OUTER HOUSE, COURT OF SESSION

[2010] CSOH 159

P790/09

OPINION

of

C J MacAULAY QC
(Sitting as a Temporary Judge)

in the petition of

F A

Petitioner;

against

A decision of the Secretary of State for the Home Department

Respondent;

Petitioner: Caskie; Drummond Miller
Respondent: Lindsay; C Mullin

30 November 2010

Introduction

[1] The petitioner seeks Judicial Review of a decision of the Secretary of State for the Home Department ("the respondent") that certified his claim not to be removed from the United Kingdom as clearly unfounded. The petitioner claimed that his removal from the United Kingdom would constitute a breach of Article 8 of the European Convention of Human Rights ("the Convention"). By decision letter dated

5 May 2009 the respondent intimated her decision refusing the petitioner's application. Subsequently that decision was confirmed by letter dated 7 April 2010. That decision was to the effect that the petitioner's claim not to be removed from the United Kingdom was to be regarded as clearly unfounded under paragraph 5(4) of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 ("the 2004 Act").

[2] So far as the appropriate legal test applicable to a certification case under the 2004 Act was concerned, it was common ground between the parties it is as expounded by the House of Lords in *Z T (Kosovo)* v *Secretary of State for the Home Department* [2009] UKHL 6. In that case Lord Phillips of Worth Matravers said at paragraph 23:

> "Where, as here, there is no dispute of primary fact, the question of whether or not a claim is clearly unfounded is only susceptible to one rational answer. If any reasonable doubt exists as to whether the claim may succeed then it is not clearly unfounded. It follows that a challenge to the Secretary of State's conclusion that a claim is clearly unfounded is a rationality challenge. There is no way that a court can consider whether her conclusion was rational other than by asking itself the same question that she has considered. If the court concludes that a claim has a realistic prospect of success when the Secretary of State has reached a contrary view, the court will necessarily conclude that the Secretary of State's view was irrational".

Facts

[3] The petitioner is a citizen of Afghanistan, born on 8 April 1988. He first arrived in the United Kingdom when aged 13 in late 2001 and claimed asylum. He was granted leave to remain by the respondent for a period of 4 years. For the first 6 months of his stay in the United Kingdom the petitioner was accommodated at an under 16's

Asylum Seekers Unit in Kent. Thereafter from mid-2002 he lived with a cousin in Glasgow. He attended an Academy in Glasgow and undertook standard grade examinations there.

[4] By letter dated 21 December 2005 from solicitors acting on behalf of the petitioner, and enclosing the relevant application form, the petitioner applied for Indefinite Leave to Remain in the United Kingdom. Apparently the petitioner received no decision from the Respondent on that application. By that time one of the petitioner's sisters had also come to live in the United Kingdom where she lived lawfully as a spouse. She has two young children.

[5] According to the petitioner, he returned to Afghanistan by lorry in 2008. He remained outwith the United Kingdom for some ten months or so until 7 April 2009 when he was discovered on a train travelling through the Euro tunnel from France. He had travelled by lorry to return to the United Kingdom but en route he encountered the Dutch police. In the Netherlands he was fingerprinted and claimed asylum. It was after that claim had been made that he returned to the United Kingdom.

[6] On his re-entry to the United Kingdom the petitioner was served with illegal entry papers. He was detained and interviewed. In the course of that interview the petitioner lied about his identity and connection with the United Kingdom. In particular he claimed that he had never been in the United Kingdom before and that he had no immediate family. However, his fingerprints were matched on the European fingerprint database and that revealed that he had made a claim for asylum in the Netherlands on 21 October 2008. His fingerprints were also matched on the United Kingdom Border Agency's immigration fingerprint database and that match revealed his previous claim for asylum in a different identity on 12 March 2002.

[7] Under Council Regulation (EC) No 343/2003 of 18 February 2003, a scheme known as the "Dublin 11 Regulations," provision is made for a hierarchy of responsibility should more than one state in the European Union have responsibility for determining a claim for refugee status. As the Petitioner had claimed asylum in the Netherlands, on 14 April 2009 the respondent asked the Dutch Immigration Authorities to accept responsibility for the determination of the petitioner's claim. On 21 April 2009 the Dutch Immigration Authorities accepted that they were the state responsible for determining the petitioner's claim for refugee status. It was not disputed that the Netherlands was at the top of the hierarchy of states responsible for determining the petitioner's claim.

[8] By letter dated 28 April and 1 May 2009, solicitors acting on behalf of the petitioner invited the respondent to determine the petitioner's claim to remain in the United Kingdom. Now the essence of the petitioner's claim was that removal would constitute a breach of Article 8 of ECHR. The petitioner was due to be removed to the Netherlands on 6 May 2009. The petitioner raised Judicial Review proceedings against his removal. First Orders were granted on 5 May 2009 with the effect that the respondent cancelled the petitioner's proposed removal.

[9] It was against that background that the respondent's decision letter of 5 May 2009 was issued.

This Petition

[10] The primary thrust of this application as developed in argument is that of establishing that the respondent erred in certifying the petitioner's human rights claim as clearly unfounded. The petitioner seeks reduction of that decision.

[11] When I first heard submissions in this petition some controversy arose in relation to the petitioner's criminal record. By decision letter dated 7 April 2010 the respondent intimated that the petitioner had the following criminal convictions:

(a) 14 April 2005 at Glasgow Sheriff Court, a conviction for assault and robbery; and

(b) 27 September 2006 at Glasgow Sheriff Court, a conviction for Breach of the Peace. Sentence was deferred on both occasions.

In her decision letter of 7 April 2010 the respondent confirmed her decision of 5 May 2009.

Submissions for the Petitioner

[12] In moving his motion for reduction of the respondent's decision Mr Caskie advanced a number of explanations for the petitioner's initial entry into the United Kingdom, his departure to Afghanistan in 2008 and his subsequent return. In so doing he was reflecting much of what was averred in the petition. That material is not accepted as credible by the respondent. Mr Caskie accepted that there was a serious question mark against the petitioner's credibility because it was clear that he had certainly lied to the immigration authorities on his return to the United Kingdom in 2009.

[13] Mr Caskie also accepted that insofar as the petitioner's refugee status was concerned that was a matter for the authorities in the Netherlands. The essence of his argument in support of the motion for reduction was that the respondent erred in certifying that the petitioner's human rights claim was clearly unfounded.

[14] In developing his submissions Mr Caskie argued that having regard to the circumstances the petitioner's case could not be described as clearly unfounded. He

relied upon the period of time the petitioner had spent in the United Kingdom and the close family ties he had developed during that period. Furthermore, although he accepted that the petitioner's departure in 2008 was a relevant factor, the fact that he subsequently returned within a year highlighted the strength of the bond that had developed between the petitioner and his life in the United Kingdom.

[15] In addressing the reasons given by the respondent in the decision letter of 5 May 2009 Mr Caskie submitted that the respondent failed to have regard to important material that would have been available on file. For example, in paragraph 10 of that letter the respondent asserts that the petitioner "spent the majority of his formative years in Afghanistan", an assertion that Mr Caskie argued was not supported by the agreed facts. He submitted that in balancing the rights of the petitioner and the rights of the state in paragraph 11 of the decision letter of 5 May 2009, the respondent failed to give adequate weight to the period of time the petitioner had spent in the United Kingdom and the family life he had established.

[16] In analysing the nature of the petitioner's position, Mr Caskie submitted that it was important to focus on the fact that for a number of years the petitioner developed a family life at a time when his residence in the United Kingdom was not precarious. That position could be contrasted to cases where the establishment of a family life occurs during a period when the immigrant's presence is always precarious.

Submissions for the Respondent

[17] Mr Lindsay submitted that the respondent's decision was lawful and reasonable. He argued that here there was no continuity of residence. The starting point had to be the point when the petitioner left the United Kingdom. At that point he brought his family life to an end. According to Mr Lindsay, the approach had to be one of

concentrating on the events that occurred on the petitioner's return to the United Kingdom.

[18] Mr Lindsay developed this part of his submissions under reference to what was said by Beatson J in (*W J) (China*) v *Secretary of State for the Home Department* 2010 WL1368796. In that case, the claimant sought to establish a family life in the United Kingdom at a time when the claimant's immigration status was precarious. Mr Lindsay argued that, although he accepted that the petitioner had created a family life before he left the United Kingdom, his immigration position on his return was precarious. All ties that had been built were ruptured when he left.

[19] Mr Lindsay also argued that *esto* some aspects of the petitioner's family life survived and still existed on his return, in applying a proportionality analysis, his position was still hopeless. His Article 8 claim was clearly unfounded because the petitioner's credibility was such that important gaps in the narrative remained unanswered in a context where the onus was on the petitioner to provide explanations.

Decision

[20] As I observed at the outset, there was general agreement between counsel as to the relevant test. Counsel were also agreed that the test was fact sensitive. In developing their respective submissions, in addition to the cases already mentioned, counsel also referred to *R (on the Application of AK (Sri Lanka)* v *The Secretary of State for the Home Department* [2009] EWCA Civ 447; *R (on the Application of Princely)* v *Secretary of State for the Home Department* [2009] EWHC 3095 (Admin); *R (on the Application of Shayanth* v *Secretary of State for the Home Department*; *The Secretary of State for the Home Department* v *GY (China)* [2009] EWCA Civ 689; *FNG* v *Advocate General for Scotland* [2008] CSOH 22; *EB*

(Kosovo) v *Secretary of State for the Home Department* [2008] 3 WLR 178; *Uner* v *The Netherlands (Application No 46410/99)* [2006] 3 FCR 340, [2006] ECHR 46410/99; *Chikwamba (FC)* v *Secretary of State for the Home Department* [2008] UKHL 40; *KBO* v *Advocate General for Scotland* [2009] CSIH 30; *Maslov* v *Austria (Application No 1638/03)* [2007] 1 FCR 707, [2007] ECHR 1638/03; *R (Nasseri)* v *Secretary of State for the Home Department* [2010] 1 AC 1; *Belfast City Council* v *Miss Beharmn Ltd* [2007] 1 WLR1420; *Mr KM (FE)* v *The Advocate General for Scotland* [2010] CSOH 8; *Ms TP* v *The Advocate General for Scotland* [2009] CSOH 121; *W* v *United Kingdom (Application No. 9749/82)* (1988) 10 EHRR 29; and *Darren Omoregie* v *Norway (Application No.265/07).*

[21] When he returned to the United Kingdom in April 2009 the petitioner lied about his previous connection with the United Kingdom. He was the author of his own misfortune as part of the respondent's reasoning in refusing certification was that she did not accept that he had family members in the United Kingdom or that he had established a family life in the United Kingdom. As I have indicated, Mr Lindsay did accept that until he left in 2008 the petitioner had established a family and private life in the United Kingdom.

[22] The approach taken by Mr Lindsay on behalf of the respondent was that the starting point was the point in time the petitioner left the United Kingdom and returned to Afghanistan. I do not accept that that is the correct approach. I consider that I require to look at the whole picture and the undisputed fact that the petitioner spent almost all of his teenage years in the United Kingdom prior to his departure is an important part of that picture as are the facts that during that period he received his secondary education in Scotland and developed family ties. Nor do I accept that, as Mr Lindsay suggested, the petitioner's lack of credibility and the absence of a credible

explanation as to why he left the United Kingdom effectively means that his family life had been permanently ruptured. Furthermore, the fact that the petitioner did in fact return to the United Kingdom is a relevant factor when considering the whole picture.

[23] I have set out the relevant test in paragraph [2] of this Opinion. The threshold that the petitioner has to surmount is a low one and one where the petitioner fails only if it can be said on the undisputed facts that the claim is clearly unfounded. Having regard to the undisputed facts of this case set out at paragraphs [3] to [9] and summarised in the previous paragraph I do not consider that the petitioner's claim that removal from the United Kingdom would constitute an interference with his Article 8 rights is clearly unfounded. Although Mr Lindsay sought to introduce a proportionality analysis in the course of his submissions, at this stage I do not consider that it is for me to assess fully the strength of the petitioner's Article 8 position as that would be to prejudge the issue. I do not propose to analyse in detail the relative merits or demerits of his position. What I can say at this stage is that on the undisputed facts the respondent's decision that the petitioner's claim was clearly unfounded was irrational. There are sufficient features in those undisputed facts in support of a claim under Article 8 to make it irrational to certify his claim as clearly unfounded.

[24] Accordingly I shall sustain the petitioner's plea in law to the extent of granting reduction of the respondent's decision as comprised in her decision letters of 5 May 2009 and 7 April 2010. The petitioner should understand that my decision only affects certification. The merits of his claim under Article 8 of ECHR remain to be fully considered. In the meantime I shall reserve the question of expenses.