EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

DECISION

Applications nos. 22897/09 and 37369/12
Vusumzi Lee MBUISA
against the United Kingdom

The European Court of Human Rights (Fourth Section), sitting on 10 September 2013 as a Chamber composed of:

Ineta Ziemele, *President*,
David Thór Björgvinsson,
George Nicolaou,
Ledi Bianku,
Zdravka Kalaydjieva,
Vincent A. De Gaetano,
Paul Mahoney, *judges,*

and Françoise Elens-Passos, *Section Registrar,*

Having regard to the above applications lodged on 1 April 2009 and 26 May 2012 respectively,

Having deliberated, decides as follows:

THE FACTS

1. This case concerns two applications brought by Mr Vusumzi Lee Mbuisa, a South African national, who was born in 1969 and lives in Huddersfield. They concern different but related sets of immigration proceedings in the United Kingdom. In his first application (no. 22897/09) Mr Mbuisa was represented before the Court by Ison Harrison Solicitors, Leeds. He represented himself in the second application (no. 37369/12).

2. The United Kingdom Government ("the Government") were given notice of the first but not the second application and, in respect of that first application, they were represented by their Agent, Mr J. Grainger of the Foreign and Commonwealth Office.

A. The circumstances of the case

1. The facts of the first application

3. The facts of the first application, as submitted by the parties, may be summarised as follows.

4. The applicant has been a student in the United Kingdom since 2004. In March 2007 he visited his family in South Africa. He returned to the United Kingdom on 17 March 2007, accompanied by his wife, XN, and his son. On arriving at Manchester airport, the family was questioned by immigration officers. The applicant's wife and son were granted temporary admission on condition that his wife report to an immigration officer for interview on 21 March 2007. The applicant was subsequently interviewed but his wife was not. On 21 March 2007 his wife and son were refused leave to enter on the basis that they were seeking entry as dependants of the applicant, that they intended to remain with him in the United Kingdom until his studies were completed, and that they did not have prior entry clearance valid for this purpose. They were removed to South Africa on 25 March 2007.

5. The applicant's wife appealed against the refusal of leave to enter. She submitted that she had only ever intended to stay with the applicant for two months and, as a South African national, she did not require prior entry clearance for such a visit. She further submitted that the refusal of leave to enter violated her human rights and was discriminatory.

6. On 1 November 2007 the then Asylum and Immigration Tribunal allowed the appeal. The Immigration Judge accepted that the applicant's wife might not have made her intentions clear when she arrived in the United Kingdom. However, the Immigration Judge noted that her legal representatives had confirmed that she and her son only intended to remain in the United Kingdom for two months in a letter dated 20 March 2007. Moreover, the applicant was interviewed on 21 March 2007 and the interview record clearly stated that his wife and son would only stay for two months as visitors. The Immigration Judge was therefore satisfied that the applicant's wife was intending to enter the United Kingdom for a period of two months. Consequently, she should not have been refused leave to enter on the ground that she did not have prior entry clearance. Finally, the Immigration Judge noted that no evidence had been provided to demonstrate that the decision was discriminatory.

7. Following an application by the Secretary of State, an order for reconsideration was made. On reconsideration, the Asylum and Immigration Tribunal found that the Immigration Judge had made a material error of law. Pursuant to sections 82, 84 and 89 of the Nationality, Immigration and Asylum Act 2002 (see paragraphs 23 and 24 below), a person who did not have entry clearance on arrival in the United Kingdom could only appeal against the refusal of leave to enter on the ground that the decision was

unlawful by reason of section 19B of the Race Relations Act, that it was unlawful under section 6 of the Human Rights Act, or that it would breach the United Kingdom's obligations under the Refugee Convention. Consequently, the Immigration Judge had no jurisdiction to allow the applicant's wife's appeal on the ground that she did and this aspect of her determination had to be quashed. The Tribunal noted, however, that the applicant's wife had also raised human rights and race discrimination as grounds of appeal. As the Immigration Judge had made no decision concerning human rights and had dismissed the race discrimination claim without giving reasons, the Tribunal had to reach its own conclusions in respect of these matters. It held that there had been no inappropriate behaviour amounting to race discrimination against the applicant's wife or child. It further held that the refusal of leave to enter did not constitute any real interference with the applicant's wife's rights under Article 8 of the Convention but, even if it had, the interference did not have consequences of such gravity as potentially to engage the operation of Article 8. The Tribunal therefore substituted a fresh determination dismissing the applicant's wife's appeal.

8. On 14 November 2008 the Court of Appeal refused the applicant's wife's application for permission to appeal and made an order prohibiting her from requesting an oral hearing.

9. On 1 April 2009 the applicant lodged his first application, no. 22897/09, with this Court, complaining, *inter alia*, that refusing his wife leave to enter breached his right to respect for his private and family life under Article 8 of the Convention. On 7 June 2010 the President of the Chamber to which the case had been allocated decided to give notice of the application to the respondent Government and to request their written observations on the admissibility and merits of the case. The applicant and the Government were informed of this decision by letter dated 14 June 2010. The Government's initial observations were submitted on 29 September 2010; the applicant filed observations in reply on 17 November 2010 and 14 February 2011. In the first set of observations (those of 17 November 2010), he informed the Court that he and XN were no longer together. The Government's final observations were received on 22 March 2011.

2. The facts of the second application

10. On 13 October 2011 the applicant applied to vary his leave to remain in the United Kingdom, this time seeking leave to remain as the unmarried partner of CB, a British national.

11. The Secretary of State refused that application on 15 December 2011 on the grounds that the applicant had failed to provide documentary evidence to show co-habitation with CB for two years, as required by the Immigration Rules (see paragraph 25 below).

12. The applicant appealed against that decision to the First-tier Tribunal (Immigration and Asylum Chamber) relying, *inter alia*, on Article 8 of the Convention. He also alleged that the Secretary of State, in reaching her decision, had been improperly influenced by the application which he, the applicant, had made to this Court and that the Secretary of State's decision was motivated by racial discrimination.

13. In his evidence to the Tribunal (at a hearing on 20 March 2012) the applicant stated that he had met CB in February 2008 and their relationship began in April 2008 and became serious in August 2008. For a while they lived one week in Huddersfield and one week in Middlesbrough, then started living together in April 2010.

14. The applicant also gave evidence of the application he had made to this Court in respect of his wife's refusal of leave to enter the United Kingdom. When asked to give details of it, he stated that it related to an ex-partner in South Africa and that the relationship had ended because of disagreements. He further stated that they had been together from 1997 to 2007. He was then cross-examined by the Secretary of State's representative, a Home Office Presenting Officer, who asked if the applicant was still pursuing his application to this Court. The applicant was then asked what he would do if his wife came to visit him from South Africa to which the applicant replied that this was not now part of the application and it was a monetary claim. He also stated that the application was on behalf of his wife. He also stated that, although the relationship had broken down in July 2007, he had wanted to continue the domestic appeal proceedings and, thereafter, his application to this Court for damages.

15. The applicant's appeal was dismissed in a written determination promulgated on 20 March 2012. The Immigration Judge found that, although there was evidence to show that the applicant and CN had been living together since April 2011, there was insufficient evidence to show that they had been living together for the required two years.

16. As regard the allegation that the Secretary of State that been improperly influenced by the application made to this Court, the Immigration Judge concluded:

> "The only evidence before me [in relation to the first application, no. 22897/09] is a document in the respondent's [the Secretary of State's] bundle which is asking the Appellant [the applicant] to submit written observations in relation to his claim against the United Kingdom. There are no details in that letter as to the basis of his claim, nor are there any other documents that have been submitted concerning that claim. I am therefore not able to make a finding as to what the basis of that claim actually is given the lack of documentary evidence concerning it. However, having considered the letter of refusal issued by the Respondent, I find that there is no reference made of any kind to an application made by Mr Mbuisa or his wife. The refusal sets out a chronological history of the Appellant's immigration status in the United Kingdom, giving details of his arrival in the UK and his applications made to study. There is no recitation of any appeal relating to his wife or any proceedings that took place before the Asylum and Immigration Tribunal, the result of any such

> proceedings or any subsequent decision made by the European Court of Human Rights. It has played no part in the decision-making process. Consequently I do not find that the Appellant has been able to demonstrate on the balance of probabilities that the Secretary of State or an official acting on her behalf has acted in any way that is discriminatory..."

17. As regards Article 8, the Immigration Judge accepted that the applicant had private and family life with CB and her four children. It was not reasonable to expect CB and her children to leave the United Kingdom and live in South Africa with the applicant: they were all British citizens and two of them had contact with their natural fathers, who were in the United Kingdom. However, the applicant and CB had begun their relationship while knowing that the applicant had only temporary leave to remain in the United Kingdom. While the practical effect of the applicant leaving the country would be that he would be separated from CB and her children, this was likely to be short term, and there was no evidence that any application to re-enter the United Kingdom would involve a lengthy process. There was no evidence as to any particular degree of dependency by CB or her children on the applicant. The children were teenagers and no doubt adept at using modern means of communication, which they could use to remain in contact with the applicant for the time he would spend in South Africa. The interference involved in leaving the United Kingdom and re-applying for leave to enter was therefore proportionate and not in violation of Article 8.

18. The applicant sought permission to appeal. That application was refused by the First-tier Tribunal on 13 April 2012, which found that the Immigration Judge had been entitled to find as she did and that there was no error of law in her determination. The applicant then sought permission to appeal from the Upper Tribunal which, on 11 May 2012, refused permission, finding that, when dealing with the case under Article 8, the Immigration Judge had correctly directed herself on the legal issues and, when considering proportionality, had properly weighed the relevant factors.

19. Following the Upper Tribunal's decision, on 26 May 2012 the applicant lodged his second application with the Court, no. 37369/12, complaining that the refusal of leave to remain as the partner of CB violated inter alia his right to respect for his private and family life, as guaranteed by Article 8 of the Convention.

20. It appears that, after lodging that application, the applicant applied again to the Secretary of State for leave to remain as CB's partner. The Secretary of State refused the application on 8 April 2013.

B. Relevant domestic law and practice

1. Entry clearance

21. Prior to 1 July 2009, South African nationals were classified as "non-visa nationals" and, as such, they did not need entry clearance to come to the United Kingdom for less than six months unless it was a requirement of the immigration category under which they were entering.

22. Pursuant to paragraph 7 of the Immigration Rules HC 395 (as amended):

> "A person who is neither a British citizen nor a Commonwealth citizen with the right of abode nor a person who is entitled to enter or remain in the United Kingdom by virtue of the provisions of the 2006 EEA Regulations requires leave to enter the United Kingdom."

23. Under section 82(2)(a) of the Nationality, Immigration and Asylum Act 2002, a person may appeal to an adjudicator against the refusal of leave to enter the United Kingdom. Section 84(1) of the 2002 Act provides that such an appeal must be brought on one of the following grounds:

> "(a) that the decision is not in accordance with immigration rules;
>
> (b) that the decision is unlawful by virtue of section 19B of the Race Relations Act 1976 (c. 74) (discrimination by public authorities);
>
> (c) that the decision is unlawful under section 6 of the Human Rights Act 1998 (c. 42) (public authority not to act contrary to Human Rights Convention) as being incompatible with the appellant's Convention rights;
>
> (d) that the appellant is an EEA national or a member of the family of an EEA national and the decision breaches the appellant's rights under the Community Treaties in respect of entry to or residence in the United Kingdom;
>
> (e) that the decision is otherwise not in accordance with the law;
>
> (f) that the person taking the decision should have exercised differently a discretion conferred by immigration rules;
>
> (g) that removal of the appellant from the United Kingdom in consequence of the immigration decision would breach the United Kingdom's obligations under the Refugee Convention or would be unlawful under section 6 of the Human Rights Act 1998 as being incompatible with the appellant's Convention rights."

24. However, section 89 of the 2002 Act provides that a person who does not have entry clearance at the time of the refusal of leave to enter may only appeal against the refusal of leave to enter on grounds (b), (c) and (g).

2. Leave to remain as an unmarried partner

25. Leave to remain in the United Kingdom as the unmarried or same-sex partner of a person present and settled in the United Kingdom is regulated by paragraph 295 of the Immigration Rules. Paragraph 295F provides that such leave is to be refused if the Secretary of State is not

satisfied that each of the requirements of paragraph 295D is met. Paragraph 295D(vi) provides that one such requirement is that the parties have been living together in a relationship akin to marriage or civil partnership which has subsisted for two years or more.

COMPLAINTS

26. In the first application, the applicant complained that, in refusing his wife leave to enter the United Kingdom, the respondent Government had violated his right to respect for his family and private life and his right to found a family, as guaranteed by Articles 8 and 12 of the Convention. The applicant also complained that, in deciding to refuse leave to enter, the correct procedures had not been followed as his wife had not been interviewed. He also alleged that the Tribunal's findings as to lack of jurisdiction were unlawful and that the applicant and his family had been discriminated on grounds of race.

27. The Government contested those arguments.

28. In the second application, the applicant complained that the refusal to vary his leave to enter as the unmarried partner of CB also violated his rights under Articles 8 and 12 of the Convention. Invoking Article 6 of the Convention, he also complained that the proceedings before the First-tier Tribunal were unfair as CB, having recently suffered a miscarriage, had been unable to attend the hearing, and thus was not heard as a witness.

29. As stated at paragraph 2 above, the respondent Government were not given notice of the second application and so no submissions have been made by them in respect of the admissibility and merits of the applicant's complaints.

THE LAW

30. Article 6, where relevant, provides as follows::

> "In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law...

Article 8 provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

And Article 12 provides:

> "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

31. It is appropriate for these applications to be joined (pursuant to Rule 42 § 1 of the Rules of Court) and it is necessary for the Court to begin its examination of them by addressing the fact that the two applications have been pleaded on very different factual bases and that, after the first application was lodged, new domestic proceedings began which ultimately led to the lodging of the second application. There are two particular aspects of these applications which are unsatisfactory.

32. First, there is an apparent contradiction between the factual bases of each application: the first application alleges that the domestic authorities improperly refused the applicant's South African wife, XN, leave to enter the United Kingdom. Both the domestic proceedings challenging that refusal and the ensuing application to this Court (lodged on 1 April 2009) were put on the basis that XN was still the applicant's wife. That remained the position after notice was given to the Government. It was not until November 2010 that the applicant informed the Court that he and XN were no longer in a relationship. The second application alleges that, in refusing to give the applicant leave to remain as the spouse of CB, a United Kingdom national, the domestic authorities failed to have regard for the fact that he and CB had been in a relationship since 2008, that is, sometime before he lodged his application with the Court in respect of his South African wife, XN.

33. Second, the fresh domestic proceedings which form the subject of the applicant's second application were conducted without the Court being informed of them. Those domestic proceedings were also conducted without the domestic courts being fully informed of the nature of the first application which the applicant had lodged with this Court. This was despite the applicant's allegation in those fresh domestic proceedings that the Secretary of State had been improperly influenced by that first application. The Court considers that no criticism can be made of the Immigration Judge in those fresh domestic proceedings or her decision to exclude from her consideration the fact that similar proceedings were pending before this Court. However, it is clear that she was not provided with all of the documents relating to the first application to this Court. Had she been, it would have been apparent that the first application was not one that the applicant had brought on his wife's behalf but one that the applicant had lodged himself; that he was the only applicant in the case; and that, until November 2010, it was being argued by him on the basis that there was subsisting family life between him and his wife.

34. In any event, the Court considers it unnecessary to consider whether, given those unsatisfactory aspects, both applications amount to an abuse of

the right of individual application within the meaning of Article 35 § 3(a) of the Convention since, for the reasons which follow, the Court is satisfied that both applications are manifestly ill-founded.

35. In respect of the first application, the Court considers that the facts as stated in the second application – including the applicant's claim to have been in a relationship with CB since 2008 – provide ample grounds to support the conclusion reached by the Asylum and Immigration Tribunal that the refusal of leave to enter to his wife, XN, did not give rise to an actionable interference with Article 8 of the Convention. It also considers that no separate issue arises in respect of the complaint made under Article 12 of the Convention.

36. As regards the second application, there is no reason to cast doubt on the domestic courts' conclusion that refusing the applicant leave to remain as the unmarried partner of CB and requiring him to make any future applications from South Africa was a proportionate interference with the private and family life the applicant enjoyed with CB and her children. Full reasons for reaching that conclusion were furnished by the domestic courts, particularly by the Immigration Judge in her determination of 20 May 2012, which gave full and anxious consideration both to the facts of the applicant's case and to the relevant case-law of this Court and the domestic courts on Article 8 in immigration proceedings. Again, the Court considers that no separate issue arises in respect of the complaint made under Article 12 of the Convention.

37. Finally, to the extent that, in the second application, the applicant relies on Article 6 of the Convention in challenging the fairness of the domestic immigration proceedings, this complaint is incompatible *ratione materiae* with the provisions of the Convention (*Maaouia v. France* [GC], no. 39652/98, § 40, ECHR 2000−X).

38. For the above reasons, both applications must be rejected in accordance with Article 35 §§ 3(a) and 4 of the Convention.

For these reasons, the Court unanimously

Decides to join the applications;

Declares the applications inadmissible.

Françoise Elens-Passos
Registrar

Ineta Ziemele
President