OUTER HOUSE, COURT OF SESSION

[2007] CSOH 46

P1392/06

OPINION OF LORD UIST

in the Petition of

T.M. (AP)

Petitioner

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Petitioner: Forrest; Drummond Miller WS
Respondent: A.F. Stewart; C Mullen, OSAG

28 February 2007

[1] The petitioner is a national of Uganda who was born on 18 December 1965. She entered the United Kingdom on or about 23 January 2001 with her four children and applied for asylum for herself and the children. She also claimed that her return to Uganda would result in a violation by the United Kingdom of Article 3 of the European Convention on Human Rights ("ECHR"). Shortly after her arrival she was diagnosed as being HIV positive. On 4 March 2001 the respondent refused her asylum claim and her human rights claim. On appeal to an adjudicator she did not insist upon her asylum claim but insisted on her human rights claim. The adjudicator allowed her

appeal on the basis that her removal to Uganda would infringe her rights under Article 3 of the ECHR. The Secretary of State appealed against the adjudicator's decision and in a determination notified on 24 January 2003 the Immigration Appeal Tribunal ("IAT") allowed the Secretary of State's appeal on the basis of the decision of the Court of Appeal in *K* v *Secretary of State for the Home Department* [2001] Imm A.R. 11, which held that as treatment for AIDS was available in Uganda removal to that country would not amount to inhuman or degrading treatment under Article 3 of the ECHR on the ground that the appellant might not be able to afford all the treatment that he might require. Having allowed the Secretary of State's appeal, the IAT in the last two paragraphs of its determination went on to state as follows:

> "7. However, in our opinion there are exceptional circumstances in this case and we strongly recommend that before removal is considered the Secretary of State reviews all the facts afresh. We find that the claimant is the head of a family, which includes one child who is already suffering AIDS and three others who might too be vulnerable. Also the claimant, it would seem, has no immediate family in Uganda and she herself last lived there seven years ago. Given her medical condition it is not unreasonable to assume that her ability to obtain appropriate treatment and to provide for her family in Uganda would be extremely limited. We have no real reason to doubt her claim that she would have no support of any kind - emotional, moral or physical - in Uganda.
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> 8. The appeal is allowed but we recommend a sympathetic reconsideration of all relevant facts."

[2] On 20 October 2003 the Glasgow solicitors for the petitioner wrote to the respondent in the following terms:

> "We note that the Immigration Appeal Tribunal whilst reluctantly allowing the Secretary of State's appeal in this matter recommended a sympathetic reconsideration of all the relevant facts, as they have stated in paragraph 8 of that determination. We wonder if you can confirm that such a reconsideration is taking place. Further, we wonder if you could confirm what further documentation and information you require to allow you to come to a positive decision in favour of our client. We look forward to hearing from you as soon as is possible."

On 7 April 2004 they again wrote to the respondent in the following terms:

> "We note there has been no response to any correspondence from either ourselves or our client's former solicitors ... in respect of the reconsideration of this case as discussed in the Tribunal determination. Mr Drabu (the chairman of the IAT) recommended a sympathetic consideration of all the relevant facts in this case. We would be grateful if you could confirm that such a reconsideration is taking place and would urge that some form of status, be it humanitarian protection or discretionary leave, be granted to our client and her dependants.
>
> In addition to the matters raised by the Immigration Appeal Tribunal, we would ask that you consider the five references attached hereto. Our client, we would suggest, on the basis of the evidence and the references, is an individual who has a positive contribution to make to UK and in particular Scottish society. She appears to be a selfless, generous individual who has touched the lives of a great number of people. One only needs to read the enclosed references to see that our client is someone who wishes to use what time she has left to alleviate the suffering of others. She is a religious woman who has used her own experiences in order to attempt to educate individuals and organisations on the issues and problems surrounding HIV sufferers. She has assisted with the Glasgow Women's Library, Barnardo's and Body Positive. She was also involved in the African choir as noted in Father C's missive.
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> In summary we would suggest that there are compassionate and compelling reasons as to why our client should be granted status along with her dependants outwith the immigration rules.
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> We would be grateful if consideration could be given as a matter of some urgency. You will note the Tribunal determination was promulgated on 24 January 2003. The final decision in this case was on 2 March 2003. We would therefore be grateful, given the fact that a year has elapsed since that determination, for your immediate regard being had to this application. We look forward to hearing from you in early course."

[3] On 22 June 2004 the respondent wrote to the petitioner's Glasgow solicitors apologising for the delay in responding and stated as follows:

> "Your client's case is being considered under current policy. However, in order to progress this case, I require an up-to-date medical report on both your client and her daughter. This should include recent details of medication, ongoing treatment and prognosis in each case."

The petitioner's Glasgow solicitors subsequently submitted to the respondent a medical report on the petitioner dated 28 July 2004 from Dr Andrew Winter, Consultant in Genitourinary and HIV Medicine, and a medical report on the

petitioner's daughter who suffers from AIDS dated 3 September 2003 from Dr Rosie Hague, Consultant in Paediatric Infectious Diseases and Immunology.

[4] On 1 June 2005 the respondent replied to the petitioner's Glasgow solicitors. In paragraph 1 of that letter he stated as follows:

> "Thank you for your letter of 7 April 2004 and subsequent correspondence in which you have asked for your representations on behalf of your above named client to be considered as an application for Humanitarian Protection or Discretionary Leave. Please accept my apologies for the lengthy delay in replying."

At paragraphs 5 and 6 he stated as follows:

> "5. You have asked that your client's case be reconsidered following the recommendation of the Immigration Appeal Tribunal's determination which was promulgated on 24 January 2003. The Tribunal dismissed your client's Article 3 claim under the European Convention on Human Rights, but recommended that before removal is considered a sympathetic reconsideration of all the facts is undertaken. You also ask that we take into consideration the references from the various charitable organisations who confirm that your client makes a positive contribution to the United Kingdom and in particular to Scottish society.
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> 6. All the points raised in your submissions were considered when the earlier claim was determined. They were dealt with in the letter giving reasons for refusal/appeal determination of 24 January 2003. Although your submissions are not significantly different from the material that has previously been considered, I have, as the Tribunal recommended, reconsidered the relevant factors of this case."

In paragraph 7 the respondent referred to the two medical reports submitted and in paragraph 8 to the information contained in the latest Home Office Country Information and Policy Unit (CIPU) report dated October 2004. He went on to state as follows:

> "9. Taking the various aspects of this report into account, I conclude that your client and her daughter will be able to continue and manage their treatment on their return to Uganda. I conclude that the most recently obtained medical reports do not add additional weight to your client's case and do not create a realistic prospect of success.
>
> 10. I have read the supporting letters from the various organisations praising your client's dedication to her charitable work. Whilst

appreciating that Mrs M has been a valued member of the community during her stay in the United Kingdom, this does not give rise to granting Leave to Remain in the United Kingdom. There is no reason why Mrs M cannot continue to help others in Uganda when she returns. I therefore conclude that these letters do not create a realistic prospect of success.

11. Having fully reviewed all the factors of this case, as well as considering the recently obtained medical reports and supporting letters, I am not prepared to reverse our decision of 4 March 2001.

12. As the Secretary of State has decided not to reverse the decision on the earlier claim and has determined your submissions do not amount to a fresh claim, you have no further right of appeal.

13. The asylum claim has been reconsidered on all the evidence available, including the further representations, but we are not prepared to reverse our decision of 4 March 2001 upheld by the Immigration Appeal Tribunal on 24 January 2003.

14. It has been concluded for the reasons given above that your client does not qualify for humanitarian protection or for limited leave to enter or remain in the United Kingdom in accordance with the published Home Office Asylum Policy Instruction on Discretionary Leave."

[5] On 14 June 2005 the petitioner's Glasgow solicitors wrote to the respondent noting his position in respect of the Article 3 matter and stated that, standing the very recent decision of the House of Lords in *N* v *Secretary of State for the Home Department* [2005] 2 AC 296, it appeared that "in terms of the law, our client is in somewhat of a difficult situation". The letter then went on to state that one matter which did not appear to have been considered by the respondent was that of Article 8 of the ECHR, and continued as follows:

> "We note that in paragraph 10 of the aforementioned letter you have read the supporting letters from the various organisations praising our client's charitable work. We note that you appreciate that Mrs M has been a valued member of the community during her stay in the United Kingdom. What we would have to take issue with is your assertion that Mrs M would be able to continue her good work for others should she be returned to Uganda. It is our position that our client's charitable work and her contacts and liaisons and assistance provided to others in the totality of the work she does for the variety of charities establishes that Mrs M has a private life in the United Kingdom. As you will be aware private and family life are to be treated under separate heads.

> It is our client's position that removal from the United Kingdom would entirely disrupt that private life. Should our client be returned to Uganda she believes there is no way she would actually be able to access medication for her and her daughter. Such is the current employment position in Uganda that our client believes there is absolutely no prospect that she will be able to be engaged in employment. She has no family in Uganda. She grew up as an orphan and other relatives have died.
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> Whilst our client is well enough now to continue with her work she does not believe that she would be able to access sufficient medication to allow her to care for her children.
>
> In summation of the above we would therefore submit to you that removal from the United Kingdom would completely disrupt our client's private life. We would also refer you to the decision of the Immigration Appeal Tribunal of 24 January 2003 at paragraph 7. You will note that the Tribunal has already decided that there are exceptional circumstances in this case. We would therefore suggest to you that removal of our client in completely disrupting her private life would therefore necessarily be disproportionate in terms of the currently settled case law as in the House of Lords decision in *Razgar* and the Court of Appeal in *Huang*.
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> We would therefore be grateful if you could confirm that you would be in a position to grant leave to remain to our client on the basis of her private life and that removal would be disproportionate to the UK's legitimate aims.
>
> One other matter, which did not appear to have formed part of your consideration, is the potential breach of Article 3 occasioned to our client by having to watch her daughter suffer should she be returned to Uganda."

On 27 June 2005 the petitioner's Glasgow solicitors wrote to the respondent enclosing a letter of support for her application from a lecturer in International Health at Queen Margaret University College, Edinburgh and stating:

> "We would suggest to you that there is every possibility that our client would suffer a breach of Article 3 whilst watching her daughter die."

[6] On 23 March 2006 the respondent replied to the petitioner personally. At paragraphs 5 to 10 he stated as follows:

> "5. Some points raised in your submissions were considered when the earlier claim was determined. They were dealt with in your appeal determination dated 24 January 2003 and the refusal of further representations letter of 2 June 2005.

6. The remaining points raised in your submissions, taken together with the material previously considered in the letter, would not have created a realistic prospect of success.

7. In their letters of 14 June and 27 June 2005 your representatives have stated that you would be unable to access medical treatment for yourself and your daughter if you were to return to Uganda. However, this aspect of your claim was considered at your appeal of 23 January 2003 and in the refusal letter of 2 June 2005 when it was concluded that you and your daughter would be able to continue and manage your treatment on return to Uganda as the medical treatment for HIV/AIDS there was more than adequate.

8. Your representatives have also stated that your rights under Article 3 of the Human Rights Act 1998 *(sic)* would be breached should you be returned to Uganda as there is a possibility that you would have to watch your daughter die. However, as stated above, in our letter of 2 June 2005 we indicated that there was indeed medical treatment available to yourself and your daughter in Uganda and in this respect it is not accepted that your daughter would have to suffer to the extent that your representatives are stating. It is therefore not accepted that your rights under Article 3 of the Human Rights Act 1998 *(sic)* would be breached as you claim.

9. Your representatives have further stated that your removal to Uganda would affect your wellbeing as you would not be able to find employment. However, it is considered that your claims that you would be unable to find employment are entirely speculative. Nevertheless, being unable to find employment is the position many people in the world unfortunately find themselves in and it is not sufficiently compelling or compassionate to warrant a grant of leave outside the Immigration Rules.

10. Your representatives have further stated that your removal to Uganda would affect your wellbeing as you would not have any family to support you there. However, it is noted that, besides your dependant children, to our knowledge, you do not have any other family members to support you here in the UK. In this respect, it is not considered that your removal to Uganda is justified."

At paragraphs 11 and 12 the respondent considered the submissions relating to private and family life under Article 8 of the ECHR and rejected them.

[7] At the hearing of this application for judicial review it was accepted by both counsel that in his letters of 1 June 2005 and 23 March 2006 the respondent had considered three questions: (1) Was the petitioner entitled to humanitarian protection?

(2) Was the petitioner entitled to discretionary leave to remain in the United Kingdom? (3) Was there a fresh claim? At the outset of his submissions Mr Forrest for the petitioner made clear that he was not challenging the decision of the respondent on the issues of humanitarian protection or fresh claim and that his challenge was restricted to the respondent's decision not to grant the petitioner discretionary leave to remain in the United Kingdom. He accepted that Articles 3 and 8 of the ECHR could not be invoked. His submission was that the Secretary of State had not properly considered the facts in order to decide whether they were so compelling as to warrant the grant of discretionary leave to remain in the United Kingdom.

[8] Mr Forrest first submitted that the petitioner had been prejudiced by the delay on the part of the respondent in reconsidering her case following upon the decision of the IAT. That decision was dated 24 January 2003 and the first communication from the respondent thereafter was dated 22 June 2004. The first decision letter was dated 1 June 2005. The petitioner had a legitimate expectation that her case would be reconsidered in view of what the IAT had stated in paragraph 8 of its decision and the longer the Secretary of State had taken to consider the circumstances of her case the more the petitioner had suffered prejudice. Secondly, he submitted that the respondent had not taken into account what the IAT had stated in paragraph 7 of its decision. He should have addressed his mind to the facts stated therein but he had failed to do so. His decision should therefore be reduced so that he could reach a fresh decision based on reconsideration of those facts.

[9] Mr Stewart for the respondent submitted that the petitioner could make nothing of the delay by the respondent in reconsidering this case as any prejudice arising therefrom was not sufficiently substantial to give rise to a ground of challenge

of the respondent's decision. In the context of immigration law the delay in this case could not properly be described as substantial. He referred to the decision of the Immigration Appeal Tribunal dated 9 March 2005 in *MB* v *Secretary of State for the Home Department*, in which the Tribunal stated at paragraph 28:

> "Delay in decision-making may cause an individual to lose specific advantages or opportunities which timeous decision-making would have conferred ... But in each case it is the effect of delay which assists the claimant's proportionality argument. It is very difficult to envisage a case in which the removal of someone who had no claim to enter and no claim for international protection would be disproportionate merely because of a delay in decision-making which had had no disadvantage ... or which had not led to the creation of circumstances which themselves made removal disproportionate. It is the effects of delay to which an adjudicator should look rather than to the fact or extent of delay itself. Delay by itself would be not so much really determinative as rarely ever significant."

Reference was also made to the decision of the Court of Appeal in *Strbac* v *Secretary of State for the Home Department* [2005] EWCA Civ 848 at paras 25-32. In the present case the claim based on interference with private life was at best tenuous.

[10] In response to the submission that the respondent had not properly taken into account the content of paragraph 7 of the IAT's decision Mr Stewart pointed out that the IAT's recommendation in paragraph 8 of a sympathetic reconsideration of all the facts amounted to no more than an invitation to the Secretary of State and was in effect a plea *ad misericordiam*. The invitation was that the respondent should review all the facts afresh and take the factors mentioned by the IAT in paragraph 7 into account in considering whether to grant discretionary leave to remain in the United Kingdom. Mr Stewart submitted that the respondent had properly carried out that task, as was clear from the content of paragraph 6 of his decision letter of 1 June 2005, in which he stated that, although the petitioner's submissions were not significantly different from the material that had previously been considered, he had, as the Tribunal recommended, reconsidered the relevant factors of this case. The remainder

of the letter indicated that he had indeed considered all the relevant factors, including taking into account an up-dated CIPU report. His conclusion in paragraph 9 of that decision letter could not be faulted. There had therefore been no ground demonstrated by the petitioner for interfering with the respondent's exercise of his discretion. Reference was made to *Macdonald's Immigration Law and Practice* (6th Ed, 2005) at p 825, para 12.174, headed "Humanitarian Protection and Discretionary Leave", wherein it is stated as follows:

> "Where humanitarian protection is not warranted, caseworkers must consider whether a grant of discretionary leave is appropriate. Humanitarian protection is not afforded to those whose claim rests on the severity of a medical condition, who may instead be eligible for discretionary leave. A person who would be excluded under 1F(b) of the Refugee Convention will similarly be excluded from humanitarian protection, but would qualify for a grant of discretionary leave if his or her removal would breach the ECHR. Discretionary leave is granted where removal would involve a direct breach of Article 8 ECHR ..., and is also appropriate in medical or other humanitarian cases where return would breach Article 3(or 8) ECHR, and for unaccompanied children who qualify for neither asylum nor humanitarian protection but for whom there are not adequate reception arrangements available in their own country. Other cases which could warrant the grant of discretionary leave for unsuccessful asylum seekers would require facts 'so compelling that it is considered appropriate to grant some form of leave'."

The quotation at the end of the above passage is from the Home Office Asylum Policy Instruction on Discretionary Leave. So far as medical cases are concerned, para 2.3 of that Instruction (quoted in footnote 8 at p 826 of *Macdonald*) states that "the United Kingdom's obligations would only be engaged where (a) the United Kingdom can be regarded as having assumed responsibility for the individual's care; (b) there is credible evidence that return, due to complete absence of medical treatment in the country concerned, would significantly reduce the applicant's life expectancy; and (c) return would subject them to acute physical and mental suffering". Those conditions, said Mr Stewart, had not been satisfied in the present case.

[11] In my opinion the submissions for the respondent are correct. I do not think it can be said that the delay by the respondent in reconsidering the petitioner's case caused her prejudice of sufficient substance as to give rise to a ground of challenge of his decision. I accept that, although the period of delay was clearly undesirable, it was not, in the context of immigration law, substantial. No doubt in any case of this nature delay in reaching a decision means that the applicant becomes more settled in this country, but it is clear that that in itself is insufficient to vitiate the decision ultimately reached. The delay has to have been of such a nature as to have caused substantial prejudice to the applicant. I conclude that the delay in this case was not of such a nature.

[12] Further, I am of the opinion that there is no merit in the submission that the respondent failed properly to consider the factors mentioned in paragraph 7 of the IAT's decision of 24 January 2003. In paragraph 6 of his decision letter of 1 June 2005 the respondent expressly stated that he had "as the Tribunal recommended, reconsidered the relevant factors of this case". Moreover, it is clear from the content of that decision letter, and indeed the content of his subsequent decision letter dated 23 March 2006, that he closely reconsidered the merits of the petitioner's case. No reported case was cited in the course of the hearing in which a court had on judicial review overturned a decision of the Secretary of State refusing to grant discretionary leave to remain in the United Kingdom. In my opinion it would require to be shown that the Secretary of State had acted irrationally in refusing to grant discretionary leave before a court on judicial review could overturn his decision. It is clear that the Secretary of State has a policy for consideration of the grant of discretionary leave, including a specific policy for medical cases, which in my view he properly applied to the circumstances of the petitioner. In the present case there is no basis for interfering

with the decision of the Secretary of State to refuse to grant discretionary leave to remain on reconsideration of the factors referred to in paragraph 7 of the IAT's decision.

[13] For the above reasons I shall dismiss the petition.