OUTER HOUSE, COURT OF SESSION

[2020] CSOH 83

P1077/19

OPINION OF LADY POOLE

in the petition

MR KAMRAN AFKHAMI FATHABADI

Petitioner

against

LORD KEEN OF ELIE, ADVOCATE GENERAL for SCOTLAND

Respondent

Petitioner: Caskie; Drummond Miller LLP
Respondent: Maciver; Office of the Advocate General

9 September 2020

Introduction

[1] The petitioner was born on 1 May 1979 and is a citizen of Iran. On 16 January 2016 he arrived in Germany. He claimed asylum on the basis that he had converted from Islam to Christianity. As an apostate, he would face persecution if returned to Iran. His asylum claim was processed and then refused by the German authorities. He became subject to a fine in Germany because he did not leave when required to do so. Ultimately, he left Germany on 20 August 2019 and crossed France to reach the UK.

[2] On 22 August 2019 the petitioner was found on a small boat trying to enter the UK. He claimed asylum in the UK. EU law includes provisions designed to avoid the need for

asylum applications to be considered in multiple Member States (currently the Dublin III Regulation, Council Regulation (EU) No 604/2013). The Secretary of State for the Home Department ("**SSHD**") ascertained from Germany that it would take responsibility for the petitioner under the relevant legal provisions, because the petitioner had previously claimed asylum there. The SSHD then issued directions for the petitioner to be removed from the UK on 28 November 2019 on a direct flight to Dusseldorf International Airport. The petitioner wished to remain in the UK. His agent made representations to the SSHD on 22 November 2019 that if the petitioner were removed to Germany it would violate his rights under Article 3 of the European Convention on Human Rights (the "**Convention**").

[3] On 10 February 2020, the SSHD issued a decision rejecting the petitioner's Article 3 representations. The SSHD also certified the petitioner's claim as clearly unfounded. Because the claim was certified in this way, the petitioner could not appeal to the First-tier Tribunal ("**FtT**") while in the UK (paragraphs 3 and 5(4) of Schedule 3 (on Removal of Asylum Seekers to a Safe Country) of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004).

[4] The petitioner seeks reduction of the decision of the SSHD to certify his claim as clearly unfounded. The effect of reduction would be that the petitioner could appeal the decision of the SSHD to reject his Article 3 claim to the FtT, while still in the UK, and the FtT would determine that claim on its merits.

[5] It is also relevant to note that the petitioner suffered an acute health episode in approximately 2011 and 2012. He told the SSHD he takes medication for this condition. In 2019 he suffered a further episode in this condition and attended hospital, returning home the same day.

Governing law

[6] Article 3 of the Convention provides that no one shall be subjected to torture or inhuman or degrading treatment or punishment. There is a minimum level of severity below which Article 3 will not be engaged. The critical test which applied to determination of the petitioner's Article 3 claim was whether there was a real possibility or risk that the removal of the petitioner from the UK to Germany would result in him being subjected to inhuman or degrading treatment in violation of Article 3 of the Convention (*R (EM (Eritrea))* v *SSHD* [2014] AC 1321 paragraph 69). If an Article 3 application against deportation is based on lack of access to medical treatment, Article 3 will only be breached if on return there would be a real risk, due to the absence of or lack of access to appropriate treatment in the receiving state, of the petitioner being exposed to a serious, rapid and irreversible decline in his state of health resulting in intense suffering or a substantial reduction in life expectancy (*AM (Zimbabwe)* v *SSHD* [2020] UKSC 17 and [2020] 2 WLR 1152).

[7] This petition is a not a challenge to the SSHD's decision on Article 3. Rather, it is a challenge to the certification of the petitioner's Article 3 claim as clearly unfounded, because that prevented the petitioner from taking an in-country appeal to the FtT, so that the FtT would determine the Article 3 case. The approach the court must take in challenges to certification is set out in cases such as *Racheed* v *SSHD* [2019] SC 344 paragraphs 14, 16-18, 20 and 33 and *Tsiklauri and Sidamonidze* v *SSHD* [2020] CSIH 31 at paragraphs 11-13. In an application for judicial review of this nature, the court's task is not to look at whether there are errors of law in the reasons the SSHD gave for granting the certificate. Rather, the court considers the same question as the SSHD, namely whether the claim is bound to fail before the FtT. The court considers whether there is an issue to be tried, or put another way

whether there is a realistic prospect of success before an immigration judge. The test is a low hurdle for a petitioner. In determining whether the claim is bound to fail before the FtT, the court is primarily considering the evidence that was before the SSHD. It should take the facts at their highest in the petitioner's favour. If, on a legitimate view of the evidence before it, a human rights claim could succeed before the FtT, the court should reduce the clearly unfounded certificate. The court's task is not to decide the merits of the petitioner's Article 3 representations, and it should resist the temptation to be drawn into doing so.

The parties' arguments

[8] The petitioner submitted that the issue for determination by the court was whether the SSHD was wrong to certify as clearly unfounded his claim that returning him to Germany would give rise to a breach of his Article 3 rights. The court should consider the whole range of possible outcomes before different immigration judges, and should not assume an immigration judge would take the same view of the facts as the court. The court was looking to see if there was anything at all in the petitioner's case, and if there was, the correct place for the Article 3 claim to be determined was before the FtT. The petitioner argued that the cumulative effect of the evidence meant his Article 3 claim was not clearly unfounded or bound to fail. There were two main strands relied on by the petitioner; unfairness in the German system of assessing asylum claims for citizens of Iran; and the impact of the petitioner's health condition and the difficulty he might experience accessing appropriate treatment in Germany given that his asylum claim had been refused. It was accepted that the petitioner's medical condition of itself did not meet the test to engage Article 3 set out in *AM (Zimbabwe)* v *SSHD* [2020] UKSC 17 and [2020] 2 WLR 1152.

However, it was argued that cumulatively the circumstances meant there was something in his case and it was not bound to fail before the FtT.

[9] The respondent argued that the court should consider only what might happen on return to Germany (and not what might happen in Iran). The petitioner's claim of unfairness in the German system was based on one internet article. The Article 3 test was an extremely high one, particularly in the context of access to medical treatment for health conditions. There was a presumption of compliance with international obligations by member states, including Article 3, confirmed in *R (EM (Eritrea))* v *SSHD* [2014] AC 1321. The petitioner had provided no material capable of displacing that presumption. Generally speaking, whether the SSHD was correct to certify a claim as clearly unfounded should be determined on the basis of the information that was produced before the SSHD. There was a very limited discretion to take into account other material (*Racheed* v *SSHD* [2019] SC 344 at paragraph [26]). The petitioner had lodged two further productions at 6/9 and 6/10 which totalled 6 pages. Even though they had not been before the SSHD, in this particular case, it was appropriate to take them into account because they were not voluminous, and showed that even where benefits were reduced (for example where a claim for asylum had failed), basic necessities for healthcare were still provided in Germany. It was argued that this was a case where it was obvious that the Article 3 claim was clearly unfounded, and that matter was capable of determination with a minimum of fuss and deliberation (*Racheed* v *SSHD* [2019] SC 344 at paragraph [27]). The petition should be refused.

Decision

[10] In my opinion, the petitioner's Article 3 claim would be bound to fail before the FtT, and the SSHD was correct to issue the certificate that it was clearly unfounded. The matters upon which the petitioner relies, even taken at their highest, do not raise a triable issue for the FtT. There are no real prospects that the petitioner's Article 3 claim would succeed before a FtT.

[11] There is a presumption that states will comply with their international obligations, including those under Article 3 of the Convention. The pursuer suggested this presumption had been fundamentally undermined because it had been displaced in cases involving a number of different Member States, including Belgium, Greece, Hungary and Italy. I did not accept this submission, or that the existence of the presumption was no longer good law. The presumption is longstanding in nature, recognised as part of EU and Scots law, and necessary as part of a workable system to implement the Dublin Regulations (*R (EM (Eritrea))* v *SSHD* [2014] AC 1321 paragraph 40, *NS* v *SSHD* Cases C-41/10 and C-493/10, *Racheed* v *SSHD* [2019] SC 344 paragraphs 14 and 20). The test to displace the presumption in Article 3 cases requires consideration of the circumstances of a particular case. It does not follow from the presumption being satisfied in any particular case that the presumption is rebutted in all cases relating to that particular state, or that the presumption is undermined. In my opinion, the presumption is still part of Scots law, as recognised in *Racheed*. It is of course a rebuttable presumption, but in order to rebut it there should be an evidential basis for doing so. In considering whether the petitioner's Article 3 case is bound to fail before a FtT, I accept that it is not for the court to find facts or determine the merits of the petitioner's

Article 3 claim. Nevertheless, in considering whether the case is bound to fail, it is necessary to look briefly at the evidence proffered by the petitioner to rebut the presumption.

[12] The petitioner's first argument was that there is systemic unfairness in the German system of assessing asylum claims for citizens of Iran. The evidence produced by the petitioner to substantiate this claim before the SSHD and the court was an internet article. The internet article was posted on a news and information website called InfoMigrants. The website is a collaboration led by three major European media sources (French, German and Italian), and co-financed by the EU. The article was dated 13 March 2019 and written by Emma Wallis. Its title was "Are Iranian asylum seekers being unfairly dealt with in Germany?" Taken at its highest as it must be, the article demonstrates that significant numbers of Iranians had their asylum claims rejected in Germany in 2018. Based on information said to be from the German Government, of 11,846 Iranians applying for asylum in 2018, 5,000 had their claims refused and 3,523 cases were closed. The rate of success for Iranians was lower than the average for all asylum seekers. The article says that the left Parliamentary Group points out that religious minorities are persecuted in Iran and apostacy can be punishable by death, and also that the German Government agrees that freedom of belief is a particular problem in Iran. However, the article must be read as a whole. The article also gives statistics showing that significant numbers of Iranians applying for asylum succeeded to some extent. In 2018, 268 were granted asylum, 2,178 were granted refugee status, 173 were granted temporary protection and 96 could not be sent back to Iran. The article also notes that Iranians do not have the worst negative decision rate of the top ten countries of origin for asylum seekers; for example Nigerians, Guineans and Georgians have far lower percentage rates of success. The article states that many

asylum applications are granted by Germany, with a protection rate of 35 per cent in 2018. It records the German government as saying that with the permission of the asylum seeker they talk to priests or friends or fellow believers if trying to ascertain if a person has converted. Finally, it notes there is an appeal system in which some succeed in appealing government decisions, and others do not. Read as a whole, the article offers no conclusion on the question posed in its title. Nor does it provide any information specific to the petitioner's claim. It is evident from its contents that many asylum cases succeed in Germany, and a significant number of Iranians seeking asylum succeed to some extent. I note that in some other cases raising issues of systemic failure, there is mention of information from the UNHCR, the Commission, non-governmental organisations bearing witness to practical difficulties, or independent expert reports (eg *R (EM (Eritrea))* v *SSHD* [2014] AC 1321, NS v SSHD C-411/10 and C-493/10, *Racheed* v *SSHD* [2019] SC 344). In this case, only the internet article is produced. In my opinion, on no legitimate view would the evidence put forward by the petitioner be found by the FtT to displace the presumption. The Article 3 claim would be bound to fail before the FtT on this ground.

[13] The petitioner also raised issues about his medical condition, making him vulnerable, and the difficulty of accessing appropriate medical treatment in Germany. Again taking the petitioner's position at its highest, the petitioner has a health condition in respect of which he takes medication. He may not be entitled to the protection of the Reception Directive (Council Directive 2013/33/EU) on return to Germany, and the support it guarantees for asylum seekers, because his asylum claim in Germany had failed. However, as set out above, it is to be presumed that Germany will comply with its international obligations to provide medical care where Article 3 requires it. The petitioner had not produced any

medical evidence to the SSHD to suggest that he would be exposed to a serious, rapid and irreversible decline in his state of health resulting in intense suffering or a substantial reduction in life expectancy if he returned to Germany. As he accepted, the test in *AM (Zimbabwe)* v *SSHD* [2020] UKSC 17 was not satisfied. Nor had he produced evidence to the SSHD that necessary medical support would not be offered to him in Germany. The petitioner lived in Germany for some time, during which his health condition (which pre-dated his arrival in Germany) appears to have been managed. At least part of his time in Germany seems to have been after his claim for asylum was refused. The acute health episode from which he had suffered had occurred in 2011 or 2012, and the more recent episode in Scotland had not necessitated any overnight treatment in hospital. His condition had not prevented him from travelling to Germany, or across France and to the UK, including in a small boat. In my opinion, this strand of the petitioner's Article 3 claim would also be bound to fail before the FtT, because on no legitimate view would the petitioner's arguments be capable of rebutting the presumption.

[14] It has not been necessary for me to go further and consider whether to base my decision on new evidence not before the SSHD, and resolve a possible conflict of whether I may admit such evidence between *Racheed* v *SSHD* [2019] SC 344 paragraphs 22-24 and 26, and *Tsiklauri and Sidamonidze* v *SSHD* [2020] CSIH 31 at paragraph 13. Nevertheless, I observe that documents lodged by the petitioner (6/9 and 6/10) tend to suggest that Germany would provide basic necessities for health care, even when benefits have been reduced (for example when an asylum claim had failed).

[15] Even looking at all of the matters raised by the petitioner cumulatively, as I was invited to by the petitioner, it is my opinion that there is no legitimate view on which the

petitioner's claim under Article 3 could succeed before the FtT. Given the minimum level of severity necessary to satisfy Article 3, the petitioner's arguments are so weak, and the evidence produced by him so slim, that there is no real prospect of success before any FtT. To borrow dicta in *Racheed* v *SSHD* 2019 SC 344 at paragraph 33, an appeal to the FtT from the SSHD's decision to reject the petitioner's Article 3 claim could achieve no more than a delay of the inevitable. The claim is clearly without substance and would be bound to fail before the FtT.

[16] For these reasons I am not prepared to grant the order of reduction sought. I refuse the petition.