IN THE UPPER TRIBUNAL

R (on the application of Jennifer Kerr) v Secretary of State for the Home Department IJR [2014] UKUT 00493(IAC)

Field House,
Breams Buildings
London

Monday, 22 September 2014

BEFORE

UPPER TRIBUNAL JUDGE JORDAN

Between

JENNIFER KERR

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Mr M Biggs, instructed by Callistes Solicitors appeared on behalf of the Applicant.

Ms N Patel, instructed by the Treasury Solicitor appeared on behalf of the Respondent.

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JUDGMENT

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JUDGE JORDAN: This is the substantive consideration of an application to judicially review the decision of the Secretary of State made on 9 March 2013 refusing the applicant's claim for leave to remain in the United Kingdom in order to pursue an established private and family life under Article 8 of the ECHR.

2. The applicant is a citizen of Jamaica who was born on 30 September 1964. She is now 49 years old. She entered the United Kingdom in May 2001 as a visitor and has remained unlawfully ever since the expiration of her visit visa sometime towards the end of 2001. On 24 September 2011, she married her husband, Jonathan White, a British citizen. About 12 months later, on 28 September 2012, by which time she had been in the United Kingdom for over 11 years (none of which, save the first six months, was lawful presence) she applied for leave to remain in the United Kingdom under Article 8 on the basis of the family life that she had developed with her husband in the preceding 12 months.

3. No attempt was made to make an application under the Immigration Rules as a spouse. Accordingly, the application did not address the formal requirements for entry clearance as a spouse, including the financial and maintenance requirements.

4. On 9 March 2013 the application was refused. No removal directions were made at that time but the applicant was warned that, if she failed to leave, enforcement action would be taken. Subsequently, the respondent was urged to issue removal directions providing her with a right of appeal under section 82 of the Nationality, Immigration and Asylum Act, 2002.

5. The respondent’s decision was prompted by an application made on 28 September 2012 supported by 15 groups of documents including bank statements from her husband, a letter from her husband's accountant showing that his business had an annual turnover of £131,626 (and £60,000 for the next 2½ month period) and a letter from HMRC.

6. The letter under challenge makes reference to the applicant's spouse by reference to a consideration of Appendix FM and the requirements of R-LTRP.1.1 that the applicant must have a valid application for limited or indefinite leave to remain as a partner and that the applicant must have lawful presence in the United Kingdom but not as a visitor or with limited or with leave of six months or less or on temporary admission. Accordingly, the fact that the applicant entered the United Kingdom in May 2001 as a visitor effectively precluded her from meeting these requirements. Thereafter the decision maker went on to consider paragraph 276ADE.

7. This resulted in setting out a series of requirements that were immaterial for the applicant. It was not, of course, suggested that she had 20 years residence in the United Kingdom or that she was under the age of 18 or that she was under the age of 25. Nevertheless, these considerations were considered and inevitably rejected. The only material part of paragraph 276ADE related to sub-paragraph (vi) applying to a person who was over 18 but had not lived continuously in the United Kingdom for 20 years but who established she had no ties, including social, cultural or family ties, with Jamaica. Quite properly, the decision maker reached the conclusion that, having been in the United Kingdom since May 2001 but having spent the first 37 years of her life in Jamaica, the applicant failed to establish that she had lost all ties there.

8. That was the only consideration that was provided pursuant to Article 8. There was no reference to whether the particular circumstances of the applicant might amount to an exception to the norm in accordance with the now established case law.

9. I do not consider that decisions of this type should be over prescriptive in their contents. If a person has entered the United Kingdom as a visitor and has overstayed, there can be no requirement that the decision maker has to go through the process of considering whether there are exceptional circumstances when there are none. This is not a formulaic exercise. However, where as here, the decision maker focused on a series of matters which were largely irrelevant, such as the position of a person who is under 18 or between the ages of 18 and 25 and treats the applicant's failure to meet those requirements as determinative, it is apparent that the decision does not engage with the fact that there may be circumstances beyond those considerations which a decision maker must acknowledge. It may only have required the briefest of references but, in this case, there was none. For this reason I consider that the decision of 9 March 2013 was unlawful. It follows that it should be set aside.

10. However, matters do not end there. In accordance with directions that were attached to the grant of permission, the respondent was required to serve a skeleton argument. Such a skeleton argument was served on 10 September 2014. On the same day, the respondent served the appellant with a further decision.

11. It was described in the following way:

> "…this letter is supplemental and should be read in conjunction with the original decision."

12. Mr Biggs submitted that no consideration should be given to this letter. He submitted that it did not contain an acknowledgement that the earlier decision was wrong and was withdrawn; he submitted it was not a new decision and was expressly stated to be supplemental. In such circumstances he submitted that it was unlawful in accordance with the principles set out in the decision of the Court of Appeal in Ermakov, R (on the application of) v Westminster [1995] EWCA Civ 42.

13. The issue that arose in Ermakov was whether the judge erred in having regard to reasons for the decision advanced by the Council's principal homelessness officer in an affidavit when those reasons were fundamentally different from the reasons communicated to Mr Ermakov in the Council's section 64 letter notifying him of their decision and the reasons for it.

13. Reference was made to the classic statement of Lord Scarman in Westminster City Council v Great Portland Estates Plc [1985] 1 AC 661 at 673:

> "Failure to give reasons. When a statute requires a public body to give reasons for a decision, the reasons given must be proper, adequate and intelligible. In In re Poyser and Mills' Arbitration [1964] 2 QB 467, Megaw J had to consider section 12 of the Tribunals and Inquiries Act 1958 which imposes a duty upon a tribunal to which the Act applies or any minister who makes a decision after the holding of a statutory inquiry to give reasons for their decision, if requested. Megaw J commented, at page 478:
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> > 'Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised.'"

14. Starting from that point of principle, the appellant in Ermakov argued that it could not be right to admit, as justification of the decision, this later evidence, since to do so would nullify the very objects and advantages underlying the requirement to provide reasons. It was conceded that evidence may be admitted to amplify the reasons given in the decision letter, but the weight of authority was against allowing wholly deficient statutory reasons to be made good by affidavit evidence in the course of proceedings. Hutchison LJ stated:

> "(2) The court can and, in appropriate cases, should admit evidence to elucidate or, exceptionally, correct or add to the reasons; but should, consistently with Steyn LJ's observations in ex parte Graham, be very cautious about doing so. I have in mind cases where, for example, an error has been made in transcription or expression, or a word or words inadvertently omitted, or where the language used may be in some way lacking in clarity. These examples are not intended to be exhaustive, but rather to reflect my view that the function of such evidence should generally be elucidation not fundamental alteration, confirmation not contradiction. Certainly there seems to me to be no warrant for receiving and relying on as validating the decision evidence - as in this case - which indicates that the real reasons were wholly different from the stated reasons. It is not in my view permissible to say, merely because the applicant does not feel able to challenge the bona fides of the decision-maker's explanation as to the real reasons, that the applicant is therefore not prejudiced and the evidence as to the real reasons can be relied upon. This is because, first, I do not accept that it is necessarily the case that in that situation he is not prejudiced; and, secondly, because, in this class of case, I do not consider that it is necessary for the applicant to show prejudice before he can obtain relief. Section 64 requires a decision and at the same time reasons; and if no reasons (which is the reality of a case such as the present) or

wholly deficient reasons are given, he is prima facie entitled to have the decision quashed as unlawful.

(3) There are, I consider, good policy reasons why this should be so. The cases emphasise that the purpose of reasons is to inform the parties why they have won or lost and enable them to assess whether they have any ground for challenging an adverse decision. To permit wholesale amendment or reversal of the stated reasons is inimical to this purpose. Moreover, not only does it encourage a sloppy approach by the decision-maker, but it gives rise to potential practical difficulties. In the present case it was not, but in many cases it might be, suggested that the alleged true reasons were in fact second thoughts designed to remedy an otherwise fatal error exposed by the judicial review proceedings. That would lead to applications to cross-examine and possibly for further discovery, both of which are, while permissible in judicial review proceedings, generally regarded as inappropriate. Hearings would be made longer and more expensive.

(4) While it is true, as Schiemann J recognised in ex parte Shield, that judicial review is a discretionary remedy and that relief may be refused in cases where, even though the ground of challenge is made good, it is clear that on reconsideration the decision would be the same, I agree with Rose J's comments in ex parte Carpenter that, in cases where the reasons stated in the decision letter have been shown to be manifestly flawed, it should only be in very exceptional cases that relief should be refused on the strength of reasons adduced in evidence after the commencement of proceedings. Accordingly, efforts to secure a discretionary refusal of relief by introducing evidence of true reasons significantly different from the stated reasons are unlikely to succeed."

14. The principles set out in Ermakov have no application in the present case. They were directed towards the lawfulness of an earlier statutory decision. Such a decision cannot be remedied by what is said later. In this case I have already made a

finding that the decision of March 2013 is unlawful. It was unlawful and remains unlawful and will always be unlawful. Nothing that is said in the decision of 10 September 2014 alters the lawfulness of the earlier decision. Indeed, the very fact that it was thought necessary to provide another letter strongly suggests that the earlier decision was deficient and required the consideration of additional material.

15. The relevance of the letter of 10 September 2014 is focused upon the *remedy* that the Tribunal affords when an earlier decision is found to be unlawful but is followed by a later decision. If the later decision is a lawful consideration of all of the factors that the decision maker was required to consider but failed to consider in the earlier decision and omits consideration of all those factors that the decision maker was required to omit, the later decision will be a lawful one. This does not alter the status of the earlier decision. As I said in the course of argument, if judicial review proceedings are commenced alleging that the relevant decision is unlawful, those proceedings will have been justified and their commencement will remain justified at least until a lawful decision is made. Hence, the applicant is protected insofar as the costs are concerned until at least the letter of 10 September 2014 was received. Thereafter, an applicant is entitled to a little time in which to consider the ramifications of the later letter and to consider whether the judicial review proceedings should continue, to include, where appropriate, a suitable provision for the payment of costs. Thus protected, there is no prejudice suffered by the applicant from the Tribunal considering the subsequent letter providing that, in doing so, the applicant is afforded sufficient time to consider it and it is not unfair for the Tribunal to express its views about its lawfulness.

16. This is a necessary corollary of its determination that the earlier decision was unlawful. If the earlier decision is quashed, it would normally be appropriate to direct that the respondent makes a fresh and lawful decision. If, however, a fresh and lawful decision has already been made, there is no point in requiring a further decision which would, of necessity, replicate what has already been decided. Accordingly, it is necessary to look at the decision of 10 September 2014 in order to determine the appropriate remedy. If the decision of 10 September 2014 merely replicates the error of the original decision, the respondent's position is advanced no farther and the appropriate remedy is to direct that the respondent must make a fresh and lawful decision.

17. Mr Biggs submitted that the letter of 10 September 2014 which is expressed to be a supplemental decision and to be read in conjunction with the original decision did not amount to a decision at all and should be disregarded as it sought to enlarge the decision of 9 March 2013 which was impermissible on Ermakov grounds. For the reasons that I have given, this is not the function of the subsequent letter. Since the letter of 9 March 2013 was a sustainable disposition of the applicant's claims under those parts of the Immigration Rules there referred to, there was no reason to withdraw that part of the reasoning. It was not the decision maker’s application of the Immigration Rules that rendered the letter unlawful. Hence it does not matter that the earlier decision was not withdrawn by the later decision. Nor does it matter that the letter was expressed to be supplemental, as indeed it was. There is no doubt that it was a decision because it considered all the relevant material and purported to reach a sustainable conclusion upon it.

18. Consideration of the letter of 10 September 2014 reveals a proper consideration of the applicant's claim arising from the

fact that she married a British citizen on 24 September 2011 and that there are no children of the marriage. Consideration was then given to Appendix FM and in particular to the so-called 'partner route' leading to settlement. As the applicant had been in breach of immigration laws by overstaying for a period in excess of 11 years, it was necessary to establish her case fell within one of the exceptions contained in the Rules. Such an exception would apply if there were insurmountable obstacles to the couple continuing their relationship outside the United Kingdom. The letter records that the applicant had been given the opportunity in the application form to set out the reasons why there were insurmountable obstacles in her husband continuing family and private life to together in Jamaica and she did not do so, see 6.12, page 42. However, the decision maker acknowledged that the applicant's husband was self-employed with a business in the hotel industry and there was nothing to show those skills were not transferable in Jamaica.

19. The applicant argued before me that it would be unduly harsh for him to give up his business in the United Kingdom which generates a considerable turnover in order to commence a speculative existence in Jamaica. I am not satisfied that the respondent's view that there were no insurmountable obstacles was an irrational one. However, in the circumstances of this case, it is immaterial whether there are, or are not, insurmountable obstacles.

20. The reason for this is because the decision maker went on to consider the issue of the applicant returning to Jamaica to pursue an out-of-country application for leave to enter as a spouse. The decision letter reads:

> "Your client has remained in the United Kingdom for 11 years without leave to remain and is now married to a British citizen. All the factors which are considered to be in your client's

favour had been carefully considered (such as the length of her relationship with her husband and that he is a British citizen), they are outweighed by other factors such as your client's poor immigration history, that the relationship with her husband was formed when her immigration status was known to be precarious, and it would not be unreasonable or disproportionate to expect her and her husband to go to Jamaica to continue their family life there. Nor, considering the same factors would it be unreasonable or disproportionate to expect your client to make an application for entry clearance as a spouse from Jamaica, if she and her husband wish for her to return to the UK."

21. This is unquestionably a lawful decision for the respondent to have made in accordance with the principles set out in Chikwamba v SSHD [2008] UKHL 40 where the House of Lords, whilst making it plain that the principle is not limited to cases where children are involved, applies to all cases where there is likely to be a significant interference with the family and private lives of a returnee whose application for entry clearance will succeed. In SSHD v Treebhowan and Hayat [2012] EWCA Civ 1054 overturning Hayat (nature of Chikwamba principle) Pakistan [2011] UKUT 00444 (IAC), the principles were summarised in these terms:

"30. In my judgment, the effect of these decisions can be summarised as follows:

a) Where an applicant who does not have lawful entry clearance pursues an Article 8 claim, a dismissal of the claim on the procedural ground that the policy requires that the applicant should have made the application from his home state may (but not necessarily will) constitute a disruption of family or private life sufficient to engage Article 8, particularly where children are adversely affected.

b) Where Article 8 is engaged, it will be a disproportionate interference with family or private life to enforce such a policy

unless, to use the language of Sullivan LJ, there is a sensible reason for doing so.

c) Whether it is sensible to enforce that policy will necessarily be fact sensitive; Lord Brown identified certain potentially relevant factors in *Chikwamba*. They will include the prospective length and degree of disruption of family life and whether other members of the family are settled in the UK.

d) Where Article 8 is engaged and there is no sensible reason for enforcing the policy, the decision maker should determine the Article 8 claim on its substantive merits, having regard to all material factors, notwithstanding that the applicant has no lawful entry clearance.

e) It will be a very rare case where it is appropriate for the Court of Appeal, having concluded that a lower tribunal has disproportionately interfered with Article 8 rights in enforcing the policy, to make the substantive Article 8 decision for itself. *Chikwamba* was such an exceptional case. Logically the court would have to be satisfied that there is only one proper answer to the Article 8 question before substituting its own finding on this factual question.

f) Nothing in *Chikwamba* was intended to alter the way the courts should approach substantive Article 8 issues as laid down in such well known cases as *Razgar* and *Huang*.

g) Although the cases do not say this in terms, in my judgment if the Secretary of State has no sensible reason for requiring the application to be made from the home state, the fact that he has failed to do so should not thereafter carry any weight in the substantive Article 8 balancing exercise."

22. Where an applicant has remained in the United Kingdom lawfully and establishes that she meets the requirements of the immigration rules for entry clearance in one capacity or another it may be disproportionate to require the applicant to return to the country of her nationality. If, in the case of

a person with an exemplary immigration history, the consequences are likely to be losing her job in the United Kingdom, remaining and accommodating herself in a foreign country where conditions may be difficult and where she has established there is a prolonged wait for a decision and where the remaining spouse in the United Kingdom may have to give up his work to look after the children, the disruption and cost will impose a disproportionate burden if the only public interest in requiring the applicant to suffer those burdens is the bare requirement to make an out of country application which, on the evidence, is bound to succeed. The *amour propre* of the respondent must give way to common sense. However, where an applicant has abused the immigration rules and has formed a relationship in circumstances conventionally described as being "precarious", there is a sound reason for requiring the applicant to make an out-of-country application as she would be required to do were she not to be unlawfully in the United Kingdom. If there is no evidence that any undue hardship will be caused by exercising this option, there is little that can be said to be disproportionate. Furthermore, unless an applicant has established that the requirements of entry clearance have been met, a decision that removal would be disproportionate must inevitably factor into the decision the recognition that it was unnecessary to determine whether the rules have been met, which is itself significant.

23. Even if the reality of the applicant's future lies in the United Kingdom, it was open to the respondent to decide that it was not disproportionate to refuse the application for leave to remain under Article 8 where there is a viable and reasonable option of returning to Jamaica to make a lawful application for entry clearance. There is no reason why the applicant cannot establish the maintenance requirements of the immigration rules but, so far, the only material before the

decision maker and Tribunal was a letter from the husband's accountant setting out the business turnover without reference to the commitments of the business.

24. Mr Biggs also sought to argue that the decision not to issue removal directions was unlawful. He accepted that in accordance with the decision in Daley Murdock v SSHD [2011] EWCA Civ 161, there is no duty to issue removal directions at the same time as the refusal of leave to remain. However, he sought to argue that, as soon as an applicant expresses an intention to the respondent not to leave the United Kingdom, the respondent is then obliged to issue a removal decision because there is no longer any room for the respondent to believe the applicant will depart voluntarily. This is simply unarguable. It imposes a duty upon the respondent where none exists simply at the election of the applicant, irrespective of the discretion held by the respondent to decide the priority in which removal directions will be made in accordance with, where applicable, policies which determine priority.

25. For these reasons, I consider that the decision of 10 September 2014 adequately performs its function of making a lawful decision on the application for leave to remain outside the Immigration Rules and on the basis of the applicant's private and family life. It is, therefore, unnecessary to require the respondent to make a further decision. The fact that this decision was only made at the time that the respondent’s skeleton argument was filed is not a reason to disregard it. Ms Patel drew to my attention the circumstances in R (on the application of Nagre) v SSHD [2013] EWHC 720 where the relevant hearing took place on 19 March 2013 and the fresh decision was made to 18 March 2013, [paragraph 2]. Whilst each case must, of course, be decided on its facts, an applicant will normally be protected by an order for costs

unless there is unfairness. No application was made for an adjournment to take instructions on the letter of 10 September 2014 and there has, of course, been a period of about a week in which to take these instructions prior to the hearing. Inevitably, an applicant should not be ambushed by a late-served fresh decision which addresses the shortcomings in an earlier decision and, to that extent, remedies them, but the position can be safeguarded by an order for costs or, where one is made and found to be necessary, an application for an adjournment.

26. Having quashed the order of 9 March 2013, I make no order for any further relief. Whilst, technically, this permits the applicant a further challenge to the decision of 10 September 2014, the practical consequences of this decision are that no such challenge has a viable prospect of success.

27. The parties are permitted 7 days in which to make their submissions as to the proper order for costs, such submissions to be limited to 2 sides of A4. I have already expressed my provisional view that the applicant is entitled to her costs at least until receipt of the letter of 10 September 2014. Unless otherwise agreed, I shall make a summary assessment on the papers.

28. I refuse Mr Biggs application for permission to appeal. For the reasons I have given, I do not consider that the Tribunal's reliance upon the respondent’s decision of 10 September 2014 is unlawful when it is considered in the context of deciding the relief to which the applicant is entitled.~~~*0*~~~~