OUTER HOUSE, COURT OF SESSION

[2009] CSOH 73

P2027/08

OPINION OF LADY DORRIAN

in the cause

K.D.

Petitioner;

For

Judicial Review

Petitioner: Caskie; McGill & Co
Respondent: Stuart; C Mullin

27 May 2009

1. The petitioner in this case seeks judicial review of a decision of the Secretary of State for the Home Department dated 12 December 2008 refusing to treat representations made on his behalf as a fresh claim for asylum. The decision of 12 December 2008 was the culmination of a lengthy immigration history. The factual summary contained in the decision letter of 12 December 2008 was accepted as accurate. That shows that the applicant arrived in the United Kingdom on 27 August 1999 as the holder of a work permit valid until 5 September 1999. He failed to leave

the country on the expiration of that permit and was subsequently encountered working illegally at the Amritsar restaurant in Kirkcaldy on 13 October 2001. Having been served with illegal entry papers he claimed asylum on 17 October 2001. That claim was refused on 2 August 2002 and his appeal rights thereanent were exhausted on 1 May 2003. An application for leave to remain as a student was submitted on 23 March 2004 and refused on 19 March 2005. On 2 October 2005 he was again encountered working illegally in the Amritsar restaurant and was arrested and detained. On 4 October 2005 a fresh asylum application was made. On 26 October 2005 a decision refusing to treat this as further representations was made and removal directions were set for 4 November 2005. Following a petition for judicial review removal directions were cancelled and he was released on bail on 5 November 2005. On 5 April 2006 an oral hearing in the judicial review was adjourned and on 22 September 2006 he was given an indication that his representations were accepted as amounting to a fresh asylum claim. That claim was refused on 12 April 2007 and his appeal rights were exhausted on 24 July 2007. Given the concession of 22 September 2006 the judicial review did not proceed. On 4 March 2007 he was encountered for a third time working illegally at the Amritsar restaurant. By

representations made in January and February 2008 a "Legacy Review" of the case was sought. That was refused and he was advised that he had failed to provide any sufficiently compelling or compassionate circumstances to justify allowing him to remain in the UK outside of the immigration rules. On 2 June 2008 he applied to the IOM for assistance to return to Nepal but failed to follow up that interest and the offer of assistance was withdrawn on 6 October 2008.

2. The further representations which became the subject matter of the decision letter of 12 December 2008 were made on 19 November 2008. As the petition states the gravamen of those representations was that

> "over the nine years the petitioner had been in the United Kingdom (and in respect of only the two initial years of which the petitioner had not been in regular contact with the immigration authorities), he had built up a sufficiently strong private life in the United Kingdom to make his removal from the United Kingdom disproportionate and in breach of Article 8 of the European Convention of Human Rights. The representations submitted in support of that application were extensive, and were designed to seek to demonstrate the extent to which the petitioner had become embedded in Scottish society. The representations included many personal

references, a petition to the Scottish Parliament, evidence of his educational qualifications and of his involvement in a great many societies and organisations was produced to the Secretary of State.(sic) The Secretary of State was already aware that the petitioner also had a record of employment, albeit that was not employment he had been authorised to take, but it was nonetheless relevant to his private life in the United Kingdom."

3. These submissions fell to be considered under the terms of Immigration Rule 353 which states as follows:-

> "When a human rights or asylum claim has been refused 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) have not already been considered; and
>
> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejections."

4. Under this rule the Secretary of State has to consider the submissions themselves and reach a decision on them. Only if they are rejected does the Secretary of State proceed to address the issues referred to in paragraphs (i) and (ii) of the rule. Initially an argument was advanced that the Secretary of State had not taken the first step and had made no decision on the submissions. However, on a careful scrutiny of the letter that argument was departed from. The letter refers to Rule 353 before going on to state that "the contents of your representations have been carefully considered but for the reasons given below we are satisfied that your clients removal does not breach the European Convention on Human Rights". It then proceeds to give reasons for that decision. It will be seen therefore that in this decision letter the first part of Rule 353 is addressed, namely that the further submissions are considered and rejected.

5. The next step to be taken under Rule 353 is to determine whether the submissions amount to a fresh claim. This in turn requires an assessment of two factors; whether the material had already been considered and whether taken together with previously considered material it created a realistic prospect of success notwithstanding its rejection. It is clear from the terms of the first full paragraph of page 3 of the decision letter which refers to evidence which has "now" been provided, that the Secretary of

State reached the view that there was indeed new material which had not previously been considered. The only remaining issue therefore was whether, taken together with the previously considered material, this created a realistic prospect of success.

Petitioner's arguments

6. For the petitioner it was argued that the Secretary of State had erred in the following ways:

(a) by failing, in addressing proportionality, to weigh the extent of the petitioner's private life;

(b) by failing to take account of alleged delay in dealing with the petitioner's case;

(c) by failing to take account of the fluctuating situation in Nepal as a relevant factor which might weigh with an Immigration Judge; and

(d) by failing to consider whether an Immigration Judge might make different findings.

7. Under reference to *WM (DRC)* v *SHHD* 2006 EWCA Civ 1495, counsel submitted that the test to be met under Rule 353 was a modest one, requiring the court to be satisfied that the Secretary of State has applied anxious scrutiny to the case. Reference was also made to *AK (Afghanistan)* v *SSHD* 2007 EWCA Civ 535, *Uner* v *The Netherlands* (2007) 45 EHRR 14, *Huang & others* v *SHD* 2007 2 AC 167 and KBO v SHHD [2009] CSIH 30.

Arguments on (a) and (d)

8. It was submitted that the decision letter made no findings as to the extent of the petitioner's family life and that without setting out in terms what was accepted to be the extent of the private life in the United Kingdom the writer could not have "weighed up the extent" of the applicant's private life. Moreover, without carrying out such an exercise, the Secretary of State could not be said to have applied the test of whether there would be a realistic prospect of success before an Immigration Judge. Such a judge would have regard to the documentation in support of the claim, including letters of support from persons of standing in the community, the fact that the applicant was registered to vote and that he had obtained an HNC in graphic design. Some of these factors might have been known about before e.g. the HNC or his ability to vote, but the overall package which was now presented was different and might cause an immigration judge to allow the Article 8 claim.

Arguments on (c)

9. Reference was made to the case of *KG (Review of current situation) Nepal CG* [2006] UK AIT 00076, a country guidance case referred to as indicating the prevailing situation in Nepal at the various times when the petitioner's applications for

asylum were made. Two claims for asylum were made when the situation in Nepal was extremely poor and volatile but in each case the situation had improved by the time the decision was made. It was not suggested that the case should have been governed by the situation prevailing at the time of the applications for asylum but it was submitted that this escalating and receding situation was relevant when looking at how an immigration judge in the future might approach an Article 8 claim. Such a judge would be entitled to conclude that the applicant had had very good reason for staying in the UK.

Arguments on (b)

10. These submissions were predicated on the case of *EB (Kosovo)* v *SSHD* 2008 3 W. L. R. 178, specifically on paragraphs 13 to 16 of the speech of Lord Bingham of Cornhill. Delay was there identified as having a possible relevance in three ways. First , during the period of delay an applicant might develop closer personal and social ties and deeper routes in the community than could have been shown earlier. Second, although any relationship into which an immigrant without leave to enter embarks upon is likely to be tentative, if months or years pass without a decision to remove being made that sense of impermanence will give way to an expectation that if the

authorities had intended to remove the applicant they would have taken steps to do so. Finally delay may be relevant in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes. When the judicial review in this case was disposed of in September 2006 by a concession that a fresh claim had been made under Rule 353 the Secretary of State should have determined first of all whether the petitioner was a refugee and if that decision was in the negative only then gone on to determine whether it was a fresh claim. If the question "Is he a refugee?" had been asked in September 2006 the answer might well have been different to that given in April or June 2007. This might indicate a disfunctionality in the system of the kind referred to by Lord Bingham.

Respondent's submissions

11. Counsel submitted that whilst there was a long protracted immigration history in this case it was not replete with delay on the part of the Secretary of State. It was replete with failed applications for leave to remain by the petitioner during that period. For two of the nine years which the applicant has spent in this country he merely avoided the immigration authorities. Five years have been engaged in fruitless applications for asylum. There have been seven years of active procedure with no

basis for considering that at any stage it would have been legitimate or reasonable for the applicant to think that the Secretary of State no longer wished to remove him from the country. The only period of inaction was March 2005 to October 2005. The situation here was far removed from the case of *EB(Kosovo)*. There was no basis for the applicant to expect that he would not be removed from the country. The pursuer's argument that the fluctuating situation in Nepal might lead an immigration judge today to say that the applicant had reason for remaining in this country was flawed. Such an approach would be to apply a subjective test whereas the only question could be whether it was objectively reasonable for the applicant to feel that he was at risk. A misconceived belief in risk attendant on return has no relevance, particularly in the light of repeated decisions that he would not be at risk. The applicant knew at all times that his position in the UK was tenuous. His work permit had expired, his applications to remain in the country had been refused. A finding that Article 8 rights will be infringed is not lightly to be embarked upon. Counsel drew attention to the observations of Lord Hope of Craighead in *EB (Kosovo)* where, whilst agreeing with Lord Bingham of Cornhill, he observed that "Article 8 claimants ought not to be advantaged merely because of the deficiencies in the control system, as my noble and

learned friend, Lord Brown of Eaton -Under -Heywood, points out.....a case ought not to succeed merely because it might have been stronger if it had been determined earlier." Apart from the fact that there were no inordinate delays in this case it should not be overlooked that the applicant was a person who knew first of all that his permit had expired and secondly knew that his application to remain had been refused. Against that background he then made a subsequent application which must indicate that he was harbouring no illusions as to the precarious nature of his position.

12. Counsel submitted that the Secretary of State had clearly directed herself to the correct test. It is at least implicit in the decision that she has refused the asylum claim. She then goes on to take account of the new material, concludes that Article 8 is engaged on the basis of private life but that the applicant fails on the issue of proportionality. The exercise upon which the Secretary of State embarked was a balancing one so regard had to be had to the quality of the private life, always tenuous, to the immigration history and make an assessment.

Discussion

(a) and (d)

13. The conclusion reached in the letter is that the fresh submissions, together with material previously considered "would not create a realistic prospect of success before a new immigration judge when applying the rule of anxious scrutiny." That conclusion is preceded by the reasoning which is applied to the circumstances of the case and which forms the basis for that conclusion. It is clear from the reasoning that a variety of factors were taken into account in reaching that conclusion. The legitimate aim of maintaining effective immigration control is one. The immigration history of the applicant is another. The extent of the private life exhibited by the applicant is also one. The letter had already noted that the applicant had remained in the UK for a lengthy period of time and "during that time made steps to integrate into his local community." It went on to refer to the "the evidence of integration into the local community your client has now provided" and "large network of friends and support your client has shown". I do not think it can fairly be said that the Secretary of State failed to make a proper assessment of the extent of the applicant's private life which was being founded upon. An attempt was made to suggest that the Secretary of State had effectively decided this matter on the basis of what her own views were rather than on a consideration of what might be open to a properly directed immigration

judge. I do not consider that this was well founded. It seems clear to me that on page 3 the Secretary of State is addressing the correct test and is approaching the matter on the basis of whether there would be a reasonable prospect of success before an immigration judge.

The letter goes on to state:

> "I have weighed up the extent of your clients life against his failure to return to Nepal when his visa expired in September 1999 instead going to ground until being encountered by immigration officials two years later, his being encountered working illegally on three separate occasions, the findings of both adjudicators who considered your clients case and conclude there would be no realistic prospect of an immigration judge, properly directing himself coming to a different view on proportionality."

It will be seen that in this passage the Secretary of State is properly addressing the test set out in Rule 353 and is making an assessment based on what might be a view open to a properly directed immigration judge. This whole passage is presented separately from the Secretary of State's own decision on the submissions which appears on the previous page and it cannot be said that the Secretary of State was merely substituting

or repeating her own reasons without considering how the matter might appear to an Immigration Judge.

(c)

On this matter I agree with the submissions for the respondent. The issue here must be judged objectively not subjectively. An applicant cannot ignore an adverse decision on asylum by virtue of a misconceived belief that he would be at risk if he returned to his country of origin. I do not think that the fluctuating situation in Nepal has any bearing on the circumstances of this case.

(d)

In the first place, I do not consider that there has been any significant or blameworthy delay in this case. Undoubtedly the passage of time in this case may have deepened the petitioner's connections with the local community but this has not been as a result of any delay of the kind castigated in *EB (Kosovo) v SSHD.* Furthermore, the kind of delay representative of disfunctionality referred to in that case is quite absent in the present case. Even if the Secretary of State erred in 2006 in treating the submissions as a new claim without making a clear finding on the substantive issue first, this was

not the kind of systemic failure which Lord Bingham seems to have had in mind in

EB (Kosovo).

Decision

For the reasons given I shall repel the petitioner's plea in law and dismiss the petition.