OUTER HOUSE, COURT OF SESSION

[2010] CSOH 155

OPINION OF LORD TYRE

in the cause

O.M.L (A.P.)

Petitioner;

for

Judicial Review of a decision by the Secretary of State for the Home Department dated 25 November 2008

Petitioner: Forrest; McGill & Co.
Defender: Campbell; Office of the Solicitor to the Advocate General
23 November 2010

Introduction

[1] The petitioner is a national of the Democratic Republic of Congo ("DRC") who entered the United Kingdom on or around 11 October 2007 and claimed asylum on the ground that he feared persecution in DRC on account of his political opinion and previous ill-treatment to which he said he had been subjected. The Secretary of State for the Home Department (the respondent in this application) rejected his claim on 22 February 2008. His appeal to an immigration judge was refused on 18 April 2008 and his application for a reconsideration of this decision was rejected by a senior immigration judge on 20 May 2008.

[2] The basis of the petitioner's claim that he would be subject to persecution and ill-treatment on return to DRC was that he was a member of a political organisation called the Bundu Dia Kongo (BDK) which operates in the Bas Congo province of DRC. In rejecting the petitioner's appeal, the immigration judge reached conclusions regarding the petitioner's credibility which were strongly adverse to him. He found the petitioner's account to be wholly without credibility and rejected his assertion that he was a member of the BDK. The immigration judge further observed that even if he had accepted the petitioner's assertion of membership of the BDK, he was satisfied that as a low level member he would not be at risk of persecution on return to DRC. In this regard the immigration judge referred to certain observations by the Asylum and Immigration Tribunal in *TN & Others (BDK not at risk)* v *Secretary of State for Home Department* [2005] UKAIT 00152 (at paras 32 and 33) regarding the absence of risk to BDK members of persecution or treatment such as would constitute a breach of Article 3 of the European Convention on Human Rights.

[3] In the course of his brief decision refusing reconsideration, the senior immigration judge noted that the *TN* decision was no longer listed as country guidance for DRC but concluded that the immigration judge's reasons for finding the petitioner wholly lacking in credibility were adequate, proper and intelligible, and that the *TN* decision was not therefore material to the petitioner's case.

[4] By letter dated 15 August 2008, agents for the petitioner submitted an application to the respondent that fresh consideration be given to the petitioner's claim for asylum. This application was submitted under reference to documentary evidence which had not been before the immigration judge. By a decision letter dated 25 November 2008, the Secretary of State refused to reverse her decision on the earlier claim and determined that the petitioner's submissions did not amount to a fresh claim, with the

consequence that the petitioner had no further right of appeal. The petitioner seeks reduction of that decision and the matter came before me for a first hearing.

Treatment as a "fresh claim"

[5] The petitioner's application to the Secretary of State was made in pursuance of Rule 353 of the Immigration Rules, which provides 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) 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."

[6] It is common ground that in a Rule 353 application, the Secretary of State must consider whether the application is "significantly different" from material previously considered, as defined in the Rule, i.e. whether the content (a) has not already been considered and (b) taken together with previously considered material creates a realistic prospect of success in an appeal to the First-tier Tribunal (Immigration and Asylum Chamber) against the refusal. If so, the decision maker must treat the claim as a fresh claim notwithstanding his or her decision to reject it, with the consequence that the refusal is appealable. It is also common ground that the standard to be applied in assessing whether a claim has a "realistic prospect of success" is a modest one. In *R (AK (Sri Lanka))* v *Secretary of State for the Home Department* [2010] 1 WLR 855, Laws LJ observed at paragraph 34:

> "A case which has no realistic prospect of success...is a case with *no more than a fanciful* prospect of success. 'Realistic prospect of success' means only more than a fanciful such prospect." (Emphasis in original.)

That description of the standard has been consistently adopted in applications to this court for judicial review of decisions taken by the Secretary of State in pursuance of Rule 353.

[7] As already mentioned, the petitioner's further application was accompanied by certain documents which had not been before the immigration judge. I mention only those upon which counsel for the petitioner continued to rely in the course of the hearing before me. They were as follows:

- A card described as an identification card showing the petitioner's membership of the BDK.
- A card described as a BDK card showing regular donations to the organisation by the petitioner.
- A card described as identifying the petitioner as a member of the London branch of BDK;

  (Although these cards are described as "translated" in the letter of 15 August 2008, no translation was included in the documents lodged for the hearing before me.)
- A "letter of recommendation" dated 9 April 2008 from BDK (Congo) to its London Branch regarding the petitioner.
- An open letter dated 8 July 2008 from BDK's London branch regarding the petitioner.

In their accompanying letter to the Secretary of State, the petitioner's agents submitted that this documentary evidence should be regarded as genuine unless proved otherwise, that it demonstrated that the petitioner was politically active in DRC, and that it was this political activity which resulted in his leaving DRC and claiming asylum in the United Kingdom. They further submitted that, in any event, removal of

the petitioner to DRC would constitute a breach of his rights of enjoyment of private and family life under Article 8 of the European Convention on Human Rights. This latter argument was not pursued before me and I need say no more about it.

[8] The Secretary of State refused to accept that the new material provided, when taken together with the previously considered material, created a realistic prospect of success in an appeal to an immigration judge. Having quoted a number of passages from the decision of the immigration judge who rejected the petitioner's claim to BDK membership as not credible, the Secretary of State noted that the new documents submitted were copies and not originals. She observed that the immigration judge had in any event found that low level membership of the BDK did not expose the petitioner to risk of inhuman or degrading treatment or torture were he to be returned to DRC. The Secretary of State concluded:

> "After considering all the evidence in the round, in line with the principles laid out in the authority *Tanweer Ahmed* (previously noted), taking into account the other discrepancies highlighted in your client's claim, the conclusion has been reached that little weight can be placed on the documents."

The Secretary of State then made certain detailed criticisms of some of the documents submitted with the petitioner's application, but at the first hearing those documents were no longer relied upon.

Scope of review by the court

[9] The task of the court in cases concerning either Rule 353 or certification by the Secretary of State under section 94(2) of the Nationality, Immigration and Asylum Act 2002 has been analysed in a series of decisions, including in particular *WM (DRC)* v *Secretary of State for the Home Department* [2007] Imm AR 337, *ZT (Kosovo)* v *Secretary of State for the Home Department* [2009] 1 WLR 348 and *R (YH)* v *Secretary of State for the Home Department* [2010] EWCA Civ 116; [2010]

4 All ER 448, which decisions have frequently been applied in petitions for judicial review in Scotland. The parties in the present case were agreed that the court must make its own assessment of how an immigration judge might decide the matter, and in particular of whether the applicant would have a realistic prospect of success in such an appeal. In so doing the court must, in its turn, give the matter anxious scrutiny. It is, however, important to emphasise that this remains a process of judicial review, not a *de novo* hearing, and that the issue must be judged on the material available to the Secretary of State (see *R (YH)* above, Carnwath LJ at paragraph 21).

The Secretary of State's decision

[11] On behalf of the petitioner it was submitted, firstly, that the Secretary of State had erred in law by applying the wrong test in assessing whether or not the petitioner's further submissions amounted to a fresh claim and, secondly, that in any event the Secretary of State's decision that an appeal to an immigration judge would have no reasonable prospect of success was irrational. I deal with each of these submissions in turn below. I should, however, note at this stage that it was common ground that a case such as this, in which fresh evidence was submitted in support of what was in effect the same claim (i.e. for asylum) as had previously been unsuccessful, fell within the scope of Rule 353.

(i) Did the Secretary of State ask herself the correct question?

[12] In her decision letter, the Secretary of State described her task as follows:

> "...The question is not whether the Secretary of State herself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an immigration judge, applying the rule of anxious scrutiny, finding that your client will be exposed to a real risk of persecution or serious harm on return. The Secretary of State can, and should, treat her own view of the merits as a starting point for the enquiry. 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, the Secretary of State must also satisfy the requirement of anxious scrutiny."

This formulation is closely modelled upon a well known dictum of Buxton LJ in *WM (DRC)* (above) at paragraph 11. Counsel for the petitioner accepted that this had at one time been the appropriate test, but submitted that in the light of subsequent case law a more sophisticated test now required to be applied. Reference was made to the judgment of Carnwath LJ in *R (YH)* (above) at paragraphs 15-24, and in particular to paragraph 16 where it is emphasised that although the concept of a hypothetical immigration judge may be helpful, the Secretary of State is standing in his or her own shoes in deciding this "threshold question".

[13] In my opinion there is nothing in the subsequent case law, including *R (YH)*, to indicate that the Secretary of State erred in law in continuing to follow the guidance given by Buxton LJ in *WM (DRC)*. It does appear to me, for the reasons which I set out in my opinion in *IM, Petitioner* [2010] CSOH 103, that some of Buxton LJ's observations in *WM (DRC)* regarding the task of the *court* require to be elaborated upon in the light of the subsequent case law to which I have referred. I did not understand this to be disputed by counsel for the Secretary of State. However, I do not consider that that case law indicates any material departure from what was said by Buxton LJ regarding the task of the *Secretary of State*. In my opinion the Secretary of State asked herself the correct question in this case, and I therefore reject the petitioner's first submission.

(ii) Was the Secretary of State's decision irrational?

[14] It will be recalled that the petitioner's previous claim for asylum had failed for two reasons: firstly, because the immigration judge did not find his assertion of

membership of the BDK to be credible and, secondly, because, in any event, the judge was not satisfied that a low-level member of the BDK would be at risk of inhuman or degrading treatment or torture if returned to DRC. In order to demonstrate a realistic prospect of success in an appeal to an immigration judge, the petitioner required to address both of these issues. It is appropriate at this stage to consider in a little more detail the new material which the petitioner's agents placed before the Secretary of State for consideration.

[15] As regards the petitioner's claim to membership of the BDK, the petitioner provided photocopies of cards said to be identification cards showing the petitioner's membership of the BDK and the making of regular donations to the organisation by the petitioner prior to his departure from DRC. The membership card bears the date 19/02/2007 and the "donations" card appears to contain entries for the years 2006 and 2007. In the absence of either original cards or translations of the copies, it is somewhat difficult to know what to make of this material. The first of the two letters produced by the petitioner is a letter in French (with English translation) headed with the name of the BDK and dated 9 April 2008 (i.e. after the date of the hearing by the immigration judge but before the date of his determination). It is addressed to "our brothers in the United Kingdom" whom it begs "to accept our brother [name] who is, by the power of the Lord our God, in the United Kingdom". The second letter which I understand to be in Congolese dialect (with English translation) is also headed with the name of the BDK and bears to be a "reference", stating:

> "This is to testify that Mr [name] is one of those helping Bundu dia Kongo in the territory of England, London office.
>
> Today (08.07.2008), we deliver to him an acknowledgment card with the number 010842.

> Whoever sees this card should know that the bearer is one of the activists of Bundu dia Kongo in the territory of England."

This letter carries a London postal address, an email address and a website url for the BDK. It appears to refer to a card (bearing the same contact details) copies of both sides of which were also included in the copy documents provided.

[16] Counsel for the respondent submitted that I should conclude, as the Secretary of State had done, that even with this new material the petitioner had no realistic prospect of satisfying an immigration judge that he was a member of the BDK. Reference was made to the first two principles set out in the decision of the Immigration Appeal Tribunal in *Tanweer Ahmed* v *Secretary of State for the Home Department* [2002] UKIAT00439 at paragraph 38, namely (1) that it is for a claimant to show that a document on which he seeks to rely can be relied on, and (2) that the decision maker should consider whether a document is one on which reliance should properly be placed after looking at all the evidence in the round. An immigration judge considering the new material would approach it with a degree of scepticism given the previous immigration judge's adverse findings on the petitioner's credibility. He would note that copies and not principals had been provided and that no translation of the cards was made available. He would note the coincidence of timing between the date of the immigration appeal and the date of the letter stated to have been received from the BDK in DRC. Taking all these factors into account and looking at all the evidence in the round, the petitioner would have no realistic prospect of satisfying a judge that he was a member of the BDK.

[17] I accept that an immigration judge hearing a further appeal would be likely to take all of these factors into account. In particular, he would be entitled to have regard to the first immigration judge's trenchantly expressed reasons for finding the

petitioner's evidence implausible and incredible. On the other hand, the copy documents now produced by the petitioner, if genuine, do provide at least *prima facie* evidence not available to the previous judge that the petitioner was a member of the BDK prior to his departure from DRC. It seems to me that an immigration judge might be persuaded not only that these are copies of genuine documents but also that the information which they contain is true. I do not therefore feel able to conclude on the basis of the material before me that the petitioner would have no more than a fanciful prospect of persuading an immigration judge that he was indeed a member of that organisation in DRC.

[18] As regards the second issue, namely the risk to the petitioner of persecution were he to be returned to DRC, I consider that the petitioner is in more difficulty. Neither the letter to the Secretary of State dated 15 August 2008 nor any of the material submitted with it addresses the issue of risk facing the petitioner on his return to DRC. In order to address this deficiency, counsel for the petitioner founded upon the observation by the senior immigration judge who refused the petitioner's application for reconsideration that "the country guidance decision that [the immigration judge] relied on...was no longer listed as country guidance". It is averred in the petition that the *TN* case upon which the immigration judge had relied pre-dated violent events involving members of the BDK which occurred in 2007. Counsel submitted that, unlike the immigration judge who decided the petitioner's previous appeal, no immigration judge could now reasonably rely upon *TN* as affording country guidance regarding the likelihood of persecution of a member of the BDK.

[19] I have already observed that this is a process of judicial review and that my assessment of the prospects of success in an appeal to an immigration judge must be made on the basis of the material available to the Secretary of State. Clearly the

Secretary of State had before her the senior immigration judge's reasons for refusing reconsideration, which include the observation that the *TN* decision is no longer listed as country guidance. That, however, in my opinion, takes the petitioner nowhere in establishing the current situation regarding risk of persecution of a BDK member in DRC. As counsel for the respondent submitted, it simply creates a hole in the evidence which was presented to the Secretary of State and which must therefore be presumed to be before an immigration judge. In the absence of any information whatsoever regarding the risk of persecution of the petitioner as a BDK member on his return to DRC, let alone any material not previously considered, it does not appear to me that he would have any realistic prospect of success in an appeal to the immigration judge against the Secretary of State's refusal of his further application.

[20] Even if it were legitimate - which in my opinion it is not - for me to have regard to the averment in the petition that violent events occurred in 2007 involving members of the BDK, I do not consider this averment to be sufficient to disturb my conclusion regarding prospects of success. In *Devaseelan* v *Secretary of State for the Home Department* [2003] Imm AR 1, the Immigration Appeal Tribunal set out guidelines (at paragraphs 37-42) on the approach to be adopted by an adjudicator in a second appeal to the determination of the adjudicator in a previous unsuccessful appeal. Although the procedural framework which provided the context for the Tribunal's observations has changed, the guidelines continue to be referred to by the courts with approval in, for example, what were described by Hooper LJ in *AA (Somalia)* v *Secretary of State for the Home Department* [2008] Imm AR 241 at paragraph 7 as "the somewhat analogous cases involving fresh asylum and human rights claims" such as the present case. With regard to country evidence, the Tribunal made the following observations at paragraph 40:

> "Evidence of other facts - for example, country evidence - may not suffer from the same concerns as to credibility, but should be treated with caution... Evidence dating from before the determination of the first adjudicator might well have been relevant if it had been tendered to him: but it was not, and he made his determination without it. The situation in the appellant's own country at the time of that determination is very unlikely to be relevant in deciding whether the appellant's removal at the time of the second adjudicator's determination would breach his human rights. Those representing the appellant would be better advised to assemble up-to-date evidence than to rely on material that is (*ex hypothesi*) now rather dated."

In my opinion, a general reference to violent events involving members of the BDK which occurred on an unspecified date or dates in 2007 would not have been regarded by an immigration judge as relevant in deciding whether the petitioner's removal to DRC in the latter part of 2008 would put him at risk of such persecution or treatment as would constitute a breach of his Article 3 rights. It would, in my view, be for the petitioner to place before the judge up-to-date country guidance supporting his assertion of risk of persecution. No such material was placed before the Secretary of State.

Disposal

[21] For these reasons I hold that the Secretary of State asked herself the correct question, that she has satisfied the requirement of anxious scrutiny, and that her decision not to treat the representations made on behalf of the petitioner as a fresh claim was not irrational or unreasonable. I therefore repel the plea-in-law for the petitioner, sustain the third plea-in-law for the respondent and refuse the petition.