OUTER HOUSE, COURT OF SESSION

[2010] CSOH 18

P1397/09

OPINION OF LORD MATTHEWS

in the Petition of

DL

Petitioner;

For Judicial Review of decisions of the Secretary of State for the Home Department dated 3 October 2009

Petitioner: Forrest; McGill & Co
Respondent: Webster; Solicitor to the Advocate General

3 March 2010

Introduction

[1] The petitioner is a national of the Democratic Republic of the Congo, born on 11 March 1972. He arrived in the United Kingdom on 12 November 2007 and his asylum claim was refused on 22 May 2008. The basis of his claim was that he feared he would be persecuted if returned to his country of origin because of his membership of and/or association with a political group called Apareco. He appealed to an Immigration Judge but his appeal was refused on 4 July 2008 whereupon he sought reconsideration from the Asylum and Immigration Tribunal. This was refused on 23 July 2008. He sought reconsideration in the Court of Session and this was refused on 20 October 2008. Thereafter further submissions were made in a letter dated

4 March 2009, enclosing a letter from a Sylvain Mutombo Kabinga, said to be the National Coordinator of the League of African Students and Pupils for Human Rights. The respondent, who has responsibility for the enforcement of immigration control throughout the United Kingdom, refused to treat the further submissions as a fresh claim, said refusal being set out in a letter dated 3 October 2009.

[2] The petition seeks Judicial Review of that refusal.

[3] It is averred that the respondent has acted unreasonably *et separatim* acted irrationally by appearing to refer to the Immigration Judge's findings to undermine the further submissions. It is also said that the respondent appears to have failed to recognise that the previous Immigration Judge's findings may have little relevance where the documents relied on by the petitioner have not emanated from the petitioner but from third parties and the further submissions cannot be said to be automatically tainted. It is also averred that the respondent does not appear to have kept clearly in mind whether or not there would be a realistic prospect of success before another Immigration Judge and appears to have treated his own view as the end point rather than the starting point. In conclusion it is averred that 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. The respondent ought to have found that the further submissions were significantly different, not having been considered previously, and having a realistic prospect of success.

[4] It is averred in answer that the respondent had regard to the correct test, considering the letter on its own terms and in the context of other evidence. He also

had regard to the absence of objective information that members of Apareco are at risk within the Democratic Republic of the Congo. It is said that he reached a decision on the petitioner's application in the round and that he was entitled to reach the view which he did. He had given adequate reasons for his decision. In any event it is said that standing the respondent's consideration of the absence of objective information that members of Apareco are at risk within the Democratic Republic of the Congo, *esto* he erred in consideration of the letter the error was of no materiality.

[5] When the case called before me Mr Forrest appeared for the petitioner and Mr Webster for the respondent. The petitioner had sought declarator that the refusal decision taken on 3 October 2009 was unreasonable *et separatim* irrational and reduction of the decision as well as the expenses and such other orders as might seem to be just and reasonable. At the outset Mr Forrest indicated that he was not seeking declarator but did seek reduction of the decision.

Submissions for the petitioner

[6] I was told by Mr Forrest that the petitioner's claim for asylum had been rejected by the Immigration Judge because the judge held that there was no evidence that anyone associated with this group would be at risk and (b) that certain items of documentary evidence on which the petitioner relied were neither credible nor reliable. Paragraph 28 of the Immigration Judge's determination was in the following terms:

> "28 I preferred the submissions of the Home Office Presenting Officer to the submissions of the appellant's representative. It appears to me that the appellant's case is based upon his association or alleged association with a particular group, but if there is a risk to someone in being associated with that group, then I would expect that to be reflected in the COIR report. I agree with the Home Office Presenting Officer that no objective information has been

> produced to show that association with Apareco carries risk. On that ground alone I considered that I would be justified in dismissing the appeal. I would add, however, that I consider that there are difficulties for the appellant with regard to the question of credibility. I consider that the letter from Mr Mulumba and the letter from Mr Kilosho are both unreliable. Mr Kilosho said that the appellant was an active member of their political organisation in the UK. Even on the basis of the appellant's own evidence, he could hardly be said to be active in the UK since the most that he appeared to have done was to have obtained a membership card. The letter from Mr Mulumba contained obvious errors which were highlighted in the presenting officer's cross-examination and in the presenting officer's submission. I do not find myself able to attach weight to either of these letters."

[7] Mr Forrest submitted that after the determination was promulgated the petitioner obtained further information, being a letter dated 3 September 2008 from the National Coordinator of a body known as the League of African Students and Pupils for Human Rights. This was item 6/2 of process and was not from a political party but a human rights organisation. Whereas the previous documentary evidence purported to identify the petitioner as a member of the political group referred to above, the thrust of this document was different. The author, on behalf of a different organisation, reported that it had been contacted by the petitioner's parents, not directly about the petitioner, but about his wife, JM. According to the petitioner's family this person had been abducted, following threats, accusations and charges against the petitioner. The organisation had been asked to inquire into this and it was revealed to them that there was a desire on the part of the authorities to get their hands on the petitioner.

Mr Forrest submitted that that linked him with a risk of danger because of his political

affiliations. The letter did not say so in terms but it was a reasonable inference, the letter indicating that the petitioner was accused of high treason by the justice system and they wanted to kill him. Although different in nature to the documentary evidence rejected by the Immigration Judge, it disclosed, in a different way, that the petitioner might be at risk if he had to return to the Democratic Republic of the Congo. The petitioner consulted his solicitors who wrote to the respondent and submitted that the further information amounted to and should be treated as a fresh claim but the respondent rejected that submission.

[8] The letter appears in process in its original French and also with a translation and it was submitted to the respondents by the solicitors, by letter dated 4 March 2009. In the covering letter a number of submissions were made into which I need not go. As translated, the letter bears to be a sworn statement by Maître Sylvain Mutombo, Barrister at the Court of Appeal and to have been issued by him in Kinshasa on 3 September 2008. It is in the following terms:

> "I, the undersigned, Sylvain Mutombo Kabinga, Barrister at the Counsel of Kinshasa/Matete and National Coordinator of the League of African Students and Pupils for Human Rights (or L.E.E.A.D.H.) hereby certify that the family of Mr DL contacted us to report the abduction of Ms JM by security agents on 08 July 2008, following conflicts opposed by her husband, Mr DL, who is accused of high treason by the justice system and reported as missing. Following investigations carried out by us, it was revealed that, at the time of this unfortunate incident, they had already received death threats, threatening to kill them, for as long as they were unable to get their hands on her husband.
>
> Our services continue to search the various prisons that have become so popular in our country, and even the private homes of certain authorities

that are being transformed into detention homes, and they can all do without fearing what is to come.

These are the reasons for which we plead with domestic and international organisations (bodies) to grant protection to Mr DL and his family, in accordance with their human rights, since they have come to suffer death threats."

The letter of refusal from the respondent is number 6/1 of process and Mr Forrest submitted that the respondent assessed the fresh submissions between paragraphs 7 and 29. Between paragraphs 7 and 15 he considered whether the submissions might amount to a fresh claim for asylum and a breach of Article 3 of the European Convention on Human Rights and between paragraphs 16 and 29 he considered whether there was a breach of the petitioner's rights under Article 8. No issue was taken with his assessment of the position under Article 8. The challenge was restricted to how he had assessed the information between paragraphs 7 and 15. Those paragraphs are in the following terms:

"7. You have submitted a letter from Sylvain Mutombo Kabinga a Barrister at the Counsel of Kinshasa/Matete and the National Coordinator of the League of African Students and Pupils for Human Rights (known as LEEADH.). In this letter he states that your client's wife was reported to him as having (been) abducted by security agents on the 08/07/2008. He further states that the family had been receiving death threats because of her husband evading capture by the security forces. He claims that your client, and his family, need international protection in accordance with their human rights.

8. It is noted that the issue of your client submitting documents was referred to in the appeal determination of 04/07/2008. Immigration Judge Clapham:

'I consider that the letter from Mr Mulumba and the letter from Mr Kilosho are both unreliable.' (appeal determination paragraph 28).

The Immigration Judge outlined the many reasons for dismissing the reliability of these documents and rejected them in full.

"I do not find myself able to attach weight to either of these documents." (appeal determination paragraph 28)."

9 Your client also submitted a newspaper/magazine article supporting his claim which the Immigration Judge gave no weight to. Indeed the Immigration Judge made a negative credibility finding against your client as he had claimed his cousin had been shot by the security forces, something that wasn't mentioned in the newspaper article.

10 The findings of the Immigration Judge relating to these documents was (*sic*) upheld by Senior Immigration Judge Eshun who said:

> 'The Immigration Judge gave sound reasons for not relying on the letter from Mr Kilosho and Mr Mulumba.....the Immigration Judge found that the appellant lacked in credibility. The IJ gave clear and adequate reasons for arriving at this finding.'

11 The decisions of both Immigration Judge Clapham and Senior Immigration Judge Eshun were upheld by the Court of Session in their determination of 20/10/2008.

12 Therefore the letter you have submitted must be viewed alongside these documents and your client's evidence in the round as per the principles set out in the case of *Tanveer Ahmed* [2002] UK IAT 00439. In summary the principles set out in this determination are:

- In asylum and human rights cases it is for an individual claimant to show that a document on which he seeks to rely can be relied on.
- The decision maker should consider whether a document is one on which reliance should properly be placed after looking at all the evidence in the round.
- Only very rarely will there be the need to make an allegation of forgery, or evidence strong enough to support it. The allegations should not be made without such evidence. Failure to establish the allegation on the balance of probabilities to the higher civil standard does not show that a document is reliable. The decision maker still needs to apply principles 1 and 2.

13 Examination of the letter from LEEADH. itself raises 2 issues. Firstly the name of your client's wife as given in his statement of 17/12/2007 and 09/01/2008 is JM however the name given in the letter from LEEADH is JM. Secondly there is no trace of the organisation calling itself LEEADH. in objective sources. The organisation refers to itself as having a standing in the DRC that allows it to search prisons and properties of the authorities and it would be expected that such an organisation could be referenced in the objective information. These issues would be considered by an Immigration Judge when assessing the reliance to be given to this document in determining your client's asylum claim.

14 Given the numerous credibility issues highlighted in the determination by Immigration Judge Clapham, and the principles of the case of *Tanveer Ahmed,* there is no reason to believe that an Immigration Judge, when applying

anxious scrutiny, would be persuaded to reverse the finding made by Immigration Judge Clapham regarding the issue of an individual threat to your client based upon this letter from an organisation calling itself League of African Students and Pupils for Human Rights (LEEADH).

15 Immigration Judge Clapham determined that even when taking your client's case at its highest there is no objective information to suggest that members of Apareco are at risk within the DRC (appeal determination paragraph 31 refers). He determined that your client's case could be refused on these grounds alone even if there were no credibility issues, which there were. There was no evidence submitted to the AIT or the Court of Session to demonstrate that this determination was wrong. No evidence has been submitted in your letter to show that this position has changed since the determination was issued by Immigration Judge Clapham. It is considered that the findings from Immigration Judge Clapham were clear and were found to be in accordance with the law."

[9] For completeness I should set out the next three paragraphs of the letter. These were as follows:

"16 There is no reason to believe that an Immigration Judge, when applying anxious scrutiny, would be persuaded to reverse the finding made by Immigration Judge Clapham regarding the threat to people affiliated to Apareco based upon the letter that you have submitted.

17 Immigration Judge Clapham considered the risk of a breach to (*sic*) your client's Article 3 rights in the appeal determination of 04/07/2008. The Immigration Judge determined that your client's Article 3 right claim failed

along with the asylum appeal. This was done after he separately considered your client's rights under the Human Rights Act.

18 There is no reason to believe that an Immigration Judge, when applying anxious scrutiny, would be persuaded to reverse the finding made by Immigration Judge Clapham regarding the potential breach of your client's Article 3 rights based upon the letter that you have submitted."

[10] Mr Forrest referred me to the relevant statutory provision, which was paragraph 353 of the Immigration Rules (HC 395, as amended by HC 1112). That paragraph is in the following terms:

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

Mr Forrest submitted, therefore, that before evidence could be accepted as fresh evidence it had to be significantly different from the previous evidence in two ways. It had to be new in the sense of not having been seen by the previous judge and secondly it had to create "a realistic prospect of success". He submitted that the information in 6/2 of process had not been seen before, so the first part of the provision was satisfied. The question was whether there

was a realistic prospect of a fresh claim succeeding before a new judge, taking this new evidence into account.

[11] Mr Forrest went on to consider the task of the respondent and the court. In considering whether the respondent had erred, it was important to examine what it was he had to do in this situation. Mr Forrest referred me to the case of *WM (DRC)* v *Secretary of State for the Home Department* [2007] Imm AR 337 and in particular to paragraphs 6, 7 and 11 of the Opinion of Buxton LJ, where he said the following:

> "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 is 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, as Mr Nicol QC 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. If authority is needed for that proposition, see per Lord Bridge of Harwich in *Bugdaycay* v *SHHD* [1987] AC 514 at p 531F."

[12] The final sentence in paragraph 10 reads as follows:

"Accordingly, a court when reviewing a decision of the Secretary of State as to whether a fresh claim exists must address the following matters."

Paragraph 11 goes on:

"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 was 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."

[13] Mr Forrest submitted that the Secretary of State, in assessing the fresh information, had relied unduly on the previous judge's findings in relation to the previous information and had not asked himself the correct question.

[14] Mr Forrest accepted that the new information had to be "taken together with the previously considered material." before a decision could be taken on whether or not there was a realistic prospect of success before another judge. The previous information was discussed between paragraphs 8 and 10 in the letter of refusal, which I have already quoted. The respondent assumed that because the previous information was not found to be credible or reliable, a similar conclusion would follow in relation to the fresh information. At paragraph 12 of the refusal letter the Secretary of State said that the new letter must be viewed alongside the previous documents. In theory he was not wrong to look at the previous material but he had found that the new material fell for the same reasons and that could not be rational. The comparison between the old and the new material showed that they came from a different source. Buxton LJ touched on the importance of distinguishing between the sources at paragraph 6 of his opinion in *WM*. If a new set of documents came from a different

source one could not take the reason for saying that the first source was unreliable and transfer it to the second.

[15] Mr Forrest then referred me to the case of *Tanveer Ahmed*, which was referred to in paragraph 12 of the refusal letter.

[16] In that case the appellant, a citizen of Pakistan, had been refused asylum by the Secretary of State and his appeal had been dismissed by a special adjudicator. On appeal to the tribunal counsel challenged the approach by the adjudicator to documentary evidence produced by the appellant and which the adjudicator discounted as not authentic, concluding that the burden of proof of showing that it was reliable lay on the appellant. It was held that it was for the appellant in an asylum appeal to demonstrate that a document on which he wished to rely could be relied on, but in assessing whether a document should be relied on, it should be considered in relation to all the evidence and that it would not as a rule be necessary to characterise the document as a forgery. Mr Forrest conceded that it was not irrelevant to consider previous evidence but it was irrational to transfer to new evidence the reasoning applying to old evidence.

[17] He submitted that the Secretary of State had not asked the correct question. He referred in particular to paragraphs13 and 14 of the refusal letter, which I have already quoted. He had not asked whether he might not believe it and then gone on to ask how another judge might have approached it but he had used his own views from first to last to inform his decision. It was premature for him to reach a conclusion on these issues. The penultimate and final sentences of paragraph 13 bear repetition. These are as follows:

> "The organisation refers to itself as having a standing in the DRC that allows it to search prisons and properties of the authorities and it would be expected

> that such an organisation could be referenced in the objective information. These issues would be considered by an Immigration Judge when assessing the reliance to be given to this document in determining your client's asylum claim."

The Secretary of State appeared to accept that another judge would need to look at the matter if it went forward but the wrong question had been asked. The respondent himself had decided that the new claim was not a good one, not whether there was a realistic prospect that it would succeed before another judge. It was possible that the source of the fresh information was tainted, its contents irrelevant or that it was neither credible nor reliable but that conclusion could only be reached after another judge considered it. The observations of the respondent in paragraph 13 identified issues upon which only another judge and not the respondent himself could reach a decision. The fresh information should only be rejected if it was neither credible nor capable of producing a different outcome. Reference was made to the case of *Boybeyi* v *Secretary of State for the Home Department* [1997] Imm AR 491 at 493.

[18] Mr Forrest submitted that the fresh information was not plainly or obviously incredible and, if accepted, it indicated that the petitioner would be exposed to persecution on account of his political opinion.

Submissions for the respondent

[19] In reply Mr Webster invited me to repel the first plea-in-law for the petitioner, sustain the third plea-in-law for the respondent and refuse to grant the orders now sought. He submitted that the refusal letter, when looked at as a whole, indicated, firstly, that the decision maker had had regard to the correct test and, secondly, that he had reached a decision which could not be regarded as perverse. Those were the hurdles the petitioner had to surmount to succeed on the merits. Mr Webster also

referred to the case of *WM* and emphasised that there were two distinct tasks to be performed. One of these was for the Secretary of State and the other was for the court. The tasks were not synonymous. The task facing the Secretary of State was set out in paragraph 6 of Buxton LJ's judgment. He had to take a decision on what he considered an Immigration Judge might do. As Buxton LJ put it:

> "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 the further asylum claim. That second judgment will involve not only judging the reliability of the new material, but also judging the outcome of tribunal proceedings based on that material."

[20] Mr Webster submitted that it was not enough to say that there was new information. The Secretary of State had to consider whether it was likely to make a difference, not merely that it might. The question was whether the material, along with the previously considered material created a realistic prospect of success. If the Secretary of State did not consider that it was of that weight then the task of the court was not to substitute its own view as to whether there was a realistic prospect of success but to assess whether the Secretary of State had reached a perverse judgment in his assessment. Mr Webster referred to paragraph 11 of Buxton LJ's judgment.

[21] It might be tempting to conclude that if the court thought there was a realistic prospect of success then that would answer the question whether or not the Secretary of States decision was perverse.

[22] That would be false, however.

[23] In this connection Mr Webster referred to paragraphs 13 to 20 of Buxton LJ's judgment as follows:

"13 Mr Nicol said that the question of whether a fresh claim existed was closely analogous in form to the question that arises under section 94 of the Nationality, Immigration and Asylum Act 2002 of whether a claim is 'clearly unfounded'. In both cases the decision is made by the Secretary of State. The approach that the courts have developed to the control of the decision under the 2002 Act should therefore be applied by analogy to control of the decision as to whether a fresh claim exists. The question of whether a claim has a realistic prospect of success is not the same as the question whether a claim is clearly unfounded; but I am content to accept that examination of the two issues is structurally sufficiently similar to allow this argument to pass the threshold of the court. There are, however, formidable other difficulties.

14 First, to the extent that the approach to cases under the 2002 Act differs from the approach of this court in *Cakabay*, this court is precluded by the latter case from adopting it. Mr Nicol said that we were not bound by *Cakabay*, because that was a decision on the former rule 346, which differed in its terms from the present rule 353. But the only significant change between the two regimes is that under rule 346 the Secretary of State was obliged, which now he is not, to exclude from consideration any material that was available at the time of first application, whatever its probative value. That does not affect the substantive issue that was addressed in *Cakabay*, the same under both regimes, of how the court should approach the Secretary of State's assessment of a realistic prospect of success.

15 Second, I would be less than frank if I did not say that now that the issue has been fully explored before us I have some difficulty with the courts' approach to decisions by the Secretary of State as to whether a claim is

manifestly unfounded. In *Razgar* v *SSHD* [2003] Imm AR 529 [30] this court approved a passage from the judgment of Richards J at first instance in the following terms:

> 'Where the lawfulness of the Secretary of State's decision is challenged on judicial review, the court's role, as it seems to me, is to determine whether the decision was reasonably open to the Secretary of State applying, in effect, the *Wednesbury* test but exercising the anxious scrutiny called for in all cases of this kind.'

In practice, however, I accept Mr Blake's submission that this comes down to much the same thing as determining whether, on the material before the Secretary of State, the claimant had an arguable case that removal would be in breach of his Convention rights. If the claimant does on proper analysis have an arguable case, then no reasonable Secretary of State could properly conclude that the case must clearly fail.

This approach therefore takes the shortcut of the court making the decision itself, rather than reviewing how the Secretary of State took his decision. When the case reached the House of Lords it was accepted that the task was one of review, but the same reality as attracted this court may have been recognised, Lord Bingham of Cornhill saying, [2004] AC 368 [17], that:

> 'In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself

> essentially the questions which would have to be answered by an adjudicator.'

A constitution of this court over which I presided returned to the subject in *Tozlukaya* v *SSHD* [2006] EWCA Civ 379. The court drew attention to *R(L)* v *The Home Secretary* [2003] 1WLR 1230, where at (paragraph) 56 this court said that a claim was either clearly unfounded or it was not: thus a question of admitting only one answer. That led this court in *Tozlukaya* to say at (paragraph) 44:

> 'although the court is exercising a supervisory jurisdiction over the Secretary of State's decision, it is in as good a position as he to determine whether the test is met, since the test is an objective one and the court has the same materials before it.'

16 That approach was not questioned in argument either in *Razgar* or in *Tozlukaya*. It however raises the following difficulties. First, for a court to say that it can adopt its own view because it is in as good a position, as well qualified, as the original decision-maker is the language of appeal, and not of review. Although courts, for instance this court in *Razgar* at (paragraph) 34, have stressed that the approach under consideration does not and should not lead to a merits review, it is very difficult to see how that is not the reality of a process in which the court directly imposes its own view of the right answer. If Parliament had intended that that should be the approach it would have provided for an appeal. Mr Patel, for the Secretary of State, was justified in saying that this was not merely a pedantic but more importantly a constitutional issue, that the decision-making power should rest in the

Secretary of State, however stringent a review the court might thereafter apply to it.

17 Second, at least one strand in the jurisprudence under discussion is the view adopted in *R(L)* that the question of whether a claim is clearly unfounded can only have one answer: which is therefore going to be the same answer whether it is given by the Secretary of State or by the court. But that is not the case, and is not suggested to be the case, with the process of assessment that is involved in determining whether a claim has a realistic prospect of success.

18 Third, it is with deference too simple to assume, as did this court in *Razgar* and *Tozlukaya*, that the approach in those cases will necessarily lead to the same answer as a review informed by the need for anxious scrutiny. In view of the demands of the latter there may not be many cases where a different result is achieved, but in borderline cases, particularly where there is doubt about the underlying facts, it would be entirely possible for a court to think that the case was arguable (the formulation used in *Razgar*), but accept nonetheless that it was open to the Secretary of State, having asked himself the right question and applied anxious scrutiny to that question, to think otherwise; or at least that the Secretary of State would not be irrational if he then thought otherwise.

19 I therefore consider that not only are we precluded by authority from importing the *Razgar* analysis into this chapter of the law, there are also, with deference, significant reasons for not doing so. Had these issues been more fully explored in *Razgar* and *Tozlukaya* a different view might or might not have been taken in those cases also.

20 The law is therefore as set out in (paragraph) 11 above, which I now apply to the cases under appeal."

[24] Mr Webster submitted that the court may have a view as to the weight to be attached to the new material but the task was really to see if no reasonable Secretary of State could reach the view which he did.

[25] Mr Webster then looked at the letter of refusal itself. Paragraph 5 set out the test according to the rules. The Secretary of State had to look at the old material as well as the new material and then make an assessment in the round. In cases of this type it could be dangerous to assess the credibility of particular documents in isolation from the whole circumstances.

[26] Mr Webster referred me to paragraph 26 of the determination in *Tanveer Ahmed*, where the tribunal quoted from the opinion of the Court of Appeal in the case of *R* v *Secretary of State for the Home Department ex parte Jose Dairla-Puga* (C/2000/3119, May 2001, unreported). Paragraphs 28 to 33 of that judgment are in the following terms:

> "28 What Mr Fripp also says is that if one looks at the documentation in this case, it was very powerful. There were far more relevant documents than one normally finds in an asylum application; they were ostensibly strongly supporting the applicant's case and were, on the face of it, cogent and authentic documents. Very broadly, they fell into three categories: the documentation which was evidencing complaints made to the police and the judges; the documentation from certain doctors evidencing the fact that the applicant and his wife had sustained in some cases quite serious injuries and evidence that the applicant was wanted by the police.
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> 29 Some of this documentation, as Mr Underwood for the respondent pointed out, is self serving in the sense that the complaints to the police and the judiciary are of course, documents which the applicant has produced. Some of

them do not fall into that category, namely, in particular, the documentation relating to the injuries sustained by the applicant and his wife.

30 Mr Fripp went so far as to submit that where there is apparently objective evidence of that kind, then really it is not open to the adjudicator to go behind it in asylum cases. With respect, that cannot be right. There are various ways in which documents may be obtained that may be presented to the authorities which are not genuine. Either they may be forgeries or it may be that individuals have been persuaded to produce these documents to represent something which is other than true.

31 In this case it is plain that the adjudicator was not persuaded that these documents were sufficient to demonstrate the credibility of the account given by the applicant. It must be said that when interviewed on the first occasion the applicant had told the immigration officer that he was not a member of the FIE and he had produced a certificate - which he had formerly produced for the government itself - to persuade the immigration officer that he was not a member of the FIE, and had no links with it.

32 So, unfortunately, he had been willing on a previous occasion to rely upon a document which he subsequently accepted had been fraudulently obtained, albeit for the understandable reasons of wanting to preserve his job, and he had sought to rely upon that as part of his claim before the immigration officer.

33 It is true that the adjudicator does not form a view about these documents, in the sense that he has not said which he considers to be authentic, or why he does not give these documents the weight Mr Fripp says they deserve. But it seems to me that it is very difficult for him to do that; he will not know

whether, for example, the medical documents are forgeries, or whether they are misrepresenting the facts, or whether there were injuries but they were not sustained for the reasons given by the applicant. What he was clearly satisfied about was that looking at the evidence in the round (and he does say on two occasions that he has done that) he was not persuaded by the credibility of the applicant's case. It seems to me impossible for him to form a concluded view about individual documents or how they were obtained. But he plainly was not satisfied, looking at all these matters, that they were sufficient to lead him to conclude that the evidence of the applicant was substantially credible."

[27] Mr Webster then read paragraphs 30 to 35 and 37 of *Tanveer Ahmed* as follows:

"It is trite immigration and asylum law that we must not judge what is or is not likely to happen in other countries by reference to our perception of what is normal within the United Kingdom. The principle applies as much to documents as to any other form of evidence. We know from experience and country information that there are countries where it is easy and often relatively inexpensive to obtain "forged" documents. Some of them are false in that they are not made by whoever purports to be the author and the information they contain is wholly or partially untrue. Some are "genuine" to the extent that they emanate from a proper source, in the proper form, on the proper paper, with the proper seals, but the information they contain is wholly or partially untrue. Examples are birth, death and marriage certificates from certain countries, which can be obtained from the proper source for a "fee" but contain information which is wholly or partially untrue. The permutations of truth, untruth, validity and "genuineness" are enormous. At its simplest the need to differentiate between form and content; that is whether a document is

properly issued by the purported author and whether the contents are true. They are separate questions. It is a dangerous over-simplification merely to ask whether a document is "forged" or even "not genuine". It is necessary to shake off any preconception that official-looking documents are genuine, based on experience of documents in the United Kingdom, and to approach them with an open mind.

31 Rule 39(2) of the Immigration and Asylum (Procedure) Rules 2000 provides:

> 'If in any proceedings before the appellate authority a party asserts any fact of a kind that, if the assertion were made to the Secretary of State or any officer for the purposes of any statutory provisions or any immigration rules, it would by virtue of those provisions or rules be for him to satisfy the Secretary of State or officer of the truth thereof, it shall lie on that party to prove that the assertion is true.'

32 It is for the individual claimant to show that a document is reliable in the same way as any other piece of evidence which he puts forward and on which he seeks to rely.

33 It is sometimes argued before adjudicators or the Tribunal that if the Home Office alleges that a document relied on by an individual claimant is a forgery and the Home Office fails to establish this on the balance of probabilities, or even to the higher criminal standard, then the individual claimant has established the validity and truth of the document and its contents. There is no legal justification for such an argument, which is manifestly incorrect, given that whether the document is a forgery is not the question at issue. The only

question is whether the document is one upon which reliance should properly be placed.

34 In almost all cases it would be an error to concentrate on whether a document is a forgery. In most cases where forgery is alleged it will be of no great importance whether this is or is not made out to the required higher civil standard. In all cases where there is a material document it should be assessed in the same way as any other piece of evidence. A document should not be viewed in isolation. The decision-maker should look at the evidence as a whole or in the round (which is the same thing).

35 There is no obligation on the Home Office to make detailed enquiries about documents produced by individual claimants. Doubtless there are cost and logistical difficulties in the light of the number of documents submitted by many asylum claimants. In the absence of a particular reason on the facts of an individual case a decision by the Home Office not to make inquiries, produce in-country evidence relating to a particular document or scientific evidence should not give rise to any presumption in favour of an individual claimant or against the Home Office.....

37 In summary the principles set out in this determination are:

1. In asylum and human rights cases it is for an individual claimant to show that a document on which he seeks to rely can be relied on.

2. The decision-maker should consider whether a document is one on which reliance should properly be placed after looking at all the evidence in the round.

3. Only very rarely will there be the need to make an allegation of forgery, or evidence strong enough to support it. The allegation should

> not be made without such evidence. Failure to establish the allegation on the balance of probabilities to the higher civil standard does not show that a document is reliable. The decision-maker still needs to apply principles 1 and 2."

[28] Mr Webster submitted that that was a long way of stating that the assessment of the new material was essentially a jury question. In any case there might be adminicles not all pointing in the same direction but the task of the decision-maker was to look at all of the evidence and make an assessment of the new evidence in the light of everything. If a petitioner had previously presented unreliable documents then the decision-maker might treat new material with a jaundiced eye. The test was not whether the new material was of itself unreliable or incredible but whether the whole case was such as to create a realistic prospect of success. The Secretary of State could properly conclude that it was not. The document under question here might come from a different source but in assessing the weight which he attached to it the Secretary of State was entitled to have regard to the fact that other material from other sources was unreliable and, whilst that was not a complete answer, it was a factor to be borne in mind and it might be, when the Secretary of State looked at the new material, there were issues therein which raised concern about its credibility and reliability. He was entitled to look not just at the material in the round but also how the Immigration Judge had previously treated the old material. He would have seen the petitioner giving evidence and formed conclusions.

[29] In the letter of refusal the material in the new letter was dealt with in paragraph 13. The Secretary of State had looked at it and drawn out two issues of concern. The first was a spelling matter and the second was that there was no trace in the objective sources of the organisation from which the letter purported to emanate. One would

expect that if an organisation such as this was able to carry out searches in prisons and even private homes of certain authorities which had been transferred into detention homes, even if they were doing so without authority, there might be some reference to them in the Country of Origin Information Report. Since there was no such reference to them in the objective sources that raised a question as to whether the organisation existed at all.

[30] The Secretary of State expressed no concluded view on the document saying properly that it would be considered by an Immigration Judge. In this he was perfectly correct. In paragraph 14 of the refusal letter the Secretary of State went on to apply the correct test. I repeat paragraph 14 as follows:

> "Given the numerous credibility issues highlighted in the determination by Immigration Judge Clapham, and the principles of the case of *Tanveer Ahmed,* there is no reason to believe that an Immigration Judge, when applying anxious scrutiny, would be persuaded to reverse the finding made by Immigration Judge Clapham regarding the issue of an individual threat to your client based upon this letter from an organisation calling itself League of African Students and Pupils for Human Rights (LEEADH.)."

[31] The Immigration Judge did not place any reliance on the letters from Mr Mulumba or Mr Kilosho.

[32] In paragraph 11 of his determination he pointed out that the letter from Mr Mulumba said that the family decided to go into hiding. Mr Kilosho's letter, dealt with at paragraph 15, was to the effect that the petitioner was an active member of the political organisation in the DRC and also in the UK.

[33] The Immigration Judge also dealt with these letters at paragraph 28 of his determination, which is reflected in paragraph 8 of the letter of refusal. He considered

that both the letters were unreliable and did not find himself able to attach weight to either of them.

[34] In paragraph 9 of the refusal letter the respondent dealt with the fact that the Immigration Judge gave no weight to the newspaper/magazine article which was submitted by the petitioner and which was dealt with by the Immigration Judge in paragraph 9 of his determination.

[35] Paragraph 10 of the refusal letter records that the findings of the Immigration Judge relative to the letters were upheld by the Senior Immigration Judge.

[36] The Immigration Judge had rejected the material that the petitioner's family were at risk. More material to the same effect had now been presented. The Secretary of State had identified concerns about the new material but at paragraph 14 he considered the broader test. He had regard to all the material, noted the credibility issues about the old material, noted that he had to consider all of the evidence in the round and decided that there were no realistic prospects of success. He had looked at the new letter, issues of credibility arising therefrom, the old material and issues of credibility arising from that and had then taken a view on the whole evidence. It could not be said that his decision was perverse. On one view all of the material came from the same source, namely the petitioner. It might be said to come from separate organisations and to that extent from different sources but it was not from an independently viable source such as a reputable newspaper. All we knew here was that it came through the hand of the petitioner himself. There was no trace of the organisation in the objective material. The Secretary of State had taken note of the credibility issues arising out of the new material and the older credibility issues and had asked if there was a realistic prospect of success. He did not consider that there was. The court might take a different view but that did not make the Secretary of

State's view perverse. A perfectly understandable approach had been taken. Paragraph 14 indicated that he assessed the credibility of the material as a whole and correctly applied the test.

[37] Even if he had applied the wrong test, that was not an end to the matter.

[38] Mr Webster read again paragraph 15 of the decision letter. That was to the effect that the Immigration Judge determined that even when taking the petitioner's case at its highest there was no objective information to suggest that members of Apareco were at risk within the DRC. The petitioner's case could be refused on these grounds alone even if there were no credibility issues. No evidence was submitted to the AI T or the Court of Session to demonstrate that this determination was wrong and no evidence had been submitted in the new letter to show that the position had changed. Paragraph 16 of the refusal letter, as I have indicated, read as follows:

> "There is no reason to believe that an Immigration Judge, when applying anxious scrutiny, would be persuaded to reverse the finding made by Immigration Judge Clapham regarding the threat to people affiliated to Apareco based upon the letter that you have submitted."

[39] Paragraphs 20, 21, 22, 26 and 27 of the Immigration Judge's determination are to the following effect:

> "20 The presenting officer submitted that the appellant claimed to have a fear of persecution purely due to his association with Apareco. The appellant had been a bodyguard to Rombo but had not been connected to the UDPS. Consequently, the presenting officer said that the issue in the appeal was that of the appellant's claimed association with Apareco. The presenting officer referred to a request that had been made to the Department in the Home Office which issues the COIR reports. The presenting officer said that Apareco was

marginal and was not registered as a political party. He said that there was no reason for Apareco personnel to be targeted.

21 The presenting officer submitted that there was no objective information to suggest risk and that there was nothing to say that anyone was persecuted owing to an association with Apareco. There was nothing in the objective information, submitted the presenting officer, to suggest that there were any government concerns about the group.

22 The presenting officer referred to the interview in the magazine with Mr Ngbanda. The presenting officer said that this was obviously an in-house magazine and that a marginal fringe party was exaggerating its influence. The presenting officer said that the magazine was not an objective source of evidence and that the party seemed quite open.....

26 The appellant's representative relied upon his skeleton argument. He referred to a country guidance case dealing with the risk factors which affects (*sic*) individuals in the DRC and to the question of political profile. It was submitted that the claimant had obtained a genuine letter and that the appellant had faced arrest in September 2007 so that there was a risk on return. The letter from Mr Mulumba was said to be the most recent information about the family that was available.

27 The appellant's representative said that the newspaper article shown at page E1 should be considered and that the interview with Mr Ngbanda was the best evidence available. In the whole circumstances it was submitted that the appeal should be allowed."

I have already quoted paragraph 28.

[40] The issues of credibility were not fundamental to the Immigration Judge's decision. Could the new material have any bearing on the substance of the decision?

[41] Mr Webster referred again to paragraphs 15 and 16 of the refusal letter and to paragraph 30 thereof, which was to the following effect

> "30 The points raised in your client's submissions have not previously been considered, but taken together with the material which was considered in the reasons for refusal of 22/05/2008 and the appeal determination of 04/07/2008, they would not have created a realistic prospect of success."

[42] Was the Secretary of State's decision perverse? There was no material saying that members of Apareco were at risk and nothing was added by the new letter. That did not say why the petitioner's wife was of interest to the authorities. It was claimed that the authorities wanted to get their hands on the petitioner but the petitioner was the only person who said that they wanted him because of Apareco. Nothing in the letter went to that. What would an Immigration Judge make of this? That was the test the Secretary of State applied. Was his decision not sustainable?. It might be that a decision-maker erred in one aspect of the process but if that error was not material then there was no basis for reduction of the decision.

[43] Mr Webster referred to the case of *BS (Kosovo)* v *Secretary of State for the Home Department* [2007] EWCA Civ 1310. In particular he referred to paragraphs 4, 5, 6 and 8 thereof which are in the following terms:

> "4 In May 2005 the applicant sought leave to remain as the unmarried partner of a person present and settled in the United Kingdom, namely Ms Holohan, who was a South African citizen with indefinite leave to remain and with whom he had been living for over two years. That application was refused by the Secretary of State in the letter of 3 June 2005. The applicant's solicitors

then submitted further representations in a letter of 30 June. Those representations were considered in a letter from the Secretary of State, dated 10 August, in which they were rejected; and the decision of 3 June was maintained.

5 The decision of the Secretary of State was challenged by way of proceedings for Judicial Review. In the judgment now sought to be appealed Underhill J granted permission to apply for judicial review, but refused the substantive application. He refused permission to appeal to this court. Permission was also refused by Buxton LJ on consideration of the papers.

6 There are five grounds of appeal. In his oral submissions, Mr Jafar has taken ground 5 first. By that ground, complaint is made of the Secretary of State's decision that the applicant's submissions did not amount to a fresh claim. It is submitted, correctly, by reference to *WM (DRC) v SSHD* [2006] EWCH Civ 1495, that the Secretary of State not only had to consider for himself whether the conditions of a fresh claim were made out, but also had to consider whether there was a realistic prospect of an immigration judge finding in the applicant's favour on the matters raised. It is said that, whilst in the letter of 3 June the Secretary of State did determine that the submissions did not amount to a fresh claim, in the further letter of 10 August he failed to consider whether the additional submissions addressed in that letter amounted to a fresh claim, let alone whether there was a realistic prospect of an immigration judge so holding. It is said that he thereby erred in law, and it is further submitted that the only reasonable conclusion open was that the further submission did satisfy the criteria for a fresh claim.....

8 In common with Buxton LJ, I take the view that the only matter that could properly be said to be new in the submissions addressed in 10 August letter (*sic*) was the IVF issue. The submissions being considered in that letter were actually put forward as a request that the Secretary of State reconsider his earlier decision. In rejecting their submissions, the Secretary of State confirmed the earlier decision and was plainly confirming the earlier conclusion that there was no fresh claim. In so far as he was forming his own judgment on the matter - whether the criteria for a fresh claim were made out - it seems to me that he gave entirely valid reasons for reaching that conclusion. He did not, however, refer expressly in that letter or, indeed in the earlier letter - both of which predated *WM (DRC)* - to the question whether an immigration judge might find in the appellant's favour on the issue. It is certainly arguable that the Secretary of State did not ask himself, to that extent, the right question. But it seems to me that the reasons given in the decision letter were such as to show that, had he asked himself the right question, he would inevitably have concluded, for those same reasons, that there was no realistic prospect of success before an immigration judge; and such a conclusion would, in my judgment, have been an entirely sustainable one. In saying that, I take account of the IVF issue looked at not only by itself but cumulatively, in conjunction with other factors raised in this case, to some of which I will come in a moment. I cannot accept that the court, exercising a judicial review jurisdiction, would be to exercise its jurisdiction to grant relief in circumstances where it took the view that, if there was an error of law in the original decision, it was not a material one in the sense that the decision would have been the same even in the absence of such an error. It seems to me that

> the argument that the Secretary of State had erred in the manner that I have indicated, in not finding a fresh claim, is one that has no real prospect of success before this court."

[44] Mr Webster submitted that reduction was an equitable remedy. Under reference to the case of *Miller petitioner*, [2007] CSOH 86, he submitted that if an incidental error was identified but the decision was nonetheless unchallengeable then reduction should not be granted.

[45] In the current case the Secretary of State had properly addressed the correct test and the manner in which he disposed of the issue was open to him.

Reply for the petitioner

[46] Mr Forrest submitted that if the letter made reference to Apareco he would accept that the decision was correct but it did not. As far as Mr Webster's subsidiary argument was concerned, he submitted that the issue was whether an error was material or incidental. In his submission the error identified here was a material one.

Discussion

[47] I was grateful to both counsel for their presentation of the issues. It seemed to me that they were at one as to the tests which the Secretary of State and the court had to apply. The issue really was whether this Secretary of State had in fact applied the correct tests. In particular, there being no doubt that the letter constituted new material, the question came to be whether he had correctly applied the test set out in Part (ii) of the last sentence of paragraph 353 of the Immigration Rules.

[48] As I understand it, the nub of the complaints made by the petitioner is that the Secretary of State acted illogically in transferring the credibility issues attaching to the original documentation to the new documentation and, secondly, that he effectively

decided the issue himself rather than considering whether there were realistic prospects of success if all the material were placed before an Immigration Judge.

[49] As to the first, it seems to me quite clear from *WM* that any finding as to the honesty or reliability of an applicant or indeed as to the credibility or reliability of documents made by an Immigration Judge may have little relevance where the new material does not emanate from the applicant himself and it cannot be said to be automatically suspect. This, it respectfully seems to me, is in accordance with sound common sense. The mere fact that one document submitted by an individual is suspect does not necessarily mean that another document submitted by the same person is also suspect. However, it does not mean that the Secretary of State must close his eyes to the previous documents, if there are issues surrounding them. Furthermore, if there is an independent reason to suspect the new material then he is clearly entitled to take that into account. His duty overall is to reach a conclusion on all of the material, both old and new.

[50] In the letter of refusal at paragraph 13 he points out two difficulties arising out of the new letter. The spelling mistake in the name of the petitioner's wife might be thought to be *de minimis* but the other difficulty, namely the absence of reference to L.E.E.A.D.H. in the objective information, is certainly more substantial. However, the Secretary of State makes it plain that these are issues which an Immigration Judge would have to consider and he does not himself find that the letter is suspect.

[51] The new letter cannot be seen to be automatically tainted but the Secretary of State was bound to consider it along with the old material and paragraphs 14 and 30 make it perfectly plain that the Secretary of State asked himself the correct question.

[52] I cannot identify any error of law in his approach, nor can I say that the decision he reached on all the material was one which no reasonable Secretary of State could have reached.

[53] The letter of refusal sets out the chronology, the correct rule and the findings of the Immigration Judge. I consider that there is nothing controversial in paragraphs 1 to 12. Paragraph 13 points out the credibility issues arising from the new letter, correctly stating that these would be a matter for an Immigration Judge. Paragraph 14 is the operative paragraph and paragraph 15 deals with the *esto* case made by Mr Webster. Nothing in these paragraphs shows that the respondent did not apply the correct test. He did not transfer to the new material the reasoning applied to the old but pointed out, as he was entitled to, the independent credibility issues attaching to the former. I can detect no support for the submission that he has applied his own views from first to last rather than considering the likelihood of success before an Immigration Judge and paragraphs 30 and 31 confirm that the correct approach was adopted.

[54] It seems to me that Mr Webster's submissions in this regard are to be preferred to those of Mr Forrest and I have no alternative but to refuse to make the orders sought.

[55] I do not consider that any error was made at all and in the circumstances it is unnecessary for me to deal with Mr Webster's subsidiary argument.

[56] Had it been necessary for me to do so I would have been with Mr Webster on this issue also, for the reasons set out in his submissions, which, in my opinion, are in keeping with the authorities.

Decision

[57] I shall repel the petitioner's plea-in-law, sustain the third plea-in-law for the respondents and refuse to grant the orders sought.