EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2022] CSIH 12
P154/21

Lord Turnbull
Lord Woolman
Lord Doherty

OPINION OF THE COURT

delivered by LORD TURNBULL

in the Petition

by

IFEOMA GRACE MBOMSON

Petitioner and Reclaimer

against

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

in the petition for

Judicial review of a decision of The Secretary of State for the Home Department

Petitioner and Reclaimer: Forrest; Drummond Miller LLP
Respondent: Pirie; Office of the Advocate General

20 January 2022

[1] The petitioner is a 43 year old citizen of Nigeria who entered the United Kingdom on a student visa on 15 September 2008. Thereafter she applied for, and was granted, various extensions to permit her to complete further studies. Her final visa expired on 22 July 2017. Prior to then she submitted an application for indefinite leave to remain. She did not qualify

for indefinite leave under the Immigration Rules. She applied on the basis of having established a private life in the United Kingdom which fell to be protected under article 8 ECHR. This application was refused on 30 July 2018.

[2] Since the petitioner benefited from limited leave to remain in the United Kingdom and had made her application before that period of leave expired, her leave to remain in the United Kingdom was extended from 22 July 2017 to 30 July 2018 by operation of section 3C(2)(a) of the Immigration Act 1971.

[3] On 13 August 2018 she applied for indefinite leave to remain on the basis of long residence under Immigration Rule 276B. However, she did not qualify under that rule because she had not been resident for a period of 10 years. On 7 January 2019 that application was refused. On 19 March 2020 the petitioner made a further application submitting that it would be incompatible with her article 8 rights for the respondent to remove her from the United Kingdom. A letter from her solicitors dated 7 July outlined the legal submissions upon which she relied in this application.

[4] By letter dated 27 November 2020 the respondent rejected this application and the accompanying submissions. She gave her reasons for so doing and explained her conclusion that the submissions would have no realistic prospects of success before an immigration judge. They therefore did not amount to a fresh claim for the purposes of Immigration Rule 353. The petition for judicial review seeks to reduce that decision. On 25 June 2021 the Lord Ordinary refused to grant permission to proceed and the present reclaiming motion seeks to challenge his decision.

Petitioner's submissions

[5] The petitioner submits that the respondent did not apply the correct test in determining whether the further information supplied on her behalf amounted to a fresh claim relying on article 8. She contends that relevant information was left out of account, namely the effect of how close she came to accruing the necessary 10 years of lawful residence and that she had made a valuable contribution to education in the United Kingdom.

[6] Reliance was placed on the fact that the petitioner fell short of fulfilling the necessary requirement of 10 years continuous lawful residence by a small margin. By 30 July 2018 she had been lawfully resident for a period of 9 years and 10 months. She was in the situation sometimes referred to as a "near miss". Reference was made to the cases of *Secretary of State for the Home Department* v *SS (Congo)* [2015] EWCA Civ 387 and *R (MM (Lebanon))* v *Secretary of State for the Home Department* [2017] 1 WLR 771.

[7] After entering the United Kingdom the petitioner obtained an MSc degree in Telecommunication Electronics and then a PhD in Nanoscale and Electronic Engineering at the University of Glasgow. After completing her studies in December 2016 she began to work at Glasgow International College, teaching maths, physics and engineering. She retained that position until her application for leave to remain was refused on 30 July 2018. Letters of support vouching the value which she had brought through her teaching positions to others in the United Kingdom were referred to.

[8] Relying on *UE (Nigeria)* v *Secretary of State for the Home Department* [2012] 1 WLR 127, counsel submitted that the loss to the community of the petitioner's services was an important factor to be assessed in determining the weight to be accorded to the public interest in any article 8 assessment. The respondent had taken no account, or insufficient

account, of the loss of value to be suffered by the petitioner's students and professional colleagues in rejecting her claim. There was a realistic prospect that an immigration judge would agree that the weight to be accorded to the public interest of immigration control was reduced on account of the petitioner's activities in the United Kingdom. It was therefore irrational of the respondent to conclude that there was no realistic prospect of success.

Respondent's submissions

[9] Counsel for the respondent submitted that her decision making had been beyond criticism. It was incorrect to claim that no account had been taken of the fact that the petitioner had accrued 9 years and 10 months of lawful residence. Nor was it correct to claim that no account had been taken of how close the petitioner came to satisfying the requirement of 10 years residence. Attention was drawn to pages 3 and 6 of the respondent's decision letter.

[10] The respondent had considered the submissions made by the petitioner and those made on her behalf concerning the establishment of a private life in the United Kingdom. The private life relied upon by the petitioner was of the sort that anyone who had stayed in the United Kingdom as long as she had would have established. This was a straightforward case of a person who had been given leave to be in the United Kingdom to study and had now completed the studies for which that leave had been granted. The respondent required to conduct a balancing exercise taking account of the factors relied upon by the petitioner and weighing them against the policy consideration of immigration control. The letter of 27 November 2020 explained the way in which this exercise had been undertaken. The fact that the petitioner fell short of the relevant period of residence by a small margin was not

relevant to the issue of whether there had been a disproportionate interference with her private life.

[11] Whilst the petitioner sought to rely on evidence of her contribution to the community, as explained in the note of argument and supplemented in oral submissions, this was not a ground of review which featured in the petition. Nor did it appear in the grounds of appeal. On the authority of *Prior* v *Scottish Ministers* 2020 SC 528 at paragraphs 38 to 40 it was not legitimate for the petitioner to rely on a note of argument which was inconsistent with the pleadings.

[12] The petitioner was in any event incorrect to argue that no account had been taken of her contribution to education in the United Kingdom. The letters of support evidencing the petitioner's contribution to society were noted at page 2 of the decision letter. At pages 4 to 5 there was an assessment of her contribution to university research and teaching. In the case of *UE* v *(Nigeria)* v *Secretary of State for the Home Department* the Court of Appeal for England and Wales had recognised that the loss of a contribution to the community was capable in principle of being relevant to an assessment of the public interest in removal. However, it was clear from what was said at paragraphs 19 and 36 that such a contribution would only make a difference in a relatively few instances where the positive contribution was very significant.

[13] The respondent took proper account of the factors relied upon by the petitioner and rejected them for the reasons given in the decision letter. She was then required to consider whether those factors taken along with the material considered in the petitioner's earlier applications created a real prospect of success before an immigration judge. This process involved a legitimate exercise of discretion on the part of the respondent. In doing so the respondent kept in mind that a notional immigration judge would require to take account of

section 117B(5) of the Nationality and Asylum Act 2002. That provision requires that little weight is to be given to a private life established by a person at a time when their immigration status is precarious. Any status less than indefinite leave to remain falls to be viewed as precarious for this purpose – *Rhuppiah* v *Secretary of State for the Home Department* [2018] 1 WLR 5536 paragraph 44.

The Lord Ordinary's decision

[14] Before the Lord Ordinary, the petitioner's submission had been that the small margin by which she failed to meet the requirement for 10 years continuous lawful residence had to be seen alongside the difficulties that she would encounter in progressing her career as a college teacher in Nigeria as her qualifications and experience had been acquired in the United Kingdom. It was submitted that these factors represented a particularly compelling circumstance to which insufficient weight had been attached by the respondent.

[15] The Lord Ordinary held that due regard was had by the respondent to the potential difficulties to be encountered by the petitioner in respect of her career on return to Nigeria. That was clear from the terms of the decision letter. He therefore held that the petitioner did not have a reasonable prospect of establishing that there was any error of law made by the decision-maker.

Decision and reasons

[16] Paragraph 276B of the Immigration Rules concerns the requirements for indefinite leave to remain in the United Kingdom on the ground of long residence. Subparagraph (i) of that rule requires an applicant to demonstrate that she has had at least 10 years

continuous lawful residence in the United Kingdom. The petitioner's period of lawful residence expired on 30 July 2018 when she had accrued a period of 9 years and 10 months.

[17] The decision of the United Kingdom Supreme Court in *R (MM (Lebanon))* v *Secretary of State for the Home Department,* at paragraphs 103 and 104, made plain that a failure to meet the requirements of the Immigration Rules by a small margin was not the relevant issue for consideration by the Secretary of State. What she required to give weight to was any factor weighing against the policy reason relied upon to justify an interference with family life as protected by article 8. Counsel for the petitioner accepted this in discussion with the court and acknowledged that there was no merit in the proposition that the respondent had failed to give effect to how close the petitioner came to accruing 10 years of lawful residence.

[18] The sole remaining argument relied upon was that the respondent had failed to take account of the value of the petitioner's contribution to education in the United Kingdom. This did not feature in the petition or in the grounds of appeal. Nor was it argued before the Lord Ordinary. Counsel for the respondent was therefore well-founded in relying on the authority of *Prior* v *Scottish Ministers* and submitting that the court should take no account of this argument. The court would have been entitled to reject the argument now advanced for this reason but it will not, however, rest its decision on this ground.

[19] The extent of the loss to the community which would occur if the petitioner were to be returned to Nigeria was said to be evidenced by the documentation lodged on her behalf. The letter from her employers, Kaplan International Pathways, vouched that she had been employed between January 2017 and July 2017, and then again from late September 2017 until 30 July 2018, as a sessional tutor contracted to a minimum of six hours per week at Glasgow International College. The letter from her former PhD supervisor at the University of Glasgow vouched her qualifications, the fact that she had authored various scientific

publications and that she had engaged in public engagement activities for the University of Glasgow and other colleges in the United Kingdom. Two letters vouched that she had provided helpful tutoring to three different school pupils assisting them in obtaining suitable grades in maths, physics and computing.

[20] It seems clear that the petitioner devoted herself conscientiously to her studies in this country; that her teaching has been appreciated by her students here; and that she has also made further positive contributions to community life. On the material available to us she appears to be an admirable person. However, the passages in the decision letter to which attention was drawn make it plain that the Secretary of State did take account of the contribution which the petitioner had made to the community. That contribution had to be weighed against the legitimate policy of immigration control. In so doing the Secretary of State was entitled to assess whether the petitioner was someone who had shown herself to be "of great value to the community in this country", as mentioned in paragraph 18 of Sir David Keene's judgement in *UE (Nigeria)* v *Secretary of State for the Home Department*. She was entitled to conclude that the petitioner's case was not one of the relatively few instances in which the contribution made outweighed the legitimate policy of immigration control. Taking account of the fact that little weight could be given to the petitioner's private life, since it was established at a time when her immigration status was precarious, the respondent's conclusion that there were no realistic prospects of a successful challenge before an immigration judge cannot be criticised.

[21] The submissions advanced on the petitioner's behalf have no merit. The respondent's decision letter of 27 November 2020 discloses no error of law. The Lord Ordinary was correct to conclude that the petition had no real prospect of success and

that permission to proceed ought to be refused. The reclaiming motion is refused and the Lord Ordinary's interlocutor is adhered to.