OUTER HOUSE, COURT OF SESSION

[2010] CSOH 89

P279/10

OPINION OF LORD DOHERTY

in the Petition of

S.Y. (A.P.) (Democratic Republic of the Congo)

Petitioner;

for

Judicial Review of a decision of the Secretary of State for the Home Department dated 9 March 2010

Petitioner: Bryce, Drummond Miller LLP (The Ethnic Minorities Law Centre, Glasgow)
Respondents: Haldane, Office of the Solicitor to the Advocate General

9 July 2010

Introduction

[1] The Petitioner is a national of the Democratic Republic of the Congo. She was born in 1942. She entered the UK illegally on 28 June 2007. She claimed asylum on 29 June 2009. She maintained she was a supporter of the Mouvement pour la Liberation du Congo (MLC) led by Jean Pierre Bemba. She claimed to have run a bar and restaurant in Kinshasa and that the premises were used for meetings and to hold mobile and satellite telephones on behalf of the party. Meetings were held there during the 2006 election campaign. Following the MLC's defeat in the election relations between the new governing party, PPRD, and the MLC were tense. Armed

conflict broke out. The Petitioner maintains that as part of a crackdown on MLC supporters her home at the premises was raided on 23 March 2007. Phones were discovered. She was assaulted and detained. She was imprisoned. On 20 May 2007 an army Commander who had been a customer at her restaurant offered to help her in return for payment. The same day he obtained payment of $2,000 from a friend of the Petitioner and enabled her to escape. The Petitioner maintains that she is at risk of persecution because of her involvement with the MLC. Alternatively, that she faces a real risk of persecution on return as a failed asylum seeker.

[2] The Respondent rejected the Petitioner's claim in a decision letter dated 26 July 2007. The Respondent found the Petitioner's account to be incredible and implausible in several respects. She gave inconsistent accounts as to the name of her husband; the date of death of her husband; the ages of her children; which of her son or daughter was the elder. Her account of her holding and distributing mobile phones in order to notify people of meetings, and being arrested and charged in respect of those activities, was found to be implausible and incredible, as were her account of her means of escape, her account of non-communication with the three women with whom she shared a room in prison, and her account that she had not tried to contact her children or anyone else from the DRC since her escape from that country. The Respondent did not accept that the Petitioner was a member of the MLC. Even if she was, the low level of her involvement had been such that the authorities would be unlikely to be interested in her were she to be returned.

[3] The Petitioner appealed to the Asylum and Immigration Tribunal (AIT). Her appeal was heard on 7 September 2007, and was dismissed on 21 September 2007. The Immigration Judge did not find the Petitioner to be credible (para. 63). She found the Petitioner's conflicting answers to the issue of the different names she gave for her

husband to be neither satisfactory nor credible (para. 53). Discrepancies in her account as to the whether meetings were held monthly or weekly were significant (para. 54). Her account of lack of contact with anyone in the DRC - including her children - and her non-recollection of any telephone numbers she found incredible. Her account as to the arrangements for the keeping and distribution of mobile telephones - and her explanations for those arrangements - she found to be implausible and incredible (para. 57). She found it incredible that the Petitioner did not discover the names of her cell mates. She did not find it credible that the Petitioner spoke to the Commander for the first time on the day of her escape; that on that day she was able to agree a payment of $2,000 with him; that the Commander went the same day to the Petitioner's friend; that the Petitioner's friend was able to obtain the money and hand it over; that she was prepared to do so to a complete stranger; and that the escape was organised and effected the same day (para. 58).

[4] The Petitioner applied to the AIT for reconsideration of the Immigration Judge's decision. That application was refused on 11 October 2007. She petitioned the Court of Session for an order requiring the AIT to reconsider its decision. The prayer of the Petition was refused on 10 January 2008, and the Petitioner became appeal rights exhausted. On 3 June 2008 the Petitioner made further submissions to the Respondent. These included a report prepared by Mrs Mary Keenan Ross, Consultant Clinical Psychologist, following an assessment of the Petitioner on 14 May 2008. The report concluded that the Petitioner was suffering from Post-Traumatic Stress Disorder DSM-IV-R (moderate-severe) and from a Major Depressive Disorder (moderate) DSM-IV-R. Both were attributed to the trauma the Petitioner claimed to have experienced while in prison in the DRC. Mrs Ross opined:

> "A return to the Democratic Republic of the Congo would result in an exacerbation of the Post-Traumatic Stress Disorder and Depression. There are 2 issues; the assault and imprisonment in 2007 and the safety of S.Y. on return. Even if her safety can be guaranteed, a return to the place where the assault occurred would re-trigger at an intense level the experience of assault and imprisonment."

The submission in the letter of 3 June 2008 was that, because of a lack of psychological services in the DRC, returning S.Y. would give rise to breaches of articles 3 and 8 of the EHCR. In a decision letter dated 17 April 2009 the Respondent refused the Petitioner's asylum and human rights claim and determined that the said further submissions did not give rise to a fresh claim. Treatment for mental health conditions was available in the DRC. Removal of the Petitioner would be proportionate, in accordance with law, and in pursuit of a legitimate aim. The Respondent determined that there was no realistic prospect of an Immigration Judge finding that the removal would give rise to a breach of article 3 or of article 8. A further submission by the Petitioner dated 21 April 2009 was held by the respondent (in a decision letter dated 3 October 2009) not to be significantly different from the previous claims and not to constitute a fresh claim. The Petitioner presented a Petition for judicial review of the decision letters of 17 April 2009 and 3 October 2009 but decided not to proceed further with it.

[5] By letter dated 8 February 2010 the Petitioner made further submissions to the Respondent and asked that they be treated as a fresh claim. The gist of the submissions was that Mrs Ross' report provided a basis for revisiting the adverse credibility findings which the Immigration Judge had made in his Determination of 21 September 2007. The reports in the objective evidence bundle (which had been

before the Immigration Judge) were said to support the Petitioner's account of events in Kinshasa at the material time; and an additional article, from the Washington Post of 15 August 2006, was tendered as support for the xenophobia of Bemba and the MLC. The Petitioner also produced an article from the British Medical Journal (Herlihy & Ors, "Discrepancies in autobiographical memories: implications for the assessment of asylum seekers", BMJ vol. 342, 9 February 2002). In the letter of 8 February the Petitioner's agents observed:

> "Significantly, it appears from the BMJ paper that claimants recall more the details that are central to an event that has a high level of emotional impact than the peripheral detail."

They submitted that whereas the Immigration Judge had had no satisfactory explanation for discrepancies in the Petitioner's accounts, Mrs Ross' report now provided the Respondent with such an explanation. They went on to highlight the following passage in Mrs Ross' report:

> "There is often memory impairment and poor orientation associated with PTSD which may account for discrepancies in facts when questioned in circumstances associated with the trauma experienced."

Mrs Ross' report, supported by the BMJ article, was said to give rise to a realistic prospect of success when set in the context of the objective evidence.

[6] By decision letter dated 9 March 2010 the Respondent determined that the further submissions made in the letter of 8 February did not give rise to a fresh claim. Mrs Ross' conclusions depended upon the account given to her by the Petitioner being true (para. 22). The fact that the Petitioner had not claimed prior to 14 May 2008 that she suffered from the symptoms of PTSD which she described to Mrs Ross was a significant matter which an Immigration Judge would consider (para. 23). Basic facts

concerning the Petitioner's husband and children were not the sort of peripheral detail which the subjects of the Herlihy article had difficulty recalling (para. 25). There were matters of incredibility and implausibility which would remain even if it was possible that some discrepancies might be attributed to memory impairment associated with PTSD (para. 29). There was not a realistic prospect of success before an Immigration Judge (paras. 30, 31).

[7] The Petitioner presented a Petition for judicial review of the decision of 9 March 2010. Answers were lodged by the Respondent. The Petition came before me for consideration at a First Hearing.

The parties' submissions

[8] Mr Bryce submitted that the Respondent's refusal to treat the Petitioner's further submissions of 8 February 2010 as a fresh claim was irrational. He acknowledged there were significant matters in the Petitioner's account which the Immigration Judge had found to be incredible, and that there were significant matters which she had found to be implausible. His submission was that the further material - and in particular the report from Mrs Ross - could explain, and resolve, some of them. He accepted that it would not address the matters of implausibility but he maintained that those matters ought not to be decisive.

[9] In support of his submission Mr Bryce referred me to the terms of Rule 353 of the Immigration Rules and to the now familiar dicta of Buxton L.J. in *WM (DRC)* v *Secretary of State for the Home Department* [2006] EWCA Civ. 1495 at paragraphs 6-11. There was no dispute here that the new material was significantly different from the material which had been before the Immigration Judge. The issue the Respondent had had to consider was whether it, taken together with the material previously

considered, created a realistic prospect of success in a future asylum claim. That was "a somewhat modest test" (*WM(DRC)* v *SSHD* para. 7). The [no] "realistic prospect of success" test was, for all practical purposes, the same as the "clearly unfounded" test contained within section 94 of the Nationality, Immigration and Asylum Act 2002 *ZT(Kosovo)* v *Secretary of State for the Home Department* [2010]1WLR 348; *YH* v *Secretary of State for the home Department* [2010] EWCA Civ. 116; *AM* v *Secretary of State for the Home Department* [2010] CSOH 25). On the application of that "modest test" no Secretary of State, applying anxious scrutiny, would have concluded that there was no realistic prospect of success before an Immigration Judge. Mr Bryce went further. He submitted that the Court ought to consider for itself whether, applying anxious scrutiny, it could be said that there was no realistic prospect of success before an Immigration Judge. Mrs Ross' report confirmed that the Petitioner suffered from PTSD and depression, and that memory impairment and poor orientation might cause "discrepancies in facts when questioned in circumstances associated with the trauma experienced." The BMJ paper showed that there were often discrepancies between accounts given by refugees suffering PTSD, especially in relation to peripheral details. He recognised that this was a case where material facts were in dispute. Nonetheless, he argued, under reference to *ZT(Kosovo)* v *SSHD* and *YH* v *SSHD*, that here the question (whether there was a realistic prospect of success before an Immigration Judge) was only capable of one rational answer, and that the Court was in as good a position as the Respondent to answer it. Whether the correct test was the rationality approach set out in *WM(DRC)*, or a more intensive review with the Court itself assessing whether there was a realistic prospect of success, the result was that the Respondent's decision of 9 March 2010 did not withstand anxious scrutiny. It should be reduced. He recognised that if the traditional rationality

approach applied his task was a difficult one. Undeterred, he argued, somewhat faintly, that some of the particular reasons given by the Respondent could be criticised as lacking rationality. The Respondent's observation that Mrs Ross lacked expertise in relation to the availability of Congolese medical facilities was irrelevant. It was irrational for the Respondent to conclude that the discrepancies relating to the Petitioner's husband and children were not peripheral matters because, he submitted, an Immigration Judge might take the view that they were peripheral. Finally, the Respondent had erred in concluding that there had been no previous evidence to support the Petitioner's complaints to Mrs Ross. He acknowledged that it was legitimate to consider when the complaints of Post Traumatic Stress Disorder symptoms had first been made. While he could not submit that complaints of PTSD symptoms had been made before they were made to Mrs Ross, the issue of whether the Petitioner might have a memory problem had occurred to her agents very shortly before the hearing before the Immigration Judge but had not been pursued further at that stage (6/5 "P" of Process).

[10] Miss Haldane invited me to refuse the Petition. She submitted that the [no] "realistic prospect of success" test in Rule 353 and the "clearly unfounded" test in section 94 were not identical, and might not always lead to the same result. In that context she referred to the (dissenting) speech of Lord Hope of Craighead in *ZT(Kosovo)* v *SSHD*, and in particular to paragraph 46. She maintained that, in any event, in a Rule 353 case it was not for the Court to substitute its own view of whether the Petitioner had a realistic prospect of success for the Respondent's view. The Respondent's decision was subject to review on irrationality grounds *(WM(DRC))*, paragraphs 8-12, 17-18). If, applying anxious scrutiny, the decision was one which the Respondent was entitled to reach the Court ought not to interfere. Here, the

Respondent had asked herself the correct question. It was not suggested that she had not applied the correct test. She had given anxious scrutiny to the material placed before her. Mrs Ross' report was premised on the account given to her by the Petitioner being true. The fact that the Petitioner first complained of PTSD symptoms when she saw Mrs Ross gave rise to legitimate scepticism as to the veracity of those complaints. Further, as the Immigration Judge and the Respondent found, there were numerous reasons to question the credibility and plausibility of the Petitioner's account of events. Few, if any, of these could be said to be satisfactorily explained by the further submission. None of the particular criticisms made by the Petitioner provided a good basis for concluding that the decision was irrational. The Respondent had been entitled to conclude that the discrepancies relating to the Petitioner's husband and children could not be dismissed as merely peripheral matters in relation to which it was understandable that the Petitioner's accounts at separate times might differ. The Respondent had been correct to proceed on the basis that the complaints of PTSD symptoms had first been made to Mrs Ross. The Respondent had been entitled to conclude that there was not a realistic prospect of success before an Immigration Judge. Indeed, in this case it could be said that the Petitioner would be bound to fail in such an application.

Discussion and decision

[11] I consider first the Petitioner's argument that the "clearly unfounded" and the "[no] realistic prospect of success" tests are the same.

[12] In *R(AK)(Sri Lanka)* v *Secretary of State for the Home Department* EWCA Civ. 447, Laws L.J. offered the following analysis of the speeches of their Lordships in *ZT(Kosovo)* on this issue*:*

> "33. These are deep waters. In my respectful view their Lordships' opinions in *ZT(Kosovo)* disclose two distinct approaches to the comparison between "clearly unfounded" (s. 94(2)) and "[no] realistic prospect of success"(Rule 353). The first (Lord Phillips and Lord Brown) is that the tests are interchangeable. The second (Lord Hope, Lord Carswell and Lord Neuberger) is that a case which is clearly unfounded can have no realistic prospects of success, but the converse is not true: there may be a case which has no realistic prospect of success which, however, is not clearly unfounded. I venture to suggest that that represents the limit of the difference between their Lordships..."

Thomas and Mann L.JJ. concurred.

[13] I respectfully agree with this part of Laws L.J.'s analysis of *ZT(Kosovo)*. I also agree that while there may be a difference between the two tests it will rarely have practical significance. It does not appear to me to have practical significance in the present case.

[14] I turn next to the degree of scrutiny required where, as here, a challenge is directed to a decision of the Secretary of State that no fresh claim has been made. The approach propounded in *WM(DRC)* involves the Court exercising a supervisory role. The challenge requires to be on *Wednesbury* grounds, tempered by the demands of anxious scrutiny.. Their Lordships in *ZT(Kosovo)* did not overrule *WM(DRC)* (see *TK* v *Secretary of State for the Home Department* [2009]EWCA Civ. 1550, paragraphs 8-10 (a Rule 353 case); *cf.YH* v *SSHD*, paragraph 12 (a s.94(2) case)). However, they recognised that there will be cases where, in order to test the rationality of the Secretary of State's decision, a Court reviewing the decision may require to form its own view of how it would answer the question the Secretary has considered.

[15] This is not a case where the essential facts forming the basis of the Petitioner's account are undisputed. Accordingly, the argument that the judgment that the Respondent has to make is essentially forensic in character, and that the Court is as well placed as her to do so, appears to me to be less compelling *ZT(Kosovo*), per Lord Phillips at para. 23, Lord Neuberger at para. 83; MacDonald, "Immigration Law and Practice"(Supplement to the7th ed.) para. 12.177, note 12; cf. *YH* v *SSHD* at para. 19). Nevertheless, for present purposes I am prepared to assume, in the Petitioner's favour, that my starting point ought to be to form my own judgement whether the new material (together with the old) gives rise to a realistic prospect of success before an Immigration Judge.

[16] I am satisfied that it does not, for many of the same reasons which led the Immigration Judge to refuse the appeal on the original material, and led the Respondent to conclude that the new material taken with the old did not constitute a fresh claim. I bear in mind that the threshold is modest and that I require to approach matters with anxious scrutiny. The considerations which weighed with the Immigration Judge and the Respondent have been summarised above and I do not repeat them all here. Important matters which weighed with the Respondent and which weigh with me include the following. The complaints of PTSD and related depression were first made only after the Petitioner's appeal rights had been exhausted. The contention that the Petitioner might, as a result of her experiences, suffer memory impairment associated with the circumstances of the traumatic events does not meet most of the credibility problems which the Immigration Judge and the Respondent identified. It advances matters not a whit in relation to the implausibility issues. Few, if any, of the matters in relation to which there are problems with the Petitioner's account may be described as peripheral and unimportant. Few involve an

apparent difficulty with recollection. In the whole circumstances I have no real difficulty in concluding that the Petitioner does not have a realistic prospect of success before an Immigration Judge. At best, in my opinion her prospects are fanciful.

[17] None of the particular criticisms of the Respondent's reasons which were advanced by Mr Bryce is well founded. The Respondent was entitled to conclude that the Petitioner's different accounts relating to her husband and children were material matters which could not be explained away as being peripheral and unimportant. It would have been very surprising had she not so concluded. She was correct to observe that the Petitioner's complaints of PTSD and related depression were first made to Mrs Ross. The vague view of her agents at an earlier stage that the possibility that she may have memory problems might be explored provides no basis for maintaining that relevant complaints were made at that time. Mrs Ross' lack of expertise in relation to medical facilities in the DRC was relevant to the petitioner's claim that her Article 3 rights would be breached were she to be returned. That aspect of her claim required to be, and was, reconsidered by the Respondent in the decision letter (paragraphs 15 and 16). While dealing with all matters relating to Mrs Ross' qualifications in a later part of the letter (paragraph 20) involved taking this matter rather out of order, I am not satisfied that, fairly read, this demonstrates any error on the part of the Respondent. In any event I am satisfied from the terms of the decision letter as a whole that this factor did not have a material bearing on the Respondent's decision.

[18] The Respondent asked herself the correct question. In addressing that question she applied anxious scrutiny. She was entitled on the material before her to determine that the claim had no realistic prospect of success before an Immigration Judge. Neither my own consideration of the material, nor any of the matters advanced by the

Petitioner, give rise to grounds for holding the decision to be irrational. The decision was lawful.

[19] I shall repel the Petitioner's plea-in-law, sustain the Respondent's second plea-in-law, and dismiss the Petition.