OUTER HOUSE, COURT OF SESSION

2021 CSOH 4

P827/19

OPINION OF LORD DOHERTY

in the cause

CL

Petitioner

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Petitioner: Forrest; Drummond Miller LLP (for JK Laws Solicitors, Glasgow)
Respondent: A. McKinlay; Office of the Advocate General

20 January 2021

Introduction

[1] The petitioner is an Argentinian national. As such, she is a non-visa national in terms of Appendix V: Immigration Rules for Visitors. She requires to obtain leave to enter the UK, but she can apply at the point of entry without needing to obtain a visa.

[2] On 1 August 2013 the petitioner sought leave to enter the United Kingdom ("the UK") at the Juxtaposed UK Border Force control point at Coquelles, near Calais, France. She was with her then partner, KD. She claimed to Border Force officers that she was teacher in Argentina, but that she was on paid leave for a year whilst her school was being refurbished; that she had been in Spain with KD; that she had last been in the UK at Easter 2013; and

that she wished to visit KD's family in Glasgow for 2-3 days. There were significant discrepancies between the accounts given by the petitioner and by KD (regarding their place of residence; their length of stay; the length of their relationship; and whether there was a flight booked for the petitioner's return to Argentina). The petitioner was unable to verify her claim to be on paid leave from teaching in Argentina or that she had a return flight booked. She was refused leave to enter because Border Force officers were not satisfied that she was a genuine visitor intending to stay in the UK for only a short period.

[3] On 10 May 2018 the petitioner travelled to Edinburgh Airport on a flight from Barcelona. She attempted to gain entry to the UK by presenting a fraudulent Italian identification card to Border Force officers at the airport. She indicated that she was on a 4 day visit to KD (who she indicated was also known as CA). During a baggage search documents within her bags disclosed that she had been in Spain since 20 July 2015 and that she had been in prison in Tarragon between 29 December 2017 and 1 March 2018. KD was interviewed by Border Force officers, first indicating that the petitioner was his wife, and later describing her as his girlfriend. The petitioner was refused leave to enter because she had used a false identification card to attempt to obtain entry. She was detained. She was issued with an IS82 refusal of leave to enter which stated *inter alia*:

> "You have presented an Italian ID card in the name [CVL] but this document has been falsified and is a stolen blank document… I am satisfied that you have used deception in this attempt to enter the United Kingdom. This means that any future applications for entry clearance of leave to enter the UK you make will be refused under para 320(7B) of the Immigration Rules…for the following period starting on the date which you leave the UK following this refusal: One year if we remove or deport you."

The petitioner was removed from the UK to Spain on 12 May 2018 in accordance with removal directions.

[4] On 7 June 2019 the petitioner arrived at Glasgow Airport having flown from Sao Paulo via New York. She attempted to obtain leave to enter the UK. She was interviewed by Border Force officers at the airport. The petitioner and her husband, G, stated that they were visiting the UK in order to sell a car then travel to Australia to set up a new life. The petitioner stated that she wanted to stay in the UK for a short period then travel to Australia. At that time she did not produce a visa for entry to Australia. She did not have proof of tickets purchased for travel to Australia. At 16:15 on 7 June 2019 the petitioner was refused leave to enter the UK. Border Force officers were not satisfied that she was a genuine visitor who would leave the UK at the end of her visit. She was served with a notice of refusal of leave to enter (IS82). At 16.20 she claimed asylum. She was detained. On 8 June 2019 she withdrew the asylum claim and signed a disclaimer agreeing to her removal to the United States of America. However, on 10 June 2019 she refused to comply with removal directions. On the same day her solicitors submitted representations to the Border Force Agency. The decision to refuse the petitioner entry and to detain her was considered by a Border Force Higher Officer in light of the representations of 10 June 2019, and the decision was affirmed on 11 June 2019. On 13 June 2019 the petitioner resubmitted her asylum claim. The petitioner's removal directions were deferred. On 14 June 2019 the Australian immigration authority revoked the petitioner's visa to enter Australia. At the petitioner's asylum screening interview on 19 June 2019 indicators of potential human trafficking were identified. On 20 June 2019 an interview was conducted in terms of the National Referral Mechanism. On 21 June 2019 a positive reasonable grounds decision was made by the Home Office acting as competent authority in terms of the National Referral Mechanism. The petitioner was assessed at level two on the Home Office's Adults at Risk policy. As a result of that policy and that assessment her application for immigration bail was revisited,

and on 24 June 2019 she was released on immigration bail. The petitioner has remained in the UK since her release.

[5] Counsel for the respondent stated the following in relation to the asylum claim and the human trafficking question. In September 2019 the petitioner's solicitors indicated that she wished to withdraw the asylum claim. The respondent sent a form IS 101 to the solicitors for completion and return by the petitioner to confirm that the claim was withdrawn. That form was not completed and returned. Accordingly, while the petitioner has not engaged with the Home Office to pursue her asylum claim, she has not withdrawn it. She has not remained in contact with the Home Office to resolve the human trafficking question that prompted her release on bail.

Notice of refusal of leave to enter dated 7 June 2019

[6] The notice of refusal was in the following terms:

> "…
> You have asked for leave to enter the United Kingdom as a visitor for an unspecified period of time but I am not satisfied that you are genuinely seeking entry as a visitor for the unspecified period as stated by you.
>
> You have stated that you wish to visit the United Kingdom with your husband in order to sell a car and then travel to Australia. You have failed to produce any documentation to verify this and do not have any flight booked to embark from the United Kingdom.
>
> Furthermore, you attempted to enter the UK in 2018 on a forged Italian Identity Card and you were removed. Also you attempted to enter the United Kingdom in 2011 [*sic*] and were refused entry as a not satisfied genuine visitor.
>
> I am not satisfied that you are a genuine visitor as required by para V4.2 of Appendix v: Immigration Rules for Visitors.
> …"

The petitioner's solicitors' letter of 10 June 2019 and the respondent's letter of 11 June 2019

[7] In an email letter of 10 June 2019 to the Border Force Agency the petitioner's solicitor stated:

> "Mrs [L] and her husband advise that they have, for many years resided in Argentina together, as well as the US for work purposes… They have onward visas to Australia and we have attached these with this letter, which goes towards the assessment of whether she is a genuine visitor, in line with Appendix V of the Immigration Rules.
>
> We are somewhat perplexed at this case, as our client's husband, a British National, has advised you on several occasions that they have no intention of staying in the UK and have also provided you with their onward Visas for travel to Australia. Our client has advised that they are simply here to wind up some affairs and see family. He has also made an offer to you that he is willing to book the flight to Australia today so that the Secretary of State can be satisfied that they have no other purpose of entering the UK other than as visitor.
> …
> We would submit that the actions of the Immigration Officer here are unreasonable as the applicant's husband, Mr [G], has offered to buy their flights to Australia today so that the Home Office can be satisfied they have no reason to remain in Scotland, UK.
> …"

[8] The Border Force Agency replied by letter of 11 June 2019 indicating the existence of discrepancies concerning information which G had provided in relation to the visit, and to the fact that he had been given the opportunity to obtain airline tickets for onward travel to Australia but that he had not availed himself of that opportunity. The letter referred to what it described as the petitioner's adverse immigration history, namely the refusal of entry in 2013 when Border Force officers at Coquelles were not satisfied that she was a genuine visitor, and the refusal of entry in 2018 when she had presented a false identity document.

Appendix V: Immigration Rules for Visitors

[9] On 7 and 11 June 2019 Appendix V provided:

"**Immigration Rules for Visitors**
This route is for a person who wants to visit the UK for a temporary period, (usually for up to 6 months), for purposes such as tourism, visiting friends or family, carrying out a business activity, or undertaking a short course of study.
…
A visa national as defined in Appendix Visitor: Visa National list must obtain entry clearance as a visitor (visit visa) before arrival in the UK.

A non-visa national can normally seek entry on arrival in the UK.

There are 4 types of visitor:

- Standard visitor: for those seeking to undertake the activities set out in Appendix Visitor: Permitted Activities, for example tourism and visiting family, usually for up to 6 months.
  …

False information in relation to an application
V 3.6 An application will be refused where:
(a) false representations have been made or false documents or information have been submitted (whether or not material to the application, and whether or not to the applicant's knowledge);…
…

Breaches of UK immigration laws
V 3.7 An application … will be refused if:
(a) the applicant previously breached UK immigration laws as described at V 3.9; and
(b) the application is made within the relevant re-entry ban time period in V 3.10 …
…
V 3.9 An applicant … breached the UK's immigration laws:
…
(d) if deception was used in relation to an application or documents used in support of an application (whether successful or not).
…

Genuine visitor requirement
V 4.2. The applicant must satisfy the decision maker that they are a genuine visitor, which means the applicant:
(a) will leave the UK at the end of their visit; and
(b) will not live in the UK for extended periods through frequent or successive visits, or make the UK their main home; and
(c) is genuinely seeking entry or stay for a purpose that is permitted under the visitor route; and
(d) will not undertake any of the prohibited activities set out in V 4.4. to V 4.6; and

> (e) must have sufficient funds to cover all reasonable costs in relation to their visit without working or accessing public funds, including the cost of the return or onward journey, any costs relating to their dependants, and the cost of planned activities, such as private medical treatment (and the applicant must show that any funds they rely upon are held in a financial institution permitted under FIN 2.1. in Appendix Finance).
> …
>
> **Decision**
> V 16.1. If the decision maker is satisfied that all the suitability requirements are met, and that the relevant eligibility requirements for a visitor are met, the application will be granted, otherwise the application will be refused.
> …"

In terms of para V 3.10 the duration of a re-entry ban was 12 months where the applicant left the UK voluntarily and at their own expense.

The petition and the answers

[10] The petitioner seeks reduction of the decision recorded in the notice of refusal of 7 June 2019 and the letter of 11 June 2019. She avers (art 6) that the Border Force officers did not give adequate reasons for not being satisfied that she was a genuine visitor. She also avers (art 6.2) that the decision was inconsistent with the policy set out in Appendix V: Immigration Rules for Visitors. The only possible basis in Appendix V for refusing leave to enter because of conduct like the 2018 incident would have been para V3.6 or para V3.9(d), but neither of those paragraphs had been satisfied or relied upon here. Nor had the refusal here founded on any of the circumstances in paras V4.2 (a) - (e).

[11] The respondent avers that the Border Force gave adequate reasons for not being satisfied that the petitioner was a genuine visitor, and that the decision was not unreasonable. She further avers that the decision was in accordance with the policy set out in Appendix V. Finally, she avers that in any case reduction of the decision would serve no practical purpose.

Counsel for the petitioner's submissions

[12] Mr Forrest submitted that the reasons given in the respondent's officers' decision to refuse leave were insufficient. They did not adequately explain why it was that they were not satisfied that the petitioner was a genuine visitor. The decision had been based on the petitioner having an adverse immigration history because of the previous incidents in 2013 and 2018. However, the incident in 2013 had been six years before the refusal in June 2019. If reliance was placed on an incident of such an age it was incumbent to explain why it was being relied upon and what significance was being attached to it. Reference was made to *R (Ngouh)* v *Secretary of State for the Home Department* [2010] EWHC 2218 (admin), at paragraph 120, and to *Sawmynaden (Family visitors – considerations)* 2012 UKUT 161, at para 17(iii). It was wrong for the officers to have attached any importance to the 2018 incident. While the petitioner had been in possession of a false document on that occasion, there had been no proper basis for the respondent's officers to conclude that the petitioner knew that the document was false and that she acted dishonestly in presenting it. Reference was made to *Balajigari* v *Secretary of State for the Home Department* [2019] 1 WLR 4647, at paras 33-36.

[13] Mr Forrest further submitted that the decision was inconsistent with Appendix V. The only possible relevance of past conduct would be if it was relied upon to justify a refusal in terms of para V 3. Taking account of past conduct in the way which the officers had was inconsistent with para V 3. The decision was also inconsistent with para V 4.2 because on the material before them the officers had no reason not to be satisfied in relation to each of the heads of that rule. There was no proper basis for their conclusion that the petitioner was not a genuine visitor. Mr Forrest went so far as to suggest that in having regard to the

incidents in 2013 and 2018 the respondent's officers had taken account of irrelevant considerations.

[14] Mr Forrest maintained that reduction of the decision would serve a practical purpose. Cases such as *Conway* v *Secretary of State* 1996 SLT 689 were readily distinguishable. If the decision was not reduced it would be likely to be treated as an adverse factor when the petitioner sought leave to enter in the future. In that regard reliance was placed upon *GK* v *Secretary of State for the Home Department* 2020 SLT 1315, per Lord Glennie at paras [14], [16]; per Lord Doherty at para [35].

Counsel for the respondent's submissions

[15] Mr McKinlay submitted that the petitioner had been provided with adequate reasons for the decision to refuse her leave to enter the UK. It was relevant to have regard to the nature of the decision when determining how just elaborate reasons had to be. It was a decision relating to leave to enter as a visitor. The consequences of such decisions were generally not as serious for the applicant as decisions on claims seeking to vindicate a positive right, eg to asylum; or to humanitarian protection; or for indefinite leave to remain (*cf. R (Ngouh)* v *Secretary of State for the Home Department, supra*). Usually, briefer reasons will suffice for decisions relating to leave to enter as a visitor. It was also relevant to bear in mind that the petitioner was aware of her own immigration history and that she had been interviewed by officers.

[16] The petitioner's account had been that she and her husband planned to visit the UK for a short period to sell a car and to see her husband's parents before travelling to Australia to settle there. It was clear from the notice of refusal and the letter of 11 June 2019 that the reason for refusal was that she had not satisfied Border Force officers that she was a genuine

visitor who would leave the UK after a short period as she maintained. That non-satisfaction was because of a conjunction of factors. While after the notice of refusal she had produced a visa for entry to Australia, she had no proof of travel tickets having been arranged, and her immigration history flagged up further reasons for officers to doubt her stated intention. She had been refused leave to enter in 2013. She had failed to satisfy Border Force officers then that she was a genuine visitor because of several discrepancies between her account and the account of her then partner (KD). In 2018 she had attempted to obtain leave to enter using a forged identification card.

[17] The decision was not inconsistent with Appendix V: Immigration Rules for Visitors. On the contrary, its basis was that the petitioner had not satisfied Border Force officers that she was a genuine visitor who intended to leave for Australia after a short visit (paras V4.2 (a) and (c)).

[18] In any case, reduction of the decision should be refused because it would serve no practical purpose *(Conway v Secretary of State for Scotland, supra*, Lord Johnston at 690F; *JM v Secretary of State for the Home Department* [2011] CSOH 174, Lord Brodie at paragraph [18]). The effect of reduction of the decision would not be that the petitioner obtained leave to enter the UK. Rather, the application would require to be considered of new by the respondent's officers. That was really no different from the position which would arise if she submitted another application for leave to enter.

Decision and reasons

[19] In *GK* v *Secretary of State for the Home Department, supra*, I observed:

> "[30] Foreign nationals are not entitled as of right to be granted a visit visa. Generally, the consequences of a refusal are not particularly serious. The applicant is

> outside the UK. The refusal to grant the visa does not involve rights being removed from him, or him being removed from the UK, or him becoming subject to the serious consequences associated with becoming an overstayer. I incline to the view that that makes the circumstances of most visit visa applications readily distinguishable from the circumstances in cases such as *Balajigari v Secretary of State for the Home Department*, *YHY (China), Petitioner*, and the recent decision of the UKSC in *R (on the application of Pathan)* v *Secretary of State for the Home Department*.
>
> [31] It is an applicant's responsibility to provide sufficient information to enable the visa application to be granted. An applicant has available to him the terms of appendix V of the Immigration Rules which make clear the matters which he has to demonstrate. He participates in the decision making process by submitting the application with sufficient information to demonstrate all of the relevant matters… [T]he application should make the case for entry clearance, and if the ECO is not satisfied by it, ordinarily he is entitled to refuse it without more ado. His reasons for refusal will indicate why it failed. If the applicant is in a position to supply further material which may address the problem or deficiency his remedy is to submit a new application. The limited content of the requirements of procedural fairness in such circumstances reflects the relatively routine nature of the application, what is at stake for the applicant, and cogent considerations of good administration."

In my opinion, those observations apply *mutatis mutandis* to an application for leave to enter the UK by a non-visa national, with the difference that the non-visa national will already have travelled to a UK port or airport when the application is made (unless it is made at a Juxtaposed Border Force control point such as Coquelles).

[20] Mr Forrest did not suggest that any issue of procedural fairness arose in the present case. The petitioner seems to have been alerted to the Border Force officers' concerns, and she took the opportunity to have her solicitors make further representations after the notice of refusal. Regard was had to those representations when the refusal was reconsidered on 11 June 2019.

[21] Both Mr Forrest and Mr McKinlay treated the refusal of 7 June 2019 and the letter of 11 June 2019 as being effectively a single decision. I see no reason to take a different course. In my opinion the decision contains adequate and intelligible reasons. It indicates that the reason for refusal was that the petitioner did not satisfy Border Force officers that she was a

genuine visitor who would leave the UK after a short period. In my view the decision makes it tolerably clear that the non-satisfaction arose because of a conjunction of factors, *viz.* that she had no proof of a travel ticket to Australia having been arranged, and her immigration history flagged up further reasons for officers to doubt her stated intention. Her intention to stay for a short period and then move to Australia depended very largely on her account, which was not supported by proof of travel arrangements. Other reasons to be wary of accepting her account (ie in addition to absence of proof of travel arrangements) were that an account given by her had not been accepted (for good reasons) in 2013 and had resulted in a refusal of leave to enter; and that she had used a forged identity card to attempt to obtain leave to enter in 2018 which had also resulted in a refusal of leave to enter.

[22] I turn then to Mr Forrest's submission that the decision was inconsistent with Appendix V. I am not persuaded that there is any inconsistency. Para V3 deals *inter alia* with circumstances in which conduct (and in some cases prior conduct) may be a ground for refusal. However, it does not prescribe the only circumstances in which conduct may be taken into account when determining an application for leave to enter the UK. Prior conduct may be a very relevant consideration when it comes to deciding whether an applicant's statement of their intention is credible or reliable. So far as the incident in 2018 is concerned, the inescapable fact is that the petitioner used a forged identity card to attempt to obtain leave to enter as a visitor. Mr Forrest maintains that the petitioner's position is that she believed it to be genuine. In that case it was for her to satisfy the Border Force officers in 2019 that that had indeed been her belief in 2018. Of course, a difficulty in that regard is that the notice of refusal in 2018 narrated that the petitioner had used deception, and the petitioner did not challenge the notice. Be that as it may, in my opinion the fact that the petitioner used a forged identity card was a relevant red flag which the officers were entitled

to have regard to whether or not she was aware of the forgery. On my reading of the 2019 decision it was the fact that a forged card was used which was founded upon. I am very far from being convinced by the submission that the decision was inconsistent with para V4.2. On the contrary, in my view on the material before them the officers were entitled to conclude that the petitioner had not satisfied them that she was a genuine visitor who would leave the UK after a short visit.

[23] It follows that in my opinion the petitioner's grounds for reduction of the decision are not well founded. In view of that, it is unnecessary to decide whether, if one or more of the grounds had been made out, reduction would have been refused on the basis it would serve no practical purpose. Mr McKinlay acknowledged that he could not exclude the possibility that the decision might be taken into account as a relevant consideration in a future application for leave to enter, and that its effect might be detrimental to such an application (*Cf. GK* v *Secretary of State for the home Department, supra*). However, he suggested that there were further factors which might also be relevant to the practical purpose issue, not least the extraordinary length of time that the petitioner had now remained within the UK; the unsatisfactory history of the asylum and human trafficking issues; and the fact that the petitioner had breached the conditions of immigration bail (a matter which Mr Forrest disputed). For present purposes it suffices to say that the facts of the present case do seem to me to be somewhat unusual, and had the petitioner established one or more of her grounds I may have wished to be addressed further on the question whether the court should grant reduction. However, as matters stand I prefer not to opine on the issue.

Disposal

[24] I shall repel the petitioner's pleas-in-law, sustain the respondent's third plea-in-law, and refuse the petition. I reserve meantime all questions relating to expenses.