**SECOND DIVISION, INNER HOUSE, COURT OF SESSION**

**Lord Justice Clerk**
**Lord Clarke**
**Lord Mackay of Drumadoon**

**[2010] CSIH 16**
**P488/08**

OPINION OF THE COURT

delivered by LORD MACKAY OF DRUMADOON

in the Petition

of

F. O. (A.P.)

Petitioner and Reclaimer;

for

Judicial Review of a decision of the Secretary of State for the Home Department dated 5 February 2008

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***Petitioner/Reclaimer: Forrest; Drummond Miller LLP***

**Respondent: Haldane; Office of the Solicitor to the Advocate General**

19 February 2010

**Introduction**

[1] The reclaimer is a national of Nigeria. She currently lives with her young son at an address in Glasgow. The respondent is the Secretary of State for the Home Department.

[2] The reclaimer arrived in the United Kingdom in March 2006. Her son was born in London on 13 September 2006. On 16 November 2006 the reclaimer applied for

asylum. On 20 December 2006 her application was refused by the respondent. She appealed against that decision, in terms of section 82(1) of the Nationality Immigration and Asylum Act 2002. Her appeal was heard by an Immigration Judge and refused by Determination dated 13 February 2007.

[3] On 13 December 2007 the reclaimer's solicitors wrote to the respondent and submitted documents they described as "fresh evidence". It was explained that the reclaimer wished to lodge a fresh claim for asylum in terms of Rule 353 of the Immigration Rules. It was also explained that the fresh evidence indicated why the reclaimer believed it would not be possible for her to relocate within Nigeria. It was contended that were the petitioner to be removed to Nigeria she would be in danger of persecution and there would be a real risk of her human rights under articles 2 and 3 of the European Convention of Human Rights being infringed.

[4] By letter dated 5 February 2008, the respondent advised the reclaimer's solicitors that the further information and representations submitted had been considered; that the respondent had determined that they did not amount to a fresh claim for asylum; and that the respondent was not prepared to reverse the decision of 20 December 2006, refusing the reclaimer's application for asylum.

[5] This petition for judicial review seeks reduction of the decision of the respondent dated 5 February 2008. The reclaiming motion is against the interlocutor of the Lord Ordinary dated 30 May 2008 dismissing the petition.

**The decision of the Immigration Judge**

[6] During the reclaimer's appeal before the Immigration Judge on 9 February 2007, the reclaimer submitted that in December 2005 her father had told her that she was not to have a relationship with her boyfriend, K.O. She gave evidence that her father beat

her, kept her indoors and stated that she was to marry a friend of his, Chief A. He is the chief of the village in which she resided with her family. During December 2005, the reclaimer was forced to go to Chief A's house, to live with him and his other wives. Whilst the reclaimer remained at Chief A's house, he sought to have sexual relations with her. When she refused, he threatened that if she continued to resist him he would kill her. The reclaimer remained at Chief A's house until January 2006. Subsequently, with K.O., she conceived her son and left Nigeria during March 2006.

[7] The Immigration Judge accepted that at the date of hearing before him the reclaimer's fear of persecution was well-founded. He accepted that both the reclaimer's father and Chief A remained steadfast that she should marry Chief A. The Immigration Judge also accepted that it would not be safe for the reclaimer to return to her home area because she would be forced to become a wife to Chief A, which would constitute persecution.

[8] During the hearing of the appeal before the Immigration Judge, the respondent did not argue that were the reclaimer to return to Nigeria, the state could protect her from persecution. However, the issue of relocation was raised. It was contended on behalf of the reclaimer that it would be not be reasonable for her to relocate in the event of her returning to Nigeria.

[9] The Immigration Judge dismissed the reclaimer's appeal. In his Determination he concluded that in the event of the reclaimer returning to Nigeria, she would have help and support available from K.O., the father of her child, and from non-governmental organisations ("NGOs"). He took the view that with such help the reclaimer could relocate within Nigeria, without undue difficulty. He also took the view that if the reclaimer relocated there would be no real risk of either her father or Chief A being able to find her, even if they endeavoured to do so.

**Further consideration of the reclaimer's claim for asylum**

[10] Following the refusal of her appeal by the Immigration Judge, the reclaimer applied for a reconsideration of her appeal. Her application was rejected. She also submitted a petition for reconsideration to the Court of Session; on 5 June 2007, this was refused.

[11] On 16 July 2007, the respondent caused the reclaimer and her son to be detained and issued directions for their removal from the United Kingdom on 19 July 2007. The reclaimer then raised proceedings for judicial review of the decision to remove her from the United Kingdom. She did so on the grounds that the removal would be (a) premature, because neither she nor her son had received the necessary medical treatment appropriate in the circumstances; and (b) unreasonable, because she had been, when she was detained, in the course of seeking further information with a view to presenting a fresh claim for asylum. A first order was granted on 18 July 2007. Directions for the removal of the reclaimer and her son from the United Kingdom were then cancelled.

[12] In the meantime the reclaimer had obtained further information. This consisted of two letters from her boyfriend, K.O., dated 5 February and 21 October 2007; three letters from her boyfriend's aunt, dated 28 June, 8 October and 14 November 2007; and a police report regarding an incident on 4 October 2007 when her boyfriend's aunt's shop had been destroyed. None of this further information was before the Immigration Judge at the hearing on 9 February 2007.

[13] On 12 December 2007, the petition for judicial review lodged on 18 July 2007 was dismissed on the unopposed motion of the reclaimer. That took place because the reclaimer wished her solicitors to submit the further information to the respondent. On

13 December 2007, the reclaimer's solicitors wrote to the respondent enclosing the further information and a statement running in the name of the reclaimer; (which together with the letter we refer to as "the fresh information"). It was submitted in the letter that the fresh information amounted to a fresh claim for asylum in terms of Rule 353 of the Immigration Rules. By letter dated 5 February 2008 the Immigration and Nationality Directorate of the Home Office wrote to the reclaimer's solicitors, intimating that the decision had been reached that the submissions on behalf of the reclaimer did not amount to a fresh claim for asylum.

**The present petition**

[14] In the present petition, in which a first order was pronounced on 22 February 2008, the reclaimer seeks judicial review of the decision of February 2008. In particular, she seeks declarator that the decision of the respondent is unlawful and irrational, and reduction of that decision.

[15] The petition came before the Lord Ordinary at a First Hearing on 14 May 2008. Subsequently, on 30 May 2008, he sustained the pleas in law for the respondent and dismissed the petition. In his Opinion the Lord Ordinary indicated that there was nothing in the additional material submitted to suggest that Chief A's influence extended beyond the reclaimer's home village or that would undermine the reasoning of the Immigration Judge in his Determination of 13 February 2007.

[16] The Lord Ordinary also indicated that there was nothing in the respondent's letter of 5 February 2008 to suggest that the respondent had applied the wrong test, when considering the additional material that had been placed before him as fresh evidence. Nor could it be said that the decision of 5 February 2008 was irrational.

**The Grounds of Appeal**

[17] The reclaimer's grounds of appeal against the Lord Ordinary's decision are (1) that the Lord Ordinary erred in law in holding that the respondent has not applied the wrong test in reaching his decision of 5 February 2008 refusing to accept that the further representations for the reclaimer amounted to a fresh claim; and (2) that the Lord Ordinary erred in law in holding that none of the material appended to the submission on behalf of the reclaimer on 13 December 2007 was relevant to the issue of the reasonableness of internal relocation in Nigeria.

**Submissions for the Reclaimer**

[18] At the outset of his submissions in relation to the first ground of appeal, counsel for the reclaimer reminded us of the test with which the respondent required to comply when the letter of 13 December 2007 and its enclosures were considered. Reference was made to *Onibiyu* v *Secretary of State for the Home Department* (1996) Imm AR 370, at p. 381, and *WM (DRC)* v *Secretary of State for the Home Department* (2007) Imm AR 337, at pp. 341 - 342. He submitted that it was for the court to review whether the respondent had asked himself the correct question. He argued that the respondent had not done so. That was clear from a passage on page 4 of the letter of 5 February 2008 which stated that the respondent "considered that if your client does fear Chief A and her father, she would not be at threat from them if she relocated within Nigeria." That passage expressed the respondent's conclusion on the issue of relocation, rather than addressing the question of whether there was "a reasonable prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that *(the reclaimer)* will be exposed to a real risk of persecution on return ...". It was

also contended that the respondent's conclusion had been reached without any reference to the fresh information submitted with the letter of 13 December 2007. The Lord Ordinary, for his part, had erred in law in failing to identify that the respondent had not applied the correct test.

[19] In advancing the second ground of appeal, counsel for the reclaimer acknowledged that the fresh information sent with the letter of 13 December 2007 was of importance only if there was a realistic prospect that another Immigration Judge might hold that it demonstrated that it would be unreasonable and unduly harsh to expect the reclaimer to relocate in another area of Nigeria. Reference was made to *Januzi* v *Secretary of State for the Home Department* [2006] 2 AC 337, per Lord Bingham at pp. 449H - 450A and *Secretary of State for the Home Department* v *AH* [2008] 1 AC 678, at p. 683 E-F. Counsel submitted that if account was taken of the fresh information, the respondent would have had a reasonable prospect of success were a fresh claim for asylum to come before the Immigration and Asylum Tribunal. In these circumstances, the Lord Ordinary had erred in law when he had expressed the view that none of the further material sent with the letter of 13 December 2007 was relevant to the issue of the reasonableness of internal location within Nigeria.

**Submissions for the Respondent**

[20] In her reply, counsel for the respondent stressed that it was necessary for the reclaimer to establish that the Lord Ordinary had erred in law and had reached a decision that no Lord Ordinary could have reached. It was submitted that the terms of his Opinion did not disclose any error of law on his part. Nor could it be suggested that he should have held that the respondent's decision had been irrational or unreasonable. The issue before the Lord Ordinary had been whether the respondent

had been entitled to conclude that the fresh information went no further than reinforcing the information that had been before the Immigration Judge on 9 February 2007 on the issue of whether the reclaimer would be at risk of persecution were she to return to her home village. She submitted that it went no further than reinforcing the existence of a threat of a local nature to the reclaimer. During the appeal before him, the Immigration Judge had accepted such a threat existed. On the other hand the fresh information did not touch on the issue of the reasonableness of the reclaimer relocating to another part of Nigeria. Nor did it suggest that if the reclaimer did relocate to another area in Nigeria, Chief A would be able to find her there or would pose a danger to her. In these circumstances, the Lord Ordinary had been correct in holding that there were no grounds for his interfering with the decision of the respondent dated 5 February 2008. The Lord Ordinary had not erred in law in declining to do so.

**The Law**

[21] Rule 353 of the Immigration Rules HC 395 (as amended) provides:

> "353 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."

[22] A decision of the Secretary of State for the Home Department under Rule 353 as to the existence of a fresh claim for asylum can be challenged before the court only by way of judicial review. The scope of such a challenge was discussed in the two cases to which counsel for the reclaimer referred, *Onibiyu* v *Secretary of State for the Home Department* and *WM (DRC)* v *Secretary of State for the Home Department*. On the basis of these authorities it is clear that the decision of the Secretary of State for the Home Department is capable of being impugned before the court only on *Wednesbury* grounds. However it is also clear from the judgment of Buxton LJ in *WM (DRC)* that the Secretary of State had to make two judgments, (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 with the material previously considered (paras 6 and 8).

[23] As far as the role of the court is concerned, guidance is to be found in the Judgement of Buxton LJ in *WM (DRC)*, who having discussed the judgment of the court in *Onibiyo*, continued:

> "[10] ...Whilst, therefore, the decision remains that of the Secretary of State, and the test is one of irrationality, a decision will be irrational if it is not taken on the basis of anxious scrutiny. Accordingly, a court when reviewing a decision of the Secretary of State as to whether a fresh claim exists must address the following matters.
>
> [11] 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 persecution 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 enquiry; 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 security? 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."

**Discussion**

[24] Three questions arise in this appeal: (a) whether the respondent erred in law by failing to ask himself the correct question, when he considered the fresh information; (b) whether the respondent erred in law by failing to satisfy the requirement of anxious scrutiny; and (c) whether the Lord Ordinary erred in law in dismissing the petition. In addressing all of these questions, it is important to consider the whole terms of the respondent's decision letter of 5 February 2009, and to do so against the background of the Determination of the Immigration Judge, rather than by merely looking at isolated passages of the decision letter.

[25] In our opinion, on a fair reading of the whole of the decision letter, it cannot be said that the respondent failed to apply the correct test. It is clear from the terms of the decision letter that the respondent considered the contents of the letter of 13 December 2007 and of its enclosures (the fresh information) with the full terms of the Determination of the Immigration Judge dated 13 February 2007. It is also clear from the decision letter that when the respondent did so he addressed whether the

fresh information, and the information that had been before the Immigration Judge, would have constituted a significantly different claim for asylum, with a reasonable prospect of success before another Immigration Judge; as opposed to being no more than a repeat or reinforcement of the reclaimer's earlier claim for asylum.

[26] In presenting his submissions on the first ground of appeal, counsel for the reclaimer focussed on one sentence on the fourth page of the decision letter. That sentence follows on the quotation of the terms of para 41 of the Determination, in which the Immigration Judge had set out his conclusion that were the reclaimer to relocate elsewhere in Nigeria, there was no real risk that the reclaimer's father and Chief A would be able to find her, even if they endeavoured to do so. The sentence criticised was to the effect that "(g)iven this it is considered that if your client does fear Chief A and her father, she would not be at threat from them if she relocated within Nigeria." Counsel for the appellant argued that sentence indicated that the respondent had gone further than he should have done. He had not restricted himself to considering whether the further information disclosed a new claim which would have a reasonable prospect of success before an adjudicator. Rather the respondent had reached his own conclusion that the fresh claim put forward on behalf of the reclaimer should be refused.

[27] In our opinion, the sentence complained about merely records that the respondent agrees with one of the conclusions of the Immigration Judge, as quoted from para 41 of the Determination. As such it formed no more than one of the starting points for the respondent's consideration of whether the further information, when taken with the information previously before him and the Immigration Judge, constituted a fresh claim for asylum with a reasonable prospect of success.

[28] Moreover, the fresh information submitted on 13 December 2007, whilst it was capable of supporting the contention that Chief A wanted the reclaimer as one of his wives, did not deal with the factual question of whether Chief A and the reclaimer's father would constitute a threat to her were she to relocate. Rather, the fresh information reinforced the contention that Chief A would pose a threat to the reclaimer in her home village, a threat the existence of which the Immigration Judge had already accepted. For these reasons we are not persuaded that the sentence complained of indicates that the respondent failed to address the correct question as far as the existence and prospect of success of the future claim were concerned.

[29] The terms of the respondent's letter of 5 February 2008 indicate that all of the fresh evidence was fully considered before the respondent reached the conclusion that the points made on behalf of the reclaimer were not sufficiently different to those previously advanced to constitute a realistic prospect of the reclaimer's application for asylum being successful before another Immigration Judge. Thus, for example, the respondent noted that no particular aspects of the further information had been referred to by the respondent or highlighted for consideration by the respondent. It was also noted that some of the points raised in the letter of 13 December 2007 had been dealt with in the earlier Determination. In these circumstances, we are satisfied that the respondent asked himself the correct question

[30] Turning to the second question that arises, we proceed on the basis that any failure on the part of the respondent to exercise anxious scrutiny whilst he was addressing the fresh information before him would have constituted irrationality. However, on the basis of our reading of the fresh information and the terms of the decision letter of 5 February 2008 we are not satisfied that any such complaint against the respondent would be justified. As we have indicated, on a fair reading of the

decision letter of 5 February 2008 it is clear that the respondent considered all the information before him, and that he did so fully and with care. In these circumstances, we are not persuaded that the respondent acted irrationally in making his decision of 5 February 2008. Nor can it be said that the decision the respondent reached was unreasonable on *Wednesbury* grounds. Indeed counsel for the reclaimer accepted that unless the court was with him in relation to his first ground of appeal an argument that the respondent's decision could be attacked as having been unreasonable would not have been open to him. In these circumstances the Lord Ordinary cannot be said to have erred in law in the manner alleged in the first ground of appeal.

[31] The third question we have focussed relates to the reclaimer's second ground of appeal. The submissions relating to this ground were directed in particular to the terms of para 14 of the Lord Ordinary's opinion:

> "[14] ...The only issue on which this fresh information might have been relevant was the issue of the reasonableness of internal relocation within Nigeria (the issue of risk of persecution have already been decided in the petitioner's favour). None of the material appended to the submission for the petitioner dated 13 December 2007 appears to me to be relevant to this issue. It suggests that Chief A is still interested in finding the petitioner, and it suggests that he may be prepared to instruct others to use violence towards people whom he perceives to be connected with the petitioner. However, there is nothing to suggest that his influence extends outwith the village or area in which the petitioner formerly resided."

[32] In our opinion the second ground of appeal confuses more than one of the issues involved under the topic of relocation. The first is the need for relocation, which the Immigration Judge answered in favour of the reclaimer. He held that Chief A would

constitute a threat of persecution were the reclaimer to return to her home village. Other issues that arose before the Immigration Judge included whether it would be reasonable for the appellant to relocate in Nigeria on her return to that country and whether, if she did so, there would a real risk that Chief A and her father would find her. The Immigration Judge found against the reclaimer on both those issues (paras 40 - 44 of the Determination).

[33] The Lord Ordinary observes that none of the fresh information appears to him to be "relevant" to the issue of the reasonableness of internal relocation. On one possible construction, that particular observation may not have been strictly accurate. That is because in one short paragraph in her statement, forming part of the fresh information, the reclaimer dealt very briefly with two reasons why she could not relocate in other areas within Nigeria - the fact that she would have no support in any area other than her home area and her Christian religion. However, it is quite clear that short passage, and indeed the fresh information as a whole, added nothing new to what had been before the Immigration Judge when he issued his Determination. In such circumstances it could not be argued that the short passage in the statement of the reclaimer, could have formed, when taken with the other information available, the basis for a fresh claim for asylum with a reasonable prospect of success.

[34] In the passage which we have quoted, the Lord Ordinary goes on to comment on the further information about Chief A. As the Lord Ordinary indicates the fresh information does not suggest that Chief A's influence extends beyond the area in which the reclaimer lived. In these circumstances, whilst that information fell to be considered by the respondent, it could not be argued that it was relevant to, in the sense that it could have provided a basis for, a fresh claim for asylum with a reasonable prospect of success before an adjudicator.

[35] In these circumstances, we do not consider that the criticism of the short passage the Lord Ordinary's opinion we have quoted constitutes an error of law that would warrant our recalling his interlocutor. On the contrary, we agree with the Lord Ordinary that the respondent asked the correct question and that the requirement of anxious scrutiny was satisfied. The respondent did not err in law is issuing his decision letter of 5 February 2008. The reclaiming motion is refused.