



OUTER HOUSE, COURT OF SESSION

[2024] CSOH 62

P686-23

OPINION OF LORD HARROWER

In the petition of

AH (FE/LA)

Petitioner

for

Judicial Review of a decision of the Secretary of State for the Home Department

Respondent

Petitioner: Forrest; Drummond Miller LLP
Respondent: Olson; Office of the Advocate General

7 June 2024

Introduction

[1] In this petition for judicial review, the petitioner, AH, sought reduction of a decision by the Home Secretary dated 18 May 2023, confirming a decision of 23 March 2023, refusing his application for permission to stay in the UK as a health and care skilled worker.

[2] I heard counsel for both parties at a substantive hearing on Friday, 7 June 2024.

At the conclusion of the hearing, I refused the petition, giving a brief statement of reasons.

There having been no agents for the petitioner in attendance throughout the hearing, I

indicated that I would be content to expand upon the reasons given if required. Agents for

the petitioner have now given notice of their intention to reclaim. This is my full statement of reasons for refusing the petition.

Background

[3] AH is a Pakistani national, who applied for and was granted leave to enter the UK as a student from 29 August 2021 until 12 September 2023. He was issued with a residence permit which also granted him permission to work up to 20 hours per week during term time. Thereafter he enrolled as a student at Napier University.

[4] On 25 November 2021, AH submitted an asylum claim, in connection with which, on 10 January 2022, he was given a screening interview at the Glasgow Asylum Unit. The interview was conducted in Pashto, and his answers recorded in English in a document entitled, "Initial Contact and Asylum Registration Questionnaire".

[5] Part 3 of the questionnaire was headed "Travel and Third Country". Question 3.1 asked, "Why have you come to the UK?" AH's answer was recorded as being, "I came to the UK for safety". Elsewhere in the document, AH was asked to explain the basis for his asylum claim, and the reasons why he could not return to his home country (Question 4.1).

He was recorded as having explained:

"On several occasions the government have killed [sic] to kill me. They will shoot members of the political party I am a member of on sight. That is why I left Pakistan to save my life. ... If I returned to my home country I would be killed on sight. That is why I came to the UK which is a safe country".

[6] On the basis of these answers, the respondent formed the suspicion that AH had used deception in order to enter the UK. On the same day as his interview, 10 January 2022, AH was issued with a "Notification of Liability to Detention". The notice explained that it

had been issued to AH “because there [was] reasonable suspicion” that he may be liable to removal or deportation from the United Kingdom. In a statement of reasons, it continued:

“Verbal Deceptive [sic]: You have admitted that your true intention for coming to the United Kingdom was to claim asylum and not as per your entry clearance/what you said to the Immigration Officer at port. You are therefore an illegal entrant and you have committed a breach under s.26 (1) (c) of the IA 1971 – verbal deception.”

Section 26(1)(c) of the 1971 Act makes it an offence for a person to make or cause to be made to an immigration officer a statement or representation “which he knows to be false or does not believe to be true”.

[7] In a further section advising AH what would happen next, the Notification of Liability to Detention stated that he would be granted immigration bail. By separate notice, AH was placed on immigration bail, and on 5 May 2022 his bail conditions were varied in order to allow AH to work up to 20 hours per week in line with his original visa conditions.

[8] On 16 March 2023, AH made the application with which this petition for judicial review is concerned, namely, for permission to stay in the UK as a health and care worker in the UK. He did so having first obtained a certificate of sponsorship from a prospective employer. As noted above, AH’s application was refused on 23 March 2023 and, following an application for administrative review, the Home Secretary confirmed her refusal by a decision dated 18 May 2023.

[9] In both decisions, the Home Secretary has given as reasons for refusal (a) that AH was on immigration bail at the time of his application for permission to stay in the UK as a skilled worker, citing paragraph SW2.2 of the appendix to the Immigration Rules applicable to skilled workers; and (b) that in any event AH had used deception in his application to enter the UK as a student, citing paragraph 9.8.3A of the general grounds for refusal contained in Part 9 of the Immigration Rules.

Remedy sought

[10] In August 2023, AH brought this petition for judicial review, in which the sole remedy sought was that of reduction, on grounds of error of law, of the Home Secretary's decision dated 18 May 2023, refusing his application for permission to stay in the UK as a skilled worker.

Preliminary point

[11] Both parties lodged notes of the issues in dispute in preparation for the substantive hearing. In neither of these notes had the Home Secretary's immigration bail argument been focussed as an issue requiring resolution, although it is clearly set out by the Home Secretary in his answers.

[12] At the outset of the substantive hearing, I made inquiries of counsel as to the exact scope of the dispute. I had wondered, standing the terms of both notes of issues, whether parties had agreed to restrict the issues in relation to which they sought a judicial resolution.

[13] However, both counsel confirmed that the fact that the petitioner was on immigration bail at the time of his application remained a live issue in the case, and that each of them had simply omitted it in error from their respective notes.

Petitioner's submissions

[14] The petitioner submitted that the Home Secretary's decision was premature and therefore unreasonable. It had assumed that there could only be one reason for AH coming to the UK. However, in reality, there might be a variety of reasons why a person such as AH

might move from one country to another. To assume that AH had been dishonest had been unreasonable on the part of the Home Secretary.

[15] No decision could be made based on assumptions about AH's reasons for entering the UK until after he had been fully interviewed as part of his claim for asylum. The case of *YL (Rely on SEF) China* 2004 UKIAT 00145 explained the limited purpose of an interview such as the one that took place on 10 January 2022. That was a mere screening interview undertaken to establish the general nature of the claimant's case so that the Home Office could decide best how to process it. Its purpose was not to establish in detail the reasons a person gives to support a claim for asylum (*YL*, paragraph 19).

[16] Secondly, and in any event, the Home Secretary's decision was irrational. Before any finding of dishonesty could be made, it was necessary to apply a two-stage test. Firstly, the fact-finder must ascertain (subjectively) the actual state of the applicant's knowledge or belief as to the facts. Secondly, once his actual state of mind as to the facts is established, the honesty of his conduct must be assessed by applying the (objective) standards of ordinary decent people (*Ivey v Genting Casinos (UK) Ltd* [2018] AC 391, paragraph 74, applied in the immigration context in *Ullah v Secretary of State for the Home Department* [2024] EWCA Civ 201).

[17] The Home Secretary had failed to apply the first stage of that test. There had been no exploration of AH's state of mind at the time he came to the UK. According to AH, he had fully intended to study in the UK, and did in fact enrol to study at Napier. He was unaware at that time that he was entitled to seek international humanitarian protection. Subsequent to AH's arrival in the UK, he received information that made it, in his view, unsafe to return to his home country. The question of whether AH had been honest or had used deception to gain entry to the UK could only be established after a full inquiry into his state of mind had

been carried out, of the sort contemplated in *YL*, as part of the asylum application process. Until then, the Home Secretary could not be said to have discharged the onus of proof by showing on a balance of probabilities that AH had been dishonest (*Ozhogina and Tarasova (deception within para 320(7B) –nannies) Russia/Russian Federation* [2011] UKUT 197).

[18] Insofar as the Home Secretary relied on AH being a person who had contravened immigration law, his position was based on a denied assertion that AH had admitted that he came to the UK to claim asylum.

The Home Secretary's submissions

[19] The original decision of 23 March 2023 was not premature. The Home Secretary was not required to carry out a full interview, either in connection with AH's asylum claim or otherwise, before determining his application for permission to stay in the UK as a skilled worker.

[20] The fact that AH was on immigration bail at the time of his application was a sufficient ground for refusing it. Appendix SW2.2(b) stated that, "If applying for permission to stay the applicant must not be ... on immigration bail". The fact that AH was on immigration bail at the relevant time was stated as a ground for refusal in both the original decision and the decision on review.

[21] In her administrative review decision, the Home Secretary had gone on to consider additional grounds for refusing the application. These included paragraph 9.8.3A of Part 9 of the Immigration Rules, namely, "...an application for ... permission to stay may be refused where a person used deception in relation to a previous application (whether or not successfully)".

[22] The Home Secretary referred to AH's answers recorded at parts 3.1 and 4.1 of the questionnaire (see paragraph 5 above). In his Note of Argument, the Home Secretary had stated that there was no ambiguity in the words used. He had described AH's being afraid for his safety as "[t]he reason" that he came to the UK. However, in his submissions at the substantive hearing, counsel for the Home Secretary departed from that submission. He accepted, in my view quite properly, that AH may have had more than one reason for coming to the UK, and in particular that he may have come both in order to study and for safety. Notwithstanding that concession, however, counsel submitted that the Home Secretary's interpretation of the words used by AH in his answers given at the asylum screening interview had been a reasonable one and had not been premature. Counsel for the Home Secretary reiterated his submission that the fact that AH was on immigration bail was a sufficient reason for refusal and therefore he had not been prejudiced by the Home Secretary having considered other grounds for refusal.

Petitioner's reply

[23] In a brief reply, counsel for the petitioner addressed the immigration bail argument which had not been covered in his Note of Argument. His short submission was that the court had to have regard to the reason why AH was placed on immigration bail. When pressed as to why I had to have regard to anything other than the fact that AH was on immigration bail, counsel replied that otherwise the Immigration Rules "could not operate".

Decision

[24] I would begin by noting that, in the grounds of review laid before the Home Secretary as part of the process of administrative review, the petitioner had advanced an

argument based on personal bar. Importantly, however, the petition stopped well short of suggesting that the Home Secretary was personally barred from making the decision under review. Statement 7.4 of the petition averred that the Home Secretary's decision of 5 May 2022, allowing AH to work while his asylum claim was being processed, was "not consistent with dealing with someone who ha[d] allegedly deceived her". From statement 7.5 of the petition, it would appear that the relevance of that averment was restricted to an assessment of the reasonableness of the Home Secretary's actions.

[25] Neither the petitioner's Note of Argument, nor the submissions made on his behalf at the substantive hearing, sought to reinstate personal bar as a ground being relied upon in this judicial review. Nevertheless, I took the precaution of seeking and obtaining an assurance from counsel for the petitioner that it formed no part of his argument.

Immigration bail

[26] In my decision, I agreed with the Home Secretary regarding what I took to be his principal ground of opposition. Appendix SW2.2(b) to the Immigration Rules stated that, "If applying for permission to stay the applicant must not be ... on immigration bail". AH was on immigration bail at the time of his application. The Home Secretary was therefore entitled to refuse his application.

[27] I was unable to accept counsel for the petitioner's submission that, in order to apply the Immigration Rules, the court was required to investigate why the petitioner had been placed on immigration bail. Rather, the rule seemed to me to be perfectly clear. It was the fact that the applicant was on immigration bail at the relevant time that was critical.

[28] No doubt it would be open to the applicant to challenge his status as being a person on immigration bail. Counsel for the Home Secretary informed me that there was no right

of appeal from a decision to place someone on immigration bail, but that the appropriate means of redress would be by making an application for judicial review.

[29] Whatever may be the appropriate avenue of redress, the validity of the decision to place the petitioner on immigration bail formed no part of his present case. There was therefore no discussion of the questions that might have arisen if it had been. On the face of it, the petitioner would appear to be out of time insofar as any challenge to the decision to place him on immigration bail is concerned. There was no discussion of whether or not time could or should be extended. There might have been other problems associated with making a collateral challenge of this sort in an application to reduce a quite different decision (*cf R v Wicks* [1998] AC 92, *Boddington v British Transport Police* [1998] 2 AC 143). It would appear that none of these matters had been before the court when it granted permission to proceed.

[30] It is striking that the argument from immigration bail had been left unanswered both in the petition and in the petitioner's Note of Argument. I was left unpersuaded by counsel's belated attempt to answer it by arguing that the court required to investigate the reasons why an applicant had been placed on immigration bail. In my view the fact that AH was on immigration bail at the relevant time gave the Home Secretary a sufficient reason to refuse his application for permission to stay in the UK as a skilled worker.

Deception in a prior application

[31] Having made that decision, I nevertheless addressed briefly the argument that the Home Secretary had erred in concluding that AH had used deception to enter the country as a student.

[32] Firstly, I rejected the argument that the Home Secretary was required to await the outcome of AH's full asylum interview before making a decision in relation to his skilled worker application. These were separate applications. I had no difficulty with what I took to be the broad thrust of *YL*. Insofar as the applicant's asylum application was concerned, the screening interview would be of limited relevance. However, as the tribunal made clear in *YL*, asylum seekers are still expected to tell the truth (*op cit*, paragraph 19). Just as, in the context of the asylum application, answers given at the screening interview could be compared to answers given later (*Ibid*), I could see no difficulty in principle with the Home Secretary comparing answers given at the screening interview to answers given earlier, albeit in the entirely different context of an application to enter the UK as a student. In short, I accepted that statements made in one context, here the asylum application, might legitimately be taken into account by the Home Secretary in considering the applicant's truthfulness in another context, in this case, AH's original visa application.

[33] In this case, the Home Secretary appears to have made an assumption about AH's true reasons for coming to the UK. She relied on information recorded as having been supplied by AH in the screening interview undertaken in the context of his asylum application. Without putting it to AH for comment, she appears to have assumed it was inconsistent with AH's earlier visa application. She did not inquire into the state of AH's knowledge or belief as to the relevant facts as at the time of his student visa application. She did not inquire into whether AH had been aware that he might apply for asylum. She did not inquire into AH's reasons for applying for asylum when he did, namely, that the situation in his home country had deteriorated and that his fears for his safety had increased. The current Home Secretary now accepts that AH might have had more than one

reason for coming to the UK. One of these might have been for study. Another might have been for safety.

[34] Even if the Home Secretary might ultimately be proved to have been correct in her assessment of AH's original reasons for coming to the UK - indeed just because she might well have been correct in her assessment about such a serious matter as whether AH had practised deception - she should, in my view, have put those concerns to AH for his comment.

[35] That might be said to be a basic requirement of fairness. Or it might also be said that the Home Secretary had failed to follow the two-stage procedure now accepted, following *Ullah*, to be applicable in immigration cases (see also *R(Balajigari) v Secretary of State for the Home Department* [2019] 1 WLR 4647). *Ullah* was a deprivation of citizenship case, but what fairness requires will not now turn on whether the case is one of forfeiture or of application (*R v Secretary of State for the Home Department, ex parte Al-Fayed (No 1)* [1998] 1 WLR 763, per Lord Woolf, MR, pages 773G-774A). As the court put it in *LLD v Secretary of State for the Home Department*, "The DNA of dishonesty is the same, in whatever legal context it features" ([2020] NICA 38, [2021] Imm AR 383, paragraph 41).

[36] In his short oral submissions, counsel for the Home Secretary argued with some force that this case was not one which required, or indeed would bear, any particularly sophisticated legal analysis. Ultimately, he submitted, the question for the court was a simple one of whether the Home Secretary had acted reasonably. Had it been necessary to decide the matter, I would have been prepared to conclude, subject to what I say in the next section, that the Home Secretary had acted unreasonably in determining that AH had necessarily been deceptive when making his original visa application.

Conclusion

[37] The Home Secretary was entitled to refuse the petitioner's application to remain in the UK as a skilled worker on the ground that AH was on immigration bail when it was made. The sole remedy sought in the petition was for reduction of the Home Secretary's decision refusing AH's application. Specifically, counsel did not offer to amend the petition, in order to seek any alternative remedy, for example, a decree of declarator that the Home Secretary had acted unlawfully in concluding that AH had used deception to enter the UK. Nowhere in the petition did the petitioner seek to found upon the serious consequences that might be visited upon the petitioner as a result of such a finding remaining on his immigration file. This was simply not part of his case. Permission to proceed with the judicial review had not been granted on any such alternative argument.

[38] In any event, it is by no means clear that any such amended case would have been successful. The Home Secretary's finding that AH had been deceptive was made on 10 January 2022 when she placed him on immigration bail. On the face of it, AH would appear to be too late to challenge the reasonableness of the Home Secretary's actions at that time. The petitioner might have sought to argue that the decision under challenge, namely, the refusal of his application to stay in the UK as a skilled worker, was based on some fresh or renewed finding of deception. Or he might have argued that it was unreasonable of the Home Secretary, when determining AH's skilled worker application, to rely on the earlier finding of deception without making further inquiries. However, there was no discussion of these matters at the substantive hearing. Rather, the petitioner's case relied on the argument that any finding of deception must necessarily be provisional until AH's full asylum interview had been carried out. For the reasons given above, I rejected that argument.

Disposal

[39] In the above circumstances, I considered that I had no alternative but to refuse the petition.