OUTER HOUSE, COURT OF SESSION

[2010] CSOH 83

OPINION OF LADY DORRIAN

in the Petition of

L.A.

Petitioner;

For Judicial Review of a decision of the Secretary of State for the Home Department to refuse to accept representation on his behalf as a fresh claim for asylum

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Petitioner: Caskie, Advocate; Drummond Miller
Respondent: McIlvride, Advocate; C Mullin

6 July 2010

[1] The petitioner is a citizen of Pakistan who arrived in the United Kingdom on 27 September 2006. He sought asylum but that application was refused, his appeal dismissed and his appeal rights ended on 22 May 2008. Thereafter he made further representations which he said constituted a fresh claim for asylum. Several representations were submitted, including representations of 11 December 2009. These were rejected on 18 December 2009 and are the subject matter of the petition which came before me claiming that the Secretary of State erred in law in declining to accept these representations as a fresh claim for asylum.

[2] The basis of the appellant's claim is based on alleged persecution of him in Pakistan on the basis of his religion. He claims to be not only an adherent of the Ahmadi faith but to preach that faith and work for the Ahmadi community. The full details of his claim are set out in the original decision of the Immigration Judge of March 2008 and in the decision letter already referred to. The respondent accepts that the petitioner is of the Ahmadi faith and that some Ahmadis are persecuted because of their faith but disputes that the petitioner is in this category.

[3] The petitioner claims to have been the subject of persecution and violence, including serious beatings and threats to his life, as a result of his involvement in his religion. He asserts that in Pakistan the civilian and other authorities not only turn a blind eye to atrocities against the Ahmadis but actively encourage them. He alleges that he sought assistance from the police following an assault on him but was not only given no assistance, he was told that if he did not shut up he would be locked up. Other attempts to seek assistance from the civilian authorities are said to have met with a similar response. He moved to Lahore on 16 March 2006 and shortly afterwards a friend approached an agent to make inquiries about the possibility that the appellant might flee the country. On 13 June 2006 his application for a multi-visit visa to enter the United Kingdom for a period of 6 months was granted. At that stage he remained in Pakistan. He maintains that he was subjected to a serious assault in August of 2006 and there were threats to arrest him. He claims that he sought protection of the High Court in Lahore which made a protection order for him and his family issued on 22 September 2006. He left the country on 27 September 2006.

[4] In the decision of 20 March 2008 the Immigration Judge rejected all of the petitioner's claims. Although it was accepted that he was of the Ahmadi faith, the Immigration Judge did not accept that he was active in that faith in Pakistan, or that he

preached that faith and noted the lack of involvement by him at the local mosque following his arrival in Glasgow. His claim that he had been told by the agent to remain in Glasgow until the agent could take him to Canada, and should not go out frequently, was also rejected. The Immigration Judge concluded that he would have been aware from an early stage of his arrival in Glasgow of being able to claim asylum in the United Kingdom and that the United Kingdom was a safe country which protected genuine refugees. In July or August 2007 the petitioner was found concealed in a wardrobe at an address visited by immigration officers. During an initial interview under caution he said that his sole purpose in coming to the UK was to work. At the hearing he said that he was hiding in the wardrobe because he was afraid. The Immigration Judge, noting his arrival in September 2006, and his discovery in the wardrobe 10 months later considered that these were not the actions of a genuine asylum seeker. On being released after the interview and caution he was told to report to the Home Office and did not do so. The Immigration Judge again concluded that this was not the action of a genuine asylum seeker. The Immigration Judge noted that the petitioner failed to take advantage of the issue in his favour of a visit visa until 3 months from its grant which did not seem consistent with the picture painted of someone living in genuine fear of his life in Pakistan. So far as the alleged application for protection from a High Court in Lahore is considered, two points struck the Immigration Judge. The first relates to the petitioner's assertions that despite the petition the police would not give him any protection, that he continued to receive threats and that the police came to his house to try to arrest him. The Immigration Judge concluded that if this were true the petitioner must have known that even after the petition was granted this would have been the attitude of the police and that obtaining the petition would be a waste of time. The second issue related to

the documentation produced in relation to the petition. The Immigration Judge referred to reports indicating a high level of corruption in Pakistan and that it is possible to obtain many types of fraudulent documents or documents that are fraudulently authenticated by a bona fide stamp or authority. He referred to various reports indicating the extent of this problem all as detailed in the Country of Origin Report. Accordingly, looking at the matter in the round, the Immigration Judge concluded that the alleged petition had been fabricated to increase the chances of success of the asylum claim. However the Immigration Judge went on to consider what the position would be even if it were accepted that the High Court petition was a genuine document. He concluded that it was unlikely, had the petitioner genuinely sought the protection of the court that he would not allow any period for that to have any practical effect. This is what he did by leaving the country five days later. Furthermore the Immigration Judge carefully examined the history of alleged assaults on the petitioner and in each case concluded that he was simply not credible. He rejected the petitioner's claim that he was threatened by the police or that they came to arrest him. He rejected in its entirety the petitioner's claim that he had been persecuted on behalf of his faith, that he actively preached in Pakistan or that he had any particular profile in the Ahmadi faith.

[5] These submissions fell to be considered under the terms of Immigration Rule 353 which states as follows:-

> "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) have not already been considered; and

(ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejections."

[6] The evidence which the petitioner produced in support of the fresh claim was evidence seeking to vouch the authenticity of the petition and order in the High Court, Lahore. It included a letter allegedly from the petitioner's advocate in Pakistan, letters from the Lahore High Court Bar Association and the Punjab Bar Council as well as copies of the advocate's identity card. There was also evidence from the advocate that he was willing and able to travel to the United Kingdom to give oral evidence in respect of his identity and the authenticity of the court documentation.

[7] The decision letter of 18 December 2009 refers to paragraph 353 of the Immigration Rules and in paragraph 6 sets out the correct test to be applied. That paragraph reads as follows:-

"It is accepted that the documents you have submitted have not been previously considered. The question therefore is whether these submissions taken together with the previously considered material, would create a realistic prospect of success, notwithstanding its rejection. The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of another Immigration Judge, applying the rule of anxious scrutiny, thinking that your client will be exposed to a real risk of persecution on return to Pakistan. The Secretary of State can and no doubt logically should, treat his own view of the merits of the claim as the starting point of that inquiry. It is clear that the

Secretary of State when addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, must also satisfy the requirements of anxious scrutiny."

[8] The letter goes on to state that:

"In considering whether this new evidence creates a realistic prospect of success the Secretary of State has taken into account the prior evidence in this case: the dismissed appeal determination: and the refusal of reconsideration which he considers that an Immigration Judge, applying the rule of anxious scrutiny, would take into account.

The Immigration Judge who heard your client's appeal made very few positive credibility findings regarding your client. Moreover, it states there were crucial discrepancies and problems in the various accounts provided.

This has been taken into account when deciding if, applying the rule of anxious scrutiny, there is a realistic prospect of success."

[9] The decision letter goes on to note that the Immigration Judge concluded that the documentary evidence purporting to be from the court was false but went on to consider what the position would be were the material accepted as genuine. The Secretary of State also noted that the Immigration Judge had not accepted the applicant's claims that he was attacked or that he had been the subject of persecution. The Secretary of State concluded:

"Therefore the previous decision was not concluded solely on the ambiguity of a particular event in Pakistan or solely on the question over the High Court petition, but was considered in the round. Overall the AIT found your client to be a wholly unreliable witness even if the documents themselves were genuine, the Immigration Judge still concluded your client was untruthful and

was not at risk on return. Therefore, as the Immigration Judge has already made findings even if your client's evidence had been accepted the conclusion was that he could return to Pakistan. The production of this document (and the envelope) stating your client's advocate is willing to travel to the UK to give evidence, taken with the extent of negative credibility findings, does not create a realistic prospect of another Immigration Judge, applying the rule of anxious scrutiny, finding that your client would be exposed to a real risk of persecution."

[10] Counsel for the petitioner submitted that if it were to be accepted he had raised an action in Pakistan before departure it would be indicative inferentially of some veracity in his earlier account. Although the Immigration Judge also considered the possibility of the genuineness of the documents on *esto* basis his primary finding which was that he had produced false documents and this led substantially to the adverse conclusion against him. Although not decisive it was nevertheless a critical finding. On examination of all the information in the round, this edifice might collapse. What the Secretary of State failed to do is consider the wider impact on the overall credibility findings.

[11] Counsel for the respondent submitted that the original conclusions on credibility were overwhelmingly negative, even when considering that the court documentation might be genuine. If the only new material was further evidence to support a hypothesis which has already been considered with such an overwhelming result then this is not new material which, when considered with previous material, would now give rise to realistic prospect before another Immigration Judge.

[12] Counsel for the petitioner submitted that no high standard was required to be achieved to satisfy the test of a "realistic prospect of success" and that the court

required to apply a "black and white test" to the question, which would usually allow only one answer. He referred to *ZT (Kosovo)* v *Secretary of State for the Home Department* [2009] UK HL 6; *R (On the application of AK (Sri Lanka))* v *Secretary of State for the Home Department* [2009] EWCA Civ 447; *R on the application of Princely* v *Secretary of State for the Home Department* [2009] EWHC 3095 and *Harakel* v *Secretary of State for the Home Department* [2001] EWCA Civ 884. The implication of the applicant's submission seemed to be that in addressing the questions which arose under paragraph 353 the court had to reach its own conclusion, rather than approach the matter on the basis of whether the decision had been one open to a reasonable Secretary of State.

[13] Counsel for the respondent disputed that the test could be taken from either of these latter two cases, relying instead on *FO (Petitioner)* [2010] CSIH 16 which in turn referred to *Associated Provincial Picture Houses Limited* v *Wednesbury Corporation* [1948] 1KB 223 and *R* v *Secretary of State for the Home Department, ex parte Onibiyo* [1996] QB 768.

[14] In fact there is not in my view any real difference between the test applied in *FO* and that referred to in the cases of *ZT (Kosovo)* and *AK (Sri Lanka)* although it is perhaps somewhat surprising that the court in *FO* was not referred to these cases. In *FO* the court stated that "...the decision of the Secretary of State for the Home Department is capable of being impugned before the court only on *Wednesbury* grounds." However it is quite clear from the context of this, which was under reference to the case of *WM (DRC)* v *Secretary of State for the Home Department* (2007) Imm A R 337 that the court accepted that in an immigration context this approach required to be subject to "anxious scrutiny" and applied the test on that basis. In *ZT (Kosovo)* (a case which arose from a decision under section 94 of the

Nationality, Immigration and Asylum Act 2002 in relation to certification of claims "clearly unfounded", the majority clearly state that "...the correct approach is that conventionally adopted on a Judicial Review challenge: *Wednesbury* (with, in the present context, anxious scrutiny). (Lord Brown of Eaton-under-Haywood paragraph 72. See also Lord Neuberger of Abbotsbury paragraph 82 and Lord Hope of Craighead paragraph 55.) Of course in asking the question whether a reasonable Secretary of State could have concluded that there was no realistic prospect of an Immigration Judge, applying the rule of anxious scrutiny, thinking that the applicant would be exposed to a real risk of persecution on return, the court will necessarily be making an assessment of how an Immigration Judge might approach this issue. That led to the conclusion in *ZT (Kosovo)* that in cases where the primary facts are not in dispute it by no means follows that there is any material difference between an approach based on *Wednesbury* principles with anxious scrutiny and that of an appellate court. However, the test fundamentally remains that of a court exercising power of Judicial Review. That approach was also taken in *AK (Sri Lanka),* where Lord Justice Laws, in giving the judgment of the court, noted that the question was whether a reasonable Secretary of State might have concluded as the Secretary of State in fact did.

[15] As to what constitutes "a realistic prospect of success" the case of *ZT (Kosovo)* was concerned with whether there was a difference between the tests under section 94 and that under rule 353. In *ZT (Kosovo)* Lord Justice Laws observed that "I do not consider, with great deference, that the reasoning in *ZT (Kosovo)* is of great assistance in setting the bar, as it were, for the impact of the "realistic prospect of success" test in rule 353." He went on to suggest that "realistic prospect of success" means only more than a fanciful such prospect. I am content to proceed on that basis.

[16] As I have already noted the decision letter set out and applied the correct test. The Secretary of State looked at the new material and the old material before reaching a conclusion. The original decision of the Immigration Judge was comprehensively against the petitioner on all issues of credibility. I do not accept the submission of the petitioner that the issue of the documentation was a critical one. I agree with counsel for the respondent that there is nothing to suggest that this issue caused the Immigration Judge to take a view on credibility which he would not otherwise have taken. The issue of the apparent falsity of the documentation relied on was only one amongst many points which were decided unfavourably for the petitioner. On all the fundamental bases of his claim - that he preached the Ahmadi religion, that he was active in that religion, that as a result he was repeatedly beaten and assaulted; that his life was threatened, that he was persecuted by the mullahs and that this persecution was contributed to by the police - he was wholly rejected by the Immigration Judge as not credible. Moreover, in addressing the significance of the documentation the Immigration Judge had proceeded to make an assessment of matters on the basis that the documentation were indeed accepted as genuine and had nevertheless come down firmly against the petitioner. Against that background it is my view that the conclusion of the Secretary of State that if the whole material presented by the petitioner were considered in the round by an Immigration Judge it would not give rise to a realistic prospect of success was not one made either unreasonably or irrationally and the petition should therefore be dismissed.