OUTER HOUSE, COURT OF SESSION

[2009] CSOH 72

P92/09

OPINION OF LADY DORRIAN

in the Petition

of

R.S.

Petitioner;

for

Judicial Review of a decision of the Secretary of State for the Home Department

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Petitioner: Komorowski; Drummond Miller
Respondent: Stuart; C Mullin

27 May 2009

1. On 20 January 2009, the Secretary of State directed that the petitioner be removed from the United Kingdom on 30 January 2009. On 22 January 2008 the Secretary of State determined the further submissions made are on behalf of the petitioner on 16 January 2009 did not amount to a fresh Human Rights claim. The Secretary of State refused the petitioner leave to remain in the United Kingdom. Judicial Review of the decisions of 22 January 2009 is sought on the basis that these decisions were unlawful. The additional submissions presented to the Secretary of State on behalf of the petitioner argued that his removal would amount to a contravention of Article 8 of the European Convention of Human Rights in respect of his family life with his wife

and son in the UK. The submission stated that he was married to Mrs Gemma Singh nee Hely, a British National and that they had a 3 year old child named Aaron John Hely in the UK. It was claimed that it was disproportionate to require the applicant to return to India to obtain entry clearance.

2. The applicant's immigration history is set out in paragraph 2 of the decision letter and that narrative is not challenged. The appellant arrived in the United Kingdom in July 2000 and claimed asylum. His claim was refused on 16 May 2001 and an appeal dismissed on 22 January 2002. His application for permission to appeal to the Tribunal was refused in March 2002. He was encountered on 1 March 2007 working at the Rupee Room in Ayr. He stated his name as Rashpal Singh, born 8 July 1979. He further stated that he entered the United Kingdom 8 years before at Ireland with no passport. He stated he was married to a British national and had one child. Police checks revealed that he was wanted for three minor offences and was due to appear at Glasgow Sheriff Court on 2 March 2007 but failed to appear. On 18 May 2007, a warrant was issued for his arrest. He was supposed to report on a weekly basis to UKBA but had failed to do so since the middle of April 2007. He resisted as an absconder on 6 September 2007 and arrested on 9 January 2009 during an enforcement visit to the Cinnamon Club, Cambuslang, Glasgow.

3. Paragraph 6 of the decision letter stated as follows:

> "The step by step approach to deciding Article 8 has been followed. The first question is whether your client enjoys a family and private life in the United Kingdom. The evidence you have submitted has been fully considered and although you have provided some evidence in the form of witness statements and marriage certificate to show that your client and his wife are married with a son, there is no evidence to show that the marriage is still subsisting. Your client was interviewed on 9 January 2009 when he was encountered by immigration officials, and he admitted that although he was married, he was no longer living with his wife and son. He said they had not lived together for about 2 years. He gave his current address as Argyle Street, Glasgow and confirmed that although he did not reside with his wife and son he saw them occasionally and that the last time that he had seen his son was two weeks before his detention. Your client was unable to give the address where his wife

> and son lived and the reasons for this according to him were because they had just moved there. This admission therefore contradicts the statement submitted on behalf of your client that his marriage to Miss Gemma Hely was subsisting. It is therefore not accepted that your client and his wife still live together nor is it accepted that he is involved in the day to day care of his son. Furthermore it is noted from the marriage certificate that you have submitted that your client and his wife were married in 2004 that he failed to regularise his status then rather than waiting until he was facing removal from the UK. In the absence of irrefutable evidence to the contrary we do not accept that your client and his wife's marriage is still subsisting and although he has a son in the UK his removal from the UK will not be disproportionate. Paragraph 7 notwithstanding, even if it is the case that they are still married and in a subsisting relationship, and Article 8(1) is engaged, I do not accept that removal will breach Article 8(2) so long as it serves a legitimate aim and is proportionate. It is considered that any interference with your client's Article 8 rights is in pursuit of one of the permissible aims outlined in Article 8(2) and is proportionate. Case law has established that the maintenance of an effective immigration control falls within the permissible aims. In order to protect the wider interests and rights of the public it is vital to maintain effective immigration control. In pursuit of that aim and having weighed up your client's interests it is believed that any interference with his family/private life would be a legitimate, necessary and proportionate response, and in accordance with the law."

4. The decision therefore was that it was not accepted that the applicant and his wife were cohabiting or that there was a stable relationship between them. A family relationship with a child can of course survive divorce, but the applicant was not found credible relating to his relationship with either his wife and son, and was found not to be involved in the child's care. The fact that he did not even know the child's whereabouts was clearly the basis for a decision that there was no genuine continuing tie. It should be noted that in this case the basis on which the letter proceeded to conclude that Article 8 was not engaged is not challenged. The Secretary of State, having concluded that Article 8 is not engaged, goes on to address the question, *esto* Article 8 were engaged would it be disproportionate to remove the applicant from the

UK? The grounds of review, and the arguments before me, were all directed to this latter issue of proportionality. In the first place an attack is made on the Secretary of State's interpretation of the House of Lords' decision in *Chikwamba (FC)* v *SSHD* 2008 UK HL 40, first on the basis that the decision letter interpreted the reference to a poor immigration history in that case as a factor to be viewed in absolute terms; and second, on the basis that the decision effectively ignored a passage in the speech of Lord Brown of Eaton-under-Heywood that in family cases it will only be "comparatively rare" for entry clearance to be required. In my view, a proper reading of paragraph 11, where *Chikwamba* is considered, discloses no such errors. It is clear that *Chikwamba* was correctly noted as identifying a variety of relevant factors to be taken into account. It is not the case that the letter treated any one factor as being absolute and that it was understood that all relevant facts required to be considered. The comments of Lord Brown do not mean that entry clearance cannot be refused in an appropriate case and the strength or otherwise of family ties is a relevant consideration. It is also said that the Secretary of State failed to take into account the blood condition of the appellant's son when referring to the question of whether obstacles would prevent his wife from leaving the country with him. However it is clear that all this part of the letter is doing is drawing a distinction between the factual position of the wife in this case and that of *Chikwamba*.

5. Reference was made also to *WM(DRC) v SSHD 2007 Imm A R 6 EWCA 1495; R (Razgar) v SSHD 2004 AC 368; Huang v SSHD 2007 2AC 167; and KBO v SSHD [2009] CSIH 30.*

6. Finally, it was argued that the Secretary of State has given insufficient reasons for finding that the further submissions have no reasonable prospect of success. In particular, it is maintained that the Secretary of State rested the decision on her own views and did not consider whether there were reasonable prospects of an immigration judge taking a different view. It was clearly accepted that the Secretary of State was entitled to take her own views as a starting point. What was suggested, that she had not taken the further step of considering what might be the decision of an immigration judge. The Secretary of State clearly recognises the proper test in paragraph 19.

7. In a case where the issues are straightforward, no very elaborate reasoning may be required, so long as the proper test has been addressed. The statement in paragraph 20 that the submissions "would not have created a realistic prospect of success" shows that the Secretary of State was not simply relying on her own decision but was considering what might be the situation were the submissions to be considered elsewhere. I see no basis for concluding that this exercise was not carried out with due scrutiny. The correct test has therefore been applied. The application is without merit and will be refused.