OUTER HOUSE, COURT OF SESSION

[2010] CSOH 24

P684/09

OPINION OF LADY CLARK OF CALTON

in the Petition for Judicial Review

JS

Petitioner;

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent:

Petitioner: Forrest; McGill & Co
Respondent: Olson; Solicitor to the Advocate General

4 March 2010

Introduction

[1] The history is summarised in paragraphs 1 to 4 of the petition and the answers thereto. The history was not in any significant dispute. Counsel for the petitioner accepted that the petitioner was a failed asylum seeker who had exhausted his appeal rights in February 2005.

[2] At my request written outline submissions for the petitioner (17 of process) and for the respondent (18 of process) were provided.

Submissions by counsel for the petitioner

[3] Counsel explained that he was not seeking to rely on the averments in Article 7.5 and Article 7.6 of the petition. He accepted that the respondent was correct to treat the letter from the solicitors of the petitioner (6/10 of process) as a fresh application. He conceded that, contrary to his written submission at paragraph 3.1 (17 of process) the respondent in considering the fresh claims by the petitioner had asked the correct question. He submitted that the way in which the question had been addressed by the respondent was in error.

[4] Counsel addressed me on the basis of his written submissions (17 of process). He prayed-in-aid *WM (RDC)* v *Secretary of State for the Home Department* (2007) Imm AR 337; *Razgar* v *Secretary of State for the Home Department* (2004) 2 AC 368; *Beoku Betts* v *Secretary of State for the Home Department* (2009) 1 AC 115; *EB (Kosovo)* v *Secretary of State for the Home Department* (2008) 4 All ER; *VW (Uganda)* v *Secretary of State for the Home Department* (2009) Imm AR 436; *KBO* v *Secretary of State for the Home Department* (2009) CSIH 30.

Submissions by counsel for the respondent

[5] Counsel for the respondent addressed me on the basis of his written submissions (18 of process) with one important change. Counsel accepted that the decision letter (6/2 of process) might be considered as ambiguous in its use of the word "engage" in relation to Article 8. In referring to paragraph 7 of the petition, counsel submitted that the respondent was entitled to conclude that Article 8 was not engaged in the circumstances of this case. Counsel submitted that on a fair reading of the decision letter that was the conclusion of the respondent and that the respondent was entitled so to conclude. But even if the respondent was wrong about that counsel submitted that the respondent had in any event considered the case on a more general basis. The

respondent had considered the case on the hypothesis that if there was interference in the petitioner's private life sufficient to engage Article 8, whether the interference could be justified in terms of Article 8(2). Counsel submitted that it is plain from the reasoning in the decision letter that the case was fully considered in relation to all aspects of Article 8. The petitioner failed to demonstrate any grounds to justify judicial review. Counsel for the respondent prayed-in-aid *AG (Eritrea)* v *Secretary of State for the Home Department* (2008) 2 All ER 28 and *Huang* v *Secretary of State for the Home Department* (2007) 2 Appeal Cases 67.

Response by counsel for the petitioner

[6] In response counsel emphasised that it was important to establish whether Article 8 was engaged and at what stage. He referred in particular to *KBO* v *Secretary of State for the Home Department* paragraph 13.

Discussion

[7] Counsel for the petitioner sought reduction only of the decision of the respondent dated 13 May 2009 and invited the Court to uphold only the fourth plea in law for the petitioner.

[8] It was not in dispute in this case that the task of the respondent in considering the fresh claim was to apply the approach set out in *WM (DRC)* v *Secretary of State for the Home Department* as set out in paragraphs 6 and 7. The task of the Court is set out in paragraphs 8-12. The Court must consider firstly whether the respondent has asked the correct question. The question for the Court is not whether the Secretary of State 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, considering that there is a breach of Article 8. It was accepted that the respondent 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.

[9] Although the petition was founded on a breach of Article 8, counsel for the petitioner accepted that no issue in respect of family life was involved. The case for the petitioner was restricted to an alleged breach of Article 8 in respect of private life. It is plain from the decision letter (6/2 of process) that the respondent purported to ask the correct question. That was expressly conceded by counsel for the petitioner.

[10] The information which was accepted as new information by the respondent is to be found in documents 6/3 to 6/7 of process. These documents can be summarised as (1) an elementary food hygiene certificate (6/3 of process); (2) a letter from the petitioner's employer commenting on his work as a chef in an Indian restaurant and giving him a good reference as an employee (6/4 of process); (3) references from a Sikh Temple commenting on his religious observance (6/5 of process); (4) a reference from a friend (6/6 of process); and (5) a petition signed by supporters of the petitioner (6/7 of process).

[11] It is not disputed that the petitioner has formed a private life. Counsel for the petitioner sought to persuade the Court that the information contained in 6/3 to 6/7 of process is of a nature and weight which had not been properly assessed by the respondent. Counsel submitted that the respondent had not given sufficient weight to the information and had applied his own judgment to reach his own decision. It was submitted that the respondent ought to have taken into account that on the new information, there would be a realistic prospect of an Immigration Judge, applying anxious scrutiny, concluding that the removal of the petitioner would breach his Article 8 rights.

[12] I do not accept the submission on behalf of the petitioner that the respondent's conclusion is irrational and not one which a reasonable decision maker would have reached in the circumstances. The respondent in making the decision expressed the view that documents now part of 6/3 to 6/7 of process are of "little weight". I agree. I accept that there is no specially high threshold to engage Article 8(1) and in the words of Lord Reed in *K.B.O.* v *Secretary of State for the Home Department*, "it simply reflects the fact that more than a technical or inconsequential interference of one of the protected rights is needed if Article 8(1) is to be engaged". In the circumstances of this case, I consider that the interference and effect thereof is inconsequential. I do not accept that in every case the mere fact of removal is sufficient to engage Article 8(1) merely because a private life has been established by an individual. To that extent therefore I would agree with the respondent's decision in this case that Article 8(1) is not engaged if the decision letter is read in that way. In my opinion, the petition would fail on that basis alone.

[13] I acknowledge however that the law as to what constitutes "engagement" in a particular case may not be without difficulty. In this case the respondent did not peril the decision merely on the conclusion that Article 8 was not engaged. It is plain from the decision letter (6/2 of process) at pages 3 to 4 that the respondent considers also the implications of Article 8(2) which only applies if Article 8 is engaged. I have no difficulty in concluding that the evidence produced on behalf of the petitioner (6/3 to 6/7 of process) is not of a kind, when weighed in the balance with the factors accepted as relevant in Article 8(2), would give any realistic prospect of a new Immigration Judge, applying anxious scrutiny, concluding that the removal of the petitioner would constitute a disproportionate interference with the petitioner's private life.

[14] Paragraph 7.4 of the petition focuses on the use of the word "engage" in the opinion letter (6/2 of process). I accept that there may be more than one way of interpreting the use of that word in the context of the letter. That is does not assist with clarity. Nevertheless, for the reasons I have expressed, I am satisfied that whatever way one interprets this letter, there are no grounds put forward by the petitioner to justify intervention by Judicial Review.

[15] In these circumstances I uphold the pleas of the respondent and refuse the petition.