OUTER HOUSE, COURT OF SESSION

[2018] CSOH 123

P309/15

OPINION BY LORD WOOLMAN

In the petition

MN

Petitioner

against

THE ADVOCATE GENERAL FOR SCOTLAND

Respondent

Petitioner: Bovey QC; MHD Law LLP
Respondent: Webster QC; Office of the Advocate General

7 December 2018

[1] MN is a national of Pakistan. He has lived in the United Kingdom since 2007, when he entered on a student visa. He met and married an Irish citizen ("SS") in April 2011. At that stage his immigration status changed. As the spouse of an EC national exercising treaty rights in the UK, MN became entitled to a European Economic Area ("EEA") residence card.

[2] The couple lived together in the UK for about a year after their wedding. She became pregnant and went to her mother's home in Ireland. SS gave birth to their son ("LN") on 4 July 2012. The marriage foundered shortly afterwards. After spending about a week in the UK with MN that autumn, SS took LN to live in Ireland on 2 October 2012. She

did so without MN's consent. They have not lived together since then. There is a degree of animosity between them.

[3] MN raised proceedings under the Hague Convention to bring LN back to the jurisdiction of the UK courts. SS also raised proceedings to regulate their legal relationship. Both matters came before the Circuit Family Court at Carrick on Shannon in Ireland. A judge of that court granted various orders in May and June 2013. They included a decree of judicial separation. The judge also gave effect to a settlement document. It (a) awarded MN and SS joint custody of their son, (b) gave primary care and control to SS, and (c) granted MN access to LN each month in Ireland, subject to him surrendering his passport before each visit to prevent any flight risk.

[4] For the next six months, MN exercised his right of contact in accordance with the court order. The visits with his son lasted either one or two days. I should add that MN is a man of good character who has never received welfare benefits in the UK. He has worked in a library and as a sales adviser. He has not come to the notice of the police. He pays child support in respect of his son.

[5] In February 2013, the Secretary of State for the Home Department ("SSHD") revoked the EEA residence card on learning that MN was no longer eligible after SS had returned to Ireland. The SSHD did not have MN's current address and therefore did not notify him at the time. He was listed, however, as "a person of interest" who should be detained at any point of entry to the UK.

[6] On 21 November 2013, MN returned to Edinburgh airport after a contact visit in Ireland. Border officials seized his residence card and passport with a view to requiring him to return to Pakistan. The SSHD then granted MN temporary admission with permission to work. That was done to give him an opportunity to obtain leave to reside in Ireland.

[7] Subsequently, there have been three broad streams of events. First, MN applied to the Irish immigration authorities to receive a visa allowing him to stay permanently in Ireland. Secondly, he sought discretionary leave to remain in the UK while that application was finally determined. Thirdly, he has had limited and sporadic contact with LN. I shall deal with each of these matters in turn.

[8] MN founded his application to live in Ireland on ECHR Article 8. He emphasised both his own and his son's right to family life. On 30 August 2017 the Irish authorities issued a letter refusing the application. The letter contained detailed reasons. MN says that he did not appeal that decision because of advice from the Irish Embassy. They told him that he could not both appeal and apply for a fresh visit visa, as they would not entertain two applications which were live at the same time.

[9] On 27 January 2018, MN applied for a further single-entry visa to Ireland. On 14 May, the Irish Embassy refused his application. On 6 July 2018, MN began judicial review proceedings challenging the decision in the Irish High Court. His Dublin solicitors have recently received a letter stating that the case is on the settlement list. It is not known whether the matter will be resolved and, if so, on what terms.

[10] From November 2013 onwards, the SSHD has granted MN permission to remain in the UK while the Irish authorities processed his application. The last two periods were each of six months duration. His permission was due to expire in March 2018. About a week before, MN sought a further extension on human rights grounds.

[11] By letter dated 3 July 2018, the SSHD refused the claim and instructed MN to leave the UK. The Home Office also certified the application as "clearly unfounded" under section 94 (1) of the Nationality, Immigration and Asylum Act 2002.

[12] MN wishes to remain in the UK to see whether the judicial review proceedings in Ireland result in a favourable outcome. His ultimate aim is to have equal involvement in the upbringing of their son.

[13] MN has been able to exercise his contact rights by means of specific arrangements approved by the UK and Irish authorities. These have covered single visits and multiple visits over longer (but limited) periods. MN last visited his son in Ireland a considerable time ago. Currently they have no physical contact. The Irish authorities will only admit MN to their country if (a) he possesses a valid passport, and (b) the UK authorities confirm that they will admit him back to this country after any such visit.

[14] Mr Bovey contends that there is a fundamental flaw in the decision of 3 July 2018. It is this. The SSHD failed to recognise that MN and LN are entitled to have physical contact. Mr Bovey maintains that it is disingenuous to suggest that MN would be in the same position in Pakistan. The financial implications would, for example, make monthly contact visits impossible. Mr Bovey points to the positive obligation upon States to seek to reunite families and to facilitate contact between parents and children: *Schneider* v *Germany* (2012) 54 EHRR 12 and *Pini* v *Romania* (2005) 40 EHRR 13.

[15] Mr Bovey makes specific complaints about the decision letter. He contends that it failed to address a number of material matters, or to provide sufficient reasons. In particular it (1) failed to recognise MN's Article 8 ECHR rights; (2) airbrushed his son's Article 8 rights to such an extent that he became invisible in the decision-making process; (3) failed to acknowledge that the Irish authorities would permit MN to visit Ireland if he satisfies the two conditions; and (4) failed to carry out a proper balancing exercise evaluating the detriment caused by the decision to MN and LN against general immigration control.

[16] On behalf of the SSHD, Mr Webster submitted that the decision letter was entirely adequate, because the issue was a short and sharp one. MN had been permitted to stay in this country to enable him to apply for residence in Ireland. He had taken that opportunity, his claim had failed, and he had not marked an appeal. The application for judicial review in Ireland should be ignored as it was brought after 3 July 2018.

[17] The decision letter has a familiar architecture. It begins by outlining MN's immigration history. It then states that he does not have a family life with LN in the UK. It therefore focuses on the private life aspect of his claim. It states:

> "We have considered, under paragraph GEN = 3.2 of Appendix FM, whether there are exceptional circumstances in your case which would render refusal and breach of article 8 of the ECHR because it would result in unjustifiably harsh consequences for you, a relevant child or other family member. In so doing we have taken into account, under paragraph GEN 3.3 of Appendix FM, the best interests of any relevant child as a primary consideration."

[18] The letter states that the SSHD has decided that there are no exceptional circumstances and continues:

> "You have told us that you require further time in the UK so that you can obtain an Irish visa to visit your son who resides in the Republic of Ireland. You were initially granted six months [leave to remain] in order to await the outcome of your Irish application, however it is noted that this was refused on 30 August 2017 and you did not appeal against this decision, a further grant of leave outside the rules is therefore not appropriate."

[19] The decision letter concludes on the merits by stating that it is proportionate to require MN to seek entry clearance to Ireland from Pakistan.

[20] The central question is in short compass: is the decision unreasonable? In answering that question, I have regard to the whole circumstances.

[21] The SSHD required to have regard to all the factors set out in Appendix FM of the Immigration Rules: *R (Agyarko)* v *Home Secretary* [2017] 1 WLR 823, per Lord Reed at

paragraphs 5 to 13. As they are not a complete code, the SSHD also had to take into account any other factor that might bear upon Article 8.

[22] What was known to the SSHD as at 3 July 2018? First, since at least November 2013 MN had been an overstayer. He was a third-country national with no right to remain in the UK. Secondly, he wished to stay here to pursue entry clearance in Ireland so that he could be closer to his son and exercise his contact rights there. Thirdly, he had been granted permission for that purpose, which had endured for a significant period. Fourthly, his Article 8 claim in Ireland had failed. Fifthly, he chose not to appeal that decision. Sixthly, the question of having contact visits with his son depended entirely on the Irish authorities. The matter was one for them to determine.

[23] These factors are all properly reflected in the decision letter. I conclude that they provided a sure foundation for the SSHD's decision. I conclude that it was a reasonable one, that it addressed the relevant issues, and that it articulated its reasons in an appropriate form.

[24] The decision cannot be characterised as disproportionate. There had to be a terminus to MN's attempts to secure a favourable result from the Irish authorities. The SSHD is under a duty to maintain immigration controls. In making individual decisions, it must therefore carry out a balancing exercise. It recognised that MN could participate, if necessary, by video link in an out-of-country appeal. Such hearings are not incompatible with ECHR Article 8 rights: *R (QR (Pakistan)* v *Secretary of State for the Home Department* [2018] EWCA Civ 1413, per Hickinbottom LJ at paragraph 11.

[25] For these reasons, I refuse to pronounce any of the orders sought in the petition. Technically, that means that I shall sustain pleas-in-law 1, 2 and 5 for the SSHD and repel the petitioner's pleas-in-law.

[26] On the unopposed motion of the respondent, I grant expenses in his favour, but modified to nil on the basis of the petitioner's legal aid certificate.