OUTER HOUSE, COURT OF SESSION

[2020] CSOH 52

P550/19

OPINION OF LADY CARMICHAEL

In the Petition of

BK

Petitioner:

for

JUDICIAL REVIEW OF A DECISION OF THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Petitioner: Winter; Drummond Miller LLP (for McLashan MacKay Solicitors, Glasgow)
Defender: Maciver; Office of the Advocate General

28 May 2020

[1] The petitioner seeks reduction of a decision of the Secretary of State for the Home Department ("the respondent") refusing to treat her representations as a fresh claim. She is a national of Namibia. She claimed asylum on arrival in the United Kingdom on 7 March 2013. She said she was at risk because of her sexuality. Her claim was refused, and an appeal against that decision was dismissed on 15 May 2013. She has previously made further representations, unsuccessfully.

[2] On 29 January 2019 she made submissions relating to her relationship with G, a British woman. She submitted, in particular, under reference to Article 8 ECHR, that it would not be reasonable to expect G to relocate to Namibia. By letter dated 20 March 2019

the respondent refused to treat those representations as a claim, under paragraph 353 of the Immigration Rules.

[3] There is no dispute as to the law that I should apply. Paragraph 353 of the Immigration Rules is in the following terms:

> "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 When a human rights or protection claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and,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:
>
> (i) had not already been considered; and
>
> (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."

[4] The test is whether there is a realistic prospect of success before another immigration judge. In an application for judicial review, the court must apply the test of rationality, but on the basis that the decision will be irrational if it is not taken on the basis of anxious scrutiny. The court must consider whether the respondent has asked herself the correct question, and whether in addressing that question she has applied the requirement of anxious scrutiny: *WM (DRC)* v *Secretary of State for the Home Department* [2006] EWCA Civ 1495; *R (AK (Sri Lanka))* v *Secretary of State for the Home Department* [2010] 1 WLR 855; *Dangol* v *Secretary of State for the Home Department* [2011] SC 560. The test of anxious scrutiny has been the subject of consideration and explanation in *MN* v *Secretary of State for the Home Department* 2014 SC (UKSC) 183, at paragraph 31.

Summary of issues

[4] The petitioner submitted that the decision maker had applied the wrong test; and

that the decision maker had failed to take into account or assess the country information in respect of whether it would not be proportionate to expect G to go to Namibia.

[5] Although the complaints in the petition are more extensive than those I have summarised, it is on those complaints that discussion came to focus. In the course of the hearing counsel for the respondent indicated that the reliance in Answer 10(iv) on section 117B(4)(b) of the petition was not apposite, and he did not pursue the line of argument prefigured in that part of the pleadings. That rendered the petitioner's submission relative to *Rhuppiah* v *Secretary of State for the Home Department* [2018] 1 WLR 5536, at paragraph 49, otiose.

[6] By the time of the substantive hearing, parties were also at one in their understanding that, because the petitioner and G did not live together, G was not the petitioner's partner as defined in paragraph GEN.1.2 of the Immigration Rules, for the purposes of a claim within the Immigration Rules. The decision maker had, however, considered whether there were exceptional circumstances which would render refusal a breach of Article 8, on the basis that G was the petitioner's partner in the ordinary sense of the word. There was therefore no inconsistency on the part of the decision maker in treating G as the petitioner's partner for the latter purpose, but not the former.

Wrong test

[7] The petitioner submitted, first, that the decision maker applied the wrong test. Counsel criticised the following sentences which appear at pages 8 and 13 of the decision:

> "For the reasons given above, it is not accepted that your claims would stand a realistic prospect of success before another Immigration Judge.
>
> Consequently it is not accepted that this claim would stand a realistic prospect of success before an Immigration Judge …

> … it is not accepted that should this material be considered by an Immigration Judge, that this could result in a decision to grant you asylum, Humanitarian Protection, limited leave to remain on the basis of your family and/or private life or Discretionary Leave for the reasons set out above."

The criticism is of the use of the word "would" in the first two of these sentences. It is without merit. The test is whether there is a realistic prospect of an immigration judge's thinking that the applicant will be exposed to a real risk of persecution on return. The form of words used by the decision maker in the first two sentences quoted is consistent with that test. The same is true of the third sentence. The words used reflect consideration by the decision maker of whether the material "could" result in a favourable decision. They do not suggest that the decision maker thought that the petitioner required to do more than to demonstrate a real prospect of success.

Failure to address the material potentially relevant to the proportionality of expecting G to relocate

Petitioner's submission

[8] Counsel for the petitioner referred to a number of passages in the respondent's Country Policy and Information Note Namibia: sexual orientation and gender expression ("the country information"). So far as treatment by the state is concerned, the situation is summarised at paragraph 2.4.10:

> "The available information does not establish that there is a general risk of persecution or serious harm to LGBTI persons from the authorities. Each case must, however, be considered on its facts and the onus is on the person to demonstrate why, in their particular circumstances, they would be at real risk from state actors on the basis of their sexual orientation or gender expression."

[9] The summary of the position regarding treatment by non-state actors appears at paragraph 2.4.15:

> "The available information does not suggest that the treatment is sufficiently serious by its nature and/or repetition such that there is a general risk to LGBTI persons in Namibia from societal actors. Each case, must, however, be considered on its facts …"

[10] The preceding paragraphs, detailing some examples of treatment by non-state actors, includes this, at paragraphs 2.4.12 and 13:

> "There have been reports of "curative rape" of lesbians, but the available evidence is limited on scale and frequency of such treatment.
>
> Some LGBTI persons have faced harassment when trying to access public services and have been denied access to healthcare services due to stigma and discrimination from healthcare professionals."

[11] Under the heading "Protection", at paragraph 2.5.4 the country information narrates that state authorities have been responsible for arbitrary arrests, detentions, harassments and discrimination towards LGBTI persons with reports of physical and sexual assault from the police, and that information suggests that the police do not take complaints of violence against LGBTI persons seriously. The state is said to be able but unwilling to offer protection: paragraph 2.5.5. Tolerance of LGBTI persons is said to be likely to be greater in urban areas; there is an active LGBTI community in the capital, Windhoek: paragraph 2.6.4.

[12] More detail is provided about abuses by the police at paragraphs 4.2.3-4.2.6, and about police responses to reports of violence at paragraph 4.4. There is an indication at paragraph 4.4.4 that while the prevailing view is that the police do not take complaints of violence against LGBTI people seriously, there are signs that the exercise of freedom of expression and assembly by LGBTI people may be gaining greater acceptance and engendering greater tolerance from the government and from society at large.

[13] At paragraph 5.3.3, the country information quotes a study report on human rights by the Ombudsman Namibia in the following terms:

> "A number of cases of human rights violations go unrecorded as lesbian women are subjected to corrective rape, LGBTI people beaten and demeaned, families disowning their children which impacts on their future livelihood and further community homophobia and transphobia."

[14] At paragraph 5.3.5 the country information quotes a report by the Legal Information Centre (which I understand to be a law centre in Namibia with a particular interest in human rights issues):

> "The Director of OutRight Namibia has reported that lesbians in Namibia often face threats of rape from men seeking to "cure" them, adding: "If lesbians try to go to the police, they say "you asked for it" and dockets go missing."

Further references to incidents of "corrective" rape and sexual assault appear at paragraphs 5.3.7 and 5.3.8.

[15] Counsel went on to draw attention to passages relative to discrimination and/or harassment in relation to access to services, reproductive and adoptive rights, and employment.

[16] The assessment of the proportionality with the rights protected by Article 8 was highly fact sensitive, requiring careful fact-finding and analysis by an immigration judge: *R(Agyarko)* v *Secretary of State for the Home Department* [2017] 1 WLR 823; *VS (India)* v *Secretary of State for the Home Department* 2017 SLT 977, at paragraphs 25, 29; *Mendirez (Turkey)* v *Secretary of State for the Home Department* [2018] CSIH 65, paragraphs 30-36; *Khan* v *Secretary of State for the Home Department* 2015 SC 583, paragraph 10. It was not inevitable that a decision maker carrying out the proportionality assessment properly as required by Article 8 would conclude that the interference with the private and family life of the petitioner and G would be proportionate: *Khan,* paragraph 11.

Respondent's submission

[16] Counsel for the respondent referred to passages in the decision letter in which the

decision maker considered the petitioner's case in the light of the country information. The decision maker had concluded that while there was widespread discrimination and prejudice against LGBT persons in Namibia, the country situation and background information did not demonstrate, in relation to the petitioner's own circumstances, a risk of persecution. The decision maker had also taken the view that sufficiency of protection and internal relocation would be available to the petitioner.

[17] The petitioner required to show more than a fanciful prospect of succeeding on an outside the rules assessment. What had been submitted by way of representations on her behalf was not directed to the question of whether the decision would have unjustifiably harsh consequences, but whether the petitioner could go to Namibia at all. The issue now relied on by the petitioner had not been raised for consideration in the representations. There had been full and adequate consideration of the situation that G would find herself in. Looking at the country information fairly, it amounted to a situation in which a reasonable life could be lived. There was a sufficient degree of tolerance for the couple to live in Namibia. Even if the decision maker had not addressed the position of G specifically, no specific issue as to the harshness of the consequences for her arose on the available material.

Decision

[18] I do not accept the respondent's submission that the representations did not raise for consideration the impact on G of relocation in Namibia. The submissions contained the following (emphasis added):

> "Our client also wishes to advance a claim under Article 8 of the European Convention on Human Rights pertaining to her relationship with her British partner, G. It will be submitted that this relationship cannot continue in Namibia and therefore it would be a disproportionate breach of the couple's right to a family life for [the petitioner] and her son, B, to require them to return to Namibia.

> It is submitted that, should [the petitioner] and her son be required to leave the United Kingdom for Namibia, the relationship between [the petitioner] and G could not continue and it would not be reasonable to expect Ms G to relocate to Namibia to remain with her family. In this regard we make reference to the aforementioned submissions on the societal position for LGBT people in Namibia. Objective evidence records (in our submission) persecution and daily discrimination against LGBT people including in the areas of employment and healthcare. The Secretary of State's own Country Policy and Information Note on the subject (most recently updated in the latter part of 2018), whilst not accepting that the treatment of LGBT people reaches the level of persecution, acknowledges instances of harassment, violence and ill-treatment of LGBT people by the police and society. It is submitted that it would not be reasonable to expect G, as a British national, to relocate to Namibia in such circumstances to pursue her relationship with [the petitioner]."

[9] The difficulty for the respondent is that there is nothing in the decision letter that engages directly with this aspect of the representations. The focus of consideration of the country information was entirely in relation to the petitioner herself. There has been no proper consideration of the harshness of the consequences for G of requiring her to move to Namibia in order to continue the relationship with the petitioner. Consideration of that matter is necessary in the context of an assessment of proportionality in the context of the Article 8 claim. I am not satisfied that consideration of the available material in the context of that matter would inevitably lead to a decision adverse to the petitioner, notwithstanding the view taken of it in relation to the petitioner's asylum claim. The respondent's error in failing to address the matter is therefore a material one.

Disposal

[10] I therefore grant reduction of the decision of 20 March 2019 refusing to treat the petitioner's further submissions as a fresh claim.