OUTER HOUSE, COURT OF SESSION

[2011] CSOH 35

P581/10

OPINION OF LORD HODGE

in the Petition of

TN

Petitioner;

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

For Judicial Review

Petitioner: Caskie; Drummond Miller LLP
Respondent: Webster; Office of the Solicitor to the Advocate General

18 February 2011

Background

[1] The petitioner, who is a citizen of Zimbabwe, resides in Glasgow. He seeks judicial review of a decision of the Secretary of State ("the respondent") dated 27 March 2010 that representations made on his behalf did not constitute a fresh claim for asylum.

[2] It is undisputed that the petitioner arrived in the United Kingdom on 1 September 2008 and claimed asylum on 10 September. His claim was refused on 23 September.

He appealed that decision but the Asylum and Immigration Tribunal dismissed his appeal in a determination issued on 19 November 2008. He requested a reconsideration of that decision but the Asylum and Immigration Tribunal refused that request. By 28 January 2009 he had exhausted all of his appeal rights.

[3] On 19 March 2010 representatives of the petitioner made further submissions on his behalf as a fresh claim for asylum on the ground that he was a refugee and under article 3 of European Convention on Human Rights ("ECHR"). In the decision under challenge the respondent refused to grant the petitioner leave to remain in the United Kingdom or to recognise the representations as a fresh claim for asylum.

[4] Because it is the current policy of H.M. Government not to remove failed asylum seekers to Zimbabwe, the petitioner is not in danger of imminent removal. But his current status prevents him from working or from claiming benefits at a higher level.

Legal background

[5] Rule 353 of the Immigration Rules provides that after a claim has been refused and any appeal is no longer pending, the decision maker will consider further submissions and, if rejected, will then determine whether they amount to a fresh claim. The Rule states:

> "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."

[6] There is no appeal to an Immigration Judge from an adverse decision under Rule 353. The parties were in agreement as to the relevant law on the "realistic prospect of success" test. The respondent must consider whether there is a realistic possibility that an Immigration Judge might decide in favour of the applicant's asylum or human rights claim on considering the new material together with the material previously considered: *AK (Afghanistan)* v *Secretary of State for the Home Department* [2007] EWCA Civ 535. The standard to be applied in assessing whether a claim has a "realistic prospect of success" is a modest one; it means only more than a fanciful prospect: *R (AK (Sri Lanka))* v *Secretary of State for the Home Department* [2010] 1 WLR 855, Laws LJ at paragraph 34.

[7] It was also common ground that the case law concerning certification under section 94(2) of the Nationality, Immigration and Asylum Act 2002, where the test is whether an asylum or human rights claim is "clearly unfounded", provided guidance as to the proper approach of the court in Rule 353 cases. I was referred to *ZT (Kosovo)* v *Secretary of State for the Home Department* [2009] 1 WLR 348, *AK (Sri Lanka)* (above), and *R (YH)* v *Secretary of State for the Home Department* [2010] EWCA Civ 116.

[8] It followed from that agreement on the relevant case law that the parties were also agreed that the court in a judicial review in this context should make its own assessment of how an Immigration Judge, applying the rule of anxious scrutiny, might have decided the matter: *ZT (Kosovo)* (above), *R (YH) (*above), and *KH (Afghanistan)* v *Secretary of State for the Home Department* [2009] EWCA Civ 1354. See also the decision of Lord Tyre in *IM* v *Secretary of State for the Home Department* [2010] CSOH 103. The court, having reached its own view on that question, does not then

have to consider whether the respondent could reasonably have reached a different view.

[9] In *R (YH)* and *IM* (both above) it was held that the process remained a process of judicial review and that the court must judge the issue on the material before the Secretary of State. In most cases that will be the relevant material. But circumstances may have changed by the time the case is heard in court. If so, the court, like the Immigration Judge, must perform its duty to uphold human rights in the light of the changed circumstances. In *FNG* v *Secretary of State for the Home Department* 2009 SC 373, at paragraph [13] I referred to the speech of Lord Bingham in *R (Razgar)* v *Secretary of State for the Home Department* [2004] 2 AC 368, in which at paragraph 20 he suggested that the court should have regard to material which would be before the Immigration Judge, including material, if any, which had not been before the Secretary of State. It appears from the speeches of Lord Hope and Lord Carswell in *ZT (Kosovo)* (at paragraphs 52-54 and 65 respectively) that they also followed Lord Bingham's approach. See also *R (Princely)* v *Secretary of State for the Home Department* [2009] EWHC 3095, Sales J at paragraph 16. But that issue does not arise in this case.

The previous application

[11] In his determination of 19 November 2008 the Immigration Judge accepted that the petitioner was from Zimbabwe but comprehensively rejected his account as incredible. He criticised as incredible the petitioner's inability to describe the circumstances of his arrival in the United Kingdom, the airline that brought him here, the false passport under which he had travelled, the airport at which he arrived or the hotel in which he had stayed. He rejected his claim that he was at risk as a person who

was a supporter of the Movement for Democratic Change ("MDC") because he showed no sound knowledge of the party, its beliefs, its structure or its members. The Immigration Judge also held that his claim to be a homosexual in danger of persecution lacked all credibility. He also observed that the petitioner admitted that he had lied to Immigration officials on entering the United Kingdom.

[12] In the current application the petitioner does not challenge those adverse findings as to his credibility.

The further submission

[13] In the submission dated 19 March 2010 the petitioner's representatives lodged a statement by the petitioner's first cousin, Mr DN, stating that he was a former member of the MDC and a refugee and that the petitioner was a member of his extended family. Mr DN had been granted permission to stay in the United Kingdom on ECHR grounds and lived in Glasgow. The submission included a photograph which was said to be of the petitioner holding a placard which stated "Mugabe must go". The photograph was said to be taken from the website of the Zimbabwe Vigil Coalition, which did not otherwise identify the petitioner. The submission represented that the petitioner had joined a non-party human rights group, called Zimbabwe Restoration of Human Rights ("ROHR"), while in the United Kingdom in 2009. There was also submitted an article from the Times newspaper in 2010 in which the petitioner described himself as having been tortured in Zimbabwe because he was a homosexual and a BBC article which suggested that there were bleak prospects for gay rights in Zimbabwe. The petitioner asserted that he was at risk of persecution (a) as a member of the extended family of a supporter of the MDC, (b) as a result of his activities *sur place*, and (c) because he was a homosexual.

The Secretary of State's decision

[14] In the challenged decision letter of 27 March 2010 the respondent narrated the petitioner's immigration history and the material lodged with the further representations. The respondent recorded that the question of the petitioner's homosexuality had already been determined by the AIT. The respondent questioned the credibility of the petitioner's alleged *sur place* activities in ROHR and held that in any event it did not create a realistic prospect of success before an Immigration Judge when considered in conjunction with all of the previously considered material.

[15] The respondent also considered the representations about the family relationship with DN in the light of the more recent country guidance case, *RN (Returnees) Zimbabwe CG* [2008] UKAIT 00083, which broadened the categories of risk for those returning to Zimbabwe. The respondent noted that the petitioner had asserted in his asylum interview that he had no family in the United Kingdom and that neither DN in his short statement nor the petitioner had provided any information to suggest that they had been in contact with each other in Zimbabwe. If the petitioner had limited knowledge of DN and his movements in Zimbabwe there was no reason to think that anyone in Zimbabwe would link them as family members. The respondent recognised that *RN* identified as at risk those who could not demonstrate support or loyalty to the regime or ZANU-PF, but observed that in that case (at paragraph 246) it was stated that an appellant, who had been found to be untruthful in relation to the factual basis of his claim, would not be assumed to be truthful about his inability to demonstrate such loyalty simply because he asserted that.

[16] The respondent also referred to paragraph 243 of *RN* which suggested that in view of the economic circumstances of Zimbabwe one had to consider whether a claimant who could finance a journey to the United Kingdom was aligned with or

loyal to the regime. The petitioner had been able to pay an agent approximately £1,000, had not claimed asylum on arrival in the United Kingdom, and had purchased clothes from several shops in this country. Those considerations and the adverse credibility findings led the respondent to conclude that there was not a realistic prospect of an Immigration Judge, applying the rule of anxious scrutiny to all the material, finding that the petitioner faced a real risk of persecution or serious harm if returned to Zimbabwe.

[17] The respondent also considered the guidance in *RN* (at paragraph 230) about the risk on return as a failed asylum seeker, referred to the petitioner's financial means, and again concluded that there was no realistic prospect of success before an Immigration Judge.

Grounds of challenge

[18] It was not disputed that there was new material before the respondent and thus the petitioner surmounted the first step in Rule 353, namely that the content of the submissions had not already been considered. The issue was whether he got on to the second step, namely whether that content when considered with the material previously available, including the adverse findings of credibility, gave rise to a realistic prospect of success before an Immigration Judge.

[19] The petitioner pleaded that the decision that there was no such realistic prospect was "unreasonable *et separatim* irrational." It is not clear to me what distinction is to be drawn between *Wednesbury* unreasonableness and irrationality. I treat them as the same test but, having regard to how the law of judicial review has developed in this area (see paragraph [8] above), nothing turns on this.

[20] The irrationality pleaded was that the respondent had failed to take account of the risk factors (i) that the petitioner had been in the United Kingdom for an extended period and (ii) that he was a failed asylum seeker. Reference was made to *RN (Returnees) Zimbabwe* at paragraphs 230 and 233. Mr Caskie submitted that those factors posed difficulties in establishing loyalty to or a connection with ZANU-PF or the regime in Zimbabwe.

[21] He submitted that the new evidence from a supporter of the MDC, Mr DN, that the petitioner was his first cousin was important as in *SM and others (MD - Internal Flight - Risk Categories) Zimbabwe CG* [2005] UKIAT 00100 it was recognised that the families of MDC activists had been among those suspected of being associated with the opposition. While each case depended on its circumstances, he submitted that it was irrational of the respondent to fail to recognise the potential significance of the cousin's evidence at a re-hearing before an Immigration Judge.

[22] He also submitted that it would be irrational to conclude that one could imply that he had a connection with or loyalty to ZANU-PF because the petitioner had been held not to be credible. I agree with that submission; but that is not what the respondent did. Nor is it relevant to the exercise which I have to perform.

[23] In his oral submissions Mr Caskie also founded on the petitioner's activities in the United Kingdom in which he appeared in a demonstration against the Zimbabwe government and was named in the Times newspaper as someone who had been tortured in Zimbabwe because he was homosexual. Although these *sur place* activities were not mentioned in the petition, they were addressed in the respondent's decision letter and are relevant to the judicial review application.

Decision

[24] In approaching the new material on which the petitioner relies, I recognise that the test of showing a realistic prospect of success is a modest one: paragraph [6] above. In applying that test, as in other decisions relating to asylum and human rights claims in this field, the court must give anxious scrutiny to the material before it. But the onus is on the petitioner to make out his case. The court must consider the content of the new submission along with previously available material and the unchallenged decisions in relation to the latter material. But the finding of lack of credibility in the past does not mean that the new material is incredible. As the respondent's policy on further submissions states:

> "An applicant may have been untruthful in the past but be telling the truth at the further submissions stage."

In reaching my decision I am prepared to assume that the new material, which the petitioner produced in support of his submissions, is accurate.

[25] Having considered the new material both individually and cumulatively in the context of the previously available material and the earlier finding of incredibility, I am satisfied that the submissions do not create a realistic prospect of success.

[26] The evidence of the petitioner's cousin does not advance his case materially. There was no evidence that the petitioner and he had ever met in Zimbabwe or that they lived in close proximity to each other. The petitioner did not mention his cousin's presence in the United Kingdom either to Immigration officials or in his earlier submissions. At best for the petitioner it can be said that a member of his extended family with whom he had no significant contact was associated with the MDC. In *SM and Others (MDC - internal flight) Zimbabwe CG* (above), as Mr Caskie accepted, the tribunal accepted (in paragraph 43) that each case must depend upon its own

circumstances. In the context of the other material, including the rejection as incredible of the petitioner's claims that he was active in the MDC and the financial means which he had to get himself to the United Kingdom and spend money while in this country, I consider that the familial connection with DN would not cause the petitioner difficulty in demonstrating positive support for ZANU-PF or alignment to the regime.

[27] The court must consider the effect of an asylum seeker's *sur place* activities even where he has acted in order to strengthen his claim of asylum: see Council Directive 2004/83/EC of 29 April 2004, articles 4(3)(d) and 5(2), and *YB (Eritrea)* v *Secretary of State for the Home Department* [2008] EWCA Civ 360. In this case I make no judgment as to the petitioner's motives in undertaking such activities. But I am not persuaded that they give his case a realistic prospect of success. The article in the Times newspaper, which mentions him by name, simply records his assertion that he was a homosexual who was tortured in Zimbabwe. That claim had already been rejected by the Immigration Judge. At most the article, if picked up by the security services of Zimbabwe, would identify him as an asylum seeker making that claim. Merely being a failed asylum seeker who has spent some time in the United Kingdom does not place a person at risk on his return to Zimbabwe if he is able to demonstrate an alignment to the regime or he returns to an area where that loyalty is assumed: *RN (Returnees) Zimbabwe CG* (above) at paragraph 230. The petitioner arrived in the United Kingdom after the presidential run-off vote in June 2008 and thus should not have the difficulties, which those who were outside Zimbabwe when the elections occurred have, in demonstrating at least apparent loyalty to the regime. See *RN* (above) at paragraph 231. His assertion that he would have that difficulty is, as the respondent stated, a bare assertion.

[28] I am prepared to accept (a) that the photograph, which the petitioner claims shows him with a "Mugabe Must Go" placard, is on a website of the Zimbabwe Vigil coalition and (b) that it may well be a picture of him, but it is not very clear that it is. While the government of Zimbabwe may be expected to spend some resources to allow its security services to monitor its citizens in the United Kingdom who are involved in activities in opposition to their regime, the resources of that state are not unlimited. And there is no suggestion that there is anything on the website to identify the petitioner with the man in the photograph. Even if the photograph were to be linked to the petitioner, I consider that, in the light of the other circumstances, including the rejection of his claims to be an MDC supporter and his financial means, his activities in this country would be very unlikely to prevent him from demonstrating alignment to the regime on his return to Zimbabwe.

[29] I must assess the petitioner's *sur place* activities in the context of the other material, including previous claims which were rejected as incredible and his financial means and I must take account of the extension of the persons identified as being at risk in *RN (Returnees) Zimbabwe CG* (above). Doing so, and looking at his new material both individually and cumulatively, I am satisfied that his case for asylum or for humanitarian protection has no more than a fanciful prospect of success before an Immigration Judge. It therefore has no realistic prospect of success.

Conclusion

[30] For these reasons I hold that the respondent's decision not to treat the representations on behalf of the petitioner as a fresh claim was not irrational. I therefore repel the plea in law for the petitioner, sustain the third plea in law for the respondent and refuse the orders sought in the petition.