OUTER HOUSE, COURT OF SESSION

[2020] CSOH 2

P826/19

OPINION OF LORD ERICHT

In the petition

ADEYIMI ODUTOLA ODUBAJO (AP)

Petitioner

for

Judicial Review of a decision of the Secretary of State for the Home Department

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

7 January 2020

Introduction

[1] This judicial review brings sharply into focus the question of when the three month time limit in section 27A of the Court of Session Act 1988 begins to run. The petition challenges a decision of the respondent that an application for asylum was not a fresh claim. The decision was in a letter dated 5 June 2019 and received by the petitioner's solicitor on 7 June 2019. The petition was presented to the court on 6 September 2019. Did the three month period begin on 7 June, in which case the petition is in time? Or did the three month period begin on 5 June, in which case the petition is outwith the three month time limit but the court has an equitable discretion to extend the period?

[2] The petition came before me in chambers for consideration as to whether to grant permission to proceed. I put the petition out for a permission hearing and asked parties to lodge notes of argument and authorities on the question of when the three month time limit starts to run. I took the view that this issue would benefit from consideration and clarification as there appeared to be uncertainty amongst practitioners which was reflected in the respondent not taking a consistent line on this issue in previous cases.

The substance of the case

[3] The petitioner, a citizen of Nigeria, made a claim for asylum which was rejected on 12 July 2018. On 23 April 2019 he made fresh representations, supported by an expert country report dated 26 November 2018 by Professor Aguilar, a psychological report dated 16 January 2019 by Consultant Clinical Psychologist Mary Keenan Ross, and various other documents. By decision dated 5 June 2019, which is the decision challenged in this judicial review, the respondent refused the application as not being a fresh claim.

[4] In the petition the decision is challenged on various grounds, the most significant of which relate to the treatment by the respondent of the reports by Professor Aguilar and Ms Ross. In the decision letter the respondent accepted that both Professor Aguilar and Ms Ross had proved their qualifications and experience and had the expertise to produce such reports. However, the respondent rejected the conclusions of each expert.

[5] Professor Aguilar is a professor at St Andrews University and adviser on Africa to the Scottish Parliament. His report concluded that the petitioner would not be able to obtain police protection on his return to Nigeria. The decision letter rejects Professor Aguilar's November 2018 report on the ground that it is not based on the most up to date country guidance dated March 2019. However, the petitioner submits that although the 2019

country guidance happens to be dated after the professor's report, the factual information within the 2019 guidance pre-dates the professor's report, and therefore the professor's report is based on the most up to date information.

[6] Ms Ross is a Consultant Clinical Psychologist with 29 years' experience as an expert witness in Scottish courts. Her report concluded that the petitioner fulfilled the diagnostic criteria for severe PTSD attributable *inter alia* to life threatening events which occurred in Nigeria prior to the petitioner's departure to the UK. The decision letter rejects Ms Ross's report on the ground *inter alia* that the petitioner has not provided any documentation about the events in Nigeria. The petitioner submits that the absence of documentary evidence about what happened in Nigeria does not invalidate Ms Ross's conclusion.

[7] In my opinion the points made by the petitioner have sufficient merit to proceed to fuller consideration by the court, although of course at this stage I offer no opinion as to whether they will ultimately succeed after full argument. All that is required at this stage is for me to state that I am satisfied that the petition has a real prospect of success within the meaning of section 27B of the Court of Session Act 1988 as explained in *Wightman* v *Advocate General* [2018] SCIH 18 at paragraph 9.

The three month time limit

Petitioner's submissions

[8] Counsel for the petitioner submitted that the "date on which the grounds giving rise to the application first arise" is the date on which the petitioner was notified of the decision. Prior to that he could not bring a challenge to the court. Grounds had not arisen. It was impossible for him to know the grounds or consider framing grounds. A contrary interpretation would mean that time was running when the petitioner did not know that a

negative decision had been taken. In immigration cases it could take over a month to notify an appellant of a decision of the Upper Tribunal refusing permission to appeal. Counsel founded on the majority decision in *Anufrijeva* [2004] 1 AC 604 and *Hakim* v *SSHD* [2001] SC 789 and sought to distinguish *Paterson* v *SCCRC* [2018] CSOH 106 and *William Grant and Sons Distillers* [2018] CSOH 27. Under reference to section 7 of the Interpretation Act 1978 he submitted that service of the decision would have been affected at the time the letter would be delivered in ordinary course of post. *Esto* the petition was not lodged in time, he submitted that it should be admitted late. It was arguably only one day late, there was no prejudice and the petition had merit.

Respondent's submissions

[9] Counsel for the respondent submitted that the date of the commencement of the three month period was the date of decision. This could be seen from *Paterson* v *SCCRC* [2018] CSOH 106 at paragraph 21, the speech of Lord Bingham in *Anufrijeva and Burkett* [2002] 1 WLR 1593 at paragraph 51. The appeal provisions within the immigration system were of little assistance in interpreting section 27A as they made specific provision for when the period began to run, depending on the circumstances. In the event that the court was with the respondent, counsel invited the court to exercise its discretion in favour of extending the time limit. The period by which the time-limit was exceeded was minimal and reflected the two day period which the decision took to reach the petitioner's agent, and there was no prejudice to the respondent.

Discussion and decision

[10] Section 27A of the Court of Session Act 1988 provides:

"**Time limits**

(1) An application to the supervisory jurisdiction of the Court must be made before the end of—
   (a) the period of 3 months beginning with the date on which the grounds giving rise to the application first arise, or
   (b) such longer period as the Court considers equitable having regard to all the circumstances."

[11] The origins of that section are to be found in the Report of the Scottish Civil Courts Review (the "Gill Review") which recommended:

"151. The general rule should be that petitions for judicial review should be brought promptly and, in any event, within a period of three months, subject to the exercise of the court's discretion to permit a petition to be presented outwith that period."

[12] The wording of that recommendation bears an obvious resemblance to Rule 54.5.1 of the Civil Procedure Rules ("CPR") for England and Wales, which provides that as a general rule (subject to exceptions for planning and public procurement judicial reviews):

"(1) The claim form must be filed –
   (a) promptly; and
   (b) in any event not later than 3 months after the grounds to make the claim first arose."

The English court has a discretion to extend that time limit under CPR 3.1 (1) which provides:

"(2) Except where these Rules provide otherwise, the court may –
   (a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired)"

[13] The application of these rules to situations where the date of the decision precedes the notification to the person affected by it is summarised in the White Book as follows:

"The time limit begins to run from the date when the grounds for the claim first arose. The time does not run from the date when the claimant first learnt of the decision or action under challenge, nor from the date when the claimant considers that they had adequate information to bring the claim. Such matters may be relevant to the separate question of whether an extension of the time limit should be granted

> (*R* v *Secretary of State for Transport ex p Presvac Engineering Ltd* (1992) 4 Admin L R 121 at 133-4)" (2019 edition p 1936)

The White Book goes on to say:

> "The courts have accepted that there was good reason for the delay if the applicant was unaware of the decision provided that they applied expeditiously when they became aware of it (*R* v *Secretary of State for the Home Department ex p Ruddock* [1987] 1 WLR 1482; *S (Application for Judicial Review), Re* [1998] 1 FLR 790)" (p1937)

[14] The English rule has been criticised on the ground that rather than a definite three month time limit it is a "promptly" time limit with a backstop of three months: a case can be dismissed as out of time even before the expiry of the three month period if the court takes the view that it was not brought promptly. The European Court of Justice took the view that, in respect of public procurement cases, Article 1(1) of Directive 89/665 precluded a national provision which allowed a national court to dismiss cases as being out of time on the basis of the criterion, appraised in a discretionary manner, that such proceedings must be brought promptly (*Uniplex (UK) Ltd* v *NHS Business Services Authority* paragraph 43). Accordingly, when the Scottish time limit was introduced by the insertion of section 27A into the Court of Session Act by the Courts Reform (Scotland) Act 2014, the section departed from the Gill Review recommendation by omitting the reference to "promptly". This was explained in the Policy Memorandum as follows:

> "The Scottish Government has not taken forward the suggestion in the Review that petitions should be raised promptly or within three months. Case law has established that in the context of EU law a requirement that proceedings should be raised promptly and in any event within three months was not sufficiently certain (*Uniplex (UK) Ltd* v *NHS Business Services Authority* [2010] 2 C.M.L.R. 47, *Buglife* v *Medway Council* [2011] EWHC 746(Admin)). The Bill does not attempt to make different provision for cases raising matters of EU law and sets out a fixed time period of three months for all judicial reviews." (paragraph 179)

[15] I was not referred to any previous Scottish case in which the court had heard submissions and come to a decision on the question of when the three month period in section 27A begins to run.

[16] It is an important principle in respect of good public administration that there should be certainty about the validity of administrative decisions. A time limit contributes to such certainty. Public authorities may, after the expiry of the time limit without a judicial review application having been made, proceed on the basis that the decision is a valid one. A third party who has an interest in the subject matter of the decision may also proceed on that basis. The starting of the calculation of the time limit from the date of the decision contributes towards that certainty. The starting of the time limit period at some later date upon which a petitioner has become aware of the decision is not conducive to that certainty. The public authority and any third party relying on the decision are unlikely to have any knowledge about when the petitioner has become aware of the decision and therefore will be unable to proceed with certainty after the passing of three months. Further, using the date of decision will generally allow the proceedings to progress more expeditiously once they are brought: there may be difficulties in proving the date on which the particular petitioner became aware of the decision, whereas the date of the decision will usually be non-contentious and will not require proof.

[17] There is also an important principle, in respect of the rule of law, that the State must accord to individuals the right to know of a decision before their rights can be adversely affected (*Anufrijeva* at para [28]). This principle also applies in European Union law (*Anufrijeva* at para [29]).

[18] In my opinion the three month time limit under section 27A(1)(a) begins to run on the date on which the decision is made, but if the decision is not received until a later date

that can be taken into account in considering whether to extend the time under section 27A (1)(b). In coming to this opinion, I have taken into account the background to the introduction of the time limit into Scots law. I have also sought to balance the principle of certainty in good administration and the principle of the rule of law. In my opinion both of these principles can be given effect to, and the appropriate balance is achieved, by giving consideration to the knowledge and awareness of the petitioner when dealing with extension of the time limit. This is in line with the approach in European Union law cases. In such cases the court is obliged to use its discretion to extend the time limit so as to ensure the claimant has a period to bring proceedings equivalent to that which the claimant would have had if the time limit had run from the date on which the claimant knew, or ought to have known, of the infringement of EU law (*Uniplex* paragraph 50).

[19] Applying the foregoing to the current case, I find that the application to the court on 6 September 2019 was not made before the end of the period of three months beginning with the date of the decision on 5 June 2019. However, in my opinion it would be equitable in all the circumstances to extend that period to the date on which the decision letter was received that is 6 September 2019. The delay is minimal and reflects the period between the date of the decision and the date of receipt. There is no prejudice to the respondents or any third party. As the proceedings were brought within that extended period, I find that this petition has been brought timeously.

Order

[20] I shall extend the time for the making of this application to 6 September 2019 and grant permission to proceed.