

IN THE UPPER TRIBUNAL

R (on the application of Dulagan) v Secretary of State for the Home Department IJR [2016]
UKUT 00136 (IAC)

Field House
London

11 January 2016

**THE QUEEN
(ON THE APPLICATION OF)
VEMA BELAO DULAGAN**

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

BEFORE

UPPER TRIBUNAL JUDGE McGEACHY

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

Mr Z Malik, instructed by the Government Legal Department appeared on behalf of the Respondent.

ON AN APPLICATION FOR JUDICIAL REVIEW

JUDGMENT

JUDGE McGEACHY: The applicant applies for judicial review of a decision dated 20 May 2014 in which her application for leave to remain on human rights grounds was refused. Although her application was initially refused on the papers permission was granted by Upper Tribunal Judge Rintoul on 10 July 2015.

2. The applicant is a citizen of the Philippines who entered Britain as a Tier 4 (General) Student on 28 October 2009. On 7 March 2011 while she had leave to remain she made an application outside the Rules on the basis of her relationship with a British citizen, Mr Rasool. That application was rejected as no fee was paid. Her leave to remain ended on 13 March 2011. On 14 December 2011 she made an application outside the Rules for leave to remain on the same basis as before. On 11 October 2012 she married Mr Rasool. On 21 November 2012 she was asked to provide further information regarding her relationship with Mr Rasool. She informed the respondent that they had married.
3. On 8 January 2013 her application of 14 December 2011 was refused. It was not accepted that the relationship was genuine and subsisting. There was no right of appeal as the application had been made out of time.
4. On 21 March 2014 she made an application for leave to remain as the partner of a British spouse. That application was refused on 20 May 2014 without a right of appeal.
5. The notice of refusal dated 20 May 2014 accepted that the applicant had a genuine and subsisting relationship with her British partner but stated that there was no evidence to suggest that there were insurmountable obstacles preventing her from continuing her relationship with her British partner in the Philippines and therefore she could not succeed under the provisions of paragraph EX.1.(b) of Appendix FM. It was also considered that the applicant could not meet the provisions under Rule 276ADE(1) of the Immigration Rules in respect of her private life and with regard to the issue of exceptional circumstances it was stated that this had been considered but

there was nothing which might warrant consideration for a grant of leave to remain outside the Rules.

6. The application for Judicial Review was made on 20 August 2014. The grounds of application stated that the decision to refuse leave to remain was challenged and in particular “the lawfulness/compatibility of paragraph EX.1.(b) of the Immigration Rules with the 1950 Convention”. The grounds asserted that the respondent had erred in her approach to the rights of the applicant under Article 8 of the ECHR. They set out the provisions of Section R-LTRP - requirements for limited leave to remain as a partner, and Section EX.1. In the detailed grounds it was asserted that the respondent had erred in her application of the “insurmountable obstacles” test which was incompatible with the applicant’s and her spouse’s Convention rights, that the change in the Rules was an attempt to circumvent the test of “exceptionality” expressly ruled out by the House of Lords in Huang [2007] UKHL 11 and set forth some case law regarding the reasonableness or otherwise of the sponsor being expected to follow his spouse to his or her own country.
7. It was also asserted that there been a failure to consider Article 8 itself directly and reference was made to the decision of the House of Lords in Chikwamba v SSHD [2008] UKHL 40 with regards to the issue of whether or not the applicant should be expected to make an application for leave to enter from the Philippines. It was argued that the terms of paragraph EX.1.(b) were satisfied stating that the applicant’s spouse had no connection with the Philippines and had spent the formative years of his life in Britain, had no other nationality and no experience of life in the Philippines and had earnings in excess of the required £18,600 threshold. The application also stated that the applicant was pregnant and due to give birth soon to their first child.
8. Amended grounds of claim asserted that anxious scrutiny had not been applied when considering the applicant’s application for further leave to remain and when considering the applicant’s Article 8 rights and again emphasised that Mr Rasool had no connections with the Philippines and was British.

9. Emphasis was again placed on the judgment of the House of Lords in Chikwamba. It was claimed that there were exceptional circumstances in this case.
10. The respondent's detailed grounds of defence referred to the provisions of paragraph R-LTRP.1.1.(c) which required the applicant to satisfy all the eligibility requirements set out in paragraph E-LTRP. It was pointed out that the applicant failed to meet the immigration status requirement that she had remained in Britain in breach of the immigration laws contrary to paragraph E-LTRP.2.2. and was unable to meet the financial threshold as set out in paragraph E-LTRP.3.1. Moreover there was nothing to indicate that the applicant had provided the specified evidence in accordance with Appendix FM-SE or met the requirements of the Immigration Rules. She could therefore not qualify under the Immigration Rules and the grounds of defence went on to argue that she could not qualify under the provisions of paragraph EX.1. The applicant could not meet the requirements of those provisions as not only did she not have a child in Britain but that in any event express consideration had been given to the citizenship of the applicant's partner, the nature of her relationship with her partner, her residence in Britain, employment in Britain, degree of hardship caused by relocation and the absence of credible evidence of insurmountable obstacles. It was argued that everything had been properly considered and the decision was one which was open to the decision maker to make. The position of insurmountable obstacles was considered in the context of the Court of Appeal judgment in Agyarko v SSHD [2015] EWCA Civ 440 and it was argued that there were no insurmountable obstacles to the applicant and her husband living together in her country of origin.
11. It was further argued that it was clear that anxious scrutiny had been given to all relevant factors and that an intelligible and adequate decision had been reached. With regards to the issue of whether or not the respondent had properly considered the issue of whether or not the applicant could make an application outside Britain the grounds of defence referred to the judgment in Chikwamba and the judgment in R(on the application of Chen) v Secretary of State for the Home Department (Appendix FM - Chikwamba - temporary separation - proportionality) IJR [2015] UKUT 189 (IAC) and that, although there might be circumstances in which

temporary absence when an application for entry clearance is made was disproportionate, evidence that that temporary separation would be a disproportionate interference with her right to private and family life would have to be put forward by the applicant. It was not enough merely to refer to the judgment in Chikwamba.

12. At the hearing of the appeal Mr Biggs relied on a skeleton argument which referred to the grounds of application and with reference to witness statements from the applicant and a witness statement from Mr Rasool amplified the assertion that anxious scrutiny had not been applied, setting out considerable case law regarding the application of anxious scrutiny. The position of Mr Rasool's citizenship was emphasised and it was argued that the decision that the relationship between the applicant and Mr Rasool was not genuine had clearly been shown to be incorrect and in effect therefore she should not have been refused initially when she made the first application. It was also argued that there was some evidence that her first application should not have been rejected for non-payment of the fee.
13. Moreover it was argued that there was no or insufficient reasoning in the decision and that the conclusions regarding "exceptional circumstances" were irrational.
14. Mr Biggs relied on the grounds of appeal stating that the lack of anxious scrutiny was a material public law error and that there were exceptional factors in this case which are not addressed by the Immigration Rules. He argued that when the decision was made on the second human rights application that the relationship was not genuine, that clearly was irrational given that by that stage the applicant and Mr Rasool were married and the Secretary of State was aware of that fact. Given that if those incorrect decisions had not been made the applicant would have had leave when the marriage application was put in then her marriage application should have succeeded.
15. He went on to emphasise the "Chikwamba" principles and put forward the argument that there was now evidence that the applicant was pregnant - she is to give birth in March of this year - and that in effect that was a factor which should

have been taken into account – this being a human rights judicial review when the decision was considered. While he accepted that the fact that the Secretary of State had not been aware of the pregnancy when the application for judicial review was made lessened the significance of that point he still argued that I should take it into consideration.

16. He accepted that the “insurmountable obstacles” test could not have been met but reserved his position on that point on the basis that the judgment in Agyarko had been appealed to the Court of Appeal.
17. He referred to the decision in SA IJR [2015] UKUT 00536 (IAC) and stated that it was important to distinguish between a public challenge and a human rights challenge and on the basis that there was a human rights challenge take into account the fact that the applicant was now pregnant. I should have regard in particular to the fact that the child would be British.
18. In reply Mr Malik also took me to the decision in SA and in particular to paragraph 10 thereof which dealt with the challenge to the grant of permission. That paragraph made it clear that focusing on the arguability of something which at no time had been contested by the Secretary of State was an error and moreover that at paragraph 17 the President of the Upper Tribunal had pointed out that where there is a “pure human rights claim” that is put within the context of an allegation of public law misdemeanours that is an impermissible conflation. He stated that this was made clear by paragraph 2 of the head note in that case which stated:

“In judicial review challenges which include Article 8 ECHR grounds, the question is not whether the impugned decision is vitiated by one or more of the established public law misdemeanours. Rather, the question is whether a breach of Article 8 has been demonstrated.”

He stated that it was clear that the evidence of the applicant’s pregnancy was not before the Secretary of State and therefore that matter should not be taken into

account when I assessed the issue of the decision made by the Secretary of State refusing the application for leave to remain.

19. He went on to argue that the decisions made earlier should have been challenged at the time but they had not been and that any challenge thereto was woefully out of time. A lack of consideration of those decisions could therefore not indicate a lack of anxious scrutiny. Moreover, there was an alternative remedy which could have been used in those cases in that when it was stated that no fee had been paid that could have been challenged by way of judicial review or indeed by way of an appeal in the First-tier Tribunal if it was being argued that the application was made while the applicant should have had leave to remain. In this he referred to the judgment of Upper Tribunal Judge O'Connor in the case of Khan v SSHD (right of appeal - alternative remedy) (IJR) [2015] UKUT 353 (IAC).
20. Moreover, insofar as Mr Biggs was arguing that there was a historic injustice that was not a matter which should have influenced the Secretary of State. In this he referred to the judgment in TN (Afghanistan) [2015] UKSC 40.
21. He went on to state that there was no evidence that the Chikwamba principle was relevant in this case. There was nothing to indicate that an application could not be made outside Britain or that the applicant would be significantly inconvenienced by so doing. He asked me to find that the reasons of the Secretary of State were properly set out and clear and fully open to the Secretary of State.

Discussion

22. The facts of this case are relatively simple. The applicant came to Britain as a student and before her leave to remain as a student ended she made an application for leave to remain on human rights grounds. That application was not accepted for lack of payment of a fee. That decision was not challenged. A further human rights application was made which was refused. There is nothing to indicate that that second application was refused irrationally. In any event that application was not challenged. The applicant therefore did not have leave to remain when the marriage

application was made. Not only did the marriage application not contain the specified documents required, although there is evidence that the sponsor's earnings would meet the financial requirements, but it was an application which could not succeed because the applicant was an overstayer. The applicant was therefore thrown back on the assertion, which is the basis of the application for judicial review, that her rights under the ECHR are infringed by the decision. The Rules clearly set out the appropriate guidelines for assessing such a claim and in particular the issue of whether or not there are insurmountable obstacles to the applicant and her husband living in the Philippines. Mr Biggs correctly accepted that there were no such insurmountable obstacles (although I note that he reserved his position on this point) and I consider that he was right to do so. There is simply no evidence whatsoever to indicate that Mr Rasool and the applicant could not live in the Philippines. Although much has been made of Mr Rasool's nationality what was not stated in the application was that not only had he been born in Pakistan but he had previously been married there. He has clearly therefore not spent all his life in Britain and has lived in a country other than Britain.

23. In any event the reality is that the provisions of Section 117B of the Nationality, Immigration and Asylum Act 2002 make it clear that when assessing the proportionality in an Article 8 decision various factors including whether or not an applicant has overstayed should be taken into account as indeed should the ability to speak English.
24. Mr Biggs put forward two particular arguments relating to whether or not the Secretary of State had considered the human rights of the applicant with anxious scrutiny. The first related to what he referred to as historic injustice of the applications for leave to remain on human rights grounds which had not succeeded. I consider that there is simply no merit in that argument. I accept Mr Malik's argument that the judgment in TN (Afghanistan) in the Supreme Court makes it quite clear that historic injustice does not weigh heavily in the consideration of an applicant's Article 8 rights but in any event the reality is that in respect of both refusals of the applications for leave to remain on human rights grounds there was

an alternative remedy which the applicant did not exercise. It is simply too late now to, in effect, argue that those decisions were incorrect and that that should have a bearing on the present case. Secondly, there is the rather convoluted argument that because the applicant is now pregnant that should somehow have influenced the decision of the Secretary of State made when not only did the Secretary of State not know that she was not pregnant but also the reality is that she was probably not pregnant on 20 May last year when the decision was made. I consider that there is simply no merit in that argument. It is clear that the issue before me is whether or not the decision of the Secretary of State, when made, was one which was open to her.

25. Finally there is the issue raised on whether or not the applicant should be expected to make an application from her own country – the “Chikwamba” point. I consider that there is no merit in that argument. It is not the case that it is an application which could, with certainty, succeed. The specified documents themselves have not been put forward – the marriage application was not one which contained all relevant documentation. Moreover there is nothing to indicate that there would be any undue hardship for the applicant or her spouse should such an application be made. There was nothing before me to indicate that it would take an unduly long time for the application to be made and considered, whether or not an interview could have been set up before the applicant went out to the Philippines for interview or that she would be unable to live in the Philippines while the application was made. Moreover there is simply nothing to indicate that Mr Rasool could not accompany her to the Philippines while the application was made let alone, of course, that, as has been accepted, there would be any insurmountable obstacles to his living with her there.
26. Taking all these factors into consideration I consider that the decision of the Secretary of State adequately dealt with all relevant matters and the reality is that the Secretary of State was correct to find that there were no exceptional factors in this case which would mean that it would have been appropriate to grant the applicant permission

for leave to remain outside the Rules. The decision was unarguably one which was open to the respondent on the evidence before her.

27. For these reasons the application fails and I refuse the application.
28. The applicant to pay the respondent's reasonable costs. In default of agreement costs to be subject to detailed assessment by a Costs Judge.
29. When this judgment was handed down there was no appearance by or on behalf of the applicant. There was therefore no application for leave to appeal to the Court of Appeal. I formally refuse permission.