OUTER HOUSE, COURT OF SESSION

[2010] CSOH 170

P115/10

OPINION OF LADY CLARK OF CALTON

in the Petition of

M O (AP)

Petitioner;

For Judicial Review of a decision of the Secretary of State for the Home Department dated 26th September 2009 to refuse to accept that representations made on behalf of the Petitioner constitute a fresh claim for asylum

Respondent;

Petitioner: Byrne; Drummond Miller (for Livingstone Brown)
Respondent: MacGregor; C Mullin

21 December 2010

Summary

[1] This is an action of judicial review of a decision of the Secretary of State for the Home Department dated 26 September 2009 (6/1 of process) to refuse to accept that representations made on behalf of the petitioner constitute a fresh claim for asylum.

[2] The petitioner is a citizen of Iran. He arrived in the United Kingdom on 7 July 2008 and claimed asylum on 9 July 2008. That application was refused on 28 October 2008. An appeal was heard at Glasgow on 9 December 2008. By determination sent on 24 December 2008, the appeal was dismissed (6/3 of process).

[3] Thereafter further representations were made on behalf of the petitioner by letter from his agent dated 10 September 2009 (6/2 of process). The said letter included: a letter dated 13 August 2009 from Dr Ian Brown; a medical report from Mr Dignon MB, ChB, MRCP, FCEM, Dip.IMC, consultant in emergency medicine dated 28 August 2009; a letter from Mr Jalih, WPI - Organisation Award (UK) dated 19 February 2009; seven photographs with no date or location in which the petitioner is pictured demonstrating.

[4] The petitioner sought to have the claim reconsidered in terms of Rule 353 of the Immigration Rules. Rule 353 provides:

> "353. 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:
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> (i) had not already been considered; and
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> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection".

[5] An official acting on behalf of the respondent considered the letter and further information (6/2 of process) and issued the decision letter dated 26 September 2009 (6/1 of process). The said letter and further information were not therefor put before an Immigration Judge for consideration.

Submissions by counsel and case law

[6] There was no order for written submissions. I am grateful therefore to counsel who were able to produce outline submissions for me. Submissions on behalf of the petitioner, described as the skeletal argument, are 13 of process. Submissions on behalf of the respondent, described as outline note of argument, are 14 of process.

[7] The cases referred to by counsel for the petitioner included: *R (AK Sri Lanka)* v *SSHD* [2010] WLR 855; *IM* v *SSHD* [2010] CSOH 103*; ZT (Kosovo)* v *Secretary of State for the Home Department* [2009] 1 WLR 348; *TN (Uganda*) [2006] EWCA Civ 1807; *AK (Afghanistan)* [2007] EWCA Civ 535; *Abdul Hassan* 2004 SCLR 524; *SB (Risk on Return Illegal Exit)* Iran CG [2009] UKAIT 00053; *FK (Persecution - Refugee - Political Writer)* CG [2002] UKIAT 01328; *MT (Iran)* CG [2002] UKIAT 06995*; Francois Mibanga* [2005] EWCA Civ 367; *Damias* [1999] EWCA Civ 3000; *Alan* v *Switzerland* 1997 INLR 29.

[8] Additional cases referred to by counsel for the respondent included: *WM (DRC)* v *Secretary of State for the Home Department* [2006] EWCA; *FO* v *Secretary of State for the Home Department* [2010] CSOH 16; *LA Petitioner* [2010] CSOH 83; *SY Petitioner* [2010] CSOH 89; *JS, Petitioner* [2010] CSOH 75; *JBM* v *Secretary of State for the Home Department* [2009] CSOH 57; *Mibanga* [2005] INRL 377; *EB Kosovo* v *Secretary of State for the Home Department* [2008] 4 All ER 28; *Tanveer Ahmed* v *SSHD* [2002] UKIAT 00439; *SD* v *SSHD* [2007] CSOH 97; *RY, QA, ZA, & MA* v *SSHD* [2010] CSOH 65; *SS (Iran)* v *SSHD* [2008] EWCA Civ 310;

[9] Counsel agreed that it was important to consider the representations and the further documents and photographs in relation to Rule 353. There was some discussion in oral submission about the test which was to be applied and the role of the Court in reviewing the Secretary of State's decision in a Rule 353 case. There was

no dispute in this case that 353(i) of the Rule was satisfied. The issue in dispute focussed on Rule 353(ii).

Discussion

[10] In considering the legal approach which should be adopted by the Court in the present case, there was a difference in emphasis in submissions by counsel. Counsel for the petitioner submitted that *IM*, was a useful summary of the relevant authorities and represented the current approach adopted in Scotland. He submitted that the task of the Court is to review on irrationality grounds the decision of the Secretary of State taking into account the letter and additional information. If the Court's decision, applying "a low test", is that there is a realistic prospect of success, the decision of the Secretary of State is irrational in holding otherwise.

[11] On behalf of the respondent, counsel accepted that the standard to be applied is a modest one. Counsel for the respondent submitted however that the Lord Ordinary in *IM* did not conclude that the Court must make its own assessment. The Lord Ordinary concluded against the background of the facts in *IM* that the Court may make its own assessment. Counsel for the respondent submitted that the approach adopted by the Lord Ordinary in IM is not necessarily appropriate in all Rule 353 cases. The Court is involved in a judicial review process which is restricted to a review taking into account the material before the Secretary of State. In circumstances where the facts are disputed, as in the present case, the Court is not well placed to substitute its own decision. Counsel emphasised that the Court's task is a review process not a *de novo* appeal. He accepted that fresh representations require to be considered in the round. He submitted that the findings of the Immigration Judge are always relevant and should be given appropriate weight.

[12] Detailed consideration of the legal approach required in the application of Rule 353 was narrated in *WM (DRC)* v *SSHD.* This case helpfully sets out the task of the Court in paragraphs 8 to 11 as well as considering the task of the respondent in paragraphs 6 and 7. Lord Justice Buxton analysed the role of the Court and concluded:

> "the determination of the Secretary of State is only capable of being impugned on *Wednesbury* grounds....Whilst, therefore, the decision remains that of the Secretary of State, and the test is one of irrationality, a decision will be irrational if it is not taken on the basis of anxious scrutiny. Accordingly a Court when reviewing a decision of the Secretary of State as to whether a fresh claim exists must address the following matters....First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return....The Secretary of State of course can, and no doubt logically should, treat his own view of the merits as a starting point for that inquiry; but it is only a starting point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind. Second, in addressing that question, both in respect of the evaluations of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? If the Court cannot be satisfied that the answer to both of these questions is in the affirmative, it will have to grant an application for review of the Secretary of State's decision".

[13] In *IM*, paragraphs 8 to 11, the Lord Ordinary makes reference to some recent cases which he considers cast some doubt on the observations of Lord Justice Buxton at paragraph 18 of *WM (DRC)*. I do not consider however that the case law referred to casts doubt on the analysis made by Lord Justice Buxton in the passages which I have quoted. I accept that analysing the Court's task of judicial review in relation to Rule 353 may lead to difficulties if one tries to analyse the task in terms of classic *Wednesbury* grounds. Nevertheless the approach of anxious scrutiny appears to be well settled and understood in immigration cases. I refer to the discussion by the Lord Ordinary in *LA* Petitioner at para. 14. I consider that the Court has to make a decision, applying anxious scrutiny, and come to a view as to whether a reasonable Secretary of State could have concluded that there was no realistic prospect of an immigration judge applying the rule of anxious scrutiny thinking that the applicant would be exposed to a real risk of persecution on return having considered the submissions and material. It is on that somewhat complicated basis that I have tried to approach what I consider to be the critical issue in this case.

[14] One might also describe the exercise to be carried out by the Court as artificial in a judicial review context in that if the Court is applying anxious scrutiny to applying Rule 353 to a particular set of facts and circumstances, it is perhaps difficult to imagine how the Court could conclude that the Secretary of State and the Court could come to a different decision applying the same test. In the context of this exercise, it may be that the Court should bear in mind that there has often been a lengthy and detailed process of decision making. By remaining conscious of that the Court may avoid falling into the error of starting afresh and coming in effect to a *de novo* decision.

[15] Let me now consider whether the respondent applying the correct legal approach was entitled to reach the conclusion she did in relation to the submissions and further information provided on behalf of the petitioner.

The decision letter

[16] In paragraph 6 and 7 of the decision letter, consideration is given to the legal test and I am satisfied that the correct legal approach was identified. But the mere reference to the correct legal test and the formula of "anxious scrutiny" by the decision maker is not in my opinion sufficient. It is necessary in my opinion to consider in more detail the way in which the new information was considered and dealt with.

[17] The decision letter does make specific reference to the medical reports. I consider that the letter from Dr Brown is descriptive and historical. Counsel for the respondent, at some parts of his oral submission, seemed to suggest that certain inferences against the petitioner might be drawn from that letter. He referred in particular to the conclusion that "there are no other medical problems of note". I do not accept that submission. The GP was plainly not in a position to give an opinion about injuries and scars and he advised the petitioner to obtain expert opinion. This is not a case in which it is submitted on behalf of the respondent that the petitioner had no injuries or scars when he consulted with the GP. The petitioner offered and attempted to display marks and results of injury to the immigration judge in December 2008.

[18] It is plain that the decision-maker has read in full the medical opinion from Dr Dignon dated 28 August 2009. The decision maker notes correctly that there is a potential inconsistency in the summary of the report compared with the full text of the medical opinion. I consider that in a situation where the decision-maker and the Court

are to approach the case with anxious scrutiny, it would be unacceptable to rely on the summary only. It is plain from the text that Dr Dignon has considered in detail the various injuries and formed a view taking into account the Istanbul Protocol (7/1 of process). I consider that the opinion of Dr Dignon, properly interpreted, without the benefit of oral evidence, should be read taking into account the body of the text and not restricted to the summary. More detail is given in the text than in the summary. In my opinion, the decision maker in paragraph 15 of the decision letter (6/1 of process) correctly decided to approach the matter on the basis of the full content of the medical opinion and not the summary.

[19] The new information provided included the report and opinion from Mr Dignon. He is a highly qualified consultant. In my opinion, his report and opinion relate to the core issue in the case as to whether or not the petitioner was tortured in prison in Iran as he states. I consider that the medical report is potentially powerful evidence that the petitioner suffered physical ill-treatment and injury in a manner consistent with his account. The report and opinion of Dr Dignon is not limited to expressing an opinion about the various injuries which he saw and described on the petitioner's body. He also expressed his opinion that the petitioner "was an accurate historian who gave a clear and consistent account of his physical and psychological symptoms. He made no attempt to exaggerate his symptoms. He has a number of scars on his body which were sustained through simple accidents and he made no attempt to attribute these to his experiences in detention.... The scars identified on his body were consistent with the history given". Dr Dignon also commented on the petitioner's psychological and emotional difficulties.

[20] The Immigration Judge who refused the petitioner's appeal stated in paragraph 34 (6/3 of process):

> "The appellant has claimed that when he was kept in custody, he was beaten and tortured and that his arm was torn apart with a sharp object. However there is no medical report before me and I am asked to accept the appellant's word alone as to the source of the injuries. Mr Mackay asked the appellant to show his arm to me at the hearing and the appellant indicated that he needed 72 stitches. However, given my finding on this appellant's credibility, I am not prepared to accept that any injuries which he might have, have been caused by ill-treatment or torture on account of his membership of the WCPI.".

The decision of the Immigration Judge proceeded on the basis that the appellant was incredible. The Immigration Judge did not appear to be particularly interested in what marks of injury were on the appellant's body and what might explain them.

[21] I consider that in a case where a person claims physical ill-treatment and/or torture, it is very important to consider whether or not the person has in fact sustained such ill-treatment. The marks of injury on the person's body may assist with that decision and a supportive medical opinion may be very powerful evidence. If a person has sustained such injury and trauma, it may also help in assessing credibility to bear that in mind. That may be helpful, for example, in assessing whether the account given by the petitioner is credible and reliable. It may also be helpful in assessing what weight to give to any perceived inaccuracies or changes or omissions in an account. The effects of a traumatic experience may influence how a witness gives an account. That may be a relevant consideration even if there is no formal diagnosis of post traumatic stress. One does not necessarily need a full psychological and psychiatric assessment of post traumatic stress to draw such inferences. Such an assessment may rarely be available for many reasons including shortage of resources.

[22] In the present case the Immigration Judge rejected the credibility of the petitioner and explained the reasons in paragraphs 27 to 37 of 6/3 of process. These reasons were not founded on issues relating to the injuries and marks on the appellant's body but related to other matters.

[23] I consider that I am entitled to look at the reasons given by the Immigration Judge in considering the approach taken to credibility of the petitioner. This exercise does not appear to have been carried out on behalf of the Secretary of State. There is no assessment of the reasons given by the Immigration Judge in the decision letter 6/1 of process despite the fact that said decision letter stated that standing the conclusions of the Immigration Judge about credibility, the new evidence would not be treated as a fresh claim in terms of Rule 353(ii). In my opinion a consideration of matters "in the round" should take into account in a case such as this, the reasons given for rejecting the petitioner as credible and reliable.

[24] The first reason given by the Immigration Judge is dealt with in paragraphs 28 and 29 of the Immigration Judge's decision (6/3 of process). "At question 116, the petitioner said that, apart from distributing leaflets, he had not carried out any other activities for the party. The petitioner stated to the Immigration Judge that he had attended meetings." The Immigration Judge describes this as "a change of story". The Immigration Judge then does a linguistic analysis of his understanding of the word "activities". He considers that this word clearly embraces "physically attending at meetings where ideology is discussed and views are exchanged". I disagree with his analysis. At the very least the question appears to be ambiguous or open to a number of different interpretations.

[25] In paragraphs 30 and 31, the Immigration Judge stated that the petitioner's answer to question 13 was "evasive". Question 13 states: "What did you hope to

achieve by joining the Communist Party?". I consider that question 13 is ambiguous and I am not surprised that the petitioner replied "I don't know what you mean". Question 13 is not an open question but includes assumptions which may not be relevant in a situation where a person may have no hope of achieving anything because persecution may be the result. I consider that there is a significant difference between the information referred to in paragraph 30 and knowledge of the Party. I do not find the reasoning in paragraph 31 compelling.

[26] In relation to paragraph 32, the two statements referred to by the Immigration Judge do not appear to me to be inconsistent. It is not clear whether this matter was ever put to the appellant for clarification.

[27] Paragraph 33 reflects the view of the Immigration Judge but the reasoning on which he reaches that view is not plain. It is also unclear whether the appellant had any practical opportunity to comment in the limited time span permitted.

[28] Paragraph 34 is the only paragraph in which the Immigration Judge deals with what I regard as the central issue to the case. The Immigration Judge does not make any finding as to what injuries the petitioner had. He does not even record whether he saw an injury to the petitioner's arm. The Immigration Judge comments on the absence of a medical report which suggests that he might have found that of assistance. He does not form any view or consider any inference from the injuries as to whether the petitioner is to be believed that he has been tortured and physically abused. That might be of considerable assistance in reaching a conclusion as to whether the petitioner is credible and reliable. Instead the Immigration Judge appears to conclude from other peripheral matters that the petitioner is not credible and therefore concludes that he is not credible in relation to the critical issue.

[29] Paragraph 36 does not assist me. It is not clear whether the Immigration Judge adopts the respondent's reasons and if so for what reason.

[30] With reference to the reason given in paragraph 37, I do not consider that it is extremely unlikely that in situations involving interrogation and ill-treatment in custody that medical intervention may be permitted to enable the interrogation to continue at a later stage. If the Immigration Judge is relying on some particular country of origin information in relation to paragraph 37 in support of his conclusion, that is not specified.

[31] In the decision letter of 26 September 2009 (6/1 of process) consideration is given to the credibility of the petitioner in paragraphs 17 to 19. No analysis of the reasons for the decision-making of the Immigration Judge is carried out to see what weight might be given to the decision on credibility. In paragraph 19, it is concluded that "it is clear that there were significant and serious doubts as to the core aspects of your client's claim. Medical evidence you have submitted has been considered in the round, as part of all the material previously considered; it is not accepted that it creates a realistic prospect of success for your client. It is not accepted that an Immigration Judge applying the rule of anxious scrutiny of the material, and of all the previously considered material, would reach a finding that there is a real risk of your client facing persecution or serious harm were he to be returned to Iran".

[32] In effect therefore the decision maker, on behalf of the Secretary of State, considered that this evidence which relates to the core issue of ill-treatment and the appellant's account is not worth sending to another Immigration Judge because of significant and serious doubts about the credibility of the petitioner. That decision is made without any analysis of the reasons given by the Immigration Judge or

considering the impact that the medical report might have in relation to credibility and reliability issues.

[33] I acknowledge that the Immigration Judge making the decision recorded in 6/3 of process did not have the advantage of the medical examination and opinion in relation to the petitioner. Had that been available, the approach to the assessment of credibility and reliability would in my opinion necessarily have been different. The Immigration Judge would have been able to use the medical evidence in assessing credibility and reliability and that might have led to a different conclusion. In stating that, I do not mean to criticise the Immigration Judge as that evidence was not before him. The evidence however has been placed before the respondent. I do not consider that such evidence is relevant only if it is "diagnostic" in terms of the Istanbul Protocol. In my opinion, the respondent has failed to take into account the effect such evidence might have in relation to credibility and reliability particularly in a case where the reasons given by the Immigration Judge about credibility and reliability are far from persuasive. In these circumstances I do not find this a difficult case to decide. I consider that the evidence submitted on behalf of the petitioner is important and significant and bears upon the core issue. For the reasons given I consider that the decision in the letter 6/1 of process is unreasonable and irrational.

[34] I also note in passing that the type of information which has been presented in this case namely medical evidence supportive of the petitioner's account of torture in custody is recognised in the respondent's guidance as the type of information which might give rise to a fresh claim. That does not mean of course that such evidence would automatically or inevitably do so. Much will depend on the circumstances of individual cases. Medical reports from independent well qualified doctors from which

physical torture may be inferred and which report on the physical signs of such torture should in my opinion always be given considerable weight.

Other information submitted

[35] I am of the opinion that the medical information should not be considered in isolation from the other information submitted on behalf of the petitioner. I accept that may be done for the purpose of discussing the issues. The decision maker in dealing with the new information does deal with the issues separately in 6/1 of process in paragraphs 20 to 24 and 25. I make no criticism of that. I consider however that material which on its own may be insufficient may, if taken cumulatively "in the round", lead to a different conclusion. In this case, had it not been for the medical report and opinion of Dr Dignon, the other information and submissions would not persuade me to find in favour of the petitioner. I consider that the reasons given in paragraph 2 of the outline note of argument by counsel for the respondent (14 of process) are well founded, with one exception. The exception relates to the interpretation of the letter dated 19 February 2009. That letter in my opinion is capable of a wider supportive inference that the petitioner was involved in *WPI* activities in Iran. The additional information "taken in the round" may bear upon reliability and credibility.

Decision

[36] I am satisfied for the reasons given that the petitioner should succeed in this action. I therefore sustain the plea-in-law for the petitioner and repel the pleas-in-law for the respondent.