OUTER HOUSE, COURT OF SESSION

[2007] CSOH 101

OPINION OF LORD EMSLIE

in the Petition of

ABDUL KHALIQ BESMEL (AP)

Petitioner;

for

Judicial Review of a determination of the Immigration Appeal Tribunal to refuse permission to appeal

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Petitioner: Devlin; Drummond Miller LLP
Respondent: A.F. Stewart; Solicitor to the Advocate General for Scotland

12 June 2007

Introduction

[1] The petitioner in this application for judicial review is an Afghan national who claimed asylum after arriving clandestinely in this country in December 2000. The respondent is the Secretary of State for the Home Department, who has responsibility for the enforcement of immigration and asylum law throughout the United Kingdom. The petitioner's claim for asylum is currently asserted on the basis that he has a well-founded fear of persecution, if he were now to be returned to Afghanistan, on a number of grounds including (i) his ethnicity, (ii) his own political and military

activities, and (iii) those of his late father. A claim in more restricted terms was initially refused by the respondent, whose decision was intimated to the petitioner by letter from the Home Office dated 12 July 2002, and the matter was then appealed to an adjudicator. After a hearing in Glasgow in March 2003 the adjudicator refused the petitioner's appeal, and his determination to that effect was promulgated to the petitioner on 16 April 2003. Thereafter, by decision dated 6 June 2003, the Immigration Appeal Tribunal refused the petitioner's application for leave to appeal against the adjudicator's determination.

[2] The petitioner now seeks judicial review and reduction of the foregoing refusal of leave by the Immigration Appeal Tribunal. For reasons which need not be discussed at this stage, the application has taken an inordinate length of time to come before this court, leading to the failure of an earlier petition on *inter alia* the ground of delay. However, it is now agreed between the parties that the application should simply be considered and determined on its merits.

[3] Put shortly, the petitioner maintains that in several respects the adjudicator erred in law in his assessment of the evidence and submissions before him. In particular, he is said to have failed to address key grounds for the petitioner's claimed fear of persecution if returned to Afghanistan, and to have rejected others without having had any legitimate basis for doing so. These deficiencies in the adjudicator's determination were, it is said, so significant that the petitioner's intended appeal would have had a "... real prospect of success" for the purposes of Rule 18(7) of the Immigration and Asylum Appeals (Procedure) Rules 2000. Accordingly the Immigration Appeal Tribunal's refusal of leave was unlawful *et separatim* unreasonable and should be reduced. Over and above that, it is said, the Tribunal failed to identify a further obvious error of law by the adjudicator which, although not

specifically focused in any ground of appeal, would have had a "... strong prospect of succeeding". For the avoidance of doubt, however, the petitioner now takes no point based on the European Convention on Human Rights, nor does he seek to insist on his fourth and fifth grounds of appeal before the Tribunal, nor, despite the terms of article 26 of the petition, does he direct any specific challenge against the adequacy of the reasons given by the adjudicator in his determination.

[4] For the respondent, on the other hand, it is contended that the adjudicator fell into no error of law; that on the evidence and submissions before him he was entitled to reach the conclusions he did; and that there was in any event no deficiency in his determination which could be regarded as affording the petitioner a real prospect of success in any further appeal. In all the circumstances, the Tribunal's decision to refuse leave was one which they were entitled to reach and should not be disturbed. Furthermore, the Tribunal had not failed to identify any obvious additional error of law by the adjudicator which would have given the petitioner a strong prospect of success on appeal.

[5] A first hearing on the petition and answers has now taken place before me on 17, 18 and 22 May 2007.

The legal framework

[6] Since I did not understand the relevant law to be materially in dispute between the parties, the following brief summary may suffice together with a note of the authorities which were cited during the course of the debate:

(i) Under the United Nations Convention and Protocol relating to the Status of Refugees (1951), and the relevant Rules made under the Immigration and Asylum Act 1999, a claimant seeking asylum as a

refugee must demonstrate - the *onus* being on him - that he has a "... well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion ..." if he were to be returned to his country of origin. Such a claim may also succeed on the alternative ground that to return the claimant to his country of origin would involve violation of his human rights in terms of the European Convention. As previously noted, however, no such alternative ground is raised in the present case.

(ii) The applicable standard of proof is that of "... a reasonable degree of likelihood" that such consequences would ensue, this being a lower test than the ordinary civil standard of the balance of probabilities:- *R* v *SSHD, ex parte Sivakumaran* 1988 A.C. 958; *Hariri* v *SSHD* 2003 E.W.C.A. Civ. 807.

(iii) Under the Immigration and Asylum Appeals (Procedure) Rules 2000 a claimant whose application for asylum is rejected by the respondent may appeal to an adjudicator. If unsuccessful before the adjudicator he may appeal further, but only with leave of the Immigration Appeal Tribunal under Rule 18(1). Under sub-paragraph (7) of the same Rule, leave may only be granted where the Tribunal is satisfied, *either* that an appeal would have a real prospect of success, *or* that there is some other compelling reason why the appeal should be heard. The foregoing requirement for a "real prospect of success" denotes an appeal carrying a degree of conviction, and having a realistic, as opposed to a fanciful, prospect of succeeding:- *Swain* v *Hillman and Another* 2001 1 A.E.R. 91, esp. per Lord Woolf M.R. at 92; *Tanfern*

Ltd v *Cameron-McDonald and Another* 2000 1 W.L.R. 1311; *International Finance Corporation* v *Utexafrica* 2001 C.L.C. 1361. Notwithstanding certain observations in cases such as *Hoseini* v *SSHD* 2005 S.L.T. 550 and *Chan U Seek* v *Alvis Vehicles Ltd* 2003 E.W.H.C. 1238, mere *prima facie* arguability is not sufficient to meet the statutory test.

(iv) In considering an immigration appeal, or in determining a petition for judicial review in that context, it is incumbent on any court or tribunal to subject the decision under review to "... the most anxious scrutiny", and to be scrupulous, before rejecting an application, to ensure that no recognised ground of challenge is open. These obligations are of particular importance where the result of a flawed decision may imperil the claimant's life or liberty:- *R* v *SSHD, ex parte Bugdaycay* 1987 A.C. 514, esp. per Lord Bridge of Harwich at 531; *R* v *Ministry of Defence, ex parte Smith* 1996 Q.B. 517.

(v) For that purpose, a court or tribunal must take account of all relevant materials, including such information as may be available concerning the social, political and human rights situation in the country concerned. In evaluating such evidence, the court or tribunal should be sensitive to the effect of national differences, UK standards not necessarily being a reliable guide. Moreover, a court or tribunal should be careful to avoid reaching conclusions adverse to the claimant which are based on mere speculation or conjecture:- *Wani* v *SSHD* 2005 S.L.T. 875; *Symes & Jorro, Asylum Law and Practice*, para.2.46.

(vi) In determining whether a well-founded fear of persecution is made out, the available evidence and grounds of claim should at some stage be considered cumulatively. Individual factors and grounds should not, in other words, be considered sequentially as if each stood alone:- *Gnanam* v *SSHD* 1999 Imm A.R. 436; *Karanakaran* v *SSHD* 2000 3 A.E.R. 449, esp. per Brooke L.J. at 472 and Sedley L.J. at 479.

(vii) Although Rule 18(6) of the 2000 Rules provides that the Tribunal should not be required to consider any grounds other than those included in an application for leave to appeal, it is well settled that a court or tribunal cannot lawfully ignore any obvious point arising on the available materials which, if specified as a ground of appeal, would have had a "... strong prospect of success":- *R* v *SSHD, ex parte Robinson* 1998 Q.B. 929, esp. per Lord Woolf M.R. at 945-6; *Petition Mutas Elabas*, Lord Reed, 2 July 2004, unreported, at paras.21-23. On the other hand, neither court nor tribunal is obliged to rake through and analyse all of the available evidence in order to identify any issue of fact which could have, but which has not, been raised on an applicant's behalf. As Lord Penrose put it in *Parminder Singh* v *SSHD* (10 July 1998, unreported):-

> "... in considering whether the IAT has erred in relation to matters of fact, or to inferences properly to be drawn from facts and circumstances, one is concerned only with the clear, the obvious, with questions that cry out for answer".

(viii) Subject to these particular requirements, the evaluation of evidence and submissions relative to asylum claims has been entrusted by Parliament

to an administrative system operating under the relevant Act and Rules. In appropriate circumstances, it is entirely legitimate for a decision to turn upon the assessment (along ordinary lines) of the credibility and reliability of the claimant's case. Equally, a trained and experienced decision-maker may legitimately draw inferences as to plausibility or implausibility from the evidential material before him:- *Wani, supra*; *Esen* v *SSHD* 2006 S.C. 555, per Lord Abernethy (delivering the Opinion of the Court) at 565.

(ix) Judicial review, on the other hand, remains an exercise of the supervisory jurisdiction of the court. It is neither an appeal nor a rehearing, and can only succeed where the petitioner is able to demonstrate one or more of the established grounds for review, notably illegality (in the sense that the decision under review is shown to have been in some way contrary to law) or irrationality (in the sense of the decision under review being shown to be one which no reasonable tribunal, correctly directing itself on the law and addressing the relevant facts, could properly have reached).

Submissions for the petitioner

[7] In the submission of counsel for the petitioner, the Tribunal had erred in holding that there was no real prospect of success in respect of his client's first and second grounds of appeal. These were stated in the following terms:

"1. At Para.66 the Adjudicator states the Appellant's fear of persecution by the Mujahideen is because they killed his father. The Adjudicator has focused on this reason. He has not given consideration to the

Appellant's evidence that he will also be persecuted by the Mujahideen for his own membership of the Communist party and for his service in the army of the former Communist government and also because of his father's position in the former Communist government.

2. At Para.70 the Adjudicator states that the Appellant did not suggest that his own activity as a full member of the PDPA would be likely to put him into conflict with the Mujahideen. This was not the Appellant's evidence."

Before the adjudicator, there was a body of evidence and submissions to the effect that, if now returned to Afghanistan, the petitioner was liable to be killed, not only by reason of his late father's position as a high-ranking figure in the former Communist government's military intelligence service (the Khad), but also of (i) his own full membership of the Communist party (the PDPA) and (ii) his own military training between 1989 and 1991 at a time when the former Communist regime was in conflict with the Mujahideen who were now in power. In this connection, counsel referred me to the petitioner's statement (Production 6/4) at pages 1 and 4; his further statement (Production 6/10) at pages 2 and 4; his interview record (Production 6/7) at answers 18-22, 52 and 55; his skeleton argument (Production 6/8) at paragraphs 5, 7 and 8; and the submissions made to the adjudicator as recorded at paragraphs 49-50 of Production 6/1. Reliance was also placed on the Home Office Guidance Note (Production 6/6), especially at page 5 of 9, and on the Afghanistan Country Assessment (Production 6/5) especially at paragraphs 6.3, 6.108, and 6.111 ff. These latter documents confirmed *inter alia* that those who were, or were perceived to have been, associated with the pre-1992 Communist regime "... might face serious problems on return", and further that "... there would be problems" for high-ranking

former Communist military officers (including former Communist regime security service - Khad members) and their families.

[8] Against that background, the petitioner was plainly founding on a number of factors which, in combination, placed him in danger from the Mujahideen if he were to be returned to Afghanistan. Actual or perceived association with the former Communist regime could obviously arise by reason of his late father's special position as a high-ranking member of the security service, but over and above that the petitioner's own membership of the PDPA, and his military service at a time when contemporaries were joining the Mujahideen instead, placed him at special risk.

[9] Accordingly, the evidential references to the PDPA and to military training were not simply "CV points" as counsel for the respondent suggested. They were essential parts of the petitioner's claim to a well-founded fear of persecution if returned to his country of origin, and they simply had not received adequate treatment from the adjudicator in his determination. The petitioner's membership of the PDPA was mentioned only in passing, and the military training was not mentioned at all.

[10] The petitioner's third ground of appeal was in the following terms:

> "3. At Para.71 the Adjudicator refers to Para.6.108 of the Country Report. This states that there would be problems for high-ranking Communist military officers and their families. Because this reference refers to 'problems' rather than 'persecution' the Adjudicator concludes that there is no real risk to the Appellant now. This conclusion is groundless and is contrary to the Country Report."

In addition, the adjudicator had discounted any risk to the petitioner by speculating as to the scope of the term "families" in paragraph 6.108, and by concluding, without having any basis for doing so, that family members of high-ranking military officers

who had been "killed many years ago" fell outwith the scope of the warning. The Country Assessment, especially at paragraphs 6.3 and 6.108, was supportive of the petitioner's own evidence in this regard, and the adjudicator was not entitled, by a process of what could only have been speculation or conjecture, to reach a contrary conclusion. There was no legitimate basis, in other words, on which the adjudicator had been entitled to disapply the reference to "families" to the petitioner's case, nor was it legitimate for the adjudicator to have read down the word "problems", which appeared widely throughout the document, as denoting something less than a relevant risk of persecution.

[11] Turning to what he described as his *Robinson* argument, counsel for the petitioner stressed the adjudicator's obligation to assess the evidence in the round, and to consider the cumulative effect of all of the factors relied on. Here, the adjudicator had failed to do so, and had instead (at paragraphs 58-71 of his determination) merely considered certain factors sequentially as if each stood in isolation. Since this approach was obviously at variance with the court's guidance in *Gnanan* and *Karanakaran*, the Tribunal should have picked it up and held that it represented a "strong prospect of success" on appeal. On a fair and anxious scrutiny of the available material, the petitioner was founding on a combination of his Tajnik ethnicity, his own membership of the PDPA and his military service (both known to members of the Mujahideen in power), and also his late father's high-ranking membership of the Khad. This combination should have been properly addressed before the petitioner's claim was determined, but that had not been done.

[12] For all of these reasons, the adjudicator had plainly fallen into error, and the Tribunal should have been scrupulous to ensure, before refusing leave to appeal, that no valid ground of challenge was open.

Submissions for the respondent

[13] In response, counsel for the respondent began by submitting that the petitioner had failed to overcome the significant hurdle of a "real" or "strong" prospect of success for the purposes of Rule 18(7) of the 2000 Rules and the petitioner's *Robinson* argument respectively. In particular, where the materials before the adjudicator showed the limited scope of the petitioner's own claim, it was not incumbent on the adjudicator or the Tribunal to rake through the documents to identify matters on which reliance might have been, but was not, placed. Under the *Robinson* argument in particular, it was only clear and obvious points affording a strong prospect of success on appeal which could be prayed in aid by the petitioner.

[14] At the time of the respondent's original refusal of the petitioner's application (Production 7/1), the claim was based on (i) Tajnik ethnicity and (ii) relationship to his late father. The statement 6/4 of process again relied on these grounds, and also on the deteriorating general situation in Afghanistan. While the petitioner's interview response (Production 6/7) admittedly contained answers regarding military training, these were, like earlier answers, in the nature of factual narrative only. So far, there was no reliance on PDPA membership or army service as alleged risk factors. The further statement (Production 6/10) similarly contained narrative elements regarding PDPA membership and military service, together with references to the general situation in Afghanistan, but sought to focus the petitioner's asylum claim on the risk of a pre-emptive strike by those who might fear revenge at his own hand for the violent death of his father. The skeleton argument for the petitioner was generally consistent with the above, relying on the revenge point, membership of the Communist party and the general security situation. Yet again, other than as a "CV point", there was no mention of army service.

[15] Against that background, the adjudicator had addressed all of the principal issues before him, and had been entitled to reach the conclusion he did. The *onus* of proof lay upon the petitioner; the assessment of evidence was a matter for the adjudicator; and it was not incumbent on either the Tribunal or this court to interfere unless some obvious error of law on the part of the adjudicator could be demonstrated. Indeed even an apparent error of law would be of no consequence unless it could be said to afford the petitioner a "real" or "strong" prospect of success on appeal. Here, the petitioner merely challenged the adjudicator's assessment of evidence on grounds which could give him no more than a theoretical possibility of succeeding, and accordingly the Tribunal had been entitled to refuse leave to appeal in this case. In his decision, the adjudicator had discussed and discounted each of the "common claims" identified in the Home Office Guidance Note (Production 6/6), and at paragraph 64 had correctly concluded that the appellant did not fall within any of the listed risk categories. In the end, as the adjudicator recognised, there was no convincing basis for the petitioner's claim to be at risk of persecution from the Mujahideen, either in his own evidence or from any other independent source. At paragraph 69, the adjudicator was entitled to conclude that there was no evidence of the petitioner's own activities putting himself at risk. Paragraphs 66-8 dealt satisfactorily with the position of the petitioner's father and the alleged revenge culture. Paragraph 71 correctly went on to consider paragraph 6.108 of the Country Assessment, making a legitimate assessment of that material and its potential relevance to the petitioner as an individual. At paragraph 72, it was recorded that the current situation in Afghanistan was generally conducive to a safe return for most asylum-seekers. In the whole circumstances the adjudicator's rejection of the petitioner's claim could not seriously be criticised.

[16] Applying the "real prospect of success" test, there was no substance in the petitioner's first and second grounds of appeal. Neither his own evidence, nor the objective country material, indicated any objective risk of persecution from past PDPA membership or military service, even assuming that these factors truly formed part of the petitioner's grounds of claim. The *onus* of proof being on the petitioner, he had simply failed to show that either factor gave rise to a well-founded fear of persecution if he were now to be returned to Afghanistan. Even taken alongside the petitioner's relationship to his late father, these factors had not been shown to heighten any relevant risk.

[17] Turning to the petitioner's third ground of appeal, the assessment of paragraph 6.108 of the Afghanistan Country Assessment was a matter for the adjudicator. Given the significant lapse of time since the death of the petitioner's father, and the less-than-explicit terminology of the paragraph in question, the adjudicator was entitled to hold that the petitioner had failed to bring himself within the relevant category of risk. No speculation or conjecture adverse to the petitioner had been involved. On the contrary, the adjudicator had legitimately reached a conclusion which was open to him on an assessment of the totality of the evidence.

[18] Finally, on the *Robinson* point, the approach of the Tribunal could not be criticised. The grounds of appeal did not make reference to any supposed additional risk arising from particular factors taken in combination where such factors individually had been assessed as lacking substance. While it was accepted that, judged by his determination, the adjudicator had not looked cumulatively at the factors before him, this was not sufficient to entitle the petitioner to succeed. Neither the adjudicator nor the Tribunal had been asked to undertake a cumulative assessment, or given any reason to suppose that such an exercise would be profitable. In any

event, the Tribunal were in no way bound to conclude that a cumulative assessment of the points now founded on by the petitioner would afford him a strong prospect of success in any appeal.

[19] For all of these reasons, according to counsel for the respondent, the petitioner had failed to make out any legitimate ground of review on which the Tribunal's decision should be reduced.

Discussion

[20] In my view this is a case which calls for the most anxious scrutiny, not least because of the significant number of years which have elapsed since the petitioner's claim for asylum was first made. There are, moreover, a number of points at which the adjudicator's treatment of the evidence before him might have been clearer or more explicit, and the respondent's counsel further conceded that a cumulative assessment of alleged risk factors did not *ex facie* bear to have been undertaken. As against that, the petitioner's grounds of claim appear to have fluctuated over time, with no consistent emphasis being discernible in his various statements, interview responses, skeleton arguments and grounds of appeal. In such circumstances, the task of the adjudicator was made even more difficult than it might have been, and in my view it is important that both his determination, and the later decision of the Tribunal, should be judged in that context.

[21] Furthermore, I am conscious that for the purposes of Rule 18(7) and the *Robinson* argument respectively, it was not open to the Tribunal to grant leave to appeal unless they were satisfied that the petitioner had a "real" or "strong" prospect of success, or that there was some other compelling reason why the intended appeal should be heard. Over and above that, I am conscious that at the stage of judicial

review this court is not conducting anything in the nature of an appeal or rehearing. Reduction of the Tribunal's decision could not be justified on the basis that this court, if left to itself, might possibly have reached a different conclusion. On the contrary, the decision is only challengeable on one or more of the established *Wednesbury* grounds of review.

[22] Against that background, while in my view counsel for the petitioner, in the course of a wide-ranging debate, did all that he possibly could to set up a case for review on his client's behalf, I am ultimately not persuaded that the Immigration Appeal Tribunal went wrong in refusing leave to appeal against the adjudicator's determination.

[23] Although the petitioner's military service undoubtedly receives a mention in some of the documents founded on in these proceedings, there is no evident attempt to promote such service as a material risk factor. In these circumstances I am unable to accept that it should have been accorded the degree of significance for which the petitioner's counsel contended. It was for the adjudicator to judge the weight to be attached to particular pieces of evidence adduced before him, and I am not persuaded that he has been shown to have gone materially wrong in his approach to this aspect of the matter. Similarly, where the petitioner himself did not initially seek to rely on his membership of the PDPA as an independent risk factor, and later treated it as, at best, a factor of lesser importance than the position of his late father as a high-ranking member of the former Communist security service, I do not consider that the adjudicator was under any obligation to give it any greater weight or significance than he did.

[24] As regards the adjudicator's treatment of paragraph 6.108 of the Afghanistan Country Assessment the real issue, as I see it, is not whether that paragraph *could*

have been interpreted in a manner potentially consistent with some of the petitioner's evidence. Such an approach would in my view tend to invert the *onus* of proof whereby it was for the petitioner to satisfy the adjudicator, even to the lower standard of proof which applies in asylum cases, that he in fact had a well-founded fear of persecution in the event of his now being returned to Afghanistan. Indications of a theoretical possibility of persecution affecting only some members of a given class or category cannot in my view avail an applicant, such as the petitioner, who in the adjudicator's judgment fails to bring himself as an individual within the ambit of the relevant risk.

[25] Here the petitioner's relationship to his late father, and the latter's high-ranking status within the former Communist security service, were directly addressed by the adjudicator in the course of his determination, and ultimately discounted as material risk factors for the petitioner at the present time. In reaching this conclusion the adjudicator was evidently influenced by the petitioner's own repeated explanation of the alleged revenge culture to which he sought to attribute his fear of persecution, as also by the passage of time since the petitioner's father was killed, and by the absence of any independent country information to confirm or support the alleged revenge culture on which the petitioner sought to found. In these circumstances, I am not persuaded that the adjudicator fell into any obvious error on this aspect of the case, or that (as urged upon me by counsel for the petitioner) he reached his conclusion by an illegitimate process of conjecture or speculation. On the contrary, it is in my view truly the petitioner who invites conjecture or speculation in an attempt to bring himself, without convincing evidence, into the potential sphere of risk discussed in paragraph 6.108. Having regard to the *onus* of proof in such matters, it was for the petitioner to satisfy the adjudicator that paragraph 6.108 applied to him as an

individual notwithstanding (a) the passage of time since his father's death, and (b) the "revenge culture" explanation which he himself repeatedly advanced. In concluding that the petitioner had failed to discharge that *onus*, the adjudicator was not in my view demonstrably guilty of any error of law, nor was it necessarily illegitimate for him to draw attention, in the same context, to the rather less-than-explicit language in which paragraph 6.108 was couched.

[26] As regards the petitioner's *Robinson* argument, I do not consider that that has been made out either. In the first place, notwithstanding counsel's concession recorded at paragraph [18] above, I am not convinced that the adjudicator in truth failed to ask himself the correct question, namely whether, on an assessment of the whole available evidence before him, the petitioner had made out a well-founded fear of persecution in the event of his being returned to Afghanistan. This (correct) approach seems to me to be generally reflected throughout the adjudicator's determination, and in my view it cannot legitimately be inferred from the terms of individual paragraphs that he failed to follow that approach through. It may be that certain matters were not explicitly spelled out but, as counsel for the petitioner very fairly accepted in the course of the debate, lack of explicit mention does not necessarily indicate that a trained and experienced adjudicator left them altogether out of account. Moreover the petitioner himself did not in his grounds of appeal seek to maintain that any given combination of factors, viewed cumulatively, should be seen as exposing him to a greater risk of persecution than the same factors viewed sequentially, and I can see no obvious reason why the Tribunal, or for that matter the adjudicator, should have taken a different view.

[27] With these considerations in mind, it seems to me that the Tribunal were entitled to refuse the petitioner's application for leave to appeal. In particular, they

were entitled to take the view that the adjudicator had not been shown to have gone wrong on any material aspect of the case, and that the conclusions which he reached were "... those which were open to him upon the totality of (the) evidence." Standing the latter observation, it does not seem to me that the breadth of the Tribunal's approach to this case can seriously be impugned. In any event, even if some error of law had been identified by the Tribunal, they were not in my view bound to conclude that it would have had a "real" or "strong" prospect of success on appeal, or that there was any other compelling reason why the appeal should be heard. In the end of the day I am unable to hold that the petitioner's grounds of challenge have any real substance, whether looked at individually or in combination, and on that basis I must now reject his claim for reduction of the Tribunal's decision.

Disposal

[29] For these reasons I shall sustain the respondent's first plea-in-law, repel the plea-in-law for the petitioner, and refuses the petition.