OUTER HOUSE, COURT OF SESSION

[2017] CSOH 116

P274/17

OPINION OF LORD GLENNIE

in the petition

by

CHENNAN FEI

Petitioner

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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

5 September 2017

[This is a revised version of a decision given extempore at the conclusion of the hearing on 22 August 2017.]

Introduction

[1] The petitioner seeks reduction of a decision by the Secretary of State dated 26 March 2017 rejecting her application for leave to remain in the United Kingdom and holding that the submissions made on her behalf in the letter from her solicitors dated 24 March 2017 did not amount to a fresh claim within paragraph 353 of the Immigration Rules.

Background Facts

[2] The following facts are taken largely from the earlier decision of the First-tier Tribunal ("FTT") dated 10 April 2016 and are not seriously in dispute. The petitioner is a national of China. She was born in China in May 1988. She spent the early part of her life there. She arrived in the United Kingdom in March 2002 at the age of 13 as a dependent of her parents. Her parents arrived in the United Kingdom lawfully, but by December 2004 at latest, and possibly as early as 2003, they no longer had leave to remain and the petitioner's right to remain, which was dependent on theirs, fell away at the same time. Thereafter the petitioner's presence in the United Kingdom was unlawful, though she was not told this by her parents and was wholly ignorant of it until sometime in 2012. From the time of her arrival with her parents in 2002, the petitioner has been brought up in the United Kingdom, attending school and university and achieving good results. She has never been back to China and has no contact with relatives in China. Her only relatives in China are grandparents who are over 80 years old on her mother's side and over 90 years old on her father's side. She no longer has any real contact with her parents. Since about 2011 she has been living in Glasgow with a British national who she refers to as her "godmother". She speaks Mandarin (though to what standard may be a matter of dispute) but does not read or write Mandarin with any fluency. Her unlawful status in the United Kingdom only came to light in 2012 when she applied for an internship while in her fourth year of studying at university. She consulted solicitors in 2012 and, in August 2013, she sought asylum in the United Kingdom. The claim for asylum was not insisted upon, but the petitioner sought leave to remain in the United Kingdom both under the Immigration Rules and, outwith the Rules, on the ground that she had established a private life in the United Kingdom which

was protected by Article 8 ECHR. That claim was refused on 22 January 2015. Her appeal to the First-tier Tribunal failed and her application for permission to appeal to the Upper Tribunal was refused. An application to court for judicial review of that refusal failed.

[3] In March 2017 the petitioner made a further application for leave to remain. That application was supported by statements and testimonials from a wide range of individuals, including her MP and MSP. More significantly, testimonials came from officers and workers at the Green Party and at the Refugee Council, all showing that she has contributed significantly to those organisations as a volunteer - since graduating from university she has been unable to get employment due to her immigration status - and is held in high regard. Her application was also supported by evidence that over the last year or so she had formed a relationship with a British citizen (DH).

[4] Her application was considered both within the Immigration Rules and, separately, under Article 8 ECHR. By letter dated 26 March 2017, the Secretary of State rejected her claim under both heads. In terms of paragraph (vi) of paragraph 276ADE of the Immigration Rules, the Secretary of State concluded that there were no "very significant obstacles" to her integration into China. In terms of Article 8, her claim to remain based on the private life she had built up in the United Kingdom was also rejected, under reference in particular to section 117B(4) and (5) of Part 5A of the Nationality, Immigration and Asylum Act 2002 as amended ("the 2002 Act"). That provides that "little weight" should be given to a private life established by a person at a time when that person was in the United Kingdom unlawfully or when their immigration status was precarious.

[5] In the decision letter of 26 March 2017 the Secretary of State not only rejected the claim for leave to remain but also held that the petitioner's submission did not amount to a

fresh claim for the purposes of paragraph 353 of the Immigration Rules. The effect of that decision, if it stands, is that there is no right of appeal against the refusal of leave to remain.

Paragraph 353

[6] Paragraph 353 of the Immigration Rules provides as follows:

> "353. When a human rights or asylum claim has been refused and any appeal relating to the 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 –
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> (i) had not already been considered; and
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> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

[7] There are two elements in the determination of whether further submissions amount to a "fresh claim". First, those submissions must not have been considered already. Secondly, those submissions, taken together with previously considered material, must give rise to a realistic prospect of success (notwithstanding that they have been rejected by the Secretary of State).

Argument and Decision

[8] Much of what is said on behalf of the petitioner in the letter of 24 March 2017 has already been considered in the petitioner's earlier application which was rejected in January 2015. But, as noted earlier, there are significant additional matters. Many testimonials have been submitted in support of the petitioner's status within the United Kingdom. These go to support her earlier claim that she has built up a private life

within the United Kingdom and has established herself in a number of areas, including in politics and in voluntary work in connection with refugees. They go considerably further than the material placed before the Secretary of State and the First-tier Tribunal (FTT) on her previous application. And there is one aspect of her claim to private life under Article 8 which was not considered at all in that earlier application, namely the petitioner's relationship with DH.

[9] Mr Forrest, who appeared for the petitioner, argued that that additional material was relevant to a claim under paragraph 276ADE(vi) of the Immigration Rules. Under reference to cases such as *Ogimundo (Article 8 - new rules) Nigeria* [2013] UKUT 00060 (IAC) and *Miah (section 117B NIAA 2002 - children)* [2016] UKUT 131 (IAC) he submitted that the assessment of whether there were "very significant obstacles" to the petitioner's integration into China was a holistic exercise, involving a rounded consideration of all factors, including the fact that removing the petitioner to China would involve uprooting her from her involvement and attachments in the United Kingdom. Given the decision I have come to on the application as a whole, I do not propose to say anything about the merits of this submission. That would be a matter for any future tribunal considering this case.

[10] However, these same matters are also relevant to a consideration of the petitioner's claim to private life under Article 8 outwith the Immigration Rules.

[11] Mr Komorowski, who appeared for the Secretary of State, submitted that these new matters were not of a great weight, particularly in view of the conclusion reached by the FTT on the first application that, on the evidence before it, there were no compelling circumstances making it disproportionate to expect the petitioner to return to China. In this context he referred to the well-known decision of the Immigration Appeal Tribunal in *Devaseelan* [2002] UKIAT 00702 and the guidance given at paragraphs 37 - 42. In particular

he relied upon guideline (6) to the effect that the second tribunal should regard the issues decided by the first tribunal as settled by that decision and make any further findings in line with that determination. However, that guideline presupposes that the facts relied upon by the appellant before the second tribunal are not materially different from those relied on before the first tribunal, and in this case the evidence of the petitioner's involvement both with the Green Party and with the Refugee Council, as well as her relationship with DH, are all new facts which have not been considered previously. In any event, as I shall explain below, that conclusion by the FTT on the petitioner's first application was, to a significant extent, influenced by their view that the wording of section 117B(4) and (5) was "decisive" in requiring them to attach "little weight" to the petitioner's private life established when she was here unlawfully.

[12] As to Mr Komorowski's submission that the new matters raised by the petitioner in her further submissions are not of such weight as to give rise to a realistic prospect of success, it must be emphasised that the question raised in terms of paragraph 353(ii) is not whether the new matters raised by the petitioner would of themselves be sufficient to create a realistic prospect of success. It is whether those matters, taken together with the previously considered material, create a realistic prospect of success, notwithstanding the rejection of the further submissions by the Secretary of State.

[13] In answering this question it is well-established that the Secretary of State must ask not whether she herself thinks that the new claim is a good one or should succeed but whether there is a realistic prospect that an immigration judge, applying the rule of anxious scrutiny, could uphold the petitioner's Article 8 claim. The test of whether there is such a realistic prospect is a "modest" test: *WM (DRC)* v *Secretary of State for the Home Department* [2006] EWCA Civ 1495, 2007 Imm AR 307.

[14] The answer to this question given by the Secretary of State in the letter of 26 March 2017, and adopted in argument before me, was in the negative, essentially for two reasons.

[15] First, it was asserted by the Secretary of State (in paragraphs 14 - 15) that on the available information there would be no very significant obstacles to the petitioner's integration into China were she to be required to return there; therefore she would not qualify for leave to remain under paragraph 276ADE(vi) of the Immigration Rules. That is consistent with the decision of the FTT on the earlier application. As to that, standing the decision of the FTT on that earlier application, it is argued by Mr Komorowski that the petitioner cannot have any realistic hope of persuading a differently constituted FTT that her claim should succeed under this heading. He referred again in this context to *Devaseelan* v *Secretary of State for the Home Department* [2002] UKIAT 000702 at paragraph 41. I have already noted Mr Forrest's submissions in relation to paragraph 276ADE(vi) and, as stated earlier, do not propose to say anything about the merits or otherwise of those submissions.

[16] Secondly, reliance is placed by the Secretary of State on section 117B(4) of the 2002 Act: "little weight" should be given to a private life established by a person at a time when that person was in the United Kingdom unlawfully. The Secretary of State in her decision letter at paragraphs 16 - 17 refers to the fact that the petitioner's private life since November 2003 (when she had only been in the United Kingdom for 21 months) was established at a time when she was here unlawfully, and concludes that "the wording of paragraph 117B is in our view decisive in assessing whether the removal of your client is proportionate to the legitimate aim being pursued" in the legislation (emphasis added). This reflects the approach taken by the FTT in paragraph 71 of its decision rejecting the petitioner's appeal from the refusal of her earlier application.

[17] Since the rejection of the petitioner's earlier application, and the failure of her attempts to appeal that earlier decision, there has been the decision of the Court of Appeal in *Rhuppiah* v *Secretary of State for the Home Department* [2016] 1 WLR 4203. In that case Sales LJ, with whom the other members of the court agreed, said this:

> "53. Reading section 117A(2)(a) in conjunction with section 117B(5) produces this: 'In considering the public interest question, the court or tribunal must have regard to the consideration that little weight should be given to a private life established by a person at a time when the person's immigration status is precarious'. That is a normative statement which is less definitive than those given by the other sub-sections in section 117B and section 117C. Although a court or tribunal should have regard to the consideration that little weight should be given to private life established in such circumstances, it is possible without violence to the language to say that such generalised normative guidance may be overridden in an exceptional case by particularly strong features of the private life in question, where it is not appropriate in Article 8 terms to attach only little weight to private life. That is to say, for a case falling within section 117B(5) little weight should be given to private life established in the circumstances specified, but that approach may be overridden where the private life in question has a special and compelling character. Such an interpretation is also necessary to prevent section 117B(5) being applied in a manner which would produce results in some cases which would be incompatible with Article 8, i.e. is necessary to give proper effect to Parliament's intention in Part 5A; and a similar interpretation of section 117B(4) is required, for same reasons. …
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> 54. In my view, reading section 117A(2) and section 117B(5) together in this way, as is appropriate, means that considerable weight should be given to Parliament's statement in section 117B(5) regarding the approach which should normally be adopted. In order to identify an exceptional case in which a departure from that approach would be justified, compelling reasons would have to be shown why it was not appropriate. …"

[18] As is made clear in that judgment, the effect of reading section 117A(2) with sections 117B(4) and (5) is that the court or tribunal seised of the matter must have regard to the consideration that little weight should normally be given to a private life established by a person when that person was in the United Kingdom unlawfully (or at a time when that person's immigration status was precarious). In other words, it is not a requirement of law that little weight is to be given to a private life established in such circumstances - "little

weight" is the usual position, or the norm, and the court or tribunal must give consideration to that matter and decide whether, in the particular circumstances of the case, it should depart from that norm. In a case where there exist particularly strong features of private life with a special and compelling character and meriting a different approach, the "little weight" approach in sections 117B(4) and (5) may be departed from. Similarly, so it seems to me, and Mr Komorowski very fairly accepted this, the court or tribunal is entitled, in its consideration of the "little weight" approach in sections 117B(4) and (5), to consider whether it would be disproportionate in Human Rights terms to afford little weight to a private life established during a period when the person was unaware (and reasonably so) that his or her presence in the United Kingdom was unlawful.

[19] This is a very different approach from that adopted by the FTT on the first application; and very different also from that adopted by the Secretary of State in the letter of 26 March 2017 in saying, in paragraph 17, that the "little weight" approach in those provisions is "decisive" of the petitioner's Human Rights claim to a private life. Despite Mr Komorowski's argument that the Secretary of State was not adopting a rigid or absolutist approach to that section, but simply saying that on the facts of this case the effect of section 117B was decisive against her application, I do not read that paragraph in the letter as amounting to anything other than a statement that section 117B(4) excludes, as a matter of law, the possibility of substantial weight being given to the petitioner's claim to private life established while she was in the United Kingdom unlawfully, albeit without any awareness of that fact.

[20] It follows, in my opinion, that the Secretary of State fell into error in her letter of 26 March 2017. In so far as this contributed to her decision that the new submissions did not constitute a fresh claim because they did not create a realistic prospect of success - and it is

clear that it did contribute to that decision - that decision is open to review. Were the matter to be considered by a newly constituted FTT, that tribunal would not be bound to approach the matter in the same way as the previous tribunal - indeed it would be bound to apply the decision of the Court of Appeal in *Rhuppia* and assess the petitioner's private life Article 8 claim on the basis that it might deserve to be given more than "little weight", possibly substantial weight, if the tribunal considered that it was sufficiently compelling as to merit a different approach and/or if the tribunal considered that it was disproportionate and unduly harsh to do otherwise given that the private life was, in the main, established at a time when the petitioner, having entered the United Kingdom as a child and being dependent on her parents in her early years in the United Kingdom, was ignorant of her unlawful status. If it came to the conclusion that these matters justified a departure from the "little weight" approach in this case, then the tribunal would be free to make a proper assessment of that private life in all its various manifestations and also to take into account other matters already relied on by the petitioner in her previous application, including the difficulties that the petitioner would face in trying to establish a new life in China. It is not possible to say that in those circumstances the petitioner's Article 8 claim would necessarily fail.

[21] I have already mentioned a submission by Mr Komorowski that the new matters relied upon by the petitioner - her involvement with the Green Party and with the Refugee Council and her relationship with DH - were not of any great weight and could not of themselves give rise to any significant or realistic possibility of success. He submitted that this was a relevant factor at this stage also, in particular in addressing the possibility that the real strength of the petitioner's case on a new appeal against the Secretary of State's decision lay in the development of the law, or at least of the understanding of the law, as manifested in the decision of the Court of Appeal in *Rhuppia*. There must, he argued, be a minimum

threshold, a minimum level of newness and arguability arising from the factual material advanced by the applicant, before new material could be allowed to lead to the new submissions being treated as a "fresh claim". Otherwise, following upon a change in the law, a person whose claim had been rejected and whose appeals had failed could simply present a new claim, relying on nothing more significant than the mere lapse of time since his previous claim had been rejected without him having been removed from the United Kingdom. I do not disagree in principle with this argument, but the question that would then have to be considered is how that threshold is to be defined. I agree that it would not be enough simply to say that further time had passed since the previous decision. But beyond that it is difficult to be dogmatic. It seems to me that the new material would not necessarily have to raise a different point: Mr Komorowski very fairly drew my attention to certain *obiter* remarks in the Court of Appeal in *R (Senkoy)* v *Secretary of State for the Home Department* [2001] EWCA Civ 328 at paragraphs 34 and 60 where the majority of the court (Peter Gibson and Keene LJJ) expressed the provisional view that new material submitted by an applicant might amount to a new claim even if it amounted to no more than additional evidence on a matter which had already been considered (cf paragraphs 56 - 57 where Chadwick LJ expressed a different view). However, the new material presented by the petitioner in this case goes well beyond that. In my view, it is of sufficient newness and weight to cross the relevant threshold at whatever level that threshold is placed.

[22] Mr Komorowski also submitted, again under reference to *Devaseelan*, that the FTT would be expected to follow the assessment of the petitioner's private life claim made by the FTT on the earlier application and, in particular, its view that there were no compelling circumstances militating against returning the petitioner to China. But in reaching that view the FTT treated as decisive the rule, as it perceived it to be, that little weight should be

attached to the petitioner's private life established while her presence here was unlawful. It would be open to a new tribunal, on a proper understanding of the law, to reach a different decision.

Disposal

[23] For these reasons I shall grant the petition to the extent of reducing the determination by the Secretary of State in the letter of 26 March 2017 that the petitioner's submissions as set out in the letter of 24 March 2017 do not amount to a fresh claim.