OUTER HOUSE, COURT OF SESSION

[2009] CSOH 168

P734/09

OPINION OF LORD MENZIES

in the petition of

A.O. (A.P.)

Petitioner;

for

Judicial Review of a decision of the Secretary of State for the Home Department dated 25th February 2009 to refuse to treat representations on behalf of the petitioner as a fresh claim for asylum.

Petitioner: Forrest; Drummond Miller LLP, Solicitors
Respondent: Webster; C. Mullin, Office of the Solicitor to the Advocate General

11th December 2009

[1] The petitioner is a citizen of Iraq. He arrived in the United Kingdom on 23 November 2000 and claimed asylum on that date. His claim for asylum was refused by the respondent on about 6 August 2001. He was subsequently served with a supplementary refusal letter on 17 December 2002. He appealed against this decision, and on 14 October 2003 an immigration adjudicator refused his appeal. This adjudicator was found to have made an error in law, and following the petitioner's application for reconsideration the case was again examined by an Immigration Judge who dismissed his appeal on 7 September 2006. He sought leave from the Tribunal to

appeal to the Inner House of the Court of Session, which leave was refused. The petitioner then sought from the Inner House leave to appeal, and on 16 November 2006 the Inner House granted warrant for service on the Advocate General's department. The application was not served on the respondent until 14 December 2007. On 22 May 2008 the application to the Inner House was dismissed on the petitioner's motion.

[2] Meanwhile, following certain decisions of the High Court in England relating to returns to Iraq, the respondent considered whether the petitioner should be granted leave to remain in the United Kingdom. In January 2008 the respondent decided not to grant such leave. The petitioner sought a judicial review of that decision in December 2008. On 13 February 2009 that petition was dismissed on the petitioner's motion.

[3] By letter dated 23 December 2008 and received by the respondent on 12 February 2009 (i.e. the day before the petitioner's petition for judicial review was dismissed on his own motion) the petitioner made further representations to the respondent on human rights grounds. By letter dated 25th February 2009 the respondent determined that the further representations did not amount to a fresh claim. It is against this decision that the petitioner presents the present application. This petition was lodged on 1 June 2009. Several remedies are sought in the petition, but counsel for the petitioner indicated that his only motion to the court was for reduction of the decision of the Secretary of State dated 25 February 2009.

[4] The argument underlying the present petition may be summarised briefly as follows. The petitioner has resided in the United Kingdom for more than eight years. He has not established a family life in the United Kingdom, but he has established a private life. He has developed friendships. In particular, he has worked as a volunteer

adviser at a Citizens Advice Bureau, and has acted as a translator for two Glasgow City Councillors. The maintenance of these aspects of his life in Glasgow would be impossible if he were not allowed to remain in the United Kingdom. Counsel for the petitioner founded on what he described as the delay in determining the petitioner's position, which had enabled this private life to develop. However, he did not suggest that the private life which the petitioner had developed was of such a nature that he would be seriously disadvantaged if he were not allowed to remain in the United Kingdom. The extent of his private life was accurately summarised in the letter dated 23 December 2008 (number 6/3 of process) - he has many friendships in Glasgow, he is an active attendee at the Culture and Sport Club and is a member of the Glasgow Library Service from which he borrows books.

[5] Counsel for the petitioner identified three issues which he considered to be relevant. (1) Has the respondent adopted the correct test when determining whether the submissions in the letter dated 23 December 2008 (number 6/3 of process) amount to a fresh claim? (2) In applying this test, whether or not removal of the petitioner would be proportionate? And (3) even if removal were seen to be proportionate, if all other things were equal whether the delay in dealing with the claim/claims affects the rationality of the decision?

[6] With regard to the first of these issues, the relevant statutory provision is paragraph 353 of the Immigration Rules, HC 395. This provides that 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, not withstanding its rejection.

[7] The first of these tests is not in dispute, and the respondent has accepted that it has been met. Counsel accepted that it appeared that the respondent had addressed the correct test in the letter dated 25 February 2009, and that paragraph 2 on page 2 of that letter was an accurate formulation of the duty on him. However, this test was not in fact properly applied. This was for two reasons - (a) because it appears from the passage towards the bottom of page 2 of the decision letter that the respondent is suggesting that no other immigration judge would attach significant weight to the proportionality of the petitioner's private life. The petitioner's private life does not arise in the earlier determination of the immigration judge dated 7 September 2006. There is no logic to this aspect of the decision letter - it is a non-sequitur. And (b) insufficient regard was paid to the petitioner's personal circumstances, and to the private life which he had been allowed to develop because of the delay in processing his applications. The importance of this aspect was emphasised by the House of Lords in *Huang* v *Secretary of State for the Home Department* [2007] UK HL 11, [2007] 2 AC 167, at paragraph 16, and *EB (Kosovo)* v *The Secretary of State for the Home Department* [2008] UK HL 41, [2008] 3 WLR 178 at paragraphs 14/16.

[8] If the immigration authorities do not deal with an asylum seeker's application quickly enough, that person may build up a private life in the United Kingdom. The crux of the issue is the reason for the delay - counsel accepted that if the reason for the delay is the petitioner himself, he cannot avail himself of it. However, if the cause of the delay is a dysfunctional system which gives rise to inconsistent results, that reduces the weight to be given to the otherwise important factor of the maintenance of immigration control. Counsel submitted that the cause of the petitioner being in the

United Kingdom for over eight years was not only his own actions in seeking to take advantage of the remedies and rights available to him, but at least to some extent to the delays in dealing with his claims. There was a delay between 23 November 2000 and 6 August 2001 which was not caused by any actions on the part of the petitioner. There was an overlapping period between 24 April 2001 (when the petitioner's application was refused on erroneous grounds, and the refusal was subsequently withdrawn) and 17 December 2002 when the respondent finally decided to refuse his application. Again, this was not due to any action or inaction on the part of the petitioner. There was then a delay between 14 October 2003, when the petitioner's appeal was refused by an immigration adjudicator, and 7 September 2006 when his appeal was finally refused. This delay was sufficient for there to be a reasonable prospect that another immigration judge might take the view that the private life which the petitioner had developed over this period was sufficient to render his removal from the United Kingdom disproportionate.

[9] Finally, counsel for the petitioner submitted that the respondent had failed to address the question of proportionality, and whether another immigration judge might reasonably consider this differently. He referred *to R(Razgar)* v *Secretary of State for the Home Department* [2004] UK HL 27 [2004] 2 AC 368, and in particular to the opinion of Lord Bingham of Cornhill at paragraph 17. The fifth question in that paragraph was engaged in the present case, and it did not appear that the respondent had addressed this question properly.

[10] For these reasons counsel for the petitioner invited me to sustain his plea in law and to reduce the respondent's decision dated 25 February 2009.

[11] In the response, counsel for the respondent invited me to sustain the respondent's third plea in law and refuse the orders sought. He emphasised that the petitioner could

have been in no doubt about the respondent's intention to remove him from the United Kingdom throughout most of the time that he has been resident here. The decision to remove him was made in August 2001, and removal directions were served on him on 15 August 2001. Since that date, the only reason that the petitioner has remained in the UK is because he has availed himself of every conceivable remedy to enable him to stay here. On each occasion he has failed. These circumstances contrast sharply with the circumstances described by Lord Bingham of Cornhill in *EB(Kosovo)* at paragraphs 15/16. There was no question in the present case of months or years passing without a decision to remove being made, nor any grounds for expectation that if the authorities had intended to remove the applicant they would have taken steps to do so - the petitioner can have been in no doubt about the immigration authority's intention to remove him from the UK. Not only was a notice of removal issued on 15 August 2001, each of the petitioner's applications, appeals and petitions has been opposed. This is not a case of inactivity on the part of the respondent.

[12] In the period between April 2001 and December 2002 there was a decision by the respondent, and thereafter a supplementary decision, both adverse to the petitioner. In the period between 2003 and 2006 time elapsed as a result of the appeal procedure initiated by the petitioner before the Tribunal, which is an independent body from the respondent. The respondent had no control over the speed of disposal of the Tribunal's reconsideration procedures. By contrast, the petitioner was granted warrant for service by the Inner House of the Court of Session on 16 November 2006 and delayed service on the respondent for 13 months; in due course that procedure was dismissed in May 2008 on the petitioner's own motion. Meanwhile, in January 2008 the respondent told the petitioner that he had decided not to grant leave to remain on the grounds of other Iraqi decisions; the petitioner did not challenge this until he raised a petition for

judicial review in December 2008, a delay of some 11 months. The petition was dismissed in February 2009, again on the petitioner's motion. The petitioner's letter dated 23 December 2008 based on human rights grounds was not received by the respondent until 12 February 2009, and was determined (by refusal) within two weeks. The present petition was not raised until June 2009. There had been no period of "delay" attributable to the respondent; certainly there had been no such delay that the petitioner could draw the conclusion that the respondent intended to forgo his entitlement to remove the petitioner. For the great majority of the time that the petitioner has lived in the UK the respondent has been unable to remove him because of ongoing proceedings before the Tribunal or the court, the timescale of which was outwith the control of the respondent and which precluded the removal of the petitioner.

[13] There was no dispute as to the first branch of the test in paragraph 353 of the Immigration Rules - it was accepted that the material in the letter dated 23 December 2008 had not already been considered. However, the respondent applied the correct test with regard to the second branch, namely whether, taken together with the previously considered material, this material created a realistic prospect of success, notwithstanding its rejection. It was conceded on behalf of the petitioner that the new material itself was not sufficient to justify an Article 8 claim. It might therefore be argued that it was not necessary to go on to consider proportionality. The position might be different if there were two individuals in the same circumstances, each with the same quality and extent of private life, and one was dealt with expeditiously and granted leave to remain, whereas the other was refused leave to remain because of delay in dealing with his application. This was not such a situation. There was no basis for the asylum appeal in the first place, and no prospect that any immigration

judge would find the information regarding the petitioner's private life sufficient to create a reasonable prospect of success. There was no gap in the reasoning towards the bottom of page 2 of the letter dated 25 February 2009. It was necessary to read the decision letter as a whole; the respondent required to assess the prospect of private life for the petitioner in Iraq as well as to assess the quality and extent of his private life in the United Kingdom; for this purpose it was necessary to look to the earlier information, and the immigration judge's assessment of the credibility of the appellant's account in this regard.

[14] The question which the respondent required to ask himself when determining the application in the letter dated 23 December 2008 was set out in *WM (DRC)* v *Secretary of State for the Home Department* [2006] EWCA Civ 1495 at paragraph 11. It is clear from the text of the letter of 25 February 2009 (from the bottom of page 2 to the top of page 3) that this is what the respondent did. The decision maker assessed what the quality of the petitioner's private life is, balancing it, putting it into the context of the elapse of time, and reaching the conclusion that there was no reasonable prospect that a different immigration judge would reach a different view. This was the correct approach. However, it should be borne in mind that the question for this court is a different one; this court must address the irrationality or otherwise of the respondent's decision - *WM (DRC)* at paragraphs 16 - 20.

[15] Under reference to the five questions posed by Lord Bingham of Cornhill in *Razgar* at paragraph 17, counsel accepted that the first four questions fell to be answered in the petitioner's favour. However, the fifth question, relating to proportionality, falls to be answered against the petitioner. Paragraphs 3 to 11 of *Razgar* give an indication of how high the threshold is before removal in an article 8 case will be held to be disproportionate. The examples considered in *Razgar* were far

removed from the present case, and much more serious than this. The respondent addressed himself to the three ways in which Lord Bingham identified delay as possibly being relevant to the decision, in paragraphs 14/16 of *EB (Kosovo)*. The first two of these have already been discussed. The third, namely if delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes requires an applicant founding on this ground to point to another case involving similar circumstances or similar family members in which a different result occurred. There is no suggestion of this in the present case. The petitioner has identified no other case which could give rise to a reasonable expectation on his part that he might remain in the United Kingdom.

[16] In conclusion counsel submitted that the Secretary of State asked himself the correct questions, he applied the relevant tests appropriately, and it cannot be argued that his decision was unreasonable or irrational. Counsel invited me to sustain the third plea in law for the respondent, to repel the plea in law for the petitioner, and to refuse the orders sought.

Discussion

[17] It is not disputed that the respondent identified the correct test to be applied in the letter dated 25 February 2009; the issues are whether he applied that test correctly, whether removal of the petitioner from the United Kingdom would be proportionate, and whether the "delay" in dealing with the petitioner's claims affects the rationality of the respondent's decision.

[18] I consider the effect of "delay" first. The term "delay" connotes some element of fault or responsibility on behalf of the respondent. Counsel for the respondent preferred the term "elapse of time", and I agree with him that this is more apposite to

the present case. This case is far removed from the situation being considered by Lord Bingham of Cornhill regarding the second category of delay, in paragraph 15 of *EB (Kosovo)*. In that case his Lordship observed:

> "An immigrant without leave to enter or remain is in a very precarious situation, liable to be removed at any time. Any relationship into which such an applicant enters is likely to be, initially, tentative, being entered into under the shadow of severance by administrative order. ...A relationship so entered into may well be imbued with a sense of impermanence. But if months pass without a decision to remove being made, and months become years, and year succeeds year, it is to be expected that this sense of impermanence will fade and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so."

[19] In the present case, although the petitioner has resided in the United Kingdom since 23 November 2000, I do not consider that he has been given any reason for an expectation that if the respondent intended to remove him he would have taken steps to do so. A decision to remove the petitioner from the United Kingdom was made in August 2001, and removal directions were served on 15 August 2001. Since then the petitioner has availed himself of every right to appeal, to seek review, and to apply to the court. Every such application has been opposed by the respondent. None of these applications have been successful, and indeed two applications to this court have been dismissed on the petitioner's own motion. The petitioner has himself been responsible for some of the elapse of time - e.g. the period between 16 November 2006 when the Inner House of the Court of Session granted warrant for service on the Advocate General, and 14 December 2007 when service was eventually effected. I do not consider that it is open to the petitioner to found on the elapse of time since his arrival

in the United Kingdom in 2000. There has been no undue delay on the part of the respondent in dealing with any applications made to the respondent. For the most part, elapse of time has occurred because of the procedures of independent tribunals or courts, the timescale of which was outwith the control of the respondent. This case is far removed from the sort of case envisaged by Lord Bingham of Cornhill, whereby no decision to remove is taken and months become years and year succeeds year. The decision to remove in this case was taken in 2001, and has been robustly maintained since then. The petitioner can have been under no misapprehension about the respondent's intention to remove him from the United Kingdom when this was open to him. Any private life developed by the petitioner in the intervening period requires to be seen against this background.

[20] I now turn to the question of proportionality. Counsel for the petitioner conceded that the information in the letter dated 23 December 2008 did not amount to article 8 grounds by itself, but it required to be considered in light of the delay. Taking these factors together, he submitted that there was a reasonable prospect that another immigration judge might take a different view. I do not agree. The nature of the private life which the petitioner has developed in the United Kingdom falls very far short of the sort of considerations which were discussed in *Razgar*. The petitioner has made friendships in Glasgow, he has attended at a culture and sports club, and borrows books from the library service. He is training as a volunteer advisor at the Citizens Advice Bureau, and has acted as a translator for Glasgow City councillors. Counsel for the petitioner was making a well advised concession in stating that he did not suggest that this private life was of such a nature that he would be seriously disadvantaged were he to be removed from the United Kingdom. Against that, there is little information as to the prospects for private life if the petitioner were to be

removed to Iraq. It is in this regard that the assessment of the immigration judge as to the petitioner's credibility was relevant; on the face of it, the passage towards the bottom of page 2 of the letter of 25 February 2009 contains a non sequitur, but when looked at against the background of the whole letter, it is apparent that consideration of the petitioner's credibility as to his circumstances in Iraq is a relevant factor.

[21] I have already indicated that I do not consider that "delay" or elapse of time can be prayed in aid of the petitioner's application. The respondent has looked at the quality and extent of the petitioner's private life in the UK, he has looked at the prospect for private life in Iraq, he has considered the questions of elapse of time, and he has reached a determination on the issue of proportionality. I do not consider that it can be argued that his decision was irrational or unreasonable. As Lord Bingham of Cornhill observed in *Razgar*,

> "Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis."

I do not consider that this falls into that small minority of exceptional cases.

[22] In conclusion, I consider that the respondent has identified the correct questions, and applied the correct tests when reaching his decision in the letter dated 25 February 2009. Not only did the respondent identify the correct questions, there is nothing to suggest that he acted irrationally or unreasonably in the application of the tests concerned. In light of the information contained in the letter dated 23 December 2008 about the quality and extent of the petitioner's private life in the United Kingdom, and the decision which I have reached with regard to the elapse of time, it cannot be argued that the respondent's decision was disproportionate. I am not persuaded that the respondent has acted unreasonably or irrationally. For these reasons I sustain the

third plea in law for the respondent, repel the plea in law for the petitioner, and refuse the orders sought.