OUTER HOUSE, COURT OF SESSION

[2021] CSOH 11

P373/20

OPINION OF LORD UIST

in the Petition of

AYUSH DHAWAN

Petitioner

for

Judicial Review of a decision by the Secretary of State for the Home Department dated 20 February 2020

Petitioner: Forrest; Drummond Miller LLP
Respondent: MacIver; OAG

29 January 2021

[1] The petitioner is a national of India who was born on 11 January 1987. He arrived in the United Kingdom on 25 September 2009 with entry clearance as a Tier-4 General student until March 2011. He graduated in business management in March 2012. Following renewals of his visa his leave to remain expired on 31 July 2014. On 12 August 2013 he applied for further leave to remain on an entrepreneur visa as he had obtained a qualification in business management. His application was rejected by the respondent and his appeal to the First-tier Tribunal (Immigration and Asylum chamber) was dismissed as he did not have sufficient funds. His appeal rights were exhausted on 21 March 2017. On 3 April 2017 he applied for leave to remain on the basis of the family and private life he had

established in the United Kingdom with his uncle and family and the fact that he had assisted his uncle in running a business. His application was dismissed by the respondent as clearly unfounded. He raised proceedings in the High Court in London for judicial review of that decision but withdrew them on 20 February 2020. On 28 November 2019 he submitted a further application for leave to remain. On 8 January 2020 his solicitors wrote to the respondent with submissions in support of his application on the basis that he had continued to develop his family and private life in the UK. On 20 February 2020 the respondent concluded that the application did not amount to a fresh claim and rejected it. The petitioner now seeks reduction of that decision.

[2] In her decision letter dated 30 August 2018 refusing the petitioner's application of 3 April 2017 the respondent stated:

> "You state that you are being supported in the UK by your maternal uncle and his family who provides *(sic)* food, accommodation and financial contributions.
>
> It is noted that your uncle, in his statement dated 17 May 2018, confirms that he currently supports you financially and will continue to do so in the future.
>
> After consideration of all the evidence available your claim is hereby certified under section 94(1) of the Nationality, Immigration and Asylum Act 2002 because the Secretary of State is not satisfied that it is not clearly unfounded."

[3] On 28 November 2019 the petitioner submitted an application for further leave to remain. By letter dated 8 January 2020 his solicitors wrote on his behalf to the respondent. They asked that his fresh representations should be considered in terms of Article 8 of the European Convention on Human Rights under the Immigration Rules, failing which outwith the Rules. They pointed out that he had been resident in the United Kingdom for more than 10 years and that the copious amount of evidence he had provided showed that he had without doubt established a very strong private life in the United Kingdom. His uncle and his family were all British citizens and he had established ties in the United

Kingdom. Accompanying the application were statements from the petitioner and his uncle. The petitioner stated in his statement that he had completed 10 years stay in the UK on 25 September 2019 and that he was therefore applying for leave to remain on the basis of his long residency in the UK. There was no mention by him of any change in circumstances since the respondent's decision of 30 August 2018 certifying his then application for leave to remain as clearly unfounded. His uncle, in his statement, stated that the petitioner was part of his family and he treated him as his son. In her decision letter of 20 February 2020 the respondent stated, so far as relevant:

> "Your further submissions raising human rights grounds made on 28 November 2019 have been rejected and *(sic)* they do not amount to a fresh claim.
>
> You applied for leave to remain on 3 April 2017 and were refused on 30 August 2018.
>
> The further submissions you have made are:
>
> - You state that you are currently supported in the UK by your uncle and his family who are all British citizens.
> - You claim that you have developed a very strong private life in the UK with many friends and social ties.
>
> I have considered your further submissions under paragraph 353 of the Immigration Rules.
>
> All the evidence you submitted has already been considered in a previous decision.
>
> Because you have not provided any new evidence the decision of 14 January 2014 *(sic)* is maintained and has not changed."

The reference to "14 January 2014" was a mistake: it should have been 30 August 2018.

[4] The ground of challenge is that the respondent failed to apply the test with regard to whether further information amounts to a fresh claim. In considering whether there is a fresh claim based on further information that was not before the original decision maker the policy of the respondent is to consider whether the fresh information is significantly different from that placed before the earlier decision maker. Such information is

significantly different only if (i) it has not previously been considered; and (ii) taken along with previous information there are realistic prospects of success before another immigration judge (Immigration Rule 353). The test is a modest one: *WM (DRC)* v *Secretary of State for the Home Department* (2007) Imm AR 307. Certainty is not necessary, and it is crucial that the respondent exercises anxious scrutiny of the facts on which such a claim is made. In every case the focus is not on whether the respondent thinks the claim would fail, but on whether there are realistic prospects of success before another immigration judge. Although it was initially submitted on behalf of the petitioner that the respondent had erred in her consideration of both limbs of Rule 353 referred to above, it was ultimately accepted that the only challenge to her decision was that she had erred in law only under the first limb in that her decision that the material submitted by the petitioner had already been considered was irrational. No reference was made to the evidence provided with the letter from the petitioner's solicitors dated 8 January 2020 in the form of statements from the petitioner and his uncle in relation to the family and private life established and developed by the petitioner. This was clearly new evidence that was not before her when she reached her decision dated 30 August 2018 rejecting the petitioner's human rights claim. In any event she rejected his human rights claim in her decision of 30 August 2018 largely because she considered at that time that there was no reason why the petitioner could not return to India.

[5] In answer the respondent submitted that in deciding that the petitioner had submitted no new material in terms of Rule 353 she had acted rationally, provided adequate reasons for her conclusion and did not err in law. She correctly applied the "fresh claim" test set out in Rule 353 and was entitled to conclude that no new material had been advanced by the petitioner. The contention by the petitioner that she "has ignored crucial

information submitted to her" was neither adequately specified nor made out as she had taken into account all of the material submitted to her. The decision under challenge met the test set in paragraphs 6 and 7 of *WM (DRC)*. At paragraph 6 thereof the Court of Appeal stated:

> "There was broad agreement as to the Secretary of State's task under para 353. He has to consider the new material together with the old and make two judgments. First, whether the new material is significantly different from that already submitted, … that to be judged under para 353(i) according to whether the content of the material has already been considered. If the material is not 'significantly different' the Secretary of State has to go no further."

There was no basis for the petitioner's argument that she had acted unreasonably in concluding that the "fresh claim" test had not been made out.

[6] In my opinion this application to the supervisory jurisdiction of the court is unstateable. That is obviously why counsel for the petitioner struggled even to attempt to make an oral submission in support of it. The plain fact of the matter is that it is evident from a consideration of the relevant documents referred to above that nothing had changed so far as the petitioner's private and family life is concerned between the respondent's decision of 30 August 2018 and the application for further leave to remain made by the petitioner on 28 November 2019. There was nothing irrational in the respondent's consideration of that application. Not only was she entitled to refuse it: she was bound to do so. It would have been irrational for her to have allowed it. The application was not a fresh application: it was simply a repeat of the application made by the petitioner on 3 April 2017, which had been refused by the respondent and certified by her as clearly unfounded. There was in this case no new material presented for the respondent to consider, far less new material which was not significantly different from that already

submitted. She was therefore not required to go any further in her consideration of the application.

[7] I shall therefore sustain the third plea-in-law for the respondent and refuse the petition.