



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/24503/2016

THE IMMIGRATION ACTS

Heard at Field House
On 17 July 2018

Decision & Reasons Promulgated
On 14 August 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

MOHAMMED MAMUN AL RASHID
(NO ANONYMITY ORDER)

Respondent

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

Representation:

For the Appellant: Mr L Tarlow, Senior Home Office Presenting Officer

For the Respondent: Ms M Chowdhury, instructed by Novell's legal practice

DECISION AND REASONS

The appellant and proceedings

1. The appellant Secretary of State was the respondent before the First-tier Tribunal and for ease of reference I refer to the parties as they were then. The appeal is brought with permission granted by the First-tier tribunal. The complaint is that the First-tier Tribunal judge (FTTJ) allowed the appellant's appeal on article 8 grounds. Mr Tarlow submitted that FTTJ had treated the respondent's delay in dealing with the appellant's

request for reconsideration of a refusal of his human rights claim in March 2011 as determinative, contrary to the case of EB (Kosovo) v SSHD 2008 UKHL 41, when referring to the delay being immense. Whilst the respondent was at fault in failing to respond to the correspondence of solicitors, that was an insufficient basis to say that the appellant's immigration history cannot be criticised, and in doing so the FTTJ failed to take into account that the appellant ought to have left the UK in 2008 when his 1st application to switch his leave from being a working holidaymaker to a student was refused. In light of the finding that the position in Bangladesh did not amount to very significant obstacles to reintegration and the appellants requirement have a Bangladesh interpreter at the appeal the judge needed to give full reasons concluding as to why there were compelling circumstances in the context of article 8.

2. Ms Choudhury for the appellant argued that the FTTJ was entitled to find that delay was a relevant matter. The application had been actively pursued so what ensued was a catalogue of failures to deal with the application and over a very long period for which no explanation was ever made. Whilst she accepted that the first application in 2008 had little prospect of success in light of the bar on switching (and not as the grounds suggest for any reason to do with revocation of the sponsor's licence), as might be thought the 2011 application taking account of the position in respect of Article 8 Private Life as it is understood now, it could not be said to have been a hopeless application, albeit that it is the respondent's delay which at the time of his belated assessment, the most significant factor driving the FTTJ's finding that the removal would now be disproportionate. The point is not what the outcome might have been on application in 2011 but the position by the time of the FTTJ's decision.
3. Mr Tarlow readily conceded that the respondent was probably wrong to refer to the issue of revocation of the sponsoring college's licence in the 2008 application because had that been the determinative position he would likely have been granted 60 days leave. In reality it would have been the inability to switch that would have governed the refusal.

Discussion

4. I find no merit in the SSHD's grounds. The grounds misread EB Kosovo, relying on the language of a dissenting opinion, when they argue that the case of EB Kosovo guides that delay in the respondent's handling of the appellant's application cannot be a sufficient basis to conclude that the proportionality balance falls in an appellant's favour in a non-deportation case. The relevant ratio is at 16:

"Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes."

5. There is no submission that that was not the position here, instead what is said is that it cannot be a factor which helps an appellant.

6. Whether, and to what extent, the delay in resolving the claim, and the manner of its handling, are relevant when considering the overall proportionality of ordering the removal of the appellant and requires a judgment in the round.
7. As per Carnwath LJ observed in Akaeke v Secretary of State for the Home Department [2005] EWCA Civ 947, [2005] INLR 575, para 25:

“Once it is accepted that unreasonable delay on the part of the Secretary of State is capable of being a relevant factor, then the weight to be given to it in the particular case was a matter for the tribunal”
8. The evidence before the FTTJ was that the Secretary of State had failed to consider the appellant’s further representations submitted in March 2011 until October 2016. During that time the appellant’s representatives made regular and repeated efforts to prompt a decision. It is apparent that only following complaints in May 2016 did the respondent start to put things in hand, with a decision only finally being issued in October 2016. I find the FTTJ was entitled to conclude that this 5 ½ year delay was immense, and so to treat it as evidence of a systemic failure and instance of the collapse of the immigration control system. The FTTJ was also entitled to take account that it followed an earlier breakdown in dealings with this appellant when, in 2008, there was an inexplicable failure to serve notice of a refusal decision on the appellant until 2010, when again service arose through the prompting of representatives. There is nothing perverse about the FTTJ’s inclusion of these failures of the respondent in operating effective immigration control in the balancing exercise, or finding that delay operated, in the round, as a compelling circumstance. There is no issue that the assessment covered a variety, and all of the relevant factors, so that the case was looked at in the round.
9. The grounds also challenge the balancing exercise on the basis that the FTTJ overlooked that the appellant should have left in 2008 when the respondent had refused his in-time application to switch from lawful working holidaymaker status to that of a student, instead of remaining and making the application which was subject of the appeal in February 2011. I find that there is no merit in the submission. As Mr Tarlow had to concede the evidence is that the 2008 decision, inexplicably, was not served until October 2010, and accordingly there was no proper basis for expecting the appellant to leave in 2008 so as to establish a protracted period of overstaying. Reading the decision as a whole it is clear the FTTJ when, at [55], following quite a detailed consideration of the position as between the appellant and the respondent in the context of the immigration history in the 4 preceding pages, says that he does not consider that the appellant’s immigration history can “properly” be criticised, he is referring back to the resolution of that dispute at [48]. Whilst the wording is possibly infelicitous the FTTJ judge is doing no more than rejecting the argument that the public interest in immigration control gains weight from the appellant’s conduct of a protracted overstay.
10. The FTTJ, for reasons which are not challenged, finds the appellant credible. The FTTJ accepted, particularly in the context of the time spent waiting for the resolution of his application, that the appellant’s Private life, including the familial (but not family life)

relationships that he enjoys with his brother and his brother's wife and children has deepened. There is nothing remarkable about that finding because the appellant lives with them and the time has been considerable. The grounds complain that the FTTJ is speculative in finding that he will not be a burden on public funds because he will accept an offer of work in a restaurant because such work is readily available. The criticism is partial, ignoring the FTTJ's satisfaction that he has not been a burden on public funds in the 11 ½ years he has been here, that he came as a working holiday maker originally, and has received offers of employment, including the one supported in writing before the FTTJ, which in oral evidence he said he would take up. The grounds also overstate the importance the FTTJ places on the issue because reading the decision as a whole, the FTTJ is simply making the findings commensurate with s117 and goes on to find that the private life in any event carries little weight. That is not to say however that it carries no weight. Similarly, and contrary to the grounds, that the appellant used an interpreter at the hearing does not carry significance, as the FTTJ has accurately stated the position.

11. The FTTJ considers the appellant's position on return and accepts that his links to Bangladesh have weakened the longer he has remained. He finds he is unable to return to live with his father, has no other family members in Bangladesh, and has nobody there to whom he could turn to for financial or emotional support. Further, over the 11 ½ half years residence here, has lost his contacts in Bangladesh and, in the conditions that obtain in Bangladesh, he would be in difficulties obtaining employment without the benefit of contacts. The FTTJ found that although re-integration would be hard it would not amount to very significant obstacles under the private life rules. Again, the ground's complaint that the ability to speak Bengali has not been weighed lacks force. The grounds complain the FTTJ's reference to the mirroring or correspondence of the increasing depth of links here and his decreasing links in Bangladesh is out with the evidence, ignores the evidence and the credibility findings, and in any event nit-picks what is, in the context of the judgement as a whole, no more than a turn of phrase.
12. The FTTJ has made his assessment with reference to s117, which section provides a list of compulsory factors which must be taken into account. It is a non-exhaustive list. The FTTJ brings forward the correctness of the rules-based conclusion as representing the public interest position of Immigration Control. The FTTJ brings forward his assessment of the character and quality of the private life now enjoyed and correctly self-directs at [48] that having been here on a temporary or precarious basis until October 2010, and subsequently unlawfully his private life here carries little weight. The FTFJ has expressly discharged the obligation to take into account section 117, and his dealing with those factors at [47] and [48] reveals substantive rather than formulaic consideration.
13. The judge correctly self-directed in respect of *EB Kosovo*, it is a 2008 case and so is expressed in language used before the introduction of the framework of Section 117 of the 2002 Nationality, Immigration and Asylum Act. Whilst immigration control is fixed as being in the public interest, weight is not fixed, but a matter for the judge, absent perversity. The principles in *EB Kosovo* still apply. In this case delay was

justified as a relevant factor and the weight attributed a matter for the FTTJ. Whether delay is dealt with as part and parcel of the weight to be given the public interest in the context of rules-based immigration control or a factor weighing for the appellant in the context of giving rise, in the round, to exceptionally compelling circumstances as the FTTJ has done here, is a matter of style rather than substance. This is a non-deport case without any significant culpable adverse immigration history where there has been a breakdown of the immigration system. As the FTTJ noted *Hesham Ali v SSHD 2016 UKSC 60* makes clear the FTTJ's obligation is to list out and weigh the competing factors and balance them. The FTTJ has done that. This is not a case where there could only be one answer. Perversity is not established.

Decision

14. The SSHD has failed to show that the decision is marred by legal error and the decision allowing the appeal stands.

Signed 
Deputy Upper Tribunal Judge Davidge

Date 26 July 2018