



OUTER HOUSE, COURT OF SESSION

[2022] CSOH 69

P157/22

OPINION OF LORD RICHARDSON

In the cause

HJ (F/E)

Petitioner

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Petitioner: Caskie; Drummond Miller, instructed by McGlashan MacKay**

**Respondent: Massaro; Office of the Advocate General**

27 September 2022

**Introduction**

[1] The petitioner is a citizen of Cameroon. He arrived in the UK on 10 January 2012 and claimed asylum. The petitioner entered the UK using a passport in the name IN. It also appeared that he had previously, on 28 September 2011, applied for a visa in this name at UK High Commission in Yaoundé. This application had involved the giving of fingerprints.

[2] The petitioner's claim for asylum was refused by the First-tier Tribunal on 13 October 2013. An important element of the petitioner's claim to the First-tier Tribunal was that he had been attacked and taken hostage by the Cameroon authorities in September 2011 and was thereafter detained and tortured by them (see paragraphs [6] to [8] of the

decision). The decision of the First Tier Tribunal, in rejecting the petitioner's claims, included findings that significant parts of the petitioner's evidence to the tribunal were inconsistent and lacking in credibility (see paragraphs [35] and [37]).

[3] The petitioner appealed the decision of the First-tier Tribunal. The petitioner's appeal was refused on 10 December 2013 and his appeal rights were exhausted on 21 February 2014. Thereafter, the petitioner lodged further submissions on three occasions. However, by 25 February 2020, all of these submissions had been refused and the petitioner had exhausted all rights of appeal.

[4] On 22 September 2021, the petitioner again lodged further submissions. These further submissions were the subject of the present proceedings. An issue arose as to whether these further submissions amounted to a "fresh claim". This issue is governed by Rule 353 of the Immigration Rules which provides as follows:

"When a human rights or protection 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:

(i) had not already been considered; and

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

[5] The petitioner's further submissions included a claim that, from October 2020, he had become an active member of the Southern Cameroon National Council (the "SCNC") (UK) and he sought asylum on that basis.

[6] By decision dated 24 November 2021, the respondent both rejected the petitioner's further submissions and found that they did not amount to a fresh claim. The respondent summarised her decision as follows:

“Careful consideration has been given to whether your submissions amount to a fresh claim. Although your submissions have been subjected to anxious scrutiny, it is not accepted that they would have a reasonable prospect of success before an Immigration Judge in light of the reasons set out above, in particular:

- You have not established that you have a significant political profile that would bring you to the adverse attention of the Cameroon Authorities.
- You have not provided new evidence that verifies that you were detained as a suspected member of any political group whilst living in Cameroon.
- You have used several aliases and you not provided [sic] credible or original supporting evidence that substantiates and verifies your true identity.”

### **Petitioner’s submissions**

[7] Mr Caskie submitted on behalf of the petitioner that the critical question in the present case was that contained in the final paragraph of Rule 353: namely whether the further submissions advanced on behalf of the petitioner, when taken together with the material previously considered, gave rise to the petitioner having a realistic prospect of success in an appeal before the First-tier Tribunal. This was because the respondent accepted the further submissions did contain new material, concerning the appellant’s involvement with the SCNC (UK), which had not been previously considered and which was significantly different from that which had previously been submitted.

[8] It was also apparent that there was no disagreement as to the correct approach to be taken by the Court to this question. In this regard, Mr Caskie accepted that the respondent was correct to point to the approach set out in the opinion of The Extra Division as given by Lord Doherty in *SM v The Secretary of State for the Home Department* [2022] CSIH 21 at paragraphs [6] to [9]. In particular, Lord Doherty quoted from the judgment of Lord Justice Buxton in *WM (Democratic Republic of Congo) v Secretary of State for the Home Department* [2006] EWCA Civ 1495, [2007] Imm AR 337 (at paragraphs [10] and [11]):

"[10]... Accordingly, a court when reviewing a decision of the Secretary of State as to whether a fresh claim exists must address the following matters.

[11] 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: see [7] above. The Secretary of State of course can, and no doubt logically should, treat his own view of the merits as a starting-point for that enquiry; but it is only 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 the 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."

[9] Mr Caskie also drew my attention to what Lord Justice Buxton said about the test of the applicant being exposed to a real risk of persecution on return at paragraph [7]:

"[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 an adjudicator, but not more than that. Second, as [counsel] pertinently pointed out, 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. If authority is needed for that proposition, see per Lord Bridge of Harwich in *Bugdaycay v SSHD* [1987] AC 514, p 531F."

This passage was also quoted, with approval, in *SM* (above).

[10] Against this background, it was submitted that the respondent had not considered the correct question focussing on whether, in the opinion of the respondent, the petitioner's appeal would succeed as opposed to considering the different and lower test of whether there was a realistic prospect of the appeal succeeding.

[11] It was submitted further on behalf of the petitioner that the respondent had erred in carrying out its assessment. In this regard, reference was made to the judgment of Lord

Justice Sedley in *YB (Eritrea) v Secretary of State for the Home Department* [2008] EWCA

Civ 360 at paragraph [18]. There, consideration was given to the correct approach to be taken when assessing the risk to asylum seekers arising from political activity *sur place*. In particular, in that case, the issues were: first, whether the AIT had materially erred in law by relying on the absence of objective evidence that the Eritrean authorities had the ability or desire to monitor the activities of expatriates throughout the UK; and, second, whether concluding that, even if photographs were taken of demonstrators, it was unlikely that the Eritrean authorities would be able to identify the appellant and/or place his name on a list of people of interest to the authorities. Lord Justice Sedley addressed these issues as follows:

“18 As has been seen (§7 above), the tribunal, while accepting that the appellant's political activity in this country was genuine, were not prepared to accept in the absence of positive evidence that the Eritrean authorities had ‘the means and the inclination’ to monitor such activities as a demonstration outside their embassy, or that they would be able to identify the appellant from photographs of the demonstration. In my judgment, and without disrespect to what is a specialist tribunal, this is a finding which risks losing contact with reality. Where, as here, the tribunal has objective evidence which ‘paints a bleak picture of the suppression of political opponents’ by a named government, it requires little or no evidence or speculation to arrive at a strong possibility — and perhaps more — that its foreign legations not only film or photograph their nationals who demonstrate in public against the regime but have informers among expatriate oppositionist organisations who can name the people who are filmed or photographed. Similarly it does not require affirmative evidence to establish a probability that the intelligence services of such states monitor the internet for information about oppositionist groups. The real question in most cases will be what follows for the individual claimant. If, for example, any information reaching the embassy is likely to be that the claimant identified in a photograph is a hanger-on with no real commitment to the oppositionist cause, that will go directly to the issue flagged up by art 4(3)(d) of the Directive.”

[12] My attention was also drawn to Lord Justice Sedley's consideration in *YB* of the approach to be taken where it is considered that the *sur place* political activity on the part of the asylum seeker is opportunistic and has been undertaken precisely in order to create the

basis for an asylum application. Lord Justice Sedley deals with the issue at paragraph [13] of his judgment.

“13 A relevant difference is thus recognised between activities in this country which, while not necessary, are legitimately pursued by a political dissident against his or her own government and may expose him or her to a risk of ill-treatment on return, and activities which are pursued with the motive not of expressing dissent but of creating or aggravating such a risk. But the difference, while relevant, is not critical, because all three formulations recognise that opportunistic activity sur place is not an automatic bar to asylum. The difficulty is in knowing when the bar can eventually come down. To postulate, as in *Danian* [1999] EWCA 3000, that the consequence of a finding that the claimant's activity in the UK has been entirely opportunistic is that ‘his credibility is likely to be low’ is, with respect, to beg the question: credibility about what? He has ex hypothesi already been believed about his activity and (probably) disbelieved about his motive. Whether his consequent fear of persecution or ill-treatment is well-founded is then an objective question. And if it is well-founded, then to disbelieve him when he says it is a fear he now entertains may verge on the perverse.”

[13] Mr Caskie maintained that when the respondent's decision on the facts of the petitioner's case were considered in light of *YB*, it was apparent that the respondent had erred.

[14] In relation to the petitioner's involvement with the SCNC, Mr Caskie noted that a membership card in the name of HJ which included a photograph of the petitioner was included in the petitioner's further submissions. Mr Caskie also pointed to an affidavit which had been provided as part of the petitioner's further submissions. This affidavit had been prepared by Mr Robert Tamanji who was the Chairman of the SCNC (UK) branch. Mr Tamanji spoke to the petitioner's membership of the SCNC (UK) since October 2020 and his participation in four online meetings (which took place during the course of the Covid Pandemic). The petitioner's online activities were also vouched by a number of screenshots. The petitioner had in May 2021 also attended a demonstration against the Cameroon Government in at Marlborough House, London (photographs of this event were produced). Mr Tamanji noted further both that the petitioner is part of the SCNC (UK) team in the

Glasgow area where he acts as liaison officer and had been involved in activities there.

Mr Tamanji noted further that the petitioner has written an article on the Southern Cameroons which was published online. Mr Caskie also drew attention to the fact that

Mr Tamanji had concerns that the Cameroon authorities were spying on the SCNC.

Mr Tamanji had reported to the police a particular incident of this which had occurred at a demonstration outside the Cameroon High Commission in London in February 2017. In relation to Mr Tamanji, I noted from the decision that the respondent did not and does not seek to challenge his evidence.

[15] Mr Caskie submitted further that based on the respondent's Country Policy and Information Note: Cameroon: North-West/South-West crisis (Version 2.0 December 2020), a similarly "bleak picture" (using the words of Lord Justice Sedley in *YB*) could be painted in respect of Cameroon as for Eritrea. The Note contains both information about the country in question (contained in Chapters 3 to 10) as well as an assessment of that information (contained in Chapters 1 and 2). The Note had been prepared for the use of the respondent's decision makers.

[16] The assessment section explains, among other things, that since 2016 there has been discontent in Cameroon on the part of Anglophone people living in Southern Cameroon. The Note records that sources indicate that the Government of Cameroon is generally intolerant of opposition and had continued to arrest and detain those who are or it perceives to be Anglophone separatists (paragraph 2.4.5). This intolerance extends to diaspora groups. The Note sets out the respondent's policy as to how such cases are to be assessed:

"2.4.7 The available information, when considered in the round, does not indicate the government has an adverse interest in all returning Anglophones. However, it may have an interest in those it perceives to support or to be linked to secessionist activities..."

2.4.8 Based on a review of the sources consulted, persons who are Anglophones and have been, or are perceived to have been, involved in activities opposed to the government, including advocating greater autonomy or secession for Anglophone areas, are likely to be of adverse interest to the state. Whether a person is at risk of persecution will depend on their profile and activities. Factors to take into account include:

- the nature, aims and methods of the group they support or are linked to
- the role, nature and profile of their activities for the organisation they represent or are linked to
- whether it has a presence in Cameroon as well as outside of the country and any evidence that it is monitored by the government
- if they are not part of a particular group their role and activities in opposing the government, such as organising demonstrations or publicly criticising the government via conventional or social media, both in country and also in the country of seeking asylum
- whether they have come to the attention of the authorities previously, and if so, the nature of this interest.

2.4.9 Each case must be considered on its facts with the onus on the person to demonstrate that they would be at real risk from the state”

[17] Mr Caskie also drew my attention to that part of the Note which contains information as to the treatment by the government of returnees to Cameroon. This section included reference to an Immigration and Refugee Board of Canada request response published on 24 August 2018. This, in turn, quoted a range of sources. The information included the following (at paragraph 10.3.5):

“...According to NDH-Cameroun, Anglophone Cameroonians who live abroad and have a link with the crisis will be [translation] ‘tracked down and arrested, wherever they are,’ as ‘officially’ stated by the Ministry of Administration (ministère de l’Administration)...The [ICG] researcher said that ‘[a]nyone in the diaspora who is vocal against the authorities faces death or torture and imprisonment if they go to Cameroon’ ...

‘The researcher indicated that Anglophone Cameroonians returning to Yaoundé or Douala are ‘not safe,’ as they “might be taken from the airport to prison to an unknown destination’ ... According to the same source, Anglophone deportees,



including failed asylum seekers, 'can be imprisoned and fined, unless [they] brib[e] [their] way out"

[18] Turning back to the respondent's decision, Mr Caskie advanced three principal criticisms of the respondent's decision.

[19] First, Mr Caskie renewed his submission that, in making the decision, the respondent had erred in not addressing the correct question. The respondent had focussed on whether, in the opinion of the respondent, the petitioner's appeal would succeed as opposed to considering the different and lower test of whether there was a realistic prospect of the appeal succeeding. Or, in the alternative, Mr Caskie submitted that the respondent had conflated the two questions.

[20] Second, Mr Caskie submitted that the respondent had erred in its approach by failing to take account of the considerations outlined by Lord Justice Sedley in *YB* (above) when assessing the risk to an individual in situations where there is objective evidence which paints a "bleak picture" of the suppression of political opponents.

[21] Mr Caskie acknowledged that, as the respondent had highlighted in its decision, the petitioner appeared at various points during his time in the UK to have used a number of different names. The petitioner's position was that his name was actually HJ albeit that he had not produced any original identification documents to prove this. Nonetheless, all of his involvement with the SCNC had been under that name. However, as noted above, he originally entered the UK using a passport which bore the name IN. Furthermore, at the time of his initial hearing before the First-tier Tribunal, the petitioner had claimed that his name was IJ. Mr Caskie noted that the respondent sought to found in its decision on, among other things, the fact that it could not be accepted that the petitioner would be identified as a member of the SCNC. Mr Caskie submitted that, in this regard, the respondent's approach

demonstrated the same flaws as had been highlighted by Lord Justice Sedley in *YB*. The respondent's decision ignored the fact that there was objective evidence – not least in the respondent's Country Policy and Information Note – which painted the “bleak picture” referred to by Lord Justice Sedley. Furthermore, the photographs of the petitioner together with other information which related to him, which were readily available on the internet enabled evidence of the petitioner's political activities to be connected to the petitioner himself.

[22] The third criticism advanced by the petitioner of the respondent's decision was that the respondent had erred by simply applying the approach set out in paragraphs 2.4.7 to 2.4.9 of the respondent's Country Policy and Information Note. The respondent had not, as they should have done, considered whether there was a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, would reach a different view when considering the information contained in the respondent's Note to that encapsulated in the respondent's policy as set out at paragraphs 2.4.7 to 2.4.9.

[23] For these reasons, Mr Caskie urged me to sustain the petitioner's plea in law and to reduce the respondent's decision dated 24 November 2021.

### **Respondent's submissions**

[24] Mr Massaro submitted that I should dismiss the petition.

[25] As a starting point, Mr Massaro placed emphasis on the fact that the petitioner's application for asylum had twice been considered by the First-tier Tribunal and twice been refused. This background established a baseline which was that the fact that the petitioner was from Cameroon and a member of the Anglophone community did not, in itself, prevent his return to Cameroon.

[26] From this starting point, Mr Massaro confirmed that, so far as the law was concerned, there was no dispute between the parties. He took no issue with the authorities referred to by Mr Caskie and agreed that the correct approach in respect of 'fresh claim' judicial reviews was set out in *SM* (above).

[27] Turning to the respondent's decision, he accepted that the reference in the petitioner's further submissions to the activity which he had undertaken since October 2020 was "significantly different" for the purposes of Rule 353.

[28] Mr Massaro also drew attention to the fact that the respondent placed emphasis on the fact that the petitioner had only joined the SCNC (UK) following the failure of his asylum claims. The respondent inferred that the petitioner had only taken this step in an attempt to bolster his claim for asylum. Mr Massaro accepted that the petitioner's motive for joining the SCNC (UK), whatever it was, did not prevent this activity from founding a claim for asylum provided that the petitioner could demonstrate that he had either a well-founded fear of being persecuted or a real risk of suffering serious harm (*YB* (above) at [10] to [15]). However, Mr Massaro submitted that the petitioner's motive in joining the SCNC (UK) was relevant to the respondent's decision because it went to the issue of the petitioner's credibility.

[29] In this regard, it was apparent to me from the respondent's decision that some significance had plainly been attached to the issue of the petitioner's credibility. This was perhaps as a consequence of the treatment of the petitioner's initial claim for asylum [see paragraph 2 above]. When Mr Massaro was pressed to explain, in light of Lord Justice Sedley's observations in *YB* (at [13] quoted at paragraph [12] above), what the significance of the petitioner's credibility was to the issues arising from the petitioner's *sur place* political

activity, Mr Massaro conceded that it was only of limited significance given that the petitioner's activity was evidenced from independent sources.

[30] Mr Massaro submitted further that, in its decision, the respondent had, as it was entitled to do, applied the approach set out in its Country Policy and Information Note: in particular at paragraphs 2.4.7 to 2.4.9. The application of this approach was encapsulated in the statement in the decision that the petitioner had not established that he had a significant political profile which would bring him to the adverse attention of the Cameroon Authorities. Mr Massaro contended that, in approaching the issue in this way, the respondent was addressing the point focussed in paragraph 2.4.8 of the Note, namely: whether the person in question was "likely to be" of adverse interest to the state.

[31] Responding to the petitioner's submissions, Mr Massaro submitted that it was not open to the petitioner to criticise the respondent for reaching a decision as to whether there was a reasonable prospect that the petitioner would succeed before an Immigration Judge on the basis of the approach set out at paragraphs 2.4.7 to 2.4.9 of the respondent's Note. In this regard, Mr Massaro highlighted the fact that no criticism had been made of the respondent's approach set out at paragraphs 2.4.7 to 2.4.9 in the further submissions which were made by the petitioner and he made reference to *YH v Secretary of State for the Home Department* [2016] CSOH 72 at paragraphs [91] to [93]).

[32] Mr Massaro accepted that within the respondent's decision there was no consideration of the SCNC itself, or the SCNC (UK), or either body's aims or methods. In this regard, it was noted that the SCNC was referred to in the Note. He referred to paragraph 4.8.3, where it was recorded that there were a number of Cameroonian organisations in the UK including the SCNC. The SCNC described themselves as a 'group advocating for self-determination aiming at obtaining independence for the former British

Southern Cameroons. It is a non-violent and a non-political group of activists with its motto; 'The Force of the Argument not the Argument of Force'.

### **Petitioner's reply**

[33] In a short reply, Mr Caskie renewed his submissions and drew my attention to the fact that the respondent's Note contains a second reference to the SCNC, at paragraph 5.6.3, in the following terms:

"BAMF – Federal Office for Migration and Refugees (Germany): Briefing Notes 2 September 2019, 2 September 2019 reported that:

'A military court in the capital Yaoundé sentenced ten members of the opposition to life imprisonment on 20 August 2019. Among them was the leader of the separatist group SCNC, Sisiku Ayuk Tabe. According to media reports the court found them guilty of rebellion, terrorism and separatist pursuits. The charges were motivated by opposition-organized protests against the controversial re-election of President Paul Biya in October 2018.'"

### **Decision**

[34] The issue which I require to decide is whether the respondent, in its decision dated 24 November 2021, has erred in concluding that the petitioner's further submissions, taken together with the material previously submitted, did not create a realistic prospect of success for the petitioner before an Immigration Judge.

[35] In my opinion, in reaching her decision, the respondent has erred in two material respects and the petition should succeed. In light of the submissions I heard, I am able to state my reasons relatively briefly.

[36] First, I consider that the respondent has erred in its assessment of the risk of the persecution of the petitioner by failing to take account of the considerations identified by Lord Justice Sedley in *YB*. When the content of the respondent's Country Policy and

Information Note is considered, along with the unchallenged evidence of Mr Tamanji, it appears to me that an Immigration Judge could conclude that the “bleak picture” described by Lord Justice Sedley existed in the petitioner’s case and, therefore, that, even without evidence, there might be a basis for inferring at least a strong possibility that the Cameroon government would be able to identify the petitioner from photographs taken of him at a demonstration or from other information available about him on the internet. The respondent’s decision omits any consideration of this. I consider that this error by the respondent in omitting a relevant factor from consideration is material because it affects the respondent’s treatment of all of the available evidence of the petitioner’s *sur place* activity.

[37] Second, I consider that the respondent had erred in failing to apply the policy set out in the Country Policy and Information Note: in particular at paragraphs 2.4.7 to 2.4.9.

Contrary to what is set out there, the respondent’s decision contains no analysis of the SCNC or its UK branch, or the extent to which it advocates greater autonomy or secession for Anglophone areas. There is also no consideration of its nature, aims or methods. The decision also fails to consider the SCNC’s presence in Cameroon and the extent to which it is monitored by the Cameroon government. Given the apparent significance of these factors within the respondent’s policy, I also consider this error by the respondent in failing to consider a relevant factor to be material.

[38] I consider that whether these errors are considered in isolation or cumulatively, they demonstrate a want of anxious scrutiny by the respondent.

[39] As to the other arguments advanced by the petitioner, first, I do not consider that, properly construed, it can be said that the respondent has addressed the wrong question. The respondent is seeking to address the correct question – namely, whether, when the petitioner’s further submissions are considered along with the material previously

submitted, he had a reasonable prospect of success before an Immigration Judge albeit, for the reasons I set out above, she has erred materially in so doing.

[40] Second, as to the petitioner's argument concerning the approach to be adopted by the respondent to the policy set out in the Country Policy and Information Note when considering the petitioner's prospects of success before the Immigration Judge, this simply does not arise because, as I have explained above, I do not consider that the respondent in fact applied her own policy in reaching the decision.

### **Order**

[41] Accordingly, in these circumstances, I will sustain the petitioner's plea in law and reduce the respondent's decision dated 24 November 2021. I will reserve all questions of expenses in the meantime.