OUTER HOUSE, COURT OF SESSION

[2011] CSOH 1

P978/10

OPINION OF LORD DOHERTY

in the petition

O A (Assisted Person),
A A and A A (Nigeria)

Petitioners;

For

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

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Pursuer: Forrest, Advocate; Drummond Miller LLP
Defender: J.N.M. MacGregor, Advocate; Office of the Solicitor to the Advocate General

7 January 2011

Introduction

[1] The first petitioner is a Nigerian national. She is aged 36. The second petitioner is her 12 year old son. The third petitioner is her eight year old daughter. The first petitioner also has a son who is aged four.

[2] The petitioners entered the United Kingdom ("UK") on 2 June 2005. The first petitioner's husband was a Nigerian national who was a student. It appears that he started a number of courses but did not complete any of them. The first petitioner had a dependent's visa which was valid until 1 January 2006 and was extended until February 2007. Since that date the petitioners have had no legal right to remain in the

UK. On 13 May 2009 immigration officers visited the first petitioner's home. On 19 May 2009 the first petitioner claimed asylum. At her screening interview she indicated that her reason for coming to the UK had been that she believed that it was a better life here and that after her husband's education they could settle here; and that she had some family problems in Nigeria.

[3] By May 2009 the first petitioner's husband had abandoned her and the children. For some considerable time prior to that date he had rarely stayed with them.

[4] The first petitioner claimed that she had a well-founded fear of persecution due to her religion and her status as a woman and a single mother. She maintained that there were substantial grounds for believing that she would face a real risk of unlawful killing or serious harm, or inhuman or degrading treatment, amounting to a breach of articles 2 or 3 of the European Convention on Human Rights. She also argued that she and her family had established a private life in the UK and that their removal to Nigeria would be disproportionate and in breach of their article 8 rights to private and family life.

[5] The respondent rejected the first petitioner's claims. She appealed to the Asylum and Immigration Tribunal. On 9 September 2009 her appeal was dismissed. On 6 October 2009 her application to the Tribunal for reconsideration of that decision was unsuccessful. Thereafter she petitioned the Court of Session for an order requiring the Tribunal to reconsider its decision. The petition was refused on 23 December 2009.

[6] On 12 January 2010 further representations were submitted to the respondent on behalf of the first petitioner and her dependents. Accompanying those representations were letters from, *inter alia*, friends, church, health visitor and schools in support of the first petitioner's contention that she and her dependents had achieved a degree of

integration in the communities in which they had lived, and that they enjoyed an established private life in the UK. On 26 January 2010 the respondent determined that these representations did not amount to a fresh claim.

[7] On 26 February 2010 the petitioners submitted further representations to the respondent. These were directed principally towards persuading the respondent that the petitioners would face persecution on the ground of their religion if returned to Nigeria; and that they would be unable to safely relocate within Nigeria. By letter dated 16 March 2010 the respondent decided that those representations did not amount to a fresh claim.

[8] On 19 May 2010 the petitioners submitted further representations to the respondent. The representations contended that the first petitioner's children would be harmed if removed to Nigeria. It was contended that the first petitioner had a well-founded fear that she and her children would be persecuted in Nigeria. It was also contended that she and her family had integrated within the community in Glasgow. Appended materials were relied upon. By letter dated 24 May 2010 the respondent decided that those representations did not amount to a fresh claim.

[9] The petitioners did not, and do not, seek to challenge the said decisions of 26 January 2010, 16 March 2010 and 24 May 2010.

[10] On 7 June 2010 solicitors for the first petitioner wrote to the respondent. The letter indicated that the first petitioner contended that to require her to return to Nigeria would amount to a breach of article 8 of ECHR. It was submitted that the first petitioner had established a private and family life in the UK that she would lose if she returned to Nigeria. The letter concluded:

> "(T)he issue then to be determined is whether or not there are truly exceptional reasons as to why Mrs A should be allowed to stay in the United Kingdom outside the rules.
>
> Mrs A had been living in the United Kingdom since 2 June 2005. The time that she has been in the United Kingdom and the fact that she has established a private and family life do amount to truly exceptional circumstances such that her private and family life ought to have met the government's need to maintain effective immigration control.
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> In the premises, it is arguable that removal of our client from the United Kingdom by the Secretary of State pursuant to his duty to maintain effective immigration control is arguably disproportionate when properly balanced with maintenance of his (*sic*) article 8 right to personal (*sic*) and family life.
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> We should be grateful if you would reconsider our client's case and grant her and her dependents discretionary leave to remain in the United Kingdom."

[11] By letter dated 10 September 2010 the respondent determined that the first petitioner's further representations did not amount to a fresh claim. The petitioners seek judicial review of that decision. The matter came before me for a first hearing.

The parties' contentions

[12] On behalf of the petitioners Mr Forrest submitted that the respondent had erred. In particular she had been wrong to conclude that there was no realistic prospect of success before another Immigration Judge. It was arguable that the removal of the first petitioner and her children to Nigeria was disproportionate and in breach of their article 8 rights to private and family life. In the course of his submission he referred

me to *R (Razgar)* v *Secretary of State for Home Department* 2004 1 AC 368 per Lord Bingham at paragraph 17.

> "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 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?"

[13] Mr Forrest's contended that the Respondent had not properly addressed Question (5); and that there was a realistic prospect that another Immigration Judge would answer it in the negative. In support of that contention he referred me to the case of *LD* v *The Secretary of State for the Home Department* [2010] UKUT 278 (IAC). He

founded in particular on the observations of the Upper Tribunal that weighty reasons would be required to justify separating a parent from a lawfully settled minor child, or a child from a community in which he or she had grown up and lived for most of his or her life. (paragraphs 26 and 30(viii)).

[14] On behalf of the respondent Mr MacGregor submitted that the respondent had been correct to conclude that the first petitioner's further representations of 7 June 2010 did not amount to a fresh claim in terms of Rule 353 of the Immigration Rules.

[15] Rule 353 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."

[16] In the present case the respondent had found that neither subparagraph (i) nor (ii) had been satisfied. She had been correct to do so. The letter of 7 June 2010 simply reiterated, and made bald assertions in connection with, the petitioners' article 8 claim. There was nothing in that letter which had not already been considered by the respondent in dealing with the previous claims.

[17] In addition, and in any event, the submissions in that letter taken with the previously considered material did not create a realistic prospect of success before another Immigration Judge. The article 8 rights of the first petitioner and her children

had been fully ventilated in the prior representations and had been fully considered in the respondent's previous decisions. The respondent had applied the same consideration and reasoning to the current claim.

[18] The respondent had been entitled to, and had, concluded that the interference with the private life of the petitioners resulting from their removal to Nigeria was proportionate.

[19] Mr MacGregor drew attention to the observations of Lord Bingham in *R (Razgar)* v *The Home Secretary* at paragraph 20:

> "Decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases, identifiable only on a case by case basis."

He submitted that the respondent was entitled to find, and that I should find, that this was not such an exceptional case. He observed that the case of *LD* v *Secretary of State for the Home Department* was clearly distinguisable. LD had come to the United Kingdom in 1999 to visit his wife who had arrived there at the beginning of the same year. His wife had already been a resident with leave to remain since 1999, first as a student and then as a nurse, and was given indefinite leave to remain in June 2009. There were three children of the marriage born in 1990, 1996 and 1998. They had also obtained indefinite leave to remain at the same time as their mother. LD had made a number of visits back to Zimbabwe since he first came to the United Kingdom, but for most of the period from his arrival in the UK to the date of the appeal he had lived with his wife and children and had had immigration leave to remain. His application for indefinite leave to remain was refused. LD's two young children had lived continuously in the UK for 11 years - most of their lives. It was unreasonable to expect the LD's wife and three children to give up their careers and prospects (as a

nurse, a university student, and school children doing well in secondary education) to relocate to Zimbabwe where conditions were well-known to be dire. In LD the result would have been the break-up of the family unit. The tribunal had little difficulty in concluding that the decision to refuse LD leave to remain was disproportionate and in breach of the article 8 rights of LD and his family. By contrast, here the removal of the first petitioner and her children would not result in division of the family unit. The petitioners' connections with the UK were far less significant or developed than those of LD and his family. In addition, for a large part of the period the first petitioner has been in the UK she has been an unlawful overstayer. Her residence has been precarious (*Konstatinov* v *The Netherlands* [2007] F.C.R 194, at pararaph 48).

[20] Both Mr Forrest and Mr MacGregor were in agreement that, in relation to the second leg of the Rule 353 test, I ought to make my own assessment of how an Immigration Judge might decide the matter on the basis of the material available to the respondent (*IM* v *Secretary of State for the Home Department* [2010] CSOH 103 at para [11]).

Discussion and Decision

[21] I have no real difficulty in concluding that the petition should be dismissed. In large part I accept the submissions for the respondent.

[22] The first petitioner's letter of 7 June 2010 contained nothing new. The matters raised had all been raised before, and had all been fully considered by the respondent. The letter was no more than the bald repetition of matters previously raised. The respondent was entitled, and indeed I think correct, to treat the submissions as not significantly different from the material previously considered. In my opinion she

would have been fully entitled on that ground alone to decide that the further submissions did not amount to a fresh claim.

[23] Nevertheless, the respondent did proceed to consider whether the submissions in the letter of 7 June 2010 taken together with the previously considered material created a realistic prospect of success before another Immigration Judge. In doing so it is clear to me that she referred to and followed the reasoning in the decision of the Immigration Judge and in the subsequent decision letters. On a fair reading of the decision letter of 10 September 2010 and the said earlier material it is evident that the respondent asked herself the correct questions; that she concluded that the interference with the private life of the first petitioner and her dependents was justified and proportionate; and that there was no realistic prospect of success before another Immigration Judge.

[24] The respondent expressly treated the best interests of the children as a primary consideration (paragraph 19 of the decision letter, 6/4 of process) (cf. *HS* v *The Secretary of State from the Home Department* [2010] CSIH 97 and *AK* v *The Secretary of State for the Home Department* [2010] CSIH 98). It was not suggested that she had not accorded those interests an important status in the decision making process.

[25] Parties were in agreement that I require to make my own assessment of how another Immigration Judge might decide the matter on the basis of the material available to the Secretary of State. I now do so. I bear in mind that I must give the matter anxious scrutiny ; and that for there to be a realistic prospect of success I would require to be satisfied only that the prospects are more than fanciful.

[26] The interference with the private lives of the first petitioner and her children is in accordance with the law and in pursuit of the legitimate aim of effective immigration

control. Is it proportionate? In my opinion the answer is very clearly yes, and there is no realistic prospect of an Immigration Judge deciding otherwise. The best interests of the children will be served by their remaining with their mother and the rest of the family unit. Their best interests do not require that they remain in the United Kingdom. The first petitioner has a far stronger connection with Nigeria than she has with the United Kingdom. Two of her children were born in Nigeria. Her family and relatives live there. While she and her children have some community connections in the UK these connections do not appear to me to be particularly strong. They have been built up to a large extent over the period during which the first petitioner has been an unlawful stayer (when her residence has been precarious). The first petitioner and her children can return to Nigeria as a family unit and family life can be continued there without any splitting of the family unit (*Huang* v *Secretary of State for the Home Department* 2007 2 AC 167, per Lord Bingham at paragraph 20). The children are all in their formative years. They will be able to continue their education - in English - in Nigeria. While the youngest child, M, was born in the United Kingdom and has never lived in Nigeria he is only four years old. He is totally dependent on the first petitioner. He has no meaningful private life in the United Kingdom outwith the family unit. All of the family unit's members have their ethnic and cultural origins in Nigeria. In my view the circumstances here fall very far short of the sort of circumstances where a decision taken pursuant to lawful immigration control might be argued to be disproportionate. On the basis of the material before the Secretary of State there is no realistic prospect of success before an Immigration Judge.

[27] The respondent has satisfied the requirement of anxious scrutiny. Her decision not to treat the representations of 7 June 2010 as a fresh claim was lawful.

Disposal

[28] I shall repel the petitioners' third plea-in-law, sustain the respondent's first plea-in-law, and dismiss the petition.