Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of Sharma) v Secretary of State for the Home Department IJR [2015] UKUT 00484 (IAC)

Heard at Field House

On 27 th July 2015

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Before

UPPER TRIBUNAL JUDGE COKER

Between

THE QUEEN ON THE APPLICATION OF

BHAVNA ANILKUMAR SHARMA

Applicant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Mr P Turner, counsel, for the applicant (instructed by Bhogal & Partners)

Mr C Staker, counsel, for the respondent (instructed by Government Legal Department)

JUDGMENT

1.
The applicant was granted permission to judicially review a decision of the respondent dated 10 th January 2014 refusing her leave to remain in the UK subsequent to an application made on 20 th November 2013 for leave to remain on Article 8 grounds or on compelling and compassionate circumstances outside the Immigration Rules. That application had been made when the applicant had no leave to remain in the UK.

2.
The grounds seeking permission also sought permission to judicially review a claimed on-going failure of the respondent to make a decision on the further representations made by the applicant through her legal representatives on 24 th February 2014.

Background

3.

The applicant, a Kenyan citizen by birth on 17 th May 1987, arrived in the UK with lawful leave to enter as a student on 27 th August 2005, valid until 2007. She did not leave the UK on the expiry of her student visa. On 14 th May 2010 she submitted an application for naturalisation as a British Citizen, such application being refused on 2 nd August 2010. No appeal was lodged against that decision.

4.
On 1 st June 2012 the applicant submitted an application for leave to remain on Article 8 grounds. It was submitted that the applicant was stateless having renounced her Kenyan citizenship; that her mother had a number of medical conditions and that the applicant had been caring for her mother since her arrival in the UK. That application was refused in a decision dated 24 th July 2013. A further application was submitted for leave to remain on compassionate grounds outside the Rules and under Article 8 on 20 th November 2013. The applicant did not re-assert her claimed statelessness but relied on:

- her studies both before and after the expiry of her visa;
- that she had ceased her studies in 2012 after failing courses;
- her mother had a hysterectomy in 2008 and thereafter was diagnosed with Lupus; her mother is also epileptic and she attributed her lack of academic success in part to looking after her mother;
- at the time of application she had been in the UK in excess of 8 years during which time she has established strong social ties with friends;
- she enjoyed family life with her mother, grandparents and brother who are all settled in the UK;
- she has been supporting her mother financially, emotionally and physically;
- she has no criminal record, has not had recourse to public funds and has sought to maintain herself financially independently;
- she has a psychiatric disorder as described by Dr Raj Persaud;
- if granted leave to remain she would continue to maintain herself and her family without recourse to public funds.

5.
The report by Dr Persaud was prepared following a consultation on 29 th October 2013 having been asked to focus on the applicant’s current state and her fitness to survive a return to her country of origin. There is no indication how long the interview was for. He concluded:

“…. this lady potentially suffers from a fairly serious psychiatric disorder most probably extreme shyness secondary to a Social Phobia or an Avoidant Personality Disorder. In particular though what marks this case out is her extreme dependency on her mother with whom she had been very close all her life. This kind of dependency is very common in this kind of disorder but does mean that moving her away from her mother could be catastrophic for her psychiatrically…”

6.
According to her application her father lives in Kenya.

Procedural history

7.
Permission to appeal was granted by UTJ Latter for the reason that the decision letter which is the subject of challenge only dealt with the application under the Rules and it was arguable that no apparent consideration had been given to Article 8 and no mention had been made about psychiatric evidence.

8.
It then became apparent that the applicant in issuing the proceedings had failed to provide a full copy of the decision dated 10 th January 2014. An application by the respondent for the UT to reconsider the grant of permission in the light of the failure by the applicant to provide a full copy of the challenged decision was refused on the basis that there was no jurisdiction for such reconsideration.

9.
The respondent replied to the request dated 24 th February 2014 for reconsideration of the decision on 15 th July 2015 (Decision 2). Reconsideration was refused, in essence, because the request did not meet the guidance for such reconsideration. The applicant was invited to make a new application for leave to remain, paying the appropriate fee if she considered she met the relevant requirements for the grant of leave to remain.

Hearing on 27 th July 2015

10.
Mr Turner did not seek to amend his grounds and confirmed that his skeleton argument had been prepared on 6 th July 2015 (prior to the making of the decision dated 15 th July 2015). The challenge remained the same namely an unlawful failure on the part of the respondent to make and serve an appealable decision together with a failure by the respondent to engage with, consider and evaluate the medical evidence, the dependency of the applicant’s mother upon the applicant and the resulting impact on her if the applicant is removed. Furthermore the interdependency of the applicant and her mother amounted to exceptional circumstances and she should thus be served with an appealable decision. Mr Turner submitted it was unfair to require the applicant to make a further application and pay a further fee in order to obtain an appealable decision.

11.
Mr Staker contested the assertion that the applicant was entitled to an appealable decision and that it was unfair and unreasonable to deny her access to that right. The legislative regime as it existed prior to April 2015 did not confer a right of appeal on the refusal of an application for leave to remain on human rights grounds in the circumstances of the present case; there was no requirement or obligation to make a decision to remove under s10 Immigration and Asylum Act 1999 (absent falling within the policy guidance) and that any implication that the applicant had been prejudiced by delay

was unfounded – whether the decision had been made immediately or after some months or years, there was and would have been no removal decision and thus no appeal. He referred to the policy introduced following the implementation of the Immigration Act 2014 and that where there was an application outstanding for reconsideration of a previous decision, such reconsideration would be undertaken if the applicant fell within one of five categories – this applicant did not fall within one of those categories and thus there was no requirement for the respondent to make an appealable decision. In so far as the applicant submitted it was unfair for the applicant to pay another fee, he submitted that the regime approved by Parliament required an application to be made, a fee paid and any resulting human rights decision would have a right of appeal (subject to certification). This applicant had already made two applications; there was nothing to prevent her from making a third if so advised.

Consideration

12.
The decision dated 10 th January 2014 considered and refused the application made under the Rules. It was not submitted that there was a public law error in that regard. Permission had been granted on the grounds that there had been no consideration or engagement with the medical evidence submitted. The applicant had not submitted a full copy of the decision the subject of challenge and specifically had not submitted page 2. Page 2, under a sub heading "Decision on exceptional circumstances" identified the application made namely that the applicant had

"…applied for leave to remain outside the normal requirements of the Immigration Rules on exceptional and compelling grounds to remain in the UK in order to care for your mother. This has been refused as there are family members in the UK who are not subject to immigration control, as evidenced by the references you have provided in support of your application, and there is nothing to suggest that these family members are unable to arrange alternative care for your mother if this is required.

The local authority and social services are under a duty to provide suitable care for people whom they have community care functions (sic) and as you have failed to provide evidence of contact with formal care providers such as the local authority or social services department which is a requirement for consideration as a carer, it is therefore not accepted that alternative arrangements for care have been explored and exhausted.

You have failed to provide sufficient evidence that the nature of the illness requires any care and that the long term prognosis of your mother's condition requires continued care.

….We have carefully considered your claim for leave to remain in the United Kingdom as a carer for your mother. In view of the above, the Secretary of State is not satisfied that your circumstances are such that discretion should be exercised outside the Immigration Rules.

In support of your application you have raised the fact that you have some form of Social Phobia Disorder, as stated by the psychiatric report. This has been carefully considered. Your condition is not life-threatening and according to the Country of Origin Information Service treatment for your condition is available in Kenya. Consideration has been given to the difference in the standard of medical facilities in Kenya compared with that available here. Although it is accepted that the health care systems in the United Kingdom and in Kenya are unlikely to be equivalent, this does not mean that your case is exceptional and does not entitle you to remain here.

On the basis of the available information it has been concluded that suitable medical treatment is available in your country of origin. You have not provided any evidence to suggest that you would be denied medical treatment, nor that you would be unable to travel to obtain such treatment. It is also noted in your application form that your father remains living in Kenya, and there is no reason to suggest that he would not adequately support and assist you on return.

…"

13.
The grounds and skeleton of the applicant asserts that it would not be proportionate to return the applicant to Kenya because:

"She enjoys family life with her mother; her mother is dependant upon her; she suffers from mental difficulties as identified in the report from Dr Persaud; she has lived in the UK over 8 years; she is of good character; there is nothing for her to return to in Kenya; she is in a genuine and subsisting relationship with a British national (the latter was not relied upon before me)."

14.
The respondent considered and engaged with the submissions made on behalf of the applicant together with the medical evidence, the presence of other family members in the UK and her father in Kenya, the availability of health treatment in the UK and in Kenya. The applicant's length of residence in the UK is as a direct result of the applicant overstaying. The respondent did not simply apply the Rules; she considered the information and evidence submitted by the applicant outside the Rules. The decision by the respondent to refuse leave to remain was plainly open to her on the evidence produced and was clearly consistent with the established case law.

15.
In so far as the failure to make and serve an appealable decision is concerned, the applicant submits that the respondent failed to engage either with the original material before her or the new material. The respondent submits that the consideration of whether the material presented was exceptional and/or compelling, amounted to consideration of the request for an appealable decision which had been refused. This is rather a circular argument and it is difficult to see if that were the case and the Article 8 claim had been lawfully refused, that anyone would have fallen within that category and thus would have been eligible for an appealable removal decision.

16.
The applicant asserts that it would be reasonable to make an appealable decision within three months of the decision refusing leave to remain and relies upon Bharadva [2010] EWHC 3030 (Admin). Bharadva makes clear that the failure to make an appealable decision at the same time as the decision to refuse leave to remain is not unlawful. Whether and to what extent the respondent then takes an appealable decision is a matter for the respondent in line with her policy. Although as I have indicated there is a circularity in the submissions by the respondent as to what constitutes exceptional and compelling circumstances, in this case the factors relied upon by the applicant do not come near to amounting to such circumstances such that the failure of the respondent to make an appealable decision is unlawful on public law grounds.

17.
Mr Turner did not seek to amend the grounds in order to challenge the decision of the respondent refusing to reconsider the application although he did refer to the respondent's current policy in his submissions and submitted that this was a case which was "crying out for a common sense approach".

He referred to what he described as an “implication” in the Acknowledgement of Service (“AoS”) that the request for reconsideration would be dealt with as a substantive reconsideration; the inordinate delay in the decision merely to refuse to reconsider in the light of the AoS stating that a decision would be taken “imminently” and that it was, in accordance with the current policy “operationally expedient or appropriate” for the decision to be reconsidered.

18.
The issue of whether it is operationally expedient or appropriate to reconsider is a matter for the Secretary of State. Although the delay in the respondent taking what in fact was a very straightforward decision is to be deprecated, that does not render, in the applicant’s circumstances, the decision unlawful – whether taken then (or indeed very shortly after the service of the AoS) or in July 2015 does not alter the factual basis of the decision.

19.
As for the claimed ‘unfairness’ of requiring the applicant to make another paid application, the legislative scheme as it now stands enables an appeal against a refusal of a human rights claim. The applicant is an overstayer; she came to the UK with no anticipation that she would be able to remain; the respondent has considered the circumstances she put forward as justifying her remaining (twice). Having to pay for an application is not unfair.

20.
For these reasons the claim must fail.

21.
I order that the applicant pay the respondent’s costs in a sum to be agreed. In default of agreement the Tribunal will determine costs on receipt of submissions limited to 2 pages of A4. The parties are on notice that costs sanctions may arise from unreasonable failure to reach agreement.

22.
Although no application for permission to appeal to the Court of Appeal was made, I refuse permission; there being no arguable point of law capable of affecting the outcome of the application.

Date 20 th August 2015

Upper Tribunal Judge Coker