EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 21
P66/20

Lady Paton
Lord Turnbull
Lord Doherty

OPINION OF THE COURT

delivered by LORD DOHERTY

in the reclaiming motion

by

SM

Petitioner and Reclaimer

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

in the petition for Judicial Review of a decision of the Secretary of State for the Home Department dated 24 October 2019 refusing to treat the petitioner's further submissions as a fresh claim

Petitioner and Reclaimer: Winter; Drummond Miller LLP (for DMO, Solicitors, Glasgow)
Respondent: Graham Middleton; Office of the Advocate General

26 April 2022

Introduction

[1] The petitioner and reclaimer (appellant) is a Gambian national. He claimed asylum in the UK on 16 April 2015. He claimed that he would be at risk of persecution if returned to Gambia because he maintains he is bisexual. On 11 September 2015 the respondent refused his claim and he appealed to the First-tier Tribunal ("the FtT"). On 12 April 2016 the FtT

dismissed the petitioner's appeal. It found his evidence was "vague and lacking in credibility in relation to the account he gives of his previous and present relationships with men." (Paragraph 20). The evidence included a brief letter from a man, AO, which stated that he was in a sexual relationship with the petitioner. AO was not called as a witness. The FtT found the evidence of the petitioner and of AO to be "contradictory as to the details of their relationship". The FtT was not satisfied that the petitioner is bisexual.

[2] The FtT refused permission to appeal to the Upper Tribunal ("the UT"), as did the UT.

[3] The petitioner made further submissions to the respondent on 7 February 2017. Those submissions included very brief statements from the petitioner and from AO. The letter from AO bore to confirm the existence of a sexual relationship between the petitioner and AO. On 12 May 2017 the respondent refused to accept that the submissions gave rise to a fresh claim. The petitioner did not challenge that decision.

[4] On 9 February 2018 the petitioner made further submissions to the respondent. The submissions included a brief letter from AO in which he claimed to be in a relationship with the petitioner, and a brief letter from PB in which he claimed to have witnessed a loving relationship between the petitioner and AO and to have attended gay nightclubs with them. On 6 December 2018 the respondent refused to accept that the submissions were a fresh claim. The petitioner did not challenge that decision.

[5] On 22 August 2019 the petitioner made further submissions to the respondent. The submissions included brief letters from AO and PB which were in similar terms to their previous letters. The letter from AO was undated. In addition, there was a letter dated 4 June 2019 from LGBT Unity Glasgow, which is a peer support, social and campaigning group for lesbian, gay, bisexual and transgender ("LGBT") people. The letter stated that

the petitioner had joined the group in May 2018, that he had signed the constitution, and that he had been an active member since he joined. On 24 October 2019 the respondent's decision-maker refused to accept that the submissions were a fresh claim. The petitioner brought the present petition for judicial review to challenge that decision.

Paragraph 353 of the Immigration Rules

[6] The respondent's consideration of new material that is said to ground a "fresh claim" is governed by paragraph 353 of the Immigration Rules. On 24 October 2019 paragraph 353 provided:

> "When a human rights or asylum claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and, if rejected, will then determine whether they amount to a fresh claim. The submissions will amount to a fresh claim if they are significantly different from the material that has previously been considered. The submissions will only be significantly different if the content: (i) had not already been considered; and (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection…"

[7] In *WM (Democratic Republic of Congo)* v *Secretary of State for the Home Department* [2006] EWCA Civ 1495, [2007] Imm AR 337, Lord Justice Buxton (at paragraphs [6]-[7]) described the task of the Secretary of State under paragraph 353:

> "[6] He has to consider the new material together with the old and make two judgements. First, whether the new material is significantly different from that already submitted, on the basis of which the asylum claim has failed, that to be judged under rule 353(i) according to whether the content of the material has already been considered. If the material is not 'significantly different' the Secretary of State has to go no further. Second, if the material is significantly different, the Secretary of State has to consider whether it, taken together with the material previously considered, creates a realistic prospect of success in a further asylum claim. That second judgement will involve not only judging the reliability of the new material, but also judging the outcome of tribunal proceedings based on that material. To set aside one point that was said to be a matter of some concern, the Secretary of State, in assessing the reliability of new material, can of course have in mind both how the material relates to other material already found by an adjudicator to be reliable, and

> also have in mind, where that is relevantly probative, any finding as to the honesty or reliability of the applicant that was made by the previous adjudicator. However, he must also bear in mind that the latter may be of little relevance when, as is alleged in both of the particular cases before us, the new material does not emanate from the applicant himself, and thus cannot be said to be automatically suspect because it comes from a tainted source.
>
> [7] The rule only imposes a somewhat modest test that the application has to meet before it becomes a fresh claim. First, the question is whether there is a realistic prospect of success in an application before an adjudicator, but not more than that. Second, as [counsel] pertinently pointed out, the adjudicator himself does not have to achieve certainty, but only to think that there is a real risk of the applicant being persecuted on return. Third, and importantly, since asylum is in issue the consideration of all the decision-makers, the Secretary of State, the adjudicator and the court, must be informed by the anxious scrutiny of the material that is axiomatic in decisions that if made incorrectly may lead to the applicant's exposure to persecution. If authority is needed for that proposition, see per Lord Bridge of Harwich in *Bugdaycay* v *SSHD* [1987] AC 514, p 531F."

[8] We would put the matter slightly differently in one respect. In our view it is more accurate to say that the first judgement which the Secretary of State has to make is whether the content of the submissions has already been considered. If it has, then the first requirement for submissions to be significantly different is not met and it is unnecessary to consider the second requirement. The submissions will not be significantly different. However, where the first requirement is met, that in itself does not make the submissions significantly different. In terms of paragraph 353 the submissions are only significantly different if both part (i) and part (ii) are satisfied (cf *O* v *Secretary of State for the Home Department* [2010] CSIH 16, 2010 SLT 1087, paragraph [22]).

[9] His Lordship went on at paragraphs [10]-[11] to consider the task of the court:

> "[10] ….Whilst, therefore, 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.
>
> [11] 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: see [7] above. 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."

That statement of the law was affirmed by the Inner House in *O* v *Secretary of State for the Home Department,* at paragraph [23], and in *Dangol* v *Secretary of State for the Home Department* 2011 SC 560, at paragraph [7].

Asylum and Human Rights Policy Instruction, Further Submissions

[10] *Asylum and Human Rights Policy Instruction, Further Submissions* (Version 9.0) ("the policy instruction") was published by the respondent for Home Office staff on 19 February 2016. Section 1.3 states:

> "1.3 Policy intention
> The policy objective when dealing with further submissions is to maintain a firm but fair and efficient immigration system that grants protection and/or leave to those who need it, or qualify for it, but tackles abuse and protects public funds by quickly rejecting unfounded or repeat claims. This is achieved by:
>
> …
>
> - quickly considering whether the new evidence changes the original decision to refuse, to ensure we grant protection and/or leave to remain to those who qualify for it
> - dealing quickly with unfounded claims and using immigration detention to ensure those who do not need protection and have no other right to be in the UK leave voluntarily or have their removal enforced quickly (and in the meantime cannot access financial support)."

The introduction to section 4 states:

> "In all cases, where **new** information is provided it must be considered alongside the previous material, taking all evidence available into account. However, where further submissions simply repeat information that has already been considered, caseworkers should refer to the previous refusal and appeal determination in rejecting the claim - there is no need to provide detailed reasons again if the issues have already been properly considered previously."

Section 4.2 provides:

> "…
> **The second test: is there a realistic prospect of success?**
> If the material **has not** previously been considered, caseworkers must assess whether the new material, taken together with material previously considered, creates a realistic prospect of success. The question is whether the issues raised are at least arguable and **could** lead an Immigration Judge to take a different view…
>
> **Consideration includes old and new material**
> Caseworkers must consider **all** the available evidence when deciding whether there is a realistic prospect of success at appeal. Where further submissions are based wholly or partly on new evidence, this must not be considered in isolation, but must be considered in conjunction with the material previously submitted. The question is whether, in light of all the evidence available, the new material could persuade an Immigration Judge - in other words whether it is arguable notwithstanding rejection…"

The decision letter

[11] The decision letter of 24 October 2019 summarised the petitioner's immigration history and his further submissions. It noted that the claim that the petitioner was bisexual had previously been considered. It stated that, in accordance with *Devaseelan* [2002] UKIAT 00702, it took the FtT's findings as the appropriate starting point. It noted that in the petitioner's letter and PB's letter AO's name had been misspelled. The petitioner's, AO's and PB's letters were very short and they lacked detail and content. The letter from LGBT Unity did not mention AO let alone any relationship between the petitioner and AO, and it did not state that the petitioner is bisexual. The decision letter continued (p 9):

> "Careful consideration has been given to whether your submissions amount to a fresh claim. Although your submissions have been subjected to anxious scrutiny, it is not accepted that they would have a realistic prospect of success before an Immigration judge … Therefore, it is concluded that your submissions have no realistic prospect of success".

On p 11 the letter stated:

> "Careful consideration in line with case law WM (DRC) v SSHD [2006] EWCA Civ 1495 has been given to whether your submissions amount to a fresh claim. Although your submissions have been subjected to anxious scrutiny, it is not accepted that they would have a realistic prospect of success before an Immigration judge…
>
> …
>
> In accordance with the published Home Office Asylum Policy Instruction on Further Submissions, your asylum and human rights claim has been carefully reconsidered on all the evidence available, including the new further submissions and the previously considered material…
>
> I have concluded that your submissions do not meet the requirements of Paragraph 353 of the Immigration Rules and do not amount to a fresh claim. The new submissions taken together with the previously considered material do not create a realistic prospect of success. That means that it is not accepted that should this material be considered by an Immigration Judge, that this could result in a decision to grant you asylum, Humanitarian Protection, limited leave to remain on the basis of your family and/or private life, or Discretionary Leave for the reasons set out above.
>
> I have decided that the decision of 11 September 2016 [*sic*] upheld by the Immigration Judge on 12 April 2016 should not be reversed."

Permission to proceed

[12] On 26 January 2021, following an oral hearing, Lord Tyre refused to grant permission for the petition to proceed. The petitioner sought review of that decision. On 17 February 2021, after a further oral hearing, Lord Clark granted permission to proceed on one ground only, namely, whether the respondent's decision-maker had properly distinguished between his own view as to whether there is a realistic prospect of success before an Immigration Judge and the ultimate question of whether there is in fact such a realistic prospect before

such a Judge. That ground had not been advanced in the petition at the time it was considered by Lord Tyre.

The Lord Ordinary's decision

[13] On 14 April 2021 at a substantive hearing Lord Boyd of Duncansby refused the petition. In his view it was clear on a fair reading of the decision letter that the decision-maker had applied the correct test. The terms of the decision letter which were criticised were nearly identical to those in *Dangol*. Moreover, Lord Boyd of Duncansby considered that there was no reason to doubt that when applying the test the decision-maker had followed section 4.2 of the policy instruction. In his view the case of *JM4* v *Secretary of State for the Home Department* [2019] NIQB 61 fell to be distinguished. *JM4* had turned on McCloskey J's (as he then was) interpretation of the decision letter as a whole. The operative part of that decision letter had been materially different from the decision letter of 24 October 2019. Although McCloskey J had relied upon the same point which the petitioner now advanced, it had been just one of a number of grounds the cumulative effect of which led him to conclude that the decision could not stand. Lord Boyd of Duncansby was not surprised by the conclusion which the decision-maker had reached in the present case when applying the correct test. He observed that the material submitted with the application was sparse. The statements were brief in the extreme and devoid of detail. There was reference to a proposed marriage in the petitioner's statement but none in the other statements. There was no detail of his involvement in LGBT Unity events.

Submissions

[14] Counsel for the petitioner submitted that the decision-maker erred in law by failing to recognise that the question was whether an Immigration Judge could take the view that there is a realistic prospect of success, not whether the Judge would take such a view. The decision-maker had failed to apply properly the policy instruction and the observations of the court in *MO* v *Secretary of State for the Home Department* [2012] CSIH 20, Opinion of the Court (delivered by Lord Mackay of Drumadoon) at paragraph [34]. Those observations should be preferred to the approach taken in *RR* v *Secretary of State for the Home Department* [2012] CSOH 67 at paragraphs [22]-[30] and in *AA* v *Secretary of State for the Home Department* [2012] CSOH 76 at paragraphs [14]-[22]. The policy instruction had not been an issue in *RR* or *AA*, or in the authorities which the court had relied upon in those cases (*Dangol* (paragraph [16]), *O* v *Secretary of State for the Home Department* (paragraphs [25], [26]), and *R (MN) (Tanzania)* v *Secretary of State for the Home Department* [2011] 1 WLR 3200 (paragraph [32])). Moreover, the use of the word "would" in those cases had not been put in issue. All of those cases pre-dated *JM4*. At paragraph [19] of that case the court concluded that it was clear from the terms of the decision letter that the decision-maker had not applied the correct test. A statement in the JM4 decision letter which was criticised by McCloskey J also appeared in the decision letter in the present case, *viz*, "I have decided that the decision of [date] upheld by the Immigration Judge on [date] should not be reversed." The court in *JM4* had concluded that the terms of the decision letter disclosed an error of law, and the court here should reach the same conclusion. The Lord Ordinary had erred in law in failing to recognise that the FtT had erred in law.

[15] Counsel for the respondent submitted that neither the Lord Ordinary nor the FtT had erred in law. The reclaiming motion was based on mistaken interpretations of the policy

instruction and of the requirements of paragraph 353. The question was not whether an Immigration Judge could take the view that there is a realistic prospect of success. It was whether on the basis of the fresh material and the pre-existing material there was a realistic prospect of an Immigration Judge finding in the applicant's favour. If on the basis of that material the correct conclusion was that he could find in the applicant's favour, then there would be a realistic prospect of success. The Lord Ordinary had been entitled to find that that was not the position here. The decision-maker had applied paragraph 353 and the policy instruction properly.

[16] The terms of the decision letter were entirely consistent with the terms of the policy instruction and with the authorities (*Dangol*, paragraph [16]; *O* v *Secretary of State for the Home Department*, paragraphs [25], [26]; *R (MN) (Tanzania)* v *Secretary of State for the Home Department*, paragraph [32]; *RR*, paragraphs [24]-[30]; *AA*, paragraphs [17]-[23]; and *AN* v *Secretary of State for the Home Department* [2013] CSIH 111, paragraph [26]). The case of *MO* was distinguishable.

[17] The Lord Ordinary was correct to distinguish *JM4*. As he noted in paragraph 10(6) of his Note, that case turned upon the whole terms of the relevant decision letter. At paragraph [19] McCloskey J described it as displaying "no awareness" of the correct test, *viz* whether the new submissions taken together with the previously considered material create a realistic prospect that on appeal an Immigration Judge would find in favour of the appellant. The Lord Ordinary had been right to conclude that the terms of the decision letter here were materially different. In any case, in *JM4* this ground had only been one of a number of errors which led the court to conclude that the decision could not stand. The position in the present case was more akin to that in *Re Mahmud's Application for Judicial Review* [2021] NIQB 6.

Decision and reasons

[18] In our opinion the reclaiming motion should be refused. We are able to state our reasons relatively briefly.

[19] In our view counsel for the petitioner misstated the law when he submitted that the question posed in part (ii) of paragraph 353 is whether an Immigration Judge could take the view that the appellant had a realistic prospect of success in an appeal based on the fresh submissions and the previously considered material. Part (ii) does not pose any such question. Rather, it asks whether the submissions and material create a realistic prospect of success before an Immigration Judge.

[20] The policy instruction advises that if the fresh submissions and the previously considered material could result in an Immigration Judge finding in the applicant's favour in an appeal, then they create a realistic prospect of success. It is entirely apt in such circumstances to say that they would create a realistic prospect of success.

[21] We are satisfied that the decision-maker construed and applied part (ii) of paragraph 353 correctly, and that he followed the advice in the policy instruction. It was open to him to find as he did, and the Lord Ordinary did not err in law in so holding.

[22] We add the following observations on *JM4* and *MO*.

[23] The main difficulty in *JM4* was that there was no satisfactory indication in the decision letter that the decision-maker had properly applied his mind to whether there was a realistic prospect of success before an Immigration Judge. He appeared simply to have approached matters by reference to his own view of the merits of the new material. That is not a criticism which the petitioner has made good in the present case.

[24] It is, of course, true to say that in *JM4* the court indicated that the decision-maker's statement that the earlier decision of the Immigration Judge should not be reversed suggested a misconception on his part as to his role. The same statement appears in the decision letter in this case, and the same criticism is advanced. However, the important difference is that in *JM4* there was no indication in the decision letter that the decision-maker had applied the correct test. The statement reinforced the concern that he had not. Here, by contrast, we do not have the same concern because we are satisfied from the terms of the decision letter as a whole that the decision-maker did address the correct test (*cf Mahmud*, Friedman J at paragraph 49).

[25] In *MO* the court observed at paragraph [34]:

> "[34] Furthermore, during our own consideration of the decision letter of 26 September 2009 a further error on the part of the Secretary of State emerged. In paragraph 19 of the decision letter, the writer states that 'it is not accepted that an Immigration Judge applying the rule of anxious scrutiny of the material and of all the previously considered material, **would** (*emphasis added*) reach a finding that there is a real risk of your client facing persecution or serious harm were he to be returned to Iran'. The test that requires to be met is a lower one than that. It is whether there is a realistic prospect that an Immigration Judge **may** find in favour of the asylum seeker, not that he or she would so find…"

Counsel for the petitioner placed reliance on those observations in support of his submission that the question posed by part (ii) of paragraph 353 is whether an Immigration Judge could take the view that the appellant had a realistic prospect of success in an appeal based on the fresh submissions and the previously considered material. We have explained already that that construction of part (ii) is erroneous, and in our opinion paragraph [34] of *MO* does not indicate otherwise. The quotation in the second sentence indicated that the decision-maker had formulated matters incorrectly because he addressed the question whether an Immigration Judge would find in the applicant's favour, rather than the question whether the fresh submissions and the previously considered material created a realistic prospect of

success before an Immigration Judge. We agree with what the court said in the second and third sentences of paragraph [34]. However, we consider that the next sentence could have been better expressed. In our opinion it is more accurate to say:

> "It is whether an Immigration Judge could find in favour of the asylum seeker, not that he or she would so find. If he or she could, then there is a realistic prospect of success."

It would be equally correct to say:

> "It is whether an Immigration Judge may find in favour of the asylum seeker, not that he or she would so find. If he or she may, then there is a realistic prospect of success."

In our opinion both of those formulations are more consistent with the test in part (ii) of paragraph 343 and with the policy instruction than the existing sentence.

Disposal

[26] We shall refuse the reclaiming motion and adhere to the Lord Ordinary's interlocutor of 14 April 2021.