OUTER HOUSE, COURT OF SESSION

[2011] CSOH 12

P1041/10

OPINION OF LORD UIST

in the Petition of

C.P.O. (AP)

for

Judicial Review of decisions of the Secretary of State for the Home Department dated 12 March and 20 April 2010

Petitioner: Forrest; Drummond Miller LLP
Respondent: McIlvride; C Mullin

25 January 2011

Introduction

[1] The petitioner, who designs herself by three different names and claims that her date of birth is 10 June 1993, is a Nigerian national who arrived in the United Kingdom from Nigeria in November 2007 and claimed asylum on 10 September 2008 on the ground that she feared persecution at the hands of a tribal chief or elder in her local area. Her application for asylum was refused by the Secretary of State for the Home Department, who is the respondent in these proceedings, and that decision was upheld by an immigration judge on 23 April 2009. The immigration judge rejected her

application because, first, he did not accept her account of persecution as being credible, and, secondly, he was of the view, even if her account of persecution was credible, she could relocate internally in Nigeria upon her return there. Moreover, in his determination, on the basis of certain indicators which he listed, he raised the possibility that the petitioner might have been trafficked into the United Kingdom for the purposes of exploitation. He held that it was impossible to reach a firm view about this as the petitioner had not offered any evidence that she had been trafficked. Nevertheless, he went on to state that, even if she had been trafficked, he considered that she could relocate elsewhere in Nigeria. The petitioner applied for reconsideration of the determination of the immigration judge but her application was refused on 25 May 2009, when her appeal rights became exhausted.

[2] Solicitors acting for the petitioner wrote to the respondent on 8 September 2009 providing further evidence in support of what they claimed was a fresh claim for asylum under Rule 353 of the Immigration Rules. They relied upon a statement of the petitioner dated 8 September 2009 in which she stated that she had not said everything that had happened to her when she originally claimed asylum because she was scared due to the fact that she had been made to go through an oath ceremony in Nigeria before she left. She had been warned not to tell anyone about this oath, the person who was bringing her to the United Kingdom and what she was doing in the United Kingdom. Her new solicitors had explained to her why she needed to tell everything and she had been put in touch with an organisation whose representative had explained to her that she would be OK if she broke the oath which she had been made to give. She then went on to give an account of having been trafficked into the United Kingdom. In a subsequent letter dated 22 February 2010 further evidence in support of the petitioner's fresh claim for asylum was submitted by her solicitors.

[3] In a decision letter dated 12 March 2010 the respondent rejected the petitioner's fresh claim for asylum and held that there was no realistic prospect of an immigration judge, applying the rule of anxious scrutiny, reversing the findings made by the original immigration judge based on the information submitted.

[4] By letters dated 8 and 14 April 2010 the petitioner's solicitors submitted yet further information in support of a fresh claim for asylum but these were rejected by the respondent in a letter of 20 April 2010 which stated that the original decision of the immigration judge dated 23 April 2009 should not be reversed and that submissions made on behalf of the petitioner did not amount to a fresh claim for asylum.

[5] The petitioner now challenges the decisions of the respondent dated 12 March and 20 April 2010 as being unreasonable and contrary to law. She seeks reduction of those decisions.

Rule 353 of the Immigration Rules

[6] Rule 353 of the Immigration Rules (as amended) provides:

> "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) 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."

[7] There is no form of appeal against a decision of the respondent taken under Rule 353 and the only method of challenging a decision is by way of judicial review.

In its previous form Rule 353 excluded from consideration material on which the petitioner could reasonably have been expected to rely in the earlier claim but that exclusion has been deleted and the petitioner is therefore entitled to rely in her favour on the fact that she was untruthful in the information which she provided in support of her original claim for asylum. In determining whether the further submissions amount to a fresh claim the Secretary of State is obliged to consider (a) whether the new material was significantly different from that previously submitted; and (b) if it was, whether it created a realistic prospect of success in a future asylum claim when taken along with the previously considered material: see *R* v *Secretary of State for the Home Department ex p Onibiyo* [1996] QB 768 and *WM (DRC)* v *Secretary of State for the Home Department* [2006] EWCA Civ 1495. The fresh evidence requires anxious scrutiny. All that is required is a realistic prospect of success before another immigration judge: success need not be guaranteed. Counsel for the respondent stated that the respondent was content to accept that the court in judicial review proceedings is entitled to exercise its own judgment on the question of a realistic prospect of success, although that question must be judged on the basis of the material which was available to the respondent: see *R(YH)* v *Secretary of State for the Home Department* [2010] EWCA Civ 116 per Carnwath LJ at para 21 and *IM* v *Secretary of State for the Home Department* [2010] CSOH 103 per Lord Tyre at para 11.

Grounds of Challenge

[8] Two separate grounds of challenge to the respondent's decisions were advanced on behalf of the petitioner. These were that the decisions were irrational, first, because they compared the previous decision with the fresh claim by confusing the circumstances in which the issue of trafficking arose in each claim, and, secondly,

they failed to take proper account of both the law and the particular facts on the issue of internal relocation.

[9] So far as the first ground of challenge is concerned, it was submitted that it was wrong for the respondent to have stated in the decision letter of 12 March 2010 that the issue of trafficking had been previously addressed. I am satisfied that, for the reasons given in the submission for the respondent, there is no merit in this ground of challenge. It is plain that the issue of trafficking had previously been addressed by the immigration judge despite the fact that the petitioner herself had not at that time claimed to have been the victim of trafficking. He referred at para 14 of his determination to a submission by the Home Office representative that there was the possibility that the petitioner had been trafficked. At paras 19 and 20 he listed indicators which showed that the petitioner might have been trafficked into the United Kingdom for the purposes of exploitation. At para 24 he stated that it might well be that the petitioner was someone who had been trafficked into the United Kingdom but that it was impossible to reach a firm view about this as she had not offered any evidence that she had been trafficked. He then went on to hold that, even if she had been trafficked, he considered that she could relocate elsewhere in Nigeria. In the decision letter of 12 March 2010 the respondent stated at para 10 that the issue in relation to the petitioner's claimed trafficking had previously been addressed but that it was accepted that the information then presented had not previously been presented as the petitioner had previously denied that she had been trafficked. The petitioner's new position was summarised by the respondent at paras 15 and 16 and he discussed the issue of trafficking in light of the new information provided between paras 20 and 34. I find no confusion on the part of the respondent in dealing with the issue of trafficking: the previously available and newly submitted material was considered by

the respondent on the basis that the petitioner had been trafficked, as she claimed. I can detect no error by the respondent in dealing with the issue of trafficking.

[10] In relation to the second ground of challenge, it was accepted that at para 23 of his determination the immigration judge had made a finding that it would not be unduly harsh or unreasonable to ask the petitioner to relocate were she to be returned to Nigeria. The immigration judge referred to what was said by Lord Brown of Eaton-under-Haywood in *AH and Others (Sudan)* v *Secretary of State for the Home Department* [2008] 1 AC 678 at page 695C, para 42:

> "Only proof that their lives on return would be quite simply intolerable compared even to the problems and deprivations of so many of their fellow countrymen would entitle them to refugee status. Compassion alone cannot justify the grant of asylum."

Reliance was placed on fresh evidence in the form of a report by a Nigerian lawyer, Victoria Ijeoma Nwogu, in which the author asserted her opinion that there was no option of the petitioner safely relocating to other parts of the country because, with no social networks to rely on, there was a substantial risk of her becoming destitute, and such destitution would most certainly render her more vulnerable to re-trafficking by other criminals, being forced into prostitution or other forms of forced labour. Reliance was also placed on the Country of Origin Information Report for Nigeria dated 15 January 2010, in particular para 26.15, which indicated that resources were required by a person to settle in a new area in Nigeria. It was maintained for the petitioner that Miss Nwogu's opinion and the information in the Country of Origin Information Report had not been taken into account by the respondent in deciding whether it would be unduly harsh or unreasonable to expect her to relocate. Moreover, the petitioner's age, gender, health and personal circumstances all had to be taken into account and the respondent's decision did not make reference to these items of information.

[11] In my opinion this second ground of challenge is also without merit. The Immigration and Asylum Chambers of the First-Tier Tribunal and the Upper Tribunal Practice Direction dated 10 February 2010 states at para 12.2:

> "A reported determination of the Tribunal, the AIT or the IAT bearing the letters 'CG' shall be treated as an authoritative finding on the country guidance issue identified in the determination, based upon the evidence before the members of the Tribunal, the AIT or the IAT that determine the appeal. As a result, unless it has been expressly superseded or replaced by any later 'CG' determination, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authoritative in any subsequent appeal, so far as that appeal:-
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> (a) relates to the country guidance issue in question: and
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> (b) depends upon the same or similar evidence."

In accordance with that practice direction an immigration judge considering afresh the question of internal relocation for the petitioner in Nigeria would be bound by the decision of the Asylum and Immigration Tribunal in the case of *PO (Trafficked Women) Nigeria CG* [2009] UKAIT 00046 (particularly paras 203 and 204) in which the Tribunal concluded that it would not be unduly harsh or unreasonable to expect the petitioner in that case, who had been trafficked and who had a child, to relocate within Nigeria. It was said on behalf of the petitioner that reliance on the case of *PO* was at present misplaced as the decision had been appealed and an appeal had been heard on 12 January 2011 in which it was argued that the findings made were wrong. Moreover, it might be the case that the appeal decision would be the subject of a further appeal to the Supreme Court. Nevertheless, I consider that the practice direction referred to would require an immigration judge to proceed at present on the country guidance provided by the Asylum and Immigration Tribunal in the case of *PO*. In light of the practice direction, the country guidance given in the case of *PO* overrides any expression of opinion by Miss Nwogu.

Decision

[12] For the reasons set out above, I shall repel the pleas-in-law for the petitioner, sustain the plea-in-law for the respondent and dismiss the petition.