OUTER HOUSE, COURT OF SESSION

[2019] CSOH 108

P501/19

NOTE OF REASONS BY LADY WOLFFE

In the Petition of

ROBERT HAVRILA (AP)

Petitioner

for

Judicial Review

Pursuer: Caskie; Drummond Miller LLP
Defender: Maciver; Office of the Advocate General

20 December 2019

The procedural background

[1] This matter called before me for an oral permission hearing on 18 September 2019. That hearing was principally concerned with the respondent's first plea, that the petition was out of time in terms of section 27A(1) of the Court of Session Act 1988 ("the Act"). I continued the matter to the following day to enable me to consider matters overnight before giving an *ex tempore* decision.

[2] Parties took the opportunity to produce additional materials at the permission (and continued permission) hearing, namely: a short affidavit from the petitioner ("the Affidavit") and a copy of *Farquharson* v *SSHD* [2013] UKUT 00146 (IAC), whereas the

respondent produced copies of *Wang* v *Scottish Ministers* 2017 SLT 1256, [2017] CSOH 140; *MIAB* v *SSHD* 2016 SC 871; [2016] CSIH 64; *RA Iraq* v *SSHD* [2016] CSOH 182 and an extract from Clyde & Edward in *Judicial Review*, paragraph 23.19. The respondent also produced a Note of Argument.

[3] As the petitioner has reclaimed, it is appropriate that I set out in this Note more fully my reasons for refusing permission.

The preliminary issue: Was the petition out-of-time?

Facts relevant to respondent's first plea

The petitioner's primary position

[4] The petitioner's position is that the date on which grounds arose was on 18 March 2019, being the date on which the Upper Tribunal ("the UT") refused the petitioner's application for permission to appeal to it. The explanation (set out in Statement 10) provided for that date is, in short, that on that date the petitioner's agents contacted the UT to enquire when a decision was to be made. In response, the UT advised that a decision had been issued on 17 September 2018 ("the original decision"). The petitioner then avers:

> "No such decision was received and the Petitioner and his agents cannot have presented the present petition earlier."

The petitioner's position augmented at the oral permission hearing

[5] The petitioner's position, augmented in oral submissions, was that the petitioner's agents had never received the original decision. The petitioner's wife had also appealed to the UT at the same time and her own agents had also never received the decision in her separate appeal, which was issued at the same time. It was only when the two sets of agents spoke to each other, and appreciated that neither had received a decision from the UT, that

they chased this up with the UT. Under reference to the Affidavit, the petitioner's counsel also explained that the petitioner himself had not received a copy of the original decision. The relevant part of the Affidavit states:

> "I did not receive a decision from the Tribunal in September last year relating to my immigration case or subsequently. The first I became aware of a decision from the tribunal was when my solicitor made me aware of it in 2019."

Counsel for the petitioner indicated that, if he had to amend, it would be to insert the words "by the petitioner" after the words "was received" in the averment quoted at the end of paragraph [4], above.

The petitioner's fall-back

[6] The petitioner's fall-back position, if the petition were out-of-time, was to invite the court to extend the time-limit to allow the petition to proceed (see Statement 11).

The respondent's position

[7] The respondent's primary position was that the petition was out-of-time. It relied on the date on which the UT first issued the original decision, on 17 September 2018. Counsel for the respondent also submitted:

(i) that while there was an averment about the state of knowledge of the petitioner's agents, there was no averment as to the petitioner's own state of knowledge;

(ii) that for the purpose of permission, the court was bound to confine its consideration to the pleadings,

(iii) that it was impermissible to have regard to extraneous materials or any augmentation of a party's position in submissions at a permission hearing,

(iv) that if a petitioner wished to add any matter, he or she required to do so by amendment, but

(v) that amendment was incompetent at any stage before permission had been granted. This followed from section 27B(1), providing that "**No proceedings** may be taken in respect of any application … unless the Court has granted permission to proceed …" (Counsel emphasised the words in bold). An amendment fell within "proceedings".

[8] Counsel for the respondent referred to the observations of Lord Boyd in *RA Iraq* (paras 4, 9, 10, 13-14); and the Inner House in *MIAB* (paras 62 to 65); and Lady Stacey in *Wang* (paras 19 to 20).

Decision on the first issue

[9] While not a model of clarity, not least because of the ambiguity in the use of the passive voice (see above at para [4]), in my view, the averment in question is capable of encompassing the petitioner. That reading is reinforced by the preceding averment that the petitioner's agents had contacted the UT to ascertain when a decision could be expected. The clear implication is that no decision had been received either by the petitioner or his agents. On that reading, it was not necessary for the petitioner expressly to aver that he had no knowledge of the original decision until March 2019. That is tolerably clear from the averment.

[10] Had I not been of that view, I would have been prepared to accept as sufficient the additional explanation provided in oral submissions at the permission hearing and which amounted to no more than clarification of an ambiguous averment. I do not accept the respondent's, perhaps extreme, proposition that the court was necessarily confined to the

pleadings (and presumably the productions lodged at the outset). To accept that submission would, in my view, deprive the oral permission hearing of much of its practical utility. That degree of procedural formalism is not consistent with the purpose of paragraph 12 of Practice Note No 3 of 2017, which indicates that the Lord Ordinary will "ordinarily order an oral hearing if considering refusing the permission". As Lady Carmichael recently observed in her perceptive comments in *Burns v The Lord Advocate* 2910 SLT 337; [2019] CSOH 23 at paragraphs 45 and 46, an oral permission hearing may be required "for the fair and proper determination of whether permission should be granted". It is implicit that the purpose of affording the petitioner an oral hearing carries with it the prospect that the Lord Ordinary is open to being persuaded to grant permission, contrary, perhaps to the provisional view reached on his or her first consideration of the papers. The submission of the respondent is also not consonant with the essentially equitable or extraordinary review the court is exercising in its supervisory jurisdiction with the flexibility associated with judicial review procedure. Furthermore, given the very modest degree of augmentation (to clarify an ambiguity) to confirm that (in common with his agents) the petitioner had not in fact received the original decision when it was issued, I do not find that taking this into account (had that been necessary) would be inconsistent with the observations of Lord Boyd in *RA Iraq* or the guidance of the Inner House in *MIAB* at paragraphs 63 and 64.

[11] Had it been necessary to determine the argument that the phrase "No proceedings" in section 27B(1) precluded amendment, I would not have been inclined to accept the respondent's submission on this point. A minute of amendment is a "step of process" (rule 1.3 of the Rules of the Court of Session 1994 ("the Rules"); "proceedings", while not defined in the Rules, is suggestive of more substantive procedure. A minute of amendment prepared by one party need not necessarily involve a hearing or any substantive response by

the other party. If, for example, it was used to correct an obvious error (or to clarify an ambiguity), the other party might concede the substance of the proposed minute of amendment. In order to preserve the court's ability to apply its procedures flexibly and fairly, I would not be inclined to construe "proceedings" in a manner which would preclude this.

[12] Even had I determined these matters in favour of the respondent, I would have been prepared to exercise the court's discretion to extend the time. The lack of notice of the original decision was not the fault of either the petitioner or his agents; the respondent did not suggest that there was any prejudice in allowing the application to proceed out of time; and the impact of the loss of an opportunity to challenge the UT decision has an indirect impact on the petitioner's children and to whom particular duties are owed.

Issue 2: was the test for permission satisfied on the merits of the petition?

[13] The Secretary of State seeks to deport the petitioner and his family. Whether he may do so is governed by the Immigration (EEA) Regulations 2016 ("Regulations 2016") and which imposes the onus on the Secretary of State as well as certain tests to be satisfied. The gravamen of the petitioner's challenge, predicated heavily on *Farquharson*, was that no sufficient "evidence" had been presented to establish the matters incumbent upon the Secretary of State (see Statement 13 and following of the petition). The particular (but not sole) focus of the petitioner's attack was the reliance on essentially hearsay material (and said to be "not self-proving") provided by the police and by the Social Work Department to support a finding that the petitioner failed to control his many children and the societal risks they are said to pose. (The FTT and UT's error is in not accepting that submission.)

[14] The respondent contends that the petitioner's approach is predicated on a fundamental misreading of *Farquharson*, and that that case is not authority for the proposition that a higher evidential burden required to be met in Regulation 2016 cases.

[15] There was a further challenge (in Statement 20 of the petition and following) on the basis that there was a failure to consider the best interests of the petitioner's children. (The further challenge, in Statement 22, as to the alleged inadequacy of the information available about the petitioner's Slovakian conviction is unarguable.)

[16] Having considered the pleadings and productions, I was not persuaded that they disclosed a challenge with reasonable prospects of success. In relation to *Farquharson*, in my view the respondent's submissions are clearly correct. The petitioner's reading of that case, which underpins his challenge to the adequacy of the evidential basis of the adverse decisions, does not disclose grounds with reasonable prospects of success. While the strongest of the challenges appeared to be that concerning the failure to consider the best interests of the petitioner's children, given the importance of those interests and the seriousness with which they must be considered, and for which the reasoning of the FtT and UT might have been fuller, in my view the petitioner's case did not meet the threshold test in section 27B(3)(b). For these reasons, although I had decided the time-bar issue in favour of the petitioner, I was nevertheless obliged to refuse permission upon a consideration of the merits of the petition.