OUTER HOUSE, COURT OF SESSION

[2009] CSOH 100

P620/09

OPINION OF LADY SMITH

in the Petition of

EY and PST

Petitioners;

for

Judicial Review of a Decision of the Secretary of State for the Home Department to refuse to accept representations as a fresh claim for asylum in letters dated 18th March 2009 and 6th May 2009 and remove the first petitioner to Turkey on 20th May 2009 at 0700 hours.

Petitioner: Caskie, Advocate (14 May 2009), JJ Mitchell Q.C (20 May 2009), Drummond Miller LLP
Respondent: No appearance

20 May 2009

Introduction

[1] This is a petition for judicial review at the instance of a person in respect of whom removal directions have been issued under paragraphs 9-10A of Schedule 2 to the Immigration Act 1971 and Section 10(1) of the Immigration and Asylum Act 1999 and also at the instance of her partner who is a resident of the United Kingdom. The petitioners seek (1) declarator that the decisions of the Secretary of State dated 18 March 2009 and 6 May 2009 to refuse to accept that representations made on

behalf of both of them constituted a fresh claim for asylum by the first petitioner was unreasonable *et separatim* irrational, (2) declarator that the decision of the Secretary of State dated 7 May 2009 to remove the first petitioner to Turkey on 20 May 2009 was unreasonable *et separatim* irrational, (3) reduction of the said decisions, (4) the expenses of the petition and (5) such other orders as may seem to the Court to be just and reasonable in all the circumstances of the case. No interim orders are sought.

[2] The petition came before me on a motion on behalf of the petitioners for first orders. The respondents were not represented at the hearing.

[3] The first petitioner is a citizen of Turkey. On or about 25 August 2000 she entered the United Kingdom as a visitor. Her immigration history is set out in the UK Border Agency's letter dated 18 March 2009 (6/3 of Process):

> "25/08/00 Arrived in the United Kingdom and began working as a prostitute soon after.
>
> 01/08/01 Claimed asylum.
>
> 17/09/01 Decision made to refuse asylum claim.
>
> 05/11/01 RFRL served together with IS151A.
>
> 07/11/02 Appeal Hearing.
>
> 20/11/02 Determination promulgated, dismissed.
>
> 07/01/03 Permission to appeal rejected.
>
> 07/01/03 Appeal rights exhausted.
>
> 18/02/09 Furthers (SIC) representations submitted, legacy programme and Article 8 of ECHR."

Application for Indefinite Leave to Remain Under the Legacy Programme

[4] The further representations dated 18 February 2009 were made in a letter from solicitors acting on behalf of the petitioners (6/4 of Process). Those representations were, essentially, that the first petitioner met the second petitioner at New Year 2004, that the petitioners had been going out together since then, that they now lived together at an address in West Calder and that the second petitioner was anxious that the first petitioner be able to remain and live with him in the United Kingdom. Reference is also made to the first petitioner having undergone medical treatment for breast cancer in December 2006 but the letter continues "we are pleased to advise that she is now recovering from her condition." The final paragraph of the letter is in the following terms:

> "We would respectfully suggest that given the length of time that she has been in this country and given the close relationships which she has obviously formed since arriving here that her now removal from this country would breach her rights under Article 8 of the European Convention on Human Rights, particularly under the more recent House of Lords decisions issued during the course of 2008."

The Secretary of State's Decision of 18 March 2009

[5] The Secretary of State's decision in respect of the application contained in the letter of 18 February 2009 is set out in a seven page letter (6/3 of Process). The letter of 18 February 2009 is referred to as are a bundle of documents that were sent together with that letter, in support of the application. The Secretary of State considered whether the submissions made amounted to a fresh claim (under reference to paragraph 353 of the Immigration Rules). The Secretary of State makes reference

to the two aspects of the "fresh evidence" test (whether the submissions have already been considered and whether, taken together with the previously considered material, they create a realistic prospect of success). Whilst the Secretary of State accepted that the points raised in the petitioners' solicitors letter had not previously been considered, she determined that, taken together with the material which was considered previously, they would not have created a realistic prospect of success.

[6] By letter dated 9 April 2009 the petitioners' solicitor appealed against the refusal decision dated 18 March 2009. That letter was responded to by letter dated 6 May 2009 confirming the original decision to refuse the application. The first petitioner was due, accordingly, to be returned to Turkey. That return was due to take place on 20 May 2009.

Motion for First Orders: 14 May 2009

[7] On Thursday 14 May Mr Caskie appeared on behalf of both petitioners and moved me to grant first orders.

[8] I enquired of Mr Caskie as to the basis on which it was considered appropriate to bring the petition, not only in the name of the first petitioner but in the name of the second petitioner. He indicated that he could not point to any authority which specifically supported a submission that the second petitioner had the requisite title and interest but he referred to what was said by Lord Justice Sedley in *AB (Jamaica)* v *Secretary of State for Home Department* 2007 EWCA Civ I 1302 at paragraph 20, where it was commented that the applicant's spouse was "in substance, albeit not in form" a party to the proceedings.

[9] Turning to the substance of the petition, Mr Caskie submitted that it was appropriate to grant first orders because there was a *prima facie* case that the

Secretary of State had failed to recognise that had she referred the matter for determination to an Immigration Judge, the Immigration Judge would have been entitled to reach his own findings in fact on the fresh representations and give whatever weight to them he thought appropriate. He did not suggest that the Secretary of State had failed to have regard to any relevant factor. It was a question of the Secretary of State not recognising that an Immigration Judge might give different weight to the new material advanced. He did not suggest that the Secretary of State had taken into account any irrelevant factors. He submitted that there was a prospect of an Immigration Judge allowing the petitioners' appeal. The case of *Chikwamba* v *Secretary of State for the Home Department* [2008] UKHL 40 was, he submitted, in point, as was the case of *Beoku-Betts* v *Secretary of State for the Home Department* [2009] 1 AC 115.

[10] So far as the case of *Chikwamba* was concerned Mr Caskie's submission was that it indicated that it was only in rare cases that the Secretary of State should order the removal of an illegal immigrant where he had existing family life in the United Kingdom. So far as the case of *Beoku-Betts* was concerned, Mr Caskie relied on it in support of a submission that the Secretary of State required to give anxious and detailed consideration to the rights of the second petitioner in addition to those of the first petitioner and she had not expressly stated that she had done so or asked herself what an Immigration Judge might have made of that matter.

Determination of the Motions for First Orders

[11] I retired to consider the motion for first orders.

[12] I required to consider whether it was competent to refuse the motion. I considered that it was. Rule of court 58.7 makes it clear that a first order is one which

the Lord Ordinary "may" grant. The Court has a discretion. There is precedent for refusal at this stage (*Sokha* v *Secretary of State for the Home Department* 1992 SLT 1049; *Butt* v *Secretary of State for the Home Department* (Lord Gill - Outer House - 15 March 1995). Whilst the respondents were represented in both of those cases at the hearing of the motion for first orders (interim orders having been sought), the rule did not and does not appear to me to direct that a motion for first orders cannot be refused if the respondents are not represented. The Court's power to do so is not, in terms of the rule of court, curtailed so as to limit it to those instances when the respondents are represented at the motion for first orders. At that stage it is, in my view, appropriate to consider the relevancy of the petition, any submissions made in explanation of it and, if so advised, to refuse the motion. When a petition for judicial review is presented, the petitioner is asking the court to take a serious step. In a case such as the present, it is my understanding that interim orders are routinely not sought because, if first orders are granted, the Secretary of State, as a matter of practice, refrains from taking any immediate action such as, in this case, proceeding with the removal of the petitioner. The granting of first orders has, accordingly, a significant effect which is liable to cause inconvenience, expense and, potentially, delay. I consider it not at all unreasonable to expect of those who present a petition for judicial review that they should be in a position to satisfy the court of the relevancy of their case at the earliest stage. I do not mean to suggest, thereby, that they should be ready to present, at the motion for first orders, the sort of detailed argument that would be presented at a first hearing. They ought, however, to be in a position to satisfy the court that their case is an arguable one.

[13] I was not satisfied that it was appropriate to grant the petitioners' motion. There was no authoritative support for the second petitioner's title and interest. Turning then

to the first aspect of the petition, as it was explained by Mr Caskie, as above noted, it proceeded on the basis that the Secretary of State should have allowed for an Immigration Judge being entitled to reach his own findings in fact in respect of the representations advanced in 6/4 of Process. That did not, however, make sense. The Secretary of State did not take issue with the veracity of those representations. It was accepted that the first petitioner now had a relationship with the second petitioner and that the second petitioner was a United Kingdom resident. I should, at this point, note that the petition appears to be inaccurate in respect of one aspect of the second petitioner's circumstances. In article 24 it is averred that the second petitioner is unemployed and unfit for work. That is contrary to what is stated in 6/4 of Process which is that "he works as a self employed builder". So far as the matter of the weight that ought to be given to the new facts advanced was concerned, it seemed to me that there was ample evidence of the Secretary of State having given careful consideration to that matter and it seemed to me that the petitioners' position was shown to be weak in that respect, in any event, given that Mr Caskie's repeated submission was, at its highest, that the Secretary of State had failed to consider whether an Immigration Judge "might" find in favour of the petitioner if the matter had been referred to him. It was not evident to me how that demonstrated that there was an arguable case of unreasonableness or irrationality on the part of the Secretary of State.

[14] So far as the position of the second petitioner was concerned, the Secretary of State's letters (6/3 and 6/6 of Process) both showed an awareness of his interests in the matter and it did not appear to me to be arguable that she had overlooked them.

[15] I considered the cases of *Chikwamba* and *Beoku-Betts* but it did not appear to me that they were in point. This was not a case where the representations made by the petitioners were either to the effect that they would be separated if the first petitioner's

application was not granted or that the circumstances were like those in *Chikwamba* where it was evident that the applicant would, once removed back to Zimbabwe, reapply to enter the United Kingdom to rejoin her family here. Further, the case of *Konstatinov* v *The Netherlands* (Application No. 16351/03) Judgment Strasbourg 26 April 2007 (referred to in 6/6 of Process) was relevant, had been taken account of by the Secretary of State but was not referred to by Mr Caskie. The passage relied on by the Secretary of State specifically relates to article 8 Rights, indicates that they do not entail a general obligation for a state to respect an immigrant's choice of country of residence and mentions as an important consideration that of whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would be precarious from the outset. It is noted that the court had held previously that where that was the case, it was likely only to be in the most exceptional circumstances that the removal of the nonnational family member would constitute a violation of article 8. The petitioners here had commenced their family life in such circumstances. [16] It thus seemed to me that when the petition was considered together with the documents lodged in support of it and Mr Caskie's submissions in support of his motion, it was not appropriate for me to grant first orders. I was not satisfied that an arguable case was made out.

Motion for Leave to Reclaim - 20 May 2009

[17] A motion for leave to reclaim came before me in the morning of 20 May 2009 a matter of hours before the first petitioner was due to be removed from the United Kingdom. In addition to the motion for leave to reclaim Mr Mitchell moved motions

firstly for orders for intimation and service and, secondly, to dismiss the petition; he was not seeking to amend it.

[18] So far as the motion for an order for service was concerned he sought to argue that it should be inferred that the refusal of first orders was "*in hoc statu*". It was a question of substance rather than language. He did, however, accept that questions of competency might arise and it was not entirely satisfactory since, on the face of it, it did look as though I was being asked to review my own interlocutor.

[19] So far as the motion to dismiss the petition was concerned he sought the grant of that motion under observation of the fact that reclaiming is competent, without leave, on a final determination of a petition. He submitted that, in substance, refusal of first orders amounted to a final determination of the petition although he, equally, appeared to accept that it would be open to a petitioner, after the refusal of first orders, to amend the petition and renew the motion.

[20] Turning to the motion for leave to reclaim, Mr Mitchell explained that there were two principal issues that the petitioners would seek to argue. Firstly there was that of the competence and appropriateness of the refusal of first orders in the absence of the respondents. He referred to the report in *Greens Weekly Digest* (1995 16/905) of *Butt* as indicating that the discretion to refuse the petition arose only where the respondent was present and represented.

[21] At this point, it may be helpful for me to indicate that since 20 May 2009, with the assistance of the First Division Clerk, Mr Jenkins, for which I am extremely grateful, I have obtained a copy of Lord Gill's opinion in the petition of *Butt* and it is now placed with the Process in this case. The passage to which the note in *Greens Weekly Digest* appears to refer occurs after Lord Gill has concluded that it is

competent to refuse a petition at first orders stage and when he is considering whether, in that case, it was appropriate to do so. The full text of the passage is as follows:

> "Without attempting to state any universal rule in the matter, I suggest that it would certainly be appropriate for the court to consider, and if need be to refuse, the petition at a first order hearing in a case where (1) the respondent is represented; (2) all necessary documents are to hand; (3) the respondent wishes to have the petition disposed of without resort to a first hearing and is in a position to present a fully prepared case; and (4) there is no dispute of a factual nature such as to prevent the court from making a properly informed decision at that stage."

Accordingly, whilst Lord Gill set out circumstances where it was, in his view, certainly appropriate for the court to consider whether or not to refuse the petition at first orders stage, he does not appear to have been suggesting that the four matters to which he refers were prerequisites to it being competent to do so.

[22] The second issue which the petitioners sought to raise in a reclaiming motion was the interrelationship of article 8 of ECHR and UK Immigration Policy. He made reference, in that regard to the cases of *Chikwamba* and *BeokuBetts*. He indicated that, whatever had been submitted by Mr Caskie, insofar as the petition sought to suggest that the Secretary of State should have treated the representations made by the petitioners agents as being a fresh claim, that would not be addressed. The focus, rather, would be on the second petitioner's article 8 rights and on the issue of his title to sue which Mr Mitchell accepted was a novel development.

[23] Having considered Mr Mitchell's submissions, I was persuaded that it was appropriate to grant leave to reclaim and, accordingly, pronounced the appropriate interlocutor.