IN THE UPPER TRIBUNAL

R (on the application of Eruteji Ibipeju Bosomo) v Secretary of State for the Home Department IJR [2014] UKUT 00492(IAC)

Field House,
Breams Buildings
London
Monday, 22 September 2014

BEFORE

UPPER TRIBUNAL JUDGE JORDAN

Between

ERUTEJI IBIPEJU BOSOMO

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

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Mr R Khubber, instructed by Descartes Solicitors, appeared on behalf of the Applicant.

Mr R Moules, instructed by the Treasury Solicitor appeared on behalf of the Respondent.

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JUDGMENT

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JUDGE JORDAN: This is a substantive hearing of this application for judicial review, following the grant of permission, by Upper Tribunal Judge Gleeson. The applicant was born on 27 April 1975. She entered the United Kingdom in February 2002 with a student visa. She was then aged 26. During a period of extant student leave she sought further leave to remain on the basis of her medical condition - she suffers from HIV Aids - but that was refused and her medical condition is really largely irrelevant to the circumstances with which I now have to deal. Suffice it to say that further leave was granted to 25 October 2010 as a student. It appears to me clear that, at a time prior to 25 October 2010, it would have been open to the applicant to make a further application for leave. Such an application was open to her because she had been offered a postgraduate degree course leading to a Masters degree which was capable at any rate of falling within the Immigration Rules and would have permitted her to apply to extend her leave. It is impossible to say what then would have happened.

2. On 27 May 2010, that is some five months before her extant leave expired, a letter was sent dated 27 May 2010 which was under the legacy programme. The letter described in a form with which we are very familiar the legacy programme that was dealing with the backlog of older asylum applications which were being handled by the Case Resolution Directorate, the CRD. It referred to the fact that her case was under active consideration under that head and that she should provide a series of documents including photographs, identity documents and information about her private and family life in the United Kingdom.

3. That letter, it is accepted, was wholly misconceived. There was no outstanding asylum claim and there was no basis upon which the applicant fell within the legacy provisions. However, she complied with the requirements of that letter and

provided the information that was sought. She was however aware of the expiration of her student leave and the fact that she had got outstanding offers for continuation. Accordingly, she wrote on 4 October 2010 asking the Secretary of State what should happen because she needed to know her position prior to the expiration of her leave on 25 October 2010.

4. There then followed a flurry of activity set out in the skeleton argument in the form of further correspondence. It included a letter at page 163 dated 12 January 2011 at which point further information was sought by the Secretary of State with which the applicant complied. It is not however surprising, perhaps, that on 14 March 2011 this wholly inappropriate application under the legacy programme was refused. By that stage the applicant's further leave had expired.

5. Further representations were made outside the Immigration Rules and a decision was made on 16 July 2013 which is the subject of this application. That letter was in the circumstances of this case an inappropriate response to the situation. It was a classic example of a tick box exercise applying the Immigration Rules by one who had applied outside them by reference to Article 8. Consideration was given to paragraph 276ADE of the Immigration Rules and not surprisingly answers to the tick boxes were provided in the negative. Of course the applicant had not lived continuously in the UK for twenty years; of course she did not comply with the requirements of one who was under the age of 18; of course she did not comply with the requirements of one who was aged between the age of 18 and 25. Accordingly, the answer that was provided by reference solely to these considerations was inevitably going to be an outright refusal.

6. The letter then went on to consider whether there were exceptional circumstances. That was a proper matter to be raised because any application made under the Immigration Rules required the decision-maker also to consider the overall circumstances and whether there was a requirement for further consideration not arising from the formulaic considerations to which I have already referred. The decision-maker said,

> "It has also been considered whether your application raises or contains any exceptional circumstances which consistent with the right to respect for private and family life contained in Article 8 of the European Convention on Human Rights might warrant consideration by the Secretary of State of a grant of leave to remain in the United Kingdom outside the requirements of the Immigration Rules. It has been decided that it does not."

7. The sole consideration therefore of whether the applicant's case had been properly considered was contained in the words, '*It has been decided that it does not.*' This is not reasoning at all but simply a conclusion that there was nothing exceptional in the applicant's case. That might well have been an appropriate response in many cases where the applicant's immigration history and her private and family life did not merit any more than such a cursory examination. However in the circumstances of this case and in particular the fact that there were some 50 pages of documentary material which had been submitted dealing with the overall circumstances of the case, no reference was made to this additional material nor to the fact, as I have pointed out, that there was prior consideration under the legacy programme which may have had consequences for the applicant.

8. It is said by Mr Moules on behalf of the Secretary of State that there had been prior consideration of her medical condition in a letter which was dated 2004 but there are a

number of difficulties with that. First of all the application was not primarily advanced on the basis of her medical condition. Secondly, that letter had been written some nine years before. Thirdly, inevitably, it did not take into account the additional written material and fourthly, and most importantly, there is no suggestion that that letter was taken into account by the decision-maker in 2013 and it is simply impossible to say that it was taken into account when it features in a large bundle of material, none of which was taken into account in the course of the July letter. I am therefore entirely satisfied that the letter of 17 July 2013 was an unlawful decision because it failed to grapple with the material that had been provided in support of the application.

9. That in many cases would be sufficient to dispose of an application for judicial review because it would require the Secretary of State to make a fresh and lawful decision.

10. However, in the circumstances of this case, there is a further decision made on 12 June 2014 which has to come into play. It is as well to point out the context in which that letter was written. It was written as a response to the challenge which had been mounted by the applicant in the judicial review proceedings and which was an attempt to make good the deficiencies in the July 2013 letter. It is of course open to the Secretary of State to acknowledge that an earlier decision is wrong and to give proper consideration to the relevant factors. That does not of course make the earlier decision of July 2013 any more lawful but it operates to suggest that there should be no relief in the judicial review proceedings because such relief would only result in a fresh and lawful decision being made and, since one has been made, it renders the judicial review unnecessary. It therefore goes to relief rather than the lawfulness of the challenged decision.

11. In this case the letter of 12 June 2014 is barely anything more than a complete repetition of the unlawful decision that had been made on 17 July 2013. It refers to the applicant's medical condition and Article 3. It refers to the consideration of family life. It refers to the application of paragraph 276ADE. It goes through the same futile consideration of factors which did not in any sense apply to the applicant's case and then reaches the same decision that was inevitably going to be reached on an application of those principles, namely that the applicant did not qualify.

12. Consideration is then given to exceptional circumstances. As I have pointed out in relation to the letter of 17 July 2013, that consideration was wholly deficient. It was encapsulated in a single sentence which did not reflect the matters which the Secretary of State was being asked to consider. Here in the letter of June 2014 there is a self-direction as to what exceptional means. The self-direction cannot be faulted in that it relies upon the developed case law and the Secretary of State's own policy in relation to exceptional circumstances. However, it wholly fails to grapple with the application which was made by the applicant and which required consideration. For this reason I am satisfied that the letter of 12 June 2014 does not make good the deficiencies of that of 17 July 2013 and consequently the Secretary of State is not able to assert that relief should not be granted because of it.

13. In the course of submissions this morning a great deal of time was taken seeking to exculpate the Secretary of State from the disastrous course of action initiated by her in the letter of 27 May 2010 in which she erroneously stated that the application was to be considered under the legacy programme. For reasons that I have already stated there was no question of this application being properly treated as a case coming

within the legacy programme. There was no asylum claim. There never had been an asylum claim and none has ever been suggested. It is therefore said by the Secretary of State that, although the respondent set this hare going, no consequences of any type should be attributed to it because the decision that was subsequently made on 14 March 2011 was inevitable. I entirely agree that the Secretary of State made an erroneous decision to pursue a course of action which had no application. She pursued that erroneous approach by seeking further information on 12 January 2011. Accordingly, it is easy to see that the legacy application was wholly without any legitimate expectation that it would produce a result in favour of the applicant.

14. However this misses the point because by embarking upon this course of action, the Secretary of State appeared to be suggesting that the applicant should rely upon that application, the legacy programme, in order to pursue her right to further leave to remain. At the same time, so the respondent argues, the applicant was not absolved from her duty to make a further application in the knowledge that her extant leave would expire on 25 October 2010.

15. I am utterly persuaded that the applicant was entitled to rely on the request of the Secretary of State that she should provide additional documents which, if they were supplied in the way that was sought, would have resulted in her being granted leave. At least, if not absolutely guaranteed that she would have leave, this was a course of action that the Secretary of State was pursuing in order to resolve her case. It does not seem to me that it is realistic that this applicant who is not legally represented was to say to the respondent :

> "You have made a glaring and most obvious error and I do not propose to comply with any of the requirements that you are making in your letter of 4 October 2010 and furthermore, when you repeat those requirements in your 12 January 2011 letter, I intend to disregard them entirely."

What an ordinary applicant will do when confronted with a request for information which appears to be nonsensical is to comply with it insofar as she is able. The point that the Secretary of State misses in my judgement is that this then had consequences.

16. The applicant had already been provided with an offer to pursue a course of further education which she knew was in jeopardy because she had not been granted further leave to remain. For the purposes of this application I am persuaded that there is a good case that she would have been granted that application, had it been made. She was diverted from making that application by the hare that was set running by the Secretary of State in treating this as a legacy application and by the time the application was decided against her, her leave had expired and she had become an overstayer.

17. It is not as if she was inactive because on 4 October 2010 she had expressly raised the problem with the Secretary of State to which she had not received a reply. This is all significant material that the Secretary of State was bound to take into account when she considered the case on 16/17 July 2013. If the letter itself of 16/17 July 2013 was inadequate because it did not deal with the 50 pages of material that had been provided, it was certainly inadequate insofar as it did not deal with the circumstances which I have set out which were argued by the applicant in her application. It follows that the letter of 12 June 2014 which sought to make good the deficiencies of July of the previous year was in itself

inadequate to counter the application for judicial review and does not make out a case that relief should be refused because a lawful decision has post-dated the application for judicial review. Accordingly, I grant the application for judicial review.

18. I set aside the decision of July 2013.

19. I summarily assess costs in the sum of £6,925. ~~~~*0*~~~~