



OUTER HOUSE, COURT OF SESSION

[2018] CSOH 71

P1290/17

OPINION OF LADY CLARK OF CALTON

in the petition of

KO (AP)

Petitioner

for

Judicial Review of a decision of the Secretary of State for the Home Department
dated 28 September 2017

Respondent

Petitioner: Caskie; Drummond Miller LLP

Respondent: C A Smith; Office of the Advocate General for Scotland

29 June 2018

Summary

[1] The petitioner raised an action for judicial review which challenged the decision by the Secretary of State dated 28 September 2017 in which she refused to treat the petitioner's further representations dated 4 May 2017 as a fresh claim in terms of Immigration Rule 353.

[2] The petitioner is a citizen of Iraq who entered the UK and claimed asylum on 12 September 1999. This claim was refused on 26 October 2001. After various unsuccessful further proceedings, he left the UK by assisted voluntary return on 13 August 2008. He returned to the UK and claimed asylum on 25 June 2010. This claim was refused on 13 July 2010. Following an unsuccessful appeal, the petitioner made a series of further

representations which the Secretary of State declined to accept as a fresh claim. His most recent submissions were made by letter delivered with attached papers on 4 May 2017. The said letter (6/7 of process) focussed on representations about fear of persecution upon return to Iraq and article 8 ECHR issues. The papers included detailed information from the petitioner's GP about the petitioner's medical condition. Dr Lesley described chronic low back pain suffered by the petitioner since 2011 which restricted his walking and intermittent migraines. Both conditions required medication and Dr Lesley was of the opinion that there was no realistic prospect of improvement in the foreseeable future.

[3] In the present proceedings, the petitioner accepted the decision that he would not be at real risk of violence in the Kurdish Regional Government (KRG) area in Iraq where the levels of violence are much lower than the rest of Iraq, and the decision to refuse his claims under articles 2 and 3 ECHR. The challenge in the petition focussed on the decision making about requirements for limited leave to remain on the basis of private life in the UK under paragraph 276 ADE(1) of appendix FM of the Immigration Rules. In subsection (vi) which regulates the grant of leave to applicants who have lived continuously in the UK for less than 20 years reference is made to circumstances where; "...there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK".

Submission by counsel for the petitioner

[4] Counsel for the petitioner adopted his combined statement of issues and note of argument. In summary he submitted that in assessing the private life claim, the respondent had failed to take into account the relevant country policy and information note entitled Iraq: Security and Humanitarian Situation dated March 2017 in considering whether there were

“very significant obstacles” to the petitioner’s integration into the area of the KRG. The country policy and information note made it plain that years of continuous conflict and economic stagnation have impacted nearly every aspect of Iraqi society with enormous dislocation from areas of conflict into the KRG area. He drew attention in particular to paragraphs 4.1.2; 8.3.1; 8.6.1; 8.7.1; 8.7.2; 9.2.1; and 9.10.1 and submitted that the current humanitarian situation in Iraq, including the KRG area was dire. In the decision letter there was no attempt to consider the obstacles to the petitioner which existed because of the current humanitarian situation particularly in circumstances where the strong likelihood was that the petitioner would be unable to obtain any employment as he was not fully medically fit and had been unemployed for years. The decision letter had considered only positive features about reintegration but had made no attempt to consider the very real obstacles to integration which existed, as was obvious from the country conditions, and the pursuer’s medical history. Counsel relied for support on the opinion of Lord Bannatyne in *HAA v the Secretary of State for the Home Department* [2017] CSOH 11 and invited the court to adopt a similar approach relying in particular on paragraphs 24 to 27. He also prayed in aid *AH (petitioner) v Secretary of State for the Home Department* [2011] CSOH 7, paragraph 33, where Lord Malcolm said: “...if one concentrates only on factors adverse to the claim, a distorted view is likely to emerge”. Counsel submitted that standing the respondent’s own information about the conditions in Iraq, it was plain from the decision letter that the respondent had failed completely to consider obstacles to integration identified in the country information coupled with the medical information about the petitioner’s medical problems and lack of work history. The approach and reasoning of the respondent in relation to the private life claim of the petitioner was wholly inadequate and the decision should accordingly be reduced.

Submissions by counsel for the respondent

[5] Under reference to *WM(DRC Congo) v Secretary of State for the Home Department* [2006] EWCA CIV 1495 and *Dangol v Secretary of State for the Home Department* [2010] CSIH 20, counsel for the respondent submitted that the Secretary of State is entitled to judge the reliability of new material presented on behalf of the petitioner and that she had not erred in assessing that there were not very significant obstacles to the petitioner's integration into the KRG area in Iraq. Reliance was placed on the positive factors identified by the decision maker at paragraph 11 which were that the petitioner had spent his formative years acquiring Iraqi customs and values; he spoke the language in the KRG area; he had demonstrated that he could transition to the UK and back; he is of working age and he could continue any friendships developed in the UK by modern means of communication.

[6] In oral submissions under reference to *HHA*, counsel accepted that it was not a relevant point of distinction with the present case that the petitioner did not speak Arabic as that was only relevant to the issue of relocation in Baghdad. She also accepted that the petitioner in *HHA* did not have the medical problems raised in the present case and to that extent, the present case could be considered a stronger case. But in *HHA*, the Lord Ordinary found at paragraph 27 on the basis of the decision letter, which was not reproduced in the opinion, that there was a complete failure by the respondent to consider the current humanitarian situation in Iraq as set out in her own guidance and to grapple with the issues, which reasonably arose therefrom regarding integration in Iraq. That was an important distinction as there was no comparable complete failure in the present case. She submitted that the decision letter in the present case must be interpreted in its whole context. It is plain from the decision letter at page 6 that specific regard was given to the country policy and information note of March 2017 and, at pages 11 to 12, there is detailed consideration of the

availability of medical treatment, facilities and consideration of the petitioner's medical condition.

[7] Counsel submitted that it is important to bear in mind the content of the information put before the respondent for consideration. The material presented was not hitherto presented in the way that it was focussed in submissions by counsel for the petitioner. Very little information was given about the medical condition of the petitioner and how his conditions might affect his ability to work. The material presented by the petitioner as fresh evidence was not focussed on demonstrating that there were any particular obstacles to his integration. The petitioner's health difficulties are not in themselves so severe that the combination of them with the labour market conditions which exist in the KRG area in Iraq mean that they are very serious obstacles. It is not the respondent's task to "fish around the material" and speculate about endless combinations of factors and their potential consequences. Counsel submitted that the petition should be refused.

Decision and reasons

[8] I consider that the respondent made a serious effort to try to address the many and varied issues which are relevant to this case. She was plainly aware of the country policy and information note of March 2017. In relation to the asylum claim, she addressed at pages 6 and 7 of the decision letter, the problems of the security situation and levels of violence in different parts of Iraq and the lack of any evidence of returnees being mistreated or detained. From the information available she concluded that the petitioner was not at risk in his home area and that he could gain documentation to return there or relocate within the KRG. I note, however, that there is no reference to any information potentially relevant to the article 8 consideration of private life under paragraph 276 ADE (1) (vi) of appendix FM of the Immigration Rules. I

accept that the application in respect of fresh evidence was not focussed on this rule.

Nevertheless the respondent correctly accepted that this rule was relevant and dealt with it. It is not in dispute between the parties that the respondent in such consideration required to take into account the up to date information contained in the respondent's own policy and information note dated March 2017. The humanitarian situation set out in the information note of March 2017 is in my opinion very concerning and can reasonably be thought to give rise to questions of whether there would be very significant obstacles to the petitioner's integration particularly in circumstances where he also has long standing medical problems which require medication and are likely to impact upon his employability. In reading the part of the decision letter dealing with private life, I can obtain no understanding of whether the respondent gave any thought to the humanitarian situation and problems which exist. She gave no reasons to explain why these conditions would not be considered very significant obstacles to the petitioner's integration into Iraq standing the very serious humanitarian problems which are described in the KRG area. Further there is no attempt to factor in what may be additional personal problems for the petitioner because of his medical condition and employability. It is not sufficient in my opinion merely to consider the petitioner's medical condition in isolation at a later part of the decision letter. The conclusion reached that the petitioner's medical condition does not fall within the extreme and exceptional category which would engage article 3 of the ECHR is not challenged by the petitioner. But that does not mean that the petitioner's medical condition may not be relevant to a consideration of whether serious obstacles exist to his integration in a situation which appears very problematic even for an able bodied adult with employment skills.

[9] For these reasons I am satisfied that there is merit in the submissions made by counsel for the petitioner. I consider that it was unreasonable for the respondent to fail to properly

consider the humanitarian problems highlighted in her own document of March 2017 and the particular circumstances of the petitioner and fail to give any adequate reasoning for the decision that an appeal to an immigration judge did not have a reasonable prospect of success in relation to private life.

[10] For these reasons, I grant reduction of the decision, sustain the petitioner's plea in law and repel the respondent's pleas in law. All questions of expenses are reserved.