OUTER HOUSE, COURT OF SESSION

[2010] CSOH 65

P1556/09

OPINION OF MORAG WISE., Q.C
(Sitting as a Temporary Judge)

in the cause

RY, QA, ZA and MA

Petitioners;

for

Judicial Review of a Decision of the Secretary of State for the Home Department dated 15 July 2009

Defender:

Petitioners: Devlin; Drummond Miller
Respondent: J MacGregor; Office of the Solicitor to the Advocate General

13 May 2010

[1] This is a Petition for Judicial Review of a decision of 15 July 2009 by the Secretary of State for the Home Department to refuse to treat submissions made on the Petitioners' behalf as a fresh claim for asylum. The Petition seeks reduction of that decision. There are four Petitioners, RY, (as an individual and as the legal representative of SA), QA, ZA and MA. RY is the mother of the child SA and of the other three Petitioners.

Factual Background

[2] All four Petitioners and the child SA are nationals of Pakistan. They are members of the Ahmadi religion. They entered the United Kingdom on 6 October 2007. On 8 October 2007 the First Petitioner claimed asylum for herself, with the remaining Petitioners as dependents. The claim was rejected. An appeal was marked and was heard before an Immigration Judge, who dismissed the appeal on 31 March 2008. An application for reconsideration was made and refused. The Petitioners' rights of appeal were exhausted as at 13 May 2008.

[3] On 16 May 2008 agents representing the Petitioners at that time wrote to the Respondent intimating what was said to be a fresh claim for asylum. On 5 August 2008 the Respondent replied, intimating a refusal to accept that the information contained in the letter of 16 May amounted to a fresh claim. The Petitioners and SY were detained and directions to remove them from the United Kingdom were issued on 12 August 2008, against which decision the Petitioners raised a previous Petition for Judicial Review. That Petition was dismissed on the basis that the Petitioners wished to obtain translations into English of further fresh information relative to a fresh claim for asylum. On 27 January 2009 the Petitioners and SY were again detained and directions to remove them from the United Kingdom on 3 February 2009 were issued. Judicial Review proceedings challenging that decision were raised.

[4] On 30 January 2009 the agents now representing the Petitioners wrote to the Respondent with information previously obtained together with further information and submitted that this information amounted to a fresh claim not only for asylum but also breach of the Petitioner's human rights. That letter is lodged at 6/2 of Process. It is those claims that were rejected by the Respondent on 15 July 2009.

Scope of the dispute at the First Hearing

[5] When the matter called before me for a First Hearing, Counsel for the Petitioners explained that he would not be insisting in any of the Human Rights arguments in the Petition and that his arguments would be restricted to the issue of the treatment by the Respondent of the new information. That information could be divided into (i) the material referred to in paragraph 7 of the decision letter No 6/1 of Process and (ii) the material referred to at paragraph 8 thereof. Unfortunately the material at (i) was no longer in the possession of the Petitioners, had not been lodged with the process and no copies were available. The Respondent did not have copies of that material. In the event, both Counsel agreed that the matter should proceed in the absence of the material concerned. Mr Devlin's position was that his arguments related to the manner in which the Respondent dealt with the material rather than its substance. He accepted that it was for the Petitioners who seek to rely on certain material to put it before the court and conceded that he was not in a position to seek to delay the proceedings as a result of the missing material. He had not drafted the Petition personally and had not seen the material himself. He noted that its existence was not in dispute.

Mr McGregor submitted that it was unsatisfactory for the Petitioners to rely on documentation that the court had not seen, but was content to proceed on the basis that the absence of documentation was not likely to prejudice the Respondent.

The Legal framework

[6] Both Counsel agreed that Rule 353 of the Immigration Rules provides the legal framework within which a decision on a possible fresh claim for asylum must be made by the Respondent. Rule 353 provides;-

"When a human rights or asylum claim has been refused and any appeal in relation 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."

The approach to be taken by the Secretary of State to a fresh claim under Rule 353 was clarified by the Court of Appeal in *WM (DRC)* v *Secretary of State for Scotland* [2006] EWCA Civ 1495; [2007] Imm AR 337. In summary, if the Secretary of State is satisfied that the new material is significantly different from that already submitted, he must consider whether it, taken together with the material previously considered, creates a realistic prospect of success in a further asylum claim. In doing so he can have in mind any finding as to the honesty and reliability of the applicant(s) as found by a previous adjudicator. However, where the new material does not emanate from the applicant himself, previous credibility findings may of little relevance. The rule was said to impose a "somewhat modest test" and the Secretary of State must give anxious scrutiny to the material in question in applying it.

Petitioners' Arguments

[7] Mr Devlin's motion was to sustain the pleas in law for the Petitioners, repel the pleas for the Respondent and grant the prayer of the petition. He began his submissions by explaining the background information relating to Pakistan and

particularly to Ahmadis. He referred to *M* v *Secretary of State for the Home Department* [2009] EWHC 3137 *(Admin),* in which it is explained (under reference to *Secretary of State for the Home Department* v *KK* [2005] UKIAT 00033 and *MJ and ZM* v *Secretary of State for the Home Department* [2008] UKIAT 00033) that not all adherents to the Ahmadi faith are at risk of ill treatment amounting to persecution and that there is an important distinction between "exceptional and unexceptional Ahmadis". In summary, unexceptional Ahmadis are those with no record of active preaching or high profile, who have no history of persecution or ill treatment in Pakistan on account of his or her faith and have no particular features giving rise to potential added risk. The general risk for such Ahmadis falls well below the level necessary to show a real risk of persecution, serious harm or ill-treatment and thus to engage any form of international protection.

[8] In the event that an Ahmadi can be categorised as an exceptional Ahmadi, the issue of whether appropriate relocation within Pakistan is available arises. The town of Rabwah in Punjab province is known as a possible place for Ahmadis to relocate internally. However, Mr Devlin submitted that the case of *IA and Others* v *Secretary of State for the Home Department* [2007] UKIAT 88 "exploded the myth" that Rabwah constituted a safe haven for every Ahmadi. Thus for those exceptional Ahmadis at risk of persecution, relocation to Rabwah may not be an answer. Reference was also made to the UK Border Agency Operational Guidance Note on Pakistan. The Respondent's position on Ahmadis is set out at paragraphs 3.6 and 3.7 thereof.

[9] Mr Devlin then turned his attention to the determination of the Immigration Judge on 31 March 2008 (lodged at No 7/1 of Process). That determination sets out the background to the claim for asylum and the original reasons for refusal. In essence the

Petitioners (appellants before the Immigration Judge) had claimed that as a family they had been the victims of harassment for years due to their religion. There were claims of assault, of an attack on a shop owned by the First Petitioner's husband and of harassment by telephone calls and glass being broken. The Petitioners believed that these alleged incidents were caused by members of Khatme Nabuwat (KN), an organisation known to persecute Ahmadis. After hearing oral evidence the Immigration Judge made detailed findings about those claims. Quite properly, Mr Devlin drew my attention to the adverse findings of the Immigration Judge (findings 33 - 47 in 7/1) on the issue of credibility and reliability of all the Petitioners. Having rejected the accounts given by them on the alleged incidents, the Immigration Judge concluded that the Petitioners were ordinary Ahmadis who may have suffered some degree of harassment or discrimination but who had not been targeted by the KN. It was thus clear that he regarded them as "unexceptional". He went on to say that they could in any event have relocated within Pakistan. He appeared to consider it important that none of the Petitioners had tried to live in another part of Pakistan. Mr Devlin argued that in doing so, he had clearly misunderstood or misapplied the case of *IA and others* v *Secretary of State for the Home Department.*

[10] Reference was then made to the letter in which the Petitioners' current agents attempted to make a fresh claim for asylum (No 6/2 of Process). While Mr Devlin did not seek to place reliance on many of the points made in the letter, he focused on the production of what were said to be two newspapers showing that the Second Petitioner was being sought in connection with his having discussed religious affairs. The newspapers were said to contain adverts placed by the KN. A copy of a police report (FIR) said to show that the Petitioners were at risk in Pakistan was also produced with the letter.

[11] Turning to the Respondent's decision of 15 July 2009 (6/1 of Process), Mr Devlin drew attention to numbered paragraphs 7 and 8, which listed a substantial number of documents. As indicated at the outset, the documents referred to in paragraph 7 were not available in these proceedings but those listed in paragraph 8 were lodged at 6/2 of process. In the decision letter, the Respondent deals with the documents referred to in paragraphs 7 and 8 at paragraphs 13 and 14 respectively. It was submitted that the decision of the Respondent was flawed and vitiated by error. The errors were said to include (i) the reference to the First Incident Report (FIR) of 28 December 2007 being inadmissible as evidence, (ii) the statement that there would be no duty on an Immigration Judge to consider the warrants of arrest, (iii) the decision that the letter and Affidavit from Muzaffar Law Associates and the letter from Mayo hospital could be given no weight, (iv) the finding that an Immigration Judge would not be obliged to accept the newspaper documentation as evidence and (v) the finding that the newspaper article merely showed that that the Second Petitioner was being sought for an unexplained purpose. It was said that those errors led to the exclusion of relevant considerations and that as it couldn't be said that the Respondent would have come to the same conclusion had he had regard to them his decision fell to be reduced. Alternatively, the errors were said to have materially affected the decision and it could fall to be reduced on that basis.

[12] Before dealing with each if the errors claimed to have been made, Mr Devlin reminded me that in proceedings of this kind the court could not read into the letter something that was not there, or seek to interpret it if it was unclear, or substitute the decision of the Respondent with another. It was all a question of whether the errors made a difference to the Respondent's decision.

[13] In developing his argument on the errors said to have been made, Mr Devlin first drew attention to paragraph 13 of the decision letter where it was said that "..The FIR has not clearly been translated into English by a suitable service and so is inadmissible as evidence." Reference was made to Rule 52 of the Asylum and Immigration Tribunal Procedure Rules, which requires documents produced to the Tribunal to be translated, signed by the translator and certified as an accurate translation. There was no requirement to use a "suitable service" and any reference to that was accordingly an error. Further it was submitted that the effect of a document not being translated was not that it was "inadmissible", but simply that an Immigration Judge would not be obliged to consider it. The characterisation of the document as "inadmissible" was thus an error. While a document not properly translated would not be considered on its own it could be considered along with other documents.

[14] Paragraph 13 of the decision goes on to state "The warrants of arrest appear to have been translated into English before being forwarded to your client". It was said that such a statement does not go to the issue of whether there was a duty to consider the documents and was accordingly illustrative of another error in approach. In relation to the lack of weight to be given to the letter and Affidavit from Muzaffar Law Associates and the letter from Mayo Hospital, the reasons given for not giving these documents any weight seemed to be that there was no explanation of why the Affidavit was translated before it was sent and that the contents of it did not correspond exactly with the letter from the hospital. It was self evident, submitted Mr Devlin, that a photographic memory was not required in asylum claims and it was also clear that documents being sent to assist such a claim would require to be

translated before they would be useful. He accepted, however, that it was open to a decision maker to take into account that such documents could easily be forged.

[14] Attention then turned to paragraph 14 of the decision letter, which related to the documents that were available in these proceedings, namely the two newspaper "articles", which looked identical. The first document in English was a letter, which appeared to be an uncertified translation, from the "Daily Musawaat" newspaper stating that an advertisement regarding the Second Petitioner had been published on 13 July 2008. Mr Devlin accepted that the reference to the advertisement relating to "..lost of .." the Second Petitioner was ambiguous. However, he argued that the second document bore to be a certified translation of both newspaper "articles". That document, headed "Search for a Missing Person" indicated that a reward was being offered by KN for finding the Second Petitioner, who "usually talks religious matters and affairs". In addressing the comments in the decision letter that the translations were undated, did not clarify which newspaper the article or articles was said to have been published in and did not explain why the Second Petitioner was being sought, Mr Devlin acknowledged that there were difficulties with the documentation. However, he argued that the documents had to be considered "in the round". The translations, taken together, clearly amounted to a statement that there was an article and a translation of it. Whatever the deficiencies with the documents, it could not be said that there was no real chance of an Immigration Judge looking at these documents and accepting them as fresh evidence. The original Immigration Judge had accepted that the Petitioners suffered low level humiliation. If the information of a reward being offered by KN for finding the Second Petitioner was added to that, it could not be said that the search for him was for an unexplained purpose.

[15] For the reasons stated, Mr Devlin submitted that the Respondent had erred in law. If I accepted that there were flaws in the reasoning, this would affect the decision as a whole, either through the failure to take material considerations unto account or on the basis that it would then be impossible to disentangle the good reasons in the decision from those that were so flawed. A failure to take account of the new material constituted a failure to take account of relevant considerations and was thus an error of law. Mr Devlin submitted that in this context it was sufficient to establish either that the omitted consideration might have caused the decision maker to reach a different conclusion, or that the new evidence was capable of having made a difference, or that it might have caused the Respondent to reach a different decision. In support of that proposition reference was made to *R* v *Parliamentary Commissioner for Administration ex parte Balchin* [1998] 1 PLR 1, at 15, *A* v *Kirklees Metropolitan Council and* Dorsey [2001] ELR 657, at 661 and *R (on the application of Mount Cook Land Ltd) and another* v *Westminster City Council* [2004] 1PLR. Mr Devlin argued that if there was any conceivable basis upon which it could be said that the Respondent might have come to a different conclusion had he taken the new material into account, then he had erred in law.

[16] Mr Devlin then presented an alternative argument, namely that even if some of the points he had made in relation to the new material were not accepted as having any weight, those points could not be disentangled from the good points and the Respondent's decision would still fall. In support of that he cited *R* v *Lewisham Borough Council ex parte Shell* [1988] 1 All ER 938 at 951 and the following excerpt from the judgement of Neill LJ ;-

> " ... where the two reasons or purposes cannot be disentangled and one of them is bad or where , even though the reasons or purposes can be disentangled, the

bad reason or purpose demonstrably exerted a substantial influence on the relevant decision the court can interfere to quash the decision."

While Mr Devlin's primary submission was that there was no need to go to the decision of the Immigration Judge at all, his secondary position was that even if it was relevant, it could be seen that the Judge had erred in his interpretation of the case of *IA and Others* v *Secretary of State for the Home Department* [2007] UKIAT 0008. He had stated (at paragraph 48) that *IA* was clear authority for the proposition that before Rabwah could be ruled out as an option for internal relocation there must be evidence that the person claiming persecution has tried to live in another part of Pakistan other than their home area but has still experienced difficulties there. Quite apart from there being no support for that in the decision in *IA* itself, Mr Devlin submitted that it was in any event an absurd proposition.

Respondent's Arguments

[17] Mr MacGregor invited me to sustain the Respondent's first plea in law and to dismiss the Petition. He submitted that it was essential to bear in mind that these Petitioners were "appeal rights exhausted", that these proceedings relate only to the Respondent's decision letter of 15 July 2009 and were not an appeal against the Immigration Judge's decision. There was no scope for interfering because of any perceived flaws with the Immigration Judge's reasoning on the case of *IA* or on any other matter. In any event there was nothing in the letters from the Petitioners' agents that led to the relevant decision letter that sought to take issue with any of the findings of the Immigration Judge. Before the Petitioners could succeed, he argued, the court would have to be satisfied that the Respondent's decision was so outrageous, so defiant of logic, that no sensible person applying their mind to the correct questions,

could have arrived at the answer given. He submitted that the Petitioners had failed to show that this decision was so deficient. The Respondent had considered all the relevant material, identified the correct issues, applied the correct test and reached a conclusion that was open to him. It was not sufficient for the Petitioner to show that another decision could have been reached on the same material.

[18] In relation to the issue of whether or not the Respondent had identified the correct test, Mr MacGregor first noted that the terms of Rule 353 were set out in full at page 2 of the decision letter. The issue was whether or not the new material created a realistic prospect of success. It was agreed that the task of the Respondent was as set out in *WM (DRC)* v *Secretary of State for Scotland* [2006] EWCA Civ 1495; [2007] Imm AR 33. However, he emphasised that the Respondent was entitled to take into account the Immigration Judge's findings on credibility and reliability in assessing the reliability of the new material and considering the outcome of a Tribunal hearing on that material. The Respondent had taken such an approach, as was clear from paragraph 6 of the decision letter.

[19] In considering whether the Respondent had been irrational or unreasonable in applying the test in *WM,* Mr MacGregor submitted that while it had to be acknowledged that the test was a modest one, it was nonetheless a test with a threshold that required to be crossed. This was best illustrated by a decision of Lord Macphail in *SD* v *Secretary of State for the Home Department* [2007] CSOH 97. That case was also a Petition for Judicial Review following the refusal of a fresh asylum claim and raised similar issues to this, as there was doubt about the provenance and translation of the new material. Lord Macphail had expressed the view that, while the onus of proof on a petitioner in such a case was not high, it was nonetheless for that party to establish the provenance of any documents submitted and

it was within the decision maker's discretion to disregard them if he failed to do so. Thus, Mr MacGregor argued, there is a threshold to be crossed, and it was not enough simply to produce a document and argue that its production would give a fresh claim a realistic prospect of success.

[20] Reference was made to a decision of Temporary Judge J G Reid QC in the Petition of *Harbachou* v *Secretary of State for the Home Department* [2007] CSOH 18. In considering the legal framework for a fresh asylum claim the Temporary Judge described the second part of the test in Rule 353 as amounting to "...little more than there being a reasonable chance that the claim might succeed." It was clear that in examining in this context whether the Respondent has given the matter anxious scrutiny the decision letter must be read as a whole, fairly and reasonably and in a commonsense way. In *Harbachou* there had been a failure on the Respondent's part to give reasons for the decision, while in this case the process of reasoning was clear. Mr MacGregor submitted that a forensic analysis of the decision letter was unwarranted. To some extent the decision maker was not only judging the material but also the outcome of a hypothetical Tribunal considering that material. The letter could only be reduced if its terms were unreasonable or irrational in a *Wednesbury* sense.

[21] Mr MacGregor then turned to the decision letter, no 6/1 of process. He pointed out that numbered paragraph 6 thereof sets out the terms of Rule 353 in full, thus the correct legal basis is identified in the letter. Paragraph 11 then states out the correct test of the realistic prospect of success applying the rule of anxious scrutiny. The test is repeated in paragraph 12. The substantive reasoning is contained within paragraphs 13 and 14. Taken together, all of these paragraphs demonstrate an awareness of and familiarity with the correct test. While the Respondent may have

given his own views on the material as a starting point, it is clear that his conclusion was based on the correct test of whether there would be a realistic prospect of success before an Immigration Judge. It followed from his having applied the correct test that the Respondent had reached a conclusion he was entitled to reach. Even if that was wrong, as a fall back position the court should recognise that the Immigration Judge had considered the option of internal relocation to Rabwah and found that it was available. His finding on that couldn't be challenged and had to be accepted by the court.

[22] Attention then turned to the issue of whether Rule 52 of the Asylum and Immigration Tribunal (Procedure) Rules 2005 had been applied correctly by the Respondent. In responding to Mr Devlin's attack on the use of the word "inadmissible" in paragraph 13, Mr MacGregor submitted that while the term was indicative of some looseness of language it could not be said to amount to an error. While it was accepted that Rule 52 went no higher than to say there was no duty to consider documents, it was clear when reading paragraph 13 as whole that the Respondent was aware of that. In any event, if it was accepted that the words "these documents" in paragraph 13 related to all the documents produced, it could be seen that the correct test, which is mentioned more than once in the paragraph, was applied. It was not clear that any of the documents had been translated. There must be a degree of materiality in the information such that a different decision might be reached. In any event, the comment about the circumstances in which the documents came to be translated had to be understood in the context of (i) the adverse findings that had been made on credibility in paragraphs 33 - 47 of the Immigration Judge's decision and (ii) the high level of corruption in Pakistan where it is possible to obtain many types of fraudulent or fraudulently authenticated documents. Mr MacGregor submitted that

such easy availability of fraudulent documents, coupled with the adverse credibility findings, were factors to be weighed in the balance. In relation to the criticisms made of the references to the FIR not having been translated into English by a "suitable service", it was said that it was clear that document purportedly from Future Business International Limited was not signed. While there was no list of translation services said to be suitable, the concern being expressed was that the Respondent simply did not know what the document said. In any event, even there were minor errors in expression, these were not material, the correct test had been applied and the decision could not properly be attacked. Again as a fall back position, it was argued that even if an error was identified, it went only to the question of whether or not the Petitioners could be categorised as exceptional Ahmadis. If they could, then findings of the Immigration Judge on relocation could not be challenged.

[23] Mr MacGregor then addressed the issue of whether the current Country Guidance for Pakistan on Ahmadis had been correctly applied. He argued that the starting point was that the Ahmadis suffered societal discrimination only. It was clear from *Secretary of State for the Home Department* v *KK* [2005] UKIAT33 that it would be exceptional for an Ahmadi to be at risk of persecution. In *MJ and ZM* v *Secretary of State for the Home Department* [2008] UKAIT 33 it was emphasised that whether relocation to Rabwah was appropriate would always depend on the facts of an individual's situation. In this case the Immigration Judge had made a specific finding that the Petitioners had family in Rabwah (No 7/1 of Process, paragraph 51). What mattered was whether there was any blanket ban on relocation. The case of *IA and Others* v *Secretary of State for the Home Department* [2007] UKAIT 88 distinguished those with friends or relations in Rabwah in stating concerns about those moving there

from other parts of Pakistan. Having friends or family in Rabwah amounted to an exceptional circumstance rendering relocation there unobjectionable.

[24] It was submitted that the Respondent was entitled to take into account discrepancies in the material from Pakistan. For example the Affidavit of Musrat Yasmeen referred to in paragraph 13 of the decision letter was from an individual in Pakistan who is not an asylum seeker. Accordingly there was no need to make any concession where she was not accurate on important facts such as dates.

[25] In conclusion it was argued that the Respondent had considered the correct questions and reached a legitimate conclusion. This was not an appeal and the exacting requirements for *Wednesbury* unreasonableness had not been met. In any event, it could not succeed on the basis of the findings of the Immigration Judge, particularly in relation to relocation to Rabwah.

Petitioners' Reply

[26] In responding to Mr MacGregor's submissions Mr Devlin made a number of short points. He submitted that the asylum process does not require photographic memory on the part of those involved. He argued that he was not attempting another appeal as he did not attack the Respondent's conclusion, he was attacking the process by which he came to his conclusion. He accepted that the Respondent had stated the correct test, but maintained that the process by which he came to his conclusion was flawed. Thus if he failed to take into account material factors his decision was still flawed, regardless of his having shown that he knew the correct test.

[27] On the issue of the Immigration Judge's approach to Rabwah, Mr Devlin reiterated that the Immigration Judge was clearly wrong in his interpretation of *IA.* He said that as he had impugned the process used to reach the conclusions in

paragraphs 13 and 14 of the decision letter, paragraph 15 thereof could also be attacked in looking to see whether a different conclusion would have been reached. Further, while the issue was one of *Wednesbury* unreasonableness, the issue was how the need for anxious scrutiny affected that test. Reference was made to *R* v *Ministry of Defences ex parte Smith* 1996 QB 516 at 537-538, where Simon Brown LJ expressed the view that where fundamental human rights are threatened, the court should not overlook some minor flaw in the decision making process. Mr Devlin contended that the court could not simply "pencil out" loose language in the decision.

[28] Mr Devlin rejected the notion that a forensic approach could not be taken to the decision letter, but he accepted that if it was found that it contained only one error that was not of a material nature the Petition could not succeed. On the issue of the importance or otherwise of credibility, reference was made to *WM (DRC)* v *Secretary of State for Scotland* [2006] EWCA Civ 1495; [2007] Imm AR 337 and to paragraph 6 thereof, where it was said that where the documents in fresh asylum cases emanate from the client, adverse findings on credibility are relevant, but where they do not, issues of credibility are not important. In any event, the Respondent had not, at least on paragraph 13, separated out the reasons why each document should be ignored. He made general criticisms of the translation issues and the perceived problem with the provenance of the documents but he had not set out for each document why an Immigration Judge would not attach weight to them. However, if the court considered it would be necessary to see the documents before making a decision on that, he would have to accept that no error would then have been established.

Discussion

[29] The issue for decision in this case is whether the Respondent properly applied Rule 353 of the Immigration Rules in formulating the decision intimated by letter of 15 July 2009. The criticisms of his reasoning primarily related to his treatment of documents not properly translated into English. As indicated, some of the documents concerned in the decision (those referred to at paragraphs 7 and 13) were not available to the court. So far as those documents are concerned I can rely only on what is said about them by the Respondent his decision letter in reaching a view on whether or not his approach to the material was flawed. Where there is no detail of what was contained in the documents that are not available to the court I cannot reach any view as to whether their content would have been of assistance to the Petitioners' case.

[30] It is important to note that at paragraph 6 of the letter, the Respondent sets out accurately the test in the Immigration Rules, then at paragraph 12 correctly identifies that in this case the issue was whether the material now submitted, taken together with the material previously considered, is capable of creating a realistic prospect of success before another Immigration Judge. Importantly, the Respondent records certain facts about the new material produced. In particular, in paragraph 7, there is reference to the First Incident Report (FIR) of 28 December 2007 having been produced together with an *uncertified* translation. It was this document that was the focus of Mr Devlin's complaint about the use of the expression " .. not clearly been translated into English by a suitable service and so is inadmissible as evidence" in paragraph 13. In my view, the reference to a "suitable service" adds nothing, the Respondent having already clarified that this was an uncertified translation. Accordingly, the expression is not indicative of an error. The lack of a list of suitable translation services does not render it erroneous to comment, of an uncertified

translation, that no translation by a suitable service had been produced. The complaint is about the lack of a certified translation, not the quality or suitability of a translation purporting to be certified. Rule 52 of the Asylum and Immigration Tribunal Procedure Rules had not been complied with in respect of the FIR. The effect of that was that an Immigration Judge would not be obliged to consider it. Of course he could consider it notwithstanding the lack of a certified translation and thus the use of the term "inadmissible" in paragraph 13 is not strictly accurate. However, I have reached the view that this inaccuracy in expression does not amount to a material error of a type that might render the decision flawed. The first few lines of paragraph 13 of the decision letter deal with both the said FIR and with warrants of arrest. After commenting on translation and provenance issues in relation to both of those, the Respondent concludes that there would be no duty on an Immigration Judge to consider the documents. It is clear from the context that he is referring to all those documents he has listed so far. Thus the reference to "inadmissible" appears to be part of the narrative and not a statement of the applicable test. Later in paragraph 13, after addressing the provenance of other documents, the Respondent concludes that an Immigration Judge would not give any or great weight to them. Reading the paragraph as a whole, it is clear that the Respondent takes cognisance of the applicable test at each stage of dealing with the documents that he had before him.

[31] So far as the complaint about the warrants of arrest is concerned, the comment about these having been translated before forwarding has to be understood in the context of the concerns expressed in paragraph 13 about ease with which false or fraudulently obtained documents can be obtained to support an otherwise unsubstantiated claim of persecution. It must also be understood against the background of the adverse findings by the Immigration Judge of the Petitioners'

credibility and reliability. The submission that these adverse findings are not important because the documents concerned are not documents of the client must be examined. The passage in *WM (DRC)* v *Secretary of State for the Home Department* [2006] EWCA Civ 1495 relied upon by Mr Devlin for that submission is in the following terms:-

> " ...the Secretary of State, in assessing the reliability of the 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 findings 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 seems to me that the Respondent in this case has made clear that he did have concerns about the source of the material in question and that he questioned whether they fell into the category of being other than emanating from the client. The lack of explanation as to how they came to be in the Petitioners' hands was of concern to him against the background of the easy availability of forged documents and the adverse findings of the Petitioners' credibility. Accordingly, I do not consider that the *dicta* from *WM (DRC)* v *Secretary of State for the Home Department* cited above assists the Petitioners in this case. I agree with the view expressed by Lord Macphail in *SD* v *Secretary of State for the Home Department* [2007] CSOH 97 that, while the onus of proof on a Petitioner is not high, it does fall on him or her to establish the provenance of any documents submitted and if he or she fails to do so, the decision maker has a

discretion to disregard them. The warrants in question are not before the court. I have no reason to conclude that the concerns expressed by the Respondent in relation to them were not justified, or that his approach to the material was wrong or his reasoning flawed.

[32] Similarly, I do not consider that the approach taken to the letter and Affidavit from Muzaffar Law Associates or the letter from Mayo Hospital can be said to be erroneous. Again the documents are not before the court. Inconsistencies between the letter from Mayo Hospital and the Affidavit of Musrat Yasmeen were noted. As the Affidavit was not from someone claiming asylum, but from someone in Pakistan, I reject the contention that any inaccuracies should be overlooked because, understandably, those who have suffered persecution and are recounting the events that led them to seek asylum may not have perfect recall. In any event, it is clear that the Respondent had the same concerns about these documents as he had about the arrest warrants. The absence of explanation as to how the documents came to be obtained and forwarded to the Petitioners has again to be understood in the context of the adverse credibility findings and the ease of availability of fraudulently obtained documents. The Respondent saw the documents, had concerns about their provenance and certain inaccuracies within them and took the view that in all the circumstances there was no realistic prospect that an Immigration Judge would give them weight. That seems to me to be an approach that he was well entitled to take.

[33] In relation to the documents that were before the Respondent and have been produced in this process, the FIR dated 9 July 2008 was the subject of the same concerns about provenance and reliability that were outlined in relation to the documents considered in paragraph 13 of the letter. The view I have reached in relation to the relevance of credibility and background information about the

availability of forged documents applies equally to that. Mr Devlin's main criticisms of paragraph 14 related to the approach taken to the newspaper "articles". In my view, the Respondent has taken care to record the deficiencies with this material. In particular, the translation does not identify either newspaper or give its publication date, as the sheet giving the name and date of a publication does not state which newspaper it is. Accordingly, I do not accept the suggestion that it bore to be a translation of both newspaper articles and I consider that the Respondent was entitled to conclude that an Immigration Judge would not be obliged to accept the material as evidence. Where a translation does not identify the document it purports to translate one cannot be confident that it relates to any one, or more than one, document produced. In any event, what is available goes no further, as the Respondent noted than to suggest that the Second Petitioner was being sought for some unexplained purpose. It falls well short of evidence of attempted persecution. I note also that the Respondent relies on the paragraphs in the Country of Origin Information Report relating to forged or fraudulently obtained documents in connection with this material.
[34] The test of whether or not an Immigration Judge could realistically decide in favour of the Petitioners in light of any of the new material, taken with that already considered, is reiterated at the end of the Respondent's reasoning on this aspect of the letter at paragraph 15. There seems to me to be no error on the part of the Respondent in identifying or applying the correct test to any of the material that was the subject matter of the fresh claim for asylum. There is nothing in the decision letter to suggest that the reasoning adopted was, in a general sense, unreasonable or irrational. With the possible exception of the infelicitous use of the term "inadmissible" in paragraph 13 that I have already commented upon, there is nothing in my view to support the submission that the Respondent made any errors at all in his approach to

the matter. So far as the use of the term "inadmissible" is concerned, I have indicated that this can be characterised as an inaccuracy in expression rather than an error. However, even if it was an error, it would fall into the category of a single error not of a material nature which Mr Devlin conceded was not sufficient of itself to lead to success for the Petitioners. This is not a case where it is necessary to consider whether good and bad points or reasons can be disentangled as there seems to me to be nothing fundamentally wrong with the approach taken by the Respondent. There is in my view no basis to find that he failed to give the matter anxious scrutiny in examining whether there was any realistic prospect of success before an Immigration Judge considering the new material along with the old.

[35] I do not consider it necessary to comment in any detail the points made about the Immigration Judge's interpretation of *IA and Others* v *Secretary of State for the Home Department*. It is sufficient to note that the Immigration Judge's findings on the option of internal relocation to Rabwah are not open to challenge in this process. The Petitioners have family in Rabwah, which would have amounted to a circumstance rendering relocation there unobjectionable, had they been exceptional Ahmadis.

[35] Accordingly, for the reasons given, I reject the contention that the Respondent's decision of 15 July 2009 was deficient in any material sense. He identified and applied the correct test and gave sufficient reasons for his decision. I shall sustain the Respondent's first plea in law and dismiss the petition, reserving meantime all questions of expenses.