OUTER HOUSE, COURT OF SESSION

[2022] CSOH 5

P498/21

OPINION

OF LORD BRAILSFORD

In the petition of

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Petitioner

For Judicial Review of a decision of the Secretary of State for the Home Department to decline to accept the petitioner has made a fresh claim

Pursuer: Caskie; Drummond Miller LLP for Andrew J Bradley & Co
Defender: Maciver; Office of the Advocate General

18 January 2022

[1] The petitioner seeks Judicial Review of a decision of the Secretary of State for the Home Department to decline to accept the petitioner has made a fresh claim. The respondent is the Advocate General for Scotland. The specific order sought is the reduction of a decision dated 19 April 2021.[1]

Factual matrix

[2] The petitioner is a citizen of Vietnam. She arrived in the UK in August 2008. She married her husband, a British citizen, and was granted indefinite leave to remain in the UK

[1] Number 6/1 of process

in January 2014. The petitioner and her husband have a child who was born in January 2009 and who is a British citizen.

[3] On 30 January 2017 the petitioner was sentenced to four years imprisonment on a charge of being concerned in the production and supply of a Class B drug. As a consequence of this conviction the Secretary of State decided to deport the petitioner and issued the appropriate decision. The petitioner appealed against this decision to the First-tier Tribunal (FtT). That appeal was successful but challenged by the Secretary of State. In a decision dated 31 December 2019 the Upper Tribunal ("UT") held that the FtT had erred in law.[2] The petitioner's appeal was dismissed on its merits.

[4] By letter from her agents dated 6 April 2021 the petitioner made further representations in light of a decision by the Secretary of State to remove her from the UK.[3] In response by letter dated 19 April 2021 the Secretary of State decided that the new representations did not amount to a fresh claim and determined not to revoke the deportation order made in respect of the petitioner.[4] That decision is the subject matter of the petition under consideration.

Relevant legislative and regulatory provisions

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

> "353 When a human rights or protection claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and,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:

[2] Number 6/5 of process.
[3] The petitioner's representations from number 6/2 of process.
[4] Number 6/1 of process.

i) had not already been considered;

ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.

This paragraph does not apply to claims made overseas."

[6] Section 55 of the Borders, Citizenship and Immigration Act 2009 provides:

"**55 Duty regarding the welfare of children**

(1) The Secretary of State must make arrangements for ensuring that-

(a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom

(b) Any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.

(2) The functions referred to in subsection (1) are-

(a) Any function of the Secretary of State in relation to immigration, asylum or nationality;

(b) Any function conferred by or by virtue of the Immigration Acts or an immigration officer;

(3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1)."

[7] Section 117C of the Nationality, Immigration and Asylum Act 2002 provides as follows:

"117C Article 8: Additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of 4 years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where –

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom,

(c) There would be very significant obstacles to C's integration into the country which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effects of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment for at least 4 years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2

(7) The considerations in subsections (1) (2) (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

Petitioner's submissions

[8] The petitioner's submissions fell into two distinct parts. First, argument based on the respondent's decision letter dated 19 April 2021.[5] A second line was predicated on a consideration of section 55 of the Borders ,Citizenship and Immigration Act 2009 ("the 2009 Act"). I deal with these arguments separately.

[5] Number 6/1 of process

(i) The decision letter dated 19 April 2021

[9] The present petition was a challenge to a decision in which the Secretary of State had declined to accept that representations made by the petitioner amounted to "further submissions". Claims of this nature arise under paragraph 353 of the Immigration Rules. In terms of these rules the Secretary of State required to address three questions; (a) should she grant leave at her own hand, (b) if the answer to that was in the negative, was there anything new in the representations which would qualify the claim and (c) if there was new material did that, in combination with the existing material, give rise to the applicant having a realistic prospect of success in an appeal.

[10] The starting point for the argument was that in the decision letter the Secretary of State was said to have failed to recognise that in dealing with the issue of whether the new material in combination with the existing material could give rise to a realistic prospect of success in an appeal there were five considerations.. These were that a judge could:(i) not misinterpret the law as it was contended the Secretary of State did; (ii) make their own appraisal of the facts giving the evidence such weight as they considered appropriate and not that which was attached to it by the Secretary of State; (iii) not fail, as it was contended the Secretary of State did, to have regard to relevant matters; (iv) give greater weight to the evidence supportive of the petitioner's petition than had been given to it by the Secretary of State; (v) overall conclude that the petitioner's removal would be unlawful.

[11] Having set out that position counsel for the petitioner then turned to consider the terms of the decision letter challenged. As a matter of generality it was observed that the "greater part", I assume the submission meant in quantitative and not qualitative terms, of the letter set forth the Secretary of State's conclusions as to why she did not consider it appropriate to grant the petitioner leave to remain in the UK. This part of the letter was said

to be addressing the first question that the Secretary of State required to answer, should she grant leave to remain at her own hand. Counsel indicated that he took no issue with this aspect of the decision letter. It was accepted that the overall conclusion in relation to that question reached by the Secretary of State was one which was open to her, albeit that acceptance was, somewhat grudgingly, caveated by use of the word "just".

[12] The second point made by counsel was that the petitioner's appeal against deportation had been allowed by the FtT but that the UT reversed that decision on appeal after reaching its own decision as to the weight to be given to the various factors involved in deciding whether the original decision was proportionate. That is that, as defined in the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") it would be "unduly harsh" to require the child to go to Vietnam and "unduly harsh" for the child to remain in the UK without her mother[6] and that there are "very compelling circumstances"[7] over and above that which render the decision to deport disproportionate. The submission on behalf of the petitioner was that there was a realistic prospect, in respect of both sections 117C(5) and (6) of those tests being met and in reaching a contrary conclusion the Secretary of State had demonstrated a failure to apply anxious scrutiny and that there was a realistic prospect of a judge of the FtT determining the matter in favour of the petitioner. It was advanced as an important factor in consideration of that argument that the petitioner's child was 11 at the date of the original decision and was now 13 years of age, a matter which had not properly been considered or evaluated.

[6] Section 117C (5) of the 2002 Act
[7] Section 117C (6) of the 2002 Act

[13] The argument was developed by reference to the decision in *HA (Iraq)* v *Home Secretary*[8]. The decision in this case had been issued by the Court of Appeal of England and Wales some 9 months after the UT decision in the petitioner's appeal. I did not understand the *ratio* of that decision to be a matter of dispute. The UT had proceeded, it was contended, on the basis that the case before it was of a kind, or perhaps more accurately raised issues involving the "undue harshness" test in the context of dependent children, which were commonly encountered in deportation cases.[9] Following *HA (Iraq)* (*Supra)* this was as a matter of law the incorrect approach. It was submitted to be clear that following that case each tribunal required to make its own assessment of the case before it, not proceeding to treat it as merely an example of a type of case commonly encountered. The alteration in the legal approach precipitated by *HA (Iraq)* (*Supra)* was said to give rise to a realistic prospect of a different decision being reached.

[14] The primary reason lying behind this submission, was, it was advanced, that there was no indication of how primary consideration had been given to the petitioner's child's best interests and it was not explained how the effective termination of the regular relationship with the child's mother was outweighed by the public interest in the petitioner's deportation.[10] It was noted that the UT had recorded the views of the child but given no explanation as to how those views had been weighed in their overall assessment of proportionality. The position advanced was that the UT required, following the approach accepted as necessary in *HA (Iraq)* (*Supra)* to assess in what respects, and to what degree, moving to Vietnam would be contrary to the petitioner's daughters best interests. The UT's

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[8] [2021] 1 WLR 1327

[9] See number 6/5 of process at paragraphs 15 and 51.

[10] See number 6/5 of process at paragraphs 46 and 51.

conclusion that it was not unduly harsh for the petitioner to relocate to Vietnam or for the whole family to relocate to that country, was, it was contended, insufficiently reasoned in the light of the absence of consideration of those factors. The decision complained of, which did no more than accept the position advanced by the UT, repeated and made the same errors.

(ii) Consideration of the position of the child under section 55 of the Borders, Citizenship and Immigration Act 2009

[15] The submission in relation to this chapter commenced with the observation that on the construction of counsel for the petitioner, the Secretary of State, in the decision letter complained of, did not consider that she was obliged to consider the position of the child of the petitioner in accordance with section 55 (3) of the 2009 Act. The Secretary of State's reasoning as to why she had no obligation to consider the child's position under the said statutory provision was that the position of the child had been considered in 2019 and she had no continuing obligation in April 2021 because such matters were not referred to in the further submission.

[16] That approach was contended to represent an error. The proposition was quite simply that obligations under section 55 (3) of the said Act of 2009 did not arise because of further submissions made by an individual, but as a result of a legal obligation imposed upon the Secretary of State by parliament in the said statutory provision. It was said that the Secretary of State's obligations were both to the child and to the maintenance of law by complying with the instruction of parliament and meeting obligations arising from Article 8 ECHR. The Secretary of State required to demonstrate that she had conscientiously and adequately "balanced the scales" before weighing the best interests of the child in the overall

proportionality assessment. That exercise had not been carried out in this case and the Secretary of State had accordingly erred as a matter of law.

Respondent's submissions

[17] Counsel for the respondent initially set forth his overview of his case. This was founded on a proposition, which as I understood it was not contentious, that factual findings by the UT cannot as a matter of law be challenged in any subsequent tribunal[11]. It was said that this was important in the context of the current petition because consideration of the petitioner's representations dated 6 April 2021[12] which formed the basis upon which the Secretary of State's decision, which is challenged, was made, contained no reference to any new matter. In essence the only thing that had changed between the date of the UT decision and the Secretary of State's decision which is challenged was the decision in *HA (Iraq)* (*Supra).* The respondent did not dispute that following that decision the UT decision could no longer be said to represent a correct statement of the law. That consideration had been taken into account in the decision complained of. Effectively beyond considering the effect of *HA (Iraq)* (*Supra)*, which the Secretary of State had done, there was no new material for the Secretary of State to consider.

[18] A second general point was made to the effect that the oral submission of counsel for the petitioner had approached the question of undue harshness in relation to the effect of the petitioner's deportation on her child in a manner which was, as I understood the proposition, influenced to an extent which was not justified by considerations which were derived from family law. It was suggested that this over emphasis, or reliance, on family

[11] Devaseelan v Secretary of State for the Home Department [2002] UKIAT 702 at paragraph 41.
[12] Number 6/2 of process.

law either ignored or was inconsistent with the primary consideration of section 117C of the Act of 2002 that the deportation of foreign criminals was in the public interest.

(i) The "fresh claim" test

[19] In relation to the fresh claim test, or in the context of the present case, the absence of any new or fresh material for the Secretary of State to consider the courts attention was initially drawn to the language of paragraph 353 of the Immigration Rules. The court was reminded that the correct approach to application of this rule is to be found in a decision of the Court of Appeal of England and Wales in *WM (DRC) v The Secretary of State for the Home Department*[13]. The respondent's proposition was that properly construed the petition did not amount to a fresh claim analysis of the Secretary of State's decision but was instead a legal analysis considering the effect of *HA (Iraq)* (*Supra)* on the law. *HA (Iraq)* (*Supra)* had determined that it was not a correct approach for a tribunal to equate "undue" hardship for a child with that going beyond that which was to be ordinarily or necessarily expected in a removal decision. That matter was considered by the Secretary of State, her conclusion being that in the present case the UT had not failed to meet the test set forth subsequent to its decision in *HA (Iraq)* (*Supra)* and that because the tribunal had properly assessed the child's circumstances and found having done so that removal would not be unduly harsh due to the care that she had already received and would continue to receive in her mother's absence. The submission proceeded that it was important to have regard to the fact that the UT considered carefully the circumstances of the petitioner's case and in that regard had also considered the circumstances of the child. In light of these considerations there was

[13] [2007] Imm AR 307 paragraphs 6-11

submitted to be no error-in-law disclosed in either decision of the UT, or more importantly for present purposes, the decision of the Secretary of State.

(ii) Best interests assessment

[20] The submission on behalf of the respondent was that the petitioner's argument in this regard had not been made out and that is because there was a best interests assessment undertaken in the course of the UT decision which the Secretary of State was bound to follow. Further, and importantly, the petitioner did not make any representations on the point to the Secretary of State and accordingly there was nothing to review. The position advanced was that the child's best interests were considered by the Secretary of State and by the UT at the time of the deportation decision and appeal against it at the end of 2019. It was noted that the UT made express references to the child's views. It was maintained that the absence of any reference on this point in the petitioner's further representations of April 2021 made it clear that the child's best interests were as assessed by the UT and, further, that the Secretary of State was correct in determining that the UT had not erred in making its assessment in that regard. By adopting this approach the Secretary of State took into account the child's best interests.

[21] There was a further submission on behalf of the respondent in relation to this aspect of the argument. The court accepted that there was recent Inner House authority, *ZG China*,[14] which provided guidance, binding on this court, as to the approach to be taken in considering the substance of the duties imposed by section 55 of the Act of 2009. That guidance is in the following terms:

[14] [2021] CSIH16

> "What was important was whether there was compliance with the substance of the section 55 duties. What such compliance requires in a particular case is intensely fact sensitive… Sometimes there may be nothing in an applicant's representations which suggests a need for the respondent to obtain further information about a child, or that there is a need to ascertain a child's views independently of the child's parents"[15]

It was submitted that that guidance covered the situation in the present case. Because of the UT's assessment and determination in relation to the child's interests there was nothing further which the Secretary of State required to do in that regard.

Conclusion

(i) Decision letter dated 19 April 2021

[22] The petition under consideration concerns a further submissions application made by the petitioner and rejected by the Secretary of State. In relation to the application the Secretary of State was required to apply paragraph 353 of the Immigration Rules, which entailed considering the fresh submissions and determining whether to accept or reject them. If rejecting the submissions she was then required to determine whether they amounted to a fresh claim. Submissions would only amount to a fresh claim if "significantly different" from material already considered. "Significantly different" in the context of the rule means matter which has not already been considered and taken together with that already considered created a realistic prospect of success.

[23] The petitioner is a foreign criminal. The deportation of foreign criminals is in the public interest.[16] The more serious the offence committed by the foreign criminal the greater the public interest in the deportation of that person.[17] The petitioner required to be deported

[15] At paragraph 32
[16] 2002 Act section 117C (1)
[17] 2002 Act section 117C (2)

unless she fell within either of two exceptions stipulated in the 2002 Act.[18] The factual circumstances in this case are that the petitioner is married and that she and her husband are the parents of a daughter, age 13 at the date of the substantive hearing in this petition. There was no dispute that in this case the petitioner had a genuine and existing relationship with her husband and the same quality of parental relationship with her daughter. The petitioner's case accordingly fell within the category of Exception 2 of section 117C of the 2002 Act,[19] which, in the factual context of this petition , meant that her deportation would not be required if the effect of that act would be "unduly harsh" on the petitioner's daughter. There is one further consideration, arising out of the relevant statutory provisions, that is because the pursuer was sentenced to 4 years imprisonment her deportation is required in the public interest unless there were "very compelling circumstances" over and above the condition under the exception already outlined. [20]

[24] In relation to the consideration of the approach to rule 353 the issue between the parties before me was fundamental. I narrate counsel for the petitioners approach in paragraph [10]. As I understood him counsel for the respondent did not materially disagree with his opponent's approach to construction of the rule and save for the last took no issue with five propositions which were said to arise out of that construction. Counsel for the respondent's approach was, at bottom, that there was no new material which the Secretary of State required to consider.

[25] Approached in that way there is one matter which occasions me some concern. My concern relates to the position of the petitioner's child. In essence, this same point features

[18] 2002 Act section 117C (3)
[19] 2002 Act section 117C (5)
[20] 2002 Act section 117C (6)

in my consideration of the decision letter under challenge. To avoid repetition I will deal with the point in the context of that matter, to which I now turn.

[26] The decision letter plainly considers the position of the child both in the context of whether it would be "unduly harsh" on that child if she remained in the United Kingdom whilst her mother was deported to Vietnam and in the alternative, if she and her father accompanied her mother to Vietnam if that person was deported. It is also fair to observe that the letter considered the child's position in relation to the more rigorous test applied in the context of persons, such as the petitioner, who were sentenced to imprisonment for 4 years or more. Two matters emerge, in my opinion, from the Secretary of State's approach to these issues. First, it is noted that the views of the child on this issue were obtained. Second, it is noted that at the date when the child was examined by an appropriate medical professional she gave a history of bedwetting and of generalised anxiety. The Secretary of State's information in relation to these matters, and the basis of what she states about them, is derived entirely from the findings of the UT. It is also fair to observe that the Secretary of State recognised that since the decision of the UT the approach that body had taken to characterisation of the test to be applied to undue harshness had, as a matter of law, changed by reason of the decision in *HA (Iraq)* (*Supra*). I take no issue with the Secretary of State's approach to that question. More difficult is the fact that the Secretary of State, whilst recognising the existence of medical issues, made no attempt to ascertain whether those remained the same, had resolved, or had deteriorated since the date of the UT decision some 19 months prior to the Secretary of State's consideration of the matter. As I understood it counsel for the respondent's position in relation to my concern was in the first place to again make the point that the issue of the child's health had not been raised in the fresh submissions. Second, counsel argued that in any event given the relatively short

period between the decision of the UT and the Secretary of State's deliberations on the matter there was, particularly in the absence of the matter being drawn directly to the attention of the Secretary of State, no requirement on the Secretary of State to take any further action.

[27] I do not accept the submission on behalf of the respondent on this point. Whilst, as already indicated, I accept that the further submissions did not raise the point of the child's health I do not consider that absolves the Secretary of State from requiring to consider the matter. I formed this view because it was clear that the issue of the child's health was founded upon by the petitioner and considered by the UT. It was therefore a matter which was before the Secretary of State when she came to consider the fresh submissions. Having regard to the nature of the medical complaints relied upon, both having a potential psychological basis, I would regard it as necessary for a decision maker to consider these matters as at the time the decision is made. Counsel for the petitioner posited his argument on this point in even stronger terms. His primary submission was that the straightforward fact that the child was 11 at the date of the UT's decision and 13 at the date the matter was considered by the Secretary of State rendered it necessary for that person to make enquiries into the child's health. Whilst I accept that it is within judicial knowledge that children develop, physically, cognitively and in other respects over time I would be unwilling to state whether the passage of time of itself would place an obligation on a decision maker to reconsider a matter afresh. Each case must be considered on its own facts and circumstances. Applying that to the present case however it seems plain that the situation is of a girl entering into her adolescent years who in addition to that factor had a medical history, albeit 19 months prior to the decision maker's deliberations, suggestive of the possibility of psychological issues. Whilst, as was accepted and indeed founded upon by the

UT, there may be reasons for psychological problems unrelated to the issue of deportation of her parent it is both possible that the proposed deportation has had an effect on the child's psychological health or that deportation might have an effect on the child's future psychological health. In that regard it is fair to point out that the clinician who reported to the UT on the girl's condition expressly recognised the possibility of future psychological health problems for the child in the event of her mother's deportation. All these factors render me to consider that it was incumbent on the Secretary of State to investigate this matter further.

[28] At this point it is only fair that I observe that counsel for the respondent, in dealing with this line of argument, criticised counsel for the petitioner in presenting his submissions on the point in a way which were, I use counsel's own language, "over influenced by considerations of family law". His proposition was that this was a case involving immigration law and, as I understood it, counsel for the petitioner was not justified in relying heavily on modern developments in family law in relation to children's rights and the approach courts should take, and do take in family law cases, to those matters. I do not accept counsel for the respondent's propositions in this respect. In my opinion all areas of law require to consider aspects of jurisprudence from other branches of law and apply them in appropriate cases. It is, in my view, correct to observe that family courts, at the highest level, have developed a more "child-centric" approach to interpretation of children's rights in recent years. It is also true to observe that children's rights are not a direct concern of the 2002 Act or for that matter section 117C of that legislation. Children's rights may however, as they are in the present case, become a factor in application of the provision under consideration if a child is affected by operation of the legislation. The legislation in fact

makes such consideration a necessary feature (section 117C (5)). I accordingly consider that the argument on this point presented by counsel for the petitioner is well-founded.

(ii) Section 55 of the 2009 Act

[29] My opinion in relation to this aspect of the argument is primarily determined by my comments in the previous paragraphs concerning the Secretary of State's failure to freshly consider the position of the child. I need not repeat my position again. Notwithstanding the preceding paragraph I accept that the Inner House has very recently considered the extent of the duty incumbent upon the decision maker under section 55 of the 2009 Act. That authority is *ZG China*[21] which I have already quoted in paragraph [21] hereof.

[30] The decision in *ZG (China) (Supra)* is, of course, binding upon me. I accept that determination of whether or not further enquiry may be required by the decision maker is a question which is highly fact sensitive. I consider having regard to the factors I have already narrated the petitioner's daughter's health issues are sufficiently relevant and important to impose an obligation upon the Secretary of State to make further enquires in relation to the health of the child.

[31] On the basis of the foregoing, I am satisfied that the Secretary of State erred-in-law in failing to properly consider and obtain information in relation to the health of the petitioner's child. I shall accordingly reduce the decision dated 19 April 2021 to refuse to accept the petitioner has made a fresh claim.

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[21] [2021] CSIH16