH 89 at § 10.]

[51] The *YH (Iraq)* approach does not mean that the quality of the Border Agency's decision-making is irrelevant. If there are flaws it helps the Court to know because these things have a bearing on the "prospect of success" supposing proper determination by another Immigration Judge. I shall therefore give full consideration to what Counsel said about the decision-making process in considering whether the content of the further submissions "taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

[52] I understand "the previously considered material" to mean essentially the learned Immigration Judge's determination. Practically, there is no alternative: the summary nature of the record makes it possible to have only glimpses of what the evidence was in its raw, unconsidered state; and the manner of presentation along with the impression made as to credibility and reliability are as much part of the "considered material" as the content [*cf. Esen* v *Secretary of State for the Home Department* 2006 SC 555, at § 21 *per* Lord Abernethy delivering the Opinion of the Court.] It has to be recognised too that the determination stands undisturbed by appeal, review or reconsideration. Focussing on the determination is consistent with *dicta* in the authorities cited to me to the effect that respect has to be given to previous findings as to credibility and reliability; that it is contrary to the public interest to re-litigate matters that have been resolved; that the exercise for the Court is not a re-hearing but

remains one of Judicial Review; and that a review of the Border Agency's determination involves, by definition, asking the same question as the decision-maker did or should have done on the basis of the same material as was available to him or her [*Deevaseelan* v *Secretary of State for the Home Department* [2003] Imm AR 1 at § 39; *LD (Algeria)* v *Secretary of State* [2004] EWCA 804 at § 28-31, 40 *per* Judge LJ giving the judgement of the Court; *Ocampo (Colombia)* [2006] EWCA Civ 1276 at §§ 24-25 *per* Auld LJ giving the judgement of the Court; *YH (Iraq)* v *Secretary of State for the Home Department* [2010] EWCA Civ 116 at §§ 1, 13-14 *per* Carnwarth LH giving the judgement of the Court.] Clearly the material considered by the Border Agency decision-maker was the Immigration Judge's determination (together with the further submissions.)

[53] In relation to credibility and reliability, I must take the Immigration Judge's findings to be informed by the advantage he had of seeing and hearing the Petitioner giving evidence. Counsel were agreed about this. Counsel for the Petitioner also reminded me that Immigration Judges exercise a specialist jurisdiction having expertise in matters not normally within the purview of the courts. Counsel referred to *L K* v *Secretary of State for the Home Department* [2009] CSIH 20 at § 12 *per* Lord Carloway:

> "Matters of the weight to be attached to a particular piece of evidence are primarily for the Immigration Judges to assess, since they normally have the benefit of seeing and hearing the appellants giving evidence. They also have the advantage, as specialists, of being experienced in the assessment of the credibility of asylum claimants and the reliability of accompanying documentation (vide *Tanveer Ahmed* v *Secretary of State for the Home Department* (supra) at para 30). It will seldom be

> possible to dress up what is essentially a challenge to the assessment of weight as an error of law, although, of course, adequate reasons require to be given for rejecting an appellant's account as incredible."

Accepting all of the foregoing, as I do, does not however mean that the learned Immigration Judge's determination is necessarily or altogether immune from "anxious scrutiny".

[54] The "realistic prospect" component in Rule 353 has been sourced to a *dictum* of Sir Thomas Bingham MR (as he then was) in *R* v *Secretary of State for the Home Department ex p Onibiyo* [1996] QB 768 at 783-784: "The acid test must always be whether, comparing the new claim with that earlier rejected, and excluding material on which the claimant could reasonably have been expected to rely in the earlier claim, the new claim is sufficiently different from the earlier claim to admit of a realistic prospect that a favourable view could be taken of the new claim despite the unfavourable conclusion reached on the earlier claim..."

[55] *Ex hypothesi* Rule 353 involves the scenario in which a new claim, lawfully rejected by Border Agency, is at the same time properly judged by the Border Agency to have a realistic prospect of succeeding on appeal to an Immigration Judge. This hypothesis makes sense - whatever the rule-making ambition might have been - only if the "realistic prospect" bar is set at a modest height. Counsel for both parties asked me to accept that a prospect anything "more than fanciful" is a "realistic prospect" for Rule 353 purposes [*AK (Sri Lanka)* v *Secretary of State for the Home Department* [2010] 1 WLR 855 at § 34 *per* Laws LJ giving the judgement of the Court.]

[56] I do accept this. There is a hinterland of practice, usage and interpretation, certainly in English law, which makes it almost inevitable that this meaning should be

assigned. For example *Practice Direction (Court of Appeal: Leave to Appeal and Skeleton Arguments)* [1999] 1 WLR 2 states:

> "*The general test for leave*
>
> 10. ...The general rule applied by the Court of Appeal, and thus the relevant basis for first instance courts deciding whether to grant leave, is that leave will be given unless an appeal would have no realistic prospect of success. A fanciful prospect is insufficient..."

In *Swain* v *Hillman* [2001] 1 All ER 91, a case about summary disposal under Part 24 of the England & Wales Civil Procedure Rules, CPR 24.2, Lord Woolf MR said at 92*:*

> "Under rule 24.2, the court now has a very salutary power, both to be exercised in a claimant's favour or, where appropriate, in a defendant's favour. It enables the court to dispose summarily of both claims or defences which have no real prospect of being successful. The words 'no real prospect of being successful or succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success or, as Mr Bidder QC submits, they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success".

Significantly in *YH (Iraq)* v *Secretary of State for the Home Department* [2010] EWCA Civ 110 at § 19 Carnwarth LJ referred to Lord Hope of Craighead's discussion of the ambit of CPR 24 in *Three Rivers DC* v *Bank of England (No 3)* [2001] 2 All ER 513. In *Besmel* v *Secretary of State for the Home Department* [2007] ScotCS CSOH 101 (12 June 2007) at § 6 Lord Emslie reached a similar conclusion in relation to the meaning of the phrase "... real prospect of success" for the purposes of the Immigration and Asylum Appeals (Procedure) Rules 2000, Rule 18(7).

[57] The low threshold for "a realistic prospect of success" coupled with the requirement for anxious scrutiny could together mean, as the submissions for the Petitioner implied, that, if the facts as so far determined are vulnerable to some adjustment in the light of the new material it might be open to another Immigration Judge to decide the application in the Petitioner's favour. While it would not be legitimate to use this Judicial Review to challenge the Immigration Judge's determination [*Davila-Puga* v *Secretary of State Immigration Appeal Tribunal* [2001] EWCA Civ 931], I accept that it is appropriate in this particular case to analyse the basis for the Immigration Judge's secondary findings of "fabrication" on which the Border Agency's determination appears to found heavily. I also accept that looking at the primary findings about the "birth certificate" and the Bewran website article, simply as documents, it is difficult to see that these by themselves properly justify the Immigration Judge's inferences of "fabrication".

[58] It is clear however that the approach followed by the learned Immigration Judge, and properly so, was to consider the evidence 'in the round' before committing to his findings of "fabrication" [*Tanweer Ahmed* v *Secretary of State for the Home Department* [2002] UKIAT 00439 at § 38.] An important part of the evidence was the Petitioner's testimony about the documents. The Immigration Judge found the Petitioner's evidence incredible. There was no suggestion that the Immigration Judge was not entitled to do so in relation to the "birth certificate". In relation to the website article, I reject the submission that the Petitioner's evidence about the language of the website and his own inability, inferentially, to search for or read the website should not be held against him. There was nothing "unfair" about how this evidence came out. In my opinion the rule of anxious scrutiny does not go so far as to require a fact-finder to put to a professionally-represented applicant like the Petitioner the damaging

implications of his own testimony freely given about a document he has chosen to produce. I accept that, were the matter to be opened up in the light of new information, the discrepancy in relation to the age of the cousin's child could be assessed by another Immigration Judge to be "insignificant" in relation to the reliability of the website's content: but the significance or insignificance of this matter could not be pivotal in relation to the reliability of the website evidence as a whole.

[59] While I personally might hesitate to draw an inference of "fabrication" as such from the primary facts, I cannot say that the Immigration Judge was absolutely not entitled to do so. Indeed, I am not sure that Counsel for the Petitioner went quite so far: he submitted that the reasoning was "tenuous" and that nothing in the evidence provided the "required" proof. The Immigration Judge had the advantage of seeing and hearing the Petitioner; he had the benefit of background COIS information, lodged by the Border Agency [§ 7]; and, as a specialist, he was "experienced in the assessment of the credibility of asylum claimants and the reliability of accompanying documentation" [*L K* v *Secretary of State for the Home Department* [2009] CSIH 20 at § 12 *per* Lord Carloway.] The inference of "fabrication" has to stand for the purpose of the Rule 353 test.

[60] Even if I were to hold that the findings of "fabrication" could not be justified on any reasonable view, where would that take the Petitioner? The answer is "not very far". He still had to show that the documents were reliable, if he wished the Immigration Judge to rely on them. That is something the Petitioner failed to do. The website article and the "birth certificate", as the Petitioner presented them, did not corroborate his core claim about the incident on 18 March 2009. Nothing subsequently submitted changes the position. The Border Agency decision-maker cannot be faulted for concluding that, on an application of the Rule 353 test, there was

no realistic prospect of success in relation to these matters [§§ 15, 19.] In my view that was the correct decision.

[61] Given that the Immigration Judge assessed the first two documents to be false, he was entitled to approach the original KDPI attestation also with scepticism [*YH (Iraq)* v *Secretary of State for the Home Department* [2010] EWCA Civ 110 at § 48 per Carnwarth LJ.] On the other hand it is fair criticism of the Border Agency decision-maker that, when he came to consider the new KDPI material, he failed to engage with the detail of the content. I accept that the decision-maker failed to exercise anxious scrutiny in this connection. Had he done so I would have expected him to recognise that the new information met most of the criticisms of the original attestation advanced by the Immigration Judge. It was also important to consider the KDPI email of 28 August 2009 in the light of the questions asked by the Petitioner's solicitors on 26 August 2009, something which does not seem to have been done. It was not fair to say, as the decision-maker did, that the Petitioner's "credibility" was damaged by the KDPI's "unwillingness" to support him [§ 14.]

The Border Agency decision-maker expressed himself, perhaps, in an unnecessarily sceptical way about the KDPI's reasons: but the fact remains that, though open source information was supposedly available for all to see on the Bewran website and though there was no one, as the decision-maker pointed out, who could be harmed by disclosure, no support for the Petitioner's account had been forthcoming [§ 14.] The problem for the Petitioner remained that the KDPI - whether they *would not* or *could not* - as a matter of fact *did not* provide confirmation of the claimed incident of 18 March 2009. Counsel for the Petitioner did not suggest that the decision-maker had erred in his assessment of the "Summons" and "Letter of Warning", treating them, as he did, as unreliable [§§ 17-19.]

[62] In consequence the content of the further submissions taken together with the previously considered material did not disturb the essential balance of the evidence as found by Immigration Judge Blair and did not substantially advance the Petitioner's claim. I reject the submission for the Petitioner that there was "nothing" in the decision-maker's reasoning to suggest that he had even considered whether a different Immigration Judge might take a different view. On the contrary the decision-maker repeatedly referred to what an Immigration Judge might do "when applying the rule of anxious scrutiny" [§§ 14-21.] It is true that there are passages where the decision-maker appears to have expressed his own view as well as the view to be attributed to the hypothetical Immigration Judge: but Rule 353 required him, as explained above at paragraph 51, to make both sorts of decisions; and his decision-making is not to be faulted merely because the conclusions coincide. Though I have found that appropriate scrutiny was not exercised in relation to certain matters, these matters were not, in my view, material to the decision-maker's conclusions.

Decision

[63] For the foregoing reasons, having given the matter anxious scrutiny myself, I conclude that there was no material error in the UK Border Agency decision of 20 March 2010; that the decision-maker's determination was correct; that the content of the Petitioner's further submissions taken together with the previously considered material did not create a reasonable prospect of success if assessed by another Immigration Judge exercising anxious scrutiny; and that those further submissions did not and do not amount to a fresh claim in terms of Rule 353. I shall sustain the Respondents Pleas-in-Law, repel the Petitioner's Plea and dismiss the Petition.