Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17028/2019 (P)

THE IMMIGRATION ACTS

Decided Without a Hearing under Rule 34	**Decision & Reasons Promulgated**
On 5 October 2020	**On 09 October 2020**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THAJ PASHA MOHAMMAD

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr F Khan, instructed on a direct access basis (Written submissions only)
For the Respondent: Ms R Pettersen, Senior Home Office Presenting Officer (Written submissions only)

DECISION AND REASONS

Introduction

1. The appellant is a citizen of India who was born on 11 May 1986.

2. The appellant entered the UK with entry clearance as a student on 5 October 2007 and with leave valid until 31 October 2008. On 21 October 2008, the appellant made an application for further leave as a student but this was rejected on 19 November 2008. On 20 November 2008, the

appellant again made an application for further leave as a student which was granted until 31 August 2010. On 28 August 2010, the appellant again made an application for further leave as a student and that was granted until 30 January 2012.

3. On 3 January 2012, the appellant made an application as a Tier 1 highly skilled migrant which was granted until 16 February 2014. On 11 February 2014, the appellant made an application based upon his private and family life under Art 8 which was refused on 1 May 2014. The appellant appealed that decision but his appeal was dismissed on 13 March 2015 and he became appeal rights exhausted on 29 July 2015.

4. On 14 August 2015, the appellant made a further application based upon his private and family life. On 7 June 2016, the appellant varied that application to that of a Tier 2 skilled worker. The appellant further varied that application to one seeking indefinite leave to remain on the basis of long residence on 15 September 2017. That application was refused on 7 April 2018. The appellant unsuccessfully sought judicial review of that decision and those proceedings were concluded on 13 February 2019.

5. On 12 February 2019, the appellant made a further application for leave based upon his private and family life under Art 8 of the ECHR. The Secretary of State refused that application on 20 September 2019.

The Appeal

6. The appellant appealed to the First-tier Tribunal. In a determination sent on 20 January 2020, Judge Skehan dismissed the appellant's appeal under Art 8. The judge accepted that the appellant had established private (but not family) life in the UK over a twelve-year period since arriving in the UK on 5 October 2007. The judge accepted that the appellant's removal would interfere with that private life. Nevertheless, under Art 8.2 the judge found that any interference with the appellant's private life was proportionate and, therefore, a breach of Art 8 had not been established.

7. The appellant sought permission to appeal to the Upper Tribunal ("UT"). The appellant relied upon a number of factors including the respondent's delay in dealing with his Art 8 application made on 14 August 2015; that the respondent should have exercised discretion "due to the lackadaisical approach" taken by the Home Office; his long residence of more than ten years; his educational qualifications and the private life he had established in the UK. Relying upon the Supreme Court's decision in R (Agyarko) and Another v SSHD [2017] UKSC 11, the appellant contended that the judge had failed to carry out the fair balance that had to be struck between the competing public interest and an individual's interests in applying the proportionality test. The grounds contend that if the judge had done so, he would have reached a different decision.

8. On 18 May 2020, the First-tier Tribunal (Judge Keane) granted the appellant permission to appeal on the basis:

> "It was incumbent upon the judge to take into account all relevant considerations when assessing the proportionality of the decision under appeal. It is arguable that the judge did not do so. Had the judge done so it is arguable that the judge might have arrived at different finding in respect of the issue of proportionality. The application for permission is granted".

9. In the light of the COVID-19 crisis, on 26 June 2020 the UT issued directions to the parties expressing the provisional view that it will be appropriate to determine the issue of whether the First-tier Tribunal had erred in law and whether its decision should be set aside without a hearing. Submissions were invited from the parties on both the substantive issues in the appeal and also on the issue of whether the appeal could be determined without a hearing.

10. In response to those directions, the respondent replied on 7 June 2020 seeking to uphold the judge's decision. Although the respondent did not object to the appeal being determined without a hearing, the response notes that the issue of an error of law "can be dealt with" by an oral hearing albeit one remotely.

11. The appellant did not reply to those directions. As a consequence, the UT issued further directions on 3 August 2020, directing that the appellant respond to the earlier directions. As a consequence, on 16 August 2020, submissions were made on behalf of the appellant. In those submissions, it is contended that the judge did err in law in reaching his assessment of proportionality by failing to give proper weight to the delay in resolving the appellant's application made in 2015 and reliance is placed upon the appellant's long residence of more than ten years and his educational qualifications. The submissions do not seek an oral hearing.

12. In the light of the parties' submissions, and having regard to the interests of justice and the overriding objective of determining the appeal justly and fairly and the nature of the legal issues raised, I am satisfied that it is in the interests of justice to determine this appeal without a hearing under rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended) and para 4 of the *Amended General Pilot Practice Directions: Contingency Arrangements in the First-tier Tribunal and the Upper Tribunal* (14 September 2020) issued by (then) Vice Senior President and (now) Senior President of Tribunals, the Rt. Hon. Sir Keith Lindblom.

The Judge's Decision

13. Before Judge Skehan, the appellant relied exclusively upon his private life established in the UK since he arrived on 5 October 2007. He did not claim to have any family life in the UK. The appellant gave evidence before the judge which he summarised at para 4(i)–(viii) of his determination as follows:

> "4. ....

(i) The appellant states that he should be granted indefinite leave to remain on the grounds of his long residence under the Rules and requests that the respondent should exercise its discretion in accepting his application. Further the appellant says that he should be granted leave to remain outside the Rules on the ground of his compassionate and compelling circumstances.

(ii) The appellant sets out his immigration history. This corresponds with that set out within the refusal letter. The appellant adds that on 13/08/2015 he submitted a further leave to remain [application] in the UK using the form FLR(FP). While this application was ongoing, he located a new sponsor, Clinical Trials Laboratory Services Ltd showed willingness to sponsor the appellant and issued him with a Certificate of Sponsorship. On 07/06/2016 the appellant amended his application to the Home Office for further leave to remain in the UK and requested a variation. Thereafter there was a substantial delay of more than a year while the Home Office considered his application. Several reminders were sent by his representative to the Home Office.

(iii) As time passed without a response from the Home Office, the appellant put in a further application for leave to remain on the basis of 10 years' long residency in the UK. The appellant had completed 10 years' residency in the UK on 15/09/2017. [I interpolate that the correct date is 05/10/2017]. The appellant made an indefinite leave to remain application that was refused by the respondent on 07/02/2018. The appellant applied for judicial review and the upper tribunal concluded that the appellant did not have lawful residence from the period since 29/07/2015.

(iv) The appellant says that his application has not been given compassionate consideration. The respondent has a discretionary policy to exercise discretion and discard breaks that were not in the appellant's control. The appellant noted that the Home Office policy identifies medical reasons as potential exceptional circumstances in which it would disregard breaks.

(v) The appellant had the benefit of legal advice. He says that the Immigration Rules are very difficult to construe. He has been severely disadvantaged by the respondent's delay.

(vi) The appellant has built up a strong personal life in the UK. He has lived here for more than 12 years, he is a good citizen, he speaks English and abides by the law. He is fully integrated into his community. He has a wide circle of friends and will be devastated if he is forced to return to India.

(vii) The appellant was awarded a Masters in Business Administration in November 2011 and the original certificate was provided in the course of the tribunal hearing. The appellant's family including his parents and siblings reside in India. The appellant conceded that on a practical basis there

would be no significant obstacles facing him should he be required to move to India. Had the respondent dealt with this matter correctly and in a timely fashion he would have had the opportunity to build his career in the UK as a management consultant. It would not be easy for him starting again in India.

(viii) There is no reason for the respondent to require his removal. He is of good character [and] well settled in the UK. There are opportunities for him in the UK and should his application be granted he would have an employer here. The appellant said that he did not wish to return to India because he could not face anyone in India and felt that his removal would belittle his achievements in the UK".

14. At paras 6 and 7, the judge set out the submissions made respectively on behalf of the respondent and appellant. In para 7, the judge specifically dealt with the appellant's contention that residual discretion outside the Rules should have been exercised in his favour. The judge said this:

> "There is a residual discretion to grant leave outside the Rules. Each decision is to be considered on its own particular facts and circumstances. [Reference is then made to the decision in R (Shaikh) v SSHD [2014] EWCA 2586 (Admin).] Discretion is acknowledged as likely to be sparingly exercised by the Secretary of State. It is found that the facts of Shaikh that the Secretary of State should have considered the exercise of its discretion. In the appellant's case it has been found previously that his lawful residence in the UK ceased in 2015. The appellant cannot comply with the Immigration Rules and no exceptional circumstances have been raised. In the circumstances, the appellant has not shown on a balance of probabilities that the circumstances are such that the Secretary of State should have considered the exercise of its discretion".

15. Then at para 8(i)–(v), the judge applied the five steps in R (Razgar) v SSHD [2004] UKHL 27. First, the judge accepted that the appellant had built up a "substantial private life" in the UK over twelve years. He had, however, heard no evidence in relation to the appellant having family life in the UK. Secondly, the judge found that the appellant's removal would interfere with that private life. Thirdly, the judge found that the interference was in accordance with the law as the appellant could not establish that the decision was not in accordance with the Immigration Rules. In particular, the appellant had not established ten years' lawful residence as his leave had expired on 29 July 2015 – which was some seven years and nine months after he arrived in the UK. Fourthly, the judge found that the interference was for a legitimate aim, namely the maintenance of effective immigration control. Finally, at para 8(v) the judge dealt with the issue of proportionality as follows:

> "This is the main question to be considered in an Article 8 claim. While I have concluded that the appellant has shown that he has private life in the UK, this must be weighed against the respondent's legitimate aim in maintaining effective immigration control. The appellant's evidence in relation to his good character and citizenship is accepted

> on a balance of probabilities. I have sympathy for the appellant's situation and the Immigration Rules are difficult to navigate. I make no adverse credibility findings against the appellant, he has been open and obviously honest with the tribunal. The appellant speaks English fluently. It is accepted that it would be difficult for the appellant to relocate to India. However, the appellant is a single healthy male who is educated to a high standard. The appellant has family and friends in India and will be able to avail [himself] of support. There is no reason why the appellant cannot continue his professional career within India using the qualifications obtained in the UK. The respondent's delay in dealing with the appellant's previous applications is lamentable but not the cause of the claimant's predicament [ ]. Taking all the circumstances into account and conducting a careful balancing exercise, I conclude that the appellant's circumstances do not fall within the narrow class of claims where the interference cannot be said to be proportionate to the respondent's legitimate aim".

16. The judge, therefore, dismissed the appellant's appeal.

Discussion

17. The appellant's claim rested exclusively upon an interference with his private life in the UK formed since his arrival on 5 October 2007. The appellant could not establish that he met any of the Immigration Rules. It does not appear to have been contended that he met the requirement in para 276ADE(1)(vi) that there were "very significant obstacles" to his integration in India. He could not establish ten years' lawful continuous residence under para 276B of the Rules as he had only been lawfully in the UK between his arrival on 5 October 2007 and when he subsequently became appeal rights exhausted on 29 July 2015 – that is a period of some seven years and nine months.

18. As the appellant could not succeed under the Immigration Rules, the public interest in effective immigration control was engaged (see, s.117B(1) of the Nationality, Immigration and Asylum Act 2002 as amended). In applying the test of 'proportionality' the judge was required to balance the public interest against the impact upon the appellant's private life if he were removed: striking a "fair balance" (see R(Razgar) v SSHD [2004] UKHL 27 at [20] per Lord Bingham; and Agyarko at [60] per Lord Reed). The appellant's claim outside the Rules could only succeed if the public interest was outweighed because there would be "unjustifiably harsh consequences" to the appellant if he were removed (see Agyarko at [60] per Lord Reed).

19. The judge was required to consider all material matters. The judge set out the appellant's case at some length, as have I above, at paras 4(i)–(viii). The judge recognised the appellant had built up, as he put it in para 8(i), a "substantial private life" in the UK over a twelve-year period. The judge noted the appellant's educational achievements including an MBA which he had acquired in November 2011. That was undoubtedly a factor which the judge was entitled to take into account which would assist the

appellant in obtaining employment on return to India. The appellant also had family and friends in India and, it is not suggested, that the judge was wrong to find in para 8(v) that he could obtain support on return if needed.

20. The grounds rely upon the judge's finding that there was "lamentable" delay in the respondent dealing with the appellant's application under Art 8 made on 14 August 2015. That application was only finally determined on 7 February 2018. But, it is important to notice that between those dates the appellant twice varied his application: first, on 7 June 2016 to an application under Tier 2 as a skilled worker; and secondly, on 15 September 2017 as an application for indefinite leave to remain based upon long residence.

21. The relevance of delay was referred to by Lord Reed in Agyarko at [52] as follows:

> "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".

22. Lord Reed referred to the decision of the House of Lords in EB (Kosovo) v SSHD [2008] UKHL 41. In EB (Kosovo), Lord Bingham identified three ways in which delay could be relevant in an Art 8 claim. He said this at [14]–[16]:

> "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.""

23. That is the majority view in EB(Kosovo) because Lords Scott and Hope, and Lady Hale agreed with these observations of Lord Bingham even though Lord Brown, whilst accepting the first two ways in which Lord Bingham said delay could be relevant, did not accept the third way (see [42]).

24. I do not see how any 'delay' in this case was not appropriately taken into account by the judge. Clearly, the judge correctly took into account that the time spent in the UK (including any delay in resolving the appellant's application made in August 2015 assisted to establish the "substantial private life" which the appellant had built up over the twelve year period.

25. I do not accept the submission that as a result of any delay the appellant acquired any legitimate expectation that he would be allowed to remain in the UK or lost out, somehow, in obtaining employment. The appellant had no legitimate expectation of remaining under Art 8 when he made his application on 14 August 2015 and he had no such legitimate expectation at any point prior to the decision on 7 February 2018 that he could remain on that basis. Likewise, simply because he had made an application as a Tier 2 skilled worker on 7 June 2016 gave rise to no legitimate expectation that he could be successful. It is, perhaps, worth noting that the 'delay' in resolving his initial Art 8 application allowed the appellant to vary his application on 7 June 2016, presumably to a basis upon which he now wished to remain in the UK. Likewise, he had no legitimate expectation when his application was varied on 15 September 2017 of remaining in the UK, on an indefinite leave basis or otherwise, based upon his claimed long residence in the UK. The period of time he had been lawfully in the UK simply could not meet the requirements of para 276B as he had not been in the UK for a continuous period of lawful residence of ten years.

26. Likewise, the delay, though described by the judge as "lamentable", does not in my judgment fall within Lord Bingham's third category, reflected later by Lord Reed in Agyarko, that any delay was relevant to the weight to be given to the public interest as it showed a "dysfunctional system which yields unpredictable, inconsistent and unfair outcomes".

27. It would be wrong, in any event, simply to look at the period of time between the appellant's initial (unvaried) application on 14 August 2015 and the decision made on 7 February 2018 as the appellant varied his application on two occasions on 7 June 2016 and 15 September 2017. The initial period up to the first application was some ten months; the period between the first variation and second variation was fifteen months; and the final period between the second variation and decision on that application was five months. None of these period taken individually (or indeed) cumulatively were, in my judgment, such as to affect in any material way the strength of his Art 8 claim. Any 'delay' did not fall properly to be characterised as demonstrating a "dysfunctional system".

28. The judge was clearly aware of the delay which he specifically referred to in para 8(v) and he took that factor into account so far as it was relevant to carrying out the 'fair balance' under Art 8.2.

29. Before the judge, the appellant relied upon the respondent's discretionary policy to grant leave outside the Rules. It is not clear whether that policy was specifically referred to the judge. The case of Shaikh, to which the judge was referred, appears to be concerned with a discretionary policy in a wholly different context, namely the context of invalid applications. However, it is important to note that the appellant's appeal was limited to grounds based upon Art 8 of the ECHR. The failure to apply a policy could not in itself be a ground of appeal. That could only arise, prior to the amendments to s.84 (and s.86) of the Nationality, Immigration and Asylum Act 2002 by the Immigration Act 2014, when one of the grounds of appeal

was that the decision was "not in accordance with the law" (see e.g. Charles (human rights appeal: scope) [2018] UKUT 89 (IAC)). That is no longer a ground of appeal. In the context of an Art 8 appeal under the present appeal provisions, a policy such as that relied upon by the appellant effectively is subsumed within the issue of proportionality and whether or not the public interest is outweighed because there are unjustifiably harsh consequences to the individual if removed. The terms of any relevant policy have not, however, been expressly identified by the appellant.

30. Here, the judge was undoubtedly reasonably and rationally entitled to conclude that the public interest in maintaining effective immigration control was not outweighed by the appellant's circumstances, including any period of delay in resolving his 2015 application. The judge found, and these conclusions are not challenged, that the appellant had family and friends in India and his qualifications in the UK would assist him in his professional career in India. At no point did the appellant have any legitimate expectation that he could remain in the UK without complying with the Immigration Rules whether as an employee or otherwise. The appellant accepted in his evidence that, in the words of the judge, as "a practical basis there would be no significant obstacles facing him should he be required to move to India". Having taken into account all relevant matters, I am satisfied that the judge's finding (and conclusion in relation to Art 8.2) that the public interest outweighed any impact upon the appellant was both a rational and reasonable conclusion to which the judge was fully entitled to make on the basis of all the evidence.

31. For these reasons, therefore, the judge did not err in law in dismissing the appellant's appeal under Art 8.

Decision

32. The decision of the First-tier Tribunal to dismiss the appellant's appeal under Art 8 did not involve the making of an error of law. That decision stands.

33. Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Signed

Andrew Grubb

Judge of the Upper Tribunal
5 October 2020

TO THE RESPONDENT

FEE AWARD

Judge Skehan made no fee award as he had dismissed the appellant's appeal. The appellant's appeal having now been dismissed in the Upper Tribunal, the decision to make no fee award stands.

Signed

Andrew Grubb

Judge of the Upper Tribunal
5 October 2020