OUTER HOUSE, COURT OF SESSION

[2010] CSOH 92

P297/10

OPINION OF LORD MENZIES

in the Petition of

G.A.O.

Petitioner;

for

Judicial Review of a decision of the Secretary of State for the Home Department dated 31 December 2009

Petitioner: Komorowski; Drummond Miller LLP (for Hamilton Burns WS, Glasgow)
Respondent: Olson; C Mullin, Solicitor to the Advocate General for Scotland

13 July 2010

Introduction

[1] The petitioner is a citizen of Sudan who arrived in the United Kingdom on 15 June 2008. She claimed asylum on 20 June 2008 and her claim was refused on 15 July 2008. She appealed against this decision on 8 September 2008, and her appeal was dismissed. She requested a reconsideration, but this request was refused on 21 January 2009, on which date she became "appeal rights exhausted". By letter dated 21 December 2009 solicitors acting on behalf of the petitioner wrote to the UK Border Agency requesting that the Secretary of State consider the application afresh and

indicating that this was a fresh claim for asylum in terms of paragraph 353 of the Immigration Rules.

[2] Paragraph 353 of the Immigration Rules states:

> "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:
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> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, not withstanding its rejection."

[3] By letter dated 31 December 2009 the UK Border Agency, acting on behalf of the Secretary of State, refused to recognise the representations as a fresh claim for asylum. In this petition for Judicial Review the petitioner seeks reduction of that decision.

Submissions for the petitioner

[4] Counsel for the petitioner submitted that the "realistic prospect of success" test in Rule 353 means only more than a fanciful such prospect - *ZT (Kosovo)* v *Secretary of State for the Home Department* [2009] UKHL 6; [2009] 1 WLR 348, and *R (AK (Sri Lanka))* v *Secretary of State for the Home Department* [2009] EWCA Civ 447; [2010] 1 WLR 855.

[5] Rule 353 requires the decision maker to consider the content of any further submissions and decide if the content had not already been considered and, taken

together with the previously considered material, created a realistic prospect of success. This required the decision maker to have regard to the decision of the Immigration Judge dated 8 September 2008 (number 6/2 of process). The Immigration Judge did not find the petitioner to be credible in all respects, and he set out those aspects of her evidence which he did not accept at paragraphs 22 and 23 of his decision letter. However, he made it clear that these findings did not affect his determination of the appeal. He accepted that the petitioner was at risk of persecution in her home area, but found that she could relocate within South Sudan safely and without undue hardship. In paragraphs 25 to 28 of his decision letter the Immigration Judge considered the consequences for the petitioner if she moved to an IDP camp. He observed that

> "It would appear that there is no need for this appellant to seek international protection as there would not appear to be such a traumatic change of lifestyle that she would be unable to adapt to life in an IDP camp, should that prove necessary. There is, of course, no requirement for her to move to an IDP camp but she is, to all intents and purposes, a single woman who is fit, able to work and able to support herself in a relatively troubled environment"....
>
> "She would not be obliged to go to an IDP camp and she clearly has friends in both Juba and Akobo should she require short term support. The fact that she has previously traded in the market would give her a wider experience than those who were only farmers and refuge in an IDP camp, should it be required, would not be unreasonable."

This was the background of previously considered material against which the content of the further submission dated 21 December 2009 required to be considered.

[6] The letter of 21 December 2009 included a list of ten documents which were described in the letter as "new evidence". However, only two of these documents were referred to in counsel's submissions, namely number 6/4 of process, an emailed report from Mr Peter Moszynski dated 14 December 2009, and number 6/5 of process, a letter from Dr Rebecca MacFarlane of Westmuir Medical Centre, Glasgow, dated 12 October 2009. Indeed, counsel's submissions ultimately depended on the latter of these two documents, as he accepted (both in his Note of Argument and in his submissions to the court) that Mr Moszynski's report is predicated upon there being a basis for stating that the petitioner's medical condition is serious. The petitioner's case therefore stood or fell on the letter from Dr MacFarlane (number 6/5 of process).

[7] Dr MacFarlane identified three problems from which the petitioner was suffering in October 2009. (1) She had abdominal pain and vomiting, which was made worse by inadequate or inappropriate diet and probably also by stress and anxiety. Her symptoms improved when she was able to buy the kind of simple food to which she was accustomed. She was taking Gaviscon as required four to five times daily and this had given her some relief. (2) She had been admitted to hospital on three occasions in 2008 and 2009 with severe and symptomatic iron-deficiency anaemia. (3) She had an enlarged uterus, most likely due to uterine fibroids. She had been seen on 21 September 2009 by a consultant gynaecologist who prescribed tablets to be taken for a three month period in the hope that she would not become anaemic again. She was due for review with that consultant in December 2009 for discussion about further treatment. The doctor concluded her letter by stating that:

> "In the meantime, I have great concerns about her health and I would be gravely concerned for her if she was made destitute in view of her problems of abdominal pain and vomiting, severe anaemia and uterine fibroids as described

above. She needs ongoing medication with Norethisterone, iron tablets and Gaviscon and she needs to eat regularly."

[8] Counsel submitted that it would be open to an Immigration Judge to find, on the basis of this medical report, that the petitioner was not fit and able to work. The letter from the UK Border Agency dated 31 December 2009 (number 6/1 of process) did consider the terms of the medical report, but only did so in the context of the high threshold required for "medical cases" in the context of Article 3 rights. The House of Lords held in *N* v *Secretary of State for the Home Department* [2005] UKHL 31 [2005] 2 AC 296 that the test in such cases was very high; in essence, the test required it to be shown that the medical condition has reached such a critical state that there are compelling humanitarian grounds for not removing the person concerned to a place where he would face acute suffering and be unable to die with dignity. This was confirmed as the correct approach by the European Court of Human Rights in *N* v *The UK*, 26565/05 [2008] ECHR 27 May 2008. Counsel did not suggest that the decision maker was wrong in the assessment of the medical certificate against that test; however, the author of the decision letter fell into error by not going on to consider the effect of the petitioner's medical conditions on the reasonableness of internal relocation. This was a separate point which required to be considered - *Januzi* v *Secretary of State for the Home Department* [2006] UKHL 5; *HGMO (Relocation to Khartoum) Sudan CG* [2006] UKAIT 00062. The decision letter did not address this point at all. On the basis of *Januzi* and *HGMO*, the Secretary of State was required to consider whether in light of this fresh medical evidence, taken together with the previously considered material, there was a realistic prospect that an Immigration Judge would consider that internal relocation would be unduly harsh. Because the

decision letter dated 31 December 2009 did not address this issue, it could not stand and decree of reduction should be granted.

[9] In answer to a question by the court as to whether the point about the petitioner's medical condition having a bearing on whether internal relocation would be unduly harsh was raised in the further representations on behalf of the petitioner made on 21 December 2009, counsel suggested that the terms of the first full paragraph on the fourth page of that letter were sufficiently wide that they might be construed as raising this point. However, he accepted that this paragraph was flanked by two paragraphs dealing with Article 3 of the European Convention on Human Rights, and that the paragraph might also be construed as supporting an argument on an Article 3 ground. The letter was not free from ambiguity, and this was the only paragraph which might support an argument that internal relocation should be regarded as unduly harsh in light of the petitioner's medical conditions. However, if the point was not properly focused in the letter of 21 December 2009, it was a readily discernable and obvious point to which the Secretary of State was bound to have regard, on the basis of *R* v *Secretary of State for the Home Department ex parte Robinson* [1998] QB 929.

[10] For these reasons counsel for the petitioner invited me to reduce the decision dated 31 December 2009.

Submissions for the respondent

[11] Counsel for the respondent invited me to refuse the prayer of the petition. He agreed with much of the approach adopted by counsel for the petitioner. Although he did not seek to challenge the suggestion in *AK* that a "realistic prospect of success" means only more than a fanciful such prospect, he submitted that the language of Rule 353 of the Immigration Rules was unambiguous and did not require any gloss - a

realistic prospect of success was a readily understandable concept which did not require too sophisticated an analysis in the context of the present proceedings.

[12] Counsel submitted that it was clear from the decision letter dated 31 December 2009 that the Secretary of State did indeed consider the letter from Dr MacFarlane in the context of the issue of whether internal relocation would be rendered unduly harsh. It was necessary to look at the decision letter as a whole; the treatment of the expert report from Mr Peter Moszynski taken together with the treatment of the medical certificate made it clear that one of the issues which was being addressed was the harshness of internal relocation in light of the new medical material.

[13] It was apparent from the opening sentences of the email which contained Mr Moszynski's report that the report was predicated on the basis that the petitioner had serious health problems. Towards the foot of page 3 of the report Mr Moszynski states that he had been asked to comment on "information regarding relocation not only within client's area (Juba), but Southern Sudan in general" and "client's ongoing medical problems in the UK and provision of medical treatment in Sudan and Southern Sudan." It was clear from the whole tenor of the report that the author was considering the test of whether it would be unduly harsh to require the petitioner to relocate internally within Southern Sudan in light of her medical condition. Paragraphs 36 and 37 of his report were examples which illustrated this point; the latter paragraph stated that:

> "It is also clear that there is virtually no possibility of someone with chronic health problems to get adequate health care anywhere in South Sudan, so this should be taken into account if Mrs O's medical condition is considered to be serious."

[14] Looking to the terms of the decision letter, counsel submitted that paragraphs 22 and 23 must be read as excluding reference to the medical certificate. He submitted that the correct test when considering whether internal relocation would be unduly harsh was that set out by the House of Lords in *AH and others (Sudan)* v *Secretary of State for the Home Department* [2007] UKHL 49, [2008] 1 AC 678; it was necessary to have regard to all the circumstances discussed in that case, and the test of reasonableness, though stringent, was not to be equated with a real risk that the claimant would be subject to such inhuman or degrading treatment as would infringe his rights under Article 3 of the Human Rights Convention or its equivalent.

[15] Where the possibility of internal relocation is raised as an issue, the onus is on the petitioner to say why she cannot relocate. In the present case, does the medical report, considered with all the other evidence, give the petitioner a realistic prospect of successfully arguing before another Immigration Judge that it would be unduly harsh to require her to relocate within Sudan? (Counsel submitted that this was a more appropriate way of formulating the question than that formulated on behalf of the petitioner - this was not an appeal, but a fresh claim for asylum, so the question was not whether the new information would cause a change to a previous decision or cast doubt on the original Immigration Judge's findings, but whether it amounts to a fresh claim.) Another Immigration Judge considering this issue would be bound by the terms of paragraph (6) in the summary or headnote of *HGMO*, which is in the following terms:

> "(6) An appellant will be able to succeed on the basis of medical needs only in extreme and exceptional circumstances."

The reason that another Immigration Judge would be bound by this statement is that *HGMO* provided country guidance. The Practice Directions of the Immigration and

Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal provide, at paragraph 12.2, that:

> "A reported determination of the Tribunal, the AIT or the IAT bearing the letters "CG" shall be treated as an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the Tribunal, the AIT or the IAT that determine the appeal. As a result, unless it has been expressly superseded or replaced by any later "CG" determination, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authoritative in any subsequent appeal, so far as that appeal:-
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> (a) relates to the Country Guidance issue in question; and
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> (b) depends upon the same or similar evidence."

It is clear that the guidance at paragraph (6) of *HGMO* is still to be followed and is binding on Immigration Judges - *AA (Non-Arab Darfuris - relocation) Sudan CG* [2009] UKAIT 00056, where the determination begins as follows:

> "All non-Arab Darfuris are at risk of persecution in Darfur and cannot reasonably be expected to relocate elsewhere in Sudan. *HGMO*...is no longer to be followed, save in respect of the guidance summarised at (2) and (6) of the headnote to that case."

[16] It follows from the above that in considering whether there was a realistic prospect of success before another Immigration Judge taking the fresh information together with previously considered material, the Secretary of State would have to bear in mind that the petitioner would be able to succeed before the other Immigration Judge on the basis of medical needs only in extreme and exceptional circumstances. It is clear from the decision letter that this is exactly what the Secretary of State did. He

referred to the latest case law and country guidance regarding Sudan, and to the passage quoted above from *AA*, at paragraphs 24 to 26 of the decision letter. Paragraph 30 states that:

> "Your client does not fall into the risk category if she were to be returned to Sudan. Your client is from Southern Sudan, and she has no exceptional health issues....therefore another Immigration Judge applying the rule of anxious scrutiny, this would not create a realistic prospect of success."

The author of the letter has therefore asked the question whether another Immigration Judge might decide that the petitioner has medical needs falling into the category of extreme and exceptional circumstances which would mean that internal relocation would be unduly harsh, and has decided that there was not a reasonable prospect of success.

[17] Turning to the terms of the letter from Dr MacFarlane, counsel observed that it was dated more than two months before the letter making further submissions on behalf of the petitioner. The author of the letter was not a partner in the medical practice, and there was no indication of when she last saw the petitioner nor how long she has known her. The doctor has indicated that she did not know the cause of the petitioner's medical problems, but she was receiving treatment which might well be successful, which failing another treatment might be successful. As at the date of the letter there were no certainties, and the petitioner was due for review with her consultant in December (i.e. about the time of the letter presenting further submissions). The question arises, is there a realistic prospect that an Immigration Judge would grant asylum on the basis of this information (together with the material previously considered)? If this letter was placed before an Immigration Judge, it would merely inform the Judge that the petitioner has anaemia, she is receiving

treatment for this, and that this treatment may be successful (which failing another treatment may be successful). This could not possibly support the conclusion that it would be unduly harsh to require internal relocation. The doctor's letter does not state that the petitioner would be unfit to work in Sudan, nor does it say anything about what the future holds for her. It is for the petitioner to show that if she returned to Sudan she would not get the medication referred to in the last paragraph of the letter. She has not shown this. (In any event, the course of Norethisterone which she started on 21 September 2009 was due to end on 21 December 2009). There was simply not enough in the fresh material to cause another Immigration Judge to decide that the petitioner should be granted asylum.

[18] Counsel's primary position was that it was clear from the decision letter dated 31 December 2009 that the Secretary of State had considered the fresh medical information in the context of deciding whether it would be unduly harsh to require internal relocation within Southern Sudan; however, even if the court were not to accept this position, given that the medical report does not provide any relevant material to found an argument that internal relocation would be unduly harsh, even if the Secretary of State failed to consider this issue such failure is not material.

[19] The letter from the petitioner's agents dated 21 December 2009 containing further submissions did not advance the ground that the fresh medical information had the result that internal relocation would be unduly harsh. It would have been open to the agents to advance such an argument, but they did not do so, and the paragraph at page 4 of the letter, which was relied on by counsel for the petitioner, was properly to be interpreted as developing a "medical needs" argument in terms of Article 3. It was flanked by paragraphs dealing with allegations of breach of Article 3, and there is no reference to internal relocation, far less to an argument that the petitioner's medical

condition would render internal relocation unduly harsh. It cannot be said that the decision maker required to consider such an argument in the absence of it being raised in the letter of 21 December 2009. The test set by the Court of Appeal in *Robinson* was a high test; the onus is on the asylum seeker to state his grounds of appeal, and mere arguability was not the criterion to be applied for the grant of leave. Although the court held that if when the Tribunal reads the Special Adjudicator's decision there is an obvious point of Convention law favourable to the asylum seeker which does not appear in the decision, it should grant leave to appeal, the court observed that "When we refer to an obvious point we mean a point which has a strong prospect of success if it is argued. Nothing less will do." Standing counsel's criticisms of the material contained in Dr MacFarlane's letter, it cannot be said in the present case that the petitioner had such a strong prospect of success as to require the Secretary of State to consider this argument. It was up to the petitioner to state why internal relocation was not an option, and why it would be unduly harsh.

[20] It followed that the petition should be refused. The primary ground for refusal was that the Secretary of State did indeed consider the terms of the medical letter in the context of whether internal relocation would be unduly harsh. Second, if the court was against the respondent on the first point, any failure by the Secretary of State to consider the medical letter in this context was not a material failure, because the contents of the letter, taken together with the previously considered material, were not such as to create a realistic prospect of success before another Immigration Judge. And third, in any event, the argument that the petitioner's medical condition was such as to render internal relocation unduly harsh was not one advanced in the letter dated 21 December 2009, and the point was not such an obvious point with such a strong

prospect of success as to require the decision maker who wrote the decision letter dated 31 December 2009 to consider it.

Reply for the petitioner

[21] Counsel for the petitioner submitted in reply that the test of "extreme and exceptional circumstances" which was stated at paragraph (6) of the headnote in the country guidance case of *HGMO* was in fact only referable to Article 3 cases such as *N* v *Secretary of State for the Home Department*. It is not the appropriate test when considering whether it would be unduly harsh to expect internal relocation. This was clear from the discussion at paragraphs 246 to 260 of *HGMO*. To the extent that the Secretary of State in the present case considered the content of the medical letter in the context of undue harshness of internal relocation, he applied the wrong test. All that was required in terms of Rule 353 was that the medical letter, taken together with the previously considered material, created a realistic prospect of success.

Discussion

[22] The decision which is challenged in this petition is that contained in the letter dated 31 December 2009 from the UK Border Agency acting on behalf of the Secretary of State to the effect that the representations on behalf of the petitioner contained in the letter dated 21 December 2009 do not constitute a fresh claim for asylum. It is not in dispute that consideration of this issue falls to be undertaken against the tests contained in Rule 353 of the Immigration Rules. Read short, this provides that these submissions will only be significantly different from the material that has previously been considered 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. The phrase "a realistic prospect of success" has been the subject of sophisticated analysis by their Lordships in *ZT*

(Kosovo); it seems to me that such sophisticated analysis is unlikely to be required in many cases, and is not necessary in the present case. For present purposes I am content to adopt the formulation proposed by Laws L.J. (with whom the other members of the Court of Appeal agreed) in *AK (Sri Lanka)* that "realistic prospect of success" means only more than a fanciful such prospect.

[23] There are several issues raised in the submissions on behalf of the parties in the present proceedings, which may conveniently be addressed by considering the following questions:-

(1) Did the Secretary of State in the decision letter dated 31 December 2009 consider the material contained in the medical letter dated 12 October 2009 in the context of the question whether internal relocation was unduly harsh?

(2) Did the Secretary of State apply the correct test when stating that the petitioner "has no exceptional health issues"?

(3) Is the content of the medical letter such, when taken together with the previously considered material, as to create a realistic prospect of success before another Immigration Judge?

(4) Did the letter from the petitioner's agents dated 21 December 2009 raise the argument that the content of the medical letter, when taken together with the previously considered material, was such as to create a realistic prospect that another Immigration Judge would find internal relocation to be unduly harsh?

(5) If the answer to the previous question is in the negative, was the Secretary of State obliged to have regard to such an argument on the basis of *ex parte Robinson*?

I consider each of these questions in turn.

[24] *Did the Secretary of State in the decision letter dated 31 December 2009 consider the material contained in the medical letter dated 12 October 2009 in the context of the question whether internal relocation was unduly harsh?*

Counsel for the petitioner submitted that the Secretary of State's consideration of the medical letter was solely in the context of an argument of breach of Article 3 rights, such as was considered in *N* v *The United Kingdom*. He did not criticise the Secretary of State's conclusions in this regard, but suggested that the Secretary of State failed to go on to consider the content of the medical letter in the context of whether internal relocation would be unduly harsh. It is fair to categorize the consideration at paragraphs 12 to 17 of the decision letter as amounting to a consideration of the medical letter against the test stated in *N*. Standing the terms of the further submissions contained in the letter dated 21 December 2009, this is not surprising; those submissions focused very substantially on alleged violation of the petitioner's rights under Articles 2 and 3 of the ECHR. It was clearly appropriate for the Secretary of State to consider the content of the medical letter in that context. However, reading the decision letter as a whole, I have reached the view that the Secretary of State did go on to consider whether the material about the petitioner's health together with the material previously considered might create a realistic prospect of success in persuading another Immigration Judge that internal relocation would be unduly harsh. Paragraphs 18 to 23 of the decision letter involved consideration of Mr Moszynski's expert report, and that report (as is stated in the opening lines) was written on the understanding that agents can maintain that the petitioner has serious health problems. Paragraphs 36 and 37 of the report are concerned with internal relocation and possible undue harshness as a result of chronic

health problems. In paragraph 30 of the decision letter the Secretary of State appears to be considering the question of internal relocation, and in this context observes that the petitioner "has no exceptional health issues". Properly construed, and looking at the decision letter dated 31 December 2009 as a whole, I have reached the conclusion that the Secretary of State did consider the medical letter in the context of the question of whether internal relocation would be unduly harsh.

[25] *Did the Secretary of State apply the correct test when stating that the petitioner "has no exceptional health issues"?*

The submission for the petitioner was that the Secretary of State applied the test of "extreme and exceptional circumstances", but this test was appropriate only to Article 3 cases such as *N*, and there was no reason why there should be such a high threshold when considering medical conditions in the context of whether internal relocation was unduly harsh. This, he maintained, was clear from the discussion at paragraphs 246 to 260 of *HGMO*.

[26] I was initially attracted by this argument. There may be a variety of factors which result in internal relocation being unduly harsh. One of these factors might be a medical condition from which an asylum seeker was suffering. It is not immediately apparent why that factor should be ignored in considering the question of whether internal relocation would be unduly harsh unless extreme and exceptional circumstances can be made out.

[27] However, on considering the passage in *HGMO* to which I was referred, it does not appear to me that the Asylum and Immigration Tribunal was intending to confine its guidance to Article 3 cases such as *N*. On the contrary, the passage of the decision between paragraph 246 and paragraph 260 is concerned expressly with evidence about

medical facilities and its specific bearing on the issue of internal relocation. The Tribunal states at paragraph 260 that:

> "The analysis that we have just conducted has been in the context of determining whether, in general terms, it would be unduly harsh to expect an appellant to relocate to Khartoum, if the evidence shows a real risk that the appellant may find himself having to live there in a camp or squatter area."

I can find nothing in that decision to suggest that the guidance at paragraph (6) of the headnote is intended to apply only to Article 3 medical needs cases such as *N*. That guidance has been expressly continued by the Asylum and Immigration Tribunal in the later case of *AA*. Another Immigration Judge, if considering the content of the medical letter together with the previously considered material, would be bound by paragraph 12.2 of the Practice Directions to apply the country guidance contained in paragraph (6) of *HGMO*. The Secretary of State refers to this specific country guidance at paragraphs 24 to 26 of the decision letter, and goes on to apply the "exceptional circumstances" test to the present case. Paragraph 30 of the decision letter ends "Therefore another Immigration Judge applying the rule of anxious scrutiny, this would not create a realistic prospect of success." While the grammar may be questionable, the application of the test is in my view correct: another Immigration Judge would be bound by the Practice Direction to apply the guidance given in *HGMO*, as modified by *AA*.

[28] *Is the content of the medical letter such, when taken together with the previously considered material, as to create a realistic prospect of success before another Immigration Judge?*

Essentially for the reasons advanced by counsel for the respondent I answer this question in the negative. The criticisms of the status of the letter are perhaps less

important than the criticisms of its content; however, the criticisms as to its status are nonetheless well founded, and undermine the weight to be attached to the letter. The author is not a partner in the medical centre, and her qualifications are not stated on the letter. There is no indication of when she last saw the petitioner nor how long she has known her. The letter is dated more than two months before agents' letter dated 21 December 2009. It explains that the petitioner was receiving a course of medication which was due to end at about the date of the letter making further submissions. This course of treatment may have been successful; if not, the possibility of further treatment would be discussed, and this might be successful. There is nothing in the letter to indicate that the author considers the petitioner to be unfit for work, nor that she could not stay with friends in Juba or Akobo, nor that she would be unable to adapt to life in an IDP camp, should that prove necessary. The contents of the letter fall very far short of extreme and exceptional circumstances. They are not such, taken together with the previously considered material, as to create a realistic prospect of success before another Immigration Judge. Accordingly, even if I am wrong in my answers to the first and second questions, any failure by the Secretary of State was not material.

[29] *Did the letter from the petitioner's agents dated 21 December 2009 raise the argument that the content of the medical letter, when taken together with the previously considered material, was such as to create a realistic prospect that another Immigration Judge would find internal relocation to be unduly harsh?*

I answer this in the negative. There is no mention anywhere in the letter of internal relocation, nor is there any suggestion of an argument that internal relocation would be unduly harsh. Read fairly, the letter makes submissions with regard to Articles 2 and 3 of the ECHR. Counsel for the petitioner accepted that the only paragraph which

might be construed as touching on undue harshness of internal relocation was the first full paragraph on the fourth page of the letter. That paragraph makes no reference to internal relocation. It is preceded and followed by paragraphs which allege violation of the petitioner's rights under Articles 2 and 3 of the ECHR. Read fairly, I consider that this paragraph is directed towards the medical letter in the context of a "medical needs" Article 3 submission such as was considered in *N*. I do not consider that the issue of undue harshness of internal relocation was raised on behalf of the petitioner in these fresh submissions.

[30] *If the answer to the previous question is in the negative, was the Secretary of State obliged to have regard to such an argument on the basis of ex parte Robinson*? I have already indicated that I consider that the Secretary of State did indeed consider the material in the medical letter in the context of whether internal relocation was unduly harsh. However, if I am wrong on this matter, I do not consider that he was obliged to have regard to this argument even when it was not raised in agents' letter dated 21 December 2009. For the reasons discussed in relation to the third question above, it cannot be argued that the test set in *ex parte Robinson* has been met. The onus is on the petitioner to state the grounds on which it is submitted that further submissions amount to a fresh claim. Mere arguability is not the criterion. Looking to the terms of the medical letter it cannot be suggested that this is a point which has a strong prospect of success if argued. As the Court of Appeal observed in *ex parte Robinson*, nothing less will do.

[31] For these reasons this petition falls to be refused.