OUTER HOUSE, COURT OF SESSION

[2009] CSOH 75

P1730/08

OPINION OF LADY CLARK OF CALTON

in the Petition of

W O

Petitioner;

for

Judicial Review of a decision of the Secretary of State for the Home Department dated 7th August 2008 to refuse to treat the petitioner's representations based on further information as a fresh claim for asylum

Respondent:

Petitioner: Forrest; Drummond Miller
Respondent: Haldane; Office of the Solicitor to the Advocate General

29 May 2009

Introduction

[1] The petitioner WO was born 25 May 1980 and is the mother of two daughters, N, born 26 February 2004 and E, born 25 May 2005. She is referred to in this Opinion as the petitioner irrespective of the stage of proceedings. The petitioner is also the mother of a son, S, born 3 September 2006. She is a national of Nigeria. The respondent is the Secretary of State for the Home Department. The petitioner seeks

judicial review of a decision contained in the letter dated 7 August 2008 (6/1 of process). Said decision letter refused to treat submissions and information contained in the letter from the petitioner's solicitors dated 8 April 2008 (6/12 of process) as a fresh claim for asylum.

History of Proceedings

[2] The petitioner arrived in the UK on 30 January 2006 with her two daughters. At that time she was pregnant. She claimed asylum and breach of her human rights on 2 February 2006. That claim was refused on 11 May 2005. The petitioner appealed. The appeal was heard by an immigration judge who dismissed the appeal in August 2007. Further procedure followed in which the petitioner was unsuccessful.

[3] On 8 April 2008 the solicitors of the petitioner wrote to the respondent advising that the petitioner wished to lodge a fresh claim for asylum and human rights in terms of paragraph 353 of the Immigration Rules on the basis that she has brought forward significant new evidence (6/12 of process). Said letter raised some issues which were not founded upon by counsel for the petitioner in relation to the application for judicial review. I do not deal with these issues as they did not form part of the submissions made to me.

[4] In response to said letter of 8 April 2008, an official of the Home Office UK Border Agency, acting on behalf of the respondent, considered *inter alia* the three items of further information referred to in the petition and the representation and information in relation the petitioner's private and family life. A reply was made on behalf of the respondent by letter of 7 August 2008 (6/1 of process). The decision was to the effect that the submissions did not amount to a fresh claim.

[5] The petitioner raised an action of judicial review. The case came before me for a first hearing. The petition and answers were amended. The final form of the pleadings which I considered are to be found in 13 and 12 of process. The petitioner avers a number of ways in which the respondent is said to have made her decision under error of law. Paragraph 7 of the petition was not relied on by counsel for the petitioner. Counsel for the petitioner did not seek to support the first plea in law of the petition which sought decree of declarator. The only remedy sought on behalf of the petitioner was reduction of the decision of 7 August 2008.

[6] In the petition for judicial review, the petitioner relies on three specific items of further information which are narrated in paragraphs 2.3 to 2.5 of the petition. In addition, submissions were developed on the basis that the petitioner had developed a private and family life under reference to various documents narrated in 2.6 of the petition and a claim for the protection of Article 8 of the Convention of Human Rights 1950 was made.

The three items of further information relied on by the petitioner in paragraphs 2.3 to 2.5 of the petition

[7] The first item of further information related to the arrest and detention of the petitioner and is a document dated 4 December 2007 entitled "extract from crime diary". Said document, which *prima facie* bears a stamp purporting to be of the Nigeria Police Division, Apapa, Lagos State narrates:

> "On 24 October 2005 at about 2220 hours One OW female of an address in Lagos was arrested and detained in connection with the clash between Odua Peoples' Congress (OPC), and the Government of the Federal Republic of Nigeria. Case was later transferred to State Criminal/Intelligence Bureau (SCID) for discreet investigation. That after police investigation in

> December 2005, she was arraigned in Court for conduct likely to cause breach of the peace and riotous assembly which led to the death of some civilians, and concealing names of OPC members who were present during the clash. That the presiding Judge later adjourned the case to January and June 2006 respectively after she was granted a temporary bail but she failed to show up, hence the report".

This document is dealt with at pages 2 to 3 of the decision letter. It is stated that:

> "Although you have mentioned how the document was obtained, no reasons have been given as to why this document was not acquired at an earlier date. In addition an immigration judge would also need to take into consideration the country of origin information report for Nigeria".

Reference is then made to the practice of obtaining forged documentation and problems with corruption. Reference is also made to two matters relating to credibility which led the immigration judge to disbelieve the petitioner. The two matters referred back to paragraphs 33 and 34 of the decision of the immigration judge of 6 August 2007. The first matter relied on is that the immigration judge did not find it believable that the petitioner would have answered at interview that the OPC was a registered legal party in the light of the clear evidence that it was banned in 1999. The second matter relied on is that the immigration judge did not find credible the petitioner's account of her need to obtain release to make arrangements for her children. It is then stated in the decision letter of 7 August 2008 that "even if the document was genuine, the first immigration judge had decided that there was not a risk of re-arrest on return to Nigeria. In his determination, the immigration judge concluded that even if the Appellant had been telling the truth about her arrest and detention I am readily satisfied that the petitioner would not face any risk of rearrest on return". The official

comments that no evidence has been provided to substantiate the alleged existence of a current arrest warrant. The official concludes "As a result, it is considered that there is no realistic prospect of the immigration judge holding that the production of the 'Extract from Crime Diary' in any way should alter the findings of the previous immigration judge, particularly in light of its uncertain provenance".

[8] The second item of further information relates in part to the circumstances in which the petitioner conceived her son, born 3 September 2006. It is averred in the petition that the petitioner had sex with her husband on 18 November 2005 following temporary release from prison. It is also averred that the petitioner was raped in prison on 20 November 2005 and twice between 21 to 28 November 2005. The petitioner did not disclose this until about 13 March 2008. It is averred that the petitioner was too ashamed to admit before the immigration judge that she had been raped and that her son's father might not be her husband. Reference in the support documentation in the letter of 8 April 2008 (6/12 of process) is made to well established problems of rape victims in making disclosure and the need to take this into account in assessing credibility. Following a DNA analysis report dated 17 February 2009, it is averred in the petition that the petitioner has now found out that her husband is likely to be the father of her third child and that the third child was not conceived, as she had thought probable, as a result of rape. The petitioner maintains her claim that she was raped when in prison.

[9] This is dealt with at pages 3 to 4 of the decision letter. It was not disputed by the parties to the petition that at the time the matter was considered, DNA results had not been supplied. The decision letter states "...the immigration judge in his determination concluded that there were aspects of the petitioner's account that led him to disbelieve her. It was not solely the chronology of conception and pregnancy in relation to her

claimed dates of arrest and detention that formed the basis of the immigration judge's finding about credibility". Reference is again made to paragraphs 33 and 34 and that the immigration judge was "readily satisfied that the petitioner would not face any risk of rearrest on return".

[10] The third item of further information averred in the petition related to the treatment of prisoners in jail in Nigeria. Reference was made to a report dated 22 November 2007 from the Special Raporteur to the Office of the United Nations High Commissioner for Human Rights on Torture and other cruel, inhuman or degrading punishment in Nigeria (6/5 of process). The petition refers in particular to paragraphs 36, 40, 42, 43 and 63 thereof.

[11] This report is referred to in said letter of 7 August 2008 at page 2 where it is noted that the report is included with the letter sent by the petitioner's solicitors dated 8 April 2008. No other reference is made to this report in said letter.

Article 8, private and family life - paragraph 2.6 of the petition

[12] In support of the submissions about the petitioner having developed a private and family life a number of documents were founded upon. These documents are referred to in 6/12 of process and are set out in paragraph 2.6 of the petition. The petitioner submits in paragraph 8 of the petition that the respondent has erred in law because the conclusion that there is no realistic prospect that an immigration judge would conclude that the removal of the petitioner from the UK would amount to a disproportionate interference with the petitioner's rights under Article 8 ECHR is irrational.

[13] The response to this aspect of the case is dealt with in pages 5 to 9 of the decision letter. It is accepted that the petitioner and her children have established a private life

in the United Kingdom and that her removal would constitute an interference with this and that potentially Article 8 is engaged. Reference is made to the documentary support provided by the petitioner's solicitor. It is stated:

> "Whilst an immigration judge would no doubt be required to take into account the documentary support provided ...it is however considered that there is no realistic prospect of him finding that these matters outweigh the need to maintain effective immigration control which is a weighty consideration by conducting a balancing exercise".

It was further stated that when assessing proportionality it is considered that an immigration judge would be entitled, and required also to take into account the following matters:

> "None of the members of the petitioner's family have had leave to remain, and their residence in the United Kingdom has never been anything other than extremely precarious. Although the petitioner and children have built up a private life in the United Kingdom, the petitioner's children are of a young enough age to be able to adapt to life back in Nigeria."

The decision letter also deals specifically with the petitioner's relationship in the UK with other family members and with the medical and psychological circumstances of the petitioner and her children.

Rule 353 of the Immigration Rules

[14] It was agreed by counsel for both parties that Immigration Rule 353 provides the legal framework within which a decision must be made by the official who made the decision on behalf of the respondent in the decision letter 6/1 of process. Rule 353 provides:

"When a human rights or asylum claim has been refused and any appeal in relation to that claim is no longer pending, the respondent 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:

(i) has not already been considered; and

(ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection...".

Submissions by counsel for the petitioner

[15] Counsel for the petitioner founding on paragraphs 2.3 to 2.5 of the petition stated that the respondent in 6/1 of process appears to accept that the material therein referred to was not previously considered by the immigration judge. He further explained that at the time of the decision to refuse the application as a fresh claim, the DNA report was not available. Counsel for the petitioner explained that the effort to obtain DNA evidence was based on the petitioner's concerns that her son was born as a result of one of the rapes and not as a result of her relationship with her husband. It was submitted by counsel for the petitioner that the fact that the DNA results do not support that the father of the petitioner's son is someone other than her husband, does not resolve the issue of whether or not the petitioner was raped in custody as she now claims.

[16] Counsel for the petitioner submitted that it was the cumulative effect of the three items of further information which was important. If taken cumulatively it is plain that the respondent erred and was not entitled to reach the view that the further

information which had not been considered did not satisfy Rule 353 and that there was a fresh claim.

[17] Counsel for the petitioner prayed-in-aid *WM (DRC)* v *Secretary of State for the Home Department* (2007) Imm.A.R.337. He submitted that this is a case in which the material is significantly different and in such circumstances the task of the official acting for the Secretary of State is to consider whether that material, taken together with material previously considered, creates a realistic prospect of success in a further asylum claim. Praying-in-aid paragraphs 6 and 7 he submitted,

> "that second judgment will involve not only judging the reliability of the new material, but also judging the outcome of Tribunal proceedings based on that material. To set aside one point that was said to be a matter of some concern, the Secretary of State, in assessing the reliability of new material, can of course have in mind both how the material relates to the other material already found by an adjudicator to be reliable, and also have in mind, where that is relevantly probative, any finding as to the honesty or reliability of the applicant that was made by the previous adjudicator. However, he must also bear in mind that the latter may be of little relevance when, as is alleged in both of the particular cases before us, the new material does not emanate from the applicant himself, and thus cannot be said to be automatically suspect because it comes from a tainted source.
>
> [7] The rule only imposes a somewhat modest test that the application has to meet before it becomes a fresh claim. First, the question is whether there is a realistic prospect of success in an application for an adjudicator, but not more than that. Second, the adjudicator himself does not have to achieve certainty, but only to think that there is a real risk of the applicant being persecuted on

return. Third, and importantly, since asylum is an issue the consideration of all the respondents, the Secretary of State, adjudicator and the Court, must be informed by the anxious scrutiny of the material that is axiomatic in decisions but if made incorrectly may lead to the applicant's exposure to persecution".

I was invited also to approach the matter bearing in mind paragraphs 8 to 11 in which the task of the Court is summarised.

[18] Counsel for the petitioner submitted that the respondent had erred in law because of a failure to approach the matter taking into account the cumulative effect of the information. The respondent was not entitled to conclude merely because some or many documents in Nigeria may be forged, that the "extract from crime diary" document was false. Counsel accepted that some adverse views about the credibility and reliability of the petitioner had been expressed but submitted that if the petitioner was in custody as the new documentary evidence set out, this plainly should alter the approach to be taken in relation to conception and the birth of the petitioner's son. The petitioner claimed she met her husband albeit briefly, when she was released for a short period from custody. The failure of the petitioner to give voice to the complaint of rapes which occurred in prison must be seen in the context of well recognised and reported difficulties for rape victims who are silent because of shame and post-traumatic stress. Counsel for the petitioner accepted that the third item of information relied on was a general report but he pointed out that the official ignores the report. It was submitted that the report is relevant to the ill-treatment in prison which the petitioner always alleged and it is also relevant to her new rape allegations. In assessing the credibility and reliability of the petitioner in relation to her ill-treatment and the rapes, the contents of the report should be given some consideration. In

developing the submission, the petitioner referred to paragraphs 5 and 6 of the petition.

[19] In summary it was submitted that the respondent had set out the appropriate test but had not properly applied that test.

[20] Turning to paragraph 2.6 of the petition which relates to the petitioner's private and family life, counsel for the petitioner developed his submission based on paragraph 8 of the petition. He prayed-in-aid *Razgar* v *Secretary of State for the Home Department* 2004 2 A.C.368, in particular paragraph 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 (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? (2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8. (3) If so, is such interference in accordance with the law? (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? (5) If so, is such interference proportionate to the legitimate public end sought to be achieved?"

Counsel for the petitioner submitted that the respondent has erred because the respondent does not explain why the personal circumstances of the petitioner would be outweighed. He prayed-in-aid *EB (Kosovo)* v *Secretary of State for the Home Department* (2008) 3 W.L.R.178 at page 184. Counsel submitted that the proper approach was to carry out an evaluative exercise, not a ticking of boxes. He said the balancing exercise is an evaluative exercise and that while a balance has been struck in this case that has not been done in a careful and informative way.

Submissions by counsel for the respondents

[21] Counsel for the respondents invited me to refuse the petitioner's motion, sustain the first plea-in-law for the respondents and dismiss the petition.

[22] Counsel conceded on behalf of the respondents that the submissions made and relied on by the petitioner in the petition have not been considered by the immigration judge. I was invited to consider the terms of the decision letter (6/1 of process) and analyse three questions. Firstly, has the respondent considered the correct question in order to determine whether the further representations amount to a fresh claim. Secondly, has the respondent given the anxious scrutiny required. Thirdly, whether there is any real doubt as to the reasoning of the decision reached. Counsel for the respondents submitted that even if there are concerns by the Court about the approach adopted by the respondent, it does not follow that the decision falls to be reduced. Reference was made to *EB (Kosovo)* at paragraph 8. In relation to *WM (DRC)* counsel for the respondent accepted that the general approach set out in *WM (DRC)* was correct. The Court in considering the petition is to review the decision-making of the respondent based on the information before the respondent when the decision was

made. I was reminded that the respondent in making the decision challenged had not had the DNA evidence now available.

[23] In relation to the first item of further information set out in paragraph 2.3 of the petition, counsel for the respondents sought to support the reasoning of the respondent. She emphasised that this was a case in which it had been decided that there was no risk of the petitioner being detained. The "extract from crime diary" made no difference to that assessment. The protection under the Convention was not designed to protect persons who were allegedly in breach of criminal codes in the country of origin or fugitives from that country's criminal justice system. At its highest the "extract from crime diary" confirms that the petitioner had been arrested and was in custody for a period. That information does not support the petitioner's case that she would be re-arrested and persecuted for her political views.

[24] In relation to the second item of further information, counsel for the respondent submitted that there had been a number of different versions of events given by the petitioner in relation to her period in custody and the birth of her son and that the petitioner's lack of credibility was plainly a matter which was entitled to weigh with the respondent.

[25] In relation to the third item of further information, counsel for the respondent submitted that this is a general document and does not assist with the specific circumstances of the petitioner. Counsel pointed out that within the terms of the document there appears to be an acceptance that female prisoners were in general provided with better conditions than men in prison. In any event it was submitted that 6/5 of process does not provide a basis to conclude that there was a risk of persecution for the petitioner.

[26] The respondent was entitled to look at all the information "in the round" and accept that, even if the material was significantly different than that considered by the immigration judge, it did not create a realistic prospect of success in future asylum claims when taken together with the material previously considered.

[27] In relation to the Article 8 claim which formed the basis of paragraph 2.6 of the petition, counsel for the respondent submitted that there was no error of approach disclosed in the petition or advanced in submissions on behalf of the petitioner. The respondent plainly considered all the material placed in front of her. It was not submitted that the petitioner could not enjoy a family life elsewhere outwith the UK. The thrust of the petitioner's submission is that she has made a family life in the UK. She and her children have been in the UK for a relatively short time. Reference was made to *Huang* v *Secretary of State for the Home Department* (2007) 2 A.C.167 which stated:

> "....where the claimant did not qualify for leave ...but relied on the family component of Article 8, the appellate authority was itself to decide whether the refusal was unlawful as incompatible with Convention rights;..."

Counsel submitted that the respondent followed the proper approach. She considered the factors in favour of the refusal with particular reference to justification of Article 8(2) and in assessing the proportionality of that decision. She had given effect to the over-riding need to strike a fair balance between the individual's rights and the interests of the community. This was not a case where family life could not reasonably be expected to be enjoyed elsewhere. It was submitted that having weighed up the factors in relation to a private and family life and having regard to a firm and fair immigration system, the respondent was entitled to reach the decision.

[28] Counsel for the respondent submitted that declarator as sought in the petition was not appropriate and relied on *Veronique Angele Boum* v *Secretary of State for the Home Department* (2006) CSOH 111.

[29] Counsel also drew attention to *Andrei Harbachou* v *Secretary of State for the Home Department* (2007) CSOH 18, in particular paragraphs 5-7. It was submitted that this case demonstrated that the general approach illustrated in *WM (DRC)* is an approach also adopted in Scotland.

Discussion

[30] I note the concession made by counsel for the petitioner that declarator is not appropriate. I accept that the submissions on behalf of the respondent summarised in paragraph [28] are well founded for the reasons given by counsel for the respondent. I do not consider it necessary to deal with this point further.

[31] There is no dispute that Rule 353 of the Immigration Rules applies. I accept that the proper approach for the Court in considering the issues in the case is as set out by Buckstone LJ in *WM (DRC)* paragraphs 8-11. I accept that in assessing the decision set out in 6/1 of process I must do that on the basis of the information which was before the respondent.

[32] I have no difficulty in concluding that the information provided in 6/12 of process and the documents to which reference is made have "not already been considered". This matter was not the subject of dispute. I am of the opinion that the requirements of Rule 353(i) are fulfilled.

[33] The dispute relates to Rule 353(ii). The issues in this case are not to be approached as if this was an appeal. The question asked by the respondent was "is there a realistic prospect of an immigration judge, applying the rule of anxious

scrutiny thinking that the petitioner will be exposed to a real risk of persecution on return". I accept that the respondent asked and considered the correct question. I turn now to consider whether the respondent in addressing the correct question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has satisfied the requirement of anxious scrutiny.

[34] Firstly let me deal with the submissions in relation to the DNA analysis. I do not consider that the respondent can be criticised for not taking the results of the DNA analysis into account and I did not understand counsel for the petitioner to make such a criticism. The respondent approached this aspect of the case on the basis that there was no supporting DNA evidence which might bear upon the rape allegations. I consider that the respondent was entitled to do that. There was some consideration of DNA evidence in the proceedings before me, I am satisfied that this evidence, in any event, does not support the contention and the belief expressed by the petitioner at an earlier stage of proceedings that her son was born as a result of rape while she was in prison.

[35] I accept that, if genuine, the "extract from crime diary" potentially undermines the reasons for which the petitioner was found not to be credible. If the petitioner was giving a credible account in line with the documentary information as set out in the "extract from crime diary", the starting point for consideration of the petitioner's credibility might be different if anxious scrutiny was applied. I accept that the respondent would not be entitled to conclude that the document was not genuine on the basis that some documents or even many documents in Nigeria are manufactured. But the respondent does not proceed on that basis. As I understand the decision, the respondent proceeds on the basis of a hypothesis that even if the petitioner's account was credible, there was in fact no risk of re-arrest.

[36] I accept that the respondent does not consider the third item of further information to which I refer in paragraphs 10 and 11. Counsel for the respondent attempted to explain this by suggesting reasons for this failure. She submitted that the report was a general report from which it could be inferred that women prisoners were better treated than men. I am however reviewing the reasoning of the respondent who gives no reasons in respect of this matter. The report does give support, albeit in general terms, to ill-treatment and rape of women prisoners and the report appears to be ignored by the respondent. The respondent however does not accept that the petitioner is credible. Counsel for the petitioner accepted that the petitioner has given different versions of events in relation to her experiences in prison. In any event I am of the opinion that whether the petitioner did or did not give a credible account of the history of events the finding by the respondent that because of changes in the treatment of OPC members, the petitioner was not at risk is a finding which is critical to the conclusion of the respondent as it was also to the conclusion of the immigration judge.

[37] I consider that the major flaw in the reasoning and approach of counsel for the petitioner is that the respondent, following the approach of the Immigration judge, relies on the country of origin information to conclude that there is in fact no risk of re-arrest. In particular the respondent makes reference to the USSD 2006 report which states:

> "Unlike in the previous year [2005], there were no politically motivated arrests of members of the Oodua People's Congress (OPC) a militant Yoruba group operating in the southwest that claims its objective is to protect the collective rights of the Yoruba within the federation".

> "Several OPC members continued to be detained for most of the year on charges stemming from October 2005 clashes between rival OPC factions, but OPC leader Frederick Fasehun was released in April [2006] on bail for medical reasons. In December [2006], charges were dismissed against Fasehun, Adams, and four others, and all of those who had been detained were released from prison".
>
> The Federal High Court judge, Justice Anwuri Chikere, who release Adams and Fasehun, ruled that membership of the OPC was not a federal offence, and therefore the offence could not be tried in a federal court....."

This report is referred to by the immigration judge in paragraph 34 of the determination (6/2 of process). This report appears to be the foundation for the finding that even if the petitioner was credible in her account of politically motivated arrest and detention, because some charges had been dismissed in respect of some such prisoners and members of the OPC who had been detained had been released, there was no risk to the petitioner. This information is also critical to the decision of the respondent. In the decision letter (6/1), it is stated:

> "therefore, taking into account the above country of origin information, the findings of the first immigration judge as well as the absence of the DNA evidence, there is not a realistic prospect of an immigration judge, applying the rule of anxious scrutiny thinking that the petitioner will be exposed to a real risk of persecution on return ....."

Counsel for the petitioner did not challenge this approach to the country of origin information in the petition or in submissions. No new information was put before the respondent to undermine this approach and the conclusions reached by the respondent about risk. Standing such finding, I do not consider that there could be any realistic

prospect of an Immigration judge, applying anxious scrutiny thinking that the petitioner would be exposed to a real risk of persecution on return.

[37] I turn now to deal with the submissions based on private and family life in terms of paragraph 2.6 of the petition. I have no difficulty in accepting the submissions made by counsel for the respondent, for the reasons she gives, and which I have summarised in paragraph 29. In my opinion the respondent at pages 5-7 of the decision letter (6/1) addressed the new material in terms of Article 8 asked the correct question and demonstrated the correct approach with adequate and rational reasons therein set out. I am satisfied that the general approach approved in *Razgar* was followed.

[38] For the reasons given, I sustain the first plea in law for the respondent and dismiss the petition. I was not addressed in relation to expenses and that matter is reserved.