OUTER HOUSE, COURT OF SESSION

[2010] CSOH 49

P116/10

OPINION OF LORD BRODIE

in the cause

Y.A.

Petitioner;

for

Judicial Review of a decision by the Secretary of State for the Home Department dated 8th January 2010 refusing to accept that further representations amounted to a fresh claim for asylum.

Petitioner: Forrest; Drummond Miller LLP
Respondent: Webster; C. Mullin, Office of the Solicitor to the Advocate General

1 April 2010

Introduction

[1] The petitioner is a national of Iraq. His date of birth is 13 February 1978. He is a Chaldean Christian. The respondent is the Secretary of State for the Home Department.

[2] The petitioner arrived in the United Kingdom on 25 February 2008 and immediately claimed asylum. The respondent rejected the petitioner's claim. The petitioner appealed in terms of Section 82(1) of the Nationality Immigration and Asylum Act 2002. The appeal was heard by an Immigration Judge on 16 April 2009.

The Immigration Judge accepted that the petitioner had fled from Iraq having been presented with an ultimatum by members of an armed group that he should either convert to Islam or leave the city of Basra where he had been born and where he lived. However, the Immigration Judge held that the petitioner could safely relocate within Iraq and that it was not unreasonable or unduly harsh to require him to do so. The petitioner's appeal was accordingly refused. The petitioner applied to this court for reconsideration of that decision but his application was rejected. His rights of appeal against refusal of his asylum claim became exhausted as at 18 September 2009.

[3] By letter dated 24 December 2009 those representing the petitioner made a further submission in support of his claim for asylum. Together with this submission there was sent documentary material which had not previously been put before the respondent. The material was as follows: an unsigned and undated letter addressed to the petitioner threatening him with violence should he return to Iraq (6/3 of process); a police report dated 21 October 2009 relating to a threat against the petitioner and his family (6/4 of process); a report on sectarian violence in Iraq printed off the internet with a page last modified date of 24 October 2007 (6/5 of process); and four news reports printed off the internet, dated, respectively, 16 December 2009, 26 April 2009, 2 November 2009 and 13 July 2009 relating to attacks on Christians and the bombing of churches in Iraq (6/6 of process). By letter dated 8 January 2010 the respondent issued a decision refusing to accept that the further submission on behalf of the petitioner amounted to a fresh claim for asylum as provided for by paragraph 353 of the Immigration Rules. The petitioner now seeks judicial review of that decision.

[4] The petition called before me for a first hearing on 24 March 2010. Mr Forrest appeared on behalf of the petitioner. Mr Webster appeared on behalf of the

respondent. Mr Forrest's motion was for reduction of the respondent's decision of 8 January 2010. Mr Webster's motion was to repel the petitioner's plea in law, to sustain the respondent's third plea in law and to refuse the petition.

Applicable Law

[5] As was made clear in their respective submissions, counsel were agreed as to what was the applicable law. The relevant Immigration Rule is 353 which is in the following terms:

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

What the Rule required had been explained by Buxton LJ in *WM (DRC)* v *Secretary of State for the Home Department* [2007] Imm AR 337 at 340. Counsel were unable to explain to me why Buxton LJ had expressed himself in precisely the way he had when considering what was meant by "significantly different" (a difficulty that I shared), but they were nevertheless agreed that the following passage provided authoritative guidance:

" [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.

...

[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, as [counsel] pertinently pointed out, 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."

Submissions of parties

Petitioner

[6] Mr Forrest began by reminding me that the Immigration Judge had accepted that the petitioner had a well founded fear of persecution were he to return to Basra, albeit that he had further held that the petitioner could safely relocate to other parts of Iraq, such as Baghdad, where there were significant populations of Christians. He then drew my attention to the additional material which had been put before the respondent together with the further submission. The letter (6/3 of process) and the police report (6/4 of process) were specific to the petitioner. Of themselves they might not constitute material which was "significantly different". However, when taken with the other material, some at least of which was dated subsequently to the decision by the Immigration Judge, and which pointed to a worsening situation of sectarian violence in Iraq, the respondent, if acting properly in terms of Immigration Rule 353 should have accepted that the further submission amounted to a fresh claim. It was accepted that the additional material had not previously been considered. Accordingly, the crucial question was whether that material, together with what had previously been considered, gave rise to a realistic prospect of success before another Immigration Judge. The respondent's conclusion was wrong. The respondent had recognised the correct test but he had failed to apply it correctly or properly, but rather, as appeared from paragraph 10 of the decision letter of 8 January 2010, the respondent had arrogated to himself the question as to whether the an appeal based on the fresh submission should succeed. Mr Forrest drew my attention to paragraphs 71 and 72 of the country guidance case which related to the situation of Christians in Iraq, *RA (Christians) Iraq CG* [2005] UKIAT 00091. That case considered whether there was a real risk of persecution for Christians generally in Iraq. The conclusion was that the evidence fell short, as at the date of the decision, indicating that the appropriate threshold had been crossed. The additional material which had been placed before the

respondent together with the further submission of 24 December 2009 included the newest reports of further violence towards Christians in Iraq. The relevant threshold as to a risk of persecution throughout Iraq may or may about to be crossed and the respondent should have recognised that another immigration judge might have come to that conclusion having considered the additional material. In any event, at paragraph 11 of the decision letter of 8 January 2010 it appears that the respondent has misunderstood what material was before the Immigration Judge at the hearing on 16 April 2009. In that paragraph he refers to the "objective information" before the Immigration Judge but if one looked at paragraph 34 of the Determination and Reasons of the Immigration Judge dated 21 April 2009, one can see that this information related to a very specific matter which was the possibility of the petitioner relocating in the Kurdish Regional Government administered zone.

Respondent

[7] Mr Webster submitted that looking at the respondent's decision letter of 8 January 2010, read as a whole, it was clear that the respondent had applied the right test and that his decision could not be regarded as perverse. That was what the petitioner required to establish if he was to succeed: *WM (DRC)* v *Secretary of State for the Home Department supra* at 341 to 344. Mr Webster then invited me to consider the terms of the respondent's decision letter. Having stated the correct test, consideration is given to the letter sent to the petitioner (6/3 of process) and the police report (6/4 of process). It is accepted by the respondent that that constitutes material that had not previously been considered. Regard is had to the conclusion of the Immigration Judge that the petitioner could move away from Basra and seek internal relocation in Baghdad or elsewhere, and the respondent then concludes that the petitioner had no

realistic prospects of success of establishing that he faced a real risk of persecution on return to Iraq because he had the option of internal relocation. The respondent does not stop there. He appreciates that the petitioner had presented other new material in the form of the articles from the internet. Again this is accepted as not having been already considered. However the respondent also considers the objective material which had been before the Immigration Judge, including what appeared in *RA (Christians) Iraq CG supra*. In addition he has regard to the most up to date Country of Original Information report, dated 10 December 2009. While it is true that that report referred to information taken from previously published material, predating what had been provided by the petitioner, what was of importance was that the report of 10 December 2009 confirmed the continued existence of substantial Christian populations in Iraq and the availability of areas to which a Christian could relocate. It could not be said that the respondent's conclusion that the additional material, taken together with the material previously considered by the Immigration Judge, created no realistic prospect of success for the petitioner was so outrageous in its defiance of logic as to be irrational. Mr Forrest's suggested reading of paragraph 11 of the decision letter of 8 January 2010 and its reference to "objective material" was simply unsustainable. Clearly the respondent had been referring to all the objective material which had been before the Immigration Judge. However, the respondent's assessment of the material had not stopped at paragraph 11 of his decision letter. Any error that the respondent may have fallen into in failing to understand what precisely was before the Immigration Judge must be regarded as having been corrected by his subsequent consideration of the up-to-date Country of Origin Information report.

Discussion

[8] It is not now disputed that the petitioner had to leave his home city of Basra owing to a well-founded fear of persecution by reason of his religious affiliation. However, his claim for asylum in the United Kingdom as a refugee was refused because he had the option of internal flight within Iraq to an area with a substantial Christian population where the risk of sectarian violence was materially less. His rights to appeal that decision are exhausted but, as provided by Immigration Rule 353, it is open to an applicant to make further submissions in support of an asylum claim which the respondent will consider. If the respondent rejects them he will then determine whether the submissions constitute a fresh claim. The significance of that decision is that a fresh claim, if rejected, gives rise to the right to a further appeal in terms of Section 82 of the 2002 Act. There is no right of appeal against a decision that the further submissions do not constitute a fresh claim, hence this application to the supervisory jurisdiction of the Court. As the nature of the application acknowledges, the person with decision-making power is the respondent. His decision is not being appealed in this application; it is being reviewed under the supervisory jurisdiction of the Court of Session. Thus it can only be reduced if it can be shown to be irrational, subject to the rider that the matter in issue being a renewed asylum claim, any decision not taken on the basis of anxious scrutiny will be irrational: *WM (DRC)* v *Secretary of State for the Home Department supra* at 341.

[9] The additional material put forward here in support of the further submissions of 24 December 2009 was, on the face of it, relevant, and had not already been considered. The respondent recognised that and, as appears from his letter of 8 January 2010 gave the material his consideration. Mr Forrest accepted that the respondent had identified the correct legal test: the question being not whether the respondent thinks that the new claim (as constituted by the additional information

taken with the previously considered material) is a good one or should succeed, but whether there is a realistic prospect of a hypothetical immigration judge, applying anxious scrutiny, thinking that the petitioner would be exposed to a real risk of persecution on return to Iraq. Mr Forrest submitted that the respondent had failed to apply the test "correctly" or "properly". He also said that the respondent's "conclusion was wrong". These expressions are unhelpful and, indeed, quite inapposite in the context of an application for judicial review. In a similar vein, Mr Forrest came very close to inviting me to do something which Buxton LJ specifically said in *WM (DRC) supra* that the court could not do, which is to come to its own view as to whether, in the circumstances of the case, the relevant test was met (referred to in *WM (DRC*) as the "shortcut"): *WM (DRC)* v *Secretary of State for the Home Department supra* at 342 to 344. This was when Mr Forrest, having referred to what was said in *RA (Christians) Iraq supra* drew my attention to the contents of the printouts from the internet contained in 6/5 and 6/6 of process and suggested that the threshold of there being a real risk of persecution of Christians throughout Iraq (the "generally consistently happening" test set out in *AA (Zimbabwe)* [2007] ECWA Civ 149 and referred to in the respondent's letter of 8 January 2010) may or may about to be crossed.

[10] Mr Forrest did, however, present more focused arguments, first, in relation to paragraph 10 of the decision letter and, second, in relation to paragraph 11.

[11] In paragraph 9 of the letter the respondent quotes from the Immigration Judge's Determination and Reasons, dated 21 April 2009: "the Appellant can move away from Basra and seek internal relocation in Baghdad or elsewhere". In paragraph 10 he goes on:

> "In light of this information another Immigration Judge would attach little weight to these documents and when applying the rule of anxious scrutiny this would not create a realistic prospect of success."

Mr Forrest submitted that by saying that "another Immigration Judge would attach little weight" to the letter and the police report (6/3 and 6/4 of process), the respondent was himself deciding on the new claim rather than considering whether there was a realistic prospect of success before a hypothetical immigration judge. I see that at as a misreading of paragraph 10. What the respondent is doing in that paragraph is precisely what Buxton LJ said he should do in *WM (DRC)* v *Secretary of State for the Home Department supra* at 340. There Buxton LJ refers to what he describes as the "second judgement" which "will involve not only judging the reliability of the new material, but also judging the outcome of tribunal proceedings based on that material". By saying that another immigration judge would attach little weight to the documents in question, it appears to me that the respondent is doing no more than judging the reliability of the new material. I can discern no error of law or perversity in coming to a conclusion on the part of the respondent in relation to paragraph 10.

[12] Paragraph 11 of the decision letter was in the following terms:

> "Your client has also submitted various articles from the internet. No indication has been provided to show this relates to your client in any way. These objective documents have merely been printed out of various websites, none of which relate to your client personally. The Immigration Judge previously considered objective information at the appeal hearing. Your client has not provided any evidence as to how this information is significantly different."

Mr Forrest submitted that this indicated that the respondent had failed to understand the import of the "objective information" which had been before the Immigration Judge at the hearing on 16 April 2009. At paragraph 34 of the Immigration Judge's Determination and Reasons the Immigration Judge makes reference to objective evidence appearing in four paragraphs of the Country of Original Information report of 12 January 2009. This deals with a specific and limited point: the possibility of a Christian from Basra relocating in the Kurdish Regional Government controlled area. Mr Forrest's reading of paragraph 11 of the decision letter to the effect that it was this very specific "objective information" and only that objective information which was being referred to is, as Mr Webster submitted, simply unsustainable. It is perfectly clear from the Immigration Judge's Determination and Reasons that he had before him and considered, objective information from a number of country guidance cases, a report from the Immigration Refugee Board of Canada and a UNHCR report in addition to the Country of Origin Information report. That was all material bearing on the situation of Christians in Iraq and the difficulties that they face. The articles submitted on behalf of the petitioner, taken from the internet, provide further instances of these difficulties. However, the respondent was entitled to conclude that the new information had not been shown to be significantly different from the information which had been before the Immigration Judge at the hearing on 16 April 2009. Critically, it could not be said, and indeed Mr Forrest did not say, that the respondent's conclusion was one that was irrational.

[13] In my opinion it is clear, as was submitted by Mr Webster, that the respondent made no error of law. He cannot be said to have come to a perverse conclusion. I therefore propose to repel the petitioner's plea in law, to sustain the respondent's third plea in law and to refuse the petition. I shall reserve all questions of expenses.