OUTER HOUSE, COURT OF SESSION

[2008] CSOH 80

P488/08

OPINION OF LORD MENZIES

in the Petition of

F.O., (AP)

Petitioner;

for

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

Respondent:

Petitioner: Forrest; Drummond Miller, LLP
Respondent: Carmichael; Office of the Solicitor to the Advocate General

30 May 2008

Introduction

[1] The petitioner is a national of Nigeria. Her date of birth is 23 September 1974. She is the mother of J.O., who is under 5 years old. She lives with her son at an address in Glasgow. The respondent is the Secretary of State for the Home Department.

[2] The petitioner arrived in the United Kingdom in March 2006. On 16 November 2006 she made an application for asylum. The respondent refused this application on 20 December 2006. She appealed in terms of Section 82(1) of the

Nationality Immigration and Asylum Act 2002. Her appeal was heard by an Immigration Judge on 9 February 2007. He held that the petitioner's fear of persecution was well founded, but dismissed her appeal because he concluded that the petitioner could relocate within Nigeria without undue difficulty. The petitioner applied for a reconsideration of this appeal. Her application was rejected. She submitted a petition for reconsideration to the Court of Session; on 5 June 2007, this was refused.

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

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

[5] On 12 December 2007, the petition for judicial review was dismissed on the unopposed motion of the petitioner because she wished her solicitors to submit the further information. On 13 December 2007, the petitioner's solicitors wrote to the respondent with this information, submitting that it amounted to a fresh claim for

asylum and breach of the petitioner's human rights. By letter dated 5 February 2008 the Immigration and Nationality Directorate of the Home Office wrote to the petitioner's solicitor, intimating that the decision had been reached that the submissions for the petitioner did not amount to a fresh claim. In the present petition, the petitioner seeks judicial review of that decision. In particular, she seeks declarator that the decision of the respondent dated 5 February 2008 is unlawful and irrational, and reduction of that decision.

Submissions for the Petitioner

[6] Counsel for the petitioner drew my attention to paragraphs 40-42 of the decision of the Immigration Judge following the hearing on 9 February 2007. In this passage of the decision letter, the Immigration Judge considered the question whether it was reasonable for the petitioner to relocate in Nigeria. At an earlier part of the decision letter, the Immigration Judge narrated the background, which was to the effect that the petitioner's father and Chief O. who was the Chief in the village in which the petitioner formerly resided, wished the petitioner to enter into a forced marriage with Chief O. The Immigration Judge accepted that, at the date of the hearing, the petitioner's father and Chief O. remained steadfast that the petitioner should marry Chief O. On that basis, he accepted that the petitioner would not be safe in returning to her home area in that she would be forced to become wife to Chief O. and this would amount to persecution. However, in the passage referred to, the Immigration Judge pointed to the Home Office refusal letter in which it was considered that the petitioner could return to Nigeria and seek protection from Mr O, whom she considered to be her fiancé. The Home Office refusal letter stated that there was no significant reason why they would be unable to locate to another part of

Nigeria together, and this view was not contradicted by the expert, Dr Gill. The Immigration Judge observed that Nigeria is a very large country, with a population estimated in 2005 to be 137 million, and with a number of large cities. He expressed the view that it was very difficult to see how the Chief and the petitioner's father would be able to find her if she moved elsewhere in Nigeria. Having earlier noted the petitioner's evidence that Chief O had influence to find her wherever she went in Nigeria and that he had spiritual powers, the Immigration Judge concluded that no good reason had been put forward by the petitioner as to why her father and Chief O might be able to find her.

[7] Counsel submitted that the fresh information cast light on this aspect of the case. The letter from the petitioner's boyfriend dated 5 February 2007 made reference to the boyfriend having heard from a reliable source that the Chief's personal assistant had destroyed computer hardware belonging to customers of the boyfriend. The letter dated 21 October 2007 from the petitioner's boyfriend narrated that the boyfriend had learnt that Chief O had caused his thugs to go to his aunt's shop and destroy all the goods there, and fear of the Chief's boys had caused the boyfriend to stay in a remote village with a childhood friend. The boyfriend's aunt lived in the area where the petitioner had previously lived. The letter from the aunt dated 28 June 2007 narrated an incident in which Chief O in company of his thugs destroyed goods in the aunt's shop. The letter dated 8 October 2007 made reference to a gang of twelve thugs going to the aunt's shop and destroying goods there, and that the Chief had "become talk of the town with all his abortive efforts" to track the petitioner down. The letter dated 14 November 2007 also related to damage to the aunt's shop allegedly caused by or on behalf of Chief O. Also produced was an extract from a crime diary kept by the Nigeria police station, Airport, A I which recorded a report by the boyfriend's aunt on

4 October 2007 that on the previous day about twelve armed thugs came to her shop and destroyed her goods there and later pulled down the structure.

[8] Counsel for the petitioner submitted that these documents demonstrated the malign influence of Chief O in three respects - (a) they showed his ability to inflict harm not just on the petitioner or on her boyfriend but on others such as the boyfriend's aunt; (b) there were specific references to his being a well known politician and a wealthy man; and (c) there was a reference (in the letter dated 21 October 2007) to the Chief having put down the petitioner's name "in their occultism as person to sacrifice in appreciation of his new position in the ungodly society." Counsel submitted that in these important respects there was fresh information which had not previously been before the Immigration Judge.

[9] Counsel referred me to Rule 353 of the Immigration Rules, while conceding that these amounted to no more than guidance for those entrusted with the administration of immigration control. He referred me to the opinion of Lord Brodie in *Anastasia Ndaya* [2006] CSOH 19. Counsel submitted that for success in the present petition, the petitioner would need to satisfy the court that in terms of Rule 353 the further submissions for the petitioner submitted on 13 December 2007 did amount to a fresh claim and moreover, created a realistic prospect of success. He referred me to the observations of the Court of Appeal in *WM (DRC)* v *Secretary of State for the Home Department* [2007] Imm. A.R. 337, [2006] EWCA civ 1495, and in particular to the passage at paragraphs 8-12 of the judgment in which the task of the court was identified. The effect of that decision is that the determination of the respondent dated 5 February 2008 can only be impugned on *Wednesbury* grounds. Buxton L.J. observed that:

"whilst the decision remains that of the Secretary of State, and the test is one of irrationality, a decision will be irrational if it is not taken on the basis of anxious scrutiny. Accordingly, a court when reviewing a decision of the Secretary of State as to whether a fresh claim exists, must address the following matters. First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return ... The Secretary of State of course can, and no doubt logically should, treat his own view of the merits as a starting point for that enquiry; but it is only a starting point in the consideration of a question that is distinctly different from the exercise of the Secretary of State making up his own mind. Second, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? If the court cannot be satisfied that the answer to both of those questions is in the affirmative, it will have to grant an application for review of the Secretary of State's decision."

[10] Counsel for the petitioner submitted that it was not clear from the letter of 5 February 2008, what test the decision maker had used; he may have applied the correct test, but one could not tell. Even if he has applied the correct test, he did not address the three factors identified by counsel for the petitioner; if these factors had been addressed, one would have expected a longer letter. (Counsel accepted that these factors were not enunciated in the submissions on behalf of the petitioner of

13 December 2007). Counsel submitted that the respondent had erred in law in the decision letter dated 5 February 2008 (1) because he had failed to apply the correct test generally in deciding whether the further information amounted to a fresh claim and (2) because he failed to apply the correct test in the particular circumstances of this claim in deciding whether the further information amounts to a fresh claim. Counsel intimated that he did not seek to argue the third ground stated in the petition. On the basis of the two grounds on which he relied, he moved me to sustain the first and second pleas-in-law for the petitioner, to grant decree of declarator that the decision of 5 February 2008 was unlawful and irrational and to reduce it.

Submissions for the Respondent

[11] Counsel for the respondent accepted that the approach adopted by the Court of Appeal in *WM (DRC)* quoted above was the correct test for the application of paragraph 353 of the Immigration Rules. The question is whether the evidence relied on by the petitioner, taken together with the previously considered material, created a realistic prospect of success. The test is *Wednesbury* irrationality, considered with anxious scrutiny. She submitted that there was no force in the submission for the petitioner that the author of the letter of 5 February 2008 had applied the wrong test. This was clear from the paragraph towards the bottom of page 3 of the letter, which stated as follows:

> "The remaining points raised in your submissions, taken together with the material previously considered in the determination, would not have created a realistic prospect of success before another Immigration Judge."

This passage makes it clear that the author of the letter was not deciding the matter for himself, but applying the correct test by considering whether all the material,

including the fresh material created a realistic prospect of success before another Immigration Judge.

[12] The submission dated 13 December 2007 by the solicitors acting for the petitioner, made no mention of the three factors relied on by counsel at the Bar; the submission merely pointed out that the petitioner was still wanted by Chief Oba, and there was nothing new in this.

[13] Looking at the information contained in the five letters and the police report in relation to the critical question of whether it was reasonable for the petitioner to relocate in Nigeria, all of the information related to matters in the petitioner's home village or area. On no reasonable reading of this material could it be suggested that Chief O's influence and power extended to other areas. Whether Chief O was a wealthy man and a political man or not, there was no material on which it could be inferred that there was a risk of his being able to trace the petitioner everywhere in Nigeria or of his being able to harm her. The Immigration Judge was aware that Chief O was a Chief; the description of him as a well known politician adds nothing, and does not give rise to the inference that he had any influence outwith the village or area in which the petitioner had formerly resided. The fact that Chief O was the head of a cult might be relevant to give rise to the inference that the petitioner would be subject to persecution of a different nature - but the Immigration Judge had already accepted that she was at risk of persecution, and this factor adds nothing to the question of the reasonableness of internal location. Counsel submitted that the onus was on the petitioner to produce fresh information relevant to the question of internal location, and none of the three factors relied on by counsel for the petitioner amounted to this. The letters and the police report added nothing which might cause an Immigration Judge to look differently at the question of internal relocation.

Discussion

[14] I preferred the submissions for the respondent to those for the petitioner. The only issue on which this fresh information might have been relevant was the issue of the reasonableness of internal relocation within Nigeria (the issue of risk of persecution having already been decided in the petitioner's favour). None of the material appended to the submission for the petitioner dated 13 December 2007 appears to me to be relevant to this issue. It suggests that Chief O is still interested in finding the petitioner, and it suggests that he may be prepared to instruct others to use violence towards people whom he perceives to be connected with the petitioner. However, there is nothing to suggest that his influence extends outwith the village or area in which the petitioner formerly resided, and where Chief O is the Chief. There is nothing which would undermine the reasoning of the Immigration Judge in his decision dated 9 February 2007. There is nothing in the letter dated 5 February 2008 to suggest that the respondent has applied the wrong test. On the contrary, it appears that the author of the letter has applied precisely the test suggested in Rule 353 of the Immigration Rules, and there is nothing in principle nor in the observations of Buxton L.J. in *WM (DRC)* v *Secretary of State for the Home Department* which would justify my interfering with the decision contained in that letter. I am satisfied that the correct question has been asked, and that the requirement of anxious scrutiny has been satisfied. It cannot be said that this decision is irrational. For these reasons, I shall sustain the pleas-in-law for the respondent and dismiss the petition.