OUTER HOUSE, COURT OF SESSION

[2020] CSOH 94

P473/20

OPINION OF LADY WOLFFE

In the petition of

AS

Petitioner

against

ADVOCATE GENERAL FOR SCOTLAND

Defender

Petitioner: Caskie; Drummond Miller LLP
Respondent: Pugh; Office of the Advocate General

19 November 2020

Introduction

The delay in the determination of the petitioner's asylum claim and the Orders sought

[1] The petitioner in this judicial review, a citizen of Egypt, made a claim for asylum in September 2018. As at the date of the substantive hearing, of 4 November 2020, the petitioner's asylum claim had not been determined. Mr Caskie, who appeared for the petitioner, readily accepted that given the impact of the Covid pandemic, he could not and did not found on the period from March to September 2020. However, even allowing for that hiatus, the petitioner's position is that the point had been reached where the delay was unlawful. In those circumstances, the petitioner sought an order for specific implement at

common law, ordaining the Secretary of State for the Home Department ("the Secretary of State" or "SSHD", as the context requires) to issue a decision in respect of the petitioner's asylum claim, and that within 7 days or such other date as the court considered appropriate.

Background circumstances

[2] In his note of argument, the petitioner refers to certain factual matters. I note these, as their nature is relevant to the length of consideration of the petitioner's asylum claim. I stress that I make no finding as to the veracity or otherwise of these factors. The petitioner acknowledges that a former flatmate in Egypt was allegedly involved in an act of terrorism in Egypt, and also that following a trial in Egypt, the petitioner, was sentenced in absence to a 15-year period of imprisonment. The petitioner's position is to deny that he was involved in terrorist activity and to assert that the trial in his absence was unfair.

The ground in the petition for which permission was granted

[3] At the outset of the hearing, Mr Caskie indicated that he no longer insisted on any challenge based on any contact or enquiries that the petitioner had understood that the Home Office might have made with the Egyptian authorities (which would have been unlawful), and the relative averments were to be treated as deleted. Counsel for the respondent, Mr Pugh, makes the point that, as a consequence, there is little of substance left in the petition. In his submission, the petitioner's case became one of "pure" delay, a description Mr Caskie disputed.

Materials considered

[4] Parties produced notes of argument and separate statements of issues, bundles of authorities and productions. I have had regard to all of these materials, to the extent they related to the remaining issues and do not propose here to repeat them.

Home Office letter of January 2020

[5] Parties referred to passages in an undated letter from the Home Office. It was understood that the letter, addressed to a staff member within the offices of the petitioner's Member for Parliament, had been received on 20 January 2020 ("the holding letter"). The body of the holding letter, omitting salutation and an introductory paragraph, was as follows:

> "I am sorry for the delay in the decision being made on [the petitioner's] asylum claim. [The petitioner] claimed asylum on 10 August 2018. Until October 2018, our aim was to decide 98% of straight forward asylum claims within six months of the date of claim. However, many asylum claims are not straight-forward, which meant it was not always possible to make an initial decision within six months of the date of claim, this has been [the petitioner's] case.
>
> As part of the application process, we routinely conduct enquiries with other government departments and external agencies. The extent and length of time taken to complete these varies according to the particular circumstance of each case. Whilst we appreciate that the delays are frustrating for the asylum claimers, our policy and procedures must remain intact. We are unable to conclude [the petitioner's] case until the security checks are completed, therefore, I am unable to provide you with a timescale of when the decision will be made.
>
> Although we do have criteria against which we will expedite asylum cases, this is only considered in the most serious circumstances. Examples of which are serious safeguarding issues, or cases of serious family illness or bereavement abroad, and only if such requests are supported by documentary evidence. *If t [the petitioner] feels that he falls under this remit, we would be more than happy to forward any supporting documentation he may wish to submit onto the relevant team for consideration.*
>
> We fully appreciate that those in the asylum process may be under severe emotional pressure, which is why we provide relevant information to asylum claimants throughout the process, including signposting to any support they may require. All

> asylum claimants are provided with a comprehensive leaflet that sets out what to expect at the asylum interview, the possible outcomes of the asylum claim, how to obtain legal advice to support their claim, details of support organisations that might be relevant, rights and responsibilities of asylum seekers, and information about asylum support and how to apply.
>
> I understand that [the petitioner] will be disappointed with the time it is taking to conclude his case, however, please reassure him that his case is under active consideration and as soon as we are able, a decision will be made and we will inform him or his legal representatives of the decision in writing. Furthermore, [the petitioner's] further representations were added to his case file and will form part of the consideration of his asylum claim." (Emphasis added.)

After the reference to the date of the petitioner's asylum claim (in the first paragraph), the holding letter is in entirely generic terms except for the two passages underlined: (i) the statement (at the end of the second paragraph) that no determination of the petitioner's claim can be made "until security checks are completed", and (ii) the assurance that "his case is under active consideration". In submissions the reference to "active considerations" was understood to include "investigations".

Parties' submissions

Submissions on behalf of the petitioner

[6] In advancing the petitioner's case of unlawful delay, Mr Caskie made the following points:

1) He noted the observation of Sir John Donaldson MR in *R* v *Lancashire CC, ex parte Huddleston* [1986] 2 All ER 941 ("*Huddleston*") at p 954, that when an applicant is granted leave for judicial review, then it became the duty of the respondent public authority "to make full and fair disclosure". He also referred to the observation, a little further on in the same page, that the process required to be conducted "with all of the cards face upwards on the

table" (at p 945g), a passage quoted with approval by Lord Walker of Gestingthorpe in his dissent from the Advice of the majority of the Privy Council in *Belize Alliance of Conservation Non-Governmental Organizations* v *The Department of the Environment* [2004] UKPC 6, [2004] Env LR 761 ("*Belize*") (at paragraph 85). In *Belize* Lord Walker observed (at paragraph 86) that proceedings for judicial review "should not be conducted in the same manner as hard-fought commercial litigation". Rather, a "respondent authority owes a duty to the court to cooperate and to make candid disclosure of the relevant facts…and the reasoning behind the decision challenged". Mr Caskie submitted that permission had been granted in this case, which had the effect of triggering the duty of candour on the part of the Secretary of State. Notwithstanding that, the Secretary of State had:

> "deliberately delayed in making a decision to allow her to carry out further investigations of the merits of the petitioner's claim without providing this Court with <u>any comprehensible explanation as to why those enquiries have taken all but two years</u>" (*per* paragraph 14 of the petitioner's Note of Argument) (emphasis added);

2) Mr Caskie also noted the observation of Laws LJ in *R Quark Fishing Limited* v *Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1409 ("*Quark*") (at paragraph 50) to the effect that, while there is no general duty of disclosure in judicial review, there was a:

> "very high duty on a public authority respondent… to assist the court with full and accurate explanations of all of the facts relevant to the issue the court must decide. The real question here is whether in the evidence put forward … the Secretary of State has given a true and comprehensive account of the way the relevant decisions in the case were arrived at".

Absent that, "it may be appropriate to draw inferences" against the Secretary of State;

3) He accepted that, having regard to the fact that the background circumstances related to an alleged involvement in terrorism, the petitioner's case was a complex case or that it may involve complex investigations. However, in this case, the Secretary of State had either failed to provide any reasons for not issuing a decision on the petitioner's asylum application or that any reasons provided (ie for not producing a decision to date) were inadequate. It was not known, for example, whether the Secretary of State had or was undertaking security checks in respect of the petitioner;

4) Under reference to Article 6(2) of Council Directive 20005/85/EC ("the Asylum Procedures Directive"), which provided that a Member state shall ensure that each adult has a right to make an application for asylum, Mr Caskie submitted that that provision gave the petitioner an established status or right, and to which the observations of Garnham J in *O&H* v *SSHD* [2019] EWHC 148 (Admin) at paragraph 89 (quoted below, at para [8]) and those of Elias J in *R* v *SSHD ex p Mersin* {2000] INLR 511 (quoted with approval in *O&H*) – two cases relied on by the Secretary of State - applied. In the present context, as in those cases, the delay was such as to be unlawful; and

5) He relied on the observation of Collins J in *R (FH)* v *SSHD* [2007] EWHC 1571 (Admin) ("*FH*"), at paragraph 30, which was to the effect that delay could be unlawful if "manifestly unreasonable" or if the claimant was suffering "some particular detriment". He submitted that the petitioner has suffered hardship

in the sense that (in common with other asylum seekers), the petitioner was precluded from working and that the benefits and other supports afforded to him were limited. This was illustrated by reference to medical bills that the petitioner had incurred (but has not yet paid) not long after he made his asylum claim, but he was "at risk" of incurring further liability for medical bills, if he were to fall ill again before his application was determined. I did not understand Mr Caskie to point to any specific or additional hardship, other than the constrained circumstances in which asylum seekers find themselves in the UK.

Reply on behalf of the respondent

[7] Mr Pugh, who appeared on behalf of the respondent accepted as a generality, that decisions on applications for asylum must be issued by the Secretary of State within a reasonable period. The short reply was that the petitioner's claim has not been determined and that investigation remains ongoing. This was reflected in the respondent's two principal lines of argument, which were as follows:

1) Where a case does not concern an established status or right, delay will only be unlawful if it is irrational. Otherwise, the Court will not generally involve itself in questions concerning the running of a government department. In this case, he submitted, the petitioner did not have a settled status.

2) In any event, the respondent argues that delay can only be considered within the full context of the case and that, here, the delay is explained and is not unreasonable. Here, the context is that the SSHD has delayed making a

decision to allow her to carry out further investigations of the merits of the petitioner's claim.

[8] In support of the first line of defence, Mr Pugh submitted that the petitioner does not have an established right to remain in the country. His right to do so has not yet been determined. He referred to the recent case of *O&H* v *SSHD* [2019] EWHC 148 (Admin) *("O&H")*, in which Garnham J was asked to consider alleged unlawful delay in the context of claims made regarding protection for the victims of human trafficking. After reviewing the authorities on unlawful delay, Garnham J summarised the applicable principles, as follows:

> "89. From those cases I draw the following principles which seem to me relevant to the present case:
>
> i) Delay may be unlawful when the right in question arises as a matter of established status and the delay causes hardship (*Phansopkar*).
>
> ii) An authority acts unlawfully if it fails to have regard to the fact that what is in issue is an established right rather than the claim to a right (*Mersin*).
>
> iii) Delay is also unlawful if it is shown to result from actions or inactions which can be regarded as irrational. However, a failure merely to reach the best standards is not unlawful (*FH*).
>
> iv) The court will not generally involve itself in questions concerning the internal management of a government department (*Inland Revenue Commissioners* v *National Federation of Self-Employed and Small Businesses* and *Arbab*).
>
> v) The provision of inadequate resources by Government may be relevant to a charge of systematically unlawful delay, but the Courts will be wary of deciding questions that turn on the allocation of scarce resources (Arbab)."

Mr Pugh submitted that those principles were stated against a background of an acceptance that the SSHD has a duty to determine cases within a reasonable period (see paragraph 71 of *O&H*). There was a rejection, however, of any notion that an alleged period of delay was

"self-evidently" unreasonable (*ibid* at paragraph 73). The propositions outlined at paragraph 89 of *O&H* were a correct statement of the law in respect of alleged unlawful delay in a case such as the present. Of particular importance were principles (iii) and (iv). Accordingly, to succeed in an application such as the present, the petitioner has to show that in not yet having reached a decision on the merits of his asylum claim the Secretary of State was acting irrationally.

[9] In support of the second line of defence, Mr Pugh took the Court through the terms of the holding letter and Answer 7. As the substance of the holding letter was referred to in the Answers (and is quoted above), I need only note the averments of additional matters made in the Answers. These were:

> "The petitioner's case is, in fact, complex. It requires a full consideration of his given account. It requires consideration to be given to the nature of offences disclosed in the account. Since March 2020, as a result of the COVID 19 restrictions, the Secretary of State has been unable to progress investigations. She will be unable to do so until restrictions are eased."

From this he submitted that there had been an explanation for the delay, by reason of the fact that the petitioner's case was complex, security checks had not been completed and investigation was required to consider the nature of the offences disclosed in the petitioner's account. Mr Pugh was at pains to stress that he was not privy to what those investigations might be. The foregoing sufficed, however, to explain the time taken. In the light of those circumstances, the delay was not irrational and the petitioner's case was bound to fail.

Discussion

Does the petitioner have an established status or right?

[10] The essential issue in this case is whether the delay on the part of the Secretary of State in determining the petitioner's application for asylum is unlawful. As is clear from the

helpful discussion by Garnham J in *O&H*, there are differing tests for determining whether delay in making a decision is unlawful. In the cases placed before the Court, the test turned on whether one had an established right or settled status; that is the difference between principles (i) and (ii) of *O&H* and principle (iii). As it was put by Elias J in *Mersin* (at p 522) (and cited with approval by Garnham J in *O&H* (at paragraph 82)):

> "…if someone has **established the right** to some benefit of significance, as the right to refugee status and indefinite leave surely is, and all that is required is the formal grant of that benefit…., then it is incumbent upon the authority concerned to confer the benefit **without reasonable delay**". (Emphasis added.)

From the cases cited, examples of those with an "established right" were foreign-born spouses with a right of abode in the UK derived from their husbands (who were registered citizens of the UK) (in *Phansopkar*), or an individual who had successfully appealed the Secretary of State's refusal of asylum and thereby attained the status of refugee (*Mersin*). By contrast, individuals in respect of whom the Secretary of State had not yet made a determination that they had been trafficked (the applicants in *O&H*) or those whose second asylum claim was pending (having successfully overturned the Secretary of State's refusal of their first application (as in *FH*)), did not have an established right. Mr Pugh notes that the court in *O&H* found that the case of *FH* was closest in its application. Mr Caskie seeks to distinguish *Mersin* on the basis that the Asylum Procedures Directive did not then exist.

[11] In my view, the petitioner does not have a settled or established status, such as to bring him within the scope of the principles in subparagraphs 89(i) and (ii) of *O&H*. He has the status of an asylum seeker. While that it is a recognised status, which entitles him to certain protections and rights, it relates to one who is *seeking* asylum but whose application for asylum is pending. It is an inherently provisional or *interim* status. The petitioner sought to rely on Article 6(2) of the Procedures Directive, and to distinguish *Mersin* as

having been decided before that Directive was in force. In my view, the petitioner's reliance on Article 6(2) of the Directive is misconceived. That is no more than a procedural right. All that provision does is entitle an adult individual to exercise the right to claim asylum: a right the petitioner has exercised. Having done so, that right is exhausted. It does not itself create or confer any other substantive right or permanent status.

[12] The fundamental difficulty for the petitioner's argument is that, at best, the status of asylum seeker is only ever an *interim* one pending determination of one's application. The outcome of the application for asylum will either (i) to be recognised as a refugee (if the claim is accepted, and which is a settled status in the sense of a permanent one) or (ii) to have one's asylum application refused (and as a now- failed asylum seeker, to lose the *interim* benefits of being an asylum seeker pending determination of the application).

[13] Accordingly, the test that falls to be applied to determine if the delay in determining the petitioner's application is unlawful is irrationality. That is not something that can be determined in the abstract. No materials, eg of a comparative nature in respect of the determination of other or similar applications, were placed before the Court to make any real assessment of whether the time that had passed was "irrational". In my view, there is considerable force in Collin J's observation at paragraph 30 of *FH*, that claims such as these (ie not involving an established status or entitlement to a significant benefit of a permanent character), are unlikely to succeed, save in exceptional circumstances and that it is:

> "only if the delay is so excessive as to be regarded as manifestly unreasonable and to fall outside any proper application of the policy or if the claimant is suffering some **particular detriment** which the Home Office has failed to alleviate that a claim might be entertained by the court". (Emphasis added.)

[14] Mr Caskie sought to bring the petitioner's case within the ambit of that last observation, but there was nothing presented to the Court to indicate or establish "particular

detriment" to the petitioner arising by reason of the passage of time or the impact of the constrained circumstances in which asylum seekers find themselves. That is borne out by the fact that, while the holding letter recognises that particular cases might require to be expedited (as referred to in the passage underlined in the holding letter, at para [5], above), there was nothing placed before the Court to suggest that the petitioner presented himself as in need of an expedited determination arising from any particular detriment.

The petitioner's criticism of the Secretary of State's failure to give an adequate explanation ad interim

[15] While the petitioner's case had been pled as a "no decision" case, hence the remedy of specific implement, at times the petitioner's argument appeared to be a complaint that the Secretary of State had failed to explain her failure to decide, and that she was under a duty in the *interim* to provide an explanation for what was being done. Nothing in the cases cited to me would support the imposition of such a duty. I accept as well-founded Mr Pugh's submission that the cases cited by the petitioner regarding a duty of candour were readily distinguishable, as all concerning cases where a decision had been made. They were not "no decision" cases. They offer no support for the imposition of a duty on a decision-taker to keep prospective applicants informed of the steps taken while their applications are pending. That is, in my view, particularly the case where the investigations may require consideration of potential terrorist activities and which may therefore involve liaising with the security and anti-terrorism agencies. There is no warrant in the cases or in principle for the imposition of a such a duty; indeed, to impose one would be inconsistent with principle (iv) of paragraph 89 of *O&H* (set out above, at para [8]).

The question of remedy

[16] The question of remedy was not the subject of detailed submissions. For completeness, I should note that even if I had found in favour of the petitioner that the delay in making a decision in respect of the petitioner's application was unlawful, I was not persuaded that a decree of specific implement was appropriate. Generally, a declarator should suffice. To require more, at least without being heard on the question of the appropriateness of that remedy, or the timescale for compliance, would be to trespass into the sphere of "internal management". In those circumstances, I would have put the matter out for a hearing for further submissions on the remedy to be provided.

Decision

[17] It follows that the petitioner's application fails and this application for judicial review falls to be dismissed.