OUTER HOUSE, COURT OF SESSION

[2010] CSOH 171

P664/10

OPINION OF LORD BANNATYNE

in the Petition of

A B

Petitioner;

for

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

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Petitioner: Lyndhurst; McGill & Co
Respondent: Campbell; C Mullin

22 December 2010

Background

The subject of proceedings

[1] In this judicial review the petitioner sought reduction of a decision ("the challenged decision") by the Secretary of State for the Home Department ("the respondent") contained in a letter of 20 April 2010 refusing to treat representations made on 17 March 2010 as a fresh claim for asylum.

The factual background

[2] The factual background to the challenged decision was not in dispute and was as follows:

> The petitioner arrived in the United Kingdom on about 12 December 2006. He claimed asylum on 22 December 2006. An asylum interview was conducted on 22 January 2007. The asylum claim was refused on 23 January 2007. The petitioner appealed, and his appeal was heard on 5 March 2007. His appeal was refused on 14 March 2007. His appeal rights were exhausted on 2 May 2007. In about July 2007, the petitioner absconded. On 17 March 2010 the petitioner submitted fresh representations to the respondent in the form of two documents bearing to be from Iran. On 20 April 2010, the respondent issued a decision letter to the petitioner advising him that the respondent declined to treat the representations as a fresh claim for asylum.

The ground of challenge

[3] That the challenged decision was unreasonable *et separatim* irrational for the reasons elaborated upon in paragraphs 7 to 9 of the petition. In terms of the petition there was a second ground which challenged the respondent's decision not to allow an in-country right of appeal as elaborated upon in paragraph 6 of the petition. This latter ground of challenge was not insisted upon.

The relevant legislation

[4] Paragraph 353 of the Immigration Rules states:

> "When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal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) has not already been considered; and

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

Submissions on behalf of the petitioner

[5] Counsel first turned to the two documents which had formed the basis of the petitioner's fresh representations, namely: 6/2 and 6/3 of process.

[6] 6/2 of process bore to be from the Kurdistan Democratic Party of Iran ("the KDPI") and in substance stated that the petitioner was a supporter of that party and an active comrade. Counsel submitted that it also confirmed the petitioner's position as earlier stated that his father had disappeared after being caught by the Iranian authorities. Lastly it averred that the petitioner's life was in danger.

[7] 6/3 of process counsel for the petitioner submitted was a judicial document issued in Iran on 4 November 2009 sentencing the petitioner to life imprisonment arising from his anti-government activities while co-operating with the KDPI.

[8] Counsel then turned to examine in some detail the terms of the decision letter setting forth the reasons for the challenged decision. It was his position that the respondent had at paragraph 5 identified the correct test, namely: Rule 353 of the Immigration Rules. However, it was his position that the respondent had gone on to apply the test in the wrong manner. Counsel turned to develop that argument.

The first branch of the petitioner's argument

[9] He first submitted that the respondent had misapplied the test by: attaching too much weight to the negative credibility findings of the previous Immigration Judge. She had failed to take account that, where it is alleged as here, that the new material did not emanate from the petitioner himself and cannot be said to be automatically suspect because it comes from a tainted source the previous Immigration Judge's findings on credibility may be of little relevance. Her decision when looked at as a whole over-emphasised the negative credibility findings of the previous Immigration Judge. In support of this submission reference was made in particular to paragraphs 11, 12, 16, 18, 19, 21 and 24 of the decision letter. This repeated emphasis on these negative findings showed that the respondent had failed to take account that said findings may be of little relevance given the nature of the newly submitted evidence, namely the above documents. It was his position that although at paragraph 14 the petitioner referred to *WM (DRC)* and *AR (Afghanistan)* v *Secretary of State for the Home Department* 2006 EWCA Civ.1495, paragraph 6 it was clear when the whole of the decision letter was had regard to that she had not followed what was said there to be the task of the Secretary of State when making a decision regarding a fresh claim:

> "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".

It was counsel's position that in particular the respondent had failed to take account of the last sentence of the observations made by the Court in paragraph 6 of the said case.

[10] Secondly it was his position that the respondent in the instant case had gone on to make the same mistake as the Secretary of State had made in the *WM* case as set out by Buxton LJ at paragraph 24:

> "I have concluded however, that the Secretary of State's approach indicates that he asked himself the wrong question..... Although Dr Kennes' evidence is in general terms, and not substantial in detail, it is evidence of a type, because of the difficulties of obtaining information from countries like the DRC, Immigration Tribunals often do consider. Granted that, and that the evidence cannot be dismissed as simply implausible, it is impossible to say that an adjudicator could not properly come to the conclusion that the claim is well founded; so the evidence's bearing on the case is a matter for the adjudicator, and not for the Secretary of State".

Counsel submitted that the new evidence put forward on behalf of the petitioner could not be dismissed as simply implausible. Nevertheless the respondent had done just that. She had thus as had been done in the *WM* case usurped the function of the Immigration Judge. It was his position that the new documents changed the whole complexion of the case, thus putting the petitioner in the same position as the applicant in *WM* (see: paragraph 26 of Buxton LJ's Opinion).

[11] He submitted that for the foregoing reasons the challenged decision was tainted. He submitted that in acting as above the respondent had acted unreasonably and in a way that no decision maker in the circumstances would reasonably have acted.

[12] Counsel further developed his argument as follows: in paragraphs 15 and 20 the respondent made certain comments relative to the provenance of the said documents. In addition she said at paragraph 17 that court documents of the type 6/3 of process can easily be obtained illegally. Counsel submitted given that there was nothing on the face of the documents to show that the content was incredible then in circumstances such as here where the respondent had raised questions about the provenance of the documents it was for the new Immigration Judge to decide these questions and not for the respondent to arrive at conclusions. It was his position that the respondent had reached conclusions which more appropriately should have been made at the second stage of the decision making process namely before the new Immigration Judge. The queries raised by the respondent should properly have been answered by another Immigration Judge and not by the respondent. Thus he submitted the respondent had again erred in law in that she had usurped the function of the new Immigration Judge. The respondent had in fact made a decision on the merits of the petitioner's case and that was not the respondent's function.

[13] Counsel's position was that the documents which were submitted were capable of having an important influence on the result of the case, even though they might not be decisive. They were apparently credible, although not incontrovertible. The respondent had erred by failing to properly direct himself to the relevant law and had she done so would have found that the content of the further submissions were apparently credible. It was not for the respondent to make a judgment 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. Under reference to *AK (Afghanistan)* v *The Secretary of State for the Home Department* 2007 EWCA Civ.535 at paragraphs 22-24 and 26 counsel submitted that the consideration of whether submissions amounted to a fresh claim was a decision of a different nature to that of an appeal against refusal of asylum. It required a different mind set, only if the respondent could exclude as a realistic possibility that an independent tribunal, i.e. a new Immigration Judge might realistically come down in favour of the petitioner's asylum claim could the petitioner be denied the opportunity of consideration of the material.

The second branch of the petitioner's argument

[14] Separately counsel submitted that the respondent had failed to apply anxious scrutiny in her decision letter.

[15] In developing this general submission counsel argued that the respondent's failure had been that she had not had regard to case law and country information to the effect that the petitioner was reasonably likely to be questioned on return to Iran for appearing to have left there illegally and in terms of the outstanding arrest request.

[16] In making this submission counsel relied particularly on *RC* v *Sweden* ECHR Application No.41827/07 at paragraph 56 and *SB* v *SSHD* 2009 UKAIT00053.

[17] In *RC* v *Sweden* the Court at paragraph 56 says as follows:

> "In assessing such a risk, regard must be had, firstly, to the current situation that prevails in Iran and to the very tense situation in that country where respect for basic human rights has deteriorated considerably following the election of June 2009 (see paragraphs 31-34). In addition regard must also be had to the specific risk facing Iranians returning to their home country in circumstances where they cannot produce evidence of their having left that

country legally. The Court notes that according to information available from independent international sources (see paragraphs 35 and 36 above) such Iranians are particularly likely to be scrutinised for verification as to the legality of their departure from Iran. The Court observes that the applicant has claimed that he left Iran illegally and that his claim in this regard has not been rebutted by the Government. Therefore, in the light of the information available to the Court, it finds it probable that the applicant, being without valid exit documentation, would come to the attention of the Iranian authorities and that his past is likely to be revealed. The cumulative effects of the above factors adds a further risk to the applicant".

Counsel submitted that the petitioner was in a broadly similar position to that set out in paragraph 56.

[18] Turning to the case of *SB* v *SSHD* counsel relied particularly on paragraphs (i), (ii) and (iii) of the summary of that case at pages 1 and 2 of the report which were in the following terms:

"(i) Events in Iran following 12 June 2009 presidential elections have led to a Government crackdown on persons seen to be opposed to the present Government...

(ii) Iranians facing forced return do not in general face a real risk of persecution or ill-treatment. That remains the case even if they exited Iran illegally. Having exited Iran illegally is not a significant risk factor, although if it is the case that a person would face difficulties with the authorities for other reasons, such a history would be a factor adding to the level of difficulties he or she is likely to face.

(iii) Being a person who has left Iran when facing court proceedings (other than ordinary civil proceedings) is a risk factor, although much will depend on the particular facts relating to the nature of the offence involved and other circumstances. The more the offences for which a person faces trial are likely to be viewed as political, the greater the level of risk likely to arise as a result.....".

Counsel also relied on what the Court said at paragraph 45 in the said case:

"It is plain from the background evidence before us that being accused of anti-Islamic conduct amounts to a significant risk factor in respect of likely treatment a person will face in return....".

Lastly, counsel referred me to the following section in paragraph 46 of the Opinion of the Court:

"This persuades us that being involved in ongoing court proceedings is not in itself something that will automatically result in ill-treatment. It constitutes a risk factor but one which has to be considered in light of all the surrounding circumstances. The more the offences for which a person faces trial are likely to be viewed as political, the greater the level of risk likely to arise as a result".

It was counsel's submission that the respondent had not had regard to a relevant country guidance case, namely: *SB* v *SSHD* and under reference to *R (Iran) and Others* v *SSHD* 2005 EWCA Civ.982 per Lord Justice Brook at paragraph 27 this was a material error of law.

[19] In addition he submitted that the respondent had materially erred by failing to have regard to relevant case law from ECHR which another Immigration Judge would have regard to in terms of section 2 of the Human Rights Act 1998, namely: *RC* v *Sweden*.

[20] Over and above the foregoing counsel submitted that the respondent had failed to consider the issue of whether the petitioner would be questioned on his return to Iran. This again he submitted showed she had failed to exercise the necessary anxious scrutiny.

[21] In support of his position that the petitioner was likely to be questioned on his return to Iran counsel referred me to the Country of Origin Information Report and in particular to paragraphs 27.08, 27.09, 27.14 and 31.19. He submitted that this was a document which would be had regard to by a decision maker assessing asylum and human rights claims. He submitted that it was reasonably likely that the authorities in Iran would discover the petitioner's asylum claim and the outstanding court document and thus in light of the above the petitioner would be at real risk.

[22] He submitted that not only had the respondent had no regard to the questioning of the petitioner which would occur on his return to Iran she had also failed to consider how the petitioner would respond to that questioning. In assessing how he would respond the respondent must approach this on the basis that the petitioner should not be expected to lie or modify his behaviour or opinions when questioned. (See: *IK* v *SSHD* 2004 UKIAT00312 and in particular paragraphs 79-83),

[23] Lastly the respondent had failed to have regard to the fact that it is the reason in the mind of the persecutor for inflicting the persecuting treatment (see *Sepet* and *Bulbul* v *SSHD* 2003 UKHL 15 at paragraph 23).

[24] For all the foregoing reasons it was the petitioner's position that I should reduce the challenged decision.

The reply on behalf of the respondents

[25] It was counsel's position that the respondent had correctly identified the test and correctly applied it.

[26] He accepted that the starting point was the *WM (DRC)* v *SSHD* case. He submitted that in paragraph 7 of the decision letter the respondent had correctly identified and set out the test contained in the foregoing case.

[27] Counsel commenced his detailed address by submitting that what underlay the petitioner's analysis was unsound. It appeared that the position of the petitioner was that if the new documents produced were not obviously bogus the matter must be referred to a new Immigration Judge. That failed to take account of the structure and purpose of Rule 353. That Rule was designed to provide a filter. The respondent's task, once it was accepted that the material had not already been considered, was:

> "(ii) Taken together with the previously considered material (the new material) created a realistic prospect of success....".

[28] Counsel then turned to examine in detail the approach of the respondent as set out in the decision letter.

[29] He submitted that first in paragraph 8 the respondent stated that she was taking into account prior evidence in deciding whether the new evidence created a realistic prospect of success. He submitted that nothing therein could properly be the subject of criticism. The respondent was undoubtedly entitled to take into account prior findings when carrying out her task.

[30] Secondly, he submitted that paragraph 9 correctly set out the principles in *Tanveer Ahmed (Documents unreliable and forged)(Pakistan)* *2002 UKIAT 00439 as summarised at paragraph 38 thereof. In particular he submitted that the principles

set out in subparagraphs 1 and 2 at paragraph 38 bore directly on the task in the instant case. Paragraphs 1 and 2 are in the following terms:

> "(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 of the evidence in the round".

[31] Thirdly, in paragraphs 11 to 13 of the decision letter the respondent went on to consider the findings of the previous Immigration Judge. He submitted that this was clearly part of the context in which the new documents required to be considered. Counsel submitted that it was important in order to gain a complete picture of the background to which the respondent had regard to see the terms of the previous Immigration Judge's decision which was No.7/2 of process.

[32] He pointed to paragraph 5 of 7/2 of process in which it was made clear that the petitioner's claim before the previous Immigration Judge was not that he was an adherent or member of the KDPI but merely that he feared he was being sought by the authorities following meetings held by his father at their house from which he had been excluded.

[33] He then referred to paragraphs 29 to 32 of the previous Immigration Judge's Determination which were in the following terms:

> "29. His story is a simple one. I consider the respondent was entitled to question the credibility of the appellant knowing nothing at all about the nature of the meetings which took place particularly as it had been over a 2 to 3 year period (his answer to question 18). It is not credible the appellant knew nothing at all about his father's political affiliations. It would have been natural

to discuss such matters with others including his uncle. I also consider it inevitable there would have been some speculation about the meetings in the village which would have reached the appellant's ears given the period of time over which they had been taking place. And in the event, the appellant has not explained why his father did not confide in him. I have difficulty in grasping the logic of the beating the appellant received from his father on hearing (from the stepmother) that he had told someone else he knew nothing about the meetings.

30. If the authorities or security forces had been intent on finding the appellant it is questionable that he would have been able to successfully hide in his uncle's chicken shed with the authorities then simply giving up.

31. I give some weight to the failure by the appellant to mention his fear from the authorities at the screening interview, particularly as he was not tested on this aspect by Miss Chalmers at hearing despite her stated intention to do so. Significantly he was asked whether he had encountered any other problems (in addition to those with his father) including problems with the authorities. He did not mention any fear from them at all.

32. My conclusion is that the appellant has not been truthful about his age and I find that he is over 18. Nor has he been truthful or forthcoming about the real reasons why he left Iran. I find his account does not stand up to reasonable scrutiny. It lacks the ring of truth and the detail which I would expect even on the lower standard to accompany a credible story."

[34] It was against that background and these findings when taken in the round that the respondent's decision had to be seen.

[35] In paragraphs 11 to 14 of the decision letter the respondent, properly he submitted, took into account that background and it was against that background that her treatment of the documents required to be viewed.

[36] At paragraphs 15 to 19 the decision letter dealt with the Court document. Counsel submitted that in these paragraphs given the principles set out in the *Tanveer Ahmed* case the respondent was entitled to comment that such documents could easily be obtained illegally in Iran. She was entitled at paragraphs 16 and 18 to refer to the negative credibility findings of the previous Immigration Judge. She was entitled to comment on the lack of provenance of the document.

[37] He submitted that taking all of that material together the conclusion which the respondent came to at paragraph 19 was not one which was taken in isolation but one which was taken in the round and having regard to the context and background. It was a conclusion which the respondent was reasonably entitled to reach on the face of the document.

[38] Turning to the letter from the KDPI again he submitted that the document was considered by the respondent on its terms and in the round. The respondent commented again on the lack of provenance and looked at the document in terms of the background of the negative credibility findings. He submitted that the respondent was entitled to look at these and reasonably entitled to reach the conclusion which was given at paragraph 23.

[39] The respondent thereafter went on to look at paragraph 24 at the overall picture in light of the new evidence and reached a view which she was well entitled to reach.

[40] Counsel submitted that the petitioner's position was this: the respondent had placed too much weight on the negative credibility findings. However, he submitted that the petitioner's position overlooked the necessity to have regard to all of the

material in the round which was before the respondent. Moreover the petitioner's position completely downplayed, if not ignored, the very adverse findings of incredibility made by the previous Immigration Judge.

[41] As regards the second branch of the petitioner's argument it was his position that this did not get off the ground. Having reached her conclusion about the likely assessment by a judge of the First Tier Tribunal of the new and existing material the respondent could not be said to have failed to have regard to the guidance in *SB* v *SSHD*.

[42] For the foregoing reasons he submitted that I should refuse the petition.

Discussion

[43] In addressing the question whether what has been submitted amounts to a fresh claim, the respondent is required to follow the two part test as set out in Rule 353 of the Immigration Rules.

[44] The task of the respondent in applying that test is first to consider whether the new material has previously been considered.

[45] Secondly, if the new material has not previously been considered, the question for the respondent is not whether she believes the new material makes it a well founded claim. Rather the respondent must keep clearly in mind that the separate and distinct question for her is whether there is a realistic prospect of a new Immigration Judge applying the rule of anxious scrutiny would think the petitioner would be subject to a real risk of persecution on return. The respondent may take as a starting point her own view on the merits but must keep these two questions distinct. In other words she must not usurp the function of the Immigration Judge (see the *WM* case at paragraph 11).

[46] Thirdly when considering the issue of whether there is a realistic prospect of success the respondent may assess the reliability of the new evidence and in doing so may have regard to previous adverse credibility findings of the Immigration Judge. She must, however, when considering such findings approach these in a manner conforming with the observations of Buxton L.J. in paragraph 6 of the *WM* case.

[47] Fourthly, in considering whether there is a realistic prospect of success the respondent is entitled to have regard to the principles in the *Tanveer Ahmed* case quoted above.

[48] Lastly, it is clear from the case of *SSHD ex parte Boybayei* 1997 Imm.AR 491 that in order to pass the test of credibility at the stage of considering whether the new material creates a realistic prospect of success, all that is required of the new material is apparent credibility though it need not be incontrovertible (see pages 495 and 496).

[49] In my opinion in the decision letter the respondent has had regard to the legal principles which I have set out and has at no point erred in law in the way that she has approached the decision she made.

[50] Turning to the first document which was part of the new material presented: namely the "document from the Public Court of Karmanshah" the respondent I believe properly has regard to the issue of apparent credibility and does not go beyond that. At paragraph 15 the respondent seeks to explain why the document lacks apparent credibility. The matters to which she refers in paragraph 15 are all matters which she was entitled to have regard to when considering apparent credibility. She was equally in my view entitled to have regard to the ease with which such documents can be obtained illegally (see paragraph 17 of the decision letter) and to take that factor into account when considering the issue of apparent credibility.

[51] The respondent's approach when considering that document as set out in paragraphs 15 and 17 conforms with the approach to new material in the authorities in that the factors she has had regard to are all clearly relevant to the issue of the apparent credibility of the document and are therefore matters she was entitled to consider.

[52] The factors the respondent considers largely relate to the lack of provenance regarding this document. This lack of provenance is of some significance when considering apparently credibility as this is not a document which proves itself. Secondly it was a document which although on the face of it it did not emanate from the petitioner himself (on the face of it this is a court document). However, it was not as I understood it disputed, that it had not been obtained directly from the Court authorities in Iran but had in some unknown way come into the hands of the petitioner. Thirdly, it is a document which can easily be obtained illegally and is easy to forge.

[53] The respondent was in my judgement entitled to hold in these circumstances that the lack of provenance was a significant factor pointing to a lack of apparent credibility.

[54] It does not appear to me that the approach by the respondent to the issue of the apparent credibility of this document shows any error in law. She does not at any point seek to usurp the function of the hypothetical judge of the First Tier Tribunal. Rather the respondent looks at the primary issue: does the document get over the initial hurdle of achieving apparent credibility or put another way she asks herself: is the document simply implausible? As part of the filtering function which Rule 353 gives the respondent these are questions she is entitled to ask. The factors she has

considered in answering these questions are all relevant. The decision she has arrived at she was entitled to reach on the basis of the information before her.

[55] At paragraph 16 of the decision letter the respondent says that another Immigration Judge would take into account the principles of *Tanveer Ahmed*. I did not understand it to be disputed that regard could be had to this.

[56] The respondent goes on in the decision letter to have regard to the previous negative credibility findings. In light of the authorities to which I was referred she was clearly entitled to have regard to such findings.

[57] The basis of the petitioner's criticism is the weight which the respondent has attached to these findings and this criticism is based on the observations of the Court as set out in the *WM* case at paragraph 6 above referred to.

[58] In my opinion the respondent in the circumstances of this case was entitled to attach to these findings the degree of significance which she did. It is clear looking to the decision letter that the respondent did attach substantial significance to the negative credibility findings. Her attaching such significance has to be seen against this background:

> (a) her findings as to the apparent lack of credibility of both new documents.
>
> (b) the extent of the negative findings of the Immigration Judge. I believe it is proper to say that in relation to all material matters the previous Immigration Judge found the petitioner incredible.

[59] Thus, although negative credibility findings may be of little relevance where new apparently credible information is produced from an independent source that was not the factual matrix which the respondent had before her in this case. Thus in my view the respondent has not erred in law in her approach to the previous findings regarding

the petitioner's credibility. The respondent then looks at all of the factors and at paragraph 19 says this:

> "it is not considered that there would be a realistic prospect of another Immigration Judge applying the rule of anxious scrutiny finding that you would be exposed to a real risk of persecution or ill-treatment amounting to a breach of Article 3 treatment due to the production of this new evidence".

The foregoing clearly shows that the respondent has had regard to the two separate questions and asked herself the correct one. She recognises that it is not for her to consider whether there is a well founded claim but rather she asks herself the separate and distinct question of whether the new information would create a realistic prospect of an immigration judge holding that the petitioner would be subject to a real risk of persecution.

[60] I believe that having regard to the information before her that the view she expresses in paragraph 19 cannot be criticised. The respondent has asked the correct questions; not had regard to any irrelevant factors; viewed all matters before her in the round and reached a decision she was entitled to reach.

[61] The respondent's approach to the other document, namely the letter from the KDPI was the same as to the court document and the criticisms made of her approach are the same.

[62] In my view the respondent again confines herself to considering the proper issue, namely: the apparent credibility of this document. The factors which the respondent has regard to at paragraphs 20 and 22 I believe are relevant when considering the issue of apparent credibility and were factors to which the respondent was entitled to have regard when considering apparent credibility. The respondent does not usurp the

function of the new immigration judge in that she goes no further than considering apparent credibility.

[63] The respondent at paragraph 22 states that no reason has been provided to explain why the document was not produced earlier. In terms of the *Boybeyi* case, the question of the previous unavailability of a document is a relevant question in considering apparent credibility (see: page 495). No explanation as to why this document has only now become available was tendered by the petitioner. Given the content of that letter it could have been produced at any time in the last 4 years. Therefore in judging its apparent credibility the lack of an explanation as to why only now it has become available is a further factor which the respondent may in my opinion properly have had regard to.

[64] Lastly, in paragraph 24 the respondent looks at the whole matter in the round: she has regard to the previous findings made about the petitioner's credibility and looks at the whole new evidence in light of her findings relative to apparent credibility. She then asks herself the proper question (as she had done at paragraph 19). She does not conflate the two questions. In my judgement her reasoning at this point cannot again be the subject of any proper criticism. In my view on the information before the respondent she was entitled to hold that no person could reasonably accept the new evidence as believable.

[65] In summary I conclude the respondent has followed the proper approach to the new evidence. No error in approach has been demonstrated. She has had regard to the well established principles set out in the cases to which I was referred. I am unable to identify any error in law in her approach. She was well entitled to reach the conclusions she reached on apparent credibility. She was properly entitled to attach

significant weight in the circumstance to the previous adverse credibility findings. The decision she reached she was properly entitled to reach.

[66] For the foregoing reasons I reject the first broad branch of the petitioner's submissions.

[67] The second branch of the petitioner's case was based on the respondent's failure to have regard to *RC Sweden* and *SB* v *SSHD*.

[68] The above cases set out risk factors that are present for persons being returned to Iran. These risk factors include: persons seen to be opposed to the Government and I would accept that persons who are supporters of the KDPI would fall into that category; those who are accused of anti-Islamic conduct and again I would accept that the conduct referred to in the court document 6/3 of process would fall into that category; and persons facing court proceedings, again 6/3 of process if apparently credible would place the petitioner in such a category. Thus I believe it is correct to say that if the foregoing documents had been held to be apparently credible and the respondent had nevertheless ordered the petitioner's return to Iran in the face of these cases, then she would have acted unreasonably by failing to apply anxious scrutiny and in failing to have regard to these authorities.

[69] However, the respondent's position is that the said information is not apparently credible. Thus she does not require to have regard to these particular factors which are set out in the said cases. The respondent's position is that the petitioner has not got over the first hurdle and on the basis of apparently credible evidence shown that he is in such a risk category. Rather the circumstances which she had to have regard to were as set out in the *SB* case and are these:

> "Iranians facing enforced return do not in general face a real risk of persecution or ill-treatment. That remains the case even if they exited Iran

> illegally. Having exited Iran illegally is not a significant risk factor, although if it is the case that a person would face difficulties with the authorities for other reasons, such a history would be a factor adding to the level of difficulties he or she is likely to face".

[70] That was the matter which the respondent had to bear in mind. What she required to have regard to given her previous findings was that if the petitioner's return was enforced he would not be at a real risk of persecution. Consideration of that factor in no way renders the challenged decision unreasonable. She was on the information before her entitled to hold that the mere fact of the petitioner's illegal exit and enforced return would not give rise to a real risk of persecution. I accordingly reject the petitioner's broad second ground.

Decision

[71] For the foregoing reasons I repel the petitioner's pleas-in-law; uphold the second plea-in-law for the respondent; dismiss the petition and reserve the issue of expenses, I not having been addressed on that matter.