Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of Marie) v Secretary of State for the Home Department IJR [2015] UKUT 00464 (IAC)

Heard at Field House

On 6 th January 2015

And subsequent to written submissions

Before

UPPER TRIBUNAL JUDGE COKER

Between

THE QUEEN ON THE APPLICATION OF

DEBBIE ANN MYRIE

Applicant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Mr P Saini, counsel, for the applicant (instructed by Greenland lawyers LLP)

Mr W Hansen, counsel, for the respondent (instructed by Treasury Solicitor)

JUDGMENT

1.
The applicant applied for leave to remain on the basis of her Article 8 ECHR rights to family and private life such application having been made on either 7 th March 2012 or 2 nd May 2012 when she was in the UK unlawfully as an overstayer.

2.
On 2 nd April 2014 Jeremy Baker J and Upper Tribunal Judge Storey granted the applicant permission to bring a judicial review of the decision of the respondent dated 28 th June 2013 refusing to grant her leave to remain in the following terms:

1. The applicant is a 36 year old Jamaican National called Debbie Ann Myrie who was born on 23 September 1977 and spent the first 32 years of her life in Jamaica. On 6 March 2009 she entered the United Kingdom on a visit visa valid until 24 April 2009. At the end of that period she remained in the United Kingdom without permission for a period of three years.

2. On either 7 March or 2 May 2012 the applicant applied for leave to remain on the basis of her Article 8 ECHR rights to family and private life. The application contained details of her life in the United Kingdom, namely that she lived with her sister and her family which comprises four nieces and nephews, the elder two of whom she had looked after for a significant period of time when they were younger and had been living in Jamaica, the younger two of whom she had helped look after while she had been living in the United Kingdom. She also said that she was in a long term relationship.

3. The application was considered by the Secretary of State for the Home Department who refused it in a decision dated 28 June 2013. The Secretary of State set out that under Appendix FM of the Immigration Rules the applicant did not qualify as someone who had either a sufficient period of continuous residence in the United Kingdom, nor was she satisfied that the applicant had no ties with Jamaica. Furthermore, she did not accept that there were any exceptional circumstances requiring her to consider the matter further under Article 8 outside the Rules.

4. On 1 October 2013 the applicant sought permission to apply for judicial review of the decision of the Secretary of State on the basis that the respondent had failed to take into account that the applicant had no ties with Jamaica, and the best interests of her nieces and nephews. That application, albeit out of time, was considered and refused by Upper Tribunal Judge Allen on 28 January 2014. Any request for oral renewals were ordered to be filed within three days. Although the request filed on 4 February 2014 is out of time we have considered it.

5. It is apparent that unless compelling circumstances exist an applicant's Article 8 rights are to be considered under Appendix FM of the Immigration Rules – Nagre v SSHD [2013] EWHC 720 (Admin), SSHD v Gulshan [2013] UKUT 00640 (IAC) and Shahzad [2014] UKUT 85 (IAC).

6. Mr Saini, who appears on behalf of the applicant, asks us to look at the letter of refusal dated 28 June 2013 and submits that whilst the respondent appears to engage with considerations such as the relatively brief period of residence in the UK and the unlikelihood of the applicant having lost ties with Jamaica where she has spent most of her life, it did not refer to the family life which the applicant states that she enjoys with her sister and her sister's children. He refers us to Zoumbas v SSHD [2013] UKSC 74 which indicates that the interests of children are a primary consideration under Article 8 and argues that the Secretary of State has omitted to consider this aspect of the applicant's family life or, if she had done so, she has failed to give any reasons for its failure to persuade her to grant the applicant leave to remain.

7. Ms Paterson, who appears on behalf of the respondent, highlights the long period of time that the applicant had spent in Jamaica, the comparatively short period of time she spent in the United Kingdom and the inherent unlikelihood of the applicant not retaining ties with Jamaica. She refers us to Kugathas v SSHD [2003] EWCA Civ 31 and submits that in relation to older children an enhanced degree of emotional relationship is required to be established if family life is said to exist between them and an adult. She submits that this was not a factor which was particularly highlighted by the applicant. Furthermore, although there was no reference to this matter in the refusal letter, there was a reference to exceptional circumstances from which it can be implied that the Secretary of State gave due consideration to this matter.

8. A further point has been raised in the course of the hearing by Mr Saini and he seeks permission to amend the claim form to include it in the grounds. He has referred us to the "Statement of Changes in the Immigration Rules" with particular reference to the date of their implementation, namely:

“However, if an application for entry clearance, leave to remain or indefinite leave to remain has been made before 9 July 2012 and the application has not been decided, it will be decided in accordance with the Rules in force on 8 July 2012.”

Mr Saini submits that this provision means that the applicant’s application for leave to remain ought to have been considered under the old, rather than the new rules.

9. In response Ms Paterson acknowledges that this may be correct. However she submits that this would not have made any difference to the ultimate result, as the same decision would have been reached under either set of rules.

10. On any view the likelihood of the applicant being able to establish that she had no ties with Jamaica was poor, and this was a matter which we can ascertain was considered by the respondent. However, although the applicant’s assertion of family life was not based upon her relationship with children of her own, but those of her sister, we are not in a position to assess her prospects of establishing family life, on this basis, as so poor that it did not require consideration by the respondent, and we are not able to satisfy ourselves that this matter was given due consideration by the respondent when making the decision to refuse leave to remain. Thus we consider that the applicant has an arguable public law challenge to this decision.

As we are giving permission for this ground to be argued, we will also allow the applicant to amend her grounds to include the matter raised during the course of the hearing concerning the correct rules under which the applicant’s application for leave to remain should have been considered. As this is acknowledged to be a matter which is arguable, we will also grant permission on that ground.

3.
The respondent, after permission to bring a judicial review had been granted for the above reasons then made two further decisions: the first on 24 th July 2014 and the second on 30 th October 2014. Mr Saini says that his instructions are that neither of those letters was received by his instructing solicitors until they were served attached to the respondent’s detailed grounds of defence which, he confirmed, had been received by the applicant’s solicitors on 3 rd November 2014.

Preliminary issue

4.
Before me Mr Saini raised a preliminary issue namely that these two letters were

“unlawful supplementations of the original Refusal Letter” and that “Whilst the Defendant does not explicitly concede the error in the previous decision letter, her supplementation of that cursory letter is an obvious and unlawful attempt to inflect (sic) rationality and reasoning into the decision under challenge by way of supplementation. However the decision under challenge itself remains prima facie unreasoned and contrary to the above mentioned jurisprudence.”

5.
He submits that the two letters cannot form part of the claim and the respondent cannot be permitted to perfect her reasons by supplementation and embellishment. All that is permitted is elucidation. He submitted that the Secretary of State should either have defended the original decision or offered settlement and reconsideration and then, in the light of any further information received, reconsidered the decision.

6.

In support of his submission Mr Saini relies upon Ermakov, R (on the application of) v Westminster City Council [1995] EWCA Civ 42 which was upheld in Lanner Parish Council, R (on the application of) v The Cornwall Council & Anor [2013] EWCA Civ 1290. He relied further upon R (on the application of Kerr) v Secretary of State for the Home Department IJR [2014] UKUT 493 (IAC). He submitted that the two letters had plainly been drafted with the judicial review claim in mind (after permission had been granted); that the fact that they had been drafted at all was highly suggestive that they were an attempt to cure the unlawfulness visible in the original decision and that they are "beyond the ambit and scope of this judicial review claim and should be excluded from the UT's assessment of the decision under challenge entirely.

7.
Mr Hansen submitted that the July and October letters accorded with established practice and elucidated and elaborated the original decision. He submitted that they did not fundamentally alter the original decision and that it was not at all unusual to cure a potential lack of reasoning by the production of a supplementary letter. He submitted that the July and October letters did not fall foul of Ermakov and should be considered as part of the decision making. He submitted that Ermakov relied upon statutory construction requiring reasons to be given at the relevant time and the reasons given in that case were contradictory amounting to a fundamental alteration whereas in the instant case the letters do not fundamentally alter the decision but elucidate and elaborate the original decision. He relied upon Kerr to support his position. If the July and October letters were a part of the decision, then the litigation is at an end; if they are not then they go to the question of remedy. But he retained as his primary submission, the two letters were a part of the decision process.

8.
I granted a short adjournment to enable both parties to bring to my attention any other case law upon which they sought to rely, given the late notification of this preliminary issue. On resumption of the hearing I was provided with R (on the application of Hafeez) v Secretary of Sate for the Home Department [2014] EWHC 1342 (Admin), Ahmed v Secretary of State for the Home Department [2014] EWHC 300 (Admin) and R (on the application of Masuma Rahman) v Secretary of State for the Home Department IJR [2014] UKUT 00374 (IAC) and heard further submissions.

9.
Following those submissions I held that the two letters were **not** a part of the decision making process and thus did not go to the legality of the original decision. I indicated that I would give my reasons for reaching this decision in my final judgment. I indicated that, obviously subject to hearing submissions, my initial view was that the original letter was unlawful and that the July and October letters went to the remedy available to the applicant. I indicated that if I were to find this to be the case I considered it appropriate, because of the particular circumstances of this case and the very recent instructions received by Mr Saini for the hearing before me and the failure of the applicant's solicitors to take her instructions on the July and October letters despite having had them at least since 3 rd November 2014, to adjourn for written and oral submissions on the issue of remedy. Mr Hansen objected to this proposed course of action. In the event I reserved my decision.

Reasons for finding that the July and October letters are not part of the decision as a whole

10.
In Ermakov , the applicant arrived in the UK and applied for housing under the homelessness provisions. He was refused with reasons. The applicant challenged that decision by way of judicial

review and the respondent filed evidence setting out different reasons for its decision from those originally given. The Court of Appeal held at [2], [3] and [4]:

“The court can and, in appropriate case, should admit evidence to elucidate, or, exceptionally, correct or add to the reasons; but should …… be very cautious about doing so. I have in mind cases where, for example, an error has been made in transcription or expression, or a word or words inadvertently omitted, or where the language sued may be in some way lacking clarity. These examples are not intended to be exhaustive, but rather to reflect my view that the function of such evidence should generally be elucidation not fundamental alteration, confirmation not contradiction. Certainly there seems to me to be no warrant for receiving and relying on as validating the decision evidence – as in this case – which indicates that the real reasons were wholly different from the stated reasons. It is not in my view permissible to say, merely because the applicant does not feel able to challenge the bona fides of the decision-maker’s explanation as to the real reasons, that the applicant is therefore not prejudiced and the evidence as to the real reasons can be relied upon. This is because, first, I do not accept that it is necessarily the case that in that situation he is not prejudiced; and, secondly, because in this class of case, I do not consider that it is necessary for the applicant to show prejudice before he can obtain relief. Section 64 requires a decision and at the same time reasons; and if no reasons (which is the reality of a case such as the present) or wholly deficient reasons are given, he is prima facie entitled to have the decision quashed as unlawful.

[3] There are, I consider, good policy reasons why this should be so. The cases emphasise that the purpose of reasons is to inform the parties why they have won or lost and enable them to assess whether they have any ground for challenging an adverse decision. To permit wholesale amendment or reversal of the stated reasons is inimical to this purpose …

[4] While it is true, as Schiemann J recognised in ex parte Shield, that judicial review is a discretionary remedy and that relief may be refused in cases where, even though the ground of challenge is made good, it is clear that on reconsideration the decision would be the same, I agree with Rose J’s comments in ex parte Carpenter that, in cases where the reasons stated in the decision letter have been shown to be manifestly flawed, it should only be in very exceptional circumstances that relief should be refused on the strength of reasons adduced in evidence after the commencement of proceedings. Accordingly, efforts to secure a discretionary refusal of relief by introducing evidence of true reasons significantly different form the stated reasons are unlikely to succeed.”

11.
The Court of Appeal in Lanner held [64]:

“Save in exceptional circumstances, a public authority should not be permitted to adduce evidence which directly contradicts its own official records of what it decided and how its decisions were reached …”

12.
In Kerr , UTJ Jordan found that in the original decision the subject of challenge was unlawful. That was not however the end of the matter because the respondent had, at the same time as filing the skeleton argument, also served the applicant with a further decision stating that it was supplemental and should be read in conjunction with the original decision. Mr Biggs, who was representing the applicant in that case made, it seems, similar submissions to those made by Mr Saini in the instant case namely that it was expressed to be a supplementary letter, did not contain an admission that the earlier decision was wrong and was withdrawn and was unlawful in accordance with the principles set out in Ermakov . UTJ Jordan held [14], [15], [16], [17]:

“14. The principles set out in Ermakov have no application in the present case. They were directed towards the lawfulness of an earlier statutory decision. Such a decision cannot be remedied by what is said later. In this case I have already made a finding that the decision of March 2013 is unlawful. It was unlawful and remains unlawful and will always be unlawful. Nothing that is said in the decision of 10 September 2014 alters the lawfulness of the earlier decision. Indeed the very fact that it was thought necessary to provide another letter strongly suggests that the earlier decision was deficient and required the consideration of additional material.

15. The relevance of the letter of 10 September 2014 is focussed upon the remedy that the Tribunal affords when an earlier decision is found to be unlawful but is followed by a later decision. If the later decision is a lawful consideration of all the factors that the decision maker was required to consider but failed to consider in the earlier decision and omits consideration of all those factors that the decision maker was required to omit, the later decision will be a lawful one. This does not alter the status of the earlier decision.....

16. This is a necessary corollary of its determination that the earlier decision was unlawful. If the earlier decision is quashed, it would normally be appropriate to direct that the respondent makes a fresh and lawful decision. If however a fresh and lawful decision has already been made, there is no point in requiring a further decision which would, of necessity, replicate what has already been decided...”

13.
In Ahmed it seems from [8] that the decision originally issued adverse to the claimant in that case had been reviewed after permission was granted and in [14] there is reference to the claimant, in the light of that later letter, “refining” his arguments. There does not appear to have been a submission that the later letter (and it is not clear whether it was described as supplementary or not) either formed part of the decision process or part of the assessment of remedy or should be ignored as unlawful. I do not take this judgment as authority in support of either the applicant or the respondent in the instant case.

14.
In Hafeez the claimant was granted permission to judicially review a September 2012 decision and, subsequent to that grant of permission the respondent issued a further decision in July 2013 which is described as “amounting to a reconsideration of the Claimant’s position”. The claimant in that case unsuccessfully argued that the 2012 decision was unlawful. He submitted that the 2013 decision should be ignored as irrelevant. It is not clear from the judgment on what basis that submission was made but in [35] Green J held:

“As to the 2013 Decision the Claimant does not explain why the analysis set out therein is unlawful. There is no explanation as to why it does not cure the defect in the earlier decision, and on its face it does precisely that. Further, as to the objection as to the admissibility of arguments on the part of the Defendant based upon the new decision it would in my view be wholly unrealistic to ignore the 2013 Decision. It is an integral part of the facts of this case. It has been in force for approaching 10 months. Had this judicial review proceeded exclusively upon the basis of the 2012 Decision then the Claimant would have had a stronger case for contending that it contained sufficient errors to be quashed and for the matter to be remitted to the SSHD to be re-taken. In such a case I would have been required to consider whether there was any utility in remitting the matter. In this regard I could not sensibly have ignored the existence of the 2013 decision, nor the fact that it lay unchallenged.”

In [36] Green J said:

"…the 2012 decision was withdrawn and the 2013 decision substituted in its place and this was correct and has not been challenged."

It is difficult to ascertain from the judgment exactly what submissions were made to Green J but it does appear that in any event the original decision was withdrawn and another substituted rather than the 2013 decision being treated as elucidating or supplementing. This is also therefore of no assistance to the instant case.

15.
In Masuma Rahman the applicant was granted permission on 27 th January 2014. The respondent issued a "supplementary decision letter" of 18 th March 2014 and it appears from [1] of the judgment that it was not contested that it formed part of the decision process and should be taken in to account in determining the lawfulness of the decision the subject of challenge. In [24] UTJ Allen stated:

"It is clear that the application could not succeed under the Immigration Rules and they have been considered adequately in a combination of the two decision letters, as regards family life under the Rules and private life under the Rules. The first letter did not address private life but that deficiency was addressed in the second letter. In the first letter it was concluded that there were no exceptional circumstances which might warrant consideration of a grant of leave outside the Rules. More detailed consideration was given to exceptional circumstances in the second decision and the approach there accords with the guidance in authorities such as MF Nigeria and Nagre ."

Again the circumstances of that case are not as in this case. There was no point taken either that the lawfulness of the original decision should be considered prior to consideration of the supplementary letter or that the supplementary letter went to remedy or should be ignored completely.

16.
I agree with UTJ Jordan that Ermakov is of no relevance in a case such as this where an immigration decision is subject to challenge and then supplementary letters are issued either after the issue of the claim form or after the grant of permission. These are not cases where the requirement to give reasons is laid down by statute and thus any subsequent decisions made or reasons given may fail to comply with statutory requirements.

17.
Both the July letter and the October letter are expressed as supplemental and to be read in conjunction with the original decision of 28 June 2013. In many cases, there may be an acceptance that that is so and the wording of the letters may be such that the additional letters are what could be called a "combined decision". Or the respondent may withdraw the first decision and remake it. But, as in Kerr , a subsequent letter or decision does not and cannot make the first decision lawful **unless** they are read together as one and the same decision.

18.
The two letters in question in the instant case were not served upon the applicant, through her solicitors, until after permission had been granted (2 nd April 2014) and even then not until the respondent's detailed grounds of defence were served (3 rd November 2014). The approach in this case should be as in Kerr namely to address the question of whether the decision under challenge was lawful or not. If not then that is the end of the matter – a subsequent lawful decision cannot render lawful a decision that was not lawful. Considerations of pragmatism in immigration proceedings require letters issued subsequent to either the issue of an application for permission or the grant of permission to be admitted into consideration. To refuse to do so would result in unnecessarily

repetitive, proceedings that would result in inordinate delay, lack of certainty for an applicant and significantly increased costs to no avail. In this case there was no application to amend the grounds seeking permission (other than the amended grounds of claim which were served immediately after the grant of permission). I have not heard argument on the relevance of the subsequent letters to remedy but have considered their content for the purpose of only determining the extent to which they addressed new issues or were merely elucidating an existing decision because it seems to me that to ignore them is inappropriate.

19.
In summary therefore I am satisfied that the July and October letters are not part of the original decision but their content is relevant to the issue of remedy.

The lawfulness of the original decision

20.
I have, therefore, taken no account of the July and October letters in reaching my decision as to the lawfulness of the original decision

21.
The applicant complains that the decision of the respondent firstly ignored and/or failed to give adequate consideration to her asserted family life with her adult sister, nieces and nephews and failed to give adequate or any consideration to the best interests of the children in the light of her relationship with them; and secondly failed to consider the application under Article 8 simpliciter as opposed to under the rules in force from 9 th July 2012. She relies in particular upon the children having lived with her whilst they and she were in Jamaica and the stated close bond between them and her both in Jamaica and in the UK which she asserts is comparable to a maternal relationship.

22.
Mr Hansen submits that although the decision was brief, there was a significant lacuna in the evidence produced to the respondent as to the years or months the applicant spent with the children in Jamaica and the detailed nature of the relationship she has with them in the UK. The applicant had been an overstayer for a number of years and it was, he said, inevitable that even if the respondent had referred in detail to the content of the application, the outcome would have been the same given the paucity of material before the Secretary of State when she made her decision.

23.
The decision did not engage with the specific matters put forward by the applicant which did not fall into the generality of claims made of family life or private life which involves the interrelationship between the applicant and her sister and her sister’s children. There were letters from the children which indicated a close bond and it behoved the respondent to at least engage with the scenario put forward.

24.
I am satisfied that the original decision was unlawful. However, for the reasons already given, as indicated as a provisional view at the hearing, I do not quash the decision. I invite written submissions by both parties together with any application with regard to costs to be filed within 21 days of this judgment being sent. If either party wishes to make oral submissions they are to notify the Tribunal within 7 days of this judgement being sent and a hearing will be listed on the earliest convenient date.

Submissions

25.
I received written submissions as to remedy from both parties. Neither requested an oral hearing.

26.
The applicant submits that having found the decision dated 28 th June 2013 to be unlawful, the respondent would need to show why the case was 'very exceptional' such that the reasons adduced in the letters of 24th July 2014 and 30 th October 2014 justified the applicant being denied relief and costs. The applicant submits that the production of not merely one but two further decisions without warning and without giving the applicant the opportunity to provide further and additional evidence/ representations renders the process unpredictable and unfair. The applicant maintains that the second and third decisions 'remain unlawful in and of themselves'. Attached to the written submissions was an itemised bill.

27.
The two later letters were produced after the grant of permission and after the service of the amended grounds of claim. The respondent submits that when the two later letters are taken into account, the applicant has been lawfully refused further leave to remain. In particular she submits that she was entitled to deal with the application in the first instance by reference to the Immigration Rules and thereafter that insofar as any consideration was required outside the Rules then such consideration was contained in the two later letters.

28.
The applicant has not identified any matters that have not now been considered by the respondent on the basis of the evidence that was before her and simply asserts that the later two decisions remain unlawful. Although the applicant asserts that they have not been admitted into evidence, they plainly exist and there must be consideration whether they are relevant as to remedy given the discretionary nature of judicial review.

29.
The later two decisions consider and engage with the evidence and information that had been placed before the respondent. They do not 'cure' the first decision of its unlawfulness but plainly address all the matters that had previously not been addressed by the respondent.

30.
Judicial review is a discretionary remedy. It is plain from the later two letters that the applicant's case has now been considered and the representations/evidence she submitted have been considered. In the light of my findings at [28] and [29] above this claim must fail.

31.
In so far as costs are concerned I have carefully considered the competing interests of the parties. I note that although the two later letters were dated July and October 2014 they were not served on the applicant until service of the detailed grounds of defence namely 3 rd November 2014. The applicant has, by the production of the two later letters achieved full consideration of application, which is no more than she could have expected had those two later letters not been produced.

32.
I therefore order that the respondent pay the applicant's costs up to and including the date of service of the detailed grounds of defence and three weeks thereafter in a sum to be agreed; the applicant to pay the respondent's costs thereafter in a sum to be agreed. In default of agreement the Tribunal will

determine costs on receipt of submissions limited to 3 pages of A4. The parties are on notice that costs sanctions may arise from unreasonable failure to reach agreement.

Upper Tribunal Judge Coker Date