OUTER HOUSE, COURT OF SESSION

[2009] CSOH 60

P3191/07

OPINION OF LORD KINCLAVEN

in the Petition of

A.A.S.

Petitioner;

for

Judicial Review of a decision dated 25 May 2007 by the Secretary of State for the Home Department

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Petitioner: Forrest, Advocate; Drummond Miller LLP
Respondents: A. F. Stewart, Advocate; Office of the Solicitor to the Advocate General

30 April 2009

Introduction

[1] This is a petition seeking judicial review of a decision of the Secretary of State for the Home Department dated 25 May 2007 certifying that the petitioner has no right of appeal in relation to claims for asylum and violation of ECHR rights.

[2] The petition concerns section 96 of the Nationality, Immigration and Asylum Act 2002 ("the Act") as amended by section 30 of the Asylum and Immigration (Treatment, etc.) Act 2004 ("the 2004 Act").

[3] Mr Forrest appeared for the petitioner. He argued that the respondent had erred in law - essentially for the reasons set out in Statements 9 and 10 of the petition. In

particular, he sought "reduction of the decision dated 25 May 2007 insofar as it certifies in terms of section 96(1) of the Act that the petitioner has no right of appeal against the decision dated 25 May 2007". Statements 11, 12 and 13 of the petition were departed from at the outset of the debate.

[4] Mr Stewart appeared for the respondent. He argued that there was no error in law - essentially for the reasons set out in the Answers. Mr Stewart referred me in some detail to the chronology of events and to the productions. He invited me to dismiss the petition.

[5] I have given anxious consideration to all the submissions made on behalf of the petitioner but, in the whole circumstances, I have reached the conclusion that, the respondent's arguments must prevail.

[6] I shall dismiss the petition - essentially for the reasons outlined by the respondent.

[7] I would outline my views as follows.

The Statutory Background

[8] Section 82 of the Nationality, Immigration and Asylum Act 2002, (right of appeal: general) provides *inter alia* that:-

> "(1) Where an immigration decision is made in respect of a person he may appeal to an adjudicator."

[9] Section 96 of the 2002 Act (earlier right of appeal) is in that part of the Act relating to "exceptions and limitations".

[10] A new section 96(1) was substituted by section 30 of the 2004 Act (1 October 2004).

[11] In particular, section 30 of the 2004 Act provides *inter alia*:-

"(1) Section 96 of the Nationality, Immigration and Asylum Act 2002 (earlier right of appeal) shall be amended as follows.

(2) For subsections (1) to (3) substitute -

'(1) An appeal under section 82(1) against an immigration decision ("the new decision") in respect of a person may not be brought if the Secretary of State or an immigration office certifies -

(a) that the person was notified of a right of appeal under that section against another immigration decision ("the old decision") (whether or not an appeal was brought and whether or not any appeal brought has been determined),

(b) that the claim or application to which the new decision relates relies on a matter that could have been raised in an appeal against the old decision, and

(c) that, in the opinion of the Secretary of State or the immigration officer, there is no satisfactory reason for that matter not having been raised in an appeal against the old decision.'"

[12] I was also referred to the Immigration Rules (HC 395 as amended) in relation to what was described as the Rule 353 "sift". Rule 353 can be found in the *Statement of Changes in Immigration Rules* (Procedure and Fresh Claims) at B [771]. It states that:-

"When a human rights or asylum 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. ..."

[13] I should perhaps add that counsel for the petitioner also kindly provided me with a copy of Lady Paton's decision in the petition of *JB* [2007] CSOH 121 - which he said was "for information only". Mr Forrest did not advance any argument based on section 94 of the 2002 Act. He accepted that the proper approach in terms of section 96 of the 2002 Act was as outlined by Lady Paton as follows:-

"[23] Section 94 of the Nationality, Immigration and Asylum Act 2002, which was prayed in aid by counsel for the petitioner, ... provides one of the exceptions or restrictions to a right of appeal from an immigration decision, and focuses upon the merits of the application. By contrast, section 96 ... does not focus upon the merits of the application, but simply upon whether a matter which could and should have been raised earlier was not, with no satisfactory reason for not having done so.

[24] Sections 94 and 96 are thus quite distinct statutory provisions, dealing with different issues. Counsel for the respondent was in my view correct in her submission that it was not possible for the petitioner to import any language or test applicable to section 94 into the certification procedure defined in section 96. Accordingly I am not persuaded by the petitioner's second argument."

The Petitioner's Position

[14] As outlined in the pleadings, the petitioner is a national of Sudan. He was born on 3 February 1980. He resides at the address stated in the instance.

[15] The respondent is the Secretary of State for the Home Department responsible for the enforcement of immigration and nationality legislation and related provisions throughout the United Kingdom ("UK"). The respondent is domiciled in Scotland. This court accordingly has jurisdiction.

[16] The petitioner avers that he is a member of the Zaghawa tribe; that he previously lived in the Darfur region in Sudan; and that he fled from Sudan in or around 1 September 2004 because he had a well founded fear of persecution.

[17] The petitioner avers that he arrived in the UK on or about 22 September 2004. He claimed asylum and violation of ECHR rights. His claims were rejected. He appealed to an Immigration Adjudicator ("the Adjudicator"). His claims were rejected. He sought leave to appeal further, but his appeal was dismissed. His rights of appeal were exhausted on 4 August 2005. The decision made in regard to the claims presented at that time (both by the Secretary of State for the Home Department ("SSHD") and the Adjudicator) are referred to in the petition as "the old decision".

[18] The petitioner then avers (in Statement 3) that:-

> "... after August 2005, the petitioner became aware of fresh information. He learned that earlier in 2007 a member of the Zaghawa tribe had been returned to Sudan from the UK. This person was persecuted after he returned. This information was not before the Adjudicator. It could not accordingly have been raised by the petitioner during the course of his earlier (rejected) appeal. The petitioner in these circumstances submitted fresh claims for asylum and violation of his ECHR rights relying on this fresh information."

[19] As outlined in the petition, as amended, the respondent received and considered the petitioner's fresh claims. He rejected them in terms of a letter dated 25 May 2007. He certified in terms of section 96(1) of the Nationality, Immigration and Asylum Act ("NIAA") that the fresh claim relied on a matter which could have been raised in an earlier appeal and that there was no satisfactory reason why it had not been raised earlier. The decision made in terms of this letter is referred to in the petition as "the new decision". The letter is the item marked "1" in the Schedule of Productions.

[20] The petitioner then avers that in reaching the new decision, the respondent erred in law - for the reasons more fully set out in Statements 9 and 10 of the petition. As mentioned above, Mr Forrest departed from Statements 11, 12 and 13 of the petition at the outset of the debate and I can leave them out of account.

[21] Statement 9 of the petition was as follows:-

> "That the decision was unlawful and irrational because it is plain that the material relied on by the petitioner when presenting the new claim could not have been raised during the course of or as any part of the old claim. One major difference between the old claim and the new claim is that the petitioner has a well founded fear of persecution on account of the death of a leading member of the Sudanese Liberation Army Movement and further the fate of the return to Sudan from the UK earlier in 2007 of a failed asylum seeker, and how this had been recorded on television (see paragraph 6 in the letter dated 25 May 2007 - item "1" attached.) The previous/old claim is noted by the respondent to have been presented on or around October 2004. The information upon which the petitioner now relies was not available to him on that date. In these circumstances, the decision of the respondent in so far as it is based on section 96(1)(b) is irrational."

[22] Statement 10 of the petition was as follows:-

> "That the decision was unlawful and irrational because (comparison of reasons for refusal under old decision are irrelevant when considering issues in section 96(1)) the respondent has not properly addressed the relevant issues. He has applied to these (principally the fate of a leading member of the SLA/M and the fate of a failed asylum seeker whose circumstances are similar to his - see Article 9 above) exactly the same considerations as he has applied to the old claim. This (old) claim did not mention the two factors referred to above. Failure to treat the consideration relevant to the new claim in a different way is irrational. The respondent has erred because he has applied without distinction the same factors which informed his earlier decision in the old claim to those in the new claim. The new claim is a separate claim. It requires separate factors and considerations to be applied when it is being considered."

[23] Mr Forrest accepted that the provisions of section 96(1)(a) had been met but he argued that subsections (1)(b) and (1)(c) had not been satisfied.

[24] During the debate Mr Forrest expanded his arguments to submit that the respondent had erred in two ways. Firstly in relation to identifying the relevant "matter" for the purposes of section 96 and, secondly, in the way "that matter" was dealt with. The essential proposition was that there must only be "one matter" in order for there to be certification.

[25] Mr Forrest suggested that in this case there were five possible "matters". They were broadly:-

1. Persecution of the petitioner;
2. Membership of the Zaghawa tribe;
3. Membership of the SLM/A

4. The death of the person referred to by the petitioner; and
5. The treatment of the failed asylum seeker referred to by the petitioner.

[26] Mr Forrest argued that in order for there to be certification under section 96 there must be only *one* matter. Section 96(1)(b) refers to "a matter". If there was more than one matter then there could be no certification. The respondent was "pinned or obliged to select one matter and that must be the correct matter" - so submitted the petitioner. Mr Forrest was unable to assist with what was meant by "correct" but he maintained that the respondent was obliged to identify "one matter".

[27] In the present case, so submitted Mr Forrest, the petitioner was relying on all five matters but "particularly on Nos. 4 and 5" listed above.

[28] If "the only matter" had been No. 3 on the list then the petition would fall to be dismissed but here there were several possible "matters". The respondent had erred in issuing certification in that situation - so submitted the petitioner.

[29] The petitioner should be given the benefit of the doubt given the serious consequences, namely, the loss of a right of appeal.

[30] It was against that background that Mr Forrest sought "reduction of the decision dated 25 May 2007 in so far as it certifies in terms of section 96(1) of the Act that the petitioner has no right to appeal against the decision dated 25 May 2007".

The Respondent's Position

[31] In the Answers, the respondent avers that the petitioner claimed to have entered the United Kingdom on or around 21 September 2004. His application for asylum was refused on 26 October 2004. He appealed to the Immigration Appellate Authority. His appeal was dismissed by an adjudicator on 24 January 2005. The petitioner made a further claim for asylum in 2007.

[32] The letter of 25 May 2007 was referred to for its whole terms beyond which no admission was made. *Quoad ultra* the petitioner's averments were denied.

[33] Before me it was a matter of agreement between the parties that, if the court was to find in favour of the petitioner, the appropriate remedy would be to reduce only the certification under section 96(1) of the Immigration and Asylum Act 2002 and not the decision letter as a whole. The petition was amended to reflect that agreement. Declarator was not sought.

[34] It was explained and averred that the respondent accepted the petitioner's 2007 application as a fresh claim under paragraph 353 of the Immigration Rules (HC 395 as amended). He then considered the fresh claim and rejected it.

[35] The respondent answered the petitioner's allegations (to the effect that the respondent erred in law) in Answers 9 and 10.

[36] Answer 9 was as follows:-

> "Denied. Explained and averred that the central issue in respect of certification was whether the petitioner was a member of SLM/A (paragraph 26 of the decision letter). The respondent found his claim to be member of the SLM/A to be incredible (paragraph 14). The petitioner could have disclosed that he was a member of the SLA/M in 2004 and he did not. The new evidence about how SLM/A members were treated in Sudan (paragraphs 21 and 22 of the decision letter) is not relevant to that central issue. The central issue was relevant to the old decision. In these circumstances the respondent was entitled to make a certification under section 96(1)."

[37] Answer 10 was brief and to the point, namely:-

"Denied. Reference is made to answer 9."

[38] Mr Stewart argued that there was no error in law - essentially for the reasons set out in the Answers.

[39] In general terms, the purpose of the statutory provisions was to avoid multiplicity of claims albeit with a proper opportunity for claimants to put their case forward fully - preferably at an early stage.

[40] Mr Stewart also referred me to the chronology of events and to the productions - which I will mention in a little more detail below.

[41] Against that background the respondent submitted that there had been no error of law and that the petition should be dismissed.

[42] The respondent's pleas-in-law were as follows:-

> "1. The respondent not having erred in law in certifying the claim under section 96(1), the petition should be dismissed.
>
> 2. The respondent not having erred in law, the petition should be dismissed.
>
> 3. In any event, the remedy of declarator being inappropriate should not be granted as craved."

Productions

[43] The productions for the petitioner were:

> 6/1 Letter dated 25 May 207 from respondent to petitioner;
>
> 6/2 Asylum Interview on 19 (and 22) October 2004;
>
> 6/3 Statement by the petitioner dated 11 October 2004;
>
> 6/4 Asylum Interview on 18 May 2007;
>
> 6/5 Decision of Immigration Adjudicator promulgated on 24 January 2005.

[44] The productions for the respondent were:

> 7/1 Screening Interview dated 18 May 2007;

7/2 Notice of Refusal to order Reconsideration under section 103A of the Nationality, Immigration and Asylum Act 2002 by a Senior Immigration Judge of the AIT dated 11 May 2005;

7/3 Notification of Judge's decision in the High Court of Justice, Queen's Bench Division, Administrative Court, to refuse to extend the time limit and to refuse to order Reconsideration under section 103A of the Nationality, Immigration and Asylum Act 2002 promulgated on 4 August 2005.

[45] I do not propose to rehearse the various productions in detail. They are known to the parties and they can be referred to for their terms. Suffice it to say that, in the course of submission, counsel went through the productions in some detail.

Discussion

[46] It might be helpful, however, to see the sequence of events and the productions in chronological context and to mention some of the features highlighted by counsel during the debate. I would do so as follows.

[47] The statement by the petitioner dated 11 October 2004 is Production No 6/3. I was referred to the whole of that statement - from paragraph 1 to paragraph 22. *Inter alia*, at paragraph 14, the petitioner is noted to have agreed that "my two brothers went and joined the SLA. ... I did not go to join the SLA".

[48] The Asylum Interview on 19 and 22 October 2004 is Production No 6/2. I was referred in particular to questions and answers numbered (39) to (43), (55) and (102) to (103). In answer (102) the petitioner is noted as saying that his two brothers joined the group called "Justice and Equality Movement". In answer (103) when asked about

his earlier statement referring to the Sudanese Liberation Army the petitioner is noted as saying that "It is Justice and Equality. There is some mistake somewhere."

[49] On 26 October 2004 the respondent decided to refuse to grant asylum and an appeal was heard on 5 January 2005.

[50] The Decision of Immigration Adjudicator was promulgated on 24 January 2005 and is Production No 6/5. I was referred to virtually the whole of that document. The Adjudicator's findings are set out in paragraphs 21 to 29.

[51] The Notice of Refusal (to order reconsideration under section 103A of the Nationality, Immigration and Asylum Act 2002) by a Senior Immigration Judge of the AIT dated 11 May 2005 is Production No 7/2. It was stated, in reason 5, that "the grounds do not identify an error of law and there is no real possibility that the Tribunal would decide the appeal differently on reconsideration".

[52] The Notification of the Judge's decision (in the High Court of Justice, Queen's Bench Division, Administrative Court) to refuse to extend the time limit and to refuse to order reconsideration under section 103A of the Nationality, Immigration and Asylum Act 2002 was promulgated on 4 August 2005 and is Production 7/3.

[53] 2005 marked the end of what was called the "old" application.

[54] 2007 saw the start of the "new" application.

[55] The petitioner's Screening Interview was dated 18 May 2007 and is Production No 7/1.

[56] The petitioner's Statement of Evidence Form dated 18 May 2007 is Production 6/4. I was referred in detail to questions and answers numbered (17) to (58). It was noted *inter alia* that:-

- In relation to the person killed by the Sudanese Government the petitioner was asked, in question (27), "Was he killed because he was a member of SLA or

SLM?". The petitioner's reply is noted as "That is the reason why he was killed."

- In question (28) the petitioner was asked "Have you ever been a member of the SLM/SLA?" He is noted as replying "I assisted by giving them money".
- In question (29) the petitioner was asked "Were you a member?". His reply is noted as "Yes I was."
- In answer (30) the petitioner said "I joined them in 2003".
- In answer (45) he said "My brother told me to go and join the Sudan Liberation Movement but I am not certain whether he joined them or not."
- In answer (47) he said "I am or rather I have joined the Sudan Liberation Movement".

[57] The letter dated 25 May 2007 from respondent to the petitioner is Production No 6/1. That letter contains the decision which is the subject of this judicial review - and understandably it was referred to in detail. It can be referred to for its full terms.

[58] In relation to that decision letter, counsel for the respondent highlighted *inter alia* certain matters which cast doubt on the petitioner's credibility. For example the letter contained comments such as:-

- Paragraph 9: "... there are a number of details within your various statements which cast doubt on the truthfulness of your asylum application";
- Paragraph 10: "This discrepancy casts doubt on the integrity of your asylum application";
- Paragraph 11: "It is therefore considered that your claim that your brothers are members of a rebel group is fabricated and has been coined in an effort to enhance you application";

- Paragraph 12: "... it is considered that you have lied to enhance this new application";
- Paragraph 14: "This account is not considered credible. ... Your inconsistencies damage your credibility and give doubt to your claims";
- Paragraph 15: "This discrepancy, together with the other doubts regarding the integrity of your claim, indicates that you are not being truthful in your asylum application"; and
- Paragraph 17: "Your current claim is inconsistent and incredible."

[59] Counsel for the respondent also highlighted paragraphs 21 and 22 of the decision letter of 25 May 2005 which were as follows:-

> "21. You submitted new evidence that you cannot return to Sudan as a member of the SLM/A who was from the Zaghawa tribe was killed around March this year by the Sudanese government. This may have been the case but in your own admission it was because he was a member of the SLM/A and not his ethnicity that caused his death. (AI (2) Q 27). It is not accepted that you are a member of the SLM/A therefore you would not face the same risk as you could have raised your membership of the SLM/A and any risk that involved at your previous asylum claim and subsequent appeal.
>
> 22. You also claim that it was reported in the news that a Sudanese man returned to Khartoum and faced prison and torture when he returned due to his ethnicity. This may have taken place but there is no evidence that all Sudanese nationals of Zaghawa ethnicity returning to Khartoum would face imprisonment or torture. The basis for your claim is the

same as your previous claim in that you fear the Janaweed and the Sudanese government."

[60] Finally counsel for the respondent highlighted paragraphs 26 to 28 of the decision letter of 25 May 2007 which were in the following terms:-

"26. On the 28th October 2004 you were issued with a One Stop Warning under Section 120 of the Nationality, Immigration & Asylum Act 2002. The notice warned that you must make a formal statement about any reasons why you think you should be allowed to stay in the United Kingdom. That included why you wanted to stay here and any grounds why you should not be removed or required to leave. It also clearly states 'if you do have any more reasons that you must disclose them. If you later apply to stay here for a reason which you could have given us now you may not be able to appeal if the application is refused.' You should have disclosed that you joined the SLM/A when first interviewed in 2004 and you did not. You have not complied with the request on the one stop notice that was issued to you.

27. For the reasons given above and in accordance with section 96(1) of the Nationality, Immigration and Asylum Act 2002 (as amended), the Secretary of State hereby certifies that -

a) you were notified of a right of appeal under that section 82(1) (or under Part IV of the Immigration and Asylum Act 1999) against another immigration decision ('the old decision') (whether or not an appeal was brought and whether or not any appeal brought has been determined).

b) the claim or application to which the new decision relates relies on a matter that could have been raised in an appeal against the old decision, and

c) there is no satisfactory reason for that matter not having been raised in an appeal against the old decision.

28. The effect of this certificate is that an appeal under section 82(1) against this immigration decision ('the new decision') may not be brought. ..."

Decision

[61] I have given anxious consideration to all the submissions made on behalf of the petitioner but, in the whole circumstances, I have reached the conclusion that the respondent's arguments must prevail.

[62] In my opinion, it cannot be said that the decision complained of was unlawful or irrational.

[63] In relation to Statement 9 and Statement 10 of the petition, the "new" information relied upon by the petitioner was considered in paragraphs 21 and 22 of the decision letter of 25 May 2005. In my view, that decision letter addressed the relevant issues adequately. It also highlighted the fact that the petitioner could have mentioned certain matters (if they were true) but did not do so. Paragraph 26 of the decision letter explains that "You should have disclosed that you joined the SLM/A when first interviewed in 2004 and you did not do so".

[64] Finally, I should add that I do not agree with Mr Forrest's arguments based on the proposition that there must only be "one matter" in order for there to be certification. That is not what the statute provides. Section 96(1)(b) relates to certification "that the claim or application to which the new decision relates *relies on a matter* that could

have been raised in an appeal against the old decision" (emphasis added). There could be several such matters. One will suffice. In my view, "a" encompasses "one or more than one". On any view, the petitioner's claim relies upon membership of the SLM/A and that is a matter that could have been raised in an appeal. That is sufficient for certification.

[65] In my opinion, the petitioner's arguments are unsound.

[66] In the whole circumstances, outlined above, I am satisfied that the respondent did not err in law in issuing the certification under section 96(1).

[67] In the result, essentially for the reasons outlined by the respondent, I shall repel the pleas-in-law for the petitioner; I shall sustain the first and second pleas-in-law for the respondent; and I shall dismiss the petition.