OUTER HOUSE, COURT OF SESSION

[2025] CSOH 49

P1130/24

OPINION OF LADY POOLE

In the cause

VEYSEL ERTURK

Petitioner

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

Pursuer: Forrest; Drummond Miller LLP
Defender: Massaro; Office of the Advocate General

13 June 2025

Background

[1] The petitioner is a 23 year old man of Turkish nationality. The petitioner entered the UK in 2011 as the family member of an EEA national (his father has Dutch citizenship). On 23 June 2017, the petitioner was convicted of six offences. He was sentenced, after appeal, to custody for a period of 3 years and 9 months. He was initially released on licence on 16 June 2019, but after breaching his licence conditions was returned to prison until 1 May 2021 when he had served his sentence. In the light of the petitioner's criminal conviction, the Secretary of State for the Home Department decided to deport him on 21 September 2018. The petitioner does not wish to be deported, and there has been a significant immigration history since 2018, including two different sets of proceedings in the tribunal system and earlier proceedings in this court.

[2] The aspects of the immigration history and other key events relevant to this particular petition are as follows.

June 2018	The Secretary of State made a decision to deport the petitioner. The deportation order was not immediately executed because the petitioner was in prison.
25 July 2018	Solicitors acting for the petitioner made written submissions on the petitioner's behalf. The submissions relied, among other things, on the petitioner's family life in the UK with his mother, stepfather and sister, under article 8 of the European Convention on Human Rights.
16 April 2021	The Secretary of State reconsidered the decision of 21 June 2018, in the light of the submissions of 25 July 2018 and the correct governing regulations. The outcome remained a decision to make a deportation order. The petitioner appealed that decision.
18 January 2022	The First-tier Tribunal upheld the decision of 16 April 2021 and refused the petitioner's appeal. Both the First-tier Tribunal (on 9 March 2022) and the Upper Tribunal (on 6 June 2022) refused permission to appeal to the Upper Tribunal. The matters before the First-tier Tribunal and Upper Tribunal included the petitioner's human rights under article 8.
15 November 2022	The petitioner entered into an arranged marriage with a Lithuanian national, NB, in an Islamic ceremony, and they began to reside together in the UK approximately one week later.
November 2023	NB returned to Lithuania (the petitioner's representations about this say she returned to care for her elderly mother). She has not returned to the UK since.
15 January 2024	A daughter was born to NB in Lithuania. The petitioner has not met his daughter.
20 February 2024	The Secretary of State issued removal directions, an administrative step for giving effect to the deportation order.
22 February 2024	Representations were received from the petitioner's solicitor, which included representations about rights to family life under article 8 based on the petitioner's family, marriage and child.
29 February 2024	The Secretary of State cancelled the removal directions so that the representations of 22 February 2024 could be considered. Around

about this time the petitioner was released from Dungavel immigration detention centre, where he had been detained since approximately 15 January 2024.

9 September 2024 — The Secretary of State issued the decision under challenge in this petition. The Secretary of State declined to revoke the deportation order.

[3] The heading to the decision of the Secretary of State dated 9 September 2024 challenged in this petition is "Rejection of further submissions under paragraph 353 of the Immigration Rules – no right of appeal". The petitioner challenges the Secretary of State's approach to human rights issues raised by him on two grounds: (i) the Secretary of State should have granted the petitioner a right to appeal her decision; and (ii) the Secretary of State erred in concluding there are no realistic prospects of success before an immigration judge. Neither ground succeeds, for reasons given below.

Governing provisions

[4] Section 82(1)(b) of the Nationality, Immigration and Asylum Act 2002 (the "2002 Act") provides:

> "(1) A person ("P") may appeal to the Tribunal where…
> (b) the Secretary of State has decided to refuse a human rights claim made by P".

"Human rights claim" is defined in section 113(1) of the same Act as:

> "a claim made by a person to the Secretary of State at a place designated by the Secretary of State that to remove the person from or require him to leave the United Kingdom or to refuse him entry into the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998 …"

[5] Paragraph 353 of the Immigration Rules provides, insofar as relevant:

> "When a human rights … claim has been refused … 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: (i) had not already been considered; and (ii) taken together with the previously considered material, created a realistic prospect of success, notwithstanding its rejection."

Did the Secretary of State err in stating there was no appeal to the FTT against the decision of 9 September 2024?

The parties' arguments

[6] The petitioner argued that the matters raised in the representations of 22 February 2024 amounted to a human rights claim, which was refused by the Secretary of State on 9 September 2024 (*R (on the application of Alighanbari)* v *Secretary of State for the Home Department* [2013] EWHC 1818 (Admin) at paragraph 70, and *MY (Pakistan)* v *Secretary of State for the Home Department* [2021] EWCA Civ 1500). The petitioner contended that he should have had a right of appeal to the FTT under section 82(1)(b) of the 2002 Act, which gives a right of appeal in relation to human rights claims.

[7] The respondent argued that the petitioner had already made a human rights claim in the representations of 25 July 2018. The human rights claim had been decided when the Secretary of State rejected it on 16 April 2021, and made a deportation order. That decision had been upheld in the tribunal system. The additional human rights representations of 22 February 2024 therefore fell to be dealt with under paragraph 353 of the Immigration Rules. Because the test for a fresh claim had not been met under paragraph 353, there was no human rights claim giving rise to a right of appeal under section 82 of the 2002 Act (*R (on the application of Robinson)* v *Secretary of State for the Home Department* [2019] UKSC 11).

Decision

[8] The law is clear about the correct approach to the petitioner's representations based on human rights in the letter of 22 February 2024. In *Robinson*, the UK Supreme Court found that when a person had already had a human rights claim refused and there was no pending appeal, further submissions which relied on human rights grounds had first to be accepted by the Secretary of State as a fresh claim under rule 353, if a decision in response to those representations was to attract a right of appeal under section 82 of the 2002 Act. To explain why, the court quoted a dictum of Sales LJ (as he then was) at paragraph 57:

> "Section 82(1) and paragraph 353 of the Immigration Rules operate in combination. If the Secretary of State decides that new representations in relation to some earlier decision (whether of her own or by the tribunal) which is now final and closed do not amount to a fresh claim under paragraph 353 she will simply reject the representations as matters which do not affect the position of the applicant within the regime of immigration law. In that sort of case, on the assessment of the Secretary of State the representations do not amount to a 'claim' by the applicant, so her decision is not a decision 'to refuse a human rights claim' (or any other sort of claim) within the scope of section 82(1). No right of appeal arises in relation to her decision that the new representations do not amount to a fresh claim. Such a decision can only be challenged by way of judicial review".

Section 82(1)(b) of the 2002 Act was not intended to open the door so as to enable repeated claims raising human rights issues to generate multiple appeals (para 62).

[9] In this case, the petitioner made a human rights claim in representations made on his behalf on 25 July 2018. The human rights claim was rejected by the Secretary of State in her decision of 16 April 2021 to make a deportation order. There is no pending appeal, because the petitioner's appeal (which included human rights grounds) was rejected by the First-tier Tribunal on 18 January 2022, and permission to appeal to the Upper Tribunal was refused.

[10] Had the representations in the letter of 22 February 2024 stood alone, there is little dispute that they would have amounted to a human rights claim within the definition in section 113 of the 2002 Act. But they do not stand alone, because there was an earlier human

rights claim that was determined and unsuccessfully appealed through the tribunal system. Following *Robinson*, the Secretary of State was correct to assess the human rights representations in the letter of 22 February 2024 under paragraph 353 of the Immigration Rules. The outcome of that exercise was that the Secretary of State did not accept there was a fresh claim. There was therefore no "claim" to which the appeal rights under section 82(1)(b) of the 2002 Act could attach. The Secretary of State did not err in stating there was no right of appeal. The only challenge available is by way of judicial review, which is a right exercised by the petitioner in his second ground of challenge.

Did the Secretary of State err in finding that there are no realistic prospects of success?

The parties' arguments

[11] It was argued on behalf of the petitioner that his human rights claim had changed from his earlier reliance on Article 8, because of the new factor of his arranged Islamic marriage on 15 November 2022, his subsequent family life with his wife, and his child. This was significantly different from his earlier representations. The Secretary of State had been wrong in fact to say at paragraph 20 of her decision that the petitioner had not claimed to be in a relationship with a partner in the UK, and that his wife had been living in Lithuania since 2022. While it might not be easy for the petitioner to succeed before an immigration judge, it could not be said there were no realistic prospects of success before a judge as opposed to the Secretary of State (*WM (Democratic Republic of the Congo)* v *Secretary of State for the Home Department* (2007) Imm AR 337). The petitioner was married, had a child, and intended to resume the family life already established with his wife in the UK.

[12] The respondent argued that there was no material error in the Secretary of State's decision, nor was it irrational. The petitioner's wife was not a UK national but Lithuanian,

she had been in Lithuania since 2023, and the petitioner had never met his daughter. Article 8 did not require the petitioner to remain in the UK, when his wife and daughter were not in the UK.

Decision

[13] The approach to be taken to the application of paragraph 353 is settled law (*SM* v *Secretary of State for the Home Department* 2022 SLT 1142 paras 7-9). The aspect of the Secretary of State's decision under that paragraph which is challenged in this case is the finding that the new submissions, taken together with previously considered material, did not create a realistic prospect of success before an immigration judge, and so did not amount to a fresh claim.

[14] There is no material error of fact in the decision of the Secretary of State. It is true that paragraph 20 of the decision of 9 September 2024 says the petitioner's wife has been living in Lithuania since 2022, but that is clearly a typographical error, given that the date she returned to Lithuania is correctly given as November 2023 in paragraph 54 of the same decision addressing paragraph 353. What is said about the petitioner not claiming to be in a relationship with a partner in the UK in paragraph 20, read in context, is a recognition of the correct factual position – that at the time of making the decision the petitioner was not in a relationship with a partner in the UK, because she had returned to Lithuania 10 months before.

[15] Nor was it irrational for the Secretary of State to decide that the material before her gave rise to no real prospect of success before an immigration judge. The material provided in 2018 had already been found of itself not to give rise to any violation of the petitioner's human rights were he to be deported. The new material was not of the nature that it created

any realistic prospect that, even when considered with the earlier material, the petitioner would succeed at tribunal. The petitioner had never met his child. The child and the petitioner's wife were in Lithuania and had been for some time. They were not UK nationals. The marriage had been entered into when the petitioner knew he was liable to be deported. The new information, together with the previous information, created no realistic prospect of success on the basis of human rights before an immigration judge applying anxious scrutiny. The Secretary of State was entitled to find that the submissions of 22 February 2024 did not amount to a fresh claim, and that no right of appeal arose under section 92 of the 2002 Act.

Conclusion

[16] The petition is refused. The petitioner is liable to the respondent in the expenses of the petition, but modified to nil under section 18 of the Legal Aid (Scotland) Act 1986, as agreed between the parties.