Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: AA/12242/2015
AA/12243/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3rd May 2016	**On 1st June 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE SHERIDAN

Between

MR THALPA DON CHAMINDA LIYANAGE
MS ANUJA PRASANGIKA PERERA WEERATUNGA ARACHCHIGE
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Miss A Seehra, Counsel instructed by Nag Law Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellants are citizens of Sri Lanka. The first appellant was born on 20 November 1974 and has been in the UK since 1999. He is the husband of the second

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appellant who was born on 31 October 1977 and has been in the UK since 2002. The appellants married in Sri Lanka in 1998.

2. This appeal arises from the decision of the respondent to refuse the appellants' application for asylum and leave to remain in the UK on the basis of their private and family life under Article 8 ECHR. The appellants' ensuing appeal, which was pursued on Article 8 grounds only, was heard by First-tier Tribunal ("FtT") Judge Samimi. In a decision promulgated on 2 March 2016, the FtT dismissed the appeal. The FtT's decision to dismiss the appeal is now being appealed.

3. The immigration history of the appellants is highly relevant to the claim and therefore I have set it out in full, based on the evidence that was before the FtT.

4. The first appellant's immigration history is as follows:

(a) On 19 November 1999 he entered the UK

(b) On 6 January 2000 he claimed asylum

(c) On 29 January 2001 his asylum claim was refused. However, the decision was not served on him or his representatives.

(d) On 8 March 2001 the first appellant was sent a letter from the respondent which stated as follows:

> *You have applied for asylum in the UK. Your application has been carefully considered, and a decision has now been taken that you do not qualify for asylum within the terms of the 1951 United Nations Convention relating to the Status of Refugees. The date on which your application is recorded as having been determined is 29/01/01.*
>
> *The implications of this decision for your immigration status within the UK are being considered separately within the Immigration and Nationality Directorate. When that process is complete, you will receive a further letter from your port of entry.*

(e) In 2003 he was listed as an absconder.

(f) Between 2001 and 2008 there is no evidence of there having been any communication between the first appellant (or his solicitors) and the respondent. The first appellant has produced a letter from his solicitors to his employer, sent in 2005, concerning his immigration status but no correspondence to or from the respondent.

(g) In 2008 the first appellant submitted a legacy casework questionnaire. In 2010 this was followed upon on several occasions.

(h) The FtT found that the first appellant did not at any stage "go underground" and that the respondent was fully aware of his whereabouts. Moreover, it found that the first appellant relied on his solicitors to make relevant enquiries with a view to regularising his immigration status.

5. The second appellant's immigration history is as follows:

   (a) On 18 June 2002 she applied for asylum

   (b) Her application as refused on 15 July 2002.

   (c) On 13 December 2002 her appeal was dismissed and as of 7 February 2003 her appeal rights were exhausted.

6. In 2012 a fresh application was made by both appellants, which was refused in 2015.

7. The appellants claim that they have established a private and family life in the UK. They have been in the UK a very long time (over 16 years in the case of the first appellant). Their life in the UK includes regular attendance at a Buddhist temple and involvement with charity work. The first appellant works at Tesco (in the same location for about 15 years) and delivers food for a restaurant. They have no criminal convictions and consider themselves to be valued members of the community who are wholly integrated into UK life.

8. The appellants do not have children and do not have wider family in the UK. They both have family in Sri Lanka. The first appellant worked in Sri Lanka at a casino.

Decision of First-tier Tribunal

9. The appellants' appeal was heard by FtT Judge Samimi on 28 January 2016. The FtT stated that the only issue before it related to Article 8 ECHR outside the Rules.

10. The FtT found that the appellants had built up a private life in the UK, consisting of their friends, the first appellant's job and their connections with the Buddhist community but that there were not compelling circumstances that would warrant their claims succeeding under Article 8 outside the Rules.

11. One of the issues considered by the FtT, in its assessment of proportionality, was the respondent's delay in dealing with the application. In this respect, it made the following comments:

    > *10. The length of the appellants stay in the UK, together with the delay caused by the respondent's failure to consider their cases promptly and in accordance with the Legacy Policy has enabled them to remain and build private lives.*
    >
    > *11. I do not find that the fact of delay and length of residence in the circumstances of this case are of sufficient weight so as to tip the balance in the appellant's favour. I do not find that the fact of delay and length of residence have strengthened their ties to the community, friendships or work.*

Grounds of appeal and submissions

12. There are several grounds of appeal but in essence the appeal is brought on the basis that the FtT failed to have proper regard to the delay by the respondent in dealing

with the appellants' applications and in particular failed to give proper consideration to, and apply, EB (Kosovo) [2008] UKHL 40. The grounds contend that there was a complete administrative breakdown which meant the application by the appellants was mishandled. The grounds also submit that the delay is exceptional and the judge should have taken into account both paragraph 353B of the Immigration Rules and chapter 53 of the respondent's Enforcement Guidance and Instructions.

13. Ms Seehra reiterated the arguments made in the grounds of appeal – contending, in particular, that the FtT had failed to recognise that the weight given to immigration control should be reduced because of the excessive delay, which was entirely the fault and responsibility of the respondent. The FtT also erred by not taking into account the respondent's policy guidance.

14. Mr Melvin argued that the appellants' case rests on there being a delay attributable entirely to the respondent. However, the reality is that the first appellant was at least partly responsible. Mr Melvin contended that he did not follow up with the respondent for a decade and it does not appear that he took any steps after his wife lost her appeal. There are no letters from him or his solicitors to the respondent between 2001 and 2010. In these circumstances, the guidance referred to by Ms Seehra is not relevant.

Relevant law

15. It is clear that delay by the respondent can be a relevant consideration when conducting a balancing exercise under Article 8 ECHR.

16. In EB (Kosovo) Lord Bingham indentified three ways in which delay could be relevant.

> *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" seeBoultif v Switzerland (2001) 33 EHRR 1179,*

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"*

17. The Immigration Rules, at paragraph 353B, recognise that delay can have implications for a human rights claim.

Exceptional Circumstances

353B. Where further submissions have been made and the decision maker has established whether or not they amount to a fresh claim under paragraph 353 of these Rules, or in cases with no outstanding further submissions whose appeal rights have been exhausted and which are subject to a review, the decision maker will also have regard to the migrant's:

> *(i) character, conduct and associations including any criminal record and the nature of any offence of which the migrant concerned has been convicted;*
>
> *(ii) compliance with any conditions attached to any previous grant of leave to enter or remain and compliance with any conditions of temporary admission or immigration bail where applicable;*
>
> *(iii) length of time spent in the United Kingdom spent for reasons beyond the migrant's control after the human rights or asylum claim has been submitted or refused; in deciding whether there are exceptional circumstances which mean that removal from the United Kingdom is no longer appropriate. This paragraph does not apply to submissions made overseas. This paragraph does not apply where the person is liable to deportation.*

18. Similarly, the significance of delay is recognised by the respondent in its Enforcement Guidance and Instructions (chapter 53), where it is stated:

> *The length of residence in the UK is a factor to be considered where residence has been accrued by an unreasonable delay which is not attributable to the migrant. Periods of residence which are built up by actions of non-compliance attributable to the migrant will not count in the migrant's favour. More weight should be attached to the length of time a child has spent in the UK compared to an adult.*
>
> *Provided that the factors outlined in 'Character' or 'Compliance' do not mean that the claimant cannot benefit from the exceptional circumstances guidance, then caseworkers must also consider whether there has been significant delay by the Home Office, not attributable to the migrant, in deciding a valid application for leave to remain on asylum or human rights grounds or whether there are reasons beyond the individual's control why they could not leave the UK voluntarily after their application was refused. For example:*
>
> > • *'Family' cases where delay by the Home Office, or factors beyond the control of the family which have prevented departure, have contributed to a significant period of residence (for the purposes of this guidance, 'family' cases means a parent or parents as defined in the Immigration Rules and children who are emotionally and financially dependent on the parent, and under the age of 18 at the date of the decision). Following an individual assessment of the prospect of enforcing removal, and where the factors outlined in 'Character' and 'Compliance' do not prevent a case from benefiting from the exceptional circumstances guidance, family cases may be considered exceptionally on grounds of delay where the dependent child has lived in the UK for more than 3 years or more whilst under the age of 18.*
> >
> > • *Any other case where the length of delay by the Home Office in deciding the application, or where there were factors preventing departure, may be considered exceptionally on grounds of delay where the person has lived in the UK for more than six years.*

Consideration

19. The appellants' case, as set out in their grounds of appeal and argued by Ms Seehra, is that an administrative breakdown resulted in a "staggering" delay of 16 years for which the respondent was responsible.

20. I do not consider this to be an accurate characterisation of the appellants' immigration history. The second appellant applied for asylum in June 2002. Her application was refused in July 2002 and her subsequent appeal was dismissed in December 2002. Notwithstanding her appeal rights being exhausted in February 2013, she remained in the UK. It is clear from this chronology that her application was dealt with promptly and, following her 2002 application, there was no delay in decision making relevant to an assessment under Article 8.

21. The first appellant applied for asylum in January 2000 and his application was refused on 29 January 2001, just over a year later. The decision was not served on him but he was sent a letter, dated 8 March 2001, the contents of which are set out

above at paragraph [4(d)]. In sum, this letter notified the first appellant that his application for asylum had been rejected but that the implications of this decision for his immigration status were being considered separately and would be communicated to him in due course. No such letter was sent to the first appellant. For the next seven years he continued to live and work in the UK. There is no evidence during that time of there being any effort on his part (or by solicitors on his behalf) to contact the respondent to clarify his status or find out when he would receive the letter referred to in the letter of 8 March 2001. This inaction occurred even though during this time his wife entered the UK and made an unsuccessful asylum application and appeal, and he had the benefit of legal representation.

22. Although it is the case that the respondent failed to complete the necessary process following its decision to refuse the first appellant's asylum application, in my view the period between 2001 and 2008 cannot properly be described as one in which there was an unreasonable delay on the part of the respondent. Rather, it is a period in which the first appellant knew he had been unsuccessful in his asylum appeal but because of inaction by the respondent continued living and working in the UK. To the extent the period between 2001 and 2008 can be characterised as a delay, such delay was at least in part a result of the conduct of the first appellant in failing to follow up with the respondent.

23. In 2008 the appellants made a legacy application, and in 2012 a fresh application. A decision was not made until 2015 and I accept that there was an unreasonable delay by the respondent in respect of these later applications.

24. I now turn to consider the FtT's approach to the "delay". The FtT did not undertake a detailed analysis of the delay (indeed, it is unclear from the decision whether the references to "delay" encompass the period from 2001 to 2008 as well as the period from 2008 to 2015 or only the latter) and the decision does not include any reference to EB (Kosovo) or the respondent's Enforcement Guidance. However, this does not mean delay was not taken into account by the FtT in its Article 8 proportionality assessment. The conclusion at paragraph [11] that "the delay and length of residence in the circumstances of the case" were not "of sufficient weight so as to tip the balance in the appellant's favour" clearly shows that "delay" was treated as one of the relevant factor in the balancing exercise under Article 8.

25. The appellants argue that, because of the delay, the FtT should have given reduced weight to the public interest in immigration control and that it was an error of law for it not to do so. I do not accept this argument. EB (Kosovo) recognises that in cases where delay is the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes, it may be appropriate to reduce the weight accorded to the public interest in the maintenance of effective immigration control. However, this is not a case where unpredictable or unfair outcomes were reached and the factual matrix is very different to EB (Kosovo) which concerned a 13 year old whose asylum application was not determined for four and a half years despite the application by his cousin (who had entered the UK with him and whose

circumstances were analogous) being determined several years earlier. Accordingly, there was not a material error by the FtT in failing to reduce the weight given to the public interest because of delay by the respondent.

26. Given my finding that the delay between 2001 and 2008 (to the extent it can even be characterised as a such) was at least in part due to the choices made by, and conduct of, the first appellant, I do not consider the Enforcement Guidance and Instructions or Paragraph 353B of the Immigration Rules to be relevant and accordingly there was no error of law by the FtT in failing to consider and apply them.

27. The FtT's approach to the delay in this case (whether it is from 2001 to 2015 or only from 2008 to 2015) needs to be understood in the wider context of how the appellants' claim under Article 8 was considered.

28. The appellants were unable to succeed under the Rules and therefore, in order to prevail, it was necessary for them to show "compelling circumstances" to warrant the appeal being allowed outwith the Rules: see SS Congo [2015] EWCA Civ 387. However, it is clear from the evidence that was before the FtT that the appellants were unable to identify any compelling circumstances other than the length of time they had spent in the UK. The appellants are both from Sri Lanka and would be returned together; their wider family reside in Sri Lanka and they have cultural, social and religious ties with the country; they do not have children who would face upheaval in moving country; and their private life in the UK was established whilst their status in the UK was precarious.

29. Although delay is a relevant factor under Article 8 and can, in certain circumstances, reduce the weight given to the public interest in immigration controls, the fact of there being a delay is not a trump card which can turn an appeal with no prospect of succeeding under Article 8 outside the Rules into one that can succeed. Applying Section 5A of the Immigration Asylum and Nationality Act 2002 to the facts of this case it becomes clear why the FtT determined the balancing exercise under Article 8 in favour of the appellants' removal. Whilst the appellants speak English and are financially independent, Section 117B(5) stipulates that little weight should be given to a private life established by a person at a time when the person's immigration status was precarious. The appellants' private lives in the UK were established following a decision to refuse their asylum applications; that is, at a time when their status was undoubtedly precarious.

30. Irrespective of the delay, and even if (which is not accepted) the delay is indicative of a dysfunctional system yielding unfair and inconsistent outcomes such that reduced weight should be given to immigration control, the Article 8 balancing exercise still weighs heavily against the appellants who are unable to show any compelling circumstances, other than the length of time they have spent in the UK, to warrant their appeal being allowed outwith the Rules. The decision of the FtT was therefore one that was clearly open to it based on the evidence.

Decision

a. The appeal is dismissed.

b. The decision of the First-tier Tribunal did not involve the making of a material error of law and shall stand.

Deputy Upper Tribunal Judge Sheridan Dated: 27 May 2016