OUTER HOUSE, COURT OF SESSION

[2010] CSOH 169

P1344/09

OPINION OF LORD STEWART

in the Petition of

O.A.

Petitioner ;

For Judicial Review of a decision of the Secretary of State for the Home Department to refuse to treat further representations made on his behalf as a fresh asylum claim in terms of paragraph 353 of the Immigration Rules [HC 395]

Petitioner: Party
Respondent: McIlvride, advocate; Office of the Solicitor to the Advocate General

21 December 2010

[1] This Petition for Judicial Review of a United Kingdom Border Agency determination called before me for a First Hearing on 19 November 2010. The Petitioner who was unrepresented appeared at the Bar on his own behalf. The Respondent was represented by Counsel. The Petitioner moved to continue the matter for four weeks to allow him to obtain representation. Counsel for the Respondent opposed the motion on the grounds that the motion had not been intimated, that it was unlikely that a continuation would result in the Petitioner obtaining representation and that the time had come to determine the Petition. He stated that those instructing him

understood from the Petitioner's original solicitors that the latter had ceased to act for certain reasons. Having heard the Petitioner and Counsel for the Respondent, I refused the Petitioner's motion. The substantive hearing proceeded to a conclusion. Having made *avizandum*, giving the whole matter anxious scrutiny, my opinion is that the Petition should be refused.

The Petitioner's motion for a continuation

[2] The Motion Sheet, Minute of Proceedings, representations from both sides of the Bar and certain inquiries disclosed the following sequence of events. On 20 October 2009 First Orders were granted and a First Hearing assigned for 10 December 2009. On 27 November the Lord Ordinary on the unopposed motion of the Petitioner discharged the First Hearing fixed for 10 December 2009 and of new assigned 24 February 2010 as the date of the First Hearing. On 24 February 2010, having heard Counsel on the unopposed motion of the Petitioner, the Lord Ordinary discharged the First Hearing set down for that day and of new assigned 12 May as the date for the First Hearing. The Petitioner's then agents Messrs McGill and Co, Solicitors, Edinburgh, withdrew from acting on 26 April. On 12 May, having heard the Petitioner personally and Counsel for the Respondent, the Lord Ordinary discharged the First Hearing set down for 12 May 2010, of new assigned 30 June as the date of the First Hearing and appointed the case to call by Order on 18 June to establish whether the Petitioner had legal representation. On that occasion the Lord Ordinary was not impressed by the Petitioner's efforts since 26 April to find new representation. It was stated that the Court would expect arguments to be presented on 30 June either by someone on the Petitioner's behalf or by the Petitioner.

[3] At the pre-Hearing By Order of 18 June the Petitioner again appeared personally. Counsel for the Respondent, having spoken with the Petitioner, advised the Court that

the Petitioner had sought the assistance of Messrs McAuley, McArthy & Co, Solicitors, Glasgow, but that it was unlikely that Legal Aid would be in place by the date of the First Hearing on 30 June. The Respondents' position was that it was desirable for the Petitioner to be represented, given the legal complexity of the arguments. Having heard Counsel for the Respondent and the Petitioner personally, the Lord Ordinary discharged the First Hearing set down for 30 June and appointed the Petition to call By Order on 30 June 2010. The Court advised the Petitioner that on 30 June the Court would expect the Petitioner to attend with legal representation or to explain what steps he had taken to secure legal representation. On 30 June, having heard the Petitioner personally and Counsel for the Respondent, the Lord Ordinary of new ordered the First Hearing to take place on a date to be fixed. On that occasion the Petitioner stated that he was prepared to represent himself. The date assigned for the First Hearing was 15 October 2010.

[4] When the case called on 15 October the Petitioner did not appear and was not represented. Having heard Counsel for the Respondent, the Lord Ordinary caused investigations to be made. He was unable to satisfy himself that the diet had been properly intimated to the Petitioner. The Lord Ordinary accordingly discharged the First Hearing set down for 15 October and of new assigned 19 November 2010 as the date of the First Hearing. The Lord Ordinary directed the Clerk of Court to intimate the date of the First Hearing together with a copy of the Interlocutor on the Petitioner at the address given for him in the Instance of the Petition.

[5] When the Petitioner appeared on 19 November he stated that he had started looking for alternative representation as soon as he received notice of the hearing by recorded delivery letter dated 21 October 2010. He stated that he had talked with more than ten solicitors but could not remember any of their names. Later he stated that he

started looking for replacement representation soon after his original solicitors had withdrawn on 26 April 2010. Over the period of more than six months since then he had approached almost all the solicitors in Glasgow who deal with immigration work. He said that he had no idea why the original solicitors had withdrawn. He had signed Legal Aid papers for Messrs McAuley, McArthy & Co. He did not know why they had not progressed his application. He was still positive he could find a solicitor to represent him.

[6] The Petitioner confirmed that his address was as shown in the Instance. He stated that he could speak, read and understand English. His answers to questions from the Bench were to the point. The Petitioner appeared to have few papers. The Clerk of Court provided him with a copy of the Petition and Answers. Before making a decision on the Petitioner's motion for a continuation I caused investigations to be made about the state of the process. A "post-it" note on the Petitioner's (First) Inventory of Productions stated: "Borrowed by McGill & Co, solicitors, on 26/1/10. Never returned." By email dated 19 November Messrs McGill & Co stated that the Petitioner had mandated Messrs McAuley, McArthy & Co in May 2010 and that all papers had been passed to the latter firm in implementation of the mandate. I adjourned the Hearing for ten minutes to allow the Clerk of Court to contact Messrs McAuley, McArthy & Co by telephone. The Clerk reported that the firm had declined to act for certain reasons and that the personnel present at the time of the call could not put their hands on the papers.

[7] When the Court reconvened Counsel for the Respondent confirmed that copies of all productions could be made available to the Petitioner. Copies of all productions were in due course made available to the Petitioner and to the Bench. Production 6/3 "Determination dated 16 January 2008" evidenced that the Petitioner had been

represented at his Asylum and Immigration Tribunal Appeal Hearing by Mr A Hussain of the Immigration Advisory Service (Glasgow.) In all the circumstances I judged it appropriate to refuse the Petitioner's motion for a continuation, which I did.

History of claim for Asylum etc

[8] The Petitioner claims to be a Somali national born on 25 May 1988. He claims to have lived at Gedeni on the island of Koyama with his parents, four brothers and three sisters. He claims to have moved to Yemen with his family on 5 July 2007. He claims to have left Aden on 5 September 2007 by aeroplane and to have arrived in the United Kingdom on 6 September 2007.

[9] The Petitioner's Screening Interview took place on 6 September 2007. His Asylum Interview took place on 4 October 2007. By Reasons for Refusal Letter dated 9 October 2007 issued by a member of Asylum Team 1 Glasgow, the UK Border Agency, on behalf of the Respondent and served under cover of Notice of Immigration Decision Form IS 151B dated 18 October 2007, the Petitioner was refused Asylum, Humanitarian Protection and Leave to Remain. The deemed date of service was 23 November 2007 and the deadline for appeal was 7 December 2007.

[10] The Petitioner appealed to the Asylum and Immigration Tribunal in terms of the Nationality, Immigration and Asylum Act 2002 s 82 on grounds specified in the 2002 Act s 84 (1.) His appeal was heard at Glasgow on 8 January 2008 by Immigration Judge Wood TD. The Petitioner was represented by Mr A Hussain, IAS (Glasgow.) The Respondent was represented by Ms J Blyth-Spiers, the officer who had conducted the Petitioner's Asylum Interview and who had issued the Reasons for Refusal Letter. By undated Determination promulgated on 25 January 2008 under cover of Notification Letter dated 16 January 2008 the Immigration Judge dismissed the appeal. The Petitioner made an unsuccessful application for reconsideration in terms

of the Immigration and Asylum Act 2002 s 103A. He applied by Petition to the Court of Session for Judicial Review which Petition was refused on 6 March 2008. The Petitioner was recorded by the Respondent as being "rights of appeal exhausted" on 6 March 2008.

[11] By letter dated 7 August 2009 the Petitioner's solicitors Messrs McGill & Co, solicitors, Edinburgh made further representations to the Respondent in relation to the Petitioner's claim for Asylum. Additional documents were enclosed. By decision letter dated 2 October 2009 a member of Asylum Team 1 Glasgow, the UK Border Agency, acting on behalf of the Respondent determined that the decision of 9 October 2007 upheld by the Immigration Judge on 16 January 2008 should not be reversed; that the Petitioner's submissions did not amount to a fresh claim in terms of the Immigration Rules, Rule 353; and that the Petitioner had no basis to stay in the United Kingdom and should make arrangements to leave without delay. The UK Border Agency determination of 2 October 2009 is the decision which the Petitioner seeks to bring under Judicial Review.

The Immigration Rules

[12] The Immigration Rules 1994 (HC 395 as amended) provide:

> "**353.-** Where 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:
>
> i) had not already been considered; and

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

Submissions for the Petitioner on 19 November 2010

[13] The Petitioner stated that he would represent himself. He asked the Court to consider his case as set out in the Petition. He did not wish to supplement the Petition with oral submissions at that stage. He would wish to reply after Counsel for the Respondent had spoken. I have carefully read and considered the case as set out in the Petition.

[14] I shall summarise the Petitioner's case. In Article 4 reference is made to the further submissions letter of "7 August 2008." The copy letter which is produced as 6/2 is dated 7 August 2009. The discrepancy is not important. For Rule 353 "fresh claim" purposes the Petitioner relies on new case law, namely the Country Guidance case *AM and AM (Somalia CG)* [2008] UKAIT 00091. A Country Guidance case is authoritative guidance to help decision-makers assess the risk of return. This updated Country Guidance was not available at the original hearing.

[15] In Article 6 of the Petition the Petitioner accepts that the decision-maker has identified the correct test but maintains that the decision-maker has acted unreasonably and/or irrationally by applying the test in the wrong manner, failing to exercise anxious scrutiny, failing to exercise proper anxious scrutiny and arriving at a conclusion not truly supported by the information. The particular point in Article 6 is that the decision-maker stated that "the Immigration Judge found your client was not a national of Somalia." What the Immigration Judge in fact stated was "I am unable to accept that [*the Petitioner*] is a Somali Bajuni."

[16] The substance of the complaint in Article 7 is that the Petitioner would be an internally displaced person [IDP] if returned to Somalia and that the decision-maker

failed to have regard to relevant factors in assessing whether the Petitioner would benefit from the guidance relating to IDPs in *AM and AM (Somalia CG).*

[17] The substance of the complaint in Article 8 is that the decision-maker failed to take into account the considerations which would create a differential impact on the Petitioner having regard to guidance in *AM and AM (Somalia CG)* given that Central and Southern Somalia are in a condition of armed conflict, the considerations being that the Petitioner had no family in Somalia, would be out of his home area, did not come from an influential clan or sub-clan, lacked recent experience of living in Somalia, would have difficulty dealing with a changed environment, would be at risk of abduction as a returnee from UK and did not speak Somali.

[18] The substance of the complaint in Article 9 is that Petitioner would have to spend a substantial time in an IDP camp in another area of Somalia where he would be isolated and unprotected and that it would be unduly harsh and unreasonable for him to exercise internal flight.

[19] In reply to the submissions for the Respondent, the Petitioner stated that he had not been to school, only to a madrassa. The only place he knew was the place he came from. How could he be expected to know all the things they [*the Border Agency*] were asking him about Somalia? They were insisting on him going back. He was not refusing to go back to where he was from as long as it was safe. On the evidence we have here [*AM and AM (Somalia CG)*] it was not safe to go back. Even if he were to go back he would still be a displaced person because his life would be in danger and he had no family there. His family had fled to Yemen. He did not know why he should go back to Somalia. That was all he could say.

Submissions for the Respondent on 19 November 2010

[20] Counsel for the Respondent moved me to refuse the Petition. For the legal test that the Court is required to apply Counsel referred to *WM (DRC)* v *Secretary of State for the Home Department* [2006] EWCA Civ 1495, approved in *FO Petitioner (Nigeria)* [2010] CSIH 16. Counsel also referred to *YH (Iraq)* v *Secretary of State for the Home Department* [2010] EWCA Civ 116 especially at paragraph 21 *per* Carnwarth LJ and reminded me that a number of Outer House judges had followed the approach suggested there. Counsel referred for example to *IM Petitioner (Libya)* [2010] CSOH 103, 30 July 2010, Lord Tyre.

[21] In relation to the specific legal issues raised by the present case, Counsel referred to *GM (Eritrea)* v *Secretary of State for the Home Department* [2008] EWCA Civ 88 at paragraphs 1, 11-14, 35-42 *per* Buxton LJ, 49-54, 58 *per* Laws LJ, 59-62, and 64 *per* Dyson LJ. That case was about the application of Country Guidance for Eritrea. It dealt with the issues which arise where there is little or no information about the individual applicant and the country guidance indicates a general risk. The proposition to be drawn from the case, counsel submitted, was that the onus is on the applicant; and that applicants, like the Petitioner, who fail to give a credible account of their history and circumstances, cannot easily show that they belong to a category particularly at risk.

[22] After directing me to the terms of the Immigration Judge's determination and the further submissions letter from the Petitioner's then agents, Counsel for the Respondent addressed the issues raised by the Country Guidance case founded on by the Petitioner *AM and AM (Somalia CG)* [2008] UKAIT 00091. Counsel read the rubric, paragraph 6 (i)─(iii), and paragraphs 144, 156-160, 180, 181-188 and 207. Counsel produced a map of Somalia to show the location of the various places

mentioned in these passages and to show the Petitioner's claimed place of origin. The salient points that I was invited to draw from the passages quoted are that there is now an internal armed conflict within the meaning of international humanitarian law and Article 15(c) of the Refugee Qualification Directive throughout Central and Southern Somalia, not just in and around Mogadishu; that the armed conflict in Mogadishu makes Mogadishu no longer safe as a place to live for the great majority of returnees whose home area is Mogadishu; that those whose home area is not Mogadishu will not in general be able to show a real risk of persecution or serious harm or ill treatment simply on the basis that they are civilians or even IDPs and from such and such a home area, though much will depend on the evidence relating to their home area at the date of the hearing. (For the avoidance of doubt the Petitioner presented no new evidence relating to his claimed home area.)

[23] Counsel submitted that an important difference between the circumstances of AM(1) as narrated at paragraph 207 and the circumstances of the Petitioner were that AM(1)'s claim that he came from Jowhar was accepted whereas there was no acceptance of the Petitioner's claim as to where he comes from. On that basis the general point was that there was and remained no material from which any rational decision-maker, Immigration Judge or Court applying the correct tests and exercising anxious scrutiny would be entitled to conclude that the Petitioner faced the risks said to be associated with his claimed home area.

[24] Turning to the four substantive complaints made in the Petition, Counsel dealt first with the issue raised in Article 6 about the Petitioner's origin. Counsel submitted that the decision-maker was entitled to characterise the Immigration Judge's conclusion about the Petitioner's origin as a finding that he was "not a national of Somalia as he claims to be." The only claim made by the Petitioner as to his origin

was that he was a Somali Bajuni. At paragraph 25 the Immigration Judge rejected that claim and concluded that the Petitioner had fabricated his account for the purposes of his asylum claim. In any event the decision-maker had gone on to give full and anxious scrutiny to the further submissions and the new material for the purposes of Rule 353 on the assumption that the Petitioner was a Somali Bajuni.

[25] As regards the issue raised in Article 7 involving the claim that the Petitioner would be an IDP if returned to Somalia, Counsel submitted that given the Immigration Judge's findings there was no material from which it could be concluded that the Petitioner would be returning to a location from which he might be displaced. That was sufficient to dispose of the complaint. However the decision-maker, in the exercise of anxious scrutiny, had gone on to consider the alternative. The decision-maker had correctly concluded that the picture remained essentially undisturbed by the new information contained in *AM and AM (Somalia CG)*. The Petitioner was not an IDP from Mogadishu. Indeed he had asserted the contrary. Otherwise the risk was essentially location- and clan-specific. The Petitioner had not offered any acceptable material in relation to these matters. The decision-maker's conclusion at the top of page 4 of the determination of 9 October 2007 was an entirely reasonable one namely:

> ".... even if [*the Petitioner*] were to be accepted as a national of Somalia, there is no realistic prospect of success that an Immigration Judge would find that, upon careful consideration with use of the rule of anxious scrutiny, your client is at real risk on return to Somalia, on account of the internal armed conflict in Somalia, [*on account of*] his status as a civilian in central or southern Somalia (outside Mogadishu), or on account of being an IDP."

[26] Counsel submitted that the "differential risk" issue raised in Article 8 of the Petition was entirely fact-sensitive. There was simply no material that would enable

the determination to be made as to whether the Petitioner fell into any category that was subject to increased risk as opposed to being simply subject to the same risk as the population in general. The onus being on the Petitioner, the conclusion reached by the decision-maker was entirely reasonable.

[27] As to the claim in Article 9 that it would be unduly harsh and unreasonable for the Petitioner to exercise internal flight, Counsel submitted that this was premised on the Petitioner being an IDP. The decision-maker was well entitled to take the view that there was no evidence to allow another Immigration Judge to find that the Petitioner would be an IDP following return to Somalia.

[28] In summary Counsel submitted that the Petitioner had failed to establish that the determination of 9 October 2007 was in any respect unlawful.

Decision

[29] It is not disputed that the points raised in the further submissions letter of 7 August 2009 had not previously been considered. The first element of the Rule 353 "fresh claim" test is therefore satisfied. The remaining question was and is whether, applying the rule of anxious scrutiny, the content of the further submissions, taken together with the previously considered material, created or creates a realistic prospect of success.

[30] I weighed the Petitioner's submissions carefully but, however much sympathy I might have for his predicament on a human level, I could find nothing in the submissions that would entitle me to grant the Petition.

[31] I accept the submissions for the Respondent. The decision-maker concluded that there was no realistic prospect of success. In reaching this decision, the decision-maker did not err in law, did not act unreasonably or irrationally, did not apply the Rule 353 test in the wrong manner, did not fail to exercise anxious scrutiny and did

not arrive at a conclusion which was not truly supported by the information. The determination of 2 October 2009 was entirely lawful. It was moreover, in my judgement, the correct decision on the information available to the decision-maker. Accordingly there was and is no "fresh claim" for the purposes of Rule 353.

[32] I shall therefore sustain the Respondent's plea-in-law, repel the Petitioner's plea-in-law and refuse the Petition.