Neutral Citation No: [2016] NIQB 35 | *Ref:* **MAG9857**

Judgment: approved by the Court for handing down | *Delivered:* **24/3/2016**
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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Anoshervan (Jahany) Application (Judicial Review) [2016] NIQB 35

IN THE MATTER OF AN APPLICATION BY ANOSHERVAN JAHANY FOR JUDICIAL REVIEW

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AND IN THE MATTER OF A DECISION OF THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

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MAGUIRE J

Introduction

[1] The applicant was born on 29 December 1985. He is therefore now 30 years of age. He is an Iranian national. It appears he came to the United Kingdom in November 2007. He would then have been 21. He has resided in the UK ever since.

[2] The applicant, after he arrived in the UK, made an asylum claim. This was determined by the Home Office negatively from his point of view on 6 February 2008. The applicant then appealed that decision. His appeal came before Immigration Judge Khawar. By a decision of 1 April 2008 the applicant's appeal was dismissed. The court has read the full reasons given by Immigration Judge Khawar for his decision. It is abundantly clear from his decision that the Immigration Judge did not believe the applicant's account as given in evidence and rejected his evidence on credibility grounds related to there being numerous discrepancies between different accounts the applicant had given over time in respect of a range of incidents that he allegedly was involved in. The Immigration Judge also made it clear that there was no evidence that the applicant had any political profile which would have placed him in conflict with the Iranian regime. As a Kurd this would not, the judge held, taken by itself, be a basis for him being persecuted.

[3] Of some importance the Immigration Judge rejected the veracity of accounts given by the applicant in respect of alleged smuggling activities which the applicant said he had been in conflict with the Iranian authorities about and an alleged incident in respect of which the applicant claimed that an automatic rifle had been planted on him or placed with his belongings.

[4] Following the decision of the Immigration Judge, the applicant had no legal basis for remaining in the United Kingdom but, notwithstanding this, he appears to have stayed in the UK.

More recent events

[5] In December 2013 the applicant, *via* his present solicitors, sent a set of materials to the Home Office by way of further submissions. The materials sent are listed by the Home Office at page 140 of the papers.

[6] Of prime importance these papers included what may be described as information about *sur place* activities of the applicant in the United Kingdom. In a statement from the applicant he said:

> "7. Since I arrived in the United Kingdom I have become involved with the Democratic Party of Iranian Kurdistan (KDPI), which seeks the attainment of Kurdish national rights within a Democratic Federal Republic of Iran. This involvement began in 2011 and I attended various seminars and meetings in both London and Manchester. These meetings would have involved discussing human rights issues in Iran and the current regime's treatment of Kurdish people. We would also commemorate the deaths of Abdul Rahman Ghassemlou and Sadegh Shara Fkandi, the two political activists and leaders of the KDPI who were assassinated by individuals thought to be agents of the Islamic Republic of Iran in Berlin and Vienna respectively. I have enclosed a letter from Mr Seid Ebrahim Rahimi, an official representative, which highlights my involvement with the party.

[7] By way of supporting evidence the applicant provided a letter dated 2 November 2013 from Mr Seid Ebrahim Rahimi to the applicant's solicitor. Mr Rahimi asserts in the letter that he is an official representative of the Democratic Party of Iranian Kurdistan in Britain. The letter is unsigned. The letter refers to:

> "Our members uncover activities mostly include distributing books, CDs and newspapers, raise

> awareness within the society, financial support and gathering information."

At one point the letter refers to:

> "Many others who are already discovered as members of the Democratic Party by the authorities are experiencing hardship under interrogation or torture. They are being ill-treated with disrespect to their ideas and values given no human rights."

The letter ends with two sentences (in a different typeface):

> "I confirm also that he (the applicant) will be at immediate risk of persecution and ill-treatment if returned to Iran".

The letter provides an e-mail address should further information be needed.

[8] In addition to the above referred to references, the material provided by the applicant's solicitor also included a substantial legal submission and a range of reports about Iran.

[9] For reasons which are not clear in the papers, no response to the receipt of these materials by the Home Office emerged until 15 May 2015. At pages 176-183 of the papers one finds set out the Home Office's consideration of the case. The Home Office had reviewed the case in full but concluded that there was no merit in the applicant's arguments. The old and new in terms of representations did not establish a claim with a realistic prospect of success, if considered by an Immigration Judge.

[10] This application for judicial review was initiated on 18 August 2015. In these proceedings the applicant filed an affidavit (see page 7 of the bundle). This rehearses the background. The applicant avers that he joined the Democratic Party of Iranian Kurdistan (KDPI) in 2011 and had "been active in the party since". He goes on to say that he continues to represent the KDPI and tries to raise awareness of its aims and to encourage others to support it The applicant affirms his belief that if returned to Iran he would face persecution or death on account of the fact that he has a profile as a political oppositionist.

[11] In response, an affidavit has been filed on behalf of the respondent by John Hitchman, a senior caseworker, but not the decision maker in the case. This indicates the test to be applied (para 4); the fact that the risk of return to Iran for returnees was fully considered (para 6); and the willingness of the Home Office to receive any further representations or submissions from the applicant. While the court will take into account what is said in this affidavit, it reminds itself that it must

maintain its focus on the terms of the refusal letter written by the decision maker which contains the reasons for the impugned decision.

Rule 353

[12] It is not in dispute between the parties that the applicant's submissions sent by his solicitor to the Home Office fell to be considered in accordance with Rule 353 of the Immigration Rules. This Rule states as follows:

> "When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn…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 which has previously been considered. The submissions will only be significantly different if the content:
>
> (i) had not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection".

[13] The correct way for the decision maker to address rule 353 has been the subject of considerable judicial guidance. A commonly cited passage is that found at paragraph 6 *et seq* of the court's judgment in WM (Democratic Republic of Congo) v SSHD; AR (Afghanistan) v SSHD [2006] EWCA Civ 1495:

> "6… [The Secretary of State] has to consider the new material together with the old and make two judgments. First, whether the new material is significantly different from that already submitted, on the basis of which the asylum claim has failed…If the material is not "significantly different" the Secretary of State has to go no further. Second, if the material is significantly different, the Secretary of State has to consider whether it, taken together with the material previously considered, creates a realistic prospect of success in a further asylum claim. That second judgment will involve not only judging the reliability of the new material, but also judging the outcome of tribunal proceedings based on that material. …the

> Secretary of State in assessing the reliability of the new material, can of course have in mind where that is relevantly probative, any finding as to 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…the new material does not emanate from the applicant himself, and thus cannot be said to be automatically suspect because it comes from a tainted source.
>
> 7. The rule only imposes a somewhat modest test that the application has to meet before it becomes a fresh claim. First, the question is whether there is a realistic prospect of success in an application before the adjudicator, but not more than that. Second…the adjudicator himself does not have to achieve certainty, but only to think that there is a real risk of the applicant being persecuted on return. Third, and importantly, since asylum is in issue the consideration of all the decision makers, the Secretary of State, the adjudicator and the court, must be informed by the anxious scrutiny of the material that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution".

[14] The approach of the court on review of such a decision was described in the same authority as follows:

> "First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return…The Secretary of State of course can and no doubt logically should treat his own view of the merits as a starting point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind. Second, in addressing that question, both in respect of the evaluation of facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? If the court cannot be satisfied that the

> answer to both of those questions is in the affirmative it will have to grant an application for review of the Secretary of State's decision".

The judicial review test

[15] At the hearing of the judicial review, there was some argument about what test the court should apply when determining the case as between what may be described the "Wednesbury" approach and what the court described as a "substitutional" approach, under which the court could substitute its view for that of the original decision maker. The case law historically had oscillated between the two but there was general agreement that the Wednesbury test is that which has been applied uniformly since the decision of the Court of Appeal of England and Wales in MN (Tanzania) v SSHD [2011] 2 AER 772. The court must therefore apply a rationality standard to the issue of the lawfulness of the conclusion reached by the decision maker in respect of whether the putative fresh claim in this case had a realistic prospect of success before a tribunal.

Realistic prospect of success

[16] The above phrase is referred to in various authorities. In AK (Afghanistan) v SSHD [2007] EWCA Civ 535 Toulson LJ (with whom Ward and Tuckey LJJ agreed) said that "a case which has no reasonable prospect of success…is a case with no more than a fanciful prospect of success". Thus "reasonable prospect of success" means only more than a fanciful prospect of success.

[17] Another formulation is found in ST v SSHD [2012] EWHC 988 Admin where His Honour Judge Anthony Thornton QC, acting as a High Court Judge, said at paragraph [49]:

> "In deciding whether the claim has a reasonable prospect of success, the decision maker must consider whether he or she considers that the claim has a reasonable prospect of persuading an immigration judge hearing an appeal to allow the appeal from the decision of the same decision maker who has just rejected the fresh representations or submissions".

Anxious scrutiny

[18] The notion of anxious scrutiny has also been the subject of discussion in the case law. For example, in a recent case, R (Kakar) v SSHD [2015] EWHC 1479 Admin, Foskett J at paragraph [32] referred to ML (Nigeria) [2013] EWCA Civ. 844 in this connection. In that case Moses LJ said:

> "Of all the hackneyed phrases in the law, few are more frequently deployed in the field of immigration

> and asylum claims than the requirement to use what is described as 'anxious scrutiny'. Indeed, so familiar and of so little illumination has the phrase become that Carnwath LJ in R (YH) v SSHD [2010] EWCA Civ. 116, between paragraphs [22] and [24], was driven to explain that which he had previously explained namely what it really means. He said that it underlines 'the very special human context in which such cases are brought, and the need for decisions to show by their reasoning that every factor which might tell in favour of an applicant has been properly taken into account'. It follows that there can be no confidence that that approach has been taken where a tribunal of fact plainly appears to have taken into account those factors which ought not to have been taken into account".

Country Guidance – Iran

[19] It is worth citing at this point material drawn from two country guidance cases in respect of Iran. The first is a case called SB v Secretary of State for the Home Department which was decided in May 2009. Its official title is SB (Risk on Return – Illegal Exit) Iran CG [2009] UKAIT 00053.

[20] In SB the Asylum and Immigration Tribunal considered the circumstances pertaining in Iran in respect of the return of persons who had left Iran illegally. The particular context was events in Iran following presidential elections in 2009. The following points, in particular, were made by the Tribunal at paragraph [53] (using the numbering in that paragraph):

> "(ii) Iranians facing forced return do not in general face a real risk of persecution or ill-treatment. That remains the case even if they exited Iran illegally. Having exited Iran illegally is not a significant risk factor, although if it is the case that a person would face difficulties with the authorities for other reasons, such a history could be a factor adding to the level of difficulties he or she is likely to face.
>
> (iii) Being a person who has left Iran when facing court proceedings (other than ordinary civil proceedings) is a risk factor although much will depend on the particular facts relating to the nature of the offences involved and other circumstances. The more the offences for which

> a person faces trial are likely to be viewed as political, the greater the level of risk likely to arise as a result. …. being involved in on-going court proceedings is not in itself something that will automatically result in ill-treatment; rather it is properly to be considered as a risk factor to be taken into account along with others.
>
> (iv) Being a person involved in court proceedings in Iran who has engaged in conduct likely to be seen as insulting either to the judiciary or the justice system or the government or to Islam constitutes another risk factor indicating an increased level of risk of persecution or ill-treatment on return."

[21] The second country guidance case relating to Iran is BA v Secretary of State for the Home Department. This case was determined in 2011 and is cited as BA (Demonstrators in Britain – Risk on Return) Iran CG [2011] UKUT 36 (IAC). In this case the court expressed some general sentiments arising from the circumstances in which persons in Britain had demonstrated against the regime in Iran and later had sought asylum.

[22] It is noted by the Upper Tribunal that "Iranians returning to Iran are screened on arrival. A returnee who meets the profile of an activist may be detained while searches of documentation are made. Students, particularly those who had known political profiles are likely to be questioned as well as those who have exited illegally". The Upper Tribunal also thought that there was not a real risk of persecution for those who had exited Iran illegally or were merely returning from Britain. In this area the Upper Tribunal endorsed the conclusions of the Country Guidance in SB.

[23] A further matter noted by the Upper Tribunal was that there was no evidence of the use of facial recognition technology at Imam Khomeini International Airport. It is noted that it is possible that those whom the regime might wish to question would not come to the attention of the regime on arrival. However if information is known about the activities of persons abroad they may well be picked up for questioning and/or transferred to a special court near the airport after they have returned home.

[24] The Upper Tribunal indicated that it was important to consider the level of political involvement before considering the likelihood of the individual coming to the attention of the authorities and the priority the Iranian regime would give to tracing him or her. The Tribunal goes on to address relevant factors when assessing risk on return having regard to *sur place* activities. As might be expected, the

emphasis is placed on the theme of the activity in question; the role of the individual and his or her political profile; the extent of his or her participation in oppositional activity; and the level of publicity which may be attracted by the individual's activities.

[25] The arrival of an opponent of the regime at Tehran Airport may trigger enquiry if the person has an identifiable record as a committed opponent of the regime or otherwise has a significant political profile.

[26] Of particular interest for the purpose of this case are the following passages taken from the Upper Tribunal's judgment:

> "66. …. we conclude … that for the infrequent demonstrator who plays no particular role in demonstrations and whose participation is not highlighted in the media there is not a real risk of identification and therefore not a real risk of consequential treatment on return.
>
> 67. … we have seen no evidence to lead to the conclusion that merely having exited Iran illegally an appellant might be subjected to persecution. While returning from Britain is at present an increased risk factor the mere fact that an appellant is returned from Britain does not lead to a risk of persecution."

[27] The court will bear in mind the above and other sentiments expressed in these authorities in arriving at its conclusion in this case.

The decision-maker's view

[28] As has already been noted, there is a substantial document in the papers in the form of a "Further Submissions Decision", which encapsulates the Home Office's consideration of the applicant's submissions.

[29] In essence, this document proceeds by looking at the submissions which previously had been considered and then looking at those which previously had not been considered.

[30] As regards the former, the decision maker cites at length the views of the immigration judge who dealt with the applicant's appeal against the Home Office's original decision. Little comment is made by the decision maker save for a statement that the submissions falling into this category "do not create a realistic prospect of success".

[31] In respect of the category of new submissions, the decision maker refers to the materials concerning the applicant's *sur place* activities which have been set out above. This encompassed both his own statement and the letter from Seid Ebrahim Rahimi. It is noted that the assessment of the decision maker is made in the light of the country guidance, to which the court has already made reference.

[32] The letter of Mr Rahimi is the subject of substantial comment. It is stated that it did not state that the applicant was a member of the KDPI or that the applicant himself distributed books, CDs or newspapers, or engaged in other listed activities or that he was involved in any way with the organisation. The criticism is further made that the letter was a photocopy and did not contain the applicant's surname. Moreover, "some of the text" it is noted "appears to have been inserted into the body of the document and there are a number of grammatical errors in the letter".

[33] Following on from the above the author then referred to various statements of the immigration judge negative to the applicant's credibility as the Judge saw it. Immediately thereafter the conclusion of the decision maker is given. He said "Your account was not credible…I am not satisfied to the required standards that the documents can be relied upon". As a result, subsequently no weight is given to the documents.

[34] Thereafter the decision maker, having quoted the previous tribunal's finding that the applicant had no political profile whatsoever, offers his view that the applicant had not submitted any evidence which demonstrated that the Iranian authorities had evidence of him taking an active role in any political demonstration against the Iranian regime while in the United Kingdom. The conclusion is then provided *viz* that "it is considered that you have not developed a political profile in the United Kingdom for which the authorities in Iran would take an adverse interest in you upon your return".

[35] It is to be noted that the "consideration of submissions" document deals with a range of other topics but it is unnecessary for these to be dealt with here as the submissions of the applicant in these proceedings were closely focussed on alleged failures by the decision maker properly to consider with the necessary element of "anxious scrutiny" the applicant's *sur place* activities.

The applicant's case

[36] Mr McTaggart BL for the applicant argued that the test to be overcome by the applicant in this case was a low one. The issue before the court related to the applicant's *sur place* activities and their assessment. The decision maker, counsel argued, had over-relied on the immigration judge's negative credibility findings in 2009. When attention anxiously is afforded to the applicant's account of his recent activities, it could not reasonably be said that his involvement in KDPI was so implausible that there was no possibility of weight being afforded it by an immigration judge.

[37] The court, it was submitted, should have regard to the concerns that the Iranian regime monitor and infiltrate and seek to control Iranian dissident groups and that the Iranian security forces would be suspicious of people with British connections. If the applicant was to be questioned on return at the airport, the court should not expect him to lie about his activities.

[38] Mr McTaggart further submitted that any inquiry the immigration judge would undertake would be likely to far exceed, in terms of detail and rigour, the level of inquiry of the decision maker whose decision was challenged. There could be an oral hearing before the immigration judge with examination and cross-examination with the benefit of experienced advocates. He referred to paragraph [51] of ST (citation *supra*).

[39] Finally, counsel submitted that the decision maker's conclusion that the applicant had no political profile worthy of the Iranians taking an adverse interest in him was flawed and that, in any event, the decision maker had misdirected himself where at one point he stated that "the new submissions taken together with the previously considered material do not create a realistic prospect of success. This means that it is not accepted that should this material be considered by an immigration judge that this would result in a decision to grant you asylum…".

The repondent's case

[40] Mr Kennedy BL on behalf of the respondent supported the decision maker's decision. As regards the submissions previously considered, such as the applicant's Kurdish identity and his alleged smuggling activities, these had been the subject of detailed consideration by Immigration Judge Khawar who had discerned no merit in them.

[41] The mere fact of illegal exit from Iran, moreover, counsel argued, did not, in accordance with the country guidance cases, give rise *per se* to a risk of persecution.

[42] The applicant's *sur place* activities since the immigration judge's decision had, it was submitted, been carefully considered but the material submitted was manifestly weak and failed to substantiate the applicant's case in this area.

[43] Overall, the court was invited to read the decision maker's letter as a whole and to accept that the correct test was applied, notwithstanding the use of words underlined in quotation above at paragraph [39]. Mr Kennedy placed reliance on paragraph [34] of the Upper Tribunal's judgment in R (Hammed Mohanmmed Alhammadi) v SSHD [2013] UKUT 00540 (IAC).

The court's assessment

[44] The court has sought to apply anxious scrutiny, in the way described above at paragraph [18], to its task of assessment in this judicial review.

[45] The issue before the court is whether the applicant has shown that the decision maker's decision not to view the applicant's further submissions as constituting a fresh claim is Wednesbury unreasonable.

[46] While the court has considered all of the material with care, the focus of this judicial review relates to the applicant's *sur place* activities. These are activities which allegedly have taken place since the last assessment of the applicant's case. The evidence submitted in support of them will therefore be new evidence which was not before earlier decision makers.

[47] How is this evidence to be assessed along with the material already assessed, what may be described as the "old material"?

[48] The treatment of the new evidence, it seems to the court, is the key factor. That evidence relates to the applicant's alleged political activities since 2011 on behalf of the KDPI. His activities, as he presents them, are set out above at paragraphs [6] and [7]. The decision maker's treatment of them is found set out above at paragraphs [31] – [33]. The decision maker has found that taken overall the claims made by the applicant do not amount to a fresh claim and would not enjoy (in the decision maker's assessment) a realistic prospect of success before an immigration judge. In the course of reaching this conclusion the decision maker placed no weight on the key documents submitted by the applicant. It falls now to the court to consider the lawfulness of the decision maker's overall assessment.

[49] The new materials relating to the *sur place* activities of the applicant may be identified as being (a) the applicant's own statement as submitted to the decision maker and (b) the letter provided to the decision maker from Mr Rahimi. It cannot, in the court's view, be doubted that these materials, read together or separately, are of a highly limited nature, especially when read in the context that it must be assumed that the applicant, with the benefit of legal advice, was intent on putting before the decision maker the strongest case that was open to him to put in respect of his activities.

[50] As regards the applicant's statement, it appears to the court that it asks more questions than it answers. There is an absence of the sort of detail in it which one might expect. The meetings referred to are described only at a very high level of generality. The information does not disclose how many meetings there were or who was present at them. An obvious question, unanswered in the material submitted, was whether the meetings took place in public or in private. The organisers are not identified. Nothing is said about whether it is believed that the

meetings were monitored by the Iranian regime. Moreover, the applicant's role in the meetings is opaque.

[51] Similar questions arise from the letter submitted in the name of Mr Rahimi. The letter submitted, apart from being unsigned, says remarkably little about the applicant and his activities. It does not say in terms that the applicant is a member of the KDPI. While there is a broad assertion about immediate risk of persecution and ill treatment if returned to Iran, there is little to connect this with the applicant's alleged activities.

[52] As with the applicant's own statement, the court assumes that the content of Mr Rahimi's letter represents the height of his evidence.

[53] It is further to be noted that the applicant filed an affidavit to support these proceedings for judicial review. This was prepared after the Home Office decision maker had made his decision of 19 May 2015. While it might have been thought that this affidavit would offer some information to expand on the material submitted, it does not do so.

[54] The court, considering the material as a whole, must ask itself the question of how it believes the material would be received by an immigration judge. The answer to this question, unfortunately, must be that the court can only conclude that before an immigration judge the applicant's case would be unlikely to enjoy a reasonable prospect of success. Rather, it seems to the court that at most its prospect of success before an immigration judge would not be greater than fanciful.

[55] It follows from this assessment that the decision maker's conclusion in this case cannot be viewed by the court as irrational or as offending against the standard of Wednesbury unreasonableness.

Issues of Process

[56] The court, in the course of its consideration of this case, has also looked closely at the decision made in this case from the point of view of issues which might arise in terms of the process of decision making.

[57] In this regard, notwithstanding that the court is of the view that the decision maker's decision was within the lawful ambit of the decision maker's discretion to make, there are, in the court's assessment, instances in this case of failures of expression and compilation in the way the decision has been formulated by the decision maker. Examples include:

- The reference properly picked up by Mr McTaggart at the end of the decision which is referred to at paragraph [39] above. However, the court accepts Mr Kennedy's submission that it is important to read the decision as a whole. When this is done the court is satisfied that the correct test in fact was applied

and is expressly referred to at other parts of the decision including in the sentence immediately preceding the sentence in which the wrong test appears to have crept in.

- There is an unfortunate juxta-positioning of the decision maker's critique of Mr Rahimi's letter and material concerning the immigration judge's negative findings in relation to the applicant's credibility. This might leave the impression that the decision maker may have taken the applicant's credibility into account in assessing Mr Rahimi's letter. The letter should, in the court's view, be assessed in accordance with the decision maker's view of its own reliability and Mr Rahimi's credibility. On the face of it, it is difficult to see how the applicant's credibility should affect this issue. In this particular case, however, the court does not view any potential error in this regard as affecting the court's overall conclusion.

Conclusion

[58] The judicial review application is dismissed.