



22 February 2017

PRESS SUMMARY

R (on the application of Agyarko) (Appellant) v Secretary of State for the Home Department (Respondent)

R (on the application of Ikuga) (Appellant) v Secretary of State for the Home Department (Respondent) [2017] UKSC 11

On appeal from [2015] EWCA Civ 440

JUSTICES: Lady Hale (Deputy President), Lord Kerr, Lord Wilson, Lord Reed, Lord Carnwath, Lord Hughes, Lord Hodge

BACKGROUND TO THE APPEAL

These proceedings relate to applications made by two foreign nationals, Ms Agyarko and Ms Ikuga, residing unlawfully in the UK, for leave to remain in the UK as partners of British citizens with whom they have formed relationships during the period of their unlawful residence. The Secretary of State’s decision in each case was that the applicant did not qualify for leave to remain under Immigration Rules (“the Rules”). Paragraph EX.1(b) of Appendix FM of the Rules required applicants to have a genuine subsisting relationship with a partner who is in the UK and is a British citizen, and for there to be “insurmountable obstacles” to family life with that partner continuing outside the UK. The Secretary of State found that no evidence had been provided of insurmountable obstacles in either case, and that in the case of Ms Ikuga she had not provided evidence of a shared address in order to show she had a partner within the meaning of the Rules.

The Immigration Directorate Instructions (“the Instructions”) state that where an applicant does not meet the requirement of the Rules, leave can be granted outside the Rules where exceptional circumstances apply, in order to ensure compatibility with the applicant’s rights under article 8 of the European Convention on Human Rights. The Secretary of State found that there were no exceptional circumstances in the case of either applicant to warrant consideration of a grant of leave outside the Rules.

Both Ms Agyarko and Ms Ikuga sought permission to apply for judicial review of the Secretary of State’s decisions. In each case permission was refused by the Upper Tribunal, and the Court of Appeal upheld that refusal.

JUDGMENT

The Supreme Court unanimously dismisses the appeals. Lord Reed gives the judgment, with which the rest of the Court agrees.

REASONS FOR THE JUDGMENT

The Secretary of State’s decisions on the facts were lawful. The ultimate question in article 8 cases is whether a fair balance has been struck between the competing public and individual interests involved, applying a proportionality test. The Rules and Instructions do not depart from that position, and are compatible with article 8.

It is within the margin of appreciation for the Secretary of State to adopt policies which set out the weight to be attached to the competing considerations in striking a fair balance, including that family life established while the applicant's stay in the UK is known to be unlawful or precarious should be given less weight, when balanced against the factors weighing in favour of removal, than family life formed by a person lawfully present in the UK [46-53].

Although the requirement of “insurmountable obstacles” to a continuing relationship is a stringent test to be met, rather than one relevant factor to be taken in account, this does not make it incompatible with article 8. The phrase “insurmountable obstacles” was not defined by the Rules when the present cases were considered, but it is reasonable to infer that it was intended to have the same meaning as in the jurisprudence of the European Court of Human Rights. It imposed a stringent test and was to be interpreted in a sensible and practical way rather than as referring solely to obstacles which make it literally impossible for the family to live together in the applicant's country of origin. This is consistent with the guidance on assessing insurmountable obstacles contained in the Instructions, and the definition of that phrase introduced subsequently in the Rules, effective from 28 July 2014 [42-48].

The “exceptional circumstances” question is also one that the Secretary of State may legitimately ask. Appendix FM is said to reflect how the balance will be struck under article 8 between the right to respect for private and family life, and the legitimate aims listed in article 8(2), so that if an applicant fails to meet the requirements of the Rules it should only be in genuinely exceptional circumstances that refusing them leave and removing them from the UK would breach article 8. The Instructions state that exceptional does not mean unusual or unique, but means circumstances in which refusal would result in unjustifiably harsh consequences for the individual such that refusal of the application would not be proportionate. This is an application of a test of proportionality, consistent with the references to exceptional circumstances in European case law and cannot be regarded as incompatible with article 8 [54-60].

On the facts of each case, there was no basis to challenge the conclusions of the Upper Tribunal judge, that no evidence was placed before the Secretary of State from which the conclusion could be reached that there were insurmountable obstacles to each applicant's relationship continuing in their countries of origin. Although in the case of Ms Ikuga the case was considered on an erroneous basis of fact that she was not in a genuine relationship, the insurmountable obstacles test was bound to fail in any event. Further, neither applicant had put forward anything which might constitute exceptional circumstances as defined in the Instructions. There was also an argument, advanced for the first time on appeal, that refusal of leave to remain served no good purpose because the applicants were otherwise certain to be granted leave to enter if the application was made from outside the UK. There was nothing to suggest that this would be the case for either appellant. [69-74].

The effect of refusal of leave in the applicants' cases was not a breach of EU law. The Secretary of State's decisions in these cases did not compel an EU citizen to reside outside the EU. These cases fell outside the situations of dependency to which the *Zambrano* principle of EU law applies [61-68].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:

<http://supremecourt.uk/decided-cases/index.html>