OUTER HOUSE, COURT OF SESSION

[2017] CSOH 154

P447/17

OPINION OF LORD PENTLAND

In the petition

AH

Petitioner

against

Secretary of State for the Home Department

Defender

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

7 December 2017

[1] In this Petition for Judicial Review the petitioner, a citizen of the United States of America, sought reduction of a decision made on behalf of the Secretary of State for the Home Department ("the Secretary of State") on 17 February 2017 to the effect that certain additional representations that he should be allowed to remain in this country did not amount to a fresh claim for the purposes of paragraph 353 of the Immigration Rules. The case called before me for a substantive first hearing, at which both the petitioner and the Secretary of State were represented by counsel.

[2] The Secretary of State accepted that the further information submitted to her constituted new material, but decided that the new matters were not significantly different

from the information that had previously been submitted and therefore the new information did not amount to a fresh claim for the purposes of paragraph 353.

[3] As the decision letter records, the basis of the application made to the Secretary of State was essentially that the petitioner's British partner, Ms B, has a severe alcohol-related medical condition and that there would be insurmountable obstacles to her ever emigrating to the United States to live there with the petitioner.

[4] The debate before me at the first hearing focussed on the meaning and effect, in the petitioner's case, of certain paragraphs of the Immigration Rules. These provisions are set out in full in paragraph 10 of the decision letter. They are known as EX.1 and EX.2.

[5] Paragraph EX.1 provides as follows:

> "This paragraph applies if
> …
> (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen settled in the UK or in the UK with refugee leave or humanitarian protection and there are insurmountable obstacles to family life with that partner continuing outside the UK."

Paragraph EX.2 states the following:

> "For the purposes of paragraph EX.1(b) 'insurmountable obstacles' means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner."

Paragraph 10 of the decision letter included the following:

> "Although (Ms B) is British it is not considered this presents an insurmountable obstacle to family life continuing overseas in the United States of America, with the support of you and your family who continue to reside in the United States of America. It would also be reasonable to expect family and private life to continue from overseas by telephone, social media and the internet, and through occasional visits until you or (Ms B) are able to satisfy the respective immigration requirements of the United States of America or the United Kingdom for leave to enter as a partner."

[6] It is also important to set out paragraphs 16 and 17 of the decision letter, around which much of the debate at the first hearing revolved. Paragraph 16 stated the following:

> "You state that the USA does not make provision for cohabiting partners to be admitted to the States. For a fiancé application you would require an income of $20,024 to be admitted. You state that as a couple you do not have such an income and that (Ms B) would not qualify for a waiver as she does not fall within the categories listed. You stated that this therefore is an insurmountable obstacle to family life continuing outside of the United Kingdom, as (Ms B) could not go to the USA."

Paragraph 17 continued as follows:

> "This point has been carefully considered. Whilst it is accepted that you are in a genuine and subsisting relationship with (Ms B), it is considered that you have built a relationship with a British citizen in the full knowledge that you have no leave to remain in the United Kingdom and would at some point be expected to leave the country if you were unable to regularise your status and were found to have overstayed. It is acknowledged that the rules and regulations governing immigration in the USA may mean that (Ms B) is currently unable to apply under her preferred category, however, it is considered that (Ms B) may currently be eligible to apply for a visitor visa. It would then be your responsibility as a couple to ensure that you fully met any requirements made by the USA or the United Kingdom before making any further applications or plans to reside together."

[7] Mr Caskie for the petitioner advanced three lines of argument. First, he submitted that for the purposes of paragraphs EX.1 and EX.2 family life meant only family life where both partners were living together in a country outside the United Kingdom. So, Mr Caskie argued, the Secretary of State was wrong to proceed on the footing that in this context family life could continue where one partner was in the United Kingdom and the other was abroad and they were able to remain in touch by visits and by telephone and internet contact. Second, Mr Caskie submitted that in paragraph 17 of the decision letter the Secretary of State had taken account of an irrelevant consideration, namely the precarious nature of the petitioner's unlawful residence in this country. Whilst Mr Caskie acknowledged that this factor could play a part in an assessment of whether there had been an infringement of Article 8 ECHR rights, it could properly arise only in a case outside the Immigration Rules; it

was irrelevant to the exercise of considering whether paragraphs EX.1 and EX.2 of the Immigration Rules applied in the circumstances of the petitioner's case. Third, Mr Caskie maintained that by looking at the prospects of Ms B succeeding in attaining the right to live permanently in the United States in the future the Secretary of State had misdirected herself. On a proper analysis all that mattered was the position as at the date of the Secretary of State's decision, namely 17 February 2017.

[8] I shall deal with each of Mr Caskie's submissions in the order in which they were advanced.

[9] On the first point, I consider that family life for the purposes of paragraphs EX.1 and EX.2 should not be read in the narrow way suggested by Mr Caskie. In my opinion, it is certainly possible for family life within the meaning of those provisions to continue whilst the relevant family members are in different countries. In the context of the present case I see no reason why there could not be said to be a meaningful continuation of family life for the purposes of the relevant paragraphs of the Immigration Rules whilst Ms B remains in the United Kingdom and the petitioner is in the United States. On this branch of the argument I find myself in agreement with the submission advanced by Miss Smith in her Note of Argument for the respondent that family life is not a fixed idea; rather it is a wide-ranging notion. Family members often have to spend time apart and sometimes for lengthy periods of time, but these separations do not in themselves mean that family life thereby disintegrates or is in some sense suspended. It seems to me that it can continue, although it may have to be experienced in different ways and at different levels than if the parties were living together under the same roof in a single country.

[10] As to Mr Caskie's second line of argument, I am not persuaded that any irrelevant matter has been taken into account in paragraph 17. The first sentence is, in my view,

included merely as background to what follows or, putting it another way, as context setting the scene for the paragraph as a whole. The sentence simply draws attention to the fact that the petitioner had been living in this country in the knowledge that he was likely at some stage to be called upon to leave if he was not able to put his immigration status onto a regular footing. In those circumstances, one might have expected that the petitioner would have done more than he has in fact done to assemble convincing evidence that there would be insurmountable obstacles to the parties eventually living together on a permanent basis in the United States.

[11] On Mr Caskie's third point, I do not agree that the focus must only be on the parties' circumstances as at the date of the decision. This seems to me to be unrealistic. The idea behind paragraphs EX.1 and EX.2 is to allow consideration to be given to whether obstacles can be overcome. That seems to me to have an inherently forward-looking perspective. Otherwise the position would be highly artificial and would open the door to manipulation of matters by unscrupulous applicants. The dictum of Lord Mulholland in the case of *Amjad* v *Secretary of State for the Home Department* [2017] CSOH 12 at paragraph [8], on which Mr Caskie placed some reliance, cannot in my view be read across to the context of the present case; *Amjad* was concerned with quite different questions than those which arose before me.

[12] Stepping back from the details of the decision letter for a moment and trying to take a realistic view of matters, it seems to me that the petitioner failed to put before the Secretary of State anything that came close to a plausible case that there would be insurmountable obstacles in the way of Ms B joining him in the United States in the fullness of time. I note that in her statement she expressed the hope that the parties will marry one another and observed that the petitioner has received many job offers in this country. In these circumstances, there is no convincing reason to suppose that she would not in due course be

able to join the petitioner in the United States on the basis of a fiancé application when he has secured employment there at the modest earnings of $20,024 per annum. It is these considerations that the decision-maker clearly had in mind in paragraphs 16 and 17 of the decision letter. Understood in that light, the considerations referred to in those paragraphs seem to me to be entirely germane to the issues raised by paragraphs EX.1 and EX.2 of the Immigration Rules.

[13] In these circumstances, I consider that the decision taken on behalf of the Secretary of State and reflected in the decision letter was at least a reasonable one. Indeed, I would go further and say that it appears to me to have been clearly the correct decision. There is no reason to think that the decision was not taken with anxious scrutiny; the contrary was not suggested by Mr Caskie. There was, I consider, no basis for supposing that an immigration judge might regard the new information as sufficient to justify allowing the petitioner to remain in this country. On the contrary, the totality of the information put before the Secretary of State was thin and unconvincing for the purpose of attempting to demonstrate that the obstacles to the petitioner and Ms B having a family life outside the United Kingdom were insurmountable.

[14] For these reasons I must refuse the Petition. I shall sustain the respondent's fourth and fifth pleas-in-law and repel the petitioner's pleas. I shall find the petitioner liable to the respondent in the expenses of the Petition and modify the petitioner's liability for those expenses, as an assisted person, to nil.