EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lord Clarke
Lord Hardie
Lord Mackay of Drumadoon

[2011] CSIH 3
P620/09

OPINION OF THE COURT

delivered by LORD CLARKE

in the Reclaiming Motion

by

E.Y.

Reclaimer and Petitioner ;

against

THE SECRETARY OF STATE FOR
THE HOME DEPARTMENT

Respondent:

____

Petitioner and Reclaimer: Carmichael QC, Bryce; Drummond Miller LLP
Respondent: Lindsay; Solicitor for the Advocate General for Scotland

12 January 2011

[1] This reclaiming motion raises the question as to the nature and extent of the power, if any, of the court to refuse to grant an application for first orders in a petition for judicial review. The question arises in the context of an immigration case but the issue is one of general significance in the context of judicial review.

[2] The petition was originally brought in the name of two petitioners E.Y and P.S.T. The first petitioner is a citizen of Turkey. The second petitioner is a resident of the

United Kingdom. Certain dates and events in the first petitioner's immigration history are set out in a letter from the respondent (6/3 of process) dated 18 March 2009. These are stated as follows:

> "25/08/00 Arrived in the United Kingdom and began working as a prostitute soon after.
>
> 01/08/01 Claimed asylum.
>
> 17/09/01 Decision made to refuse asylum claim.
>
> 05/11/01 RFRL served together with IF151A.
>
> 07/11/02 Appeal hearing.
>
> 20/11/02 Determination promulgated, dismissed.
>
> 07/01/03 Permission to appeal rejected.
>
> 07/01/03 Appeal rights exhausted.
>
> 18/02/09 Further representations submitted, legacy programme and Article 8 of ECHR."

[3] It will be noted that there is a gap of over six years in the immigration history of the first petitioner as set out in the foregoing chronology.

[4] The decision which the petitioners sought to have reviewed was made on the 18 March 2009 whereby the respondent decided to refuse to accept the representations made on behalf of the first petitioner constituted a fresh claim by her for asylum, which decision was confirmed in a letter dated 6 May 2009. On 7 May 2009 the respondent notified the first petitioner that it was intended to remove her to Turkey on 20 May 2009 at 07.00 hours. The decision letter of 18 March 2009 runs to seven closely typed pages. Reference was made in that letter not only to the representations which had been made on the first petitioner's behalf, but a long list of documents provided in support of those representations. The application on behalf of the first

petitioner requested that she be granted indefinite leave to remain under the "Legacy Programme". It was, in addition, contended, on her behalf, that her return to Turkey would breach her rights under Article 8 of the ECHR.

[5] The present petition for judicial review seeks to attack the decision to refuse to accept that the representations on behalf of the first petitioner constituted a fresh claim for asylum on her behalf on grounds of unreasonableness and irrationality. The petition came before the Lord Ordinary, Lady Smith, on a motion on behalf of the petitioners' for first orders. The respondent was not represented at the hearing. No issue as to competency or jurisdiction arose in relation to the petition. At pages 34 to 36 of her opinion, however, the Lord Ordinary appears to have reached a conclusion on the relevancy of the petition in the form it was presented to her. She appears to have considered that before the petitioners were entitled to have a motion for first orders granted they had to demonstrate that they had an arguable case. She reached the view that the petition, as supplemented by submissions made on the petitioners' behalf by counsel, did not reveal an arguable case. She, accordingly, refused the motion but granted leave to reclaim.

[6] At the commencement of the reclaiming motion before this court Miss Carmichael QC sought leave to abandon the petition at the instance of the second petitioner with no expenses due to or by. The second petitioner is a man with whom, it is averred, the first petitioner has lived together in a relationship "akin to marriage". The motion was consented to, on behalf of the respondent, and was granted.

[7] The court was informed, in the course of the hearing, that after the first petitioner's appeal rights had been exhausted on 7 January 2003 no steps were taken by the authorities to have her removed from the United Kingdom. She had met the second petitioner at New Year 2004 and they had been living together as a couple since that

time. She had been diagnosed with breast cancer in 2006 for which she had received surgery. She had approached the respondent in 2007 to seek to have her position regularised. That had resulted in the respondent proceeding to take enforcement action. On behalf of the first petitioner, and now reclaimer, senior counsel argued that the Lord Ordinary had been wrong to refuse the motion for first orders. She had applied the wrong test in doing so. While in terms of the relevant Rules of Court it was clear that it was competent for the court to refuse a motion for first orders nevertheless, in bringing her petition the reclaimer did so as of right. Prior to the introduction of the rules relating to judicial review the reclaimer would have been required to make her complaint by way of summons for reduction of the relevant decision. The Rules of Court which provide for petitions for judicial review, following the recommendation of the Dunpark Committee, were designed to provide for expedition in the field of review of administrative acts and decisions. The Dunpark Committee proposals did not envisage the requirement of seeking first orders. The Committee also noted that it was unnecessary to provide that an appellant must obtain leave of the court to make his application because the judge would have the power to dismiss an application as incompetent or irrelevant at the preliminary diet, which was to be part of the procedure. In the event when the relevant Rules of Court were enacted they included the following provision:

> "58. On being lodged, the petition shall, without appearing in the Motion Roll be presented forthwith to the Lord Ordinary in court or in chambers for -
>
> (a) an order specifying -
>
> (i) such intimation, service and advertisement as may be necessary;
>
> (ii) any documents to be served with the petition;

(iii) a date for the first hearing, being a date not earlier than 7 days after the expiry of the period specified for intimation and service; or

(b) Any interim order;

and, having heard counsel or other person having a right of audience, the Lord Ordinary may grant such an order."

That provision, it was submitted, should not, in any sense, be equiparated with a provision for leave to be required. Nor should it be construed as allowing the judge to prevent the petition going any further on the basis of perceived irrelevancy. The appropriate stage for that to occur was at the first hearing provided for in Rule of Court 58.9 or, in exceptional cases, at a second hearing, if there was one in terms of Rule of Court 58.10. It was of some interest to note that the commentator in *Macfadyen: Court of Session Practice* had opined at H/121, para 117 under reference to the relevant rules in force at the time of writing that "While it may be thought to be desirable to be allowed to dismiss or refuse a clearly irrelevant or incompetent petition at the earliest stage, and so spare the needless expense associated with a first hearing, the outcome of which is pre-ordained, it may be questioned whether it is in fact a course which can competently be adopted". At para 116, after discussing the case of *Butt* v *Secretary of State for the Home Department* 15 March 1995, unreported (as to which see infra) the commentator stated "only in the clearest of cases, then, would it seem that a petition should be refused or dismissed at first order stage". It had, however, to be acknowledged that the relevant rules had recently been amended by Act of Sederunt (Rules of the Court of Session, Amendment Number 10) (Miscellaneous) 2007 SS1-2007, number 548. By virtue of paragraph 5 thereof a new Rule of Court 58.7 was promulgated which is to the following effect:

"First Order

58.7 - (1) On being lodged, the petition shall, without appearing on the Motion Roll, be presented forthwith to the Lord Ordinary in court or in chambers for -

(a) an order specifying -

(i) such intimation, service or advertisement may be necessary;

(ii) any documents to be served with a petition;

(iii) any date for the first hearing, being a date not earlier than 7 days after the expiry of the period specified for intimation and service;

or

(b) Any interim order.

(2) The Lord Ordinary may grant, but may not refuse to grant, any order specified in paragraph (1) without having heard counsel or other person having a right of audience instructed by the petitioner".

While the new version of R.C 58.7 made it clear that there was power in the court to refuse to grant a motion for first orders, this amendment to the Rules, it was submitted, should not be read as having introduced in Scotland, a requirement which exists in England and Wales, that a party must obtain leave to proceed with a petition for judicial review. Nor was the new R.C. 58.7 to be read as allowing the judge to determine the merits of the matter at the stage of first orders being sought. The new Rule of Court was introduced, it was suggested, to allow for the judge to grant first orders without the need of any appearance on behalf of the petitioner. This was thought appropriate in the light of experience that many, if not most applications for first orders did not necessitate the appearance of the petitioner's representative.

[8] The First Division had recently expressly acknowledged that the law of Scotland, unlike the position in England, does not require that an applicant for judicial review should obtain leave of the court. They did so in the case of *Eba* v *The Advocate General for Scotland* (2010) CSIH 78, where the Lord President, in giving the opinion of the court, at paragraph 35 observed as follows:

> "While the jurisdiction is equitable, and so there might have developed a doctrine that leave of the court was required to present any application of that kind, no such doctrine was in the event developed."

His Lordship went on to state:

> "This contrasts with the position in England and Wales where leave was required for the presentation of prerogative writs (Order 53) and is now required for applications for judicial review (Civil Procedure Rules, rule 54(4)). There may, however, be some measure of judicial control in the Court of Session in that, as applications for judicial review are now required to be made by petition (RC 58.3), the Lord Ordinary may be able immediately to prevent an application going further - by refusing to grant a first order. This seems to have been done only where the application was manifestly without substance (unless the respondent was also represented so that the position of both parties was explored);"

The Lord President then went on to note that the present case was pending before the Inner House and also noted that:

> "There has been a suggestion that the law be changed to require leave for an application for judicial review (Civil Courts Review, Chapter 12, paras. 40-54)."

Neither counsel for the reclaimer nor counsel for the respondent were able to point this court to any previous authority where the phrase used by the Lord President "manifestly without substance" had been applied in deciding whether or not a motion for first orders should be granted. That expression seems to have found its first appearance, in the present context, in the opinion of the Lord President in the *Eba* case. The distinction between the position in Scotland and that in England and Wales was further remarked upon by the Lord President at para 53 of his opinion.

[9] What was submitted on behalf of the reclaimer was that there was no authority before the Lord Ordinary entitling her to proceed in the way she did in the present case. The case of *Butt*, referred to *supra*, dealt with a different situation. While it related to an immigration matter, and the petition was dismissed at a hearing for first orders, the respondent was represented at the hearing of the petitioner's motion. Counsel for the respondent had argued that the petition was irrelevant and that the court would be entitled to reach that conclusion at the first order stage. The Lord Ordinary, Lord Gill, stated at page 9:

> "Since the respondent is the only party on whom service was sought and since he was represented in court I decided to hear the parties on the petition there and then. At the conclusion of the hearing I intimated my decision to refuse the motion."

The Lord Ordinary, at pages 9 to 12 of his opinion, then set out his reasons for refusing the motion. He did so in the following terms:

> "The first question to be considered is whether the court can refuse a petition at this initial stage. Rule of Court 58.7 makes it clear that a first order is one which the Lord Ordinary 'may' grant. The court has a discretion. There is

precedent for refusal at this stage (*Sokha* v *Secretary of State for the Home Department* 1992 SLT 1049).

The next question is whether it is appropriate to do so in this case.

In the normal case the relevancy of the petition will fall to be decided at the first hearing. There are good practical reasons for that. In the majority of judicial review cases only the petitioner is represented at the hearing on a first order. At this stage the usual question is whether an interim interdict should be granted. Unless there is a caveat, the court will make a decision on that matter on the ex parte representations for the petitioner. Even if the respondent is represented at that hearing the court will usually be in no position to make a decision disposing of the petition: for example, because the petitioner may have to recover essential documents relating to the decision complained of, or may be ordered to serve specified documents on the respondent (RC 58.7(a)(ii)); or because the respondent may wish to lodge answers to the petition and to have time to prepare his defence on the facts and on the law. But in my view the court should be prepared in appropriate circumstances to consider the relevancy of a petition, and if so advised to refuse it, at the first order stage. Those who petition for judicial review are asking the court to take a serious step. The interim orders which are commonly granted to petitioners in such cases can have important practical effects and can disrupt settled arrangements often involving third parties. It is in the public interest that such petitions should be dealt with with the minimum of delay. It is reasonable to expect of those who present a petition for judicial review that they should be prepared at the earliest stage to defend the relevancy of it if that should be challenged.

> In the present case counsel for the petitioner in replying to the arguments against the relevancy emphasised that these arguments raised issues to try. He therefore proposed that the discussion be deferred to a first hearing, the petitioner being liberated ad interim. I am not prepared to accept that in a case such as this counsel for the petitioner need only say that there are issues to try in order to entitle his client to a first order and to the protection of interim orders.
>
> Without attempting to state any universal rule in the matter, I suggest that it would certainly be appropriate for the court to consider, and if need be to refuse, the petition at first order hearing in a case where (1) the respondent is represented; (2) all necessary documents are to hand; (3) the respondent wishes to have the petition disposed of without resort to a first hearing and is in a position to prevent a fully prepared case; and (4) there is no dispute of a factual nature such as to present the court from making a properly informed decision at that stage. All of these criteria are satisfied here....Counsel for the petitioner informed me that he did not have it in mind to add any further grounds to the petition and he accepted that if a first hearing were allowed it would proceed on the same arguments as had been canvassed in the discussion before me. That confirmed me in my decision to proceed."

It is clear that Lord Gill, in electing to proceed in the way he did was driven by considerations of expediency. There was nothing to be gained in continuing the matter to a first hearing. Both parties were represented at the hearing and were, or should have been, in a position, to argue the merits of the matter. Nevertheless his Lordship clearly indicated that the action he had taken in that case was to be regarded as exceptional and, as has been seen, set out his own criteria for such an exceptional

approach being justified. These factors were not all present before the Lord Ordinary in the present case as she herself recognised.

[10] Counsel for the reclaimer submitted that the case of *Butt* was no authority for applying a test of arguability as the Lord Ordinary had done in this case without a hearing where both parties were represented. It was true that in *Clyde and Edward*s *on Judicial Review* at para 23.14 it is stated "While there is, in distinction from the English practice, no requirement for leave to make an application for judicial review it is open to the judge after reading the petition and hearing the petitioner's representative to refuse to grant an order for service and dismiss the application there and then." Those remarks had been made under reference to the case of *Butt*. The writers did not, however, suggest what the legal basis for any refusal should be. In a footnote, however, they stated "This echoes the practice of the former Bill Chamber". But the reference, it appears, is a reference to the position relating to Bills of Suspension and a comment by McLaren on Bill Chamber Practice at page 11 to the effect "The Lord Ordinary, after consideration of the Note, may be of the opinion that it is manifestly incompetent, or that caution should have been offered by the complainer, in either of which case he may refuse the Note". That gives no support for refusing the motion for first orders on the basis of no arguable case.

[11] Questions of pure relevancy should, it was submitted, not be determined by the Lord Ordinary without hearing from the respondent or at least ascertaining his position on the matter. The basis for refusing a motion for first orders should be as the Lord President suggested in the *Eba* case, that is, whether or not the Lord Ordinary, on reading the petition and hearing the petitioner's representative, could clearly state that the application was manifestly without substance. That was clearly a high test and would not involve detailed consideration and criticism of pleadings. In England and

Wales there had been much discussion of, and development in, the notion of arguability in the field of judicial review. The test had come to be seen as amounting to "a real prospect of success" and this had attracted criticism. It would be highly undesirable to import that test into our system. If the proper test was, as contended for by the reclaimer, namely whether or not it could be said that the application was manifestly without substance or words which were to similar effect, the Lord Ordinary had clearly erred in the approach she took to the matter.

[12] The question then would be, whether if the proper test had been applied, the motion for first orders should have been granted. Counsel for the reclaimer contended that that question fell to be answered in the affirmative. A mere reading of the petition did not reveal that the reclaimer's case was manifestly without substance without there being any need for further discussion and or inquiry. The urgency of the situation meant that the averments in the petition were not yet in final and complete form. The reclaimer's immigration history was lengthy and complex. As had been noted there had been a long period of inactivity by the respondent following the reclaimer's appeal rights having become exhausted during 2003 in relation to the reclaimer's status having been reached. Her personal situation had changed significantly since then by reason of her now established relationship with the second petitioner, and her serious medical history. Though the second petitioner was no longer party to the proceedings that did not mean that his rights under Article 8 were irrelevant in a consideration of the petitioner's position. There was a large amount of documentation lodged in support of the reclaimer's position. It could not be said with confidence, at
the stage of a motion for first orders that an Immigration Judge would not take a different view of the reclaimer's position from that taken by the respondent.

[13] For the respondent, counsel accepted that the hurdle to be cleared by an applicant seeking first orders was a low one. It was not, however, restricted to pure questions of competency and jurisdiction, it could stray into the borderland where issues of competency and relevancy shade into one another. It may, indeed, not be possible in a context like the present to draw "a bright line" between competency and relevancy. Counsel then sought to formulate the proper test that should be applied in such a situation. The question, he suggested, might be whether or not it could be said that the petition disclosed a point "fit for investigation". He would not disavow, however, the approach of the Lord Ordinary in the present case namely was there a *prima facie* case disclosed by the petition in what was said on behalf of the petitioner. The Lord Ordinary, it was submitted, however had misunderstood the decision in *Butt*. The hearing before the Lord Ordinary in that case at which first orders were sought was in effect treated as a first hearing.

[14] However the test should be formulated, the Lord Ordinary in the present case had reached the correct conclusion. The iceberg upon which the reclaimer foundered was that she entered the relationship with the former second petitioner, which was the platform upon which she sought to bring her case, after all her immigration remedies had been exhausted and her position had become precarious. That being so, the petition was manifestly without merit.

[15] If the court were to be against the respondent on the matter then it was accepted on behalf of the respondent that the appropriate disposal of the reclaiming motion was as proposed by senior counsel for the reclaimer.

[16] It is quite clear, in our opinion, that an applicant for judicial review does not by simply presenting a petition to the court have a right to have a motion for first orders granted. The wording of the relevant Rule of Court makes that clear. On the other

hand, the application for first orders is simply the first procedural step in the procedure for judicial review. Petitions for judicial review have, of their very nature, often to be brought in haste. It would be quite wrong, in our judgment, that a hearing of a motion for first orders should be regarded as anything like the equivalent of an application for leave to bring the petition. We regret to say that the Lord Ordinary has clearly, in that respect, erred. At page 34 of her opinion at paragraph 12 she states:

> "I consider it not at all unreasonable to expect of those who present the petition for judicial review that they should be in a position to satisfy the court of the relevancy of their case at the earliest stage. I do not mean to suggest, thereby, that they should be ready to present, at the motion for first orders, the sort of detailed argument that would be presented at a first hearing. They ought, however, to be in a position to satisfy the court that their case is an arguable one."

Notwithstanding the qualification put on the first sentence of that quotation by the second sentence we are satisfied that the Lord Ordinary clearly set the test too high for a motion for first orders to be granted. The heresy, which we have detected, is repeated by her Ladyship at page 35, paragraph 13 where she states:

> "....Mr Caskie's repeated submission was, at its highest, that the Secretary of State had failed to consider whether an Immigration Judge 'might' find in favour of a petitioner if the matter had been referred to him. It was not evident to me how that demonstrated that there was an arguable case of unreasonableness or irrationality on the part of the Secretary of State."

As to what the correct test is, we agree with the submission of counsel for the respondent that the hurdle to be crossed is a low one. While a residual power is given to the judge, hearing such a motion, to refuse it, such a power must be exercised, in

our opinion, only in what can be regarded as exceptional circumstances. These would include a petition which betrayed a clear lack of jurisdiction or incompetency which could not be explained away to any extent by the applicant's representative at the time of the hearing. Petitions whose averments are incomprehensible or gibberish would also entitle the judge to refuse first orders. We would not exclude also those cases which do not raise issues of jurisdiction or competency *strictu sensu* but, where the averments are apparently so out of step with received and long established canons of law, and where the representative of the applicant can give no indication as to how that fundamental difficulty might be resolved. But even in such cases caution should be exercised since the law is always developing and, in particular, in fields such as immigration law, can develop quite quickly and dramatically. These cases are often quite fact sensitive and an over ready conclusion on the merits of the matter without any testing of the facts might be quite inappropriate. In addition, as was observed in the course of discussion before the court to refuse such a motion before the respondent's position is known might preclude the applicant obtaining a remedy which the respondent, for whatever reason, is prepared, in the event, to be granted. Moreover experience shows that the respondent's position, once known, may indeed place the applicant's position in a better light than was first supposed. Ultimately it may be unwise to say anything more than that only in very clear exceptional cases should a refusal to grant first orders be made. It may be that the formulation of the test provided by the Lord President in the case of *Eba* "manifestly without substance" is simply a reflection of that being the position.

[17] Applying what we consider to be the proper approach to such a question, we have reached the conclusion that first orders should have been granted in this case. While there appears *prima facie* to be a very formidable obstacle in the way of the

reclaimer in seeking to establish her case, having regard to her immigration status when she elected to enter the relationship with the former second petitioner, there are considerations referred to in the case which may yet, after investigation and discussion, show that she is able to surmount that apparent obstacle. It is to be noted first of all that the application to the respondent was made under reference to "the Legacy Programme". The nature and relevance of that programme was not it seems the matter of any discussion before the Lord Ordinary or consideration by her. Moreover the reclaimer points to the lapse of time which has taken place between the final determination of her immigration appeal and action being taken by the respondent. The reclaimer also founds upon her medical history and the former second petitioner's position with regard to her Article 8 case. No conclusion on the merits, or otherwise, of these matters, and there may be others, should, in our judgment, be arrived at before first orders be granted. The questions which arise here are questions, which in our judgment, are questions of pure relevancy, which should be determined at a stage after the petition has been served on the respondent and answered by her.

[18] We accordingly, for the foregoing reasons allow the reclaiming motion, grant the motion for first orders and remit to the Lord Ordinary to proceed as accords.