OUTER HOUSE, COURT OF SESSION

[2010] CSOH 43

P1582/09

OPINION OF LORD KINCLAVEN

in the petition of

K. A. M.

Petitioner;

for

Judicial Review of a decision of the Secretary of State for the Home Department dated 15 October 2009

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

26 March 2010

Introduction

[1] This is a first hearing in a petition seeking judicial review of a decision of the Secretary of State for the Home Department dated 15 October 2009 (No 6/1 of Process) refusing to accept that certain further information from the petitioner amounted to a fresh claim for asylum and breach of human rights.

[2] The respondent is the Secretary of State for the Home Department who has responsibility for the enforcement of immigration and nationality legislation and related provisions throughout the United Kingdom. It is admitted that this court has jurisdiction.

[3] Mr Forrest appeared for the petitioner. He sought reduction of the decision dated 15 October 2009.

[4] Mr Olson appeared for the respondent. He invited me to refuse the orders sought by the petitioner and to dismiss the petition.

[5] In my opinion the petitioner's submissions are well-founded - to the extent outlined below.

[6] In the whole circumstances, I shall sustain the petitioner's plea-in-law, repel the pleas-in-law for the respondent, and reduce the respondent's decision dated 15 October 2009.

[7] My reasons are as follows.

The Background

[8] The petitioner was born in 1978 and is a national of Iraq of Kurdish ethnicity.

[9] On 15 October 2009, the respondent issued a decision refusing to accept that further information submitted on behalf of the petitioner amounted to a fresh claim for asylum and breach of human rights (No 6/1 of Process).

[10] The petitioner seeks:-

(i) reduction of the decision of the respondent dated 15 October 2009;

(ii) the expenses of this petition; and

(iii) such further order or orders as to the court may seem just and equitable.

Productions

[11] I was referred to the following Productions for the petitioner:-

6/1 Letter dated 15 October 2009 from the respondent to the petitioner (particularly paragraphs 3 to 26);

6/2 Arrest Warrant dated 8 May 2005 (an important document - which was referred to for its whole terms);

6/3 First letter of report from the petitioner's parents to the petitioner's solicitors;

6/4 Second letter of report from the petitioner's parents to the petitioner's solicitors;

6/5 Report dated 15 May 2006 from Dr Rebwar Fatah (particularly paragraphs 19, 99 and 172 to 175 - the section headed "Membership of a Social Group");

6/6 Petition for Judicial review - relating to decision dated 7 November 2008;

6/7 Items referred to in paragraph 9 of the respondent's letter dated 15 October 2009 being:

7.1 Letter of support dated 27 February 2009 from Dalshad R Nader;

7.2 Letter of support dated 28 February 2009 from Burhan M Aziz;

7.3 Glasgow Club Membership Card;

7.4 Selection of photographs;

7.5 Birthday and greetings card from Karen Wilson.

[12] I was also referred to the following productions for the respondent:-

7/1 AIT determination promulgated on 20 November 2001;

7/2 Further representations from Livingstone Brown dated 6 March 2009 (particularly at fax page numbers 2/70 to 4/70, 6/70, and 8/70 to 10/70);

7/3 Further representations from Livingstone Brown dated 22 December 2009 - excluding item 7 on the schedule of documents - (particularly at fax page numbers 12/70 to 16/70);

7/4 Outline submission on behalf of the appellant (covering letter dated 17 October 2001) particularly paragraphs 4 to 6;

7/5 SEF Interview Notes for 27 March 2001 (particularly at fax page numbers 2/16, 5/16, 11/16 and 14/16 to 16/16);

7/6 Excerpt from petitioner's bundle of documents before AIT;

7/7 Excerpt from Country of Origin Report for Kurdistan Regional Government Area of Iraq dated 16 September 2009 (particularly at paragraphs 3.01 to 3.03, 3.05 and 3.06).

Authorities

[13] I was referred to the undernoted authorities:-

1. *WM (DRC)* v *Secretary of State for the Home Department* [2007] Imm AR 337; [2006] EWCA Civ 1495, particularly Buxton LJ at paragraphs [6] to [11];
2. *R (on the application of Razgar)* v *Secretary of State for the Home Department* (2004) 2 AC 368; [2004] UKHL 27; [2004] 3 All ER (HL) 821, particularly Lord Bingham of Cornhill at paragraph [17];
3. *EB (Kosovo)* v *Secretary of State for the Home Department* [2008] 3 WLR 178; [2008] UKHL 41; [2008] 4 All ER (HL) 28, Lord Bingham of Cornhill at paragraphs [12] and [14];
4. *VW (Uganda)* v *Secretary of State for the Home Department* [2009] Imm AR 3 436; [2009] EWCA Civ 5; and

5. *Immigration Law and Practice in the United Kingdom* (7th Ed), Macdonald and Toal, page 792, at paragraph 12.23).

The Petitioner's Position

[14] In the petition, as amended, the circumstances are set out along the following lines.

[15] The petitioner previously lived in Kurdistan in an area controlled by the Patriotic Union of Kurdistan ("PUK"). In or around 2000, he had a relationship with the daughter of a high ranking official in the PUK. This person did not allow them to get married. The couple decided to run away, but her father caught them. On around 20 December 2000, he killed his daughter. He tried to kill the petitioner, but he escaped. He appears to have acted in this way because his daughter had offended the honour of his family. He saw it as his duty to kill both her and the petitioner. The petition fled from Iraq (Kurdistan). He entered the UK on 28 January 2001. He claimed asylum and breach of his ECHR rights. His claims were rejected. He appealed. His appeal was finally dismissed on 20 November 2001.

[16] After that date, further information was obtained. The petitioner learned that on 8 May 2005, a warrant was issued for his arrest. A copy of the warrant (translated into English) is produced as No 6/2 of Process. The warrant was issued by the Ministry of Justice in the Kurdistan Regional Government. Following elections in Kurdistan which took place in 2005, the PUK now play a leading role in the government of Kurdistan. They did not play such a prominent role in 2001. The petitioner accordingly fears that he would, if returned, be persecuted by a man who is a high ranking official in a party which plays a lead role in the government. The petitioner consulted his solicitors. It was suggested that the petitioner's parents try and resolve

the matter with the agents for the family of the man whom the petitioner fears. In the meantime, an expert was instructed to submit his views.

[17] The petitioner's parents arranged to visit the agent of the man who has threatened to kill the petitioner. Attempts to mediate were unsuccessful. Further threats were made. The parents later approached the police. They were told that if the petitioner returned to Kurdistan, the warrant to arrest him (No 6/2 of Process) would be executed. In view of the man's status and ranking in the PUK (and the role of the PUK in government), the police would be unable to protect the petitioner. Reference was made to the English translations of the letters of report from the petitioner's parents to the petitioner's solicitors (Nos 6/3 and 6/4 of Process).

[18] The petitioner's solicitors received a report from the expert shortly after 15 May 2006 (No 6/5 of Process) - being a report from Dr Rebwar Fatah. He reported *inter alia* that in Kurdish society (a) pre-marital relationships between a man and a woman unauthorised by the family of the woman in many circumstances justified the killings of both man and woman; (b) such killings are characterised as "honour killings"; (c) the authorities had done little to protect persons, such as the petitioner, who were are risk of being killed in such circumstances (page 6 in his report); and (d) it would not be safe for someone like the petitioner to live elsewhere in Kurdistan or Iraq, having regard to the influence of the PUK, and changes in society since 2003 (page 27 in his report). He also cites (between pages 8-16 in his report) numerous examples of how often such killings take place in Kurdistan and in Kurdish society.

[19] The petitioner also averred that he has established a private life in Glasgow. He has formed a number of close friendships. He was previously in a relationship with Karen Wilson, a UK national. He formed a close bond with her son Lennon. He actively participates in sports and is a member of a sports club. He plays football

regularly. He is fluent in English. Reference was made to the items in No 6/7 of Process. Removal of the petition from the UK would constitute a disproportionate interference with his private life - so it was averred.

[20] The petitioner's solicitors wrote to the respondent with documents and relative schedule submitting that information derived from the above matters constituted a fresh claim for asylum and breach of ECHR rights. On 7 November 2008, the respondent replied. The respondent refused to accept that the further information amounted to a fresh claim. The petitioner raised proceedings for Judicial Review of these proceedings in this court (copy Petition No 6/6 of Process). The respondent agreed to reconsider his decision in the light of the averments in that Petition. The proceedings were accordingly dismissed (see decision letter dated 15 October 2009, No 6/1 of Process, at paragraphs 4 and 5).

[21] The respondent reconsidered the representations in the light of the averments in the previous Petition and decided to adhere to his decision to reject the submissions (No 6/1 of Process).

[22] The current guidelines in relation to considering further information following a failed asylum claim (whether this consists of a fresh human rights or asylum claim) are contained in paragraph 353 of the Immigration Rules (HC 395) - which are set out below.

[23] Article 8 of the European Convention on Human Rights ("ECHR") provides:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public

> safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals and for the protection of the rights and freedoms of others."

[24] Against that background, the petitioner's submissions were to the following effect.

[25] Firstly, the petitioner submitted that in reaching the decision dated 15 October 2009, the respondent erred in law because he has acted unlawfully and irrationally in regard to his consideration of whether the further representations made to him in reliance on the information described (above) amounted to a fresh claim. He has failed to apply the correct test in the appropriate way in deciding whether the further information amounts to a fresh claim. The appropriate test to be applied in deciding whether further representations in such a case amount to a fresh claim is whether the new claim is sufficiently different from the previous one ".. to admit of a reasonable prospect that a favourable view could be taken of the new claim despite the unfavourable conclusion reached on the (previous) claim....". (*Onibiyo* v *SSHD* [1996] Imm AR 370 at 381). The views of the respondent are by no means irrelevant when applying this test, but they are no more than a starting point for his enquiry into and consideration of whether there are reasonable prospects of success, having regard to the additional requirement that the respondent in reaching his decision must satisfy the requirements of anxious scrutiny. *(WM (DRC)* v *SSHD* [2006] EWCA 1495 at paragraph 11). The respondent has usurped the function of the court. He has ignored, misunderstood or rejected submissions on what may be crucial evidence, namely the effect of the rise to power of the PUK and in particular the man whom the petitioner fears. It may be that in 2001 (when his original claim was heard) his quarrel with this man could not have been characterised as persecution on account of political opinion,

but since the assimilation into important positions in government of the PUK, the position is now different (paragraph 12 in the letter No 6/1 of Process). This is a matter on which it is important that evidence is heard. It is premature to determine the issue before that. By doing so, the respondent has usurped the function of the court in regard to how or even whether such evidence should be taken into account. He has erred by treating his own view on the merits of the further information as determinative. He has erred by not accepting it as no more than a starting point (see *WM, supra*), He has proceeded to actually decide the issues arising out of the change in status of the PUK (as well as the effect of other additional evidence submitted to him which were not before the Immigration Judge). He has clearly decided that the information referred to which was not before the judge is not relevant and would have no bearing on the claim. He is entitled to do this only if such information is patently not credible. The information does not fall into that category. It is at the very least capable of belief. In reaching a view on whether there are realistic prospects of success before another immigration judge, he should have done no more than decide whether there was a reasonable prospect that another decision maker, such as an immigration judge (underlining added by petitioner), would reach a different decision from the judge. In treating the further information in this way, he has treated his own view as not on the *starting* but also the *finishing* point. In so doing he has acted unreasonably and in a way that no reasonable decision maker would in the circumstances have acted.

[26] Secondly, the petitioner submitted that in reaching the decision dated 15 October 2009, the respondent erred in law because his reasoning (at paragraph 13 on page 3 of the letter) that there was no realistic prospect of success before another judge because of the effect of the previously presented documents was irrational. The previously

presented documents are no longer relevant. They may have been previously in regard to the situation that obtained in 2001, but matters have now changed. In the circumstances that apply since receipt by the petitioner of the Arrest Warrant (No 6/2 of Process), and other documents, the effect of the previous documents is limited. In any event, the respondent seeks to restrict the effect of these documents, quoting from a passage of the Immigration Judge in which he states *inter alia* that all he is prepared to do is accord them "little weight..." as adminicles of evidence. (paragraph 11 - bottom of page 2). Accordingly the whole reference to and purported reliance on the previous documentation is irrelevant and irrational. In these circumstances, the respondent has acted in a way that no reasonable decision maker would have acted.

[27] Thirdly, the petitioner submitted that in reaching the decision dated 15 October 2009, the respondent erred in law because his reasoning (at paragraph 14 on page 2 of the letter) that there was no realistic prospect that another judge would reach a favourable conclusion because the arrest Warrant on which he seeks to rely was before the previous immigration judge is irrational. The respondent refers to having received an Arrest Warrant from the petitioner's solicitors (paragraph 7, page 2), with a letter from them in December 2006. The petitioner assumed, bearing in mind the context in which the respondent refers to this document, that what was being referred to was the Arrest Warrant dated 8 May 2005 (No 6/2 of Process). This plainly was not before the Immigration Judge in 2001. To have held or implied that it was is irrational. In these circumstances, the respondent has acted in a way that no reasonable decision maker would have acted.

[28] Fourthly, the petitioner submitted that in reaching the decision dated 15 October 2009, the respondent erred in law because his conclusion (at paragraphs 15 on page 3 of the letter) that there was no realistic prospect of success before another judge

because the dispute between the petitioner and the man referred to did not amount to an honour killing is irrational. At page 6 in his report (No 6/5 of Process) Dr Fatah states that Kurdish society approves the killing of a man (and sometimes the woman too) in circumstances where they have established an extra marital relationship which is disapproved of by the woman's family. Such a killing can be characterised as either an honour killing (*per* Dr Fatah) or a revenge attack (*per* the respondent). To hold that another judge would not consider that an intended attack on the petitioner was not an honour killing was irrational. In these circumstances, the respondent has acted in a way that no reasonable decision maker would have acted.

[29] Fifthly, the petitioner submitted that in reaching the decision dated 15 October 2009, the respondent erred in law because his reasoning (at paragraphs 18 on page 4 to paragraph 26 on page 5 of the letter) that there was no realistic prospect that another judge would hold that removal of the petitioner from the UK would be disproportionate and would violate his rights under Article 8 ECHR was irrational. The respondent accepts that the petitioner has established both family and a private life in the UK (see the first sentence in paragraph 19 in the letter). He is entitled to expect that the respondent will respect that right in accordance with Article 8(1) ECHR. He also accepts that their removal from the UK would constitute interference with this right. The way in which another judge would consider this is to weight factors of the necessity and legality of removal against its proportionality (*R (Razgar)* v *Secretary of State for the Home Department* 2004 2AC 368 (at paragraph 17). To do this properly, all the relevant circumstances, including the personal circumstances of the petitioners, must be taken into account before a judge can reach a decision on whether removal is proportionate (*Huang* v *Secretary of State for the Home Department* 2007 2 AC 167; *EB (Kosovo)* v *Secretary of State for the Home*

Department [2008] UKHL 41). This exercise would require the judge to consider in detail the matters referred to in paragraph 9 of the letter. The respondent has, in effect, held that there are no realistic prospects that another judge would hold that these matters materially affected whether removal would be proportionate. It is irrational and unreasonable to so hold (having regard to the matters raised in the enclosures referred to) that a judge would hold that removal would not be disproportionate. The respondent has failed to take into account all the relevant circumstances, in particular the personal circumstances of the petitioner. He has failed effectively to weigh in the balance the petitioners' rights against his obligations. He has acted in a way that in the circumstances no reasonable decision maker would have acted - so submitted the petitioner.

The Petitioner's Plea in Law

[29] The Petitioner's plea-in-law was as follows:-

> "The respondent or those for whom he is responsible having erred in law in reaching the decision dated 15 October 2009; the decision should be reduced as sought."

The Respondent's Position

[30] There was no material dispute as to the procedural background.

[31] In outline, the submissions for the respondents were to the following effect.

[32] Contrary to the petitioner's averments, the PUK did play a leading role in the government of Kurdistan on 2001.

[33] The current Country of Origin Information Report on the Kurdistan Regional Government Area of Iraq states that the PUK have been in control of Suleimaniyah since about 1994 (paragraphs 3.03 and 3.04).

[34] A Kurdish Regional Government factsheet dated September 2008 recorded that:

> "Until the unification agreement of 21 January 2006, the governorate of Suleimaniah was governed by a PUK-led administration, while the governorates of Erbil and Dohuk were governed by a KDP-led administration. In line with the wishes of the people and their own desire for a more efficient and united government, the political parties of the Region signed the historic Unification Agreement." (See paragraph 3.06.)

[35] In the 2005 elections for Kurdistan the PUK and the KDP formed an electoral coalition called the Democratic Patriotic Alliance of Kurdistan. (See the report by Dr Fatah, paragraph 147.)

[36] There are no reasonable prospects that an Immigration Judge would find that there had been a change in the status of the PUK as averred by the petitioner.

[37] Further, and in any event, the petitioner's further submissions of 22 December 2006 and 6 March 2009 do not submit that there was a change in the status of the PUK from 2001. They do not contain any evidence or any submissions on the effect of the rise to power of the PUK and in particular the man whom the petitioner fears.

[38] In assessing any new documents an immigration judge would have regard to the findings of Mr Clapham regarding previously presented documents.

[39] The petitioner's stated in answer 8 of the asylum interview that the father wanted to kill the petitioner "but accidentally he shot his daughter". The petitioner did not submit in front of the immigration judge that the killing was an honour killing. The

petitioner in his further submissions on 22 December 2006 and 6 March 2009 does not suggest that the killing was an honour killing but uses the phrase "blood feud".

[40] According to the petitioner's statement dated 31 July 2001 the petitioner had been blamed for the murder of his girlfriend, a warrant for the arrest of the petitioner was issued on 20 December 2000 and a publication document was issued on 22 December 2000.

[41] At paragraph 14 (of the decision letter No 6/1) the respondent was discussing the arrest warrant of 20 December 2000 and the publication document of 22 December 2000 which were before the immigration judge in 2001.

[42] Paragraph 15 (of the decision letter) has to be read with paragraph 16:

> "Furthermore, taking these documents including the alleged arrest warrant at face value, they merely reiterate a claim that Mr Clapham has determined to be outside of the ambit of the Refugee Convention. In light of this, it is not accepted that there is a realistic prospect of success on asylum grounds before another immigration judge."

[43] The conclusion reached by the respondent in paragraph 16 was correct.

[44] There are no realistic prospects that another judge would hold that the removal of the petitioner would be a violation of his rights under Article 8 - so submitted the respondent.

The Respondent's Pleas-in-law

[45] In the result, Mr Olson invited me to sustain the pleas-in-law for the respondent which were as follows:-

> "1. The petitioner's averments being irrelevant, *et separatim* lacking in specification, the petition should be dismissed.

2. The decision complained of being reasonable *et separatim* rational, the decision should not be reduced."

Discussion

[46] I have given anxious scrutiny to the submissions made by both parties.

[47] In my opinion, the petitioner's submissions fall to be preferred in relation to asylum grounds - but the respondent's submissions prevail in relation to human rights.

[48] The respective submissions of the parties have already been outlined in some detail (above).

[49] Immigration Rule 353 ("Fresh Claims") is in the following terms:-

"353. When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:

(i) had not already been considered; and

(ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

[50] It is also worth noting that the definition of a "refugee" for the purposes of the Refugee Convention is any person who:

"owing to a well-founded fear of being persecuted for reasons of race religion nationality membership of a particular social group or political opinion, is outside his country or nationality and is unable or, owing to such fear, is

unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence .. is unable or, owing to such fear, is unwilling to return to it."

[51] The task of the Secretary of State in such situations was outlined by Buxton LJ in *WM (DRC)* v *Secretary of State for the Home Department [2007] Imm AR 337* where he said, at paragraphs [6] and [7]:-

"[6] There was broad agreement as to the Secretary of State's task under rule 353. He has to consider the new material together with the old and make two judgements. First, whether the new material is significantly different from that already submitted, on the basis of which the asylum claim has failed, that to be judged under rule 353(i) according to whether the content of the material has already been considered. If the material is not 'significantly different' the Secretary of State has to go no further. Second, if the material is significantly different, the Secretary of State has to consider whether it, taken together with the material previously considered, creates a realistic prospect of success in a further asylum claim. That second judgement will involve not only judging the reliability of the new material, but also judging the outcome of tribunal proceedings based on that material. 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 adjudicator to be reliable, and also have in mind, where that it relevantly probative, any finding as to the honesty or reliability of the applicant that was made by the previous adjudicator. 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 said to be automatically suspect because it comes from a tainted source.

[7] The rule only imposes a somewhat modest test that the application has to meet before it becomes a fresh claim. First, the question is whether there is a realistic prospect of success in an application before an adjudicator, but not more than that. Second, ... the adjudicator himself does not have to achieve certainty, but only to think that there is a real risk of the applicant being persecuted on return. Third, and importantly, since asylum is in issue the consideration of all the decision-makers, the Secretary of State, the adjudicator and the court, must be informed by the anxious scrutiny of the material that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution. If authority is needed for that proposition, see per Lord Bridge of Harwich in *Bugdaycay* v *SSHD* [1987] AC 514 at p 531F."

[52] The task of the court in such situations was outlined by Buxton LJ in that case at paragraphs [8] to [11] as follows:-

"[8] There is no provision for appeal from a decision of the Secretary of State as to the existence of a fresh claim. The court has therefore been engaged only through the medium of judicial review. ...

[9] ... With appeal excluded, the decision remains that of the Secretary of State, subject only to review and not appeal. And in any event, whatever the logic of it all, the issue to which Bingham MR gave only a tentative answer in *Onibiyo* arose for decision before this court in *Cakabay* v *SSHD* [1999] Imm AR 176. There is no escaping from the ratio of that case that, as encapsulated at the end of the judgment of Peter Gibson LJ at p 195, the determination of

the Secretary of State is only capable of being impugned on *Wednesbury* grounds.

[10] That, however, is by no means the end of the matter. Although the issue was not pursued in detail, the court in *Cakabay* recognised, at p 191 above, that in any asylum case anxious scrutiny must enter the equation: see §7 above. 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.

[11] 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: see §7 above. 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 enquiry; 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 evaluation 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 those questions is in the affirmative it will have to grant an application for review of the Secretary of State's decision."

[53] In my opinion, in the circumstances of the present case, the petitioner's submissions in relation to asylum grounds are sufficiently well-founded to result in decree of reduction.

[54] The new material founded upon by the petitioner has been outlined above.

[55] Paragraph 14 of the letter under review dated 15 October 2009 (No 6/1 of Process) is in the following terms:-

> "Turning to the alleged arrest warrant apparently dated 20 December 2000 and subsequent publication document. It is noted that these documents were before Mr Clapham when he dismissed (the petitioner's) earlier appeal and determined that only very little weight could be attached to them."

[56] Paragraph 16 of the letter under review also refers to "the alleged arrest warrant" (singular).

[57] The arrest warrant dated 20 December 2000 is produced as No 7/6 of Process. It is clearly referred to in the decision letter No 6/1 of Process.

[58] Importantly, however, there is a further arrest warrant dated 8 May 2005 which is produced as No 6/2 of Process. That arrest warrant dated 8 May 2005 was also before the respondent. However that warrant of 8 May 2005 is not referred to anywhere in the decision letter under review (No 6/1).

[59] In my view, that is a material omission.

[60] It might be an understandable omission (given that the petitioner's advisers did not highlight the new document - as they should have done) but it is nevertheless a material omission. It amounts to a failure to take into account a material matter. The test of "*Wednesbury*" unreasonableness has been satisfied.

[61] The points made by the petitioner in relation to the report by Dr Rebwar Fatah (No 6/5 of Process particularly at paragraph 172) and the statements from the

petitioner's parents (No 6/3 and 6/4 of Process where they are identified by description if not by name) may not *of themselves* give grounds for reduction. However, when those points are taken together (with the failure to consider the warrant dated 8 May 20005) they do provide some support for the conclusion that the petitioner is entitled to the remedy which he seeks in relation to asylum. The petitioner's averments in relation to the role of the PUK add little.

[62] In the result, however, I am satisfied that there is a realistic prospect of an Immigration Judge, applying the rule of anxious scrutiny, thinking that the petitioner will be exposed to a real risk of persecution on his return.

[63] In my view, the requirements of Immigration Rule 353(i) and (ii) have been satisfied in this particular case.

[64] The petitioner succeeds on asylum grounds - for the reasons outlined above.

[65] The respondent's decision dated 15 October 2009 falls to be reduced.

[66] Finally, I find against the petitioner in relation to human rights (as opposed to asylum grounds). In short, I agree with the conclusion set out in paragraph 26 of the letter dated 15 October 2009. I do so essentially for the reasons set out in paragraphs 18 to 25 of that letter. In my opinion, there is no realistic prospect of an Immigration Judge, applying the rule of anxious scrutiny, thinking that the petitioner's removal to Iraq is a disproportionate response to the need to maintain an effective immigration control - or that his removal would unlawfully breach his rights under Article 8.

Decision

[67] In the whole circumstances, and for the reasons outlined above, I shall sustain the petitioner's plea-in-law, repel the pleas-in-law for the respondent, and reduce the respondent's decision dated 15 October 2009.

[68] Meantime, I shall reserve all questions of expenses.