



EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 31
P570/19

Lord Brodie
Lord Malcolm
Lord Woolman

OPINION OF THE COURT

delivered by LORD BRODIE

in the appeal by

(1) NINO TSIKLARI and (2) AKAKI SIDAMONIDZE

Petitioners and Appellants

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioners and Appellants: K Forrest; Drummond Miller LLP (for McGlashan MacKay, Solicitors, Glasgow)

Respondent: J Gardiner; Office of the Advocate General for Scotland

10 June 2020

Introduction

[1] This is an appeal in terms of section 27D of the Court of Session Act 1988. It proceeds as a reclaiming motion in terms of RCS 38.8(d) and 58.10. The appellants appeal against the interlocutor of the Lord Ordinary, dated 21 October 2019, refusing permission to proceed in a petition for judicial review of a decision by the respondent, the Secretary of State for the Home Department, dated 26 March 2019 (promulgated 1 April 2019), certifying

the petitioners' claims that to remove them from the UK would contravene their rights as guaranteed by article 8 of the European Convention on Human Rights ("the human rights claim"), as clearly unfounded in terms of section 94 of the Nationality Immigration and Asylum Act 2002.

[2] The effect of certification is that the petitioners have no right to appeal the refusal of their claim, while they remain in the UK (see 2002 Act, sections 82 and 92(3)). In the absence of certification an appeal may be presented from within the UK.

[3] The first and second petitioners are Georgian nationals. They entered the UK in 2007 and 2013 respectively. The first petitioner was born on 30 November 1990. The second petitioner was born on 26 May 1987. They are spouses and have two children together, on whose behalf the first petitioner also brings this petition. The children are aged 5 and 6. A matter to which the petitioners attach importance, as an element in their family life, is that they and their children live in the same house in Glasgow as the first petitioner's brother, his wife and his two children, and also the first petitioner's parents.

[4] The first petitioner had discretionary leave to remain in the UK which came to an end on 15 May 2015. On 10 June 2015 she applied for leave to remain. This application was refused with a right of appeal. The first petitioner appealed to the First-tier Tribunal (FTT) on 24 September 2015. Her appeal was dismissed on 11 August 2016. Permission to appeal to the Upper Tribunal (UT) was refused by the FTT on 6 March 2017 and by the UT on 6 April 2017 when her appeal rights were deemed exhausted. She was served with a removal notice on 30 October 2017. The second petitioner entered the UK clandestinely. He applied for asylum. His application was refused on 20 March 2015. He appealed that refusal to the FTT. His appeal was refused on 17 July 2015 and permission to appeal to the

UT was refused on 26 August 2015. His appeal rights were deemed exhausted on 11 September 2015.

[5] The petitioners made the human rights claim on 2 August 2018. It was refused in terms of the decision letter of 26 March 2019 which also certified the claim as clearly unfounded. In their petition for judicial review the petitioners seek reduction of that decision on the ground that “the respondent has erred in law because in certifying the claim as clearly unfounded his decision is irrational because it has failed to take into account evidence it should have taken into account” (petition statement 6).

[6] The petitioners’ averments in support of that proposition are as follows:

“6.1 **Challenge:** ...The petitioners do not challenge the [respondent’s rejection of their human rights claim]. They accept that the respondent, having regard *inter alia* to the immigration history of each petitioner, was entitled to reach such a decision on this matter. But what they do not accept is that the respondent was entitled to certify the rejection was clearly unfounded the result of which will be to deprive the petitioners of a right of appeal from within the UK.

6.2 **Test:** the test whether a claim is clearly unfounded is whether the decision maker is ‘reasonably and conscientiously satisfied that the allegation (on which it is based) must fail ...’ or the claim is one that is ‘...so clearly without substance that [an] appeal would be bound to fail’ (*Yogathas v Secretary of State for the Home Department* [2003] 1 AC 920). The basis of the claim is that both petitioners (and the children) have established in the UK a family life, interference with which is disproportionate.

6.3 **Evidence:** as evidence of this they submitted material which indicated that they lived together within a wider family unit comprising the first petitioner’s father (who financially supports the first petitioner), her mother, brother, sister-in-law and their children. In certifying the claim as clearly unfounded (and so ‘bound to fail’ ...) the respondent has not taken into account - in concluding that there are no exceptional circumstances that would render rejection a breach of article 8 ECHR because it would result in unjustifiably harsh consequences for the petitioners or another family member - evidence from other wider family members or at least has not properly taken this into account. He does refer to the wider family living arrangements but fails to accord any weight to what these are and the consequences for the petitioners, the children or other members of the wider family.

6.4 **Authority:** Whether family life exists is a question of fact in every individual case *Kugathus v Secretary of State for the Home Department* (2003) INLR 170. Where the relationship is not husband and wife/ parent and child there will need to be additional evidence of some significant element of dependency: the statements from other family members (and letter from the [first petitioner's] father indicate that there is an additional element of both financial and emotional dependency by [first petitioner] on her wider family. It has been said by the Upper Tribunal that whether there is family life outwith the normal ties between husband and wife and parent and child is intensely fact sensitive (*Dasgupta v Entry Control Officer* (2016) UKUT 28. In addition, it is clear from the statements that the wider family (mother, brother, sister-in-law, and the other children) would themselves all be affected by removal of [first petitioner] (see *Beoku-Betts v Secretary of State for the Home Department* [2009] 1 AC 115 para 42

6.5 **Result:** In the circumstances the respondent in certifying this claim as clearly unfounded has reached a decision that no reasonable decision maker would have reached. Evidence was placed before him that family life here existed in a context wider than husband and wife and parent and children. It may be after evidence on the nature and strength of these wider relationships the claim may fall to be dismissed, but in certifying it as clearly unfounded the respondent has deprived the petitioners of the opportunity to bring their family living arrangements before a fact finder here in the UK, and seek to persuade him/her that such an intensely fact sensitive issue should be aired before such a judge. In depriving them of this opportunity the respondent has erred in law."

Submissions

Petitioners

[7] Mr Forrest identified the issue for the court as being whether the Lord Ordinary had erred in holding that the respondent had rationally applied the test applicable in cases certified as clearly unfounded in terms of section 94 of the 2002 Act. Mr Forrest submitted that the Lord Ordinary had erred. The test for the respondent is whether on any legitimate view the human rights claim would fail on appeal to the FTT (*R on the application of EM (Eritrea) v Secretary of State for the Home Department* [2014] 2 AC 1321 at para 6). If an inquiry as to prospects of the success of the claim admits of only one answer and that is that the

claim is bound to fail, the test is met. If, on the other hand, there is more than one possible answer, the claim cannot be said to be clearly unfounded (*ZT (Kosovo) v Home Secretary* [2009] 1 WLR 348 at para 23). The petitioners' human rights claim required the respondent to address two matters: (1) has family life been demonstrated? and (2) would the petitioners' removal interfere disproportionately with that family life? To do that it was necessary for the respondent to consider how the petitioners were saying they (and other family members) would be affected by the respondent's decision. Whether family life exists outwith the normal immediate family ties and whether there is an additional element of dependence is a question of fact (*Kugathus v Secretary of State for the Home Department* [2003] INLR 170 at para 24). Here the petitioners lived in an extended family with six other members. The first petitioner had only ever lived with her mother. She and her mother provided assistance to one another. There was no sign in the decision letter that the respondent had recognised the existence and potential relevance of the extended family. In particular there was no recognition of the way in which each of the various individuals were said to be liable to be affected by removal of the petitioners from the UK. Proportionality is always a question of fact, or at least mixed fact and law. That is so independent of whether the relationship between the petitioners and the other members of their extended family is found to be protected under article 8. What is in issue cannot be decided other than after the petitioners have had the opportunity to present evidence before the FTT that the decision to reject the human rights claim is disproportionate. The certification decision will deprive the petitioners of the chance to do that. It cannot be concluded that their claims are bound to fail or that on no legitimate view could they succeed. The appeal should be allowed.

Respondent

[8] On behalf of the respondent, Mr Gardiner drew attention to the concession by the petitioners that the respondent was entitled to reject their human rights claim. That was effectively a concession that any claim would be clearly unfounded. As such, it was determinative of the certification issue. In these circumstances, the Lord Ordinary had been right to find, as he did, that the first petitioner has accepted in express terms that the respondent was entitled to refuse her application and that if any error exists such error is immaterial to the matter of disposal. Any prospective appeal being bound to fail, the determination to make a certification order cannot be faulted.

[9] In any event, the petitioners' criticisms of the decision letter were unfounded. The respondent had expressly recognised the existence and potential relevance of the petitioners' extended family. The respondent had noted the petitioners' contention that they were not able to return to Georgia as they lived with the first petitioner's parents and extended family and that they were still financially and emotionally dependant on that extended family. The respondent had expressly recognised that removal would "interfere" with the petitioners' family life, that it may be "initially difficult" for them to resettle; and that removal "may involve a degree of disruption to [their] private life". The respondent had adopted the correct approach to the question of certification. The decision letter stated that the claim was "clearly unfounded". It went on to find that the claim "cannot succeed on any legitimate view". That was the applicable legal test.

[10] Should it be the case the Lord Ordinary had somehow erred in law (which the respondent denied), the petition nevertheless has no real prospect of success. Any error is therefore academic. Nothing in the petition comes close to meeting the "high threshold" for human rights claims under article 8 (*R (Razgar) v Secretary of State for the Home Department*

[2004] 2 AC 368 at para 9). The petitioners were either in the UK illegally or their immigration status was precarious. They were not financially independent. They have spent the majority of their lives in Georgia, and married there. In addition, the petitioners do not dispute that they: would not face very significant obstacles to integration in Georgia; do not satisfy the requirements in the Immigration Rules for leave to remain in the UK; have family in Georgia; speak Georgian; could continue to receive money from the first petitioner's father on return to Georgia; could make use of a functioning education system for their children in Georgia; could obtain employment in Georgia; and could continue to see their extended family on visits. In these circumstances, the appellants' human rights claim was "clearly unfounded". The respondent would have rightly certified the claim irrespective of any errors of law. The Lord Ordinary would have rightly held that the claim had no real prospect of success irrespective of any errors of law. The appeal against refusal of permission should therefore be refused.

Decision

[11] The task of the court when considering an application for judicial review of a certificate by the Secretary of State that a human rights claim is clearly unfounded was identified as follows by Lord Phillips in *ZT (Kosovo) v Home Secretary (supra)* at para 23, in a passage with which Lords Brown (at para 76) and Neuberger (at para 83) expressly agreed:

"Where, as here, there is no dispute of primary fact, the question of whether or not a claim is clearly unfounded is only susceptible to one rational answer. If any reasonable doubt exists as to whether the claim may succeed then it is not clearly unfounded. It follows that a challenge to the Secretary of State's conclusion that a claim is clearly unfounded is a rationality challenge. There is no way that a court can consider whether her conclusion was rational other than by asking itself the same question that she has considered. If the court concludes that a claim has a realistic prospect of success when the Secretary of State has reached a contrary view, the court will necessarily conclude that the Secretary of State's view was irrational."

Thus, although this is an appeal, this court is able to cut through the underlying layers of decision-making and go directly to the certification question which we must answer for ourselves. Consideration of whether or not the decision letter makes sufficient mention of relevant circumstances bearing on the human rights claim, which featured in both parties' submissions, is not strictly to the point. Lord Phillips was referring to cases where there was no dispute of primary fact. This is such a case; the respondent has not disputed any of the information provided by the petitioners.

[12] We make two further preliminary observations. The first is that the respondent's certification decision is distinct from the respondent's decision on the merits of the petitioners' human rights claim, albeit that the decisions were made on the same factual material. Here the petitioners concede that it was open to the respondent to reject the human rights claim but contend that the respondent was nevertheless wrong to have certified the claim in terms of section 94. They are entitled to do that. Contrary to what was advanced as the principal submission on behalf of the respondent, these are not mutually inconsistent positions. Section 82 of the 2002 Act confers a full right of appeal from a decision of the respondent determining a human rights claim to the First-tier Tribunal. The appeal takes the form of a rehearing of evidence. In a case such as the present it will then be for the Tribunal to form an independent view on the basis of that evidence as to whether removal from the UK would contravene the appellants' rights guaranteed by article 8 of the Convention (see *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 at para 11, and *Ali v Secretary of State for the Home Department* [2016] 1 WLR 4799 at para 42). A concession that the respondent was entitled to conclude that a particular human rights claim

was ill-founded is not a concession that a Tribunal would necessarily come to the same conclusion after having heard evidence.

[13] Our second preliminary observation is that a consequence of the nature of the supervisory jurisdiction to which this petition is an application (as well as logic) is that the rationality of the respondent's certification decision must be determined on the basis of what was before him at the time the decision was made. Mr Forrest seemed to suggest that it was irrational for the respondent to conclude that on any legitimate view the human rights claim would fail on appeal when, in relation to what was a very fact-sensitive issue, the respondent was not in a position to know precisely what evidence might come out in the course of a hearing before the FTT and how the FTT would assess that evidence. If that was his suggestion it was wrong. The rationality of a decision is to be tested by reference to the material which was available to the decision-maker when she made his decision not by reference to material which might become available to a different decision-maker at a future date.

[14] We turn then to consider whether the human rights claim is bound to fail. In addition to the averments in the petition, we have had regard to all the material in the appendix which was before the respondent when making the certification decision.

[15] Mr Forrest confirmed that the human rights claim was that the removal of the petitioners from the UK would amount to a disproportionate interference with their family life and therefore a contravention of article 8. The claim did not find support in the Immigration Rules and it did not relate to the petitioners' right to respect for private life, to the extent that that is a concept distinct from family life. As Mr Forrest further confirmed, for the human rights claim to succeed requires relevant family life to be demonstrated and for it to be established that removal from the UK would amount to a disproportionate

interference with that relevant family life. We use the expression “relevant family life” to refer to the relationships which would be interfered with by the removal of the petitioners to Georgia. The petitioners undoubtedly enjoy family life among themselves in the form of the usual relationships between spouses and between parents and young children but that is not “relevant family life” for the purposes of the human rights claim. A return to Georgia will no doubt involve some disruption and inconvenience, as the respondent recognised, but their family life together as spouses, parents and children will remain intact. Accordingly, it is only the relationships between the petitioners and their extended family which can be relevant, given that in the event of the petitioners being returned to Georgia the extended family will remain in the UK and, to that extent, there will be a rupture. However, to be relevant for the purposes of the human rights claim, the relationships with the extended family must amount to “family life”, as that expression is to be understood in the context of what is protected by article 8. As Mr Forrest appreciated, that presents a difficulty. In contrast to the position with relationships between spouses or between parents and young children, there is no presumption that article 8 protected family life exists between or among other blood relatives.

[16] Mr Forrest described the decision of the Court of Appeal in *Kugathus v Secretary of State for the Home Department (supra)* as the leading authority on what sorts of relationship might fall within the concept of family life for the purposes of article 8. At para 19 Sedley LJ said this:

“19. ... neither blood ties nor the concern and affection that ordinarily go with them are, by themselves or together, in my judgment enough to constitute family life. Most of us have close relations of whom we are extremely fond and whom we visit, or who visit us, from time to time; but none of us would say on those grounds alone that we share a family life with them in any sense capable of coming within the meaning and purpose of Article 8.”

And at paras 24 and 25 Arden LJ said this:

“24. There is no presumption that a person has a family life, even with the members of a person's immediate family. The court has to scrutinise the relevant factors. Such factors include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life.

25. Because there is no presumption of family life, in my judgment a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties: see *S v United Kingdom* (1984) 40 DR 196 and *Abdulaziz, Cabales and Balkandali v United Kingdom* [1985] 7 EHRR 471. Such ties might exist if the appellant were dependent on his family or *vice versa*. ...”

This is not to exclude the possibility of relationships between parents and their adult children or between adult siblings or between adults and their young nieces and nephews, qualifying as article 8 protected family life, but it emphasises that such situations are exceptional and only capable of being demonstrated by evidence of particularly close links. We have considered the material included in the appendix that was provided to the respondent in support of the human rights claim (the solicitor’s letter dated 1 August 2018 and the accompanying witness statements) as well as the averments in the petition. That material discloses that the six adults and four children live together in the same house; that the adults help each other with housework and childcare; that they are mutually emotionally supportive; and that the first petitioner’s father provides her with £200 per month by way of financial support. In our opinion, these shared living arrangements do not come within “the meaning and purpose of article 8”, to use Sedley LJ’s expression. But even if that were to be wrong, for the human rights claim to succeed on an appeal to the FTT the petitioners would have to establish that their removal to Georgia, with the consequent interference with their living arrangements, was disproportionate. In our opinion, that

proposition is clearly unfounded; as a contention before the FTT it would be bound to fail.

Our reasons are as follows.

[17] The first petitioner has not had leave to remain in the UK since 2015. The second petitioner has never had leave to remain. Accordingly, if their relationships with their extended family in Glasgow are to be regarded as constituting family life for the purposes of article 8, it is precarious family life as that expression is discussed in *R (Agyarko) v Secretary of State for the Home Department* [2017] 1 WLR 823 at paras 49 to 53. It is also family life which will only be partially disrupted by the petitioners' removal to Georgia. If the first petitioner's father wishes to continue providing her with financial support he can do so, and the family can remain in contact through visits and no doubt also by means of electronic communication. In so far as an aspect of the interference of which the petitioners complain is the inconvenience of resettling in Georgia that is mitigated by the factors to which Mr Gardiner drew attention in the course of his submissions and which we have listed above. There is a strong public interest in the enforcement of immigration control by the removal from the UK of those who, like the petitioners, do not have leave to remain or entitlement to obtain leave to remain, and the removal of such persons will be lawful, subject only to the proportionality of exercise of the power. Mr Gardiner cited Lord Bingham's statement in *R (Razgar) v Secretary of State for the Home Department (supra)* at para 20, in submitting that decisions taken pursuant to the lawful operation of immigration control will be proportionate in all save a small minority of exceptional cases. In *Huang v Secretary of State for the Home Department (supra)* at para 20 Lord Bingham explained that he had been expressing an expectation in *Razgar*, not laying down a legal test (and see *VS (India) v Secretary of State for the Home Department* 2017 SLT 977 at para [23]), but weighty factors will be required in favour of an application sufficient to overcome the normal result

in a precarious family life case (see *MAK (Pakistan) v Secretary of State for the Home Department* 2016 SC 536, Lord President (Carloway) giving the opinion of the court at para [19]). As Lord Reed put it in *Agyarko* at para 70 after a review of the authorities, “having regard to the Strasbourg case law, a very strong or compelling claim [is] required to outweigh the public interest in immigration control”. In the present case there is nothing approaching weighty factors on the petitioners’ side of the balance. Their claim is not very strong or compelling. On the contrary, their claim is very weak, if not absent. On no realistic view can it be said that it would be disproportionate to remove them to Georgia. It follows that the respondent’s certification under section 94 was not irrational.

[18] Accordingly, we shall refuse the appeal and adhere to the Lord Ordinary’s interlocutor dated 21 October 2019 refusing permission for the petition to proceed.