OUTER HOUSE, COURT OF SESSION

[2011] CSOH 7

P662/10

OPINION OF LORD MALCOLM

in Petition of

AH (AP)

Petitioner;

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

Pursuer: Caskie; Advocate; Drummond Miller LLP
Defender: Olson, Advocate; Office of the Solicitor to the Advocate General

19 January 2011

[1] In this application for judicial review the petitioner asks the court to quash decisions made on 6 May and 15 June, both of 2010, by the Secretary of State for the Home Department ("the Secretary of State") respectively that representations on behalf of the petitioner did not constitute a fresh claim for asylum and that the petitioner should be removed to Bangladesh. It is necessary to set out the background circumstances in some detail.

[2] The appellant is a citizen of Bangladesh. He entered the UK in December 2003 using a false passport. He did not claim international protection on arrival. He was

arrested on 15 January 2006 and then sought asylum. The Secretary of State refused that application by decision letter dated 23 January 2006. The claim was based upon the petitioner's fear that if returned to Bangladesh he would face mistreatment because of his political opinions and that his removal from the UK would be contrary to articles 2 and 3 of the European Convention on Human Rights (ECHR). He claimed that he had fled Bangladesh because, as a supporter of the Awami League, he was being persecuted by the Bangladesh National Party ("BNP"). He also feared the police and army in Bangladesh.

The decision letter of 23 January 2006

[3] The decision letter set out the specific incidents and background circumstances which had created the petitioner's concerns. The Awami League had been the ruling party in Bangladesh from June 1996 until July 2001. Subsequently there was a coalition government led by the BNP. It included three smaller parties, but not the Awami League. The Secretary of State did not accept that involvement with the Awami League in itself gave rise to a well-founded fear of persecution on the grounds of political opinion. Moreover it was considered that the described threats and acts of violence were caused by local members of the BNP acting on their own initiative, independent of their party's policies and directives. There was no reason to believe that this kind of behaviour was condoned by the then government. Furthermore the petitioner had not produced any evidence to suggest that the actions of specific individuals were carried out under the direct instruction of the BNP nor that they would be repeated should he be returned to Bangladesh. It was open to the petitioner to seek the necessary avenues of protection within Bangladesh before seeking international protection.

[4] It was noted that the petitioner was wanted by the court in Bangladesh, however the country has an independent judiciary, and he would have the right to be represented by counsel. In short, he could expect to receive a fair trial under a properly constituted judiciary. In any event the size and population of Bangladesh would afford the petitioner the opportunity to relocate to another area of that country where local political rivals would be unable to find him. It was not accepted that his removal to Bangladesh would be in breach of either article 2 or article 3 of the ECHR.

The appeal against the decision of 23 January 2006

[5] The petitioner appealed against that decision to an immigration judge who issued a decision upholding the appeal on 15 June 2006. The immigration judge summarised the appellant's claims as follows. He is a citizen of Bangladesh. He and his family supported a political party called the Awami League. He became actively engaged in AL activities when he was 18 years old. The BNP came to power in October 2001. Thereafter he suffered various forms of severe harassment because of his AL activities. He was severely assaulted by BNP supporters in October 2001. His injuries included a fracture of the left tibia. He was denied medical treatment at the local hospital. Shortly thereafter BNP supporters threatened to kill him. The police failed to note the appellant's complaint. He was tortured by the Rapid Action Battalion (RAB), a combined security agency consisting of the army, police and various auxiliary forces. BNP supporters made a number of false complaints against him to the police, resulting in five related charges for which he was granted bail. All the foregoing was caused by his political opinions. He did not expect to receive a fair trial. He went into hiding for about two years. His father paid an agent to assist him to leave Bangladesh. He entered the UK in December 2003 with a false passport. When in the UK he

discovered that he had been charged with another offence which was allegedly committed at a time when he was in the UK. There are outstanding warrants for his arrest. The RAB had visited his home to try to detain him. The immigration judge referred to the Secretary of State's decision as set out in the refusal letter and commented that, put briefly, the respondent disputed all of the appellant's claims, and held that he had provided no credible evidence in support of them.

[6] At the appeal hearing both parties were represented. The appellant gave evidence with the assistance of an interpreter, and the immigration judge considered the relevant documents. He said that in essence the appellant's claim is that he was severely harassed by reason of his political opinion after the BNP Government came to power in October 2001 because he was an Awami League activist and seen as an opponent of that Government, its agents and supporters, and that he would be similarly harassed if he returned to Bangladesh.

[7] The immigration judge made findings based upon the evidence before him, which included the October 2005 Bangladesh HOSRG Report lodged by the respondent. He noted that in Bangladesh torture had been and remained widespread under successive governments. Victims included people detained on politically motivated grounds. The Redress Trust had stated that torture continues unabated with near impunity for the perpetrators, namely the law enforcement agencies, the police, the army and paramilitaries. The police use torture as a means to extract money from detained suspects and their families. The judge held that there were politically motivated detentions, with many political activists arrested and convicted for unfounded criminal charges. Dismissal of wrongful charges or acquittal took years. The Rapid Action Battalion and security forces committed numerous human rights abuses, including extrajudicial killings, and were rarely disciplined. When innocent people

were killed, law enforcement agencies attempted to brand them as criminals by producing false criminal records against them. Detailed criticisms were made of the judiciary and of prison conditions in Bangladesh.

[8] The judge noted that there were various credible documents in process from the Awami League which confirmed that the petitioner was an activist who had become a target of the present government for political activities. On 18 October 2001 about 15 BNP supporters attacked him in the street with sticks and batons. They punched and kicked him. They broke his left leg. They beat him unconscious. He was rescued from more severe harm by local people. He was denied medical treatment at the local hospital due to government intervention. However, as a result of the receipt of private medical treatment there was related credible evidence in process that the appellant's left tibia had been fractured.

[9] The immigration judge made several detailed findings upholding the petitioner's claims. For example at paragraph 46

> "The Government's 'Operation Clean Heart' anti-crime drive occurred from 16 October 2002 until 9 January 2003. About two weeks after that operation commenced, the army detained the appellant in Dhuar Camp for about 24 hours. There his captors interrogated him regarding AL matters and tortured him by electrics shocks ... Then he was transferred to the local police station for some 24 hours where the police severely beat him in order to obtain a bribe."

The immigration judge observed that there are credible documents in process relating to criminal complaints against the appellant in Bangladesh. He upheld the claim that the appellant was being harassed by the RAB and the police because of his political activities. It was noted that he claimed that when he was in the UK he discovered that

he had been charged with another offence to the effect that he (and others) had disrupted a seminar on 15 August 2005, however by that date he had been in the UK for some 18 months. A further charge had been made against the appellant in August 2005 but the precise details were unknown. The judge found that the government continued to harass AL members and arrange for them to be unlawfully detained. It was likely that the petitioner would be detained as soon as he was discovered on his return to Bangladesh. The judge accepted the evidence that after he left Bangladesh the RAB had visited the petitioner's family home to try and detain him. The police report of 2 November 2002 was to the effect that the petitioner was involved in terrorism and political terrorism and should be interned.

> "There is a real risk that (whichever detains him) the RAB and the police will torture him if it is they who detain him. Such torture would be sufficient to constitute persecution for his political belief. He certainly cannot expect sufficiency of protection from the police. There is no real prospect of internal flight."

While the judge rejected the claims under articles 2 and 3 of the ECHR, he held that the appellant did have a well-founded fear of persecution in the home country by reason of political opinion if forcibly returned there; that the Refugee Convention was engaged; and that the appellant's removal to Bangladesh would cause the UK to be in breach of its obligations under the Refugee Convention. The appeal was allowed.

The Secretary of State's appeal

[10] The Secretary of State lodged an appeal against that decision. By a determination promulgated on 19 March 2007 the Asylum and Immigration Tribunal ruled that the immigration judge had not addressed certain reasons given by the Secretary of State in

the refusal letter of 23 January 2006. The view was taken that the reasoning which had not been addressed related to material conflicts of facts and interpretation which had to be resolved in order to reach a sustainable conclusion. Failure to give any reasons in respect of those matters amounted to a material error of law. The only course was to have an entirely fresh hearing when all issues would be at large.

The fresh hearing before a different immigration judge

[11] In due course a fresh hearing took place before a different immigration judge. That judge made the following finding:

> "Having now had an opportunity to consider the evidence of the appellant, both documentary and parole, and having considered the submissions made to me, I am in no doubt that this appellant is neither a credible nor a reliable witness."

The immigration judge then set out his reasons for that conclusion. They included apparent ignorance of some "basic facts" relating to the Awami League, and certain apparent discrepancies between information provided in answers given by the petitioner when compared with other material relating to, for example, the Operation Clean Heart programme. Reliance was placed upon certain "embellishments" which were "designed to enhance his chances", and what was described as a "lengthy, evasive and frequently conflictive account" of his movements from 2002 until his departure from Bangladesh. Reference was made to the petitioner's failure to identify himself or his presence to the authorities when he arrived in this country.

[12] Criticisms were made as to the compliance of certain documents with the requirements of the Asylum and Immigration Tribunal (Procedure) Rules 2005, for example an absence of certification from the translator that the translations were

accurate. It was stressed that it was not an immigration judge's function to "trawl" through documents lodged by an appellant to which no specific reference had been made, and that it would appear that the petitioner had not discharged the onus to adduce the best evidence that was readily available. Under reference to the 2005 charges, the new immigration judge found it difficult to accept that in his absence the petitioner had been granted bail by a court in Bangladesh "when the Government is so concerned about rising crime levels and deteriorating law and order that it launches and maintains extraordinary counter measures."

[13] For the above reasons the immigration judge took the view that the petitioner's account is a fabrication. He summarised his views as follows:

> "The appellant's lack of up-to-date knowledge of the Awami League and various agencies with which he claimed to have come into contact in Bangladesh is damaging to his credibility. His inclusion in the account of a body which was not in existence and a campaign which had not been then launched undermined the core of the claim. I do not accept his claims to have been arrested, detained and tortured. His conduct when he claimed to be in hiding was not redolent of a fugitive constantly on the move and keeping one step ahead of persistent pursuers. His conflicting accounts as to whether he did or did not experience difficulties from February 2002 until he left Bangladesh makes it difficult to conclude that he was being pursued in any event. An individual who genuinely experienced the claims lately articulated by the appellant would have taken steps to remove himself from those dangers long before he actually did so. I have difficulties with the weight to be given to the documents on which he relies but, taken at their highest, I do not accept in the whole scheme of things that they advance his claim. I do not consider that

their contents can be relied upon any more than the rest of his account. I reject his claim of ignorance of the procedure to claim asylum as contrived. He well knew how the process could be taken forward having asked his friend for advice. He had no grounds for pessimism that his claim would be rejected in light of the success of his friend. I reject his claim to have accepted advice to maintain a low profile. A genuine refugee would not practise that level of deception. A genuine refugee would anxiously consider his future and would appreciate that allowing a lengthy passage to time to elapse could damage rather than help his claim. Against such a background I am satisfied that the appellant has no relevant ground for arguing that he has a well founded fear of persecution for political reasons. There is no risk to this appellant on return on the basis of a corrupt judiciary. The material referred to and analysed by the respondent in paragraphs 31 to 35 of the letter has not been impugned by the appellant who provides only a partial appraisal of the system. He cannot avoid his own claims that he was dealt with fairly. He has an advocate who could advance his case if there is any truth in that part of his account. Had I found that the appellant had a well founded fear of persecution in his home area I would have concluded that he could reasonably and safely have relocated elsewhere in Bangladesh. He is a fit young man with no health or other difficulties. He has been able to work since his arrival here. He has no dependents. He has been able to adapt to life in the UK without difficulty. He has been able to do so without identifying himself over a lengthy period of time. There is no reason advanced to me why he could not adapt to living outwith his home area in a country as large as Bangladesh. Furthermore, he suffered no difficulties while living in Bogra. That place was simply not to his

liking and he moved on. He does not need and is not entitled to humanitarian protection."

The overall result was that on dated 14 September 2007 the immigration judge dismissed the appeal against the Secretary of State's original decision to remove the petitioner. It can be noted that on almost every issue, including the appellant's credibility and reliability and the value of the supporting documentation, the two immigration judges reached diametrically opposite conclusions.

Further submissions in support of the claim

[14] Notwithstanding the decision to remove him, the petitioner remained in this country. On 28 August 2009, and 17 February and 19 April, both of 2010, further submissions were made on his behalf which were said to amount to a fresh claim for asylum on refugee and article 3 grounds. In a decision dated 6 May 2010 the Secretary of State refused to grant the petitioner leave to remain and held that the representations did not amount to a fresh claim for asylum. The petitioner now seeks judicial review of that decision.

[15] In the letter of 21 August 2009 agents for the petitioner described the fresh information as follows:

"Our client's brother Nadeem Hussein has recently sent him certain documents by post. He was physically assaulted by our client's opponents. He was admitted in Tauhida General Hospital and Diagnostic Centre, Dhaka where he was treated for his injuries from 15 June to 3 July 2009 and was discharged on 4 July 2009. Our client's brother has sent his medical certificate from hospital. Our client's brother has further sent him letter of Mr Hussein's advocate, Mr Firoz Alam from Dhaka, which explains the current situation regarding

false case registered against our client in his absence from his country by the opponents, in connivance with state authorities. Letter of our client's advocate further states that he has been declared as absconder and the arrest warrants have been issued and further that our client's brother has also been involved in false case and physically assaulted. Our client's brother has further enclosed certified copy of first information report (FIR) registered against him recently. The same has been registered by our client's political opponents just to annoy and harass his family in Bangladesh. Our client's brother has further enclosed FIR against our client. He has been shown as accused at serial number 6. Our client maintains that FIR has been registered falsely because on the date of occurrence as shown in FIR (11/11/2007) he was in the UK on that date. The registration of false criminal case in Mr Hussein's absence is just to detain, torture, humiliate and kill him. Our client has further received police application, charge sheet and decision by Special Tribunal Judge, Dhaka in the above referred false case. He has been convicted in absence for ten years with work and fine of TK 10,000 along with others named in FIR. Court has issued warrants of arrest against Mr Hussein. Our client genuinely apprehends that in case he returns, he would be arrested in execution of his warrants of arrest. He expects no justice from corrupt judiciary of his country. He maintains that Special Court Tribunal judges are acting under state influence and his advocate has advised him not to return. Mr Hussein apprehends that in case he returns to Bangladesh, he would be arrested, detained illegally, tortured and killed by state authorities merely because of his political opinion."

[16] The enclosures with the said letter included a statement of the petitioner; a letter from the said advocate dated 27 July 2009 with English translation; a medical

certificate relating to the petitioner's brother; and certified copies of various official documents relating to the criminal charges against the petitioner and others in Bangladesh. They indicate that along with other members of the Awami League the petitioner was prosecuted for an alleged crime carried out when the petitioner was in fact in the UK, and that he was subsequently sentenced to a total of 17 years imprisonment (not 10 as stated in the said letter) along with the said fine. One of the documents describes the prosecution case as being that various members of the Awami League took a decision to kill the General Secretary of Dhaka District BNP and in pursuit of that plan kept illegal arms and bullets in an office of the League. Police raided the premises and seized two pistols and eight rounds of ammunition.

The decision letter of 6 May 2010

[17] The decision letter dated 6 May 2010, which was prepared by an official acting on behalf of the Secretary of State, stated that, while the petitioner's further submissions had been considered, it was considered that they did not qualify him for asylum or humanitarian protection, nor did he qualify for limited leave to remain in the UK in accordance with published Home Office asylum policy instruction on discretionary leave. Since the further submissions had not resulted in a grant of leave, they had also been considered under paragraph 353 of the Immigration Rules. That paragraph states:

> "When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 33C of these Rules 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.

This paragraph does not apply to claims made overseas."

The decision letter continued:

"In your client's particular case, the question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether the new material when taken together with the previously considered material creates a realistic prospect of success in front of a new immigration judge when applying the rule of anxious scrutiny. It is accepted for the purposes of this letter that some of the material lodged has not already been considered. It is not accepted however, for the reasons given below, that taken together with the previously submitted material that your submissions would create a realistic prospect of success before a new immigration judge. Your client's asylum and human rights claims have been considered on all the evidence available, including evidence previously considered, but it has been decided that the further submissions are not significantly different from the material which has previously been considered and therefore they do not amount to a fresh claim for asylum and human rights."

[18] The petitioner was provided with a further document headed "Consideration of Submissions" which gives reasons for the said decision. The reasoning in that document, so far as relevant for present purposes, can be summarised as follows. It was noted that the issues of the petitioner's political opinion, no fair trial, and well-

founded fear upon his return to Bangladesh, were fully considered at appeal where an immigration judge concluded that the petitioner was not a reliable witness and that no weight could be placed upon the evidence submitted. Further, in that decision it was concluded that he could return to Bangladesh where he would not be at risk upon his return under articles 2, 3, 5, 6 and 8 of the ECHR. So far as the fresh material was concerned, reference was made to the evidence from abroad which purports to show that a false claim had been brought against the petitioner as a result of which he had been sentenced to 17 years imprisonment. It was observed that a new immigration judge would be aware of the determination in *Tanver Ahmed* [2002] UKAIT 439 and be bound by it with regard to the arrest warrants and summons. The test is to approach documents with an open mind and to differentiate between form and content, and not to consider documents in isolation but to look at the evidence in the round in order to consider whether a particular document is one upon which reliance could be placed. A new immigration judge would be aware that the petitioner had not provided any adequate explanation as to how these documents were obtained by his brother. So far as the medical report concerning an attack on the petitioner's brother is concerned, it was noted that a new immigration judge on considering this document would be aware that the medical report does not divulge the injuries to which he was subjected as a result of the alleged assault which caused him to be hospitalised for a period of three weeks, and also that the medical report does not provide any evidence that this assault was politically motivated (although that is stated in the report). Furthermore, a new immigration judge would note that this document is written in English, whereas the other documents had been submitted in their original untranslated form with an English translation, and without any adequate explanation. A new immigration judge would note the content of the testimony from the petitioner's advocate dated 27 July

2009 which states that his client had been sentenced to 17 years imprisonment *in absentia*, and contains the advice that the petitioner should not return home. Under reference to paragraph 52 of the Asylum and Immigration Tribunal Procedure Rules 2005, it would be noted that the submitted documents had been translated and attested, however a new immigration judge would not be able to check either the identity of the translator or that the translations are accurate. The decision letter continued:

> "A new immigration judge would conclude that as the translator cannot give evidence, and his or her experience is not known and cannot be tested or the extent of the clarification known has to consider these documents in the round. However, a new immigration judge would avail himself to the previous immigration judge's findings in regards to previously submitted material of the same by your client at his appeal hearing and taking account of the Country Information Report of August 2009."
>
> (The above is an accurate quotation.)

[19] The decision letter acknowledged that the Country of Information Report 2009 states that the current Prime Minister is from the political party of the Awami League and was sworn in as of January 2009, and that arrests can only be made by police with a valid arrest warrant issued by a magistrate. However the Report goes on to state that, due to corruption, within Bangladesh individuals arbitrarily are arrested without a valid arrest warrant, and that false documents can be easily obtained for use abroad. The decision letter continued as follows:

> "The Report further states that the Bangladesh Government is aware of the corruption, and has been taking premeditative against this. Notwithstanding the above, a new immigration judge would be aware that due to the change of

political power within Bangladesh, your client who claims to be a member of the Awami League; who are now in power after winning the election and was sworn in as Prime Minister as of January 2009. Therefore, in light of the above and the changes in Government, in that your client's party, the Awami League is now in power within Bangladesh, on the basis of this evidence it is considered reasonable that your client would be able to seek protection from any individuals from the BNP or RAB party which your client claims to have a future fear of. Moreover, in regard to your client's claim that his brother was specifically targeted due to the political motivations of your client. Based on the evidence your client has failed to demonstrate this incident was not simply the random acts of individuals (the general population). It follows that a new immigration judge would have inadequate evidence of a sustained pattern of campaign of persecution directed at your client's family, due to your client's political affiliation which was knowingly tolerated by the authorities, or that the authorities were unable, or unwilling, to offer your client's effective protection. Your client has not established this in his case. Your client upon his return would be able to obtain the protection, as would his family from the Awami League as they are the ruling party. Your client has the option to seek redress through their authorities before seeking international protection. Indeed it is noted that your client's advocate purports that he has represented your client for a number of years. A new immigration judge would find it reasonable, that your client's advocate would be able to represent him in regards to these false accusations, having previously done so. Taking account of all of the evidence above, including the background material there is no realistic prospect of success of a new immigration judge concluding that your

client would if returned to Bangladesh today be at any real risk upon his return contrary to Articles 2 and 3 of the ECHR."

(The above is an accurate quotation from the decision letter.)

[20] The decision letter continued in similar vein under reference to articles 5 and 6 of ECHR. For example it was noted that a new immigration judge would have to consider the previous immigration judge's findings, where, at paragraph 45 of the determination of 28 September 2007, it was determined that there was no risk from a corrupt judiciary in Bangladesh, and that the petitioner, having an advocate acting on his behalf, would be able to advance his case on his behalf.

[21] In general the decision-maker focused on a substantial number of points adverse to the petitioner's claim. There was no consideration of anything which might be said to a new immigration judge in support of the petitioner's claim for asylum in light of both the original and the new material. Amongst other things the decision letter stated:

"It is noted that the appellant is a member of the current political regime to whom he could seek protection from, and that the appellant is of a young age and of good health. In these circumstances, a new immigration judge would conclude that there are no special conditions pertaining to your client's age, health, physical or mental abilities which would differentiate his likely situation against other prisoners taking account that he would be able to obtain legal assistance through his advocate and his political party. Based upon this evidence, there is no realistic prospect of a new immigration judge concluding that your client's alleged detention upon his return to Bangladesh would meet the threshold to engage article 3 as it is not believed that he would be subject to imprisonment for a period in excess of ten years based upon false charges, which can be legally challenged by your client upon his return. Taking account

of all of the evidence upon there is no realistic prospect of success of a new immigration judge finding that your client's removal from the United Kingdom would breach articles 5 and 6 of the ECHR." (Again this is an accurate quotation.)

The decision letter dealt with a claim based on article 8, but since this was not pursued at the hearing before me, I make no further reference to it. Similar comments apply in relation to the claim for consideration of compassionate circumstances.

The petition for judicial review

[22] In the petition for judicial review it is emphasised that the new material all came after the earlier hearing. It is averred that the Secretary of State required to decide whether the petitioner has a realistic prospect of success before an immigration judge in an appeal against the refusal of the claim for asylum, taking account of all that has gone before, including the first judge's findings, and the new material. The petitioner has no right of appeal against the Secretary of State's decision, hence the need for the present proceedings. The petition states that the Secretary of State had to keep clearly in mind that at this stage the only issue is whether an immigration judge might conclude that the claim is valid. That test is not met by reference to the Secretary of State's view on the matter. Thus, for example, so far as new evidence is concerned, the question is whether a judge could regard it as credible and significant. The threshold for a fresh claim is low - "a modest test" as described by a recent Court of Appeal authority. The rule of anxious scrutiny has to be kept firmly in mind.

[23] So far as the Bangladeshi translator is concerned, it is averred that he could give evidence by affidavit or other means. While there has been a change of government in Bangladesh, an immigration judge might well consider that this does not necessarily

mean that the petitioner, who has been in the UK for some years, would be protected by the new government. The Secretary of State has ignored, or given insufficient weight to the conviction and sentence to 17 years imprisonment for a crime said to have been committed when the petitioner was in the UK, all of which occurred in the absence of the petitioner. There was no consideration by the Secretary of State as to how an immigration judge might view that new situation. The 2009 country information report regarding prison conditions is alarming. It was available to the Secretary of State, yet no reference was made to it.

[24] In the answers to the petition it is stressed that the petitioner claims to be an activist on behalf of the Awami League, which came to power in early 2009. Why then would he be persecuted by state authorities? The new documents were not certified by the translator as accurate, contrary to paragraph 8.2(b) of the Practice Directions. The Secretary of State had to proceed on the basis of the information presented on behalf of the claimant. The judge had held that the petitioner's account was "a fabrication". The documents presented could not be relied on "any more than the rest of his account." Given that the Awami League is now in power, it was correct for the Secretary of State to express the view that the petitioner would be able to seek protection from any individuals of the BNP or the RAB who meant him harm. On his return the petitioner would receive legal assistance and a fair trial. The Secretary of State was correct to state that "It is not believed that (the petitioner) would be subject to imprisonment for a period in excess of 10 years based upon false charges, which can legally be challenged...upon his return...".

The submissions at the first hearing

[25] On behalf of the petitioner Mr Caskie indicated that there is no criticism of the article 8 aspect of the decision. The challenge is confined to the refugee and article 3 issues. Reference was made to various authorities which demonstrate that it is sufficient for the petitioner to show that he has more than a fanciful prospect of success before an immigration judge. It is for the court to form a view on this issue and act accordingly. Mr Caskie submitted that it cannot be said that the petitioner has no prospect of success before an immigration judge.

[26] The fresh material raised two new issues, namely the petitioner's conviction and sentence, and the attack on his brother in Bangladesh. It was submitted that there is nothing in the criticism that the medical report was in English. Around the world doctors use English as a common language. An immigration judge might well accept the petitioner's evidence that the attack was politically motivated. In contested proceedings it is open to the Secretary of State to challenge the accuracy of translations, which here were signed, attested and certified as a true copy. At this stage, on behalf of the Secretary of State Mr Olsen intervened to say that the Secretary of State had not checked the accuracy of the translations. Mr Caskie continued to the effect that one cannot be certain that an immigration judge will share the view that the petitioner will receive sufficient protection in Bangladesh simply because the party he supports is now in power, not least in respect of the obviously wrongful conviction and the sentence to 17 years imprisonment. The fact that the petitioner has an advocate in Bangladesh did not stop the conviction and sentence *in absentia*. The Secretary of State's view that prison conditions in Bangladesh do not breach article 3 is not of much comfort to the petitioner. An immigration judge would take into account the Secretary of State's own country information report regarding the

deteriorating conditions in Bangladesh prisons. There is at least a reasonable prospect that an immigration judge will consider them to be in breach of article 3.

[27] Regarding the Secretary of State's opinion that the petitioner would have no difficulty in obtaining a fair trial in Bangladesh, this left out of account the fact that the trial is completed. The Secretary of State has not addressed the question as to whether the petitioner has a right to a retrial. That is a matter for an immigration judge to consider, and there is at least a realistic chance of success in respect of an article 6 claim.

[28] For the Secretary of State Mr Olsen submitted that the problem "at the heart of the petitioner's claim" is that the Awami League is now in government. It was accepted that the petitioner was convicted *in absentia* regarding an alleged crime in Bangladesh said to have happened when he was in fact in the UK. It would be "an easy matter" for the petitioner to present evidence about this on his return to Bangladesh. It was accepted that, on their face, the new documents presented by the petitioner indicated that his political opponents had "stitched him up", however the Secretary of State was not persuaded that the documents were true documents, and in any event the petitioner would be able to seek the protection of the state given that he is an Awami League supporter. His opponents are now out of power. He will be able to prove that he was wrongly convicted. If, as the petitioner alleges, the judiciary are corrupt, the judges will now do as they are told by the Awami League. When considering the fresh material, significant weight was given to the adverse findings made by the second immigration judge as to the petitioner's credibility and reliability. Having regard to recent case law on the topic, it was accepted that if there is an issue to try, it must go to an immigration judge, and that, at this stage, the claimant is entitled to the benefit of any doubt. Mr Olsen agreed that it is for the court to judge

whether the petitioner does or does not have realistic prospects of success in an appeal before an immigration judge.

[29] Reference was made to the decision in *Tanver Ahmed* [2002] UKIAT 00439. The Secretary of State has looked at the cumulative effect of various criticisms that can be made of the new documentation. The petitioner has been branded a liar, so he faces a high hurdle if he is to persuade anyone to place weight on the new documents. He has failed to present a coherent and convincing case for leave to remain. The petitioner can now seek to repair gaps or problems in the information by lodging further submissions and information with the Secretary of State, including any further material from the advocate in Bangladesh as to whether there would or would not be a retrial, and as to any ongoing risks notwithstanding the change in government. If the court comes to the view that an immigration judge should consider the documentation, Mr Olsen could not resist the current application for judicial review. However it was submitted that the Secretary of State had reached a reasonable decision.

[30] In response Mr Caskie made reference to the country information report at paragraphs 10.11 - 13, which refers to "an epidemic" of police killings. "Crossfire" references may resonate more with an immigration judge, given his experience in such cases. While Mr Olsen emphasised Judge Forbes' decision, no reference was made to the earlier decision by a different judge which had upheld the petitioner's credibility and reliability. That judge believed the petitioner's evidence and accepted his claims. Contrary to the submission on behalf of the Secretary of State, the Awami League are not the state in Bangladesh, they are the government. The same people will be in post as police, army officers, civil servants, etc. Documents are rarely perfect and often more information could be provided. It was a matter of judgement as to whether an immigration judge might accept the general reliability of the new

documents. The court was reminded of the rule of anxious scrutiny in cases of this kind. On any view there is more than a fanciful prospect of success.

[31] In a short response Mr Olsen submitted that it may well be that the Awami League is not synonymous with the state and all its agencies. However that is an example of the kind of thing that should have been said on behalf of the petitioner in the submissions to the Secretary of State. He must explain why he will be persecuted when the government shares his political beliefs.

Discussion and decision

[32] The question before me is whether the petitioner would now stand a more than fanciful chance of success before an immigration judge. This is a low hurdle to clear, and, given what is at stake, I must consider the matter with anxious scrutiny. I should answer the question in the negative only if it is clear that the petitioner's case is bound to fail. I have set out the relevant background circumstances in full. Having formed the view that I should grant the petitioner's application for judicial review and quash the Secretary of State's decisions, the result is that the matter will go before an immigration judge for an independent decision on the merits of the claim. My decision simply means that this is the appropriate course; it most certainly does not mean that the judge should uphold the claim. In these circumstances it is unnecessary, and perhaps inappropriate for me to deal with the merits of the case in detail. However it is right that I should give an indication of the main reasons for my decision.

[33] The decision letter of 6 May 2010 is a slipshod document, full of grammatical errors and non sequitors. It would be easy to be prejudiced against it on this account, but it is important to concentrate on substance rather than form. Given that the task

before the Secretary of State's official was to decide whether the claimant has a prospect of success before an immigration judge, one might have expected the author to weigh and balance both the points in favour of and those against the claimant's case, and ask whether the scales fall so clearly on the side of refusal that the decision to remove must be confirmed without any possibility of appeal. However it is a feature of the decision under review that, though emphasis is placed on almost everything that might be said against the petitioner's claim, there is little or no consideration of factors that might be prayed in aid in support of the claim.

Mr Caskie's address set out a number of propositions which at least blunt the force of the various factors relied upon in the decision. Plainly at any hearing before an immigration judge the claimant would be afforded the opportunity to persuade the judge of the merits of his claim. For myself I would expect the Secretary of State's official to appreciate this and to reflect it in the consideration of the relevant issues arising under paragraph 353 of the Immigration Rules. There is a real danger of being overly influenced at this stage by the immediately preceeding rejection of the claim on its merits, a decision made by the same official. This danger must be guarded against. If one concentrates only on factors adverse to the claim, a distorted view is likely to emerge. This is all the more so given the very low hurdle for new submissions to amount to a fresh claim.

[34] In similar vein it can be noted that great weight was placed on the adverse findings on the credibility and reliability of the claimant reached by the immigration judge appointed to conduct the fresh hearing after the Secretary of State's successful appeal against the original decision. Those adverse findings were used to cast doubt on the reliability and value of the fresh documentation. However, in deciding whether a claimant has a more than fanciful prospect before an immigration judge, I would

expect the decision maker to at least take into account the fact that at an earlier stage an immigration judge had found the claimant to be both credible and reliable, and had made findings upholding the factual basis of his case. When assessing the petitioner's prospects before another immigration judge, this seems to me to be at least a relevant consideration. In any event I see no good reason why it should be ignored, especially when so much weight is being given to the second decision.

[35] In response to Mr Olsen's main submission, namely that the Awami League is now in government and can be expected to protect the petitioner, Mr Caskie observed that the government is not synonymous with the state, and may not necessarily be able to control every action of all personnel in the state authorities. Mr Olsen responded that, while there may be force in those observations, they should have been made in the fresh submissions submitted to the Secretary of State. Be that as it may, Mr Caskie's observations are fairly obvious propositions that are bound to be stressed before an immigration judge. Even if the Secretary of State was not bound to anticipate them when assessing the prospects before an immigration judge, I do not consider that I should now shut my eyes to them and to the other submissions made by Mr Caskie. Mr Olsen submitted that the petitioner could respond to the decision letter of 6 May 2010 by submitting new or additional fresh submissions, but I prefer to view the submissions made to me in the context of the over-arching question of whether the claimant might persuade an immigration judge to uphold his claim. If I were to proceed on the basis suggested by Mr Olsen, the parties might well become locked into a very slow and cumbersome process. Furthermore, in the documentation and submissions presented to the Secretary of State the petitioner did focus on the 17 year sentence imposed in absence. I am not certain that a reference to the change in

government necessarily resolves all questions arising from that element in the petitioner's claim as now framed.

[36] At the hearing there was some discussion of the decision in *Tanver Ahmed* [2002] UKAIT 00439. The issue resolved in that case concerned burden of proof, and in particular, when the issue arises, whether there is an onus on the Secretary of State to prove that documents relied on by a claimant are forgeries, failing which they will be presumed to be authentic. It was decided that it was for the claimant to demonstrate that a document is reliable in the same way as any other piece of evidence relied upon by him. In that context, a document should not be viewed in isolation, but rather the decision maker should look at all the evidence in the round. The case did not decide that concerns about gaps or deficiencies in documents necessarily rules them out of consideration. This is all the more so when the Secretary of State is simply at the stage of asking whether there is any realistic prospect of success before an immigration judge.

[37] In all the circumstances, and essentially for the reasons put forward by Mr Caskie, I shall sustain the petitioner's plea-in-law, grant the application for judicial review, and quash the decisions of the Secretary of State dated 6 May and 15 June 2010. Meantime I shall reserve all questions of expenses.