OUTER HOUSE, COURT OF SESSION

[2009] CSOH 140

P648/09

OPINION OF LORD UIST

in the Petition of

JL

for

Judicial Review of a decision by the Secretary of State for the Home Department dated 4 March 2009 refusing to accept that further submissions amount to a fresh claim for asylum

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Petitioner: Forrest; Drummond Miller LLP
Respondent: Webster; OSAG

27 October 2009

Introduction

[1] The petitioner, who was born on 29 August 1959, is a national of Cameroon. On 22 January 1999 he arrived in the United Kingdom using a forged document and claimed asylum. On 1 December 2000 his application for asylum was refused by the Secretary of State for the Home Department, who is the respondent in this petition. The petitioner thereafter appealed against the refusal of asylum to an adjudicator, who dismissed his appeal on 15 February 2002. An appeal against that decision was taken to the Immigration Appeal Tribunal, which dismissed the appeal on 28 October 2002.

The petitioner then sought leave to remain on compassionate grounds. This was refused on 28 February 2003. He thereafter submitted further representations to the Secretary of State on five separate occasions, the last being on 4 April 2005. All such further representations were rebutted. On 18 April 2005 he absconded from the address in London where he had been living and eventually resurfaced in Glasgow on 10 October 2007. He again submitted further representations on 24 February 2009, which the Secretary of State rebutted by decision dated 4 March 2009. The present petition seeks reduction of that decision on the ground that the Secretary of State erred in law by acting unlawfully and irrationally in reaching it.

The relevant test

[2] The test which has to be applied by the Secretary of State in considering whether further representations following a failed asylum claim amount to a fresh claim is set out in paragraph 353 of the Immigration Rules, which provides as follows:-

> "When a human rights or an asylum claim has been refused and any appeal relating to the 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;
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> (ii) taken together with previously considered material created a realistic prospect of success, notwithstanding its rejection".

[3] In *WM (DRC)* v *Secretary of State for the Home Department* [2007] INLR 126 Buxton LJ stated at page 130, para [11] that a court when reviewing a decision of the Secretary of State as to whether a fresh claim existed must address the following matters:

> "First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of prosecution on return. . . The Secretary of State of course can, and no doubt logically should, treat his own view of the merits as a starting point for that inquiry; but it is only a starting point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind. Second, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? If the court cannot be satisfied that the answer to both of those questions is in the affirmative, it will have to grant an application for review of the Secretary of State's decision."

[4] In *R (Razgar)* v *Home Secretary* [2004] A C 368, Lord Bingham of Cornhill stated at page 389, para 17:

> "In considering whether a challenge to the Secretary of State's decision to remove a person must clearly fail, the reviewing court must, as it seems to me, consider how an appeal would be likely to fare before an adjudicator, as the tribunal responsible for deciding the appeal if there were an appeal. This means that the reviewing court must ask itself essentially the questions which would have to be answered by an adjudicator. In a case where removal is resisted in reliance on article 8, these questions are likely to be:
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> > (1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private life or (as the case may be) family life?
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> > (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?
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> > (3) If so, is such interference in accordance with the law?
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> > (4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
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> > (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

[5] In *VW (Uganda)* v *Secretary of State for the Home Depart*ment [2009] EWCA Civ 5, Sedley J set out the relevant law at paras 17 to 24. He stated as follows at para 24:

> ".....the material question in gauging the proportionality of a removal or deportation which will or may break up a family unless the family itself

> decamps is not whether there is an insuperable obstacle to this happening but whether it is reasonable to expect the family to leave with the appellant."

The Secretary of State's decision

[6] In his decision letter of 4 March 2009 (6/1 of process) the Secretary of State quoted para 353 of the Immigration Rules and accepted that none of the submissions made by the petitioner had been considered previously. He went on to state that the question was therefore whether, when those submissions were taken together with previously considered material and the actions of the petitioner, they created a realistic prospect of success. He next considered the question of proportionality and the balancing exercise that an immigration judge would have to undertake. He accepted that the petitioner's removal from the United Kingdom would constitute an interference with his private life and that an immigration judge would conclude that the interference would be sufficiently real potentially to engage article 8 of the European Convention on Human Rights (ECHR). He referred to the petitioner's history, in particular that he had worked after his permission to work had been revoked and remained in the United Kingdom when he had no leave to do so. He determined that there was no realistic prospect of an immigration judge finding that there were factors in the petitioner's favour which outweighed the need to maintain effective immigration control, which was a weighty consideration in conducting a balancing exercise. It was accepted that the petitioner had established a private life and had a wide circle of friends and acquaintances in Glasgow and that his removal to Cameroon would interfere with these connections, but it was not accepted that an immigration judge could find that these ties outweighed the need to maintain an effective immigration control. As the petitioner did not live with his girlfriend in Glasgow it was considered that an immigration judge would not consider this

situation to constitute a subsisting family relationship and there were no insurmountable obstacles to them enjoying their private life elsewhere. So far as the petitioner's anxiety and depression were concerned, there were, according to the World Health Organisation, the necessary medical facilities in Cameroon. He concluded by stating that it was not accepted that there was a realistic prospect of an immigration judge concluding that the removal of the petitioner would constitute a disproportionate interference with his private and family life and that his article 8 rights would be breached. He added that the petitioner did not qualify for discretionary leave to remain in the United Kingdom.

Submission for the petitioner

[7] The submission for the petitioner was that the Secretary of State had not carried out the required balancing exercise because he had not taken into account, or at least not properly taken into account, all the material facts and circumstances. The decision maker had to look properly at all the facts and circumstances. The Secretary of State could have enquired into the petitioner's relationship with the named woman in Glasgow and his social connections at the church he attended, but instead reverted to relying on his own obligations to maintain effective immigration control. Further, there was an error in referring to "no insurmountable obstacles", which was not the test. Moreover, the Secretary of State's consideration of the medical issue was irrational: his response to the petitioner was to tell him that he would get treatment in his own country.

Submission for the respondent

[8] The submission for the respondent was that when his letter of 4 March 2009 was

read in context and as a whole it did not disclose any error of law. The respondent had in mind how an immigration judge would deal with the matter. The submission for the petitioner depended on the issue of proportionality, but it was more than tolerably clear from the respondent's decision letter that he had embarked on the necessary balancing exercise. It was not clear what the petitioner was saying the respondent had failed to take into account. The burden was on the petitioner to present the required material to the respondent and it was then for the respondent to reach a decision on the basis of the material presented to him. The respondent was not under any duty to carry out an enquiry. The court should not expect the decision letter to contain a lengthy discussion of every issue. The medical issue had been properly considered by the respondent: *R* (*Iran)* v. *Secretary of State for the Home Department* [2005] EWCA Civ 982 per Brooke LJ at paras 13 to 16. The court should not expect the Secretary of State to deal with every factual matter placed before him. It was for the petitioner to identify the material to which the Secretary of State had not had regard. The Secretary of State did not say in his decision letter that the petitioner had to identify an insurmountable obstacle to the enjoyment of his private life if he were returned to Cameroon. "Insurmountable". meant "real" and the issue was whether there were real obstacles to the establishing of a private life elsewhere: *VW (Uganda)* v *Secretary of State for the Home Department* at para 19 and *LM (DRC)* v *Secretary of State for the Home Department* [2008] EWCA Civ 325. The Secretary of State, looking at the matter in the round, had considered whether there was any real obstacle to the petitioner establishing a private life elsewhere. The decision letter, read as a whole and in context, allowed one to conclude safely that the Secretary of State had not addressed the article 8 issue on the basis of a test of insurmountability. The terms of the conclusion in the decision letter could not be said to be perverse.

[9] So far as the issue of the petitioner's mental health was concerned, the petitioner had to place himself in extreme circumstances if he sought to avail himself of article 3 of the ECHR: *R (Razgar)* v *Home Secretary* per Lord Bingham of Cornhill at paras 1 to 10, Lord Walker of Gestingthorpe at para 37 and Baroness Hale of Richmond at para 59. It was not the case that the petitioner would be denied any mental health care if returned to Cameroon. The facts of the case did not come anywhere near suggesting that this return to Cameroon would amount to inhuman or degrading treatment. The necessary therapeutic drugs would be available there.

Discussion and conclusion

[10] The submission for the petitioner was remarkable for its lack of content. It failed to identify the specific facts and circumstances which the Secretary of State had failed to take into account when reaching his decision. It is quite clear from the decision letter that the Secretary of State approached his decision-making task by considering what an immigration judge would be likely to make of the petitioner's representations. The Secretary of State did not seek to decide the issue himself, but approached it by asking what an immigration judge could make of the new representations. The fact of the matter is that the only change which there has been in the petitioner's personal circumstances since he last made further representations on 4 April 2005 is that he has come to live in Glasgow, where he has made friends. He is a single man with no family commitments or obligations. He does not live with his girlfriend. In my opinion it is fanciful to suggest that, in these circumstances, an immigration judge could conclude that his removal to Cameroon would amount to a breach of either article 3 or article 8 of the ECHR. It is unfortunate that in his decision letter the Secretary of State used the expression "no insurmountable obstacles". I accept the

submission made on his behalf that this means no more than whether there are real obstacles to establishing a private life elsewhere. The submission for the petitioner suggested at one point that the Secretary of State could have enquired into the petitioner's relationship with his girlfriend and his friendships at the church he attended. It has to be made clear that, when he considers fresh representations, the Secretary of State is under no obligation to carry out an enquiry of any sort: the burden of establishing that the new representations amount to a fresh application rests upon the person making the representations.

[11] In my opinion this application to the supervisory jurisdiction of the court is wholly without merit.

Decision

[12] As I am satisfied, for the reasons set out above, that there was no illegality or irrationality in the Secretary of State's decision of 4 March 2009 I shall dismiss the petition.