



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/03248/2014

THE IMMIGRATION ACTS

Heard at Field House
On 2 October 2014

Determination Promulgated
On 16 January 2015

Before

UPPER TRIBUNAL JUDGE DEANS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MUHAMED ALI NUHU

Respondent

Representation:

For the Appellant:

Mr S Walker, Home Office Presenting Officer

For the Respondent:

Miss J Howorth, Irving & Co Solicitors

DETERMINATION AND REASONS

- 1) This is an appeal with permission against a decision by Judge of the First-tier Tribunal Pygott allowing an appeal both under Article 8 and also on the grounds that the Secretary of State's decision was not in accordance with the law. The appeal was dismissed on asylum and humanitarian protection grounds and under Articles 2 and 3. Before the Upper Tribunal the appellant is the Secretary of State and the respondent, Mr Muhamed Ali Nuhu is hereinafter referred to as "the claimant".

- 2) The claimant was born on 27 August 1960 and is a national of Tanzania, originating from the island of Zanzibar. The claimant has been in the UK since December 1995, when he claimed asylum. His asylum claim was refused in 1997 and a subsequent appeal was dismissed in 1999. In the asylum appeal in 1999 it seems that the adjudicator accepted to the lower standard of proof that the claimant had been active in politics in Zanzibar and had faced detention by the police. After he left Zanzibar, however, he lived in Dar-es-Salaam, where he had stayed with an uncle for two months. The adjudicator did not believe the claimant's evidence that throughout this time he had never ventured outside, or that movements in every locality were monitored.
- 3) It appears that following the unsuccessful appeal in 1999 the claimant was due to be removed but removal was postponed to allow the claimant to make further representations. These were not accepted, however, as a fresh claim. There was then a period between 2000 and 2008 when the claimant was not in contact with the Secretary of State. It seems that around the end of 2008 the claimant made an application for leave to remain on the basis of 14 years' residence. This was refused by the respondent on the basis that removal directions had been issued in 1999. It was pointed out in response on behalf of the claimant, however, that the application had also included claims under Articles 2, 3 and 8 and these had not been addressed by the respondent. It seems the respondent did not make a decision on the human rights claims made in 2008 until May 2014. It was a removal decision made in May 2014 which gave rise to the appeal to the First-tier Tribunal.
- 4) So far as the asylum grounds were concerned, the Judge of the First-tier Tribunal noted that before coming to the UK the claimant had been able to live in the mainland of Tanzania with his uncle for two months without experiencing problems. He left Tanzania using his own passport. The judge considered that in the highly unlikely event that the authorities in Zanzibar were still looking for the claimant he would be able to relocate elsewhere, particular as he had stayed on the mainland, bearing in mind that, as the claimant acknowledged, he had been out of the country for nearly 19 years.
- 5) The Judge of the First-tier Tribunal then turned to the Article 8 grounds. The judge found that the claimant has no family life in the UK as he has no relatives here. There was not a great deal of evidence of private life in the UK. The claimant still had family in Tanzania with whom he was in contact either directly or indirectly. Nevertheless he had been in the UK for 18½ years and has friends here. The judge therefore accepted that the claimant has a private life in the UK and that Article 8 was engaged.
- 6) The judge went on to find that the claimant was in continual touch with the respondent either directly or through various solicitors and his MP from November 2008. In 2009 the claimant sought consideration of his case under the Legacy Programme and the Secretary of State accepted that the case was eligible under this programme. The judge was particularly concerned by a six year delay by the

Secretary of State in dealing with the claimants human rights claims and referred to the decision of the House of Lords in EB (Kosovo) [2008] UKHL 41. The judge concluded that the delay by the Secretary of State in dealing with the claimant's case tipped the balance of proportionality in favour of the claimant because the delay was "indicative of a system that was dysfunctional".

- 7) The Judge of the First-tier Tribunal then went on to consider whether the Secretary of State's decision, against which the appeal was brought, was in accordance with the law. The Secretary of State had referred in the reasons for refusal letter to paragraph 353B of the Immigration Rules, which applied where a person was facing removal after the consideration of further submissions made by that person. The judge found that in considering the claimant's case under paragraph 353B the Secretary of State had misapprehended material facts. The claimant had been seeking to comply with immigration control since 2008, not 2010 as alleged by the Secretary of State, and there had been a delay in making a decision by the Secretary of State of 5½ years rather than 3¾ years. This delay had occurred notwithstanding exhortations by or on behalf of the claimant for his case to be dealt with.
- 8) In the application for permission to appeal the Secretary of State challenged the judge's conclusions under Article 8 by reference to the case of Nasim [2014] UKUT 00025 and the decision of the Supreme Court in Patel [2013] UKSC72. According to the Upper Tribunal in Nasim, the case of Patel recognised Article 8's limited utility in private life cases that were far removed from protection of an individual's moral and physical integrity. The Secretary of State pointed out that the judge had made no reference to the claimant's moral and physical integrity and had failed to make any direction in relation to the case of Nasim. The claimant's private life did not reach the high threshold required to remain in the UK in accordance with Nasim. Delay could not be determinative on its own. In addition, the judge erred in remitting the case back to the Secretary of State for reconsideration under paragraph 353B.
- 9) At the hearing before me Mr Walker, for the Secretary of State, relied on the grounds set out in the application for permission to appeal. The first ground was a failure to consider private life properly and to give effect to the case of Nasim. There was no interference with the claimant's physical or moral integrity. The claimant still had ties to Tanzania and he had no family life in the UK. The judge had further erred in seeking to allow the appeal as not in accordance with the law under paragraph 353B. Taken together these points showed confusion and ambiguity in relation to the findings made.
- 10) For the claimant, Miss Howorth accepted that the judge had not directed herself towards Nasim. That case was concerned primarily with foreign students applying for leave for post-study work. The circumstances of the current claimant could be distinguished from the circumstances under consideration in Nasim and the claimant was towards the other end of the scale from the appellants in that case. The Secretary of State had a policy for legacy cases and in the light of that policy it was

not appropriate for the judge to have referred specifically to Nasim. Even had the judge done so the outcome was likely to have been the same.

- 11) The point was raised as to whether the claimant had suffered any prejudice from the delay by the Secretary of State in dealing with his claim and whether the claimant had failed to attend for removal in 1999 as he was expected to do. Reference was made to paragraph 34, in which the case of EB (Kosovo) was mentioned. At the time the claimant was due to be removed in 1999 his solicitors were in touch with the Secretary of State and they advised the claimant not to attend for removal because they were in the process of making an appeal. This was pointed out in the claimant's witness statement. The judge did not reject this explanation.
- 12) Mr Walker submitted that there was no specific reference in the determination to the case law in respect of the Legacy Programme.

Discussion

- 13) I have carefully considered the arguments advanced on behalf of the Secretary of State in seeking to challenge the judge's decision under Article 8. It seems to me that the difficulty for the Secretary of State is in showing that the judge reached a decision which was not open to her upon the facts as found by her. The main issue raised by the Secretary of State in this regard was that the judge did not properly direct herself by reference to the case of Nasim. I accept the submission by Ms Howorth, however, that this decision was not entirely in point so far as the circumstances of this claimant are concerned. The judge properly followed the Razgar steps and had regard to the case of EB (Kosovo), which is a decision of the House of Lords relevant to the question of delay by the Secretary of State in the consideration of a claim. In essence the judge found that a delay by the Secretary of State of nearly 6 years in responding to the claimant's human rights claim, by which time the claimant had been in the UK for over 18 years, was sufficient to tip the balance of proportionality in favour of the claimant. This was a conclusion which the judge was entitled to reach for the reasons which were given.
- 14) The Secretary of State asserted in the application for permission to appeal that there was no private life that would qualify under Article 8 on a "stand alone basis" and that delay cannot be determinative on its own. The decision of the judge, however, was that the duration of residence combined with the delay in considering the claimant's human rights claim together rendered the Secretary of State's decision disproportionate. This was as already stated, a decision the judge was entitled to make.
- 15) Where I take issue with the Judge of the First-tier Tribunal was in allowing the appeal on the basis that it was not in accordance with the law, for the reason that the Secretary of State had misapprehended material facts when considering the appeal under paragraph 353B. As I read the effect of that provision, had the Secretary of State made a decision in favour of the claimant under paragraph 353B this would

have led to no different outcome from a decision in favour of the claimant under Article 8. In other words, after the judge found in favour of the claimant under Article 8 it was no longer necessary to consider also the effect of paragraph 353B. The decision of the judge to allow the appeal to the limited extent that the decision under paragraph 353B was not in accordance with the law is to an extent contradictory with the decision allowing the appeal under Article 8 and results in uncertainty and possible inconsistency. For this reason I accept that the judge erred in allowing the appeal on the ground that the Secretary of State's decision was not in accordance with the law and on this point only I would amend the decision by dismissing the appeal on this ground.

- 16) On the principal issue, however, the judge was entitled to allow the appeal under Article 8 and the judge's decision is upheld on this ground.
- 17) The judge made an order for anonymity on the basis that the claimant is an asylum seeker and to protect the privacy and safety of him and his family. The asylum claim is no longer of any significance to the outcome of the appeal and I do not consider that the facts as found by the judge suggest that the claimant's family would be in any danger. Accordingly, I will vary the anonymity order and lift it.
- 18) The judge of the First-tier Tribunal further found that no fee was paid or payable and therefore there could be no fee award. This aspect of the decision remains unchanged.

Conclusions

- 19) The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law insofar as the judge erred in allowing the appeal on the basis that the Secretary of State's decision was not in accordance with the law.
- 20) The decision is set aside to this limited extent only. The decision by the judge allowing the appeal under Article 8 shall stand.

Anonymity

- 21) The First-tier Tribunal made an anonymity order and for the reasons given above I lift that order.

Signed

Date 16 January 2015

Judge of the Upper Tribunal