OUTER HOUSE, COURT OF SESSION

[2018] CSOH 58

P203/18

OPINION OF LADY WOLFFE

in the application by

XL

Applicant

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

for Judicial Review

No representation: permission determined on the papers

10 May 2018

Nature of challenge

[1] This is an application for judicial review of a decision of the Secretary of State not to treat the further submissions of the petitioner as a fresh claim for the purposes of rule 353 of the Immigration Rules.

[2] This opinion follows my consideration on the papers as to whether the petitioner has satisfied the test for permission in Section 27B of the Court of Session Act 1988.

Background

[3] The petitioner, a Chinese national, had her application for asylum refused, following the expiry of her student visa. She has exercised, and exhausted, appeal rights to the First-tier Tribunal ("the FTT") and the Upper Tribunal ("the UT"). The gravamen of her application was the fact that she had (at that point) two children out of wedlock, and the anticipated difficulties she would face upon return to China in the light of its policies about children or about certificates of sterilisation from women with more than one child.

[4] There is no need to narrate the petitioner's prior unsuccessful challenges. For present purposes, it suffices to note that she made representations by letter dated 23 October 2017 ("the petitioner's representations"), which were not accepted as constituting a fresh claim, by decision communicated on 29 November 2017 ("the Decision"). The petitioner wishes to bring these proceedings to challenge the Decision.

The material relied on as constituting a fresh claim

[5] The only new material included in the petitioner's representations, apart from the fact that she has had a third child out of wedlock, was a copy of the recent decision of the Inner House in *YZ* v *SSHD* [2017] CSIH 41 ("*YZ*"). In *YZ* the Court considered the question of whether the UT was entitled to open up and reverse a finding in fact made by the FTT. The finding related to the evidence of an expert, Ms Gordon, about a requirement for a woman to undergo a forced sterilisation before her child or children could be registered for a "hokou". The FTT had accepted her evidence and, on that basis, departed from the Country Guidance case of *AX (family planning scheme) China Country Guidance* [2012] UT 00097 (IAC) ("*AX*"). It is important to note that the Court was not adjudicating on the merits of that

evidence but, rather, on the proper scope of the powers of the UT to interfere with a finding in fact by the FTT.

[6] The purpose in producing this case was, presumably, to rely on the few extracts of this expert's report, quoted by the Inner House, in order to challenge the Country Guidance case of *AX*. The Secretary of State rejected the petitioner's representations.

Ground of challenge in the petition

[7] The challenge in the petition is on the basis that the Secretary of State failed to apply anxious scrutiny or erred in declining to accept the material quoted in *YZ* in preference to her reliance on *AX,* and that it was not necessary for the petitioner to have to commission another generic report to vouch the points quoted in *YZ.*

Discussion

The use of reports from other cases: The Slimani principle

[8] It is a well-established principle in immigration law that a third party report, that is a non-generic report prepared for a person other than the applicant, may not be used unless the author has agreed that it may be relied upon: *Slimani* v *Secretary of State for the Home Department* [2001] UKIAT 00009, per Collins J (as he then was) ("the *Slimani* principle"). Toward the end of *Slimani* Collins J stated that:

> "We would add that all too often reports prepared for a specific case are relied on in other cases in which appellants from the same country are represented by the same advisers. This should not happen unless the report is stated to be general and to be valid for all cases or the author is asked to confirm that he is content for it to be relied on. Apart from anything else, conditions change and views which may have been valid when the report was written might not be 12 months later".

[9] The *Slimani* principle has been applied in Scotland in *YH* [2016] CSOH 72 and more recently by Lord Mulholland in *XL* v *SSHD* [2017] CSOH 41 at paragraph [13].

The Country Guidance system

[10] In this case, the petitioner seeks simply to rely on extracts from the report quoted by the Inner House in *YZ*, in a manner indistinguishable from the petitioner in the recent case before Lord Tyre in *YC* v *SSHD* [2018] CSOH 40 ("*YC*"). Lord Tyre rejected that approach. I agree with his observation (at para 23) that it is difficult to see how any factfinder could base his decision on brief excerpts in an appellate judgment from the evidence of a witness in a different case. I would add that this is particularly so, where the appellate court was not adjudicating on the merits of that evidence, but addressing a procedural issue. I also agree with his observations that the attempt to rely on the extracts of a report in *YC*, as a means to challenge a Country Guidance case (such as *AX*, relied on by the Secretary of State in the Decision), is impermissible. As he noted (at para 24):

> "But it seems to me that it would entirely subvert the CG system if a claimant were able to search through reported appeal decisions for passages of evidence which appear to support an argument that a relevant CG case should not be followed. Far from promoting consistency of treatment, such an approach would lead to considerable uncertainty, as parties would no longer know where they stood as regards the starting point of the tribunal's findings in fact. Where a particular aspect of country guidance is thought to have become inaccurate, the solution is to amend the guidance in an appropriate appeal. Ms Gordon's evidence in *YZ* has not, of course been awarded CG status; if it had been, subsequent tribunals would have had the benefit of a tribunal's identification of the critical matters found to have been proved, rather than a small group of excerpts which happen to have been most relevant to the circumstances of a particular appellant."

[11] It respectfully seems to me that those remarks apply with equal force to this case.

[12] For these reasons, I find that the petitioner in this case has failed to meet the threshold in 27B of the 1988 Act, and that it has not been shown that there are reasonable prospects of success.

[13] The petitioner's challenge is not the first predicated essentially on *YZ* as the basis for a fresh claim. The purpose of this opinion is to bring these recent cases to the notice of those practicing in this field.