EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 57
P826/19

Lord Glennie
Lord Woolman
Lord Pentland

OPINION OF THE COURT

delivered by LORD PENTLAND

in the Reclaiming Motion

by

ADEYIMI ODUTOLA ODUBAJO (AP)

Petitioner and Reclaimer

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Reclaimer: Dewar QC et Caskie; Drummond Miller LLP
Respondent: McIlvride QC et McIver; Office of the Advocate General

21 August 2020

[1] The petitioner, a citizen of Nigeria, seeks judicial review of the respondent's decision to refuse to accept that his further submissions amounted to a fresh claim for asylum. The decision letter is dated 5 June 2019. The petitioner received it on 7 June 2019. His solicitors lodged the present petition with the court on 6 September 2019. That is three months and one day after the date of the letter. There is a 3 month time limit for commencing judicial review proceedings. It runs from the date on which the grounds giving rise to the

application arose. The court has a discretionary power to extend the time limit. These rules are set out in section 27A of the Court of Session Act 1988.

[2] Following an oral hearing, the Lord Ordinary held that the application for judicial review had not been made before the end of the 3 month period. He considered that the date on which the grounds giving rise to the application arose was 5 June 2019, the date of the decision letter. Accordingly, the petition was time-barred under section 27A(1). The Lord Ordinary went on to hold, however, that it would be equitable in all the circumstances to exercise the discretionary power conferred on him by section 27A(1)(b). He extended the 3 month period to 6 September 2019. He observed that the delay was minimal and reflected the period between the date of the decision and the date of its receipt. There was no prejudice to the respondent, who had not opposed an extension, or any third party. The Lord Ordinary held that as the proceedings were brought within the extended period the petition had been brought timeously. He then granted permission for the petition to proceed because he was satisfied that it had a real prospect of success.

[3] The petitioner enrolled a motion seeking leave to reclaim against the Lord Ordinary's interlocutor of 7 January 2020. He wished to challenge the Lord Ordinary's finding that the date on which the grounds giving rise to the application arose was 5 June 2019. The respondent did not oppose the petitioner's motion. Leave to reclaim was granted by interlocutor of 30 January 2020.

[4] We were told that the reclaiming motion was brought as a test case because practitioners are uncertain about the meaning of the words "when the grounds giving rise to the application arose" contained in section 27A of the 1988 Act. Do they refer to the date (a) on which the decision was made or (b) when the applicant received notification of it? We

were told that there are conflicting decisions on the point and that practitioners are anxious to obtain an authoritative ruling from the Inner House.

[5] Before the hearing on the summar roll we raised with parties a question whether the reclaiming motion was competent in view of the provisions of section 27D of the 1988 Act and also whether it was academic. Section 27D provides as follows:

> "(1) Subsection (2) applies where, after an oral hearing to determine whether or not to grant permission for an application to the supervisory jurisdiction of the Court to proceed, the Court—
>
> (a) refuses permission for the application to proceed, or
>
> (b) grants permission for the application to proceed subject to conditions or only on particular grounds.
>
> (2) The person making the application may, within the period of 7 days beginning with the day on which the Court makes its decision, appeal under this section to the Inner House (but may not appeal under any other provision of this Act).
>
> (3) In an appeal under subsection (2), the Inner House must consider whether to grant permission for the application to proceed; and subsections (2), (3) and (4) of section 27B apply for that purpose.
>
> (4) In subsection (1), the reference to an oral hearing is to an oral hearing whether following a request under section 27C(2) or otherwise."

[6] It is necessary also to set out the terms of section 28 of the 1988 Act. It provides:

> "Any party to a cause initiated in the Outer House either by a summons or a petition who is dissatisfied with an interlocutor pronounced by the Lord Ordinary may, except as otherwise prescribed, reclaim against that interlocutor within such period after the interlocutor is pronounced, and in such manner, as may be prescribed."

[7] For the petitioner, Mr Dewar QC submitted that the reclaiming motion was competent. It was brought under the terms of section 28 of the 1988 Act. This was a broad provision. It was not disapplied by anything stated in section 27D. The present case was not covered by section 27D because the court had not refused permission for the application to proceed or granted permission subject to conditions or only on particular grounds. The

position could be contrasted with section 27C(6) which provided that section 28 did not apply where there had been no request for an oral hearing or where a request for an oral hearing had been refused. The Lord Ordinary had granted leave to reclaim because he was satisfied that an important point of statutory construction should be authoritatively clarified by the Inner House.

[8] On behalf of the respondent, Mr McIlvride QC agreed with Mr Dewar that the reclaiming motion was competent. He submitted that sections 27A to D provided a complete code governing issues relating to permission itself. However, the normal reclaiming rules applied in other circumstances arising from a permission decision, such as where a party had been granted permission to proceed on the basis of an extension of the 3 month period and contended that such an extension was unnecessary because the petition was not truly time-barred.

[9] We refused the reclaiming motion as incompetent. We now set out our reasons for reaching that decision. In our opinion, it is clear that the intention behind section 89 of the Courts Reform (Scotland) Act 2014, which added sections 27A to D, was to introduce a comprehensive and self-contained statutory code governing all aspects of the procedure for obtaining permission for applications to the supervisory jurisdiction of the Court of Session. Section 27A covers time limits. Section 27B introduces a requirement for permission. Section 27C deals with oral hearings where permission is refused on the papers. Section 27D creates appeal rights.

[10] These reforms were proposed in the Report of the Scottish Civil Courts Review. The review recommended the introduction of a requirement to seek leave to proceed in an application for judicial review. In paragraph 51 of Chapter 12 it recommended that if leave was refused in the Outer House:

> "there should be a right of appeal, within 7 days, to the Inner House which would look at the petition anew."

The review did not recommend that the respondent should have a right of appeal against the granting of leave.

[11] The policy memorandum accompanying the Courts Reform (Scotland) Bill is to similar effect. It noted in paragraph 187 that:

> "There is a right of appeal to the Inner House in relation to a refusal of permission or the grant of permission subject to conditions following an oral hearing."

[12] In our view, it is obvious that the legislative intention was to create a new stand-alone scheme requiring permission to be obtained to proceed with an application for judicial review; the scheme was to cover all aspects of the permission stage, including appeal rights. It was to be comprehensive. The policy intention was for the new system to be speedy and efficient. Consistent with this objective, a disappointed applicant for judicial review was to have the right to appeal to the Inner House against a refusal of leave (or a conditional grant) so long as the appeal was marked within seven days. There is nothing to suggest that an applicant was to have any other right of appeal, such as by way of a reclaiming motion. There is nothing to suggest that instead of an appeal he or she could choose to reclaim under the old rules. There is nothing to suggest that a respondent would be able to appeal against a grant of leave. There is nothing to suggest that an applicant who had been granted leave, like the present petitioner, could nonetheless reclaim because he was dissatisfied with a finding that the time limit for bringing proceedings had expired.

[13] In the course of the hearing we asked counsel if they could explain why the provisions in section 27D had been introduced if persons dissatisfied with a permission decision already had the right to reclaim against the decision or, according to the

respondent, against some issues arising from such a decision. Neither counsel was able to provide a convincing answer.

[14] If the position adopted by the parties in the present case was correct and section 28 of the 1988 Act applied to at least some aspects of or issues arising from decisions on permission, it is impossible to see what the purpose of section 27D would be. There would then be two separate avenues of appeal with different time limits. A respondent could reclaim against a decision to grant permission. A petitioner could ignore the 7 day time limit and elect instead to enrol a reclaiming motion. That would not make sense. The appeals system would be incoherent and potentially become chaotic. That is not an outcome that the legislature can reasonably be taken to have intended.

[15] We conclude that the provisions in section 28 do not apply to a decision to grant or to refuse permission. The sole right of appeal available in respect of a permission decision is contained in section 27D. It governs the circumstances and scope of any appeal by a petitioner. Here permission to proceed with the application has been granted. The court did not make it subject to conditions or only on particular grounds. In those circumstances, the petitioner has no right to appeal or to reclaim.

[16] It is also clear that a respondent has no right to appeal or to reclaim against the granting of permission. Ultimately, we did not understand Mr McIlvride to submit the contrary.

[17] We are satisfied that the present reclaiming motion is incompetent and must be refused on that ground. We shall remit the case to the Lord Ordinary to proceed as accords. At the request of parties we have reserved all questions of expenses.