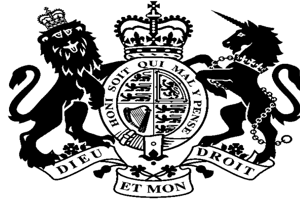

In the Upper Tribunal (Immigration and Asylum Chamber)

R (on the application of Turay) v Secretary of State for the Home Department IJR [2015] UKUT 00485 (IAC)

Heard at
Birmingham Civil Justice Centre
On 28 May 2015

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Before

MR C M G OCKELTON, VICE PRESIDENT

Between

The Queen on the Application of
FATMATA TURAY

Applicant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

Mr C McCarthy, instructed by Bhatia Best Solicitors appeared behalf of the Applicant.
Miss N Candlin, instructed by the Government Legal Department appeared on behalf of the Respondent

JUDGMENT

1. This is an application for judicial review, with permission granted by His Hon. Judge McKenna. The decision challenged by the claim form is a decision of the respondent on 11 March 2014 refusing the applicant leave to remain. The proceedings were issued on the last day of the period of three months following that date, on 10 June 2014. The grant of permission was on 30 October 2014 and the

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hearing before me was on 28 May 2015. At that hearing I was provided with copious authorities and a skeleton argument by Mr McCarthy on behalf of the applicant. In such circumstances it is easy to lose sight of the crucial facts and chronology, which do not always appear very readily from Mr McCarthy's grounds or his skeleton argument. They are as follows.

2. The applicant is a national of Guinea. She arrived in the United Kingdom in 2005. After an unsuccessful asylum application her appeal rights were exhausted on 14 July 2005. She has since remained in the United Kingdom unlawfully. In 2005, shortly after her arrival, she met Mohammed Thullah. She and he began what is described as "a relationship" straightaway. He had arrived in the United Kingdom from Sierra Leone in 2002. His status in the United Kingdom between 2002 and 2011 is not indicated in the applicant's case. In 2011 he obtained British citizenship. The applicant and Mr Thullah married in the United Kingdom on 18 August 2012 and lived together.

3. On 6 November 2012 the applicant applied for leave to remain as a partner of a British citizen. The application was made on the appropriate form and a copy of it has been provided to me. The application was accompanied by the marriage certificate, evidence that the couple lived together and shared financial responsibilities, and the necessary English language test certificate. The questions in what is notoriously a lengthy form are answered in a clear and firm hand and, throughout, the form appears to be entirely legible. It indicates that the couple have no children and that neither of them has any children of his or her own and gives other details of their relationship as sought. Question 6.12 is as follows:

> "Could you and your sponsor live together outside the UK if necessary?
> Yes ( ) No ( )
> If no, please provide details."

The question is answered by ticking the box marked yes, and no details are provided. The form goes on to ask questions about income, and full details are given showing Mr Thullah's income as £19,000 per year.

4. There was a considerable delay before the applicant had a response to that application. Following an enquiry by Mr Thullah's MP the decision was issued, as I have said, on 11 March 2014. It is a structured decision working first through the principal requirements for leave as a partner under Appendix FM to the Statement of Changes in Immigration Rules, HC 395 (as amended), then under the exceptions to the general rules, and then on the question whether discretion should be exercised in the applicant's favour.

5. The answers given are as follows. First, the applicant did not meet the general requirements for leave to remain as a partner, because she was in the United Kingdom in breach of immigration laws, having been an overstayer since 2005. Secondly, she did not meet the requirements of paragraph EX.1. The relevant wording is that:

> "(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK."

The decision on that issue is as follows:

> "It is acknowledged that you have a subsisting relationship with a British citizen, however it is not accepted you have demonstrated there would be any insurmountable obstacles to family life with your partner continuing outside the UK. You have not submitted any evidence why your sponsor would be unable to accompany you to Guinea. Therefore it is not accepted paragraph EX.1 would apply in your individual circumstances."

6. So far as discretion is concerned, the decision is very terse:

> "Consideration has also been given as to whether an exercise of discretion in your favour should be given, however the Secretary of State has decided it would not be appropriate in this instance."

7. In the mean time, the applicant had, apparently in November 2013, been diagnosed as HIV positive. Although, as I have said, she appears to have been actively seeking a response to her application, she did not draw the diagnosis to the attention of the Secretary of State. That, together with other matters upon which the applicant now relies, appears to have been disclosed to the Secretary of State for the first time in a witness statement supporting the application for judicial review. The copy of the witness statement in the Tribunal bundle is dated 9 June 2014.

8. The Secretary of State's acknowledgement of service was late, as it so often is. The summary grounds of defence respond to the challenge to the decision of March 2014: they do not purport to deal with additional facts asserted in the applicant's then new witness statement. Following the grant of permission the Secretary of State considered the matters of which she was then aware and on 18 December 2014 wrote supplementing her original decision, taking into account the contents of the applicant's witness statement, and indicating that, even taking those matters into account, the adverse decision on the original application was maintained. The detailed grounds of defence refer to that supplementary letter as remedying any defect in the original consideration of the applicant's application. In a reply to the supplementary grounds, undated, the applicant submits that the defendant is not entitled to rely on the supplementary reasons "insofar as the decision addresses facts which were known to the SSHD at the time of her original decision".

9. The grounds of challenge advanced in the judicial review claim are that the decision of March 2014 is not in accordance with the immigration rules "interpreted in light of the requirements of article 8, ECHR"; that the Secretary of State has "unlawfully failed to apply immigration rules adopting a proportionality assessment"; that the Secretary of State has acted in breach of the "Tameside public law obligation to make further enquiries, such as when necessary in order to reach a lawful decision"; and that she has failed to give lawful, adequate and intelligible reasons

enabling the claimant to understand the basis upon which the decision has been reached. Those reasons were expanded by Mr McCarthy before me.

10. In view of Mr McCarthy's objection to the Secretary of State's attempted reliance on the supplementary decision letter, it is convenient to consider the claim on the basis upon which it was made, in response to the decision which had by then been taken. On that basis, the decision is challenged on the ground that the defendant had failed to apply the relevant tests within the immigration rules, had failed to consider article 8 outside the rules, had failed to make further enquiries, and had failed to consider paragraph 276ADE of the Immigration Rules on the basis of the applicant's private life. Those submissions are supported by various assertions about the circumstances of the claimant and her husband.

11. The difficulty is, however, that neither in those submissions nor elsewhere does Mr McCarthy deal with the applicant's own answer to question 6.12 in the application form. In the course of the hearing he suggested that the question would have been answered differently if the applicant had had legal advice. That is a very troubling suggestion. There is nothing on the form or elsewhere to suggest that the answer (or indeed any other content of the form) was either mistaken or untruthful. The position is that the original application made to the Secretary of State unambiguously included the information that the applicant and her husband could live together outside the United Kingdom if necessary. Mr McCarthy's submissions construct an argument that the applicant and her husband could not live together outside the United Kingdom: but that is not what she herself said. There are, as Mr McCarthy points out, certain features of their own circumstances, and their relationship, which, if they had chosen to do so, might have enabled them to make the argument Mr McCarthy now seeks to make on their behalf. But that is not what was said in the application. And to suggest that, reading an application containing information such as that which was contained in this application, the Secretary of State should have made some assumption that the answer to this question (but, apparently, not to any of the other questions on the form) should be an object of suspicion and further investigation is simply absurd. The Secretary of State was dealing with an application by a person in a relationship which was both long-term and formal: but it was an application by a person who recognised that living outside the United Kingdom was an option for the couple. There was no proper basis upon which the Secretary of State could conceivably have been required to override the applicant's own assertion and investigate whether, contrary to what she herself said, there were insurmountable obstacles to family life with her husband continuing outside the United Kingdom.

12. So far as concerns article 8 outside the rules, the position is that nothing in the application before the Secretary of State gave any reason why the applicant's case should be regarded as one where the applicant had a right under article 8 to reside in the United Kingdom despite failure to meet the requirements of the rules. In Mr McCarthy's submissions, he emphasised a phrase from one of the authorities (R (Ganesabalan) v SSHD [2014] EWHC 2712 (Admin)), a decision of Michael Fordham QC sitting as a Deputy High Court Judge), and the need to consider "the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled". But the application before the Secretary of

State did not suggest that any difficulties that might subsequently be identified by the applicant's legal team were such as to affect the application or the ability of the parties to live together outside the United Kingdom.

13. Mr McCarthy's submissions continue by asserting that the Secretary of State should have considered paragraph 276ADE of the Immigration Rules. So far as relevant, that paragraph reads on the relevant date as follows:

> "(1) The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of the application, the applicant
> …
> (vi) is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK".

14. Mr McCarthy criticises the Secretary of State for failing to consider whether this paragraph applied: particularly because "the Claimant [sic] has a very strong case that she has no ties to Guinea". The Secretary of State, in Mr McCarthy's submission, did not "ask the right questions". This argument again is wholly without merit. Paragraph 276ADE is inapplicable from its threshold: the applicant was not "an applicant for leave to remain on the grounds of private life in the UK". Her application was unambiguously for leave to remain as a spouse. Secondly, all the facts to which Mr McCarthy refers are facts declared by the applicant only after the date of the decision under challenge. The Secretary of State's decision was the response to the application made, not to some other application made on some other grounds which Mr McCarthy might now think ought to have been made. Despite the interval between the applicant's application and the Secretary of State's decision, the applicant did not bring to the Secretary of State's attention any material other than that which was in the application. As I have noted, this is the case even in relation to her HIV diagnosis.

15. Although the matter is not fully explored in Mr McCarthy's skeleton argument, he also argues that the Secretary of State failed to give proper reasons, particularly in relation to her decision not to grant leave as a matter of discretion. The Secretary of State's decision was that the applicant had no right to have leave to remain in the United Kingdom. No basis has ever been suggested for granting her leave other than on the basis that she had a right to it. In the circumstances, the Secretary of State's treatment of this issue was wholly adequate. Even now there is, as I understand it, no suggestion that the applicant is a person whose circumstances merit a grant of leave to remain other than on the basis of entitlement. Even if some public law error could be identified in the passage of the decision letter dealing with discretion, there would be no proper ground for a grant of relief.

16. Thus, in my judgement as a response to the application actually made, the decision letter of 11 March 2014 was wholly adequate and apposite. The challenge is based on a presentation of the applicant's case that is different to the way in which she presented it to the Secretary of State. That challenge is simply hopeless.

17. I turn now to Mr McCarthy's objection to the Secretary of State's reliance on her supplementary letter. It is of course perfectly clear that the supplementary letter is not a new decision; it is equally clear that the applicant's challenge is to the decision of 11 March 2014 and that, as the authorities show, the Tribunal should be wary in allowing the Secretary of State to provide ex post facto reasoning supporting a challenged decision, after seeing the grounds of challenge to it. In judicial review proceedings of this sort, however, it is commonplace for the Secretary of State to update her decision and reasons, in the light of material provided at the time of the judicial review proceedings or subsequently. See, for example, R (Islam) v SSHD [2015] EWHC 1049 (Admin). In such circumstances, the formal position is no doubt that the Secretary of State offers the supplemental letter as part of her response to the claim; the applicant thereupon adjusts his position in order to meet the Secretary of State's case as it is now said to be. Save in exceptional circumstances, the Court or Tribunal is likely to dispense with requirements for leave to amend grounds, and simply proceed on the pragmatic basis that the applicant wants to, and needs to challenge the Secretary of State's position taken as a whole on the basis of all the material available at the time. There is usually a considerable advantage for the applicant, because any material that has been brought to the Secretary of State's attention only after the decision originally under challenge can be taken into account by the Court and the Secretary of State, without the applicant needing to make a new, paid for application to the Secretary of State, and without having to bring fresh, possibly costly, proceedings if the new application is refused.

18. In the present case, however, Mr McCarthy's position is clearly that he does not apply to amend his grounds in order to deal with the Secretary of State's supplementary letter: he objects to the consideration of that letter, save in one respect to which I shall return. In my judgement he is wholly entitled to take that position if so instructed or advised. As such, his challenge is the one which I have already dealt with, that is to say the challenge to the Secretary of State's decision on the 11 March 2014 and on the basis of the material then before her.

19. As noted earlier, however, Mr McCarthy confines the full force of his criticism of the supplementary letter to its dealing with matters that he says were already known to the Secretary of State, even if the way in which the appellant seeks to present the facts can be determined only from post-decision material. In relation to the applicant's HIV diagnosis, however, he accepts that it could not have formed part of the Secretary of State's initial consideration. He therefore proposes that the Secretary of State's response to that fact alone be separated from the rest of the supplementary decision and form the subject of challenge in the present proceedings.

20. In principle, that submission seems to me to be unsatisfactory. The Secretary of State purports, in the original decision taken as a whole, supplemented by the supplementary letter taken as a whole, to consider the applicant's circumstances as a whole. Although the various issues are dealt with separately, the conclusion has to be one which reflects the facts as a whole. The Secretary of State has never been asked to make a decision on the basis upon which Mr McCarthy now suggests the Tribunal should now make a decision: that is to say, on the facts disclosed on the original application with the addition of the diagnosis and nothing else. I do not

consider that it would in general be right to try to divide up a supplementary decision in this way.

21. In any event, however, there are reasons why it would not be appropriate in the present case. It will be remembered that the diagnosis pre-dated the Secretary of State's decision. The only reason why it is not a feature of the original decision is that the applicant chose to await a decision on the application that she had made, rather than seeking to supplement it with new facts. In order to enable the Secretary of State's response to the diagnosis, contained in the supplementary decision letter, to be the subject of challenge in these proceedings, Mr McCarthy would have to make on the applicant's behalf an application to amend his grounds in order to include a challenge to the Secretary of State's response to the HIV diagnosis, which was not a part of the factual matrix of the decision of 11 March 2014, challenged in these proceedings. No formal application has been made. If it had been made, I should have refused it for two reasons: one for the general reason I have just given; the second because the failure to deal with the matter in the original decision derives wholly from the applicant's own conduct.

22. The position is therefore that the applicant's challenge to the original decision fails. No doubt she is at liberty to make a new application, based on the new material and new arguments upon which she now relies, if she chooses to do so. The application for judicial review is dismissed.

23. There remains the question of costs. Mr McCarthy makes relatively detailed submissions on this issue, relying on the fact that the respondent failed to comply with the requirements either of the rules or of the decision of this Tribunal in R (Kumar) v SSHD [2012] UKUT 104 (IAC). My description above of the challenge as "hopeless" might be regarded as somewhat surprising, given that the applicant had permission to bring this claim. The applicant, however, and her legal representatives, have a duty of candour to the Tribunal. In making the claim, the applicant ought to have indicated the contents of the application to which the Secretary of State's decision was a response, including in particular the crucial answer to question 6.12, and the lack of any indication of any difficulties that the couple would experience abroad. If the facts had been set out in that way, it is in my judgement virtually inconceivable that permission would have been granted, even without an acknowledgement of service.

24. In these circumstances I see no reason to depart from the usual rule that costs follow the event, and I anticipate making an order for costs in the respondent's favour.

C. M. G. OCKELTON
VICE PRESIDENT OF THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 14 August 2015