Neutral Citation Number: [2010] EWHC 1321 (Admin)

Case No: CO/14182/09

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10th June 2010

Before :

MR CHRISTOPHER SYMONS Q.C.
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

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Between :

THE QUEEN ON THE APPLICATION OF FLORENCE MHANGO — **Claimant**

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT — **Defendant**

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- -

Michael Harris (instructed by Beemans solicitors) for the Claimant
Brendan McGurk (instructed by the Treasury Solicitor)

Hearing date: 27th May 2010

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Judgment

Christopher Symons Q.C.:

Introduction

1. This is an application for Judicial Review of a decision of the Defendant contained in a decision letter dated the 18 November 2009. That decision was supplemented and further explained by a letter of the 5 March 2010. The application is brought on behalf of the Claimant herself and also directly affects her young daughter, Tionge. Permission was refused on paper by Wyn Williams J. on the 18 December 2009 but was granted at an oral hearing of the renewed application by H.H. Judge Thornton Q.C. on 10th February 2010.

2. By the decision referred to above the Secretary of State declined to accept that the Claimant's submissions, on why she and her daughter should remain in the United Kingdom, amounted to a fresh claim. Before I turn to the arguments advanced it is necessary to set out the history of this matter.

The Immigration History

3. The Claimant is now aged 32 and is a national of Malawi. She arrived in the United Kingdom on 3 May 2003 with her daughter, Tionge Mhango, who was born on 29 October 1999 and is therefore now 10 years old and was 3 when she was brought to the United Kingdom. At the time of their entry the Claimant's husband was in the United Kingdom on a student visa which was due to expire on 31 October 2007. The Claimant was given leave to remain also expiring on 31 October 2007. The Claimant separated from her husband in July 2006. Her husband did not seek to renew his visa on its expiry (although it was later renewed in 2008). Thus the Claimant had no leave to remain as a dependent and did not initially take any steps to regularise her position in the United Kingdom on the expiry of her visa.

4. On 25 March 2008 the Claimant claimed asylum. At that stage she and her daughter had been in the country a little under 5 years. Her asylum application was rejected on 21 May 2008 and she then appealed to the Asylum and Immigration Tribunal. During the course of the hearing the Claimant made a number of allegations to the effect that she and her daughter would be at risk if they returned to Malawi but these allegations were not accepted by the learned Immigration Judge and on 21 August 2008 he rejected the appeal. The effect of the Judge's decision was that he did not accept that the Claimant was a credible witness in relation to those matters.

5. An application for asylum was made by Tionge in her own right on 11 February 2009 but that claim was refused and certified under section 96(2) of the Nationality, Immigration and Asylum Act 2002 on 30 July 2009. While an application was made to have that decision judicially reviewed in the Scottish Court of Session that claim was not pursued and was withdrawn on 29 September 2009.

6. Further submissions were made by the Claimant by letter of 29 October 2009 and it was in response to those further submissions that the Secretary of State issued the decision letter of 18 November 2009.

Other relevant history

7. After the separation from her husband in July 2006 the Claimant and her daughter lived in their own accommodation. Tionge had started her education at the Eardley Primary School in Streatham in September 2003 and she continued at that school until she and her mother moved to Glasgow in early 2007. In March 2007 Tionge started school at Dalmarnock Primary School. She moved to St. Maria Goretti Primary School in Glasgow in October 2008. It is to Tionge's credit that she appears to have done well at all her schools and fitted in well with other children.

8. It is also apparent from letters which were before the Secretary of State and before me that the Claimant has fitted in well in the community in Glasgow and is a well respected citizen and she and her daughter have made many friends in the area.

The Claimant's letter of 12 October 2009 and the Decision letter of 18 November 2009

9. In the letter of 12 October 2009 those representing the Claimant drew the Secretary of State's attention to a considerable number of testimonial letters concerning both the Claimant and her daughter and enclosed copies. The letter focussed on the position of

Tionge and enclosed her school reports and other materials. On the second page the letter continued:

> "We, in particular, wish you to consider the child Tionge Precious Mhango's circumstances. She has been here for the majority of her life and can only remember life in the United Kingdom. She has been educated here, having attended previously a primary school in England … before moving to Glasgow… The child has been educated here and has settled into life in the United Kingdom. The child cannot speak any language apart from English. She cannot speak Chichewa, the native language of Malawi, or any other spoken language there. The child therefore would encounter extreme difficulties in an educational, social and developmental capacity if she were to be forcibly returned to Malawi. We would submit it would be unduly harsh to remove the child from her settled environment and from a country which she has been a part of for all the parts of her life she can remember. Consequently we would submit that strong consideration should be given to the child's position when considering both forms and Tionge's immigration case.
>
> We would submit that Discretionary Leave applies in this case, the child having been in the United Kingdom since, in effect, 2003."

10. In the decision letter of 18 November 2009 the Secretary of State set out the effect of paragraph 353 Of the Immigration Rules (HC 395, as amended by HC 1112) relating to fresh claims. The letter stated that:

> "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 had not already been considered; and taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

11. The letter then set out the list of documents which had been sent to the Secretary of State and continued:

> "It is accepted that none of these documents has been considered previously. The question is therefore whether, when these documents are taken altogether with previously considered material, they create a realistic prospect of success. 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 Immigration Judge, applying the rule of anxious scrutiny, thinking your client will be exposed to a real risk of persecution on return… The points raised in your submissions have not previously been considered, but taken together with the material which was

> considered in the appeal determination of 21 August 2008, they would not have created a realistic prospect of success."

12. That passage was rightly criticised because it was not the risk of persecution point that was really engaged. The point that had been fairly and squarely raised in the letter of 12 October was whether the removal of Tionge from her settled environment was an unlawful interference with her rights and in particular the right to private life under Article 8. However it was apparent from the rest of the letter of 19 November that this point was well in mind and was addressed. It was noted that Tionge was making good progress at school and had adapted to 3 different schools and would therefore be able to adapt well and make good progress in school in Malawi. It was pointed out that she was sufficiently young to adapt to life back in her home country. Under the heading "Strength of connections with the United Kingdom" the letter said:

> "Regard has been had to the strength of your clients' connections in the UK. It is noted that Tionge Mhango has attended school for much of her time in the UK. However, as outlined above, it is considered that your clients' ties to the United Kingdom are not sufficiently compelling to justify allowing them to remain in the UK."

13. Following that letter removal directions were set for 23rd November 2009 and these proceedings were launched on that day. Following the decision at the oral hearing for permission, and as a result of some comments of the learned Judge, the Secretary of State issued the letter of 5 March 2010. That letter set out in paragraph 10 the correct basis for the claim. Having rejected any suggestion that the Claimant's removal would interfere with family life (since the intention was they would be removed together) it went on:

> "It is also accepted that your client and her daughter may enjoy some degree of private life in the United Kingdom, and therefore their removal will interfere with that private life. However, as detailed below, it is considered that the removal is in accordance with the law and in pursuit of a permissible aim. The question therefore remains whether or not the interference is proportionate to that permissible aim."

The letter went on at paragraph 33:

> "The decision to remove your client and her daughter is 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 her family and/or private life, would be a legitimate, necessary and proportionate response and in accordance with the law. It is not accepted, that removal of your client and her daughter fails to strike a fair balance. Nor is it accepted, ... that there is a realistic prospect of an Immigration Judge concluding that the removal of your client and her daughter to Malawi would constitute a

> disproportionate interference with their right to respect for their private life."

14. There was set out within the letter the basis of the Secretary of State's reasoning which has formed the basis of the submissions made to me and I shall not rehearse that here.

15. While at one stage there were allegations concerning the safety of the Claimant and her daughter if returned to Malawi, the risk of FGM to her daughter and a failure on the part of the Secretary of State to provide, or offer, anti-malaria medication before me all these points fell away and there was only one issue. That issue is whether the case advanced by the Claimant and her daughter, based on their right to private life, had a realistic prospect of success before an Immigration Judge. If it did then the decision of the Secretary of State's decision was irrational and cannot stand.

The submissions on behalf of the Claimant

16. Mr Harris who appeared for the Claimant drew my attention to the step by step approach set out in Lord Bingham's speech in the case of *R (Razgar) v. SSHD* [2004] UKHL 27 and also the judgment of Moore-Bick L.J. in *AS (Pakistan) v. SSHD* [2008] EWCA Civ 1118. At paragraph 15 Moore-Bick L.J. said:

> "...in my view there is some force in (counsel's) submission that the nature and extent of the circumstances that the appellant, and more particularly L, could expect to encounter on relocation to Pakistan are relevant principally to the question of proportionality rather than that of interference with private and family rights. Once one accepts, as the tribunal did, that the appellant and L both had a private and family life in this country, it is clear that the very fact of their removal to Pakistan would interfere to some extent with them, particularly in the case of L who has grown up here, whose family and friends are here and who has an established career here. It is true that Lord Bingham's second question in *Razgar*[1] supports the view that in some cases the degree of interference with private and family life may not be sufficient to engage Article 8, but it has been recognised that the threshold for establishing that Article 8 is engaged is not high... In any event, it is obvious that the degree of interference to be expected is likely to depend more on the disruptive effect of relocation itself, rather than on the social and political conditions likely to be encountered in the country of destination."

17. Mr Harris criticises the decision letters of the Secretary of State for concentrating more on the conditions in Malawi than on the disruption caused by the uprooting of the Claimant and her daughter from where they are now living. He placed particular reliance on the rationale behind the former policy DP5/96. That policy was

[1] Namely whether the interference with private life will have consequences of such gravity as potentially to engage the operation of Article 8.

withdrawn in a Ministerial statement made on 9 December 2008 by Mr Woolas then Minister of Borders and Immigration in these terms:

> "The United Kingdom Border Agency is withdrawing DP5/96, a concession which has also been referred to as the seven year child concession, as of 9 December 2008. The concession set out the criteria to be applied when considering whether enforcement actions should proceed or be initiated against parents of a child who was born here and has lived continuously to the age of seven or over, or where, having come to the UK at an early age, they have accumulated seven years or more continuous residence. The original purpose and need for the concession has been overtaken by the Human Rights Act and changes to immigration rules. The fact that a child has spent a significant part of their life in the United Kingdom will continue to be an important relevant factor to be taken into account by case workers when evaluating whether removal of their parents is appropriate. Any decision to remove a family from the UK will continue to be made in accordance with our obligations under the European Convention on Human Rights (ECHR) and the Immigration Rules.
>
> The withdrawal of DP5/96 and replacing it with consideration under the Immigration Rules and Article 8 of the ECHR will ensure a fairer, more consistent approach to all cases involving children, whether accompanied or unaccompanied, across UKBA. Withdrawing the policy will also prevent those overstaying or unlawfully present in the UK having the benefit of a concession which does not apply to those persons who comply with the Immigration Rues and remain in the UK lawfully."

18. For the Secretary of State Mr McGurk told me that there had not been any sea change in policy since the withdrawal of that policy and the factors are still taken into account. However on behalf of the Claimant it was submitted to me that the Secretary of State had failed to take into account this stated policy or at least the rationale behind it. While that policy was in place there was a starting point of a presumption that it was only in exceptional circumstances that indefinite leave to remain would not be given. It was appropriate to then look at the criteria within the policy to see if the case was an exceptional one. Those factors included the extent of the parents' residence without leave, whether removal has been delayed through protracted representations, criminal conduct on the part if the parents and whether return to the country of origin would cause extreme hardship for the child (see *NF (Ghana) v. SSHD* [2008] EWCA Civ 906 in particular paragraph 39 and *AF (Jamaica) v. SSHD* [2009] EWCA 240).

19. In *NF (Ghana)* the Court of Appeal also set out the history DP5/96. At paragraph 26 reference is made to a written Parliamentary answer given on 24 February 1999 which included the following passage:

> "Children who have been in this country for several years will be reasonably settled here and may, therefore, find it difficult to adjust to life abroad. In future, the enforced removal or deportation will not normally be appropriate where there are minor dependent children in the family who have been living in the United Kingdom continuously for 7 or more years. In most cases, the ties established by children over this period will outweigh other considerations and it is right and fair that the family should be allowed to stay here. However each case will continue to be considered on its individual merits."

20. A press release issued on 1st March 1999 included this excerpt:

> "A child who has spent a substantial, formative part of life in the UK should not be uprooted without strong reason and that is why we are changing the time limit from ten to seven years for families with young children who have been unable to establish a right to remain.
>
> ...
>
> For those who have been in this country for a long time we need to recognise that they will have become established in their community."

21. It was in part because the Court of Appeal in *NF (Ghana)* accepted the Secretary of State's concession that the passages set out above were binding that it was decided that it was only in exceptional cases that indefinite leave to remain would not be given where DP5/96 applied.

22. While the policy has now been withdrawn and while it was accepted on the Claimant's behalf that at the time the decision of the Secretary of State was taken in this case Tionge had not been in this country for seven years, nevertheless the new material which had now been produced concerning the daughter's schooling and the family's integration into the community ought to be able to be placed in front of an Immigration Judge with these statements of policy. The rationale behind the policy applied since Tionge had been here for the vast majority of her formative years. It was submitted that her removal to a country she did not know, whose culture and social background she was unaware of and where she did not speak the language most widely spoken was disproportionate.

23. Attention was also drawn to some psychological problems experienced by Tionge. These related to the concerns over her possible removal and precarious immigration status and it was not suggested to me that these would continue to be a concern once her future was more certain.

24. It was argued that it was apparent from the decision letters that the Secretary of State had failed to direct herself in line with at least the rationale that lay behind the seven year rule. There was a compassionate reason for the policy. Finally, in reply, Mr Harris reminded me of the case of *AF (Jamaica)* [2009] EWCA Civ 240. At the end of his judgment Rix LJ said:

> "Since the hearing of this appeal and my writing this judgment in draft, the decision of this court in *VW (Uganda) v. Secretary of State for the Home Department; AB (Somalia) v. Secretary of State for the Home Department* [2009] EWCA Civ 5 (16 January 2009) has come to my attention. That in turn has led me to *EB (Kosovo) v. Secretary of State for the Home Department* [2008] UKHL 41, [2008] 3 WLR 178 at para 12, and to *LM (DRC) v. Secretary of State for the Home Department* [2008] EWCA Civ 325 (17 March 2008) at paras 10/14, to which we might have been but were not referred. Albeit those cases all arose in the context of removals rather than deportations and did not raise the issue of proportionality against the background of the commission of a serious criminal offence, they each in their own way dethrone the significance of the test of "insurmountable obstacles" or emphasise the importance of the test of whether it is reasonable to expect a spouse or child to depart with the family member being removed. The ultimate test remains that of proportionality."

25. In considering my decision it was submitted that there was nothing in the decision letters which was decisively in favour of removal.

The submissions on behalf of the Defendant

26. Mr McGurk on behalf of the Defendant gently complained that having been criticised in front of HH Judge Thornton Q.C., at the renewed permission hearing, for failing to deal sufficiently with the effect on the claimant and her daughter of the removal to Malawi was now criticised by the Claimant for not dealing sufficiently, in the 5 March 2010 decision letter, with the disruptive effect of removal from this country.

27. It was submitted that the question in this case was whether the Secretary of State had acted irrationally in reaching the view that a new claim based on the new material presented had no realistic prospect of success in front of an Immigration Judge. In deciding that question the Court could form its own view to act as a guide.

28. The policy DP5/96 had never been relevant in this case. Before the IAT in August 2008 the Claimant had only been here five years. When considered by the Secretary of State in November 2009 she had been here some six and half years. By the time that seven years had elapsed since her arrival at the hearing of this application the policy had long since been withdrawn. Thus the policy could not assist the Claimant and her daughter. Having said that it was accepted that there had been no sea change in policy since the withdrawal of DP5/96 and the rationale was still to be taken into account.

29. Mr McGurk criticised the submissions made on behalf of the Claimant on the basis that only one side of the proportionality balance had been addressed. The Secretary of State had a need to protect and secure the UK's borders. If the judicial review had been brought in 2007, and heard in early 2008, it was highly likely that there would have been no legitimate expectation of staying in this country. The expectation would have been that at the expiry of their visa in October 2007 mother and daughter would have returned to Malawi. There would have been disruption to Tionge at that time and

indeed by coming here in 2003 and accepting leave to remain for a four year period it was inevitable that there would be disruption to Tionge's school, social life and all that goes with that in any event.

30. It was pointed out that the Claimant and her daughter are now over-stayers. Their departure has now been delayed as a result of their applications for asylum. The period of delay caused by those applications is now prayed in aid as a reason to permit them to stay. It was submitted that the matters that the Secretary of State has to weigh in the proportionality balance outweighs any disruption to the claimant and her daughter.

31. There is no positive case advanced of any hardship by returning the Claimant and her daughter to Malawi. My attention was drawn to the case of *VW (Uganda)* [2009] EWCA Civ 5 where Sedley LJ endorsed these words from the Immigration Judge in that case:

> "(If a removal is to be held disproportionate,) what must be shown is more than a mere hardship or a mere difficulty or mere obstacle. There is a seriousness test which requires the obstacles or difficulties to go beyond matters of choice or inconvenience."

32. In conclusion, it was submitted that the Secretary of State had legitimate concerns in preserving a consistent immigration policy. The Claimant in her submissions had not addressed the other side of the balancing exercise in carrying out a proportionality test. In addition, there was no positive case advanced on hardship and the Claimant and her daughter could reasonably relocate. In the premises there had been no irrationality on the part of the Secretary of State.

Discussion and conclusion

33. There is only one issue in this case. That issue is whether the Secretary of State, in deciding that there was no realistic prospect of an Immigration Judge, applying the rule of anxious scrutiny, in deciding an appeal based on Article 8, right to private life, in the Claimant's favour, was acting irrationally.

34. It is accepted by the Secretary of State that the materials submitted on behalf of the Claimant and her daughter in the form of letters and testimonials were new and had not previously been considered. Following paragraph 353 of the Immigration Rules and the case of *WM (DRC) v. Secretary of State for the Home Department* the issue remaining is whether those materials, taken with the previously considered material, created a realistic prospect of success, the threshold test being somewhat modest.

35. The case advanced by the Claimant is, on first consideration, seductive. Tionge has clearly done very well in this country and both she and her mother, the Claimant, are well liked and have fitted into their new community. Tionge is doing well at her current school and did well at the previous two schools she has attended.

36. The Claimant and her daughter have been in this country now for over seven years. They have become settled and clearly enjoy their life in the UK and are very anxious

not to have that disrupted. Having regard to the rationale behind the old policy DP 5/96 Tionge should not be "uprooted" without strong reason.

37. However, against that, the Secretary of State has the right and the duty to control the entry of non-nationals into its territory. Article 8 does not give a person an automatic right to choose to pursue a private life in the United Kingdom. The rights of the Claimant have to be balanced against the maintenance of effective immigration control. That requires consistency of treatment between one aspiring immigrant and another.

38. While in his original decision letter the Secretary of State did not state in terms that the real issue was the effect on the Claimant and her daughter's private life I am satisfied, looking at the two decision letters together, that the correct question has been properly addressed. The policy DP5/96 was dealt with in the letter of 5 March 2010 and the effect on the Claimant and her daughter of removal was considered.

39. In considering this case the Secretary of State was entitled to have regard to the position of this Claimant and her daughter had they merely returned to Malawi after their time to remain had expired. By that time, on 31 October 2007, Tionge would have spent slightly more time in this country than in Malawi. She would have just turned 8. She would have made friends and have been integrated into the community where she was at that time. All that should have been anticipated when the Claimant arrived seeking to stay while her husband was a student. Since that time both the Claimant and her daughter have made asylum applications and launched these proceedings. The result is that further time has elapsed such that now the Claimant is able to make much of the fact that Tionge has been in this country for seven years and therefore it is argued that the rationale behind the policy DP5/96 should be applied.

40. I bear in mind that Tionge herself had no part in the decision to come here, to apply to stay for four years nor about the attempts made to remain here. She has merely followed her mother's wishes and actions. I accept that some disruption will be caused by Tionge's removal back to Malawi and it will take her some time to adjust. But she has shown herself to be adaptable and I have little doubt that she will make as much a success of her life there as she has here. While her English will not be understood in many places it is an official language in Malawi and will be a great advantage to her in later life. She will quickly pick up the local language, Chichewa. I do not accept that she will have "extreme difficulties in an educational, social and developmental capacity" as suggested in the Claimant's solicitors' letter of 29 October 2009.

41. This is not a case that has ever been about family life since mother and daughter will remain together whether staying here or going back to Malawi. The Claimant has herself spent the majority of her life in Malawi and will be able to fit back in there with the additional benefit she has of having spent some seven years in the United Kingdom. In my judgment there will be no hardship which crosses the "seriousness" line in either mother or daughter returning to Malawi.

42. In applying the proportionality test I am satisfied that the Secretary of State was quite entitled to reach the conclusion that the Claimant's return was justified and compatible with her and her daughter's Article 8 rights. I am satisfied that there was no reasonable prospect of an Immigration Judge, applying the correct test, deciding

this case in the Claimant's favour. The argument that the decision was irrational therefore fails. In reaching my conclusion I have had regard to the tests laid down in *Razgar*. In my judgment any interference with the private life of the Claimant and her daughter is proportionate having regard to the need to apply appropriate and consistent immigration controls. As was said by the Secretary of State in the decision letter of 5 March 2010 that I have quoted from in paragraph 13 above, the decision was a legitimate, necessary and proportionate response.

Conclusion

43. The application for Judicial Review therefore fails and this claim is dismissed.