



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal Number: IA/27559/2015

THE IMMIGRATION ACT

Heard at Manchester

Decision & Reasons Promulgated

On 29th January 2018

On 06th February 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE MCCLURE

Between

Mr Peter Kintu

(NO ANONYMITY DIRECTION MADE)

Appellant

And

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr Clarke, Counsel instructed by Howe & Co Solicitors

For the Respondent: Ms Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Uganda. No anonymity direction was made previously. It appears that none was applied for. Having considered the circumstances I do not make an anonymity direction.
2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge Hussain promulgated on 20th February 2017 whereby the judge dismissed the appellant's appeal against the decision of the

respondent to refuse him leave to remain on the grounds of Article 8 of the ECHR, that is family and private life grounds.

3. The grant of permission at paragraph 3 states:-

"2 The grounds assert that the Judge erred in failing to consider the Respondent's delay in decision-making in assessing his application. The respondent conceded on 23 March 2015 that the Appellant's applications submitted in March 2008 had been lost and the decision in his case was made over 7 years after the application was submitted. It is asserted that the judge failed to consider the relevance of the delay in both strengthening the appellant's private/family life and diminishing the public interest in immigration control..."

3 The grounds are arguable. It is clear from the appellant skeleton argument that the delay in determining the application was relied on in relation to article 8 and no reference is made to this argument in the decision of the First-tier Tribunal."

4. It is on the basis indicated that leave was granted. Central to a consideration of the appellant's the fact that the appellant made an application for leave to remain in the UK in 2008. The decision letter of 14 July 2015 acknowledges on page 2 of the immigration history that the appellant did make an application in March 2008. There is also in the appellant's bundle of documents at page 142 a copy of the respondent's letter in response to that initial application. The respondent's letter is dated 10th March 2008. Further to that in pages 143 to 152 are a series of letters from the appellant, the appellant's representatives and a Member of Parliament requesting some response to the appellant's application from the Home Office.
5. Despite the application have been raised in 2008 and the acknowledgement of the application, there appears to have been no action to deal with the application by the respondent until an acknowledgement that the application had been lost and that there was no record of the application. At that stage on 23 March 2015 the respondent acknowledged the loss of the application and requested that a replacement application be made. Accordingly a renewed application was made by the appellant on 25 May 2015. That is acknowledged in the decision by the First-tier Tribunal Judge at paragraph 2. That in turn resulted in the decision of the 14 July 2015 refusing the application.
6. In essence the appellant seeks to rely upon the delay between the application being made in 2008 and the final decision in July 2015. In seeking to rely upon that delay the applicant relies upon EB (Kosovo) v SSHD [2008] UKHL 41 paragraphs 14-16; 27 and 32. The issue of delay commences within the case at paragraph 13 where a summary is made of some of the earlier cases. At paragraph 14 the following guidance is given as to the impact that delay may have:-

"14 It does not, however, follow the delay in the decision-making processes necessarily are relevant to the decision. It may, depending on the facts, be relevant in any one of 3 ways. First, the applicant may during the period of any delay develop closer personal and social ties and established deeper roots in the community than he would have shown earlier. The longer the period of delay the likelier that this is to be true. To the extent that it is true, the applicant's claim under article 8 will necessarily be strengthened. It is unnecessary to elaborate this point since the respondent accepts it.

15 Delay may be relevant in a 2nd, less obvious, ways. An immigrant without leave to enter or remain is in a very precarious situation, liable to be removed at any time. Any relationship into which such an applicant enters is likely to be, initially, tentative, being entered into under the shadow of severance by administrative order. This is more true where the other party to the relationship is aware of the applicant's precarious position. This has been treated as relevant to the quality of the relationship. Thus in R (Ajoh) v SSHD [2007] EWCA Civ 655 para , it was noted that 'is it was reasonable to expect that both [the applicant] and her husband will be aware of her precarious immigration status'. This reflects the Strasbourg court's listing of factors relevant to the proportionality of removing an immigrant convicted of crime; ... A relationship so entered into may well be imbued with a sense of impermanence. But if the months passed without a decision to remove being made, and months become years, and years succeed years, it is to be expected that this sense of impermanence will fade and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so. This result depends on no legal doctrine but on an understanding of how, in some cases, minds may work and it may affect the proportionality of removal.

16 Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirement 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. In the present case the appellant's cousin who entered the country and applied for asylum at the same time and whose position is not said to be materially different, was granted exceptional leave to remain during the two-year period which it took the respondent to correct its erroneous decision to refuse the appellant's application on the grounds of non-compliance. In the case of JL (Sierra Leone) , heard by the Court of Appeal at the same time as the present case, there was a somewhat similar pattern the facts. JL escaped from Sierra Leone with her half brother in 1999 and claimed asylum. In 2000 her claim was refused on the grounds of non-compliance. As in the appellant's case this decision was erroneous, as the respondent recognised 18 months later. In February 2006 the half brother was granted humanitarian protection. She was not. A system so operating cannot be said to be 'predictable, consistent and fair as between one applicant and another' or as yielding 'consistency

*of treatment between one aspiring immigrant and another'. To the extent that this is shown to be so, it may have a bearing on the proportionality of removal, or of requiring an applicant to apply from out of country. As Carnwarth LJ observed in *Akaeke v SSHD*:*

"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"

Lord Hope of Craighead

27 I draw attention to this history in order to emphasise my noble and learned friend's point that the weight which would otherwise be given to the requirements of firm and fair immigration control may be reduced if the delay is shown to be due to a system which is dysfunctional. There is, of course, no right to a decision with any given period of time. Article 8 claimants or not to be advantaged merely because of the deficiencies in the control system, as my noble and learned friend Lord Browne of Eaton-under-Heywood points out. Allowance must be made for the administrative burden that is unavoidable if the system is to be fair, in the case ought not to succeed merely because it might have been stronger if it had been determined earlier. But the shortcomings that have affected the appellant's case cannot be explained or excused on these grounds. On the contrary, the balance in the appellant's favour is significantly strengthened by the fact that the explanation for the delay is so unsatisfactory.

Baroness Hale of Richmond

32 ... In particular, I agree that prolonged and inexcusable delay on the part of the decision-making authorities must, on occasion, be capable of reducing the weight which would normally be given to the need for firm, fair and consistent immigration control in the proportionality exercise. That is a legitimate aim which will normally carry great weight in immigration cases. The heavy administrative burdens which such a system entails are well understood. But in article 8 cases, one is always concerned with whether the correct balance between the legitimate aim and the means employed has been struck on the facts of the particular case. Where the aim has failed spectacularly as it did here, the general importance which is normally attached to it must to some extent be diminished. But it has still to be weighed in the balance along with everything else."

7. As referred to in the skeleton argument the same point is made in the case of *Agyarko* 2017 UKSC 11 paragraphs 52 and 57 wherein the weight to be given to even a precarious family life will be greater where for example there is protracted delay. Paragraph 57 provides:-

"57 That approach is also appropriate when a court or tribunal is considering whether a refusal of leave to remain is compatible with article 8 in the context of precarious family life. Ultimately, it has to decide whether the refusal is proportionate in the

particular case before it, balancing the strength of the public interest in the removal of the person in question against the impact on private and family life. In doing so, it should give appropriate weight to the Secretary of State policy, expressed in the Rules and the Instructions, that the public interest in immigration control can be outweighed, when considering an application for leave to remain brought by a person in the UK in breach of immigration laws, only where there are 'insurmountable obstacles' or 'exceptional circumstances' as defined. It must also consider all factors relevant to the specific case in question, including, where relevant, the matters discussed in paragraph 51 and 52 above. The critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, in cases concerned with precarious family life are very strong or compelling claim is required to outweigh the public interest in immigration control."

8. The appellant's representative argues that the judge has failed to take account of the delay between the application in March 2008 and the decision in 2015 as a factor in determining whether the decision is proportionately justified. It is submitted that the fact that at paragraph 2 of the decision the judge has identified the material date for making the application as 20th May 2015 merely emphasises that the judge has failed to take account of the delay in assessing the position of the appellant.
9. In that respect however careful note has to be made of what he said in the case of Agyarko. The 2nd part of the cited paragraph emphasises that where an individual, who does not have leave to remain and who is in breach of immigration rules, is bringing an application it is only where there are insurmountable obstacles or exceptional circumstances as defined in the rules themselves or in the statutory provisions that the public interest in removal will be outweighed by an Article 8 claim.
10. However in respect of the present circumstances careful consideration has to be given to a number of factors, which were taken into account by the judge. First and foremost it has to be noted that the judge specifically found that there was no Article 8 right relating to family life that was engaged on the facts as presented. Whilst the appellant was in a relationship with a Ms [N] and Ms [N] had a daughter, ostensibly from another relationship, those relationships did not qualify as family life. The parties did not live together. The judge has specifically made that finding paragraph 12.
11. Consideration was given by the judge otherwise to whether or not the appellant could fall for consideration under any other of the provisions of appendix FM or paragraph 276 ADE. Clearly in making findings with regard to paragraph 276 ADE the judge would have to

consider not only the circumstances of the appellant in the UK but whether there were very significant obstacles to the appellant's integration into society in the country to which he would have to go, if he had to leave the United Kingdom. The judge specifically considers the issues in paragraph 13 and concludes that there are no significant obstacles to the appellant's reintegration into society in Uganda.

12. Given the findings of fact set out the appellant can only rely upon private life as an aspect of Article 8 as being engaged on the facts. In that respect since the case of EB further guidance have been given both within the Immigration Rules and in the statutory provisions of section 117B of the Nationality, Immigration and Asylum Act 2002 [as amended -introduced into the act in 2014].
13. Within the rules as pointed out paragraph 276 ADE contains specific provisions concerning private life and the factors to be taken into account. As pointed out one of those factors is whether or not there are significant obstacles and if there are no significant obstacles than in accordance with the case of Agyarko and the rules the public interest in maintaining immigration control would not be outweighed. Delay of itself does not create a significant obstacle. Delay as set out within EB allows an individual to develop more meaningful and substantial relationship; raises an expectation that an individual may not be removed; and reduces otherwise the weight to be given to the public interest.
14. In considering this matter the provisions of section 117B are relevant as indicated. Specifically 117B (4) and (5) which provide:-

'(4) Little weight should be given to-

 - a) a private life, or*
 - b) a relationship formed with a qualifying partner,*

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.'
15. In considering the circumstances of the appellant I would draw attention to the appellant's statement itself, specifically paragraph 5 wherein the appellant states:-

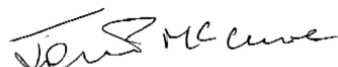
"5 On arrival in the UK I did not make a claim for asylum as I was advised by the agent who brought me to the UK to lay low key and accumulate some life here and understand the system before making an application. He also told me that I should make an application so soon as I am likely to be removed from

the UK. I realise now that this was not good advice but at the time did not know better."

16. The appellant claims to have entered the United Kingdom in or around January 2001. The appellant did not enter legally and it does not appear that the appellant ever had any lawful leave to be in the United Kingdom.
17. As recognised in the decision by Judge there were no significant obstacles. The only factor which the judge allegedly has failed to consider is the fact that the appellant made an application and there was a significant delay before that application received a decision. Set against that are the statutory provisions which make quite clear that where an individual is unlawfully in the United Kingdom little weight should be given to a private life established during that period of time. There is nothing exceptional on the facts as presented. Whilst the delay has got to be acknowledged it is not such that it places the appellant in any less favourable position than he was in before. The appellant still does not meet the requirements of the rules.
18. The appellant clearly could take advantage of the period of time that he has been in the United Kingdom but still that period of time does not approach the requirements of paragraph 276 ADE.
19. In light of section 117B I find that the judge was entitled to deal with the appeal in the manner that he did. The matter may have been different if the appellant had entered into a significant relationship and had brought that to the attention of the respondent in 2008 but the appellant's relationship arises long after that time. Indeed the evidence was to the effect that it was less than 2 years and that the parties did not live together. I can see that there would be a substantial and significant difference if a person had entered into a long-term relationship and had children, who were entitled to remain in the United Kingdom. However here the appellant is merely relying upon his private life and the rules make specific provisions which the appellant still cannot meet. To that extent the fact delay would have been to the advantage the appellant but such of itself does not create a right, or a significant obstacle or an exceptional circumstance.
20. Accordingly taking all the matters into account I do not find that there is any material error of law in the judgement.

Notice of Decision

21. The decision of the First-tier Tribunal did not involve the making of material error of law. The decision to dismiss this appeal on all grounds stands.



number: IA/27559/2015

Signed

Date

Deputy Upper Tribunal Judge McClure

Dated 29th January 2018