OUTER HOUSE, COURT OF SESSION

[2010] CSOH 146

P759/10

OPINION OF LORD PENTLAND

in the cause

NM

Pursuers;

for

JUDICIAL REVIEW OF A DECISION OF THE SECRETARY OF STATE FOR THE HOME DEPARTMENT TO REFUSE TO ACCEPT THAT REPRESENTATIONS ON BEHALF OF THE PETITIONER WERE A FRESH CLAIM FOR ASYLUM

Defender:

Pursuers: Byrne; Drummond Miller
Defender: MacGregor; OSSAG

3 November 2010

Introduction

[1] The Petitioner, an Iranian citizen, came to the United Kingdom on 19 July 2006. She applied for asylum on that date, but her application was refused. She appealed against the refusal to the Asylum and Immigration Tribunal, which dismissed the appeal on all grounds on 3 January 2007. Her application for reconsideration of that decision was, in turn, refused on 29 January 2007. Her rights of appeal were exhausted on 26 February 2007. On 15 September 2009 the Petitioner's solicitors

made a fresh claim for asylum under Immigration Rule 353 on the ground that fresh evidence had become available. On 29 September 2009 the UK Border Agency refused the fresh claim. The Petitioner now seeks judicial review of that refusal.

[2] The Petitioner argued at the First Hearing that the collective weight of the new material was sufficient to entitle her to a fresh hearing before an Immigration Judge. The Respondent contended that, viewed in the round, the new material did not give rise to a realistic prospect of success at a fresh hearing.

The approach of the court in an application for judicial review

[3] Counsel for the Respondent, in his succinct and helpful submissions, accepted that it is open to the court in an application for judicial review to determine for itself whether the Petitioner has a realistic prospect of success in a fresh hearing before an Immigration Judge, so long as attention is confined to the material submitted in support of the fresh claim. In fairness to the Petitioner, this is the approach I propose to adopt. It seems to me that this approach is in line with what Lord Philips of Worth Matravers said in *ZT (Kosovo)* v *Secretary of State for the Home Department* [2009] 1WLR 348 at para 23 to the effect that the only way in which a court can consider whether the Secretary of State's decision to refuse a fresh asylum claim was a rational one is to ask itself the same question as the Secretary of State had to address. Similar views were expressed by Lord Brown of Eaton-under-Heywood at para 75 and by Lord Neuberger of Abbotsbury at para 83. Carnwath LJ made much the same point in *R (YH) v Secretary of State for the Home Department* [2010] EWCA Civ 116 at paras 19 - 21 where he identified the relevant question as being whether the court took the view that there was a realistic prospect of success before an Immigration Judge rather than whether the Secretary of State was entitled to conclude that an

appeal would be hopeless. Therefore on the threshold question the court is entitled to exercise its own judgement, but it must do so on the basis of the material which was available to the Secretary of State.

[4] In addressing matters in this way, I must, of course, apply anxious scrutiny to all aspects of the Petitioner's case. I must also remember that the Petitioner needs only to show that she would have more than a fanciful prospect of success at a fresh hearing: *R(AK (Sri Lanka))* v *Secretary of State for the Home Department* [2010] 1 WLR 855 per Laws LJ at para 34. The test which the Petitioner has to satisfy is, as is well-known, a modest one.

The fresh material relied on by the Petitioner

[5] This comprised firstly a report from Dr. Maureen Nicol, a clinical psychologist. She concluded that the Petitioner suffers from Post Traumatic Stress Disorder ("PTSD") caused by her alleged imprisonment and mistreatment by the authorities in Iran; secondly, a document purporting to be a service copy of a Summons requiring the Petitioner to attend the Iranian Revolutionary Court to answer unspecified charges; and thirdly, photographs from websites showing the Petitioner taking part in public demonstrations against the conduct and outcome of the Iranian elections in 2009. The protests were in Edinburgh and Glasgow.

Evaluation of the fresh material in the round

[6] There was no dispute that the new material had not been previously considered. The contest between the parties centred on whether, taken together with the previously considered material, the new information created a realistic prospect of success at a fresh hearing before an Immigration Judge. In resolving that contest, I

must have regard not only to the new material, but also to the findings already made by the Immigration Judge, particularly in regard to the credibility and reliability of the Petitioner: *WM (DRC)* v *Secretary of State for the Home Department* [2007] INLR 126 per Buxton LJ at para (6). Counsel for the Petitioner submitted, at one stage in his address, that the correct approach was to consider whether the new material was intrinsically incredible; only if it was intrinsically incredible would it be appropriate to deny the Petitioner the opportunity of a fresh hearing. This submission was based on a passage in the judgement of Maurice Kay LJ in *R (TN (Uganda)) v Secretary of State for the Home Office* [2006] EWCA Civ 1807 at para 10, but Counsel's submission failed, in my view, to recognise that in that passage his Lordship stated also that if, when one looks at the whole of the case, it is possible to say that no person could reasonably believe the new material then it must, of course, be rejected. Read as a whole the passage does not seem to me to suggest that there should be any departure from the well-established principle that one must consider the new material in the round and, in particular, alongside any earlier factual findings by an Immigration Judge.

[7] The findings made by the Immigration Judge in the present case were highly damning of the Petitioner. He found her to be neither a plausible nor a credible witness. He held that her account of her alleged experiences in Iran was incredible (para 35). In a detailed and careful judgement, he concluded that there were many discrepancies in the Petitioner's evidence and that these undermined the core of her version of events. For example, the Petitioner claimed that she had been beaten so badly and had become so ill that her stomach swelled up, she developed a rash and the authorities became so concerned about her condition that they sent her to the prison clinic because they thought she was going to die. At the hearing before the

Immigration Judge the Petitioner said that her interrogators had beaten her up by punching and kicking her. Despite the alleged severity of these attacks and the gravity of her condition, the Petitioner maintained that, on the morning after being taken to the prison clinic, she managed to escape and to travel for many hours by car and on horseback to the Turkish border. She was then conveyed in the back of a lorry to the United Kingdom. The Immigration Judge found that had she truly been subjected to an ordeal of the type which she described in her evidence, the Petitioner's condition would have been apparent on arrival in the United Kingdom and she would have required medical treatment for her injuries. But there was no medical evidence lending support to the Petitioner's account. In the circumstances, the Immigration Judge concluded that the Petitioner had fabricated her account of her alleged experiences in Iran. He held that the Iranian authorities did not know or suspect that the Petitioner had been lending a banned book to various people, that she had not in fact been so doing, that she had never been arrested, detained or ill-treated, that her house had not been raided and that she would suffer no real risk of persecution on return to Iran (para 59).

[8] Having regard to these findings by the Immigration Judge, what prospect of success would the Petitioner have at a fresh hearing where her new evidence would also be considered? In my opinion, she would have no realistic prospect of succeeding in the sense in which that criterion has been explained in the case law; in other words, she would have no better than a fanciful chance of success. So far as the psychological report is concerned, the views expressed by Dr. Nicol are (understandably) based entirely on the Petitioner's own account of events. It was evidently no part of Dr. Nicol's remit to look more widely at the plausibility of the Petitioner's account in the light of other evidence. In *JBM* v *Secretary of State for the*

Home Department [2009] CSIH 57 and in *SA (Somalia)* v *Secretary of State for the Home Department* [2006] Imm AR 236 the importance of considering medical evidence in the round was stressed, under reference to the United Nations document known as the Istanbul Protocol. In my opinion, the psychological report would not be treated by an Immigration Judge as advancing or supporting the Petitioner's credibility or reliability when considered in the round along with the previously made negative findings on these issues. The Petitioner argued that her PTSD might have affected her evidence before the Immigration Judge. I am not convinced by this. His conclusions were based on the inherent implausibility of the factual account presented by the Petitioner; even if one accepts that the Petitioner has PTSD, the core facts would not be any different at a fresh hearing. In my view, the fact that the Petitioner has been diagnosed as suffering from PTSD on the basis of her own account of her alleged experiences in Iran does not serve to lend credibility to her claims.

[9] As to the document said to be a service copy of an Iranian Summons, the Petitioner drew attention to certain passages in the Country of Origin Report on Iran where there is discussion about the nature and content of Iranian court documents. It was said that the Summons relied on in the present case was in the form described in the report. In my view, that does not take the Petitioner anywhere. It would obviously not be difficult to create a document which matched the description provided in the report. I note that the translation states that, in view of the Petitioner's absence, the document was delivered to her mother. But the Petitioner has provided no explanation as to the provenance of this document or as to how it came to end up in her possession some years after her arrival in this country. Yet she ought to be able to provide a full account about such matters. In *Ahmed* v *Secretary of State for the Home Department* [2002] UKIAT 00439, the Immigration Appeal Tribunal observed that it was for the

individual claimant to show that a document is reliable in the same way as any other piece of evidence which he puts forward and on which he seeks to rely; that a document should not be viewed in isolation and that there is no obligation on the Home Office to make detailed inquiries about documents produced by individual claimants (paras 33, 35 and 36). In the present case the information provided by the Petitioner about her possession of the purported Summons is, in my opinion, wholly inadequate and inspecific. I consider that an Immigration Judge would not regard the document as supporting the Petitioner's position to any significant extent when taken in the round with all the other material in the case, particularly the findings that the Petitioner has been dishonest in her evidence.

[10] Finally, there are the website photographs of the Petitioner taking part in protests against the Iranian elections. I note that, according to the statement provided by the Petitioner in support of her fresh asylum claim, she participated in two protests in Glasgow and one in Edinburgh. She explains that photographic evidence of her participation in these events is readily accessible on an Iranian language website and on YouTube. It seems to me that the observations made by Lord Neuberger of Abbotsbury in *SS (Iran)* v *Secretary of State for the Home Department* [2008] EWCA Civ 310 at para 24 are particularly pertinent here. His Lordship said this:

> "There must be a limit as to how far an applicant for asylum is entitled to rely upon publicity about his activities in the UK against the government of the country to which he is liable to be returned. It seems to me that it is not enough for such an applicant simply to establish, as here, that he was involved in activities which were relatively limited in duration and importance, without producing any evidence that the authorities would be concerned about them, or even that they were or would be aware of them. As Longmore LJ put it, when

> refusing permission to appeal on paper, 'Is every person present at Komala Party activities in the UK to be entitled to asylum by providing a photograph of himself during those activities?'"

In the present case the Petitioner relied on various passages contained in the Country of Origin Information Report showing that the Iranian authorities systematically monitor the internet for evidence of involvement in anti-regime activities. I note also that in *Kiani v Secretary of State for the Home Department* [2002] UKIAT 01328 the Immigration Appeal Tribunal held (at para 5) that there was ample evidence that those who are regarded as being against the Iranian state are liable to be detained and mistreated in custody. I do not, however, consider that information of that degree of generality is sufficient to demonstrate that the authorities in Iran would be likely to become aware of the Petitioner's somewhat limited involvement in protests in the United Kingdom in the aftermath of the Iranian elections in 2009 or that they would be liable to subject her to persecution because of such involvement. It is well known that many thousands of Iranians openly protested inside and outside Iran about the elections, but there is no evidence in the present case to show that someone like the Petitioner, who was clearly not a ring-leader, would be liable to be the subject of attention by the authorities. As Sedley LJ indicated in *YB (Eritrea)* v *Secretary of State for the Home Department* [2008] EWCA Civ 360 at para 18, a person identified in a photograph as a hanger-on with no real commitment to the oppositionist cause cannot be assumed, without more, to have shown that he is liable to be the victim of persecution or serious mistreatment, even in a country where the authorities are known to monitor the internet for the purpose of suppressing political dissent. In the present case there is no evidence that the Petitioner had any significant political profile before she left Iran. In view of that and her limited

involvement in protests, I am not persuaded that this evidence would give rise to a realistic prospect of success at a fresh hearing.

[11] In the whole circumstances, I am not persuaded that any of the new material, even when it is considered collectively, would be sufficient to give rise to a reasonable prospect of success for the Petitioner in a fresh hearing before an Immigration Judge. I have, therefore, repelled the Petitioner's plea-in-law, sustained the Respondent's first and second pleas-in-law and dismissed the Petition. I have reserved all questions of expenses.