OUTER HOUSE, COURT OF SESSION

[2024] CSOH 101

P337/24

OPINION OF LORD BRAID

in the Petition by

CD

Petitioner

for

Judicial Review of a decision by the Secretary of State for the Home Department to refuse entry clearance as a visitor

Petitioner: Halliday, Drummond Miller LLP
Respondent: Middleton, Office of the Advocate General

12 November 2024

Introduction

[1] The petitioner is a national of Nigeria. She is employed there as a Logistics Manager. She has four adult children, three of whom live with her in Nigeria. The fourth, A, resides in Edinburgh and in November 2021 she was granted leave to remain in the UK as the parent of a British child. In fact, she has two daughters: V, aged four; and AE aged nearly two. V has a disability, having been diagnosed with cerebral palsy. The petitioner is the grandmother of V and AE, whom she has never met.

[2] A previous application having been refused because the Secretary of State for the Home Department (hereafter, for simplicity, the respondent) questioned the petitioner's ability to finance her visit, on 13 February 2024 the petitioner applied for a visa to permit her to enter the UK. The stated purpose of her visit, the proposed duration of which was one month, was to visit A and to meet her granddaughters. The petitioner stated that she intended to contribute £700 towards the cost of her visit to the UK, and that A would contribute £1,500.

[3] On 27 February 2024, the respondent's Entry Clearance Officer (the decision maker) refused the petitioner's application. In this petition for judicial review, the petitioner asks the court to reduce (quash) that decision. There are three live grounds of challenge, which are (retaining the numbering in the petition):

(ii) failure to take account of Bank of Scotland statements pertaining to A when considering whether A could provide support to the petitioner for the intended duration of her visit;

(iii) failure to consider the best interests of V and AE, and in particular a failure to have regard to the duties in section 55(1) and (3) of the Borders, Citizenship and Immigration Act 2009;

(iv) failure to provide adequate reasons.

(The petitioner originally sought also to challenge the decision on the ground (ground (i)) that the decision maker had failed to take into account money received from the petitioner's daughters when considering the petitioner's financial circumstances, but permission was refused to pursue that ground as patently, the decision maker had taken that information into account.) The detailed reasons for refusal are explored more fully below but, in essence, the decision maker was not satisfied that the petitioner had demonstrated that her

circumstances were as declared or were such that she intended to leave the UK at the end of her visit, which led the decision maker to doubt the petitioner's intentions in travelling to the UK. Further, the decision maker was not satisfied that A could and would provide support to the petitioner for the intended duration of her stay. The petitioner's application was therefore refused under paragraphs V4.2(a), (c) and V4.3(c) of the immigration rules.

The issues

[4] The petition called before me for a substantive hearing. The issues to be resolved are:

a. whether the decision maker took into account A's bank statements;

b. whether the decision maker complied with the duties under section 55 of the 2009 Act; and if not, whether the failure to comply was material;

c. whether adequate reasons for the decision were provided.

The Immigration Rules

[5] Insofar as material, the immigration rules provide:

> "V4.2 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) ...
> (c) is genuinely seeking entry or stay for a purpose that is permitted under the Visitor route as set out in Appendix Visitor: Permitted Activities and at V13.3; and
> (d) ...
> (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. The applicant must show that any funds they rely upon are held in a financial institution permitted under FIN 2.1 in Appendix Finance.

V4.3 In assessing whether an applicant has sufficient funds under V4.2(e), the applicant's travel, maintenance and accommodation may be provided by a third party only if that third party:

(a) ...
(b) ...
(c) can and will provide support to the applicant for the intended duration of the applicant's stay as a Visitor."

Section 55 of the Borders, Citizenship and Immigration Act 2009

[6] Section 55, insofar as material, 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, and
(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;
...

(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)."

The respondent accepts that the Entry Clearance Officer who was the decision maker was a person discharging an immigration function, on whom the section 55 duties were incumbent.

Relevant guidance

"Every Child Matters: Change for Children" published November 2009

[7] Statutory guidance was issued under section 55 entitled "Every Child Matters: Change for Children". Paragraph 6 of the guidance states that the guidance must be taken into account by any person exercising an immigration function, and that if that person decides to depart from it, they must have clear reasons for doing so. Paragraph 2.7 provides that the best interests of the child will be a primary consideration (although not necessarily the only consideration) when making decisions affecting children; and that ethnic identity, language, religion, faith gender and disability are taken into account when working with a child and their family.

Visit guidance

[8] The respondent's "Visit Guidance", version 14.0 published on 31 January 2024, under the heading "Standard and burden of proof and evidence", also provides the following guidance to decision makers:

> "You must assess all the information provided by the applicant...and any other evidence that may be relevant to the application...Make an assessment considering all factors relevant to the application."

The petitioner's application

[9] The petitioner provided supporting documentation with her application. In particular, she provided Bank of Scotland bank statements pertaining to two accounts held by A, respectively, a Classic Account and an Instant Access Savers Account (IASA). The statements for the former, covering 1 November 2023 to 30 November 2023, showed regular income in the form of state benefits. The IASA statements, covering 4 November 2023 to

4 December 2023, showed regular transfers of money from, and occasional transfers of money to, the Classic Account. The opening balance on 4 November 2023 was £10,036.37, the closing balance on 4 December 2023 was £5,036.37, and the lowest balance during the intervening month was £4,426.37. The petitioner also provided a letter of support from A, headed "Invitation Letter for Family visit for [the petitioner]" which included the following:

> "I have leave to remain in the UK as the parent of a British citizen child. I have two daughters who live with me in the UK: [AE and V].
>
> V has cerebral palsy and I provide her with full-time care. As such, it is very difficult for us to travel.
>
> My mother...lives in Nigeria. She has not met my two daughters, who are her granddaughters. It will be very important for us to spend some time together as a family as it has been a long time since we have seen each other and my mother wants very much to meet her grandchildren.
>
> My mother is employed full time in Nigeria and I have some savings. Together we will be able to cover the cost of her visit.
>
> She will stay for one month and then return home, where she lives with my three siblings and a grandchild...."

Finally, the accompanying letter from the petitioner's solicitors confirmed the purpose of her visit as being to visit A, and to meet her granddaughters.

The decision of 27 February 2024

[10] The decision letter issued on behalf of the respondent dated 27 February 2024 gave the following reasons for refusal of the petitioner's application:

> "I have refused your application for a visit visa because I am not satisfied that you meet the requirements of paragraph(s) V4.2-V4.6 and V7.2 of Appendix V because:
>
> - You have applied to visit the UK for the purpose of visiting family for 30 days. I note the main purpose of your visit is to visit family. I understand the importance of maintaining family ties and I have considered all elements of your application, weighing the importance of your proposed visit against the requirements of the Immigration Rules.

- I note you state your (*sic*) employed with a monthly income of [ ] NGN. I note for the period 01/07/2023 to 08/01/2024 you accumulated a total credit of [ ] NGN. You therefore accumulated more than 23 times your declared monthly income in a 7 month period. The source of these extra funds is unknown, and you have provided no explanation for this. This information does not adequately demonstrate your current financial situation in your country of residence. I am therefore not satisfied you have given an accurate reflection of your employment/financial circumstances or that the level of funds declared are for your own personal use.

- You state that you are being sponsored 1500 GPB on your trip to the UK. However the supporting information provided does not demonstrate that your sponsor currently possesses this level of funds for use on your proposed visit. I am therefore not satisfied that your sponsor will be able to sponsor you for the duration of your visit whilst in the UK.

- Given the above I am therefore not satisfied that you have demonstrated that your circumstances are as declared or are as such (*sic*) that you intend to leave the UK at the end of your visit. This also leads me to further doubt your intentions in travelling to the UK. Furthermore, I am also not satisfied that your sponsor can and will provide support to you for the intended duration of your stay. You application for a visit visa has therefore been refused under paragraphs V4.2(a) , (c) and V4.3(c) of the immigration rules."

Submissions for the petitioner

Ground (ii) – failure to take into account A's bank statements

[11] Counsel for the petitioner submitted that the decision maker's conclusion was not that A was unwilling to support the petitioner but that she did not currently possess £1,500 and so was unable to support the petitioner during her visit. That, together with the failure to mention the bank statements in the decision letter, indicated that the decision maker had failed to have regard to the bank statements which showed that A had a minimum of £4,426.37 throughout the period 4 November 2023 to 3 December 2023. The policy guidance required all information to be assessed. Failure to take into account a relevant consideration was outside the wide ambit of the respondent's power (*R (Naidu)* v *Secretary of State for the Home Department* [2016] 1 WLR 3775 at [52]).

Ground (iii) - failure to consider the best interests of the petitioner's grandchildren

[12] The section 55 duties were engaged, as the respondent now admitted. The decision maker had to take into account V's disability or provide clear reasons for not doing so. In particular, he or she had to determine whether face to face contact with the petitioner in the UK would be in the best interests of V and AE. It was important to have a clear idea of a child's circumstances and of what was in a child's best interests before one asked oneself whether those interests were outweighed by the force of other considerations (*Zoumbas* v *Secretary of State for the Home Department* 2014 SC (UKSC) 75 at [10], principle 5). The interests of V and AE had to be treated as a primary consideration which had to be at the forefront of the decision maker's mind (*Zoumbas* at [21]). The decision maker then had to consider whether the cumulative effect of the other considerations outweighed the best interests of the children (*Zoumbas* at [10], principle 3). The decision maker had failed to adopt this approach. As the question was one of substance rather than form (*CAO* v *Secretary of State for the Home Department* [2024] UKSC 32), it was not fatal to the respondent's position (contrary to previous authority) that the letter had not made express reference to section 55 or to the guidance thereunder. However, there was nothing in the reasoning to show that regard had been paid to the section 55 duty, or that V's disability, had been taken into account as the guidance required. That was a material error. The test for materiality was whether the outcome would inevitably have been the same had the section 55 duties been complied with (*X* v *Mental Health Tribunal for Scotland* 2022 SLT 1234 at [40]). That could not be said here. This was not one of those rare cases where a failure to comply with section 55, and the guidance thereunder, was not material (*JG* v *Upper Tribunal, Immigration and Asylum Chamber* [2019] NICA 27, at [30]).

Ground (iv) – failure to provide adequate reasons

[13] The decision maker had failed to provide adequate reasons, contrary to both the Visit Guidance (which required reasons for refusal to be "factual, clear and relevant to the application") and the common law. Applying the test in *Wordie Property Co Ltd* v *Secretary of State for Scotland* 1984 SLT 345, the informed reader would be left in real and substantial doubt as to what factors were taken into account in reaching the decision; in particular, as to whether A's bank statements were taken into account and whether the interests of V and AE had been considered. The decision maker had also failed adequately to explain why the petitioner's evidence had been rejected. There was real and substantial doubt as to why the decision maker had concluded that: (a) the funds in the petitioner's bank account were not for her personal use; (b) why receiving money in addition to her salary from employment suggested that the petitioner would abandon her home, family and job in Nigeria and remain in the UK at the end of her visit, or cast doubt on her stated intention to visit the UK to spend time with her daughter and granddaughters; and (c) why A did not possess sufficient funds for the purposes of the petitioner's visit. There was also real doubt as to whether the section 55 duties had been complied with. As Lord Ericht had said in *Sughra (Pakistan)* v *Secretary of State for the Home Department* [2022] CSOH 71, at [17] and [18]:

> " We simply do [not] know what the reason for rejecting the sponsor's evidence was...
>
> The petitioner is entitled to a clear statement of the reasons for rejection of the evidence...Without a clear statement of reasons, the petitioner is unable to properly assess whether she has any potential remedies against the substance of the decision."

Submissions for the respondent

Ground (ii) – the bank statements

[14] Counsel for the respondent submitted that by referring to the "supporting information provided", the decision maker had made clear that the bank statements had been taken into account. The question was not simply how much money A had, but how much money she could make available to the petitioner. The statements spanned only one month, and were nearly three months out of date. It was reasonably open to the decision maker not to be satisfied on the evidence that, as at the date of the application, A possessed £1,500 for use on the petitioner's proposed visit.

Ground (iii) – the section 55 duty

[15] There was no duty on the decision maker to make further inquiries or cast about for more information (*CAO* v *Secretary of State for the Home Department*, above, at [47], referring to the FTT but the same principle applied where the respondent or one of her officials was the decision maker). The onus was on the petitioner to submit such evidence as she wished to be taken into account (*ibid*; *Naidu*, above, at [35]). The supporting letter had provided information at a very high level of generality, and made no mention of the children's welfare at all. The decision maker was entitled to provide reasons with that same degree of generality. The authorities recognised that the main area where guidance may affect decisions was where there was an issue as to whether the decision maker should hear directly from the child but that did not arise here. It was difficult to understand what more the petitioner contended should have been done. Even if there had been a breach of the section 55 duties, it was not material.

Ground (iv) – reasons

[16] The decision letter should not be read as though it were a legal document (*Holmes-Moorhouse* v *Richmond upon Thames LBC* [2009] 1 WLR 413, Lord Neuberger at paragraphs 47 and 50). A benevolent approach should be adopted to its construction. The *Wordie* test was met. The letter made clear that the decision maker decided that, on the basis of the evidence submitted with the application, the petitioner failed to meet the "genuine visitor" requirements set out in paragraph V4.2 because neither she, nor her sponsor, had sufficient funds to cover the expenses of the petitioner's proposed visit. The letter also made clear that the decision maker decided that the petitioner's failure to meet the requirements of the immigration rules was not outweighed by the importance of maintaining family ties between the petitioner and her wider family in the UK. The informed reader was left in no real or substantial doubt as to what the reasons for the decision were and what material considerations were taken into account in reaching it.

Decision

Were the bank statements taken into account? (ground ii)

[17] It is not disputed that a failure by the decision maker to take into account a material consideration, or to follow guidance issued by the respondent, would be an error of law justifying reduction of the decision. However, there is no basis for holding that there was any such error. The decision letter expressly referred to the supporting documentation, which included the bank statements and A's letter of support. Contrary to the submission of counsel for the pursuer, the letter did not state that the decision maker had concluded that A did not possess £1,500. However, the bank statements, which covered a period of only one month, demonstrated that the level of funds in the account had been depleted by more than

one half by the month's end. They were also some three months out of date by the time of the application. As Counsel for the respondent submitted, the issue was not simply what level of funds A held in November 2023, but whether she had £1,500 available as at the date of consideration of the application in February 2024; and not only whether the funds existed at that date, but, if so, whether they were available for the purpose of funding the petitioner's visit. It might have been different had the statements demonstrated a constant level of savings over a longer period of time, but where the money in the account had clearly been significantly depleted by A for her own use over a relatively short period, the decision maker was, on any view, entitled to conclude on the basis of the bank statements which had been produced that the petitioner had not established that A had £1,500 available to fund her visit. That being so, it simply cannot be inferred that the decision maker had no regard to the bank statements, or left out of account a material consideration, or failed to have regard to the Visitor guidance. This ground of challenge therefore fails.

Were the section 55 duties complied with (and if not, was the failure material (ground (iii))?

[18] It is accepted by the respondent that both the section 55(1) duty and the section 55(3) duty were engaged; in other words that the decision maker not only had to have regard to the best interests of V and AE, but that those interests were a primary consideration. The decision letter did not refer to the duties at all, indeed it did not refer to the children other than obliquely in the references to "family" and "family ties". However, applying the approach in *CAO* v *Secretary of State for the Home Department*, above, that is not determinative. The issue is whether, as a matter of substance, there was compliance with the guidance. As *CAO* tells us, the respondent was under no obligation to carry out any further inquiries with regard to the children. If, for example, the nature or extent of V's

disability was material to the decision, the onus was on the petitioner (or A, as V's parent) to provide further and fuller information, not on the decision maker to ask for it. But that is not the petitioner's complaint. The petitioner's complaint is that no regard was had to the welfare of the children, or to V's disability, at all as it ought to have been.

[19] It is true that A's letter of support did not explain why the children's welfare would be promoted by their having face to face contact with the petitioner. She simply said that it was important to spend time together as a family, and that the petitioner very much wanted to meet her grandchildren; thus, the focus was on the petitioner rather than on the welfare of the children. Had it not been for the section 55 duties, the petitioner could not have complained that the respondent had met her high level general "family" approach with an equally high level general response.

[20] However, it is the very existence of the section 55 duties which precluded the decision maker from taking that approach. The decision maker was required by section 55(1) to have regard to the need, not just to safeguard, but to promote, the welfare of V and AE. By virtue of the section 55(3) duty to have regard to the guidance, "Every Child Matters: Change for Children", that need was to be a primary consideration; and, moreover, V's disability required to be taken into account.

[21] I have in mind the submission of counsel for the respondent that the decision letter should not be subjected to a nit-picking level of scrutiny by the court, but that a benevolent approach should be taken to it (*Holmes-Moorhouse* v *Richmond upon Thames LBC*, above) bearing in mind that it was written by an administrative official rather than by a lawyer. However, even on a benevolent approach, I cannot read the decision letter in the manner contended for by the respondent. The very general reference to family and to family ties, reflecting the language of the application and supporting letter, tends to undermine, rather

than support, an argument that the need to safeguard and promote the welfare of the children had been taken into consideration, given that the application and supporting letter did not make express reference to that need. In other words the decision maker, like the petitioner, has appeared to focus on the petitioner's stated desire to see the children rather than on the children's welfare. Even if that is wrong, there is nothing in the letter which gives a hint that regard has been had to V's disability. The statement in the opening part of the letter that the decision maker has considered "your application and *any* (emphasis added) relevant information you have provided with it" appears to be a stock phrase rather than one which gives comfort to the reader that the decision maker has taken V's disability into account. In comparison with the (relatively) full explanation the letter goes on to give as to why the decision maker concluded that the petitioner had not adequately explained her financial position, the letter gives no explanation at all as to why the other considerations, viewed cumulatively, outweighed the interests of the children.

[22] For these reasons, I consider that the section 55 duties were not complied with. The question then arises as to whether that failure was material. It falls to be regarded as material unless the outcome would inevitably have been the same had the section 55 duties been complied with (*X* v *Mental Health Tribunal for Scotland* 2022 SLT 1234 at [40]). As counsel for the petitioner recognised, if the matter is considered again, and express regard is duly had to the need to promote the welfare of the children, the same decision may well be reached. On the other hand, it cannot be said that in no circumstances could a different decision ever be reached: for example, V's disability and consequent inability to travel to Nigeria may have a bearing on the conclusion reached as to the petitioner's intentions in travelling to the UK. I therefore consider that the failure to comply with the section 55 duties was material and that the decision of 27 February 2024 must be reduced.

Ground (iv) – reasons

[23] Reasons must be such as to leave the informed reader in no real and substantial doubt as to what the reasons for the decision were and what matters were taken into account in reaching it (*Wordie*, above). Further, as it was put by Lord Brown of Eaton-Under Heywood in *South Bucks District Council and another* v *Porter* [2004] 1 WLR 1953 at [36]:

> "The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration."

[24] I have come to the view that the reasoning does leave the reader in real and substantial doubt as to the reasons for the decision. Dealing first with the reasoning regarding A's bank account, it is, perhaps, on the sketchy side but had that been the sole reason for refusal of the petitioner's application, it would have been sufficient to inform the petitioner as to why she was not considered to be a genuine visitor: because she did not have sufficient funds, which was, in turn, because A had been assessed as being unable to provide support to the tune of £1,500 for the intended duration of the petitioner's visit. That would have justified refusal under paragraph V4.2(e) of the rules.

[25] The problem with the reasoning, however, is that it did not end there. In fact, on one view it did not even begin there, since the decision letter did not refer to paragraph V4.2(e) at all as being a reason for refusal, although it referred to paragraph V4.3, which does refer to that paragraph. However, more fundamentally, the letter also referred to V4.2(a) and (c) as justifying refusal, the decision maker not being satisfied that the petitioner would leave the UK at the end of her visit, or that she was genuinely seeking to enter the UK for a permitted purpose. This conclusion was reached "[g]iven the above" – a reference back to

the observations on the petitioner's bank account and the perceived inability of A to sponsor the petitioner for the duration of her visit. Against a background where the respondent admits in her answers to the petition that the petitioner is employed in Nigeria, there is no obvious explanation as to why the appearance in her account of additional funds led the decision maker to doubt her intention to leave the UK at the end of her visit, and to doubt her intentions in travelling to the UK. There may well be an explanation but the petitioner was entitled to know what it was. As it stands, she is unable to properly assess what information or documentation may satisfy the respondent in any future application that the requirements of the immigration rules are met.

[26] I have therefore concluded that the reasons given were inadequate and that the ground (iv) challenge must also succeed. It is strictly unnecessary to consider whether the reasons were also inadequate insofar as the letter left it unclear as to whether the section 55 duties had been complied with or not. There is clearly a high degree of overlap here with the ground (iii) challenge which I have already upheld. Suffice to say that if I am wrong in finding that no regard was had to the section 55 duties, I would have found that the reasoning was also inadequate insofar as it failed to make clear whether the decision maker had regard to those duties, the petitioner being entitled to know whether that duty had been complied with.

Disposal

[27] I have sustained the petitioner's second plea in law, repelled the respondent's pleas in law and reduced the decision of the respondent's Entry Clearance Officer dated 27 February 2024.