OUTER HOUSE, COURT OF SESSION

[2008] CSOH 115

P815/08

OPINION OF LORD BRODIE

in the Petition of

M G (Assisted Person)

Petitioner

For

Judicial Review of a decision of the Secretary of State for the Home Department dated 14 March 2008 to refuse to treat the petitioner's representations as a fresh claim for asylum under Rule 353 of the Immigration Rules

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Petitioners: Stobart; McGill & Co
Respondent: Lindsay; Office of the Solicitor to the Advocate General

13 August 2008

Introduction

[1] The petitioner is M G. She is married and the mother of a child. She is designed in the petition as currently detained in Dungavel Detention Centre. The respondent is the Secretary of State for the Home Department. The petitioner seeks judicial review of a decision of the respondent contained in letter dated 14 March 2008 (number 6/2 of process) refusing to treat submissions made on her behalf in a letter from the petitioner's solicitors dated 13 March 2008 (number 6/1 of

process) as a fresh claim for asylum. The petitioner's contention in her petition is that the respondent's decision was made under error of law. The declarator sought in the petition however goes somewhat beyond that in that the petitioner seeks to have it declared that in reaching the decision the respondent acted unlawfully *et separatim* acted in a manner that is unreasonable and irrational *et separatim* in breach of section 6 of the Human Rights Act 1998.

[2] The petitioner is a national of Algeria. She arrived in the United Kingdom on 10 September 2007. She immediately made an application for asylum on the basis of her fear of persecution in Algeria by Islamists associated with the *Groupe Islamique Arme*, or GIA. The application was refused. The Reasons for Refusal letter is dated 30 October 2007. The petitioner appealed the decision that she was not entitled to asylum. The appeal was heard before an immigration judge at Glasgow on 7 December 2007 and refused in terms of Determination and Reasons prepared on 12 December 2007 (number 7/2 of process) (the "Determination"). In the petition it is averred that the petitioner's appeal was dismissed on 25 January 2008. This would appear to be an error.

[3] The petitioner made an application under section 103A of the Nationality, Immigration and Asylum Act 2002 for reconsideration of the dismissal of her appeal in terms of the Determination. This was refused by a senior immigration judge in terms of a determination dated 7 January 2008. The petitioner made a further application for an order for reconsideration to the Court of Session. This application was refused by Lord Carloway on 8 February 2008 for the reasons given in the Note, number 7/4 of process.

[4] On 13 March 2008 the petitioner's solicitor wrote to the respondent asking for new evidence to be taken into account and that the letter be treated as a fresh claim for

asylum. The new evidence took the form of three documents: a Terrorist Declaration, written in something resembling French, bearing to be issued by Police Headquarters, Algiers, and recording a complaint by a member of the petitioner's family of two visits by groups of armed persons looking for the petitioner and her husband; a brief affidavit written in French and signed by a number of the petitioner's friends and family declaring that the petitioner and her husband "are threatened in Algeria because of her position at the Ministry"; and a statement confirming a complaint made by G N on 26 December 2007 in relation to the first of the two visits by groups of armed persons, written in what I assume to be Arabic and bearing the stamp of the Directorate of Algerian Police.

[5] In response to the claim made by letter of 13 March 2008, an official of the Borders and Immigration Agency, acting on behalf of the respondent, made a decision, the terms of which were contained in a letter of 14 March 2008 (number 6/2 of process) sent to those acting for the petitioner. Reference was made in that letter to the three documents which had been presented as new evidence and to Immigration Rule 353. The letter included the following paragraphs:

> "Your client is said to be in fear of returning to Algeria and you have submitted further documentation in support of this claim. This includes a translated report by the Police authorities in Algiers dated 11 March 2008 and an alleged complaint made to the police in Algiers by a relative of your client on 26 December 2007. The submission of these documents must be set against the findings made by the immigration judge who found your client's credibility and claim to be wanting. Your attention is drawn to the case of *Ahmed Tanveer* [2002] Imm AR 318 ...In asylum and human rights cases it is for an individual claimant to show that a document on which he seeks to rely can be

relied upon. However, even if the documents are accepted as valid, they imply a reliance on legal processes which represent a framework for legal protection. Taking all of your client's evidence in the round, including her ability to not provide a truthful account in her appeal, it is not considered that reliance should properly be placed on these documents.

I reiterate that the decision to refuse your client asylum on 30 October 2007 was upheld by an Immigration Judge who in making her determination did not find your client to be credible. The Immigration Judge found that there were a number of discrepancies in your client's account, and stated at paragraph 56 of her determination: 'However, the Appellant has constructed a story around an incident but that story which as Dr Mackay characterised was an evolving one and a living one.' The immigration Judge went onto to dismiss your client's claim on asylum and human rights grounds.

It remains the case that your client has a viable internal flight option and can avail herself of the sufficiency of protection which exists and is provided by the Algerian authorities. It is evident that your client is seeking to frustrate the removals process by repeating his [sic] asylum claim. Taking all the above into consideration, your representations are rejected and the decision to refuse the earlier asylum claim on 30 October 2007 is maintained."

[6] The letter then turned to a consideration as to whether the removal of the petitioner and her family from the United Kingdom would result in a breach of article 8 of the European Convention on Human Rights before, in its pre-penultimate paragraph, paraphrasing paragraph 353 of the Immigration Rules and then continuing in its penultimate paragraph:

> "We are not persuaded that the submissions that you have made, taken together with previously considered material, create a realistic prospect of success. Accordingly, we are not prepared to reverse the decision of 30 October 2007. Because we have declined to reverse the decision on the earlier claim and have determined that your submissions do not amount to a fresh claim, your client has no right of appeal against this decision from within the United Kingdom."

[7] It is that decision that the petitioner seeks to reduce by way of this application for judicial review.

[8] At the hearing before me the petitioner was represented by Miss Alice Stobart, Advocate. The respondent was represented by Mr Mark Lindsay, Advocate. Miss Stobart's motion was for reduction of the decision. Mr Lindsay's motion was for dismissal of the petition

Immigration Rule 353

[9] The Immigration Rules are made by the respondent in accordance with sections 1 (4) and 3 (2) of the Immigration Act 1971 for the guidance of those entrusted with the administration of immigration control. One such person is the official who made the decision intimated by letter dated 14 March 2008. Rule 353 is in the following terms:

> "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) has 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."

Submissions

Submissions for the petitioner

[10] Miss Stobart submitted, under reference to what appears in paragraphs [6], [7], [11] and [24] of the judgement of Buxton LJ in the cases reported as *WM (DRC)* v *Secretary of State for the Home Department* [2007] Imm AR 337, that the respondent (through her official) had applied the wrong tests in coming to a view as to the reliability of the information contained in three documents presented as new evidence in support of the submissions made on behalf of the petitioner, and in determining whether the submissions amounted to a fresh claim in terms of Rule 353. There was no proper basis for concluding that the documents were other than genuine. What the respondent should have done but did not do was to ask the question: if an independent immigration judge took the view that the documents were genuine whether there was a realistic prospect of the judge, applying the rule of anxious scrutiny, thinking that the petitioner would be exposed to a real risk of prosecution on return to Algeria. The respondent had not, as she should have done, evaluated the documents having regard to the fact that they appeared to be stamped or sealed, emanated from Algeria, and included an affidavit from the petitioner's friends and family, and considered their contents. The respondent should then have considered what appeared and might be inferred from the contents of the documents together with what had been found by the immigration judge in the petitioner's appeal, which included the fact that she had been assaulted. It was not for the respondent to make a judgement on the credibility of the

new material, unless it was possible to say that no person could reasonably accept it as believable: *R (on the application of TN) (Uganda)* [2006] EWCA Civ 1807 at paragraph 10. The consideration of whether submissions amounted to a fresh claim was a decision of a different nature to that of an appeal against refusal of asylum, it required a different mindset, only if the respondent can exclude as a realistic possibility that an independent tribunal (in the person of an immigration judge) might realistically come down in favour of the applicant's asylum or human rights claim, can she deny the applicant the opportunity of consideration of the material: *AK (Afghanistan)* v *Secretary of State for the Home Department* [2007] EWCA Civ 535 at paragraphs 22 to 24 and 26. In making the decision intimated by letter of 14 March 2008 the respondent had not followed that approach and the decision accordingly fell to be reduced. As far as the availability of effective protection from the petitioner's own state was concerned that was an issue to be dealt with by the immigration judge when considering the petitioner's fresh claim, on the basis of such material as was then available. It was not clear from the letter of 14 March 2008 what view had been taken about the sufficiency of protection but it was not for the respondent, in circumstances where, as here, anxious scrutiny had not been applied, to give any weight to the contents of documents with a view to assessing the extent of the protection that might be available to the petitioner. For an example of a case where even the protection available from the authorities of Western European states (the United Kingdom and the Irish Republic) had not been taken to be sufficient, Miss Stobart referred to the decision of the Supreme Court of Canada in *Canada (Attorney-General)* v *Ward* [1997] INLR 42.

Submissions for the respondent

[11] Mr Lindsay moved me to uphold the first plea-in-law for the respondent and to dismiss the petition. In support of that motion he began by reminding me, under reference to *BS (Kosovo)* v *Secretary of State for the Home Department* [2007] EWCA Civ 1310 and *Miller Petitioner* [2007] CSOH 86, that the approach of the court on judicial review is that the discretionary remedy of reduction will not be granted where no useful object would be achieved thereby. Thus an error of law by a decision-maker will not justify reduction of his decision if, in the absence of error, the same decision was inevitable. In other words if there was only one possible answer then it is irrelevant if the decision-maker has come to that answer for the wrong reason. It was, however, Mr Lindsay's primary submission that the respondent had made no error in refusing to treat the petitioner's representations as a fresh claim. The respondent had concluded that reliance should not be placed on the new documents but had considered the representations on the basis that they were valid, viewed them as indicating the existence of a framework for legal protection and pointed to the provision of protection provided by the Algerian authorities as negating the petitioner's asylum and human rights claims. Mr Lindsay reminded me that a claim will only be available under the Refugee Convention or article 3 of the European Convention on Human Rights where the claimant's state fails to provide reasonable protection. Reasonable protection did not require an absolute guarantee of safety. In the present case the petitioner's claim had been refused by reason of , *inter alia,* the availability of state protection. Submission of the additional material had only, as Mr Lindsay put it, made it worse for the petitioner in that it tended to support the view that state protection was available. At best for the petitioner there was nothing in the new material to suggest that the Algerian authorities were unwilling or unable to provide protection.

[12] Mr Lindsay took me to the previous considerations of the petitioner's claim, first in the respondent's letter of 30 October 2007 and then in the immigration judge's Determination. Taking the petitioner's claims at their highest, the respondent, at paragraphs 27 onwards of the letter of 30 October 2007 and particularly paragraphs 30 and 31, found there to be a sufficiency of protection in Algeria from, *inter alia*, the GIA. The immigration judge had considered the issue, particularly at paragraphs 45 and 50 of her Determination. At paragraph 50 she finds the level of protection afforded to the petitioner by the Algerian authorities to be adequate under reference to the apposite paragraph in the decision of the Asylum and Immigration Tribunal in *IM (Sufficiency of Protection) Malawi* [2007] UKAIT 00071. There it is explained that reasonable steps to prevent persecution by operating an effective legal system will generally, not in necessarily in every case but generally, amount to the provision of adequate protection. Mr Lindsay then referred to *R (Bagdanavicius)* v *Home Secretary* [2005] 2 AC 668 at 678F in order to remind me that where it is said that a well-founded fear of persecution emanates from non-state agents, the asylum seeker must establish not merely the risk of severe ill-treatment but also that the home state was unwilling or unable to provide a reasonable level of protection from it. In this case, he submitted, there was nothing in the decision letter to suggest that the wrong test had been applied, but in any event, even if it had, the decision of the respondent had been inevitable, given the conclusion reached by the immigration judge on the sufficiency of state protection in Algeria. It was not fatal to the respondent's decision that the decision letter of 14 March 2008 had used the expression "no reasonable prospect of success" without specifying that what was relevant was a reasonable prospect that an immigration judge would think that there was a risk of persecution or contravention of Article 3 rights. There was no question of the respondent's decision

being irrational in a *Wednesbury* sense. He referred to *R (Mustafa Taskin)* v *Secretary of State for the Home Department* [2008] EWHC 256 (Admin), *R (Erdogan)* v *Secretary of State for the Home Department* 8 February 2008, *R (Bashir Jumha Aliabo-Julledah)* v *Secretary of State for the Home Department* [2007] EWHC 2910 (Admin). Returning to the point with which he had begun, again referring to *Miller Petitioner supra*, at paragraphs [11] and [19], he concluded by emphasising that there had been nothing before the respondent to indicate that the Algerian authorities were unwilling or unable to provide reasonable protection.

Discussion

[13] Miss Stobart, on behalf of the petitioner, identifies two instances of what she characterises as error of law on the part of the respondent in rejecting the representations made in the letter of 13 March 2008. Mr Lindsay disputes that either instance amounts to an error but if it is it does not matter because nothing was put before the respondent to displace the immigration judge's conclusion that reasonable protection was available from the Algerian authorities. Miss Stobart's riposte to that last point is that coming to a view on sufficiency of protection, if that is what the respondent did, is for the immigration judge when considering the fresh claim, not for the respondent when considering whether representations amount to a fresh claim.

[14] There is no dispute between Miss Stobart and Mr Lindsay as to what is the applicable law. That is set out in paragraph [11] of the judgement of Buxton LJ in *WM (DRC)* v *Secretary of State for the Home Department supra*. Subject to a pleading point, which I will come to, the issue as to whether the respondent is to be taken to have made an error in law depends on how the not entirely felicitously expressed letter of 14 March 2008 is read.

[15] Referring to the material sent as part of the submissions made by letter of 13 March 2008, the respondent concluded that "it is not considered that reliance should properly be placed on these documents." I do not regard this component of the respondent's decision to be satisfactory. First of all I am uncertain as to precisely what it means. As far as the two police reports are concerned, the respondent may be saying that she doubts the authenticity of what, *ex facie*, are official documents or she may be questioning the accuracy of the information provided to the police by the person who made the complaints which were the subject of the two, on this alternative, genuine reports, or she may not be committing herself to either of these possibilities but nevertheless is not persuaded of their reliability. Whichever of these possibilities was in the mind of the respondent I do not find sufficient supporting reasoning in the letter. All that is offered is: "Taking all of your client's evidence in the round, including her ability to not provide a truthful account in her appeal..." The expression "her ability to not provide a truthful account" is something of a curiosity but taking it to mean "inability to provide a truthful account", it is difficult to see how that factor, if accurate, provides a reason for doubting either the authenticity of a report or the honesty of the informant on the basis of whose information the report was compiled where the informant is someone other than the petitioner. Similarly, I fail to see how an adverse assessment of the credibility of the petitioner provides a basis for doubting the credibility of those who, on the face of it, signed the affidavit. This would be my view where the petitioner had indeed been found not to be credible, which is how the respondent understood matters. That is not quite how I would understand the Immigration Judge's rather opaque sentence in paragraph 56 of her Determination: "...the Appellant has constructed a story around an incident but that story which as Dr Mackay characterised was an evolving one and a living one" but even if that

sentence is to be understood as a finding that the petitioner lied, or at least could not be believed, when giving at least some parts of her account, I do not find that as a reason to reject documents emanating from other sources and supporting her assertion that she was a target for persecution, as being false. I agree with Miss Stobart that, as far as appears from the letter of 14 March 2008, there was no proper basis for concluding that the documents were other than genuine. This, however, is where what I have described as the pleading point emerges. I would regard this component in the respondent's decision as defective for want of adequate reasons. That, as Mr Lindsay pointed out, is not a ground pled in the petition. Miss Stobart may have sought to get round this by suggesting that the respondent has not followed the approach commended by Buxton LJ in *WM (DRC)* v *Secretary of State for the Home Department supra* at 340 (paragraph [6]) where he said this:

> "To set aside one point that was said to be a matter of some concern, the Secretary of State, in assessing the reliability of new material, can of course have in mind both how the material relates to other material already found by an [immigration judge] to be reliable, and also have in mind, where that is relevantly probative, any finding as to the honesty or reliability of the applicant by the previous [immigration judge]. However, he must also bear in mind that the latter may be of little relevance when, as is alleged in both of the particular cases before us, the new material does not emanate from the applicant himself, and thus cannot be automatically suspect because it comes from a tainted source."

[16] I rather doubt whether that, properly speaking, falls to be regarded as a rule of law. However, I would agree with Miss Stobart that in the present case the respondent does seem to have fallen into the potential error identified by Buxton LJ in the second

of the two sentences quoted above. Important as I consider it to be that the points to be made in an application for judicial review are clearly identified in the petition, in all the circumstances of the present case I am prepared to accept Miss Stobart's submission that the respondent's rejection of the new material as unreliable was in error. This does not appear to me to be a case such was posited by Collins J in *Rahimi* v *Secretary of State for the Home Department* [2005] EWHC 2838 where it can be said that the information in the material was intrinsically incredible or that, looking at the whole case, it could not reasonably be believed. Nor, as I have endeavoured to explain, is it a case where it can be said that the documents are clearly not genuine in the sense of obviously not emanating from their *ex facie* authors. Accordingly, whether the respondent falls to be regarded as having fallen into error of law, as having failed to give proper reasons or as having acted irrationally, her decision insofar as based on her conclusion that reliance should not be placed on the documents is unsustainable. That, however, is not an end to the matter. The decision letter includes the sentence: "However, even if the documents are accepted as valid, they imply a reliance on legal processes which represent a framework for legal protection." As I understood him, Mr Lindsay pointed to that sentence as indicating that the respondent had considered the submissions made on behalf of the petitioner on the hypothesis that documents were genuine and information contained within them accurate. Agreeing with him up to a point, I also understood Miss Stobart to read the decision letter as including a consideration of the submissions, albeit not by reference to the correct test. That the respondent did in fact consider the submissions on the hypothesis that the documents were genuine and accurate may indeed be the proper conclusion, given the terms of the penultimate paragraph of the decision letter, following as it does a paraphrase of Rule 353. I am not be inclined to differ with

counsel on that. But if that is so I am not persuaded that the respondent can be shown to have erred by failing to apply the correct test as explained in *WM (DRC)* v *Secretary of State for the Home Department supra* at 341 to 342 (paragraphs [11] and [12]). I recognise the distinction, emphasised by Miss Stobart, between the Secretary of State forming a favourable view on the merits of the claim, as enhanced by the new material, and the Secretary of State forming a view as to the realistic prospect that an immigration judge might form a favourable view of the claim, having given the matter anxious scrutiny. I accept that the decision is stated relatively briefly without the approach which has been followed having been spelled out in the way one might anticipate in a judicial opinion. Nevertheless, I would regard it to be clear that what the respondent had in view was realistic prospect of success before an immigration judge. I see it as difficult to interpret "realistic prospect" as other than a reference to a hypothetical future decision by a different decision-maker. Agreeing with Mr Lindsay, I do not regard the respondent's conclusion as *Wednesbury* unreasonable, given the material before her.

[17] Mr Lindsay founded upon the fact that there had been nothing in the new material to displace the finding of sufficient state protection by the immigration judge. I understood him to take that as a point available to him even if I was against his primary submission that the respondent made no error in her decision. From my reading of the decision letter, assuming that the respondent did indeed consider the submission on the basis that the documents were genuine, which is how parties encouraged me to approach the matter, it not clear to me that the respondent took the availability of state protection to be a free-standing point. Rather, I see her as having rolled it up as part of her assessment of "the submissions ...made". Be that as it may, I take it to be clear that the respondent did consider the availability in Algeria of "a

framework of legal protection" as being relevant to her conclusion that the submissions made on 13 March 2008, together with the previously considered material did not create a realistic prospect of success. Agreeing with Mr Lindsay, I see it as reason not to grant decree of reduction of a decision simply because of some flaw in the decision-making process if the final decision was inevitable, irrespective of the flaw. I take as accurate the summary of the law as to risk of persecution or of article 3 ill-treatment contained in the judgement of Auld LJ in the decision of the Court of Appeal in *R (Bagdanavicius)* v *Secretary of State for the Home Department* [2004] 1 WLR 1207, which follows *Horvath* v *Secretary of State for the Home Department* [2001] 1 AC 489 and is cited and discussed in the decision of the Asylum and Immigration Tribunal in *IM (Sufficiency of protection) Malawi* [2007] UKAIT 00071 at paragraphs 17 to 19 and 36 to 45. It is for the claimant to show a well-founded fear and a systemic insufficiency of state protection in the face of a threat from non-state agents. Here the immigration judge found there to be sufficient state protection in Algeria. The respondent in considering the submission made on behalf of the petitioner found nothing to displace that finding in the new documents therefore, argued Mr Lindsay, she was entitled to find there to be no prospect of success before another immigration judge and, separately, this court should not reduce her decision because it can be satisfied that even if it is to be considered to be flawed in some way, it was inevitable, because a claim for asylum cannot succeed where the claimant fails to establish insufficient state protection in the country of former residence of the claimant.

[18] As I see it the issue comes to be quite narrow: was the respondent on the submission of what was said to be a fresh claim entitled to come to a view on the availability of state protection in relation to the present case and, by reason of that

view, determine that the submissions taken together with the previously considered material did not create a realistic prospect of success? I understood Miss Stobart to submit that the answer should be no. It was her position that the question of sufficiency of protection was to be dealt with by the immigration judge who would look at the new documents, decide what they meant and make a determination on the risk of persecution on the basis of all the material then before him, always being mindful of the need to exercise anxious scrutiny. I have no quarrel with this summary of the task of the immigration judge once further submissions have been determined to amount to a fresh claim, but the decision as to whether further submissions amount to a fresh claim is for the Secretary of State, her decision only being challengeable by way of judicial review on *Wednesbury* grounds: *WM (DRC)* v *Secretary of State for the Home Department supra* at 341 (paragraph [9]). In order to make that decision the Secretary of State has to consider the new material, together with that which has previously been considered. Among the issues to be had regard to in determining whether the submissions create a reasonable prospect of success is the availability of state protection. Here the respondent clearly did consider this issue and did so on the hypothesis that the documents relied on were "valid" which in context must mean at least genuine in the sense of including documents emanating from the police in Algeria. That appears to me to be the only reasonable meaning of: "However, even if the documents are accepted as valid, they imply a reliance on legal processes which represent a framework for legal protection" and, later in the decision letter: "It remains the case that your client ... can avail herself of the sufficiency of protection which exists and is provided by the Algerian authorities." Accepting that sufficiency of state protection requires more than the existence of a police force to which complaints can be made but which does not or cannot act on them, as was explained by Auld LJ in

Bagdanavicius, I cannot regard the respondent's decision as *Wednesbury* unreasonable.

[19] I shall dismiss the petition. I shall reserve all questions of expenses.