OUTER HOUSE, COURT OF SESSION

[2009] CSOH 162

P1994/08

OPINION OF LORD KINCLAVEN

in the Petition of

N A K

Petitioner;

for

Judicial Review of a decision of the Secretary of State for the Home Department dated 3 December 2008

Petitioner: S. Winter, Solicitor Advocate; McGill & Co, Edinburgh;
Respondent: K. Campbell, Advocate; Office of the Solicitor to the Advocate General.

8 December 2009

Introduction

[1] This is a petition seeking judicial review of a decision of the Secretary of State for the Home Department dated 3 December 2008 (No 6/1 of Process) refusing to treat certain further submissions from the petitioner as amounting to a fresh application for asylum.

[2] The respondent is the Secretary of State for the Home Department who has responsibility for the enforcement of immigration control throughout the United Kingdom, including Scotland. It is admitted that this court has jurisdiction.

[3] Mr Winter, Solicitor Advocate, appeared for the petitioner. He sought reduction of the decision dated 3 December 2008.

[4] Mr Campbell, Advocate, appeared for the respondent. He invited me to refuse the orders sought by the petitioner.

[5] In my opinion the petitioner's submissions are sufficiently well-founded to result in decree of reduction.

[6] In the whole circumstances, and for the reasons outlined below, I shall sustain the petitioner's plea-in-law, repel the first three pleas-in-law for the respondent, and reduce the respondent's decision dated 3 December 2008.

The Background

[7] The petitioner arrived in the United Kingdom on 7 February 2005. He applied for asylum on the same day. By letter dated 7 April 2005 the respondent refused to grant the petitioner asylum. The petitioner appealed to an Immigration Judge. By a determination promulgated on 16 June 2005 (No 6/7 of Process) the Immigration Judge refused the petitioner's appeal on asylum grounds and also under Article 3 of the of the European Convention of Human Rights and Fundamental Rights (ECHR). The Immigration Judge disbelieved him.

[8] By letter dated 10 December 2005 (No 6/2 of Process) the petitioner made further submissions to the respondent. The petitioner avers that he submitted fresh evidence to the respondent in support of those further submissions and that he relied upon a letter he had received from the Democratic Party of Iranian Kurdistan ("DPIK" also referred to as "KDPI") confirming he is a supporter. By letter dated 5 November 2007 the respondent refused to treat the further submissions as giving rise to a fresh application ("the refusal decision"). Thereafter a petition for judicial review was

lodged with the Court. The respondent conceded that petition and agreed to reconsider the further submissions. By letter dated 3 December 2008 (No 6/1 of Process) the respondent again refused to treat the further submissions as amounting to a fresh claim. It was not disputed that the petitioner's only remedy is judicial review.

[9] In the current Petition as amended (No 15 of Process) the Petitioner seeks:-

(1) reduction of the refusal decision dated 3 December 2008;

(2) the expenses of the petition; and

(3) such other orders as may seem to the court to be just and reasonable in all the circumstances of the case.

[10] Declarator is no longer insisted upon.

Productions

[11] The Productions for the petitioner were as follows:-

6/1 Refusal of application dated 3 December 2008 - the decision under review;

6/2 Application dated 10 December 2005 - which includes a letter from the Democratic Party of Iranian Kurdistan ("DPIK"), Bureau of International Relations, dated 7 September 2005;

6/3 Operational Guidance Note - Iran 27 February 2007;

6/4 Home Office Country of Origin Information - Iran - August 2008;

6/5 Home Office Country of Origin Information - Iran - April 2004;

6/6 Home Office Country of Origin Information - Iran - October 2004;

6/7 Immigration Judge decision promulgated 16 June 2005.

Authorities

[12] The petitioner referred me to the undernoted authorities:-

1. *WM (DRC)* v *SSHD* [2006] EWCA Civ 1495 (particularly at paragraphs 6, 7, 10 and 11);

2. *MG* v *SSHD* [2008] COSH 115;

3. *AD Iran CG* [2003] UKIAT 00107 (paragraphs 3, 4, and 10-13);

4. *Zarnaghi* v *SSHD* [2002] UKIAT 02272 (paragraphs 4 and 12-14);

5. *Sepet and Bulbul* v *SSHD* [2003] UKHL 15;

6. *TN (Uganda)* v *SSHD* [2006] EWCA Civ 1807 (paragraph 10);

7. *Hassan* v *SSHD* [2004] SLT 34;

8. *Boybeyi* v *SSHD* [1997] ImmAR 491;

9. *AK* v *SSHD* [2007] EWCA Civ 535;

10. *Harbachou* v *SSHD* [2007] CSOH 18;

11. *Kaniz and others* v *SSHD* [2007] CSOH 29;

12. *Kurtaj* v *SSHD* [2007] EWHC (Admin) 221;

13. *IK* v *SSHD* [2004] UKIAT 00312 (paragraph 133.7);

14. *J* v *SSHD* [2006] EWCA Civ 1238 (paragraphs 8, 9 and 11); and

15. *R (Iran) and others* v *SSHD* [2005] EWCA Civ 982 (paragraphs 21 and 27.

[13] The respondent also referred me to:-

1. *Devaseelan* v *SSHD* [2002] UKAIT 702; [2003] ImmAR 1 (particularly at paragraphs 1 and 37-42);

2. *AA (Somalia)* v *SSHD* [2007] EWCA Civ 1040;

3. *Januzi and others* v *SSHD* [2006] EWHL 5; [2006] 2 AC 426;

4 *South Bucks DC* v *Porter* (No 2) [2004] 1 WLR 1953;

5. Immigration Rules, r. 353;

6. *Boum* v *SSHD* 18 July 2006, Lord Macphail, [2006] CSOH 11; and

7. Extract from *Asylum and Immigration Tribunal Practice Directions*, Section 18 (Starred and Country Guidance Determinations).

The Petitioner's Position

[14] In overview, the petitioner sought judicial review on the following six inter-related grounds.

Ground (1)

[15] In Ground (1) the petitioner avers that that the respondent has acted unreasonably *et separatim* acted irrationally.

[16] The respondent has erred in law because her decision to refuse to accept that further submissions amounted to a fresh claim is irrational by appearing to usurp the function of the court. The respondent has made what would appear to be a decision on the merits of the petitioner's case. In so doing the respondent has erred by treating her own view on the validity of the further submissions and its effect as more than a "starting point" (see the last paragraph on the second page and the last paragraph of page 3 of the refusal letter). In addition the previous Immigration Judge does not appear to have considered whether the petitioner would be questioned on return and how he would respond to such questioning. Although the respondent refers to whether there would be a realistic prospect of success before an Immigration Judge the respondent does not appear to have kept clearly in mind the proper test to be applied. The respondent appears to have failed to recognise that there is only a modest test before the submissions become a fresh claim. The respondent appears to have erred by failing to consider that the Immigration Judge does not have to achieve certainty, but only to think that there is a real risk of the applicant being persecuted on return. In

so doing the respondent has acted unreasonably and in a way that no reasonable decision maker would in the circumstances have acted (see *WM (DRC)* v *SSHD* [2006] EWCA Civ 1495 per Lord Justice Buxton at paragraphs 6, 7 and 11).

Ground (2)

[17] In Ground (2) the petitioner avers that respondent has erred by failing to bear in mind that delay (which is referred to in the refusal letter No 6/1 of Process at page 2 of 8) and the previous Immigration Judge's findings may be of little relevance when, as is alleged in the present case, the new material does not emanate from the petitioner himself, and thus cannot be said to be automatically suspect because it comes from a tainted source.

[18] The new material referred to is the letter from the Democratic Party of Iranian Kurdistan "DPIK" dated 7 September 2005 which forms part of No 6/2 of Process.

Ground (3)

[19] In Ground (3) the petitioner avers that the respondent erred in law by failing to satisfy the requirement of anxious scrutiny.

[20] The petitioner submitted that contrary to the assertion by the respondent on page 3 of the refusal letter that there is no evidence to substantiate the petitioner being at real risk the respondent has failed to properly consider all information. Although the respondent has considered some of the country information, the country information also demonstrates that the petitioner is reasonably likely to be questioned on return not only with regard to his support of the KDPI but also for appearing to have left illegally (see *AD Iran CG* [2003] UKIAT00107; *Zarnaghi* v *SSHD* [2002] UKIAT 02272). Reference was made to the Country of Origin Information Report on Iran

dated August 2008 (No 6/4 of Process at paragraph 28.13 and paragraphs 31.02-31.04) and the US State Department Country Report on Human Rights Practices for Iran dated 28 February 2005 (in No 6/2 of Process). Both reports are used by decision makers in assessing asylum and human rights claims. It is reasonably likely the authorities will discover the petitioner's asylum claim and his claim being based on his association with the KDPI. He will thereafter be at real risk. The informed reader does not know how the principal points have been resolved (by the respondent) and further investigation is required.

Ground (4)

[21] Ground (4) for the petitioner is that the respondent has erred in criticising the petitioner for only being described as a supporter in the letter and not a militant supporter (No 6/1 of Process at page 3 of 8). The respondent has erred by arriving at a strained interpretation of the country information and arriving at an unreasonable finding. The country information (referred to in Ground (3) above) shows that the KDPI is militant and any supporter is implicitly a supporter of a militant organisation. The petitioner should not be expected to lie or modify his behaviour or opinion when questioned (see *IK* v *Secretary of State for Home Department* [2004] UKIAT 00312; *J* v *Secretary of State for Home Department* [2006] EWCA Civ 1238). The respondent has erred by failing to consider that in any event it is the reason in the mind of the persecutor for inflicting the persecutory treatment (*Sepet and Bulbul* v *SSHD* [2003] UKHL 15 at para 23). The respondent has failed to take these material factors into account. The respondent ought to have applied anxious scrutiny to the further submissions. Had anxious scrutiny been applied the respondent would have found

there was a realistic prospect of success and would not have rejected the further submissions.

Ground (5)

[22] Ground (5) is that the content of the further submissions taken together with previously considered material create a realistic prospect of success where 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). The petitioner contends that it appears investigation is required in assessing delay and the details narrated in continuation of the last paragraph on page 2 onto page 3 of the refusal letter namely the role played by the petitioner and how the client is a supporter of the KDPI and whether the petitioner would be questioned on return and how he would respond to the questioning.

[23] 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. The respondent has erred by failing to properly directing herself in the relevant law and had she done would have found that the content of the further submissions was apparently credible. It was not for the respondent to make a judgement on the credibility of the new material, unless it was possible to say that no person could reasonably accept it as believable: *R (on the application of TN) (Uganda)* [2006] EWCA Civ 1807 at paragraph 10. The consideration of whether submissions amounted to a fresh claim is a decision of a different nature to that of an appeal against refusal of asylum. It requires a different mindset. Only if the respondent can exclude as a realistic possibility that an

independent tribunal (in the person of an immigration judge) might realistically come down in favour of the petitioner's asylum or human rights claim, can the petitioner be denied the opportunity of consideration of the material: *AK (Afghanistan)* v *Secretary of State for the Home Department* [2007] EWCA Civ 535 at paragraphs 22 to 24 and 26. Moreover, no such Secretary of State so directing herself 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 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.

Ground (6)

[24] Ground (6) draws together various threads from the earlier submission and is to the following effect.

[25] A reasonable Secretary of State for the Home Department having regard to the relatively low test applicable and applying anxious scrutiny, would not have failed to decide that the fresh evidence was material, apparently credible and when taken together with the previously considered material was reasonably capable of producing a different outcome before an Immigration Judge (*WM (DRC)* v *Sceretary of State for Home Department* [2006] EWCA Civ 1495; *Petition of Andrei Harbacchou* [2007] CSOH 18; *Petition of Fatima Kaniz* [2007] CSOH 29; *Kurtaj* v *Secretary of State for Home Department* [2007] EWHC 221 (Admin)). The respondent ought to have found the further submissions were significantly different, namely not having been considered previously and having a realistic prospect of success.

The Petitioner's Plea in Law

[26] The Petitioner's plea-in-law, so far as relevant, was as follows:-

"The respondent having erred in law, *et separatim* acted unreasonably in refusing to treat the petitioner's further submissions and fresh evidence as a fresh application for asylum as hereinbefore condescended upon, ... reduction should be pronounced as sought."

The Respondent's Position

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

[28] In response to petitioner's various Grounds for review, the respondent contends that she properly considered the correct question before her. She was entitled to reach the view which she did. She has given adequate reasons for her decision.

[29] In addition, in relation to Ground (2), the respondent avers that the evidence produced by the petitioner did no more than affirm that the petitioner was a supporter of the KDPI, but that had been accepted by the Immigration Judge in determining the petitioner's credibility on the core of his account, in which assessment the petitioner was found not be truthful.

[30] In relation to Grounds (3) and (4), the respondent avers that she had regard to the background evidence and that submitted by the petitioner. She contends that the petitioner's circumstances do not bring him within the circumstances considered at para 28.13 of the Country of Origin Information Report. So far as relevant to the petitioner's circumstances, reference is made, as it was made reference to by the respondent, to the terms of para 28.12 (erroneously referred to in the decision letter as para 28.13). Any sentence the petitioner may be required to serve because of illegal exit from Iran does not amount to a breach Article 3, ECHR. Reference is made to *AD Iran CG* at para 13. The absence of reference to the US State Department Country Report is, in the circumstances, not material. So contends the respondent.

[31] In relation to Ground (5), the respondent also contends that no further investigation was, in the circumstances necessary. The letter produced by the petitioner affirmed that which had been accepted by the Immigration Judge, and formed part of his determination, that the petitioner was a supporter of the KDPI. The further submission did not identify the petitioner as a militant supporter.

The Respondent's Pleas-in-law

[32] In the result, Mr Campbell invited me to sustain the third plea-in-law for the respondent which was as follows:-

> "The respondent not having erred in law *et separatim* acted unreasonably, the orders sought should be refused."

Discussion

[33] I have given anxious scrutiny to the very helpful submissions made by both parties.

[34] Mr Campbell outlined the respondent's position with characteristic clarity and fairness.

[35] However, in my opinion, Mr Winter's submissions on behalf of the petitioner fall to be preferred.

[36] The petitioner's submissions were well focussed in the petition and I have outlined them in some detail (above).

[37] 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."

[38] It is accepted by the respondent that the letter from the DPIK had not been considered before. The requirements of Rule 353(i) have been satisfied.

[39] The question for the respondent was whether the requirements of Rule 353(ii) had also been satisfied.

[40] There was no dispute between the parties as to the test to be applied by the respondent which was set out in the refusal letter (No 6/1 of Process) as follows:-

"The question is not whether the Secretary of State herself think that the new claim is a good one or should succeed, but whether 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 return".

[41] The petitioner, in essence, accepted that the correct test had been identified but submitted that it had been wrongly applied to the facts of this particular case.

[42] In my opinion the petitioner's submissions are sufficiently well-founded to result in decree of reduction.

[43] The new material founded upon by the petitioner is the letter from the Democratic Party of Iranian Kurdistan ("DPIK"), Bureau of International Relations, dated 7 September 2005 which forms part of No 6/2 of Process. That letter states:-

"We, the undersigned, representatives of the DPIK in Europe, hereby certify that (the petitioner) is a supporter of our party and that, because of oppression exercised by the regime of the Islamic Republic of Iran, he has been obliged to leave Iran. A return to his native country would place his life in danger."

[44] There was, in my view, just sufficient explanation for the delay in producing the letter which came from the party headquarters of DPIK in Paris. The petitioner believed that the party checked with their counterparts in Iran and only when they were satisfied of his involvement would this letter be issued.

[45] The respondent was correct to point out that the letter did not state that the petitioner was a "KDPI leader nor militant supporter" (a reference to paragraph 3.11.11 of No 6/3 of Process) but it is also important to bear in mind that the letter did state in terms that "A return to his native country would place his life in danger". That last sentence is material.

[46] In the result, 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.

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

[48] The petitioner succeeds essentially for the reasons summarised in Ground (6) - which I have set out in full above.

[49] The respondent's decision dated 3 December 2008 falls to be reduced.

[50] For completeness, I should also mention that there was some uncertainty as to whether the respondent was referring to, and correctly quoting from, the appropriate Country of Origin Information Reports. The paragraph numbers stated in the refusal letter were difficult to reconcile with the documents produced.

Decision

[51] In the whole circumstances, and for the reasons outlined above, I shall sustain the petitioner's plea-in-law, repel the first three pleas-in-law for the respondent, and reduce the respondent's decision dated 3 December 2008.