OUTER HOUSE, COURT OF SESSION

[2011] CSOH 42

P964/10

OPINION OF LORD MACKAY OF DRUMADOON

in Petition of

RA (AP)

Petitioner;

for

Judicial Review of a decision of the Secretary of State dated 6 September 2010 to refuse to accept representations on behalf of the petitioner as a fresh claim for asylum.

Petitioner: McGuire; Drummond Miller LLP
Respondent: Webster; Office of the Solicitor to the Advocate General

2 March 2011

Introduction

[1] The petitioner is a national of Afghanistan. He claims he was born on 4 September 1991 and to have entered the United Kingdom on 15 March 2008. He sought asylum on 18 March 2008. The petitioner maintains that he left Afghanistan after he had been falsely accused of committing adultery with his sister-in-law. He contends that were he to be returned to Afghanistan he would be at risk of persecution at the hands of his brother, his sister-in-law's father, the local community and the State as a perceived

adulterer. The petitioner's claim for asylum was refused by the respondent on 11 May 2010.

[2] The petitioner appealed against the refusal of his asylum claim. On 7 July 2010 that appeal was refused by an immigration judge, who also considered and refused appeals by the petitioner in respect of his claims for humanitarian protection under para 339 of the Immigration Rules and that his removal from the United Kingdom would be unlawful as being incompatible with the European Convention on Human Rights. In his determination, the immigration judge indicated that he had not been prepared to find, to the low standard which applies in such appeals, that in the event of the petitioner's return to Afghanistan he would be at risk of persecution on account of alleged adultery with his sister-in-law. The immigration judge explained he had not found the petitioner's account of events to be credible, on account of a number of implausible features of his evidence, which are discussed in the determination. The immigration judge also indicated that he had not prepared to find that in the event of the petitioner's return to Afghanistan, he would be at risk of persecution on account of being a Christian convert. That was because he was not persuaded that the petitioner had converted to Christianity.

[3] In para. 71 of his determination, the immigration judge states that as far as he knew the petitioner had not established a family life in the United Kingdom. However, the immigration judge acknowledged that during the two-year period the petitioner had been in the United Kingdom, he would have established a private life which would be interfered with, to a significant degree, by the respondent's decision to refuse the petitioner's claim for asylum. However the immigration judge held that the respondent's decision to refuse the petitioner asylum served a permitted purpose, namely the preservation of a fair and firm immigration policy, and was proportionate.

[4] On 26 August 2010 the respondent issued directions to remove the petitioner from the United Kingdom for Afghanistan. It was arranged that the removal would take place by aeroplane, leaving from London Airport at 2200 hours on 7 September 2010.
[5] On 2 September 2010 the petitioner's solicitors wrote to the respondent submitting further representations on behalf of the petitioner. Apart from some limited reliance on Article 3 of the European Convention on Human Rights ("ECHR") (which in the event has not been insisted upon), the further representations were to the effect that the petitioner should be granted leave to remain in the United Kingdom on compassionate grounds and that his removal would be in breach of his rights under Article 8 of the ECHR. The letter of 2 September 2010 referred to "new evidence" that the petitioner now had a long-term partner, Miss S E, with whom he had been in a relationship since July 2010, and who was currently three months pregnant with the petitioner's child. The letter stated that Miss S E was the mother of another child, born on 12 May 2009. The petitioner was acting as father to that child and had helped to bring that child up since he was 2 months old. A signed affidavit by Miss S E was offered, as were photographs of the petitioner and Miss S E and any further information "in relation to this relationship and the pregnancy should it be required". In the letter it was asserted that removal of the petitioner to Afghanistan would breach his rights under Article 8 of the ECHR to respect for his private life and for his family life and that, on account of the petitioner having been in the United Kingdom since 2008 and having many social cultural and family ties with the United Kingdom, it would be disproportionate to remove the petitioner from the United Kingdom.
[6] By letter dated 6 September 2010, the petitioner's solicitors were advised that their representations had been considered by an official on behalf of the respondent. It would appear from the terms of that letter that the respondent treated the

representations in the letter of 2 September 2010 as being a "purported fresh asylum claim". The letter also stated that the respondent had considered whether the petitioner would qualify for humanitarian protection or discretionary leave to remain in the United Kingdom and the petitioner's claim that his rights under Article 8 would be breached by his removal to Afghanistan. The letter stated that the representations on behalf of the petitioner were rejected. The letter concluded by indicating that having regard to the terms of paragraph 353 of the Immigration Rules, the view had been reached that the representations contained within the letter of 6 September 2010, when taken with the material previously considered, would not have created a realistic prospect of success. In these circumstances it had been determined by the respondent that the representations on behalf of the petitioner did not amount to a fresh claim.

Petition for judicial review

[7] On 7 September 2010 the petitioner lodged the present petition. As originally drafted, the petition sought reduction of the respondent's decision of 26 August 2010 to issue directions for the removal of the petitioner. Very shortly before a hearing before Lord Pentland on 7 September 2010, a copy of the letter of 6 September 2010 was made available to the lawyers acting for the petitioner. During the hearing Lord Pentland granted *interim* interdict against the respondent removing the petitioner from the United Kingdom for a period of seven days. The petition was subsequently amended to seek reduction of the decision of 6 September 2010 to refuse the further representations in the letter of 2 September 2010 in so far as that decision relates to the petitioner's rights under Article 8 of the ECHR .

[8] The petition as now revised seeks a total of seven remedies. The first three remedies, which related to the decision of 26 August 2010, are no longer insisted upon. The fourth seeks reduction of the decision of the respondent dated 6 September

2010 in so far as it relates to the petitioner's rights under Article 8 of the ECHR and the fifth seeks declarator that the decision of the respondent dated 6 September 2010 is unlawful *et separatim* unreasonable in so far as it relates to the petitioner's rights under Article 8 of the ECHR. The sixth and seventh relate to expenses and the making of any other orders the court may consider to be just and reasonable.

[9] The petition came before me for a first hearing. At the outset of the hearing, counsel for the petitioner made clear that the petitioner was no longer insisting on the pleadings which referred to Article 3 of the ECHR. The papers lodged for the first hearing included a precognition of the petitioner dated 3 September 2010. As I understand it, that precognition was not before the respondent when the letter of 6 September 2010 was issued on her behalf. At one stage during his submissions counsel for the respondent indicated that there was nothing in the precognition significantly different from the information contained in the letter dated 2 September 2010. That observation may not be entirely accurate. For example, the precognition refers to Miss S E having visited the petitioner in Dungavel Immigration Removal Centre every day between 29 August and 3 September 2010. The letter of 2 September 2010 makes no mention of any such visits, the occurrence of which the respondent could readily confirm or challenge. In the event I have not relied on the terms of that precognition in reaching my conclusion as to how this petition should be decided.

[10] During the course of the submissions by counsel for the respondent, counsel for the petitioner intervened and sought to tender a letter which the petitioner's solicitors had received and which bore to have been sent to them by Miss S E. The letter was dated 17 September 2010 but had not been received by the petitioner's solicitors until early October 2010. The lodging of that letter, on the basis that it was a document I

should have regard to, was opposed on behalf of the respondent. Having heard submissions on the issue I decided to refuse the motion to lodge the letter as a production. I was not persuaded that any good explanation had been provided for the late production of the letter. Furthermore if it was intended to found on any new or additional factual information within the letter as supporting the existence of a fresh claim, I did not consider it appropriate that I should consider the contents of the letter, prior to the respondent having an opportunity to do so.

The law

[11] Rule 353 of the Immigration Rules provide as follows:

> "Fresh claims
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> 353. When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 33C of these Rules 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:
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> (i) had not already been considered; and
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> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.
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> This paragraph does not apply to claims made overseas. "

[12] As Lord Tyre discussed in his Opinion in the case of *I M, Petitioner* [2010] CSOH 103, at para [4] Rule 353 involves a two-stage process for the respondent, to

whom he referred as the decision maker. First the decision maker must decide whether or not to accept the asylum or human rights claim. If the claim is rejected the decision maker must then consider whether the further submissions in support of the claim amount to a fresh claim. The exercise involves the decision maker considering whether the further submissions are significantly different from the material previously considered. As defined in Rule 353 that will only occur if the contents of the further submissions have not already been considered and when taken together with previously considered material create a reasonable prospect of success. That involves the decision maker asking whether there is a realistic prospect of an immigration judge in the First-Tier Tribunal (Immigration and Asylum Chamber), applying the rule of anxious scrutiny and upholding the claim.

[13] The role of the court in petitions for judicial review concerning the application of Rule 353, has been analysed in number of decisions, in particular in the judgment of Buxton LJ in *WM (Democratic Republic of Congo)* v *Secretary of State for the Home Department* [2007] Imm AR 337, in paras [10] and [11]:

> "[10] ... Whilst, therefore, the decision remains that of the Secretary of State, and the test is one of irrationality, a decision will be irrational if it is not taken on the basis of anxious scrutiny. Accordingly, a court when reviewing a decision of the Secretary of State as to whether a fresh claim exists must address the following matters.
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> [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. ... 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 those questions is in the affirmative it will have to grant an application for review of the Secretary of State's decision."

That analysis was adopted and applied by the Second Division in *FO, Petitioner* [2010] CSIH 16. Parties were agreed it was applicable in the present petition.

[14] Having regard to the discussion in paras. 17 - 24 of the judgment of Carnwath LJ in *R (YH)* v *Secretary of State for the Home Department* [2010] EWCA Civ 116; [2010] 4 All ER 448, the parties were also agreed that it was for me to make my own assessment of how an immigration judge sitting in the First-tier Tribunal might decide the issues involved and, in particular, whether the petitioner would have a reasonable prospect of success in such an appeal. In doing so I required to give the matter anxious scrutiny. It was also important to bear in that the exercise on which I was engaged was a process of judicial review, not a *de novo* hearing, and that the issue must be judged on the material that had been available to the respondent (see *R (YH),* para 21, per Carnwath LJ). Counsel were also at one in accepting that the test of "a reasonable prospect of success", which is to be found in Rule 353, is a modest one and means no more than a case with more than a fanciful prospect of success (see *R(AK (Sri Lanka))* v *Secretary of State for the Home Department* [2010] 1 WLR 855, para 34, per Laws LJ).

Submissions on behalf of petitioner

[15] Counsel for the petitioner submitted that (a) the refusal of the respondent to accept that the petitioner had established a private life and a family life in the United Kingdom; (b) her conclusion that any interference with the petitioner's rights to private and family life by removing him to Afghanistan would be proportionate;. and (c) her refusal to consider the petitioner's further representations as a constituting a fresh claim were all unreasonable and irrational.

[16] It was submitted that the petitioner had realistic prospects of persuading an immigration judge that he had established a family life in the United Kingdom for the purposes of Article 8 EHCR. The petitioner had been in a relationship with Miss S E for over a year. The couple were starting a family and on the date of the respondent's decision, 6 September 2010, Miss S E had been approximately three months pregnant. Miss S E is a British citizen and has another young child with whom the petitioner had developed a "father-like relationship". It was submitted that it was not fanciful to suggest that on the basis of those factual circumstances an immigration judge would hold the petitioner's relationship with Miss S E and her young son amounted to family life for the purposes of Article 8. It was pointed out that the petitioner had in any event established a private life in this country. That had been accepted by the immigration judge who decided his asylum appeal. The petitioner's relationship with his partner and the imminent birth of their child would strengthen his private life in the United Kingdom.

[17] Counsel for the petitioner submitted that in the letter of 6 September 2010 the Secretary of State appeared to be of the view that any interference with the petitioner's rights under Article 8 ECHR, by reason of his removal from the United Kingdom, would be "proportionate" to the aim of maintaining effective immigration control.

However the question the respondent should also have asked herself, which she had not, was whether there was a realistic prospect that an immigration judge would find that to remove the petitioner from the United Kingdom would constitute an interference with his private and family rights that would not be proportionate. The correct question involved addressing whether the claim set out in the letter of 2 September 2010 when taken with the previously considered material created a realistic prospect of success before an immigration judge. It was argued that it would. From the point of view of his family life, removal of the petitioner from the United Kingdom would effectively bring to an end his relationship with Miss S.E and her young child and from the point of view of the petitioner's private life in the United Kingdom a similar conclusion could be reached. In these circumstances, there was a realistic prospect that in an appeal by the petitioner an immigration judge would find that it was not proportionate to remove the petitioner from the United Kingdom.

Submissions on behalf of the petitioner

[18] As a preliminary submission, counsel for the respondent argued that even if the court was persuaded that the respondent's decision of 7 September 2010 should be reduced, the granting of the declarator sought would be futile. In the event the respondent's decision was reduced she would still have to determine the further representations on behalf of the petitioner contained in the letter of 2 September 2010. She would do so having regard to the court's decision in the present petition and in the light of any additional material that might be tendered on behalf of the petitioner. Reference was made to *Boum* v *Secretary of State* [2006] CSOH 111, para [6], per Lord Macphail.

[19] The principal submission behalf of the respondent was that she had not erred in law in reaching the decision set out in the letter of 6 September 2010. She had

addressed the correct question and reached an answer which it was open to her to reach. In these circumstances the petition should be refused.

[20] Counsel for the appellant argued that there was no realistic prospect that on the basis of the representations in the letter of 2 September 2010, an immigration judge would hold (a) that the petitioner had established family life; (b) the petitioner had established an enhanced private life; and (c) that interfering with any family life or enhanced private life the petitioner had been able to establish, by removing him to Afghanistan, should be viewed as being disproportionate. In such circumstances the respondent's decision had neither been unreasonable nor irrational.

[21] Counsel for the respondent accepted that the representations in the letter of 2 September 2010 contained new material. It was accepted that in reaching her decision the respondent had required to assess whether the new material and the previously considered material had any prospects of success before an immigration judge. It was argued that in carrying out that exercise, the respondent had been entitled to draw an adverse inference from the fact the new material could have been produced earlier, in particular during the hearing of the petitioner's appeal before the immigration judge on 6 July 2010. Indeed it was impossible to believe the petitioner's assertion about a relationship dating back to July 2009, when the petitioner had failed to make any mention of that relationship on four specific occasions: (a) his asylum interview on 30 April 2010; (b) the representations lodged on his behalf by his solicitor on 20 June 2010, in advance of the hearing of his asylum before the First -tier Tribunal; (c) the hearing of that appeal on 6 July 2010; and (d) when he was detained on 20 August 2010, prior to be taken to Dungavel.

[22] The respondent had also been entitled to have regard to the fact that no other evidence had been tendered in support of the claimed association, although it was

acknowledged that an affidavit had been offered. Reliance could also placed on the fact that the immigration judge who determined the asylum appeal had not found the petitioner to be credible.

[23] Turning to the detail of the decision letter of 6 September 2010, counsel for the respondent accepted that the contention that the petitioner has a family life, and as a consequence an enhanced private life, were the cornerstones of the petitioner's argument that the new representations constituted a fresh claim. Counsel for the respondent acknowledged that the decision letter did not deal with the respondent's position as to the petitioner enjoying a private life and a family life in the United Kingdom as clearly as it might have done. He agreed that letter does not explicitly state that the respondent does not accept that the petitioner has established a family life in the United Kingdom. He argued, however, that such a finding fell to be inferred from the last two paragraphs on page 2 of the letter in which the respondent addressed the issue of interference on the assumption that the petitioner had established a family life and a private life since coming to the United Kingdom. At that point in the letter she makes it clear that even if she accepted that the petitioner's removal to Afghanistan may interfere with his Article 8 rights to family life and private life, she considered such interference to be in accordance with the law and to be proportionate to the wider interests of maintaining an effective immigration control. Under reference to *R(Razgari)* v *Secretary of State for the Home Department* [2004] 2AC 368, para 17 - 20, per Lord Bingham of Cornhill; *Huang* v *Secretary of State for the Home Department* [2007] 2 AC 167, para 20, per Lord Bingham of Cornhill; and *Chikwamba* v *Secretary of State for the Home Department* [2008] 1 WLR 1420, paras 41 - 44, per Lord Brown of Eaton-under- Heywood, counsel for the respondent argued that was a view she had been entitled to reach.

Discussion

[24] Unfortunately the letter on behalf of the respondent, dated 6 September 2010, was not drafted in as clear terms as it might have been. That may have occurred on account of the urgency with which a response to the letter dated 2 September 2010 was required. A reply clearly had to be in the hands of the petitioner's solicitors by 7 September 2010, the date of the planned removal of the petitioner to Afghanistan. Unlike other decision letters issued on behalf of the respondent in similar situations, the letter of 6 September 2010 does not clearly focus the important question which the provisions of Rule 353 required the respondent to ask herself, once she had decided to reject the further representations. As explained by Buxton LJ in *WM (DRC)* v *Secretary of State for the Home Department* [2006] EWCA Civ 1495, at para 11, in a passage of his judgment from which I have quoted earlier, that question was not whether the Secretary of State herself thought the new claim was a good one or should succeed, but rather whether there was a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, upholding the claim (see also *FO, Petitioner* [2100] CSIH 16).

[25] The respondent's letter of 6 September 2010 contains no indication that the drafter of the letter, acting in the name of the respondent, gave any consideration at all to the question of what an immigration judge sitting in the First-tier Tribunal would make of the further representations on behalf of the petitioner, when taken with the previously considered material relating to the petitioner's human rights claim. After several pages discussing the respondent's own views on the further representations, the letter turns on its last page to deal in four paragraphs with Rule 353 of the Immigration Rules. Those paragraphs are drafted in the most general of terms. They make no reference to the detail of the further representations that have been submitted

on behalf of the petitioner. Whilst the words "a realistic prospect of success" are used on two occasions, no attempt is made to focus the issues involved along the lines of whether there is a realistic prospect of an immigration judge determining the claim submitted in the letter dated 2 September 2010 in a manner favourable to the petitioner. The issues require to be focussed that way because asking the correct question as whether there is a realistic prospect of an independent adjudicator finding in favour of the petitioner is central to the respondent's duty when handling representations to which Rule 353 applies. In these circumstances, whilst I accept that the respondent was entitled to begin her consideration of those further representations by deciding whether or not she herself was prepared to accept the claim being put forward on behalf of the petitioner, I am far from persuaded that when the respondent came to determine whether those further representations amounted to a fresh claim for the purposes of Rule 353 she addressed the correct question. Indeed having regard to the terms of the last page of her letter I am not prepared to hold that she did. The respondent's failure to ask herself to correct question amounted to an error in law. In these circumstances her determination that the further representations do not amount to a fresh human rights claim cannot stand.

[26] In light of that conclusion, it is unnecessary to for me to comment in detail on the submissions I heard relating to other of the terms of the letter of 6 September 2010. Suffice it to say that when the petitioner's further representations come to be reconsidered, the petitioner will no doubt look to the respondent to take into account the full contents of the further representations, to ask herself the correct questions and indicate in clear and unequivocal terms whether she is prepared to accept the human rights claim put forward on behalf of the petitioner and if not why. Equally importantly, if the respondent is minded to refuse the petitioner's human rights claim,

the petitioner will look to the respondent to address the issue of whether or not his claim falls to be treated as a fresh claim in accordance with the guidance to be found in the authorities to which I have referred and to provide clear reasons for her decision on that issue.