**OUTER HOUSE, COURT OF SESSION**

**[2024] CSOH 88**

**P1184/23**

OPINION OF LORD LAKE

In the Petition

A, B and C

Petitioners

for

Judicial review of the Secretary of State for the Home Department's decisions that the Petitioners' further submissions do not amount to a fresh claim

**Petitioners: D James, Advocate; Drummond Miller LLP**
**Respondent: A McKinlay, Advocate; Office of the Advocate General**

13 September 2024

[1] The petitioners seek review of a decision of the Secretary of State for the Home Department that further submissions made in support of the petitioners' applications to remain in the United Kingdom do not amount to a fresh claim. The first and second petitioners are the father and mother of the third petitioner. She was aged 5 at the time the further submissions were made and is now aged 7.

[2] In September 2018, the second petitioner claimed asylum on the basis of a fear of forced female genital mutilation. The first and third petitioners were dependants on that application. The application was refused and an appeal to the First-tier Tribunal was unsuccessful. On 31 July 2020, the second petitioner submitted further representations to

the Secretary of State, claiming that they amounted to a fresh claim. On 28 July 2022, the Secretary of State determined that these did not amount to a fresh claim. After having sought to submit additional further representations on 11 August 2022 and having been told she must make an application to regularise her stay, on 7 October 2022 the second petitioner made such an application in respect of herself, the first petitioner and the third petitioner. In the context of that application, she submitted the further representations she had previously sought to submit. The further representations relevant to this application were that the third petitioner had an out-patient appointment at an ophthalmology clinic, had been prescribed emollients by her doctor for eczema and had started attendance at school. No issue arises in the arguments before me as to the fact that the second petitioner was required to submit an application in this way and the representations were made in that context. On 6 October 2023, the respondent refused the applications. There was a separate decision letter for each petitioner, but they all had the same application reference. In the letters, the respondent refused the application for leave to remain and concluded that the further submissions did not amount to a fresh claim.

**The applicable legal tests**

[3] The parties were agreed as to the tests that were to be applied by the respondent in making a decision on the application. It was necessary first to decide whether the application for leave should be granted. If it was not granted, it was necessary to decide whether the submissions amounted to a fresh claim. In making this decision, it was first necessary to consider whether the material had been considered before. If it had not, it was necessary to go on and consider whether the material gave rise to a realistic chance that an immigration judge would accept the individual's claim. These propositions were vouched

by reference to *ABC (Afghanistan) v Secretary of State for the Home Department* [2013] CSOH 32, at [11]). In relation to the test of the realistic chance, I was referred to the decision of the Inner House in *SM* v *Secretary of State for the Home Department*, [2022] CSIH 21 where it was noted of the test that:

> "It is whether an immigration judge may find in favour of the asylum seeker, not that he or she would so find. If he or she may, then there is a realistic prospect of success" (paragraph 25).

The petitioner submitted that the decision taker must apply anxious scrutiny when answering the questions.

**Submissions for the petitioner**

[4] In general, the petitioner submitted the issue of whether leave should be granted had been conflated with the issue of whether the new material amounted to a fresh claim. It was submitted that the two stages are distinct and that the test to be applied is different but, on the basis of the contents of the letters, it was not apparent that there had been separate consideration of the test for whether there was a fresh claim.

[5] The arguments were slightly different in respect of each of the petitioners. In relation to the second petitioner, it was noted that the decision letter said that there was no material that had not been considered before. It was argued that this was irrational in that it had been accepted that there was material that had not been considered before in relation to the first and third petitioner and that the same information had been submitted in relation to each person. In relation to the claim by the respondents that any error in this regard was not material, it was submitted that in not having regard to the additional material the respondent could not have approached the decision with the necessary anxious scrutiny and that it was speculation to attempt to determine what the decision might have been had the

information been considered. By reference to *R (Balajigari)* v *Secretary of State for the Home Department* [2019] 1 WLR 4647, it was noted that the test for immateriality was whether the decision would "inevitably" have been the same (paragraph 134). It was submitted that in the circumstances relating to the second petitioner, it was possible that another decision might have been reached in relation to whether there were realistic prospects and therefore whether this was a fresh claim and that was sufficient for the petitioner. It was not necessary to demonstrate that there was in fact a realistic prospect.

[6] Lastly in relation to the second petitioner, it was submitted that the respondent had not addressed the relevant question; the decision letters did not consider whether the material meant that there was a realistic chance of success before an immigration judge and only had reasoning relating to the different and separate issue of whether leave should be granted. It was said that the last sentence of the decision letter which makes some reference to the issue of prospects before an immigration judge was a "token gesture" and that the substance of the letter revealed that the issue that had been considered was only whether leave should be granted and/or whether previous decisions should be overturned.

[7] In relation to the third petitioner, it was said that although the decision correctly recognised that there was material that had not previously been considered, it did not properly evaluate the issue of whether the additional submissions amounted to a fresh claim. It was submitted that that issue had been conflated with the issue of whether leave to remain should be granted. It was submitted that the test of whether there was a reasonable chance of success before an immigration judge was a lower test than that the test for whether leave should be granted and that it had not been considered. It was emphasised that all the petitioner need do is show that there was a reasonable chance and not that she would succeed. The issue was not whether or not the claim was thought to be strong. It was

submitted that there was no reasoning in relation to the application of the correct test and that the absence of reasoning was itself an error. To be lawful, the reasoning would have to identify the correct question and then follow it to indicate how the result was achieved.

[8] In relation to the first petitioner, it was submitted that the same conflation of the issues was apparent and that it was not recognised that the test for a fresh claim was a lower threshold than the test for whether leave should be granted. It was submitted that the only reasoning in the letter concerned the issue of whether leave should be granted, that the issue of whether the submissions amounted to a fresh claim was distinct and that there was no reasoning to support the conclusion that there were no reasonable prospects before an immigration judge. It was submitted also that the connection between the three decisions was such that the claimed errors in relation to the second and third petitioners were relevant also to the first petitioner.

[9] In relation to all of the decision letters it was noted that the decision letters referred to paragraph 353B of the Immigration Rules and it was submitted that this paragraph had no application. The relevant test was in paragraph 353 and the correct test had not been applied.

**Submissions for respondent**

[10] The respondent accepts that there was new material submitted in relation to the applications. It was submitted that despite this, the material related all to the third petitioner, it was slight, the averments in the petition in this regard had no detail and, having regard to these matters, it did not create a realistic prospect of success. It was said that, in reality, there was one decision by a single decision-taker in response to the same material but a separate letter for each applicant. It was said that the decisions in relation to

the first petitioner and, in particular, the third petitioner in relation to the additional material indicate that the result in relation to the second petitioner would have been the same and that no issue of speculation arises in reaching the same conclusion. The respondent placed reliance on the statement within the letters that there was no fresh claim on that basis it was said that there no conflation. It is apparent from the letters that the decision-maker was aware that there were two separate tests and had given a decision on each. It was submitted that to contend that the statements in the letters were "token" was an illegitimate attempt to step into the mind of the decision-maker. It was plain that the test has been identified and considered. It was inconceivable that the same decision-maker, having stated the test in all three decisions and applied it in relation to the first and second petitioner would have left it out of account for the third petitioner.

[11] It was submitted that as all the decisions were given at the same time and the claims had always been treated together, each had to be considered in the context of the other. It therefore did not matter that in respect of the second petitioner it had been stated that all the material had been considered previously. It was noted that submissions tending to bear on Article 8 of the European Convention on Human Rights had been considered previously in June 2022 and at that time they were considered not to amount to a fresh claim. It was recognised that in relation to the materiality argument raised in relation to the second petitioner, it would not be appropriate for the court to substitute its own view. Nonetheless, as the petitioner has expressly said that there was no submission that there was material that generated a realistic prospect, it would be open to refuse to grant the remedy sought on the basis that it is academic.

[12] It was noted that the first page of the letters which make up the decision each states "your submissions do not amount to a fresh claim" and that this indicated that the relevant

issue had been considered and a decision reached in relation to it. It was submitted that the new material all relates to the third petitioner – the child. It was submitted that if this material is considered in the context of the decision letter for the third petitioner, it is apparent that it does not amount to a fresh claim. It was recognised that in relation to this petitioner, it is clear from the letter that there was fresh material and it is apparent that it was considered. If it was judged not to be relevant there, it was apparent that it could not be relevant for the first and second petitioners as it had no relevance to them other than in so far as it affected the claim in relation to the third petitioner. That being so, the same decision followed in relation to the first and second petitioner.

[13] In relation to the arguments that the tests were conflated, it was claimed that the issue of realistic prospects of success inevitably involves consideration of the merits and it was legitimate for the decision-maker to proceed as they had. Although it was a different judgement call, it was the same factual material and there would be no benefit in repeating what had been said in other letters. It was submitted that the petitioners had not been prejudiced by the reasons given and that the basis for the decisions was readily understandable.

[14] It was submitted that although the decisions referred to in paragraph 353B, that itself refers to a situation in which the decision-maker had determined whether submissions amount to a fresh claim under paragraph 353. It was submitted that although the test was not specifically referred to in that decision, the context is clear that the correct issue was identified and considered in relation to the first and second petitioners.

**Decision**

[15] Each of the three letters sent to the petitioners intimates the decision that the individual does not quality for permission to stay in the United Kingdom and then states "In addition, your further submissions do not amount to a fresh claim for the reasons given in the 'reasons for decision' section." In that section of the letter in respect of the first petitioner, after concluding that permission to stay will not be granted, paragraph 25 states:

> "25. I have considered your further submissions together with previously considered material and concluded that your further submissions, although rejected for the reasons given above, would have no realistic prospect of success before an immigration judge, so they do not amount to a fresh claim."

The same text is included in paragraph 19 of the decision in relation to the second petitioner. It is not included in the decision letter in relation to the third petitioner.

[16] As the additional material related to the third petitioner, the decision letter in respect of her is the logical place to start. There was no dispute before me as to whether reasons require to be given. Within the letter to the third petitioner, although there is reference to issues of education and healthcare, including the ophthalmology appointment, in the reasons for the decision to refuse leave to remain, there is no reasoning concerning whether the further information amounts to a fresh claim - ie whether there was a realistic prospect of success before an immigration judge. I have considered whether, in that situation, it is sufficient that there is a clear statement that the submissions do not amount to a fresh claim and/or whether what is said in the reasons section of the letters for the first and second petitioner that there is no realistic prospect before an immigration judge can be read across to this decision. The answer to this issue turns on consideration of what is required by way of reasons.

[17] In *Wordie Property Co Limited* v *Secretary of State for Scotland*, 1984 SLT 345, the Lord President (Emslie) said that reasons must

> "deal with the substantial questions in issue in an intelligible way. The decision must, in short, leave the informed reader and the court in no real and substantial doubt as to what the reasons for it were and what were the material considerations which were taken into account in reaching it."

In *South Bucks District Council and another* v *Porter (No. 2)* [2004] 1 WLR 1953, Lord Brown of Eaton-under-Haywood stated:

> "The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. 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. ..." (paragraph 36)

It is clear form this that what required by way of reasons depends on the context in which they are given. The decision there was a planning decision was in a completely different sphere to the decisions before me. However, the issue at stake in the present decisions seem to be at least as important and to justify at least the same level of reasons as a planning decision.

[18] The statement in the letters that the submissions do not amount to a fresh claim and the statement in two of the sets of reasons that there is no realistic prospect of success before an immigration judge are the conclusions reached on the key issues that were before the respondent. I agree with the submission for the respondent that, despite the error in referring to paragraph 353B of the Immigration Rules, the letters do indicate that the decision-maker had in mind the correct test for a fresh claim. However, the tests for each of the two issues differ with the test for leave to remain being more stringent. This means that leave to remain may be refused but there could still be a reasonable prospect before an immigration judge.

[19] Although reasons are stated for the decision as to leave to remain, in relation to the issue of whether it was a fresh claim, the letters do not indicate the basis on which that decision was reached. As stated by Lord Brown in *South Bucks Council*, giving such an indication of how the decision has been reached is one of the functions of reasons. Although the decision on each issue and the relevant test to be applied are stated, they on the one hand and the reasons for them on the other are distinct matters. In *R* v *Birmingham City Council, Ex p B* [1999] ELR 305, Scott Baker J concluded that in giving reasons, it was not enough merely to state that the test had been applied in making the decision. In my view that is all that has been done here. Even the contents of the letters in respect of the first and second petitioners shed no light on how the test was applied and therefore how the stated conclusion was reached. Those letters identify the subsidiary conclusion that even with additional material the submission would have no realistic prospect of success before an immigration judge but do not state the basis for this conclusion. They therefore did not perform the function of reasons identified in *South Bucks Council*. The reasons underlying the decision might not be hard to divine, but it is not the function of the court to speculate or guess as to what they were. To do this would mean that the purpose identified by Lord Brown was not achieved.

[20] In *Uprichard* v *Scottish Ministers* 2013 SC (UKSC) 219, Lord Reed, giving the decision of the Supreme Court, said that the Court should not impose an unreasonable burden on decision-makers. I do not consider that giving some indication of why it was concluded that even with the additional material there was no realistic prospect of success would have required very much. It would not be an unreasonable burden. Requiring that there is an indication of how the conclusion was reached is not dictating how the letters should be written. It is merely requiring that they have basic content to perform their intended

function. As they stand, not only do the letters for the first and second petitioners not meet the shortfall in the decision letter for the third petitioner, they do not provide adequate reasons for the decisions they record. The result is that the decisions contained in each of the letters fall to be reduced.

[21] Although the above factors mean that the other issues are academic, I will express my views on them briefly in case this matter is considered further. If there were reasons stated in relation to the third petitioner's claim which were sufficient to indicate how the decision had been reached that there were not reasonable prospects before an immigration judge, I would have concluded that the error in the decision for the second petitioner to the effect that there has been no material that had not been considered before would not vitiate the decision. As is submitted for the respondent, it would be apparent from the decision letter relating to the third petitioner that the new material had been considered and had been found not to create reasonable prospects for her. That being the position, it would not create a better prospect for the first or second petitioners, her parents. Accordingly, although there was an error in the decision, it had had no practical effect and it would be academic. There had been a single application leading to all three letters and the letter for the third petitioner was available to the second petitioner. On the hypotheses that the reasons given in relation to the third petitioner were adequate, the petitioners would have the necessary information to verify that the material had been considered and that the correct test had been identified even if they disagreed with the conclusion that was reached.