



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/02111/2013
AA/02112/2013

THE IMMIGRATION ACTS

Heard at Glasgow
on 29 October 2013

Determination issued on

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Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

XL & SS

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellants: Mr A Caskie, Advocate, instructed by Latta & Co, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

- 1) The procedural position is somewhat confused in the First-tier Tribunal determination. Correctly, it is this. XL, born on 15 August 1975, is the first appellant. Her son, SS, born on 19 November 2008, is the second appellant, having filed a separate notice of appeal. Her other son, born on 28 June 2010, is not an appellant, not having filed a notice of appeal.
- 2) The husband of XL is the father of both children and is a failed asylum seeker, who remains in the UK without status. All four family members are citizens of China, and not of any other country.

- 3) The first appellant says that she entered the UK in 2007. She sought asylum on 6 October 2008. The respondent refused that claim on 3 December 2012. First-tier Tribunal Judge Blair dismissed her appeal by determination promulgated on 21 January 2013 (case reference AA/11090/2012). Having rejected the asylum claim for lack of credibility, the judge took the view that the respondent had erred by deciding issues under Article 8 of the ECHR by reference to Appendix FM of the Rules, whereas they should have been dealt with under “the law on Article 8 as it stood before these changes were made” (paragraphs 33 and 34 of the determination). The judge thought that he should not substitute his own decision under Article 8 but should remit the issue to the respondent. (That might have been a debatable outcome, from either side, but neither party disputed it.)
- 4) By letter of 19 February 2013, at paragraph 16, the respondent refused the appellant’s claim under reference to Appendix FM of the Rules. At paragraph 17 the respondent said it was unnecessary to consider the case outside the Rules, because they struck the balance in relation to Article 8 in the majority of cases and this case was not exceptional.
- 5) First-tier Tribunal Judge Kempton dismissed both appeals by determination promulgated on 25 April 2013, referring in her conclusions to Article 8 only, without reference to the Rules.
- 6) That was in line with the approach taken by the appellants’ solicitor. It was not suggested in the First-tier Tribunal or in the Upper Tribunal that this case turns to any extent on whether Article 8 requires consideration both within and outwith the Rules, nor that anything turns on any difference between the law as it stood before and after 9 July 2012 (when the major amendments to the Rules were made).
- 7) Mr Caskie referred firstly to the grant of permission to appeal to the Upper Tribunal, which is on the lines that the judge arguably needed to deal “with the Article 8 effect of the Home Office delay of 4 years in refusing [the first appellant’s] asylum claim in terms of the principles set out in EB (Kosovo) [2009] UKHL 41 rather than the facts of that case.” He said that the issue is whether “the EB principles” regarding delay were properly taken into account by the judge. It was accepted that she did have regard to the building up of family and private life during the period of delay. The grounds went to the “third aspect” of EB, namely whether delay, in this case of over 4 years in a case involving Article 8, when the Secretary of State was aware that a child or children were involved, should properly reduce the weight to be given to the interests of immigration control. At paragraph 34 of her determination the judge made it plain that the first 4 questions of Razgar were readily answered in the appellant’s favour. At paragraph 36 the judge found that she was “not able to say for sure that there would be a disproportionate result for these children on return to China.” That was not an appropriate phrase. It suggested that the judge wrongly thought that the burden of proof at that stage might be on the appellant. The judge went on at paragraph 36 to say that the situation “may not be so bleak as the appellant would wish to paint it”, again suggesting that she was unclear as to where the onus lay. It was plain from

Quila in the Supreme Court that the onus of justifying a breach of Article 8 rights is on the respondent. Mr Caskie accepted my comment that there is authority that once a case arrives at the stage of assessing proportionality and weighing the balance, the incidence of the burden of proof may be not important. However, he argued that the judge plainly found this to be a finely balanced case, and so where the burden lay might be crucial. The two passages quoted suggested that the judge was looking incorrectly to the appellants to make their case. In a marginal instance, that was an error of such importance as to require a fresh decision.

- 8) If a fresh decision were to be made, Mr Caskie sought to introduce further evidence, updating the position regarding private and family life. This goes mainly to show that the second appellant is now attending primary school. Mr Mullen had no objection to admission of further evidence, if that stage were to be reached, and its nature was not contentious. I asked for Mr. Caskie's further submissions, under reservation of the error of law issue.
- 9) Mr Caskie submitted that it was significant that the second appellant has now moved into primary education, so that his removal would involve not only removal to another culture and society, he having lived his life to date in the UK, but also to another educational system. He termed this as a "double transition". He said the case was significantly stronger for the second appellant than in relation to the younger sibling. He relied on IE [2013] CSOH 142 at paragraph 14 :

Nevertheless, I consider that the respondent has erred in law. In my opinion, there is force in the submission on behalf of the petitioner that the respondent erred in her approach in paragraph 18 to evaluation of the best interests of the children, in that she treated the petitioner's immigration status, and in particular her removal from the UK, as a factor in answering the question of what was in the children's best interests. In the light of the decision of the Supreme Court in *ZH (Tanzania)* and the decision of the Upper Tribunal in *MK (India)*, it seems to me that as a matter of law, as well as logic, the respondent was not entitled to proceed upon a factual assumption that the petitioner would be removed when assessing what was in the best interests of the children, with a view to deciding whether or not the petitioner should be removed. I have considered carefully whether paragraph 18 can simply be regarded, as counsel for the respondent submitted, as poorly expressed, but I have concluded that it cannot. The process of reasoning described in it is quite clear, and clearly wrong. Moreover it seems to me that the error is significant, given that the respondent began paragraph 18 by stating "Your complaint appears to be that life would be better for your client's children in the UK as opposed to Nigeria. *That may be correct, but...*" (My emphasis.) The implication of these words, as I read paragraph 18, is that if the respondent had not had regard to the fact that the petitioner had no right to remain in the UK and was to be removed, she might well - and I need not put it higher than that - have reached a different conclusion as regards what was in the children's best interests.

- 10) He submitted that the impact on the children, in particular the older one, taken along with the delay of 4½ years, where there was a duty to have regard to the best interests of the children as a primary consideration, was such that removal would now be disproportionate, and a decision should be substituted in favour of the appellants.
- 11) Mr Mullen submitted that the judge's wording at paragraph 36 did not suggest a misunderstanding of the burden of proof. These were simply comments on the

shortcomings of the evidence presented by the appellants to support their assertions. The judge undertook the final decision on proportionality as a balancing exercise. She found that the delay by the respondent strengthened the case for the appellants, but concluded that it did not tip the balance in her favour. That conclusion was properly open to her. The judge had been entitled to hold that this case did not come close to the circumstances of EB in respect of delay. The court in EB was at pains to point out that delay by itself would rarely be determinative. The judge's decision should not be interfered with. The appellants had not drawn to the attention of either Tribunal to cases such as AG Nigeria and MK India in which the facts relating to children were significantly stronger than in the present case.

- 12) As to remaking the decision, if that were to arise, Mr Mullen submitted that it should be found proportionate to require the appellant's removal under current circumstances. The second appellant has now entered primary education and is integrated in the UK, but he is of Chinese nationality and background, and of a young age, when his major ties must still be in the home and family. It is established that in the earlier years of a child's life the focus is inevitably on his parents. IE was not authority for a presumption that an appellant should be treated as if having lawful status in the UK. The possibility of removal of the parent could not be excluded from consideration of the best interests of the child.
- 13) Mr Caskie in reply emphasised that the appellants did not argue that the decision reached was not open to the First-tier Tribunal, rather that the decision was flawed by an error of legal approach. The case was so finely balanced that the error required a fresh decision to be substituted, and that could properly be reached in favour of the appellants. While the early years of a child's life were of lesser significance in terms of integration into the UK, that contradicts the respondent's "bright line" of 7 years in the Rules. If the first 4 years of life count for little there are cases where 4 years' residence (eg from age 8 to age 12) are more significant than a full 7, and the bright line envisaged by the Rules disappears. In this case, residence throughout a life of almost 6 years is a significant factor, and taken along with the unusual and unexplained delay is sufficient for the appeal to be allowed. His point in relation to IE was not that the first appellant had to be deemed to have been here lawfully, but that the nature of her residence was a neutral factor in assessing the child's best interests.
- 14) I reserved my determination.
- 15) It is undisputed in this case that both the date and the substance of amendments of the Rules are of no significance, and that whether the issue is thought to arise under the Rules or under the general law as to Article 8, the same proportionality test, as required by the Strasbourg jurisprudence, applies - cf. MF (Nigeria) v SSHD [2013] EWCA Civ 1192, paragraphs 43-46.
- 16) The first issue is whether Judge Kempton erred in law in relation to the respondent's delay in decision making. Neither party referred directly to what was said in EB, which is reported at [2008] Imm AR 713.

17) Lord Bingham said at paragraphs 13-16:

Delay

13. In *Strbac v Secretary of State for the Home Department* [2005] EWCA Civ 848, [2005] Imm AR 504, para 25, counsel for the applicant was understood to contend, in effect, that if the decision on an application for leave to enter or remain was made after the expiry of an unreasonable period of time, and if the application would probably have met with success, or a greater chance of success, if it had been decided within a reasonable time, and if the applicant had in the meantime established a family life in this country, he should be treated when the decision is ultimately made as if the decision had been made at that earlier time. For reasons given by Laws LJ, the Court of Appeal rejected this submission, for which it held *Shala v Secretary of State for the Home Department* [2003] EWCA Civ 233, [2003] INLR 349 to be no authority. While I consider that *Shala* was correctly decided on its facts, I am satisfied that the Court of Appeal was right to reject this submission. As Mr Sales QC for the respondent pointed out, there is no specified period within which, or at which, an immigration decision must be made; the facts, and with them government policy, may change over a period, as they did here; and the duty of the decision-maker is to have regard to the facts, and any policy in force, when the decision is made. Mr Drabble QC, for the appellant, did not make this submission, and he was right not to do so.
14. It does not, however, follow that delay in the decision-making process is necessarily irrelevant to the decision. It may, depending on the facts, be relevant in any one of three ways. First, the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of the delay, the likelier 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 second, less obvious, way. 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 the 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 Secretary of State for the Home Department* [2007] EWCA Civ 655, para 11, it was noted that "It was reasonable to expect that both [the applicant] and her husband would 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: "whether the spouse knew about the offence at the time when he or she entered into a family relationship" see *Boultif v Switzerland* (2001) 33 EHRR 50, para 48; *Mokrani v France* (2003) 40 EHRR 123, para 30. A relationship so entered into may well be imbued with a sense of impermanence. But if months pass without a decision to remove being made, and months become years, and year succeeds year, 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 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. 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 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 of facts. JL escaped from Sierra Leone with her half brother in 1999, and claimed asylum. In 2000 her claim was refused on grounds of non-

compliance. As in the appellant's case this decision was erroneous, as the respondent recognised eighteen 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 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."

18) Lord Hope agreed with Lord Bingham and put the matter of delay thus at paragraph 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 within any given period of time. Article 8 claimants ought not to be advantaged merely because of deficiencies in the control system, as my noble and learned friend Lord Brown of Eaton-under-Heywood points out. Allowance must also be made for the administrative burden that is unavoidable if the system is to be fair, and a 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.

19) Lord Scott would have allowed the appeal outright rather than remitting the case to the AIT, on the view that the unfairness to the appellant through having been deprived of the benefit of the same policy as applied to his cousin was overwhelming.

20) Baroness Hale said at paragraph 32:

For the reasons given in the opinions of my noble and learned friends, Lord Bingham of Cornhill and Lord Hope of Craighead, with which I agree, I would allow this appeal and make the order which Lord Bingham proposes. 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 as 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.

21) (Lord Brown disagreed with Lord Bingham on the question of delay, as explained at paragraph 42.)

22) Judge Kempton found that the delay in the first and second of the ways mentioned by Lord Bingham significantly strengthened these appeals. That is very plain at paragraphs 20 and 23, in particular, of her determination. It is as to the third aspect of delay that she is said to have erred.

- 23) At paragraph 35 Judge Kempton distinguished EB (Kosovo) on its facts. I do not think there is a sharp line to be drawn between comparing facts and deriving principle from such cases. Lord Bingham derived his decision partly from comparison of the facts of EB with those of JL. It was highly significant in both EB and JL that a close relative under similar circumstances gained protection through an earlier decision, disclosing inconsistency and unfairness in the system. There is no such point of comparison in this case. Nor has it been said that other cases involving young children (of Chinese or any other origin) have succeeded because of similar delay.
- 24) The present case is not one which ought to succeed because it might have been stronger if determined earlier. If a prompt decision had been made, the case would have been much weaker.
- 25) The judge took it very much into account that there had been inordinate delay by the respondent in deciding the case. She thought that went quite strongly in favour of the appellants, but she correctly treated that as only one of the factors in the proportionality outcome.
- 26) I find no error of law in the judge's approach to the delay by the respondent.
- 27) Some subsidiary criticisms were made of the wording of passages at paragraph 36 of the determination, reading these as implying that the burden lay on the appellants rather than on the respondent. I do not think that is a fair overall reading. There was nothing wrong with being less than sure about some aspect of the evidence, or with observing that the appellants sought to paint a bleaker picture than was justified, provided that the eventual result was a balancing exercise. The judge found that the evidence did not show a significantly adverse impact on the children on return. Her decision was ultimately reached on balancing all relevant factors, not on where the onus lay.
- 28) Although no direct criticism was made, the determination is unhappily worded at paragraph 38 as to the appellant not having discharged the burden of proof on Article 8, and at paragraph 39 as to the appellant not having engaged Article 8. What the judge should have said was that although Article 8 was engaged, as she had found with no difficulty at paragraph 34, removal was in the end a proportionate measure.
- 29) In the alternative, I would have substituted a decision to dismiss the appeals. The submission related to IE was (I thought) put in a rather complicated way, but if its essence is that the immigration history of the parents is left out when assessing what would best serve the interests of the children, and becomes relevant only at the proportionality stage, I agree. However, there is nothing very unusual or extraordinary about young children moving far around the modern world, and the evidence does not show that anything seriously against the children's interests would arise from the family moving to China. As a fairly typical case of a Chinese family with two young children and an adverse immigration history, it would not be

disproportionate for the respondent to remove the appellants, notwithstanding that the second appellant has entered the first year of primary school. The additional factor of delay is in the appellants' favour, but there is no inconsistency or unfairness of outcome, reducing the weight to be accorded to immigration control to an extent which requires the appeals to be allowed.

30) The determination of the First-tier Tribunal shall stand.

31) An anonymity direction, made in the First-tier Tribunal, continues to apply.

A handwritten signature in black ink, appearing to read "Hugh Maclean". The signature is written in a cursive style with a large, stylized initial 'H'.

31 October 2013
Judge of the Upper Tribunal