OUTER HOUSE, COURT OF SESSION

[2010] CSOH 72

P1727/09

OPINION OF LADY STACEY

in the Petition of

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Petitioner;

For Judicial Review
of the decision of the Secretary of State
for the Home Department
dated 17 December 2009

Petitioner: Forrest; Drummond Miller
Respondent: Webster; Office of the Solicitor to the Advocate General.

15 June 2010

Introduction

[1] This is a petition for judicial review of a decision by the respondent dated 17 December 2009, to refuse to treat submissions made on behalf of the Petitioner as a fresh claim for asylum. The Petitioner seeks reduction of that decision.

[2] At the outset of the hearing counsel for the petitioner sought to lodge as a production an extract from a country information report on Nigeria dated 09 June 2009. Counsel for the respondent had no objection. I allowed it to be added to the Petitioner's inventory as 6/15 of process.

[3] Counsel for the petitioner advised that his submissions would relate only to the petitioner's rights under article 8 of the European Convention of Human Rights ("ECHR").

Factual Background

[4] The Petitioner entered the UK from Nigeria in July 2002 and claimed asylum on the basis that his Christian beliefs and events involving his family would lead to his being persecuted in Nigeria. His date of birth is 28 August 1977. The respondent refused his claim. He appealed to an immigration judge who refused his appeal. Thereafter, in December 2003 his solicitors wrote to the respondent submitting that on the basis of his circumstances at that time, removal from the UK would violate his rights under article 8 of ECHR. The respondent rejected that submission and detained the petitioner in December 2003 with a view to removal. Between January and September 2004 the petitioner was held in various detention centres and in prison. There was an attempt to deport him during that period, which was unsuccessful. There was controversy between petitioner and respondent in their averments about that attempt; it is not necessary that the controversy be determined for the purposes of this case. The fact is that after a disturbance at the airport the petitioner was not put on a plane and was returned to custody. While in custody the petitioner received visits from members of a Christian Fellowship. He had been involved with a similar organisation in Nigeria, and had undertaken some training in the priesthood in Nigeria.

[5] In September 2004 the petitioner was admitted to bail. He spent some months living with a family in Ayrshire and then moved to accommodation in Glasgow. The members of the Christian Fellowship who visited him in custody continued to offer him friendship. The petitioner became an active member of St Michael's Church in

Parkhead, Glasgow. He acted as an assistant to the priest, becoming an Altar server, and undertaking duties such as visiting sick parishioners. Many members of the church valued his contribution to the life of the church community. He built up social ties with members of the church, and he retained social ties with some of those who had visited him when in custody.

[6] The petitioner completed an HNC course in business management at a college in Glasgow, and carried out part time study at Glasgow University. He obtained sponsorship to attend the International Christian College in Glasgow. He took up football and trained and played regularly in an amateur league. He had friends both at college and in the football team.

[7] After his release in 2004 the petitioner sought medical advice and was referred by his GP in 2005 to a clinical psychologist; he was seen by doctors running a specialist mental health service for asylum seekers in 2006, and by a psychiatrist in 2007. He was diagnosed as suffering from depression and post traumatic stress disorder, relating to experiences both in Nigeria and since arriving in the U.K. The Petitioner was treated by being prescribed an anti depressant, Fluoxetine, from 2006 and continuing at present. He also attended regular clinical psychology sessions. His clinical psychologist was of the view in December 2009 that his being well supported by his local church was a protective factor for his mental health. She was concerned that in absence of the sessions, the medication and the support of the church, he would be at significant risk of self harm.

The submissions made to the respondent

[8] The petitioner's solicitors wrote to the respondent following the petitioner's admission to bail in 2004, submitting a report which they claimed indicated that there was a risk of persecution if the petitioner was returned to Nigeria. The respondent

rejected that claim in 2006. The solicitors wrote in 2007 intimating a fresh claim on the basis that the petitioner's article 8 rights would be violated by his being returned to Nigeria, and in the course of 2007 submitted letters of support from church members, details of the petitioner's voluntary work with the church and a letter from the clinical psychologist stating that depression and post traumatic stress disorder had been diagnosed and were being treated with anti depressants. The respondent replied in November 2008 to the effect that he intended to carry out a review and asked for a copy of a letter from 2007 which had gone missing. The petitioner's solicitors replied in December 2008 and received no reply; they wrote seeking clarification in April and May 2009. In October 2009 the respondent replied to the effect that the petitioner's appeal rights were exhausted. The petitioner's solicitors replied to the effect that he awaited a reply to the fresh claim made in 2006, supplemented by further information provided in 2007. They sent, in December 2009, the information referred to above from the clinical psychologist. The respondent replied by letter of 17 December 2009, to the effect that while it was accepted by the respondent that new material has been lodged, he did not accept that the new material taken with that previously submitted would create a realistic prospect of success before a new Immigration Judge. He therefore refused the petitioner's claim.

The Submission for the petitioner

[9] Counsel argued that the respondent having accepted that he was presented with new material, he had in terms of the Immigration Rules paragraph 353 to consider if the new material, taken with the material which had been previously considered, created a realistic prospect of success before a new Immigration Judge. He argued that the respondent had erred in holding that there was no realistic prospect of success because in so doing he failed to take account of the petitioner's health and

consequences to him if removed from UK. He argued that the decision to remove the petitioner was not proportionate.

[10] The claim on behalf of the petitioner was based solely on his article 8 rights. Counsel referred to the case of *Razgar* v *Secretary of State for the Home Department* (2004) 2 AC 368 and to Lord Bingham's speech at paragraph 17. His Lordship set out five questions which a court must ask itself if removal is resisted in reliance on article 8. Counsel submitted that the first four questions would in this case be answered in the affirmative but that the fifth question should be answered in the negative. Thus he argued that it was not proportionate to remove the petitioner in light of all of the circumstances. He referred to paragraph 20 of the same case, where his Lordship said.

> "The answering of question 5 ....must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage.....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."

[11] He referred to the case of *Huang* v *Secretary of State for the Home Department* (2007) AC 167 and to Lord Bingham's speech at paragraph 20 where his Lordship clarified that there is no test of exceptionality which must be met, while it is expected that few cases will arise where it is found removal is not proportionate. Counsel argued that this was one of those few cases.

[12] Counsel based his argument on the petitioner's medical status and the respondent's treatment of the country information report, arguing that he had not given proper weight to what was said about the availability or otherwise of treatment.

In page 5 of the letter of 17 December 2009 the respondent noted that the report at paragraph 28.20 stated that all psychiatric illnesses, including depression and post traumatic stress disorder, can be dealt with in hospitals in Nigeria. Drugs including Fluoxetine are available and if a patient could not pay for treatment he would be referred to a Social Welfare Unit, which might be able to make arrangements to make funds available. Counsel argued that nothing had been said about paragraph 28.19 of the same document which states that relatively few centres have trained staff and equipment to implement primary health care. Thus counsel argued that the respondent had decided that an Immigration Judge would decide to refuse to overturn the decision to remove the petitioner to Nigeria in face of information which showed that he might not be able to get the treatment necessary for his mental health. Such a decision showed that the respondent had not considered the balance to be struck between the need to maintain immigration control and the potentially very serious consequences for the petitioner. The respondent had material before him which he had ignored in deciding that there exists an adequate regime for mental health in Nigeria.

[13] Counsel argued that a further matter which had to be taken into account was that of delay. He argued that the petitioner's claim under article 8 had been outstanding since 2006 and during that time the solicitors had put forward information but no decision had been made. He said delay had caused prejudice and referred to the case of *EB(Kosovo)* v *Secretary of State* (2009) 1 AC 1159 and the speech of Lord Bingham at page 1189 D/G. There his Lordship set out three ways in which delay may be relevant. Counsel argued that the first was relevant in the current case as the petitioner had developed closer links with the community by his continued involvement with the church, and his education. Thus his private life in the UK had become more deep rooted. While the petitioner had continued to live in UK his sense

of impermanence began to fade, although it was clear from his medical condition that he was troubled by not having permission to stay. Thus counsel argued that the second way in which Lord Bingham found delay to be relevant applied. As for the third, counsel did not argue that there was a particular person to whom the petitioner should be compared but he did seek to argue that the delay was unreasonable and that it therefore had a bearing on the proportionality of removal. Counsel argued that the petitioner had an increasing feeling that the authorities, having tried unsuccessfully to remove him, and his still being present years later, meant that they were less likely to try again to remove him.

Submissions for the respondent

[14] Counsel moved me to sustain the third plea in law and refuse the order sought. He made submissions on the following matters:-

a. The scope of court's jurisdiction
b. Whether any error was identified in the respondent's decision making on the issue of health
c. Whether any error was identified in the respondent's decision making on the issue of delay

[15] Counsel accepted that the respondent had been presented with new material after decisions on asylum and on ECHR claims had been made, and submitted that the respondent had made clear in his letter of 17 December 2009 that he recognised that. The respondent had dealt with the new material fully and had come to a decision in terms of paragraph 353 to which he was entitled to come. Counsel referred to the case of *WM (DRC)* v *Secretary of State for the Home Department* (2007) Imm AR 337 as an authoritative exposition of the correct procedure in such a situation. He noted Lord Justice Buxton's opinion at paragraphs 6 to 11. Counsel argued that in a fresh

claim case, the task under paragraph 353 for the respondent is to consider the new material along with the old. He must decide if the new material is in fact new; if so he must decide if it is significantly different from the old material. If it is, then he must consider if it, taken along with the previously considered material, creates a realistic prospect of success in a further claim before an Immigration Judge. The respondent should apply anxious scrutiny in deciding the question of what the immigration judge would do.

[16] Counsel argued that in the present case the respondent had accepted that there was new material and had then considered it carefully. The court had power to review his decision if his decision making was irrational. In this case the decision letter showed that there had been no irrationality in the decision making. The letter when read as a whole showed that the respondent had considered all that was relevant and had not considered anything which was irrelevant. He had applied anxious scrutiny to the assertions made. In the letter he had explained his decision fully.

[17] The respondent began by setting out the immigration history. No issue arose about any of that as the challenge now taken was made solely on the article 8 right to private life. When the petitioner had applied in 2006 to be allowed to remain he had cited violations of rights protected by articles 2, 3 and 8 and respondent had considered all of them. The petitioner had claimed that his mental health was such as to preclude his removal and the respondent had considered all that that been said about that. The respondent had noted the country information report of June 2009, from which he had deduced that adequate medical treatment for the petitioner's conditions was available in Nigeria and that help with the cost of necessary medication may be available. In the letter he referred to paragraph 28.00 and paragraph 28.20. The respondent decided that a new Immigration Judge was likely to

find that the petitioner suffered from post traumatic stress disorder and from depression, but that he could continue treatment for these conditions in Nigeria. Counsel submitted that there was no internal inconsistency between 28 .19 and 28. 20 of the country information report, as one paragraph referred to hospital care and the other to primary care. In any event, paragraph 28.20, being the one to which the respondent had made explicit reference, was reported later in date than the report referred to in 28.19. Therefore the respondent had before him material from which he was entitled to infer that there were sufficient medical facilities for treatment to continue.

[18] Counsel argued that in page 6 of the letter the respondent considered the claim under article 8, having rejected claims under articles 2 and 3. He came to the conclusion that an Immigration Judge would find that the petitioner had established a private life around his church, sport, and education. The respondent found that the Immigration Judge was likely to find that he could develop a similar network in Nigeria, and that he could maintain friendships with people in UK from overseas. In considering proportionality, the respondent noted that the petitioner could build up friendships in Nigeria, and that his private life in UK had been built up during time when he knew that he was liable to be removed from the UK. He therefore concluded that any detriment to the petitioner's private life did not outweigh the need to maintain fair and effective immigration control.

[19] The respondent considered the effect of delay in his letter. He acknowledged that representations made on behalf of the petitioner in 2007 were not considered until 2009. He found that the delay was not exceptional. In light of the history of refusal of claims and of attempted removal, the petitioner could not have gained the impression that leave to remain was likely to be granted.

[20] Thus counsel argued that the petitioner did not meet the high test set out in *Razgar* v *Secretary of State for the Home Department* (2004) 2 AC 368. Nor did he meet the test in *EB (Kosovo)* v *Secretary of State for the Home Department* (2009) 1AC 1159. The applicant in that case was a young teenager and therefore in a different position from the petitioner.

[21] Counsel argued that a decision to remove will be found to be disproportionate in only a small number of cases, as the need to maintain immigration control is weighty.

[22] In a short reply counsel reminded me that the effect of delay is in the issue, and argued that it could be perverse to say that the petitioner's private life could continue overseas.

Discussion

[23] The question before the court was correctly identified in the written pleadings and by counsel at the oral hearing. This is a case in which the respondent had to consider what the outcome of a new hearing before an Immigration Judge would be likely to be, in which all of the information put before the respondent by the petitioner was carefully considered, using anxious scrutiny. The history showed that the petitioner's claim for asylum as a refugee was refused some time ago and was no longer under consideration; rather the petitioner made a new claim based on his rights under ECHR, and it was argued before me only on the basis of his right to private life under article 8. In my opinion counsel was correct to appreciate that the claims under article 2 or article 3 of ECHR which were made in correspondence would not succeed and that article 8 was the only article which might afford relief to the petitioner. Article 2 protects the right to life. There is no suggestion in this case that the petitioner's right to life would be breached by his not remaining in this country.

Article 3 prohibits torture, inhuman or degrading treatment or punishment. In my opinion this article will not be breached if the respondent's decision is maintained.

[24] Article 8 is in the following terms:

"(1) Everyone has the right to respect for his family and private life, his home and his correspondence.

(2) There shall be no interference by a public authority with exercise of his right except such as in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

[25] Therefore this article does not prohibit expulsion from UK of a person who has been living in this country, whether lawfully or not. The fact that private life will be disrupted is not determinative of the question. It will be lawful to disrupt private life if the decision is taken lawfully, it pursues one of the aims set out in article 8(2) and it is proportionate to the reason for it.

[26] In considering whether the disruption of the petitioner's private life which is it recognised would occur is justified, it is relevant to consider the reason for his not having permission to stay, the extent of his ties with UK, and whether there are real obstacles to his developing private life elsewhere.

[27] In this case the petitioner's claims of persecution should he return to Nigeria have already been the subject of consideration and have not been made out. His ties with UK are established. The respondent does not seek to argue that he has not made ties with friends in UK, nor is it disputed that many of those friends have written on his behalf explaining the useful work he has carried out in the church.

[28] The petitioner's case before me concentrated on his mental health and the assertion was that the respondent had reached a conclusion that his mental health could be treated in Nigeria despite there being no basis for such a conclusion in the information before him. I do not agree with that. I am of the view that the country information report did indicate in the most up to date report referred to that treatment is available. I do not accept that the respondent had failed to read the report properly or that he had come to an unwarranted decision on it.

[29] It was also argued that the private life built up could not be continued from overseas and that the petitioner would find it difficult to build up his private life again. While I accept that the petitioner may not find it easy to make friends due to his depression and post traumatic stress disorder, I find that he has built up most of his private life in UK through the church and his work for it. While it is obvious that he will not be involved with the same people if he has to leave, I accept counsel's argument that he should be able to build up contacts and friendships within the church elsewhere. I accept that while he is not in good health, he has shown that he is fit enough to assist in church and to interact with other people. I accept that he will be able to do so elsewhere, and that some written contact with those he has met in UK can be maintained.

[30] The petitioner also relied on the effect of delay. In my opinion the delay in this case is regrettable and I accept that any person in the position of the petitioner will feel more disappointed by an adverse decision the longer it takes to make it. I do not accept however that the delay in this case is such as to render the decision disproportionate. Counsel was correct to point out that the petitioner has always known that this removal may be ordered. The respondent did nothing to suggest that he may change in his thinking. His failure to respond at all in 2007 and 2008 is not so

unusual or so lengthy as to suggest that he abandons his stance. The petitioner's age places him in a different position from the petitioner in *EB (Kosovo)* who was only in his teens throughout the process.

[31] In my opinion refusal to the petitioner of his application to remain in this country will have an effect on his private life. I accept that the respondent had material before him indicating that the treatment needed for the petitioner's mental illness would be obtained in Nigeria. Further I accept that the petitioner should be able to develop a private life in Nigeria, and to continue to maintain ties to friends in this country from overseas. Therefore while I accept that there will be an effect on the petitioner's private life, the need to maintain effective immigration control outweighs that effect and so the decision to refuse such permission does seem to me to be a proportionate decision.

[32] I am therefore of the view that this case is not in the category of cases described by Lord Bingham in paragraph 20 of *Razgar*. The decision to refuse the claim does not breach the petitioner's rights under ECHR article 8 and is therefore one which the respondent was entitled to reach.

[33] I will therefore sustain the third plea in law for the respondent and dismiss the petition. I was not addressed on expenses.