**OUTER HOUSE, COURT OF SESSION**

**[2010] CSOH 121**

P275/10

OPINION OF LORD KINCLAVEN

Petition by

A M

Petitioner;

for

Judicial Review of a decision of the Secretary of State for the Home Department dated 15 February 2010

---

**Petitioner: S. Winter, Solicitor Advocate; McGill & Co, Solicitors, Edinburgh**
**Respondent: Olson, Advocate: Office of the Solicitor to the Advocate General**

26 August 2010

## Introduction

[1] This is a first hearing in a petition seeking judicial review of a decision of the Secretary of State for the Home Department dated 15 February 2010 (No 6/1 of Process) refusing to treat certain further information from the petitioner as amounting to a fresh application for asylum ("the refusal letter").

[2] The respondent is the Secretary of State for the Home Department who has responsibility for the enforcement of immigration control throughout the United Kingdom. It is admitted that this court has jurisdiction.

[3] Mr Winter appeared for the petitioner. Mr Winter moved me to sist these proceedings and sought declarator that the respondent had acted unreasonably *et separatim* acted irrationally in failing to issue a notice of appeal allowing the petitioner an in country right of appeal against the refusal letter. *Esto* that remedy was not granted, Mr Winter sought reduction of the refusal letter on the other grounds set out in the petition (as amended) outlined below.

[4] Mr Olson appeared for the respondent. He opposed the sist and invited me to refuse the orders sought by the petitioner and to dismiss the petition for the reasons set out in the Answers.

[5] I refused the petitioner's motion to sist, which was made at the start of the hearing, and I proceeded to hear both parties' substantive arguments. I am grateful to Mr Winter and Mr Olson for their assistance.

[6] In short, in my opinion, the respondent's submissions are well-founded.

[7] In the whole circumstances, having heard parties, I shall sustain the respondent's pleas-in-law, repel the pleas-in-law for the petitioner and dismiss the petition.

[8] My reasons are as follows.

**The Petitioner's Position**

[9] The petitioner claims that he left Iran on 11 September 2008 and eventually arrived in the UK on 6 October 2008.

[10] The petitioner claimed asylum on 10 October 2008 and was refused by the respondent on 31 October 2008. The petitioner thereafter appealed to an Immigration Judge. The Immigration Judge refused the petitioner's appeal on asylum grounds and also under Article 3 of the European Convention of Human Rights and Fundamental Rights (ECHR) on 12 December 2009. The Immigration Judge disbelieved the

petitioner. A copy of the determination is produced (No 6/3 of Process). The petitioner sought reconsideration from the Asylum and Immigration Tribunal and this was refused on 25 February 2009.

[11] By letter dated 31 August 2009 (No 6/2 of Process) the petitioner made further submissions to the respondent. The petitioner relied upon a request from the disciplinary forces of Mariwan to arrest the petitioner and a membership card from the Kurdish Worker's Organisation of Iran (Komala) in the name of his father.

[12] By letter dated 15 February 2010 (No 6/1 of Process) the respondent refused to treat the fresh evidence as giving rise to a fresh application ("the refusal decision"). The respondent's only remedy is judicial review.

[13] The petitioner now seeks:

i. declarator that the respondent has acted unreasonably *et separatim* acted irrationally in failing to issue a notice of appeal allowing the petitioner an in country right of appeal against the refusal letter dated 15 February 2010. *Esto* this remedy is not granted.

ii. reduction of the refusal letter dated 15 February 2010;

iii. the expenses of the petition;

iv. such other orders as may seem to the court to be just and reasonable in all the circumstances of the case.

[14] The petitioner did not insist upon declarator that the refusal letter is unreasonable *et separatim* irrational.

**Productions**

[15] I was referred to the following Productions for their terms:-

6/1 - Refusal letter dated 15 February 2010;

6/2 - Application and enclosures dated 31 August 2009;

6/3 - Asylum and Immigration Tribunal determination 12 December 2008 and intimation letter dated 15 December 2008;

6/4 - Country of Origin Report, Iran, January 2010, particularly paragraph 11.41; and

6/5 - Extract: Nationality Asylum and Immigration Act 2002, Part 5.

**Authorities**

[16] I was also referred to the following authorities:-

1 *BA* v *SSHD* [2009] UKSC 7, particularly at paragraphs 5, 6, 10, 14, 32-33, 35, 36, and 38;

2 *ZA and SM* v *SSHD* [2010] EWCH 718 (Admin), at paras 30-32;

3 *WM (DRC)* v *SSHD* [2006] EWCA Civ 1495, at paras 6-7, 11, and 22;

4 *SB* v *SSHD* [2009] UKAIT 00053, the rubric and paras 46, 48, 50 and 52;

5 *RC* v *Sweden* ECtHR Application No 41827/07, at paras 35-36;

6 *R (Iran) and others* v *SSHD* [2005] EWCA Civ 982, at para 27;

7 *IK* v *Secretary of State for Home Department* [2004] UKAIT 00312, at para 133, particularly sub-paragraph 7;

8 *J* v *Secretary of State for Home Department* [2006] EWCA Civ 1238;

9 *Sepet and Bulbul* v *SSHD* [2003] UKHL 15, at para 23;

10. *Hassan* v *SSHD* 2004 SLT 34,

11. *SSHD ex p Boybeyi* [1997] Imm AR 491, at pages 495-496;

12. *R (on the application of TN) (Uganda)* [2006] EWCA Civ 1807, para 10;

13. *AK (Afghanistan)* v *Secretary of State for the Home Department* [2007] EWCA Civ 535;

14. Extract from Borders, Citizenship and Immigration Act 2009, section 53;

15. Extract from Tribunals, Courts and Enforcement Act 2007, section 20;

16. *Eba* [2010] CSOH 45;

17. *ZT* v *SSHD* [2009] UKHL 6, paras 54-55;

18. *Tanveer Ahmed* v *Secretary of State for the Home Department* [2002] UKIAT 00439, paras 5 and 29-36;

19. *Asylum and Law Practice* (Symes and Jorro), paragraph 14.79;

20. *AK (Sri Lanka)* v *Secretary of State for the Home Department* [2009] EWCA Civ 447, paras 33-34; and

21. *N.A.K Petitioner* [2009] CSOH 162.

**The Petitioner's preliminary point**

[17] As noted above, a motion to sist the cause was made by Mr Winter at the bar. It was opposed by the respondent who had been given prior intimation of the motion.

[18] The point underlying the motion is set out in paragraph 6 of the petition which is in the following terms:

> "That the respondent has acted unreasonably *et separatim* acted irrationally by failing to issue a notice of appeal allowing the petitioner an in country right of appeal against the refusal decision dated 15 February 2010. That claims which are not certified under section 94 of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") or excluded under section 96 of the 2002 Act, if rejected, should be allowed to proceed to appeal under sections 82 and 92 of the 2002 Act, whether or not they are accepted by the respondent as fresh claims. That Rule 353 has no part to play in the legislative scheme (see *BA* v *SSHD* [2009] UKSC 7 per Lord Hope at paragraphs 32-33). Reference is also made to *ZA* and *SM* v *SSHD* [2010] EWHC 718 (Admin) which held that the

approach advocated in *BA, supra* was wrong (see *ZA and SM* at paragraphs 30-32). That the respondent has confirmed there has been an appeal marked by the claimants, ZA and SM, to the Court of Appeal in England and Wales."

[19] Mr Winter acknowledged that there appears to be a tension between the House of Lords' decision in *BA, supra* and the High Court in *ZA* and *SM, supra* which has subsequently been appealed to the Court of Appeal.

[20] This issue arose in the course of Mr Winter's research and there did not appear to be any Scottish authority on this preliminary point. Mr Winter thought it appropriate to bring the Court's attention to the ongoing proceedings in England and to raise the question of whether it would be appropriate to sist the present case.

[21] I was grateful to Mr Winter for bringing the point to my attention. However, I was satisfied that, as the law stands at present, the appropriate course was to refuse the motion and to hear parties on their other substantive submissions.

[22] The current authorities tend to support the respondent. I shall maintain the *status quo*. I shall decide the preliminary issue in favour of the respondent.

**The Petitioner's position**

[23] Apart from the preliminary point (mentioned above), the petitioner alleges essentially that the respondent has acted unreasonably *et separatim* acted irrationally. The petitioner seeks judicial review on the following grounds.

[24] Firstly, *esto* the correct approach is that the respondent is under no obligation to allow the petitioner an in country right of appeal (i. e. the preliminary point mentioned above), the respondent has thereafter applied the test under Rule 353 in the wrong manner. The respondent has erred at paragraphs 10 and 11 of the refusal letter by failing to bear in mind that the previous Immigration Judge's findings (cited on pages

2-3 of the refusal letter) may be of little relevance when, as is alleged in the present case, the new material does not emanate from the petitioner himself, and thus cannot be said to be automatically suspect because it comes from a tainted source. The respondent also appears to have failed to recognise that there is only a modest test before the submissions become a fresh claim. The respondent appears to have erred by failing to consider that the Immigration Judge does not have to achieve certainty, but only to think that there is a real risk of the applicant being persecuted on return. In so doing the respondent has acted unreasonably and in a way no reasonable decision maker would in the circumstances have acted (see *WM (DRC)* v *SSHD* [2006] EWCH Civ 1495 per Lord Justice Buxton at paragraphs 6, 7 and 11).

[25] Secondly, the respondent has acted unreasonably *et separatim* acted irrationally. The respondent has erred in law because her decision to refuse to accept that further submissions amounted to a fresh claim is irrational by appearing to usurp the function of the court. The respondent has made what would appear to be a decision on the merits of the petitioner's case at paragraphs 12 and 13 of the refusal letter. In so doing the respondent has erred by treating her own view on the validity of the further submissions and its effect as more than a "starting point".

[26] Thirdly, the respondent has acted unreasonably *et separatim* acted irrationally at paragraph 14 of the refusal letter. The respondent has erred in relying on the absence of any country information to support the contention that Komala issue membership cards. This appears to be the wrong approach and the absence of country information does not automatically lead to the conclusion that the documents are false.

[27] Fourthly, the respondent has acted unreasonably *et separatim* irrationally by failing to apply proper anxious scrutiny in terms of the case law and country information. The country information and case law demonstrates that the petitioner is

reasonably likely to be questioned on return for appearing to have left illegally and in terms of the outstanding arrest request (see *RC* v *Sweden* ECtHR Application No 41827/07 at paragraph 56; *SB* v *SSHD* [2009] UKAIT 00053). Although *SB, supra,* was a case which was decided after the further submission had been submitted the respondent appears to have materially erred by failing to have regard to a relevant Country Guidance case namely *SB, supra*. The failure to have regard to a Country Guidance case is a material error of law (see *R (Iran) and others* v *SSHD* [2005] EWCA Civ 982 per Lord Justice Brooke at paragraph 27). It appears that in terms of *SB, supra* there is a real risk of the petitioner being questioned on return. The respondent also appears to have materially erred by failing to have regard to relevant case law from the European Court of Human Rights which another Immigration Judge would have regard to in terms of section 2 of the Human Rights Act 1998, namely *RC* v *Sweden, supra,* which also indicates the petitioner would be reasonably likely to face questioning on return. The original Immigration Judge did not appear to consider whether the petitioner would be subject to questioning on return. Further there does not appear to have been any evidence as to how the petitioner would respond to questioning on return before the original Immigration Judge. Reference was also made to the Country of Origin Information (COI) Report on Iran dated January 2010 at paragraphs 27.08, 27.09, 27.14 and paragraphs 31.19 (which was incorporated into the petition *brevitatis causa*). The COI report is used by decision makers in assessing asylum and human rights claims. It is reasonably likely the authorities will discover the petitioner's asylum claim and his claim being based on imputed political opinion. He will thereafter be at real risk. The respondent has failed to have regard to the questioning the petitioner would face on return to Iran, how the petitioner would respond to such questioning and whether that questioning would lead to real risk. In

assessing how the petitioner would respond to such questioning the petitioner should not be expected to lie or modify his behaviour or opinion when questioned (see *IK* v *Secretary of State for the Home Department* [2004] UKAIT 00312; *J* v *Secretary of State for the Home Department* [2006] EWCA Civ 1238). The respondent has erred by failing to consider that in any event it is the reason in the mind of the persecutor for inflicting the persecutory treatment (*Sepet and Bulbul* v *SSHD* [2003] UKHL 15 at para 23). The informed reader does not know how the principal points have been resolved and further investigation is required. The respondent has failed to take these material factors into account. The respondent ought to have applied anxious scrutiny to the further submissions. Had anxious scrutiny been applied the respondent would have found there was a realistic prospect of success and would not have rejected the further submission.

[28] Fifthly, the content of the further submissions taken together with previously considered material create a realistic prospect of success where (a) the content of the further submission is apparently credible, there being nothing on its face to show that the content is incredible; if investigation is required to determine credibility then the material is apparently credible (*SSHD ex p Boybeyi* [1997] Imm AR 494-7' *Hassan* v *SSHD* 2004 SLT 34 at 40F paras.36-37). It appears investigation is required in assessing the documents and also as how the petitioner would respond to questioning from the Iranian authorities. Secondly, (b) the content of the further submission is capable of having an important influence on the result of the case, although it need not be decisive. The respondent has erred by failing to properly direct himself in the relevant law and had he done would have found that the content of the further submissions was apparently credible. It was not for the respondent to make a judgment on the credibility of the new material, unless it was possible to say that no

person could reasonably accept it as believable: *R (on application of TN) (Uganda)* [2006] EWCA Civ 1807 at paragraph 10. The consideration of whether submissions amounted to a fresh claim is a decision of a different nature to that of an appeal against refusal of asylum, it requires a different mindset, only if the respondent can exclude as a realistic possibility that an independent tribunal (in the person of an immigration judge) might realistically come down in favour of the petitioner's asylum or human rights claim, can the petitioner be denied the opportunity of consideration of the material: *AK (Afghanistan)* v *Secretary of State for the Home Department* [2007] EWCA Civ 535 at paragraphs 22 to 24 and 26. Moreover, no such Secretary of State so directing himself would have found that the content of the further submissions could not reasonably go to overcome doubts which led to the dismissal of the original claim. The new material could reasonably allow an Immigration Judge to overcome the doubts expressed by the Adjudicator as to whether the Petitioner faced unfair trial, imprisonment or ill-treatment. The new material suggested that the petitioner's father was a member of Komala and on return the petitioner would face arrest.

[29] Lastly, so submitted the petitioner, a reasonable Secretary of State for the Home Department having regard to the relatively low test applicable and applying anxious scrutiny, would not have failed to decide that the fresh evidence was material, apparently credible and when taken together with the previously considered material was reasonably capable of producing a different outcome before an Immigration Judge (*WM (DRC)* v *Secretary of State for Home Department* [2006] EWCA Civ 1495; *Petition of Andrei Harbacchou* [2007] CSOH 18; *Petition of Fatima Kaniz* [2007] CSOH 29; *Kurtaj* v *Secretary of State for the Home Department* [2007] EWCH 221 (Admin)). The respondent ought to have found the further submissions

were significantly different, namely not having been considered previously and having a realistic prospect of success.

**The Petitioner's pleas-in-law**

[30] The petitioner's pleas-in-law were as follows:-

> "1. The respondent having erred in law, *et separatim* acted unreasonably in refusing to issue a notice of appeal allowing the petitioner an in country right of appeal against the refusal decision of 15 February 2010 declarator should be pronounced as sought.
>
> 2. The respondent having erred in law, *et separatim* acted unreasonably in refusing to treat the petitioner's further submissions and fresh evidence as a fresh application for asylum as hereinbefore condescended upon, declarator and reduction should be pronounced as sought."

**The Respondent's position**

[31] The respondent's position, in opposition to the petition, might be summarised as follows.

[32] It is admitted that by letter dated 31 August 2009 (No 6/2 of Process) the petitioner made further submissions to the respondent. However, it is pointed out that, in that letter, the petitioner did not rely on any documents produced with the letter. There is no explanation of what the documents were - nor of their significance. Nonetheless the respondent considered the letter and the documents produced with the letter and did so, it is averred, in accordance with paragraph 353 of the Immigration Rules.

[33] The material averments in the petition are denied.

[34] It is averred that the respondent acted lawfully, reasonably and rationally by not issuing a notice of appeal allowing the petitioner an in country right of appeal against the refusal decision dated 15 February 2010.

[35] Further and in any event, it was submitted that the petitioner has misunderstood the respondent's letter dated 15 February 2010 (No 6/1 of Process). The respondent's reasoning is contained in paragraphs 7 to 18. In paragraphs 7 to 10 the respondent sets out the correct tests to be applied. In paragraph 11 the respondent noted the findings made by Immigration Judge Hamilton. In paragraphs 12, 13 and 14 the respondent made observations about the documents submitted by the petitioner. In paragraph 15 the respondent considered what the effect would be if the membership card was genuine. In paragraph 16 the respondent correctly stated that the factors mentioned would be considered by an Immigration Judge. In paragraph 17 the respondent considered the petitioner's claims under Articles 3 and 8 of the ECHR. In paragraph 18 the respondent correctly concluded that "it is not accepted that an Immigration Judge, when applying the rule of anxious scrutiny, would be persuaded to reverse the finding [sic] of Immigration Judge Hamilton [see paragraphs 20-30 of his determination] on the basis of the document [sic] you have submitted."

[36] The respondent also avers that the content of the further submission was not apparently credible.

[37] The respondent correctly found that the submissions did not amount to a fresh claim under paragraph 353 of the Immigration Rules. The documents add nothing material and cannot be relied upon to support the petitioner's claim - so submitted the respondent.

**The Respondent's pleas-in-law**

[38] The respondent's pleas-in-law were as follows:

> "1. The petitioner's averments being irrelevant, *et separatim* lacking in specification, the petition should be dismissed.
>
> 2. The respondent not having erred in law, *et separatim* not having acted unreasonably in refusing to issue a notice of appeal allowing the petitioner an in country right of appeal against the refusal decision of 15 February 2010 declarator should not be pronounced as sought.
>
> 3. The respondent not having erred in law, *et separatim*, not having acted unreasonably in refusing to treat the petitioner's further submissions and fresh evidence as a fresh application for asylum, declarator and reduction should not be pronounced as sought."

**Discussion**

[39] I am grateful for the assistance provided by Mr Winter and Mr Olson. I have given anxious scrutiny to all their submissions.

[40] As mentioned at the outset, I found in favour of the respondent in relation to the preliminary issue.

[41] In relation to the other grounds for review, in my opinion, the respondent's submissions also prevail.

[42] Paragraph 353 of the Immigration Rules (which is quoted in paragraph 5 of the refusal letter) is in the following terms:

> "353. When 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."

[43] I need not rehearse the whole refusal letter (No 6/1 of Process). Parties are familiar with the terms of the letter and the salient features have been outlined in the competing contentions (above). However, it might be helpful to highlight certain passages.

[44] Paragraph 7 of the refusal letter is in the following terms:-

"In consideration of your representations, the key question is whether, when these issues are taken together with the previously considered material, they create a realistic prospect of success. The question is not whether the Secretary of State thinks that the new claim is a good one, or should succeed, but whether there is a realistic prospect that an Immigration Judge, when applying the rule of anxious scrutiny, would conclude that your client is at real risk of persecution or serious harm, or would breach his rights under the European Convention on Human Rights (ECHR)."

[45] I agree with that approach - which was not really in dispute. There must be "a realistic prospect".

[46] In paragraph 10 of the refusal letter the respondent says, *inter alia*:-

"In assessing the reliability of the document you have submitted an Immigration Judge would be duty bound to consider the principles in assessing

documentary evidence which were set out in the case of *Tanveer Ahmed* [2002] UKIAT 00438".

[47] I agree with that assessment. In general terms, it would be fair to say the principles to be derived from *Tanveer Ahmed* (at paragraphs 33 to 36) include the following:-

1. It is 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;

2. The question is whether the document is one upon which reliance should properly be placed;

3. A document should not be viewed in isolation. The decision maker should look at the evidence as a whole or in the round (which is the same thing); and

4. There is no obligation on the Home Office to make detailed enquiries about documents produced by individual claimants.

[48] In paragraph 18 of the refusal letter (having rehearsed matters in some detail) the respondent summarises his conclusions as follows:-

"Taking all of these issues into consideration alongside the Immigration Judge's findings regarding the lack of credibility your client has demonstrated it is not accepted that that an Immigration Judge, when applying the rule of anxious scrutiny, would be persuaded to reverse the finding of Immigration Judge Hamilton on the basis of the document you have submitted."

[49] The wording of paragraph 18 might have been chosen more carefully but the meaning and conclusion is clear.

[50] Mr Olson also emphasised the unsatisfactory nature of the information provided by the petitioner - particularly the documents referred to in paragraphs 12 to 15 of the

refusal letter (the "request to arrest the petitioner" and the "membership" card relied upon by the petitioner).

[51] In my view, the respondent's criticisms of the information provided by the petitioner were well-founded.

[52] In my opinion, in this case, the requirements of paragraph 353 of the Immigration Rules have simply not been satisfied.

[53] The petitioner's submissions, and the documents provided by him, are not sufficient to amount to a fresh claim.

[54] The respondent has not acted unreasonably or irrationally.

[55] In my opinion, despite Mr Winter's carefully presented submissions, the petition falls to be dismissed.

**Decision**

[56] In the whole circumstances, and for the reasons outlined above, I shall sustain the respondent's pleas in law, repel the pleas-in-law for the petitioner and dismiss the petition.