



SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2019] CSIH 21
P447/17

Lord Justice Clerk
Lord Drummond Young
Lord Malcolm

OPINION OF THE COURT

delivered by LADY DORRIAN, the LORD JUSTICE CLERK

in the Reclaiming Motion

by

ARNALDO HERNANDEZ

Petitioner and Reclaimer

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Appellant: Caskie; Drummond Miller LLP (for McGlashan Mackay, Solicitors, Glasgow)

Respondent: C Smith; Office of the Advocate General

2 April 2019

Background

[1] The reclaimer is a citizen of the United States of America. He is in a subsisting relationship with his British partner Ms B. Having previously been removed to the USA in December 2007, he returned via Dublin in June 2008. On being detained in 2013 on making himself known to the authorities, he submitted a Human Rights claim. This was refused, and certified as clearly unfounded. He was released from detention, but detained again in 2015/2016 when further representations were made on his behalf, and again refused.

Further submissions in support of a human rights claim were made in November 2016 and refused in February 2017, on the basis that they did not amount to a fresh claim for the purposes of paragraph 353 of the Immigration Rules. Under that paragraph, submissions will amount to a fresh claim only if significantly different from material which has previously been considered. That will only follow if the content had not already been considered; and taken with the prior material created a realistic prospect of success. The Lord Ordinary upheld the Secretary of State's decision. The nub of the claim was that there are insurmountable obstacles which would prevent the claimer's partner emigrating to the United States to live with him.

Immigration Rules

[2] Paragraph EX.1 of Appendix FM 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."

[3] Paragraph EX.2 provides:

"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."

The decision letter

[4] Paragraph 10

“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.”

[5] Paragraphs 16 and 17:

“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 state 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.

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.”

The Lord Ordinary’s decision

[6] Three arguments were advanced to the Lord Ordinary.

[7] First, that within paragraphs EX.1 and EX.2 family life meant only family life where both partners continued living together in a country outside the United Kingdom. The Lord Ordinary held that family life should not be interpreted in the narrow way suggested. Family life was a wide-ranging notion not a fixed idea. Family members often had to spend time apart, sometimes for lengthy periods. This did not mean that family life thereby

disintegrated or was in some sense suspended: it continued, even if experienced in different ways and at different levels than when parties cohabited in a single country.

[8] Second, in paragraph 17 of the Decision Letter the Secretary of State had taken account of an irrelevant consideration, namely the precarious nature of the claimant's unlawful residence in this country. The Lord Ordinary held that the second sentence of paragraph 17 was not evidence that an irrelevant consideration had been taken into account. It merely set the factual context for the paragraph as a whole. The Lord Ordinary expressed the view that in these circumstances one might have expected the claimant to have done more than he had to assemble convincing evidence.

[9] Third, 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. The Lord Ordinary considered it unrealistic to suggest that the focus of the decision must only be the parties' circumstances as at the date of the decision. Paragraphs EX.1 and EX.2 allowed consideration of whether obstacles could be overcome, and thus had an inherently forward-looking perspective. Any other approach would be highly artificial and open to manipulation. Observations in *MA v Secretary of State for the Home Department* [2017] CSOH 12 at paragraph [8] on which reliance was placed, were not applicable to the present case.

[10] The Lord Ordinary noted that the information placed before the Secretary of State included a statement from Ms B expressing the hope that the parties will marry and noting that the petitioner had received many job offers in this country, suggesting that there is no reason why he might not obtain employment in the USA. In these circumstances, there was no convincing reason to suppose that she would not in due course be able to join the

petitioner in the USA on the basis of a fiancée application when he has secured employment there at the modest earnings of \$20,024 per annum.

[11] Overall the Lord Ordinary was of the view that the claimer had failed to submit a reasonable case that there would be insurmountable obstacles in the way of Ms B joining him in the United States in the fullness of time.

Submissions for the claimer

[12] In the Note of Argument it was submitted that the Lord Ordinary had erred in law in respect of all three arguments. However, in the course of discussion counsel for the claimer recognised that the issues addressed in the first and third grounds overlapped, and that the simple question was whether the claimer had advanced a case that there were insurmountable obstacles to the claimer and his girlfriend living together in the USA. He did not therefore press the first ground of appeal. He addressed the remaining grounds in reverse order.

Relevancy of the date of the decision

[13] The test to be applied by the Lord Ordinary was whether there is a realistic prospect of a judge of the First-tier Tribunal allowing an appeal by the claimer. Such a judge is obliged by sections 82 and 84 of the Nationality, Immigration and Asylum Act 2002 to decide the case on the basis of the facts pertaining at the date of the decision and not some hypothetical date. To do otherwise would be arbitrary and therefore unlawful. Whether an individual might meet the general rules at some point in the future, if circumstances change, is irrelevant: *Mostafa* [2015] UKUT 112 [IAC]. 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. It was notable that in the pleadings in a separate case *Alkader v SSHD* (P488/13) the respondent had

adopted the argument that only the date of decision should be looked at. As the argument developed, the submission became that in so far as any degree of future consideration arose, it was a probabilistic assessment, and there was a reasonable prospect of an immigration judge concluding that the obstacles could not be overcome. If one looks to the future it is only to see what is probable.

Other considerations in the decision making process

[14] On a fair reading, paragraph 17 of the Decision Letter suggests that the claimant was the author of his own misfortune, and unless and until the relevant immigration provisions could be met couples should not make plans to live together. However, paragraphs EX.1 and EX.2 were designed to provide a safety net, to prevent a disproportionate interference in family life for those who could not meet the normal immigration rules. The Lord Ordinary's approach would deprive this exception of effect. An individual's immigration status is irrelevant, the only question being whether there is an insurmountable obstacle to family life continuing outside the UK.

Submissions for the respondent

[15] The test under paragraph 353 of the immigration Rules is whether there is a realistic prospect of an adjudicator, applying the rule of anxious scrutiny, considering that the obstacles were insurmountable. The Secretary of State was entitled to assess both the reliability of the new material presented and the likely outcome of Tribunal proceedings based on that material.

Relevancy of the date of the decision

[16] The Lord Ordinary was correct that failing to consider the future at all would be highly artificial and unrealistic. It would be impossible to assess whether "insurmountable

obstacles” existed without considering the future position. On the claimant’s approach, the Secretary of State would not be allowed to take into account circumstances in the near future that might assist an applicant. It would be open to manipulation by allowing an applicant to ensure that at the date of the application obstacles were misleadingly presented as insurmountable. It would be perverse to take a snapshot on one day and be blind to other relevant factors, either past or future. The rule is concerned with a process rather than an event. One looks at what life will look like for this person if returned to the home country, rather as one does when assessing whether it would be in the best interests of a child to return.

Other considerations in the decision making process

[17] Some of the information included in the claimant’s application was at best doubtful - it was not clear from the information presented why he would not succeed in securing employment earning the modest sums required to fulfil a successful application. The reference to the precarious nature of his immigration status was the context for the findings that the Home Secretary proceeded to make about the absence, or weakness, of evidence in support of the claim. Standing the precarious nature of his status, the claimant might have been expected to ensure that he was in the best possible position to support his application. The reference to precariousness was context for those presumed preparations.

Analysis and decision

[18] We do not consider that there is any force in the criticisms made of the Lord Ordinary’s decision. He clearly considered the correct test under paragraph 353 and considered whether the decision of the Secretary of State had been made with anxious scrutiny. It is not correct to say that either that the Secretary of State took into account the

reclaimer's immigration status in her "inside the rules" assessment, or that the Lord Ordinary concluded that she was entitled to do so. The Lord Ordinary was correct to say that a reasonable reading of the sentence criticised, in the context of the letter as a whole, is that it was meant to address that someone in the position of the reclaimer might be expected to have offered evidence in support of the contentions made, which the Secretary of State was entitled to find was entirely lacking (see for example paragraphs 10 and 24 of the letter). The characterisation by the reclaimer that the Secretary of State was suggesting that the reclaimer was the author of his own misfortune, and thus did not address the correct issues is not justified. It is not appropriate to select one or two phrases from an 8 page decision and construe them in isolation. The terms of paragraph 16 make it clear that the Secretary of State recognised that the only issue was whether insurmountable obstacles existed. The Lord Ordinary noted that the totality of the information put before the Secretary of State was thin and unconvincing. This is something which is referred to repeatedly in the Decision Letter, see for example paragraphs 10 and 24-26. The reference to the immigration history can reasonably be identified as the context in which the comments about the apparent lack of evidence should be read.

[19] In our view the two remaining grounds cover issues which are not separate, but which are inter-dependent. The critical issue is whether there are insurmountable obstacles to family life with the partner continuing outside the UK. That involves two considerations, first, whether there are obstacles; and second, whether these are insurmountable. Whilst one may be able to address the first of these simply by looking at the date of the decision, the same cannot be said about the second consideration. Consideration of whether the obstacle is insurmountable necessarily involves a degree of futurity, or at least potential, in respect of which one requires to address what may reasonably be considered to be achievable by the

individual in tackling the obstacle. It is necessary to consider whether there are reasonably achievable events which could enable that obstacle to be overcome. In this sense the issue is less a temporal one, and more whether there are practical steps which the claimer could accomplish which would enable the obstacle to be overcome. The term "insurmountable obstacles" is defined in paragraph EX.2. It means that the applicant must show that there are very significant difficulties in continuing family life outside the UK which could not be overcome or would entail very serious hardship. Again the focus is on what might be achievable. The fact that something needs to happen or be resolved to allow family life to continue in the USA is not a bar to the claimer's return, so long as, in a practical and reasonable sense, it can be brought about. In our view, therefore, the Lord Ordinary was correct in his conclusion that the correct focus, where obstacles exist, is on whether they may be overcome, without undue hardship. Further, he was entitled to conclude that the claimer had failed to put before the respondent anything that came close to a plausible case that the obstacle to Ms B joining him in the United States was an insurmountable one.

[20] The evidence suggests that the parties in this case intend to marry, and that the claimer intends to obtain employment, which, as the Lord Ordinary notes, would assist Ms B in joining the claimer via a fiancé application, once the claimer has secured employment earning the modest sum of \$20,024 per annum. Taken together with the possibility that Ms B may be able to apply for a visitor visa the Lord Ordinary was entitled to conclude that the totality of the information put before the respondent was thin and unconvincing for the purpose of attempting to demonstrate that the obstacles to the claimer and Ms B having a family life outside the United Kingdom were insurmountable, and that there was no basis for supposing that an immigration judge might regard the new

information as sufficient to justify allowing the reclaimer to remain in this country. It follows that the reclaiming motion will be refused.