OUTER HOUSE, COURT OF SESSION

[2007] CSOH 18

OPINION OF J GORDON REID, QC

(Sitting as a Temporary Judge)

in the Petition

ANDREI HARBACHOU

Petitioner;

for Judicial Review of a Decision of the Secretary of State for the Home Department

Respondent;

Petitioner: Devlin; Drummond Miller, W.S.
Respondent: Stewart; H. Macdiarmid

2 February 2007

Introduction

[1] The Petitioner seeks judicial review of a decision made on behalf of the Secretary of State for the Home Department, refusing an application for asylum and refusing to treat the Petitioner's submissions as a *fresh claim* within Rule 353 of the Immigration Rules (HC 395) (as amended). A First Hearing took place on 14, 15 and 22 December 2006. By that stage the Petition had been amended, and amended

Answers produced. Productions, lodged by the Petitioner, were considered by counsel in the course of the Hearing.

Factual Background

[2] The Petitioner is a national of Belarus. He left Belarus for the Republic of Ireland in March 2002 where he had obtained a work permit. He entered the United Kingdom from there on 3 January 2003. He applied for asylum. His application was refused on or about 28 February 2003 [7/1 of Process]. He appealed. The appeal was dismissed by an Adjudicator on 18 August 2003 [7/3]. The Petitioner sought leave to appeal to the Immigration Appeal Tribunal. Leave was granted on 24 October 2003 [7/4]. The appeal was subsequently dismissed in October 2004 [7/5]. In November 2004, the Petitioner applied to the Immigration Appeal Tribunal for leave to appeal to the Court of Session. All proceedings hitherto had taken place and all applications had been made in England. The IAT refused the Application in December 2004 [7/7]. An application to the Court of Session for leave to appeal was not proceeded with [7/8].

[3] By letter (with accompanying documents) dated 15 August 2005 (the "Further Submissions") [6/1], the Petitioner's solicitors requested the Home Office to consider what was described as a *fresh claim for asylum.* By letter dated 26 November 2005 (the "Decision Letter"), an official acting on behalf of the Secretary of State for the Home Office (the "Respondent") rejected the claim and determined that the Further Submissions did not amount to a *fresh claim.* The consequence of that is that there is no further statutory right of appeal.

Issues

[4] The Petitioner challenges the Decision on a variety of grounds. Essentially, the Petitioner contends that the Respondent was not entitled to conclude that the Further submissions did not amount to a *fresh application* within the meaning of Rule 353, and that he failed to give adequate and comprehensible reasons.

Legal Framework

[5] Rule 353 of the Immigration Rules (HC 395)(as amended) provides as follows:

> "When a human rights claim or asylum claim has been refused and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content:
>
> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

[6] There was much discussion about the approach which Respondent and the Court had to adopt. In summary, in my opinion, the Respondent must consider (i) whether the new material is significantly different from the material previously considered, and (ii) if it is significantly different, whether it, taken together with the previously considered material, creates a realistic prospect of success in a further asylum claim before an adjudicator. This is a relatively modest test for an applicant to pass. It amounts to little more than there being a reasonable chance that the claim

might succeed (*R ex parte Rahimi* v *SSHD* [2005] EWHC 2838 (Admin) 21 November 2005 Collins J at paragraph 12; Collins J subsequently modified his approach to other aspects of the legal framework in *Naseer* v *SSHD* [2006] EWHC 1671 (Admin) 21 June 2006, at paragraphs 32 and 37; *R ex parte Palash* v *SSHD* [2006] EWHC 2702 (Admin) at paragraph 9).

[7] The Respondent must consider whether there is a realistic prospect of an adjudicator (giving the proceedings anxious scrutiny) concluding that the Petitioner will be exposed to a real risk of persecution on return to Belarus. In doing so, the Respondent will assess the material, old and new. All such new material will be "new evidence" unless the further submissions consist only of legal argument. Material which could reasonably have been made available at the earlier stage will not be considered. Thus, the new material may consist of new evidence to support a fact previously asserted, or it may consist of a recent event such as the receipt of a court summons to support a new submission or to support a fact previously asserted or both. In my opinion, it is somewhat unrealistic to suggest that the latter category need not pass the tests of significance and apparent credibility (a recent event obviously passes the {non-}availability test), particularly where the categories of material may overlap, and where the Respondent has to apply his mind to the broad test of *realistic prospect of success*, the parameters of which are flexible rather than hard-edged. An alleged change of circumstances which had no appearance of credibility such as a recent but obviously forged warrant or summons or an assertion that a recent military coup had taken place, when it was well known that no such event had occurred or that it had failed to overthrow the government concerned, would surely be disregarded because the new material had no apparent credibility (cf *Nazir* v *SSHD* 2002 SC 124 at 145E).

[8] If the new material is significant, apparently credible, and where appropriate was not previously available, and, when taken together with the previously considered material, is reasonably capable of producing a different outcome (i.e. a favourable view could be taken of the new claim by an adjudicator despite the unfavourable conclusion reached on the earlier claim), the relatively modest test will, it seems to me, have been passed (see for example *Rahimi ibid* at paragraphs 13-15, and 18-20, as subsequently explained in *Naseer* at paragraphs 32-36).

[9] The Court is not concerned with the merits of the Respondent's decision but whether as a matter of reasonableness or rationality in all the circumstances, or as a matter of law, and the two may overlap, he was entitled to reach the decision made. It is thus not for the Court to form its own view on whether there is a realistic prospect of success, or on whether an adjudicator properly directing herself on the law would conclude on the basis of all the material that there was a real risk of the Petitioner being persecuted on being returned to Belarus. However, the Court must decide whether the Respondent acted within the foregoing legal framework and whether the decision was rational or irrational.

[10] In short, the test the Court must apply is essentially *Wednesbury* reasonableness, in its current state of development. However, as asylum is in issue, all decision-makers, including the Respondent and the Court, must give *anxious scrutiny* to the material placed before them (see generally *R* v *SSHD ex p Onibiyo* 1996 QB 768, *Cakabay* v *SSHD* 1999 Imm AR 176 at 189, 194-195 and *Bugdaycay* v SSHD 1987 AC 514 at 531F-G). In particular, the Court must be satisfied that the Respondent has addressed the correct questions or issues and given anxious scrutiny to them. *Dicta* in these authorities are indicative of the proper *approach* to these issues. The *dicta* should not, in my opinion, be over-analysed as if they were the text

of statutory provisions (see *Nassir* v *SSHD 1999 Imm AR 250 at 253-4*) or some binding formula. In applying these principles, the Respondent's decision must be read as a whole, fairly and reasonably and in a commonsense way, albeit with anxious scrutiny. Such a reading of the decision must be able to identify proper and adequate reasons for the decision which deal with the substantial questions in issue in an intelligible way (*Koca* v *SSHD* 2005 SC at 487 at 500 paragraph 19; *Wordie Property Company Ltd* v *Secretary of State for Scotland* 1984 SLT 345 at 348; *Singh* v *SSHD* 2000 SC 219 at 222H; and *South Bucks DC* v *Porter (No 2)* 2004 1 WLR 1953 at 1964 paragraph 36, except the last sentence which deals with the statutory planning appeal requirement of substantial prejudice).

Respondent's Decision on Original Application for Asylum

[11] The Petitioner's claim that he had a well-founded fear of persecution in Belarus was based upon (i) his membership of the Belarus Popular Front, and his political opinions; (ii) arrests on three occasions, detention and beatings by the police, (iii) the assertion that, as a Catholic, he was not allowed to practise his religion, and (iv) his fear of ill-health from radioactivity in Belarus.

[12] The claim was rejected by letter dated 28 February 2003 [7/1] on the grounds that (i) while the security forces in Belarus continued to arrest and detain arbitrarily, these were most often in connection with unauthorised demonstrations, (ii) the petitioner's arrests appeared to be lawful; (iii) the claim amounted to the police abusing their position rather than persecution, (iv) the Respondent did not consider that the Petitioner would be of continuing interest to the Belarus authorities, (v) the constitutions of Belarus allow freedom of religion, and (vi) there are areas within

Belarus which contain a large Catholic population and which are free from radioactivity.

The Adjudicator's Determination

[13] The Adjudicator found that the policies of the Belarus government aim to crush political opposition and to repress civil society [7/3 paragraph 22]; that the human rights position was poor, and the judiciary were not independent [paragraph 23]. The Petitioner was found to be a truthful witness and his account was accepted in its entirety by the Adjudicator [paragraph 24]. That account narrated *inter alia* that (i) he had joined the Belarus Popular Front in 1993, (ii) he had been arrested, detained and beaten on three occasions between 1993 and 2001, (iii) his name had been removed from the housing list, (iv) his wife was dismissed from her employment, (v) he was prevented from starting a business by the local authorities and taken to court over his business activities, (vi) the prosecution authorities had begun a case against him for anti-constitutional behaviour and public disorder, (vii) he had received weekly visits at night from the police and threats from criminal elements, believed to be supported by the police. [paragraphs 5, 6, 12 and 13], (viii) he left Belarus because of the psychological pressure and because and acquaintance in the police there had told him that there was a file against him for anti-government activity and that he should leave the country [paragraph 13] and (ix) since his departure from Belarus, the police had visited his family on several occasions because he was "needed in court" [paragraph 12]. In the course of the hearing before the Adjudicator, the Petitioner produced a court summons, sent to him by his mother in Belarus.

[14] The Adjudicator concluded *inter alia* that (i) the court summons produced did not relate to criminal charges, and that it could not be accepted that the Petitioner would be subjected to criminal charges, unfair trial imprisonment or ill-treatment if returned to Belarus [paragraph 2], (ii) the Petitioner's fear of arbitrary arrest, if returned to Belarus, was not well-founded because, following his last arrest in 2001, he remained in Belarus for seven months without further arrest, without any charges being brought and without any threats from criminal elements [paragraphs 25 and 26], (iii) the Petitioner could avoid such threats by relocating elsewhere in Belarus [paragraph 27], and (iv) there was no evidence to show that failed asylum-seekers face persecution or human rights abuses on return to Belarus or that former political activists would be persecuted on the basis of their past activities [paragraph 29].

The Immigration Appeal Tribunal's Decision

[15] The grounds of appeal were, in summary, that (i) the Adjudicator had ignored the terms of the summons produced which referred to criminal sanctions for non-compliance, (ii) the Petitioner was of enduring interest to the Belarus authorities, (iii) official permission was required to relocate within Belarus and this was impossible to obtain, and (iv) the adjudicator's conclusion regarding the risk to failed asylum-seekers and political activists was irrational.

[16] The appeal tribunal concluded that (a) the Adjudicator was not necessarily wrong to take the view that the summons related to civil proceedings, (b) the consequences of failure to comply with it were not such as to conclude that the Petitioner would be unlikely to receive a fair trial, or face persecution if convicted and sent to prison, (c) while internal relocation would be difficult, the evidence did not

justify the conclusion that it would be impossible, and (d) the Adjudicator was entitled to come to the conclusions she reached for the reasons given.

The Decision Under Challenge by Judicial Review

[17] The Further Submissions to the Home Office referred to and relied heavily upon correspondence and a summons directed at the Petitioner's mother requiring her to attend with the police authorities in July 2005 and provide them with details of his whereabouts. What, if anything, happened in July 2005, is not disclosed. Reference is also made to correspondence from a friend who was involved in political activities and who has been arrested. One of the letters (from "Olga" and undated), states that the District Department of Internal Affairs threatened to make "big trouble for her" (the Petitioner's mother) if she did not reveal the Petitioner's whereabouts. Another letter (dated 23 February 2005) records a friend's arrest and ill-treatment at the hands of the police and continued interest in the Petitioner's whereabouts. Various legal arguments were advanced under reference to several authorities. However, there is an element of "cut and paste" in the text as, at several places in the Further Submissions, reference is made to the Petitioner's fear of returning to "Azerbaijjn" rather than Belarus. "Azerbaijjn" has no relevance at all to the claim or these proceedings.

[18] The US Department of State Report on Human Rights Practices in Belarus in 2004, and dated 28 February 2005 [6/1/33], confirmed that a repressive regime continued to operate in Belarus; its human rights record was poor and the judiciary were not independent. An Amnesty International Report was also produced with the Further Submissions but was not referred to by counsel.

[19] In the Decision Letter [6/2], the Respondent, or more correctly the official acting on his behalf, states *inter alia*:

> "Your client has provided various letters and translations of Court Summons allegedly addressed to his mother. We are not persuaded that their production adds any weight to your clients (sic) case. It would appear unlikely, given your clients(sic) alleged level of involvement, that after some years the authorities would still be pursuing him. The Immigration Tribunal in their determination of 15/10/04 [7/5] stated that even if it was accepted that your client was a political activist then he had the option of internal flight which was likely to be difficult but not impossible." (the "first passage")

[20] It can thus be seen from this first passage that (i) the Respondent was not persuaded that the summons and correspondence added any "weight" to the Petitioner's case, and (ii) it appeared to him "unlikely" that the Belarus authorities would be pursuing the Petitioner after the passage of some years given his alleged level of "involvement" (presumably in political activities). The Respondent also noted the Immigration Appeal Tribunal's finding that internal flight, while difficult, would not be impossible. The Decision Letter then proceeds to sum up what has already been stated and concludes this part of the decision as follows:

> "We are not persuaded that these documents substantiate your clients (sic) claim that he would be subject to treatment that would engage Articles 2, 3, and 8 of the ECHR on his return to Belarus." (the "second passage").

[21] After considering and rejecting the Petitioner's eligibility for a grant of Discretionary Leave, the Decision Letter continues:

> "Some points raised in your submissions were considered when the earlier claim was determined. They were dealt with in the letter giving reasons for

refusal dated 28/2/03 [7/1- Respondent's decision on original application for asylum] and the appeal determinations of both 18/8/03 [7/3- by the adjudicator] and 15/10/04 [7/5- by the IAT].

The remaining points raised in your submissions, taken together with the material previously considered in the letter/determination, would not have created a realistic prospect of success.

The asylum claim has been reconsidered on all the evidence available, including the further representations, but we are not prepared to reverse our decision of 28/2/03 which was upheld at appeals on 18/8/03 and 15/10/04" (the "third passage")

The remaining part of the Decision Letter is formal.

Submissions

[22] The petitioner's submissions are set forth at great length in the amended petition, which Mr Devlin prepared, at the request of another judge before whom the proceedings called at an earlier stage. He developed those submissions in the course of the Hearing. In summary, the petitioner's arguments are:

i. The requirement that the Further Submissions be "significantly different" from the material previously considered, does not imply that there must have been a change in the factual basis of the application. Convincing fresh evidence of the same persecution previously alleged is capable of giving rise to a fresh claim (*R* v *SSHD ex p Ravichandran* (No 2) [1996 Imm AR 418 at 431).

ii. The new material must be such as might reasonably lead another Immigration Judge to reach a different result e.g. if it goes to overcome

the doubts about an applicant's credibility which led to the dismissal of his original claim (*Onibiyo* at 381).

iii. The Respondent did not keep clearly in his mind that he was deciding whether a fresh claim had been made, but asked himself whether the Further Submissions were well-founded.

iv. The content of the Further Submissions taken together with previously considered material create a realistic prospect of success where (a) the content of the Further Submission is apparently credible, there being nothing on its face to show that the content is incredible; if investigation is required to determine credibility then the material is apparently credible (*SSHD ex p Boybeyi* [1997] Imm AR 491 at 494-7; *Hassan* v *SSHD* 2004 SLT 34 at 40F paras. 36-37), and (b) the content of the Further Submission is capable of having an important influence on the result of the case, although it need not be decisive. Here, no reasonable Secretary of State properly directing himself in the relevant law could have found that the content of the Further Submissions was not apparently credible (*Onibayo* at 381-383). The Adjudicator had found the Petitioner to be a "witness of truth". Moreover, no such Secretary of State so directing himself would have found that the content of the further submissions could not reasonably go to overcome doubts which led to the dismissal of the original claim. The doubts which led to the dismissal of the original claim related to (a) whether the Petitioner faced unfair trial, imprisonment or ill-treatment in detention, (b) whether the Belarusian authorities had any enduring interest in the Petitioner, and (c) whether the Petitioner would

face a threat from criminal elements in Belarus. The new material could reasonably allow an Immigration Judge to overcome the doubts expressed by the Adjudicator as to whether the Petitioner faced unfair trial, imprisonment or ill-treatment in detention. The new material suggested that the Belarusian authorities did have an enduring interest in the Petitioner. This could reasonably allow an Immigration Judge to over come doubt (b) above. Doubt (c) becomes irrelevant once it is accepted that the Petitioner has a well-founded fear of persecution at the hands of the State, apparently in pursuit of an official policy; thus there is nowhere in the State where the Petitioner could safely relocate; there is therefore no internal flight alternative. Nothing in the documents indicated there was any lack of credibility.

v. The Respondent failed to give adequate and comprehensible reasons for his decision (*Wordie Property Co Ltd* v *Secretary of State for Scotland* 1984 SLT 345 at 348). The Decision Letter left real and substantial doubt as to why the Respondent (a) was not persuaded that the content of the Further Submissions added any weight to the Petitioner's case, (b) rejected the evidence that the Belarus authorities were still pursuing the Petitioner and concluded that internal relocation would not be impossible. It was also submitted that there was real and substantial doubt as to whether the Respondent accepted that the summons presented with the Further Submissions was genuine and related to criminal proceedings, and whether the Respondent had taken into account the up to date objective evidence in relation to the

treatment by the Belarus authorities of political activists. The informed reader does not know how the principal points have been resolved.

[23] In the course of his submissions, counsel for the Petitioner also advanced the following two propositions. First, he submitted that the Respondent erred in law in that he dismissed the new material that accompanied the Further Submissions on the grounds of weight. Weight, at best was peripheral to the question whether a fresh claim was being made. This indicated that the Respondent was not considering whether the claim was a fresh application. Second, he submitted that the Respondent erred in that he found that the content of these Further Submissions (a) had already been considered and (b) taken together with the previously considered material, did not create a realistic prospect of success. The new material was evidence of the intensification on the part of the Belarus authorities to persecute on a national basis all opposition to the regime. It constituted a change of circumstances, and related to the Petitioner's current fear of persecution and to recent events; or alternatively it was new evidence bearing on issues previously determined. The change was that the police were now harassing the Petitioner's mother, a summons had been issued, and there was a current background of arrests (*Nazir* v *SSHD* 2002 SC 134). The question was whether the Respondent was entitled to find that the content of the further submissions could not reasonably allow a decision-maker to overcome the doubts which had led to dismissal of the original claim.

[24] The main difference between Rule 353 and 354 was that the order of the decision making process was reversed. Now, the Respondent asks himself whether the further submissions are well founded and, if they are not, he considers whether they amount to a fresh claim. Questions of significance, credibility and availability still

arise by implication. Rule 353 was not wider in scope than Rule 346, and the authorities under the latter rule were relevant to the proper approach to the new Rule.

[25] In the course of his submissions counsel for the Petitioner also referred to *Bugdaycay* v *SSHD* 1987 1 AC 516 at 531E-G, *Smith* 1996 QB 517, *Nazir* v *SSHD* 2002 SC 145se 15 at 34G; the Respondent's analysis of this case was strained; the distinction drawn between a change of circumstances and new evidence was temporal; to *Januzi* v *SSHD* 2006 2 WLR 397 at 412E-413B, which reviewed the law relating to internal relocation and *Linn* v *SSHD* 2005 SLT 301 at 304E-F, paragraph 12, which also considered that topic. Reasonableness is the test to be applied when deciding whether a relocation alternative is open to an applicant for asylum (*Naseer* v *SSHD* [2006] EWHC 1671 (Admin) 21 June 2006, Collins J at paragraphs 37 & 38).

[26] Mr Stewart, for the Respondent, submitted that under Rule 353, there was a three stage test, the first being whether to reject the application. If the application is rejected, the second and third stages are considered. Rule 353 amended the previous test, as set forth in paragraph 12 of *Nazir*. The second stage or test was the *Acid Test* in *Onibiyo* which was still applicable. The third test was the familiar *Wednesbury* test as set forth in *Ndaya* v *SSHD* [2006] CSOH 19 2 February 2006 Lord Brodie at paragraphs 15, which Mr Stewart expressly adopted. Reference was also made to paragraphs 20-22 although I was not addressed on the distinction, drawn by the Lord Ordinary in *Ndaya,* between the test in Rule 353 and the test in *Onibiyo* or how it might affect my task in these proceedings.

[27] Mr Stewart highlighted various elements of the Adjudicator's Determination, namely (i) visits from the police, attributable to registration of the Petitioner's business (paragraph 5 of the Determination), (ii) threats by criminal elements (paragraphs 12 & 27), (iii) acceptance that Belarus has an oppressive regime

(paragraphs 22 and 23), (iv) a court summons in relation to a civil matter, and (v) internal relocation. The appeal before the IAT concentrated on the court summons, the alleged enduring interest in the Petitioner by the Belarus authorities, and internal relocation as did the further appeal documents [7/6 and 7/8]. The theme of the Further Submissions was (i) the pursuit of the Petitioner by the authorities, (ii) the summons issued to the Petitioner's mother, and (iii) general conditions in Belarus in relation to human rights and the repressive regime there. However, the material was very far removed from showing that the police were seeking to bring criminal charges against the Petitioner for political activity. At best, all this constituted new evidence in relation to the same claim and did not constitute a change of circumstances.

[28] With reference to the Decision Letter, Mr Stewart submitted that (i) the Respondent was entitled to assess the material and thus the weight to be attached to it, (*Nkereuwen* v *SSHD* 1999 Imm AR 267 at 270, *Naseer* v *SSHD* [2006] EWHC 1671(Admin) 21 June 2006 Collins J paragraph 22 and 37), (ii) while not the clearest or most elegant, the Decision Letter nevertheless satisfied the test in *Wordie Property Company Ltd* v *Secretary of State for Scotland* 1984 SLT 345. Reference was also made to *Singh* v *SSHD* 2000 SC 219 at 222H-223C, and (iii) the material considered by the Respondent fell into the second category (new evidence bearing on matters or factual assertions considered in the original application) identified by Lord Macfadyen in *Nazir* (at paragraph 25). These matters were the police interest in the Petitioner, and the repressive nature of the Belarus regime. It was thus perfectly proper for the Secretary of State to weigh the matters put before him. As for the Petitioner's second proposition branch (a) the Respondent was dealing with the various claims in the Further Submissions for which no further evidence had been produced. As for branch (b) the proper approach is not to consider whether the

Adjudicator's doubts might be overcome but to follow Rule 353 and consider whether the new material and the pre-existing material, taken together, created a realistic prospect of success. It was accepted that this was a low test but one which had to be given anxious scrutiny. Mr Stewart also accepted that if it were correct to assume that the police would pursue the Petitioner throughout Belarus, then the Decision Letter was flawed on the question of internal relocation. The Adjudicator did not consider the question of internal flight because of his finding that there was no real risk of persecution.

[29] Mr Stewart also pointed out that *Hassan* had been successfully reclaimed. He produced a copy of the Inner House Interlocutor dated 23 March 2006 dismissing the petition "in respect that the Lord Ordinary failed to recognise that, in terms of Rule 346 of the Immigration Rules, a further representation will be treated as a fresh application for asylum only if there is a realistic prospect of success and that, in a case of non-state persecution, there could be no such prospect unless there was an offer to prove failure by the home state to afford protection against that ill-treatment, as required by the decision in *Horrvath* v *Secretary of State for the Home Department* [2001] 1 AC 489, which, in this case, there was not."

Discussion

[30] The starting point is the Decision Letter. I bear in mind the legal framework referred to above and that the basis of the Respondent's decision calls for the most anxious scrutiny (*Bugdaycay* at 531F-G; *R* v *Ministry of Defence ex p Smith* 1996 QB 517 at 537G-538D). While it must be read as a whole, counsel concentrated their submissions on the passages quoted above.

[31] In the first and second passages and indeed, in all the text which precedes them, it seems to me that the Respondent is addressing the initial question to be considered under Rule 353, namely whether the Further Submissions fall to be rejected. His answer to this question is not the subject of attack. It is, in my opinion, the third passage which considers the other question (which falls into two parts) under Rule 353, namely whether the Further Submissions amount to a fresh claim and, in particular, whether they are significantly different from the material previously considered, and when taken together with the earlier material, created a realistic prospect of success, notwithstanding their rejection.

[32] The Respondent, in the first and second passages, is expressing his own view of and deciding the merits of the Further Submissions. He considers and rejects them. Thus, he states that he is *not persuaded that their (sic) productions add any weight to your clients (sic) case.* The Decision letter proceeds *It would appear unlikely ..... that.... the authorities would still be pursuing him.* The passage concludes by stating that *We are not persuaded that these documents substantiate your clients (sic) claim.....*

[33] In the first part of the third passage, the reference to *Some points* raised in the Further Submissions having been previously considered when the earlier claim was determined, is vague. However, it is reasonably clear from the material before the Respondent that this must relate to (i) the nature of the regime in Belarus and its human rights record, (ii) lack of access to proper judicial process, and (iii) the argument based on religion. There would appear to be no new evidence which affects these matters. The US Department of State Report confirms findings previously made by the Adjudicator (see for example 7/3 at paragraphs 22 and 23).

[34] The new material relates to the summons sent to the Petitioner's mother and the correspondence to show that there is (contrary to the Adjudicator's finding on the original material [7/3 at paragraph 26] an enduring interest in the Petitioner. This material thus seems to constitute new evidence about a matter previously considered, although the summons might also be classified as a new event and therefore a change of circumstances.

[35] The final part of the third passage of the Decision letter seems to me to be bare assertion. Again, the (remaining) *points* are not identified, but as the Respondent is here referring to *realistic prospect of success,* he must be directing himself to the material not previously produced. This material as set forth above, relates to the summons directed at the Petitioner's mother, apparently with a view to her disclosing the Petitioner's whereabouts to the Belarus authorities, the assertion that the Belarus authorities had an enduring interest in the Petitioner and that he would be at risk (to put it broadly) if he were to return.

[36] The Respondent does not give any reason in the third passage for stating that these points taken together with the material previously considered do not create a realistic prospect of success. It can be inferred from the first passage that *the Respondent* has rejected the content of the new material, found that it is not credible and found as a fact that the Belarus authorities have no enduring interest in the Petitioner. Although the Respondent, when considering the question of realistic prospect of success, will or at least may be influenced by his initial assessment and rejection of the Further Submissions, the question he must ask himself and thus his task is a different one. It is to assess the Petitioner's prospects before an adjudicator. He cannot rely solely on his findings in relation to *rejection* of the Further Submissions because these flow from his consideration of a different question. He

expresses no view on whether the new material is apparently credible. He does not express the view that the summons or the sentiments expressed in the correspondence are not genuine or have been, in some way, manufactured to assist the Petitioner's claim. One is therefore left in the dark as to whether the Respondent has truly considered whether there is a reasonable prospect that an adjudicator *could* form a favourable view of a new claim, notwithstanding the Respondent's rejection of it, if the new material had to be considered along with the previously considered material. In particular, the Respondent has not expressed a view on whether it could reasonably be concluded that the Belarus authorities still have an enduring interest in the Petitioner and/or whether internal relocation was an option, given the absence of material to indicate that the Belarus authorities do not control the whole of Belarus, or would be unduly harsh for the Petitioner; or how those circumstances combined with the apparently undisputed fact that the judiciary in Belarus are not independent (see for example *Hrom* v *SSHD Appeal No* [2002] UKIAT01598 21 May 20022 paragraphs 5, 11, and 12). These matters are at least capable of being significant or influential although not necessarily decisive. They bear on some of the essential ingredients of a claim for asylum (*R* v *SSHD ex parte Ravichandran* 1996 Imm AR 418 at 431; *SSHD* v *Senkoy* 2001 Imm AR 399 at 405. Whether they are of sufficient weight for a claim to succeed is not for the Court to decide in a judicial review application.

[37] The Respondent might well have stated that, on the assumption that the new material is apparently credible and creates a reasonable prospect of establishing that the authorities had an enduring interest in the Petitioner, that still did not create a realistic prospect of success because an enduring interest by the Belarus authorities, without more, was in his view, not reasonably capable of establishing that the

Petitioner's fear of persecution was well founded. However he does not do so. The reasoning process, as noted above, is absent. It is thus difficult to conclude that the Respondent has given anxious scrutiny to the question whether the Further Submissions amount to a *fresh claim.* In my opinion, reading the Decision Letter as a whole, fairly and reasonably in a commonsense way, still leaves a real and substantial doubt as to (i) whether Respondent truly considered the correct question in order to determine whether the Further Representations amounted to a *fresh claim* and (ii) why the Respondent considered that the new material, when taken along with the previously considered material, gave the Petitioner no realistic prospect of a favourable outcome before an adjudicator. The informed reader is left in a real and substantial doubt as to whether the Respondent considered the correct question and what the Respondent's reasons were. On the face of matters, the new material supported the assertion that there was an enduring interest in the Petitioner on the part of the Belarus authorities. Moreover, there was nothing to suggest that the Belarus authorities did not control or enforce their policies throughout the whole of Belarus. Internal relocation, on any reasonable view could be regarded, *prima facie,* as problematical. Whether this would or could be sufficient to tip the scales in favour of the Petitioner before an adjudicator, or whether the Respondent, properly applying his mind to the question these matters, ought reasonably to have concluded that the totality of the facts and circumstances before him would create a reasonable prospect of success before an adjudicator, is not for me to decide.

[38] What I do decide is that, in the foregoing circumstances, the Respondent has fallen into error. It seems to me that the absence of reasons indicates that the Respondent has not correctly addressed himself to the correct question. This is an error of law fundamental to the issues before him. The absence of reasons also tends

to show that the Respondent has not given the claim the anxious scrutiny required. He has thus misdirected himself in law. He has failed to give or to give adequate reasons for his decision and has not, so far as appears from the terms of the Decision Letter, given anxious scrutiny to the Petitioner's claim. Whether the Respondent can properly arrive at the same decision by giving proper and adequate reasons remains to be seen.

Result

[39] I shall therefore sustain the Petitioner's plea-in-law, repel the Respondent's pleas-in-law and reduce the Decision Letter. All questions of expenses are, meantime, reserved.