EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2020] CSIH 72
P317/19

Lord Glennie
Lord Woolman
Lord Doherty

OPINION OF THE COURT

delivered by LORD WOOLMAN

in the Appeal

by

SAMAN MAHMOOD RASHED

Appellant

against

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Appellant: Caskie; Drummond Miller LLP
Respondent: Maciver; Office of the Advocate General

9 December 2020

[1] The petitioner is an Iraqi citizen whose home city is Kirkuk. He arrived in the UK in 2008 and unsuccessfully claimed asylum. An immigration judge refused his appeal. Since then he has made repeated applications to remain here. All have failed. In this petition he seeks reduction of the respondent's decision dated 4 January 2019 that he had not made a fresh claim under Immigration Rule 353. In terms of that decision the respondent accepted that it would be unsafe for the petitioner to be returned to Kirkuk, which lies outside the Kurdistan Region of Iraq ("KRI"), but she concluded that there were other areas

of Iraq to which the petitioner could be relocated, namely Baghdad City and the KRI, and that there was no realistic prospect of an immigration judge taking a different view. Article 15(c) of the Qualification Directive (Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted) was not engaged by the conditions in either of those locations. There were no substantial grounds for believing that the petitioner would suffer serious harm on return, nor would return to either of those areas breach the petitioners' article 2 and article 3 ECHR rights.

[2] Immigration Rule 353 provides:

> "When a human rights or protection claim has been refused or withdrawn or treated as withdrawn under paragraph 333C of these Rules and any appeal relating to that claim is no longer pending, the decision maker will consider any further submissions and,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:
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> (i) had not already been considered; and
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> (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection.
>
> … "

[3] In *WM (Democratic Republic of Congo)* v *Secretary of State for the Home Department* [2006] EWCA Civ 1495, [2007] Imm AR 337, [2007] INLR 126 the Court of Appeal set out the proper approach to the application of rule 353:

> "[11] First, has the Secretary of State asked himself the correct question? The question is not whether the Secretary of State himself thinks that the new claim is a good one or should succeed, but whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk of persecution on return: … The Secretary of State of course can, and no doubt logically should, treat his own view of the merits as a starting-point for that enquiry; but it is only a starting-point in the consideration of a

> question that is distinctly different from the exercise of the Secretary of State making up his own mind. Second, in addressing that question, both in respect of the evaluation of the facts and in respect of the legal conclusion to be drawn from those facts, has the Secretary of State satisfied the requirement of anxious scrutiny? If the Court cannot be satisfied that the answer to both of those questions is in the affirmative it will have to grant an application for review of the Secretary of State's decision."

[4] Mr Caskie contends that the Lord Ordinary ought to have granted permission to proceed with the petition, and that the court should allow the appeal, recall the interlocutor refusing permission, and itself grant permission. It is important to distinguish the pleats in Mr Caskie's argument. He acknowledges that the respondent was entitled to reject the further submissions. He accepts that in considering whether they amounted to a fresh claim she asked herself the correct question. However, he says that she erred in law in holding that the further submissions taken together with the previous submissions did not amount to a fresh claim. He maintains that it is arguable (with a real prospect of success) that the respondent erred in law in concluding that there was no realistic prospect of the petitioner satisfying an immigration judge that he could not be internally relocated if returned to Iraq. The errors involved the leaving out of account of relevant and material considerations. In relation to relocation to Baghdad City, he submits that the respondent left out of account the risk that the petitioner might be stopped at a checkpoint between Baghdad Airport and the city and prevented from proceeding to the city. In relation to relocation to the KRI, she left out of account the fact that there had been a massive influx of refugees there. As a result, it was argued, successful integration of the petitioner in the KRI would be very difficult.

[5] Mr Caskie accepts that unless he persuades us that it is realistically arguable that the respondent committed both of the suggested errors of law, her decision that there was no realistic prospect of an immigration judge holding that internal relocation is not possible would be unassailable, and the present appeal would fail.

[6] Mr Maciver argued that the respondent had thoroughly reviewed all of the relevant material. The petitioner could internally relocate within Iraq to either of the two locations. There was no evidence that persons travelling between Baghdad Airport and Baghdad City who had an appropriate identification document would be prevented from proceeding to the city. The respondent had had regard to the prevailing conditions in the KRI but she was satisfied in the whole circumstances that the petitioner could relocate there. Her view that there was no realistic prospect of an immigration judge holding that internal relocation of the petitioner would not be possible was a view which she had been entitled to reach. It was not vitiated by any error of law.

[7] We are not persuaded that the petition has a real prospect of success. Since in order to succeed the petitioner has to show that both of his criticisms of the respondent's conclusions in relation to internal relocation to Baghdad and the KRI are arguments of substance, it suffices for us to say that we are not satisfied that there is an argument of substance that the respondent left out of account evidence that persons with appropriate documentation would be likely to be prevented from travelling from Baghdad Airport to Baghdad City. On the basis of the material before us there was no such evidence before the respondent (and it does not appear from the decision letter that the petitioner contended to the respondent that there was). It follows that there is no real prospect of the petitioner establishing that the respondent misdirected herself in holding that there was no realistic prospect of an immigration judge determining that internal relocation was not possible.

[8] Since we are satisfied that the petition does not have a real prospect of success we shall refuse the appeal.