



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/24135/2018 (V)

THE IMMIGRATION ACTS

Heard at Field House *via Skype for Business*
On 17 February 2021

Decision & Reasons Promulgated
On 3 March 2021

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

N D
(ANONYMITY DIRECTION CONFIRMED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. S Rungasamy, Solicitor, Lawrence & Associates

For the Respondent: Mr. D Clarke, Senior Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of a Judge of the First-tier Tribunal ('the Judge') sent to the parties on 4 December 2019 by which the appellant's appeal against the decision of the respondent to refuse to grant her leave to remain on human rights grounds was refused.

2. By a decision dated 27 July 2020 Upper Tribunal Judge Finch granted permission to appeal on all grounds.

Hearing

3. The hearing before me was a Skype for Business video conference hearing held during the Covid-19 pandemic. I was present in a hearing room at Field House. The hearing room and the building were open to the public. The hearing and its start time were listed in the cause list. I was addressed by the representatives in the same way as if we were together in the hearing room. I am satisfied: that this constituted a hearing in open court; that the open justice principle has been secured; that no party has been prejudiced; and that, insofar as there has been any restriction on a right or interest, it is justified as necessary and proportionate.
4. The appellant and her father attended the hearing remotely.

Anonymity

5. The Judge issued an anonymity direction. Neither party sought for the direction to be set aside, and so I confirm it at the conclusion of this decision. I do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of her human rights claim becoming publicly known, particularly as her stated history of sexual intimidation and/or abuse remains to be considered.

Background

6. The appellant is a national of Mauritius. She is presently aged 21.
7. She entered the United Kingdom with entry clearance as a visitor on 19 November 2016, when aged 17. She was granted leave to enter for six months.
8. On 21 March 2017 she applied for indefinite leave to remain outside the Immigration Rules ('the Rules'), relying upon article 8 ECHR. The appellant did not request that the respondent undertake expedited consideration of her application. An accompanying covering letter authored by her present legal representatives simply detailed as to the substance of the application:

'Our client is currently living under [sic] the same household as: a) father, b) step-mother (British national), c) siblings (British national). Our client's father submits he has sole responsibility of her. Further, he is actively involved in our client's life by taking key decisions in her education and health. You will note that our client is a minor'

9. The appellant relied upon her family life with her father in this country, detailing in bald terms that he had sole responsibility for her consequent to his divorce from her mother. No representations were made on her behalf as to fears of returning to Mauritius or personal health concerns.

10. The application was made a little under three weeks before the appellant's 18th birthday. As the application was made outside of the Rules, she did not enjoy the benefit of any subsequent decision being linked to her age at the date of application.
11. By a letter dated 11 September 2017, the respondent requested that the appellant provide further documentation. The appellant wrote to the respondent on 22 September 2017 requesting an additional 14 days in which to secure and provide the requested documents. The appellant provided further documentary evidence, including her birth certificate, under cover of a letter authored by her present legal representatives, and dated 10 October 2017, which simply detailed:

'We have been informed that [the sponsor] has the sole responsibility for our client since our client's parents are divorced. Further, her father and step-mother are the ones supporting her.'

12. The appellant was aged 18 at the date of this letter.
13. The respondent refused the application by a decision dated 7 November 2018, observing that the appellant was now an adult who had spent most of her life living in Mauritius. It was noted for the purposes of article 8 that relationships between an adult applicant and their father did not constitute family life without evidence of further elements of dependency that are beyond normal emotional ties, amounting to real, committed and effective support. Such ties were said not to arise in this matter. The respondent concluded that no exceptional circumstances arose.

Hearing Before the FTT

14. The appeal came before the Judge sitting at Taylor House on 5 November 2019. The appellant and her father gave evidence.
15. The appellant filed a witness statement, dated 13 June 2019, which primarily adopted the contents of her father's first witness statement, save for detailing:

'Further, I wish to explain why I did not reveal my circumstances to my father. I felt incredibly ashamed and scared about the situation. Further, I did not know how my father would react. I confirm that my mother and I are no longer on speaking terms.'

16. By means of his first witness statement, dated 13 June 2019, the appellant's father detailed that in December 2016, following her arrival in this country, the appellant had explained to him the problems she was experiencing with her mother's partner at home in Mauritius. He explained that consequent to this discussion he decided that she should make an application to remain in this country. He further detailed that he was concerned as to his daughter's mental health because she had suffered several panic attacks and had suicidal thoughts.

17. The appellant's father further detailed that the appellant would have no network of support in Mauritius on return and though she is an adult, she 'does not have any employment experience in Mauritius since she came here as a minor'.
18. By means of a supplementary statement dated 4 November 2019, the appellant's father explained that the appellant could not register with a GP in this country consequent to her immigration status. He addressed his daughter's health concerns:

'I went to Boots Pharmacy seeking help and explained to them that my daughter was struggling to sleep. Therefore, I purchased some off-counter sleeping pills called Kalm which she has been using since then. Further, we prayed every day for her in the hope she gets better. In brief, I did not know how to deal with the situation other than speaking to her daily and praying.

However, when she was really unwell, we went to a private GP since each consultation costs around £50.00. Due to our financial constraints, we could not increase the number of visits for her to see the doctor. On the 30 October 2019, she was very unwell and I took her to the doctor. At that stage, she broke down and the GP became very concerned and advised us to seek urgent psychological help. Although I was advised by my legal representative that a psychiatric report was required in the beginning I could not afford to get one done until recently.

I also wish to clarify that I did not mention my daughter's medical circumstances before to the Home Office. The reason is because I was not comfortable due to the stigma that will be attached to her being a young Muslim girl. However, my partner persuaded me that this is important for her case. Finally, I also want to add the bond my daughter shares with her two little brothers is very strong and that has helped her to cope with panic attacks at times.'

19. The Judge records the oral evidence of the appellant's father at the hearing, at [15] of the decision, detailing:

'15. In examination-in-chief, the Sponsor added that he supports the Appellant by providing everything for her: food, accommodation and anything else that she may need. The Appellant and her mother are no longer speaking to each other and there is no one available in Mauritius to look after her there. The Sponsor does have a brother in Mauritius, but he is busy with his family and they are also not speaking to each other due to a dispute over their inheritance. The Sponsor believes that the Appellant would not be able to work in Mauritius and she has not completed their education there either.'

20. The appellant relied upon a letter from Dr Gintaute Cukanoviene, dated 30 October 2019, detailing two visits by the appellant to her medical practice. The first visit was in July 2019 and concerned epigastric pain, periodic dizziness and 'sleepless' [sic]. The second, undated, visit is referenced as follows:

'The second time [the sponsor] worries about her mood, sleep disorder and her idea of suicide. During the our [sic] conversation I have been told that [the appellant] was waiting visa [sic] and other additional documents for legal living

[sic] in UK. It took longer than a year. Leeding [sic] to, [sic] her attending to the [sic] was suspend [sic] a year ago, the patient cannot get registration with NHS service. [The appellant] distressed and need [sic] psichlogical [sic] help.'

21. Reliance was also placed upon a psychiatric report authored by Dr Krishnapillai Balasubramaniam, consultant psychiatrist, dated 1 November 2019. The length of the consultation is not detailed. The report confirms Dr Balasubramaniam being informed by the appellant that she was present in Mauritius when she informed her father as to her problems and it was upon receiving this information that her father 'made arrangements for her to visit him on a Visit Visa on 19 November 2016'. The appellant informed Dr Balasubramaniam that since her arrival in this country she had been feeling depressed, with sleep disturbance and suicidal thoughts. She was being treated with Alprazolam, which I observe is commonly prescribed for the treatment of anxiety and insomnia. Dr Balasubramaniam identifies it as an Anxiolytic, or a drug used to relieve anxiety.
22. Dr Balasubramaniam diagnosed the appellant as suffering from a Depressive Episode, of a severe degree as evidenced by persistent low mood, poor concentration, disturbed sleep, feelings of hopelessness, helplessness and transient suicidal thoughts.
23. The Judge identified the appellant as advanced a medical health case under article 3 and concluded at [22] - [26]:

'22. I have no evidence from the Appellant or the Sponsor of any self-harm to the Appellant or any risk of self-harm in the future. I have regard to Dr Balasubramaniam's psychiatric report, however I do not find the report to be persuasive. On the strength of a consultation with the Appellant of unspecified duration, Dr Balasubramaniam diagnosed the Appellant to be suffering from a depressive episode of 'a severe degree' and that the Appellant has talked about jumping out of the building and 'this risk is likely to increase if attempts are made to remove her from the UK'.

23. On a holistic view of the evidence, I do not find the Appellant to meet the high threshold for breach of Article 3. The Appellant's current medical condition, in my view, cannot be argued to be sufficiently severe to engage Article 3 and the pertinent consideration is the risk on any removal.

24. The Appellant is a young woman who clearly has the love, affection and support of the Sponsor and I have no evidence to suggest that this will not or cannot continue from the UK. I find the Sponsor's and the Sponsor's family's support could assist the Appellant minimising any risk that she may face in Mauritius.

25. Furthermore, I have no evidence to find that Mauritius lacks the necessary medical services to assist the Appellant on return or that such services will not be available to the Appellant, should be necessary.

26. On the totality of the evidence before me, I do not find the risk of self-harm to be sufficiently high to cross the Article 3 threshold and, on the lower standard of proof, I find the Appellant has not discharged the burden of showing that the decision would lead to a breach of Article 3.'
24. I observe at this juncture that the appellant did not rely upon article 3 in her notice of appeal, filed with the First-tier Tribunal on 20 November 2018. The Notice expressly stated that only article 8 was relied upon in respect of the human rights appeal. Further, there is no reference to article 3 in the grounds of appeal filed with the notice, nor is there any reference in the record of proceedings to Mr. Rungasamy making oral submissions as to article 3. There is no reference to the appellant seeking to rely upon article 3 as a new matter. I am unclear as to how the Judge understood there to be an article 3 appeal before him.
25. The Judge determined that the appellant could not succeed on article 8 grounds both under and outside of the Rules. He took the appellant's case at its highest observing, *inter alia*, at [29]-[31]:
- '29. Taking the appellant's evidence at its highest, I accept that the Appellant had endured difficulties with the Appellant's parents separately and then the Appellant falling victim to her mother's new partner's inappropriate behaviour towards the Appellant.
30. However, the Appellant is now a young woman of 20 years of age, with some education at least, and the Appellant does not need to return to her mother. Indeed, it is the evidence before me that the Appellant and her mother are no longer on talking terms. Any difficulties the Appellant may face on return, I find, can be overcome with the support of the Appellant's father.
31. Further, the Appellant clearly has experience of life in Mauritius and can speak the national language and I find that the Appellant would be able to build up a private life back in Mauritius and, on balance, the Appellant will not face very significant obstacles to integrating into Mauritius.'

Grounds of Appeal

26. Two grounds of appeal are advanced:
- i. The Judge erred in not considering the impact of delay in the assessment of proportionality in respect of the article 8 appeal.
 - ii. When considering the appellant's medical circumstances, the Judge erred 'in not considering the level of support from the father regarding the mental health of the appellant'.

Decision on Error of Law

Respondent's concession

27. At the outset of the hearing Mr. Clarke confirmed on behalf of the respondent that it was accepted that the decision of the Judge contained several material errors of law and so it was conceded that the decision had to be set aside.
28. I observe that the material errors of law identified by Mr. Clarke were not those raised by the grounds of appeal.
29. Upon considering Mr. Clarke's submissions I am satisfied that the respondent was correct to concede that the decision should be set aside. I am further satisfied that the respondent was correct to conclude that the grounds advanced by the appellant enjoyed no merits.

Date of consideration

30. Mr. Clarke identified two fundamental failures within the decision. Firstly, at [17] of the decision the Judge expressly self-directed himself as to considering 'all of the evidence up to the date of the decision'. Section 85(4) of the Nationality, Immigration and Asylum Act 2002 confirms that on an appeal under section 82(1) of the Act the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of decision. It is trite that in considering a human rights appeal, where the evidence is not concerned with a new matter, a judge is to consider such evidence as is presented at the hearing and to consider whether there is an interference with protected human rights and the proportionality of the proposed interference at such time. Mr. Clarke was correct to observe that it is entirely unclear as to what 'date of decision' the Judge is referring to, the respondent's or his own. I am satisfied that such lack of clarity means that I cannot be sure that the Judge correctly self-directed himself. Such failure is therefore a material error of law.

Inadequate findings as to medical condition

31. Secondly, Mr. Clarke observed that the fact-finding exercise undertaken by the Judge was fatally flawed in respect of the appellant's health, and consequently there was inadequate consideration as to the case being advanced by the appellant under article 8.
32. As observed above the Judge concluded at [22] that he did not find the psychiatric report of Dr Balasubramanian to be persuasive. However, it is entirely unclear as to whether reliance is or is not then placed upon the report when the Judge proceeds to vaguely observe that the appellant's 'current medical condition' is not sufficiently severe to engage article 3. It is entirely unclear as to which, if any, of the several

medical conditions referred to by the appellant are accepted as existing. The requirement to be clear as to findings of fact is exemplified in circumstances where one of the complaints advanced is suicide ideation. Though having observed above that there was no article 3 appeal before the Judge, I agree with Mr. Clarke that such failure in the Judge's consideration of this 'ground' then adversely flowed into the subsequent assessment of dependency, including the father's emotional support of the appellant, when considering article 8: *Kugathas v. Secretary of State for the Home Department* [2003] EWCA Civ 31, [2003] I.N.L.R. 170. The article 8 decision is adversely infected consequent to such material error of law.

Appellant's grounds

Delay and article 8

33. I turn to the grounds of appeal relied upon by the appellant. Ground 1 is concerned with delay and proportionality.
34. I note that the appellant relied in both her grounds of appeal to the First-tier Tribunal and in her submissions to the Judge upon a purported delay by the respondent resulting in a failure to consider her application whilst she was a minor. The record of proceedings detail Mr. Rungasamy's submission that a different outcome would 'probably' have been reached by the respondent if the application had been considered whilst the appellant was still a minor.
35. The appellant is understandably aggrieved that the submission was only tangentially addressed at [37]:

'37. I also take into consideration the Appellant's good character, the length of time spent in the UK to date, including the delay by the Respondent in deciding the Appellant's application and the difficulties the Appellant may face on return to Mauritius.'
36. However, upon detailed examination no material error of law arises. At the date of application, the appellant was aged 17 years, 347 days. Her 18th birthday fell 2 ½ weeks after the application. Her legal representatives made no request for expedition and, in any event, I can identify no true basis on the facts advanced in the application for the respondent being on notice that she was required to expedite her consideration within such short period of time. I conclude that there is no reasonable or practical basis for the appellant to rationally believe that in the circumstances the respondent unlawfully delayed considering her application until after she reached her majority.
37. Further, once she turned 18 the fact that her father may, or may not, have enjoyed sole responsibility was not determinative. Dependency would be considered in accordance with the principles identified in *Kugathas*.

38. At the hearing Mr. Rungasamy accepted that upon reflection there was no merit in this ground.

Medical health and article 8

39. In respect of ground 2 reliance is placed upon the head note in *Akhalu (health claim: ECHR article 8)* [2013] UKUT 400 (IAC). The core of the challenge is detailed at §5:

‘5. It is submitted that the FTTJ erred in law in not considering the level of support from the father regarding the mental health of the appellant. Further the psychiatric report established that the support from her family network in the United Kingdom is an important factor in managing her mental health.’

40. There is no merit in the complaint that the Judge failed to consider the level of support provided to the appellant by her father as to her mental health. The submission advanced before the Judge on behalf of the appellant focused upon the emotional support offered by the father, and the failing identified as to the judicial consideration of that submission is dealt with above.
41. As to the second limb of the ground, there is no challenge by the appellant to the finding that Dr Balasubramaniam’s report was unpersuasive. In such circumstances, there is no merit to the contention that the Judge was required to place weight upon the very limited observation in the report as to the appellant being ‘supported by her father and his Girl Friend [sic]’. Consequently, there is no merit to ground 2.

Preservation of individual findings of fact?

42. In setting aside the Judge’s decision, I am required to consider whether it is appropriate to preserve findings of fact. Upon considering the material errors detailed above, I conclude that they have adversely flowed into the decision-making process and consequently no findings of fact can be preserved.
43. However, there are a number of significant concerns in relation to the approach adopted by the Judge and upon careful reflection it is appropriate that they are addressed by this Tribunal.

Inadequate fact finding

44. I am concerned that the Judge has not undertaken an adequate fact-finding assessment in this matter and this in turn has led to material errors of law as identified above.
45. The approach adopted by the Judge to fact-finding varies from making no, or no clear, findings of fact at all when erroneously considering the matter under article 3 to simply considering the appellant’s case ‘at its highest’ when considering article 8.

46. The adoption of the former course led to the erroneous approach identified above, namely the identification of concern as to the reliability of medical evidence, but then proceeding to accept that the appellant had a 'current medical condition' without providing any reasoning for such acceptance or identifying the scope and nature of such condition. Without making a clear factual finding as to the appellant's health, the Judge could not properly proceed to appropriately apply the relevant threshold, whether it be under a mistaken understanding that article 3 was in play or in relation to article 8. Whilst ultimately it was a futile consideration, I am satisfied that the approach adopted by the Judge at [23] is a simple mechanical device solely utilised to refuse the article 3 claim without any true engagement with the evidence presented by the appellant. Such approach should not properly be adopted.
47. The alternative approach adopted by the Judge was to simply consider the appellant's case at its highest. Without more, this approach simply led to the Judge making generalised observations as to the appellant's circumstances, as evidenced by the Judge expressly finding that the appellant has 'endured difficulties' with her parents and had fallen victim to 'inappropriate behaviour' from her mother's present partner. The scope and nature of such 'difficulties' and the 'inappropriate behaviour' are not identified. The parties, and anyone reading the decision, are required to proceed on the assumption that the 'inappropriate behaviour' found as a fact at [29] is that detailed in the June 2019 witness statement of the appellant's father, namely that 'a number of sexual advances' were made towards the appellant. Such evidence is vague in terms. There is no finding as to whether such advances were verbal or physical, or whether the term 'inappropriate behaviour' is used to detail sexual harassment, assault or rape. Whilst it is for the appellant to advance her case, it is for a judge to consider whether the evidence presented is sufficiently detailed and capable of meeting the requisite standard of proof.
48. The difficulty of adopting the crude approach of taking a case at its highest and making a general, positive finding of fact, is that there is no engagement with discrepancies and inconsistencies within the evidence. The adoption of such approach can usually be considered a dereliction of the First-tier Tribunal's fact-finding function. Both parties are entitled to expect adequate judicial consideration of their respective cases as advanced and to secure appropriate judicial undertaking of the fact-finding exercise. To do otherwise is an abdication of judicial responsibility.
49. I am satisfied that it is clear from considering the papers placed before the Judge that there was a delay in the appellant raising the issue of sexual impropriety at the hands of her mother's partner with the respondent. Such delay is addressed by the appellant's father in his second witness statement. From this, it can be identified that the appellant and her father were aware that such delay would be an issue to be addressed by the Tribunal and they sought to provide a cogent explanation. The Tribunal should have been aware that this issue was first raised after the respondent's decision to refuse the appellant leave to remain. It is an issue that both parties would expect to be addressed by a fact-finding Tribunal in its decision. This is an issue upon which a reasonable judge could decide in favour of one or other of the

parties. However, if a judge were to find in favour of the appellant on this point the respondent could legitimately expect adequate reasons to be given for such decision. Simply taking the case at its highest and making a favourable general finding as to credibility in favour of the appellant without cogent reasoning is wholly inadequate in the circumstances.

50. Further there is an inconsistency between father and daughter as to when they first discussed the improper acts of the mother's partner. The father states that he was only made aware of the true circumstances in December 2016, following his daughter's arrival in this country, and as explained in his June 2019 witness statement it was this conversation that resulted in him deciding his daughter should make an application to stay in this country. However, Dr Balasubramanian records in his report that he was informed by the appellant that her discussion with her father was conducted while she was present in Mauritius and that consequent to such discussion her father arranged for her to apply for a visit visa to join him in this country. No reasons are given by the Judge as to why such inconsistency could properly be overlooked. With regard to an important element of the appellant's case, when there is clear inconsistency in evidence, it was wholly inappropriate for the Judge to proceed by taking the appellant's case at its highest, and to accept her stated personal history, without more.
51. The Judge should clearly have had in mind the fact-finding nature of the First-tier Tribunal, which requires adequate consideration of the evidence presented and the making of clear, reasoned conclusions referencing the evidence. A decision should clearly identify what central facts are accepted or not accepted, with adequate reasoning so that the parties can understand the decision reached. There was a clear failure to adopt basic fact-finding requirements in this matter. Consequently, the findings of fact cannot be preserved.

Delay

52. The appellant's reliance upon delay on the part of the respondent is advanced outside of the Immigration Rules, and so she is ultimately required to establish that exceptional circumstances arise from her circumstances which place her in the small class of cases in which leave to remain outside the Rules should properly be granted in order to avoid a breach of her article 8 rights.
53. In *R. (Agyarko) v. Secretary of State for the Home Department* [2017] UKSC 11, [2017] 1 W.L.R. 823 the Supreme Court observed that the Strasbourg Court has made clear that Member States are entitled to control the entry of non-nationals, who should not be able to evade immigration control by establishing a family life while unlawfully present. Observing the respondent's relevant instructions stating that leave could be granted outside the Rules where exceptional circumstances applied which outweighed the public interest in removal, the Court confirmed that this involved applying the test of proportionality to each case. Such process is compatible with article 8. As to delay, the Court observed at [52]:

'52. It is also necessary to bear in mind that the cogency of the public interest in the removal of a person living in the UK unlawfully is liable to diminish - or, looking at the matter from the opposite perspective, the weight to be given to precarious family life is liable to increase - if there is a protracted delay in the enforcement of immigration control. This point was made by Lord Bingham and Lord Brown of Eaton-under-Heywood in EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41; [2009] AC 1159, paras 15 and 37. It is also illustrated by the judgment of the European court in Jeunesse.'

54. I note the reference to 'protracted delay', which in its normal usage means something taking longer than expected.

55. In TZ (Pakistan) v. Secretary of State for the Home Department [2018] EWCA Civ 1109, [2018] Imm AR 1301 the Senior President of Tribunals detailed, at [28]:

'28. The consideration of article 8 outside the Rules is a proportionality evaluation i.e. a balance of public interest factors. Some factors are heavily weighted. The most obvious example is the public policy in immigration control. The weight depends on the legislative and factual context. Whether someone is in the UK unlawfully or temporarily and the reason for that circumstance will affect the weight to be given to the public interest in his or her removal and the weight to be given to family and/or private life (see the examples given in Agyarko at [51] and [52] which include the distinction between being in the UK unlawfully and temporarily). Decisions such as those in Chikwamba and EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41, [2009] AC 1159 describe examples of how the weight or cogency of the public interest is affected. It is accordingly appropriate for the court to give weight when considering the proportionality of interference with article 8 outside of the Rules to factors that have been identified by the Strasbourg court, for example, the effect of protracted delay, the rights of a British partner who has always lived here and whether it can reasonably be expected that s/he will follow the removed person to keep their relationship intact: that is, by way of example, the circumstances identified in EB (Kosovo) or the circumstance described in Chikwamba where the removal of an appellant who is the spouse of a British citizen could be followed by a right of re-entry.'

56. The consideration of article 8 outside the Rules is therefore a proportionality evaluation involving a balance of public interest factors in which some factors are heavily weighted, the most obvious being the public policy in immigration control. I observe that the list of the circumstances to which the Tribunal can give weight is not closed. I further observe that the confirmation by the Court of Appeal in Strbac v Secretary of State for the Home Department [2005] EWCA Civ 848, [2005] Imm. A.R. 504 that delay is not determinative it is merely a relevant factor remains applicable.

57. The Judge appears to simply have accepted, without more, that the respondent delayed in the consideration of the appellant's application. Again, no reasoning is

provided for what could be an important finding of fact. Such approach as adopted by the Judge in this matter is very unfortunate.

58. In *EB (Kosovo) v. Secretary of State for the Home Department* [2008] UKHL 41, [2009] 1 A.C. 1159 the House of Lords confirmed, when considering circumstances concerning an asylum application, that delay in the decision-making process might be relevant when considering the overall proportionality of ordering removal from this country in any one of three ways. Firstly, during such delay the applicant might develop closer personal and social ties and establish deeper roots in the community than they could have shown earlier. The longer the period of the delay, the likelier that was to be true. To the extent that such circumstances are true, a claim under article 8 would necessarily be strengthened. The second way concerns the impact on a person in a relationship with the applicant, who enters the relationship aware that it is imbued with impermanence because the applicant enjoys either no status or limited status, but as months become years it can be expected that such 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. The third way delay may be relevant in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, when considering the proportionality of removal, is to establish that such delay is the result of a dysfunctional system that yielded unpredictable, inconsistent and unfair outcomes.
59. The appellant has not identified with any clarity, either before the Judge or in the grounds of appeal before this Tribunal, as to which of the three circumstances apply in this matter. The failure by the Judge to seek an explanation at the hearing is a concern. I conclude from the appellant's case as generally advanced that the second circumstance identified in *EB (Kosovo)* does not arise, and it is not expressly asserted on her behalf that the purported delay was the result of a dysfunctional system. Consequently, the consideration is as to whether such delay occurred that the appellant developed closer personal ties with her father and her family in this country, than she could have shown when the application was made 19 months earlier.
60. Consideration of article 8 calls for a broad and informed judgment and is fact specific. What may be protracted delay in one matter upon consideration of its particular facts, will not be so in another. However, it was open to the Judge to consider the approach adopted in *R. (M) v. Secretary of State for the Home Department* [2014] EWHC 159 (Admin) in which the High Court held that a three-year delay in considering a matter was not unlawful delay in circumstances where there were no factors at that time which should have led to the respondent, acting reasonably and fairly, to recognise the inappropriateness of the ongoing delay.
61. In this matter, the Judge gave no express consideration to the circumstances arising. He appears at [37] to have simply accepted the appellant's contention that the respondent had delayed in considering the application. The Judge gave no reasons

for finding that the respondent taking 19 months from the date of application on 21 March 2017 to the date of decision on 7 November 2018 was sufficient to be a 'delay' that could be placed in the proportionality assessment. No consideration was given to the appellant not seeking expedition when making the application, nor as to the respondent writing to the appellant on 11 September 2017 seeking further documentary evidence which was subsequently sent in response on 10 October 2017. No express consideration was given as to whether over the 19 months the appellant developed closer personal ties with her father than she could have shown when the application was made. The lack of adequate reasoning on a potentially important issue is stark. It is a clear example of the inadequacy of adopting a 'take the case at its highest' approach to the fact-finding task.

Emotional support

62. On behalf of the appellant, Mr. Rungasamy relied in his submission before the Judge upon the emotional support provided to the appellant by her father and expressly relied upon the judgment of the Court of Appeal in *Kugathas*. No express consideration was given to this submission by the Judge in his decision.
63. Accompanying the father's first witness statement are documents confirming his employment in this country. The wage slips evidence his employment as a chef and relate to a period of approximately a year from July 2018. Their contents suggest his working between 31 and 104 hours a week. The wage slips detailing fewer working hours identify the provision of holiday pay in those weeks. Of the 22 wage slips filed with the Tribunal, 17 are suggestive of the appellant's father working 70 or more hours during a week. He appears to be an industrious employee. However, being made aware by Mr. Rungasamy that the appellant may wish to rely upon this submission at the next hearing, it is appropriate that the parties be on notice that whoever hears this appeal will wish to examine the nature and substance of such personal support in circumstances where documentary evidence suggests that the father is absent from the family home in the region of 80 to 100 hours a week, including travel time. The appellant will be aware that the burden of proof rests upon her and more detailed evidence should be presented as to the scope and nature of any support provided by family members in this country.

Remittal

64. Both representatives before me agreed that this matter should properly be remitted to the First-tier Tribunal.
65. Upon considering paragraph 7.2 of the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal I am satisfied that the effect of the several material errors of law has been to deprive the appellant of a fair hearing before the First-tier Tribunal and so remittal is appropriate in this matter.

66. For the reasons detailed above, it is not appropriate for any findings of fact to be preserved.

Notice of Decision

67. The decision of the First-tier Tribunal involved the making of an error on a point of law and I set aside the Judge's decision promulgated on 4 December 2019 pursuant to Section 12(2)(a) of the Tribunal, Courts and Enforcement Act 2007.
68. This matter is remitted to the First-tier Tribunal for a fresh hearing. No findings of fact are preserved.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

69. The anonymity direction issued by the First-tier Tribunal is confirmed in the following terms:

'Unless the Upper Tribunal or a court directs otherwise no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant or her family members. This direction applies to, amongst others, the appellant and the respondent. Any failure to comply with this direction could give rise to contempt of court proceedings.'

Signed: *D. O'Callaghan*
Upper Tribunal Judge O'Callaghan

Dated: 21 February 2021