Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/05771/2012

THE IMMIGRATION ACTS

Heard at Field House
On 22 November 2013
Prepared 22 November 2013

Determination Promulgated

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MR ZUBAD IQBAL

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Miah, Counsel instructed by Edward Alam & Associates
For the Respondent: Mr T Wilding, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, who was born on 1 January 1992, is a national of Bangladesh. He arrived in this country at some date prior to 21 March 2007, when he claimed asylum. He had apparently left Bangladesh on 28 October 2006 and travelled to this country with a couple known to his parents, and was taken to the address of a cousin, Mr Syed Ahmed.

2. Following the usual interviews, the appellant's asylum claim was refused, but on 17 May 2007, he was granted limited leave to remain in this country until 30 July 2009 on discretionary grounds in accordance with the respondent's published policy relating to the grant of discretionary leave to minors.

3. Before the expiry of this discretionary leave (which had, as is usual, been granted until he was 17½) on 21 May 2009 the appellant applied to vary his leave to remain on the grounds that he was entitled to asylum/humanitarian protection.

4. The respondent took nearly three years to consider this application, but eventually, on 16 May 2012 a decision was made refusing to grant the appellant further leave and refusing to vary his leave to enter or remain in this country. The respondent, on the same occasion, also made a decision to remove the appellant by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2006.

5. The appellant appealed against this decision, and his appeal was heard before First-tier Tribunal Judge McIntosh, sitting at Taylor House on 13 July 2012. It is recorded in the determination, referred to below, that at that hearing the appellant's representative, Ms Akther, "confirmed on the appellant's behalf that he no longer seeks to pursue an asylum claim but appeals against the decision of the Secretary of State on the grounds that his removal from the United Kingdom would be contrary to Article 8 of the European Convention on Human Rights".

6. In this determination, signed on 23 July 2012 and promulgated shortly after, Judge McIntosh dismissed the appellant's appeal. She made no separate decision regarding the Section 47 removal directions which had been made.

7. The appellant now appeals against this decision, permission having been granted by First-tier Tribunal Judge Cruthers on 23 August 2012.

8. In the grounds in support of the application for permission to appeal, with regard to the substantive decision, it is submitted first that the judge had not taken properly into account the long period of time the appellant had been in this country, but the main argument is that by reason of the respondent's delay in considering his application, this "has also created a legitimate expectation that leave would ultimately be granted". It is said further (at paragraph 8 of the grounds) that "the appellant has established his life in the UK knowing that if [the respondent] wanted to remove him any earlier, they would've taken steps to do so earlier".

9. It is also argued (at paragraph 9) that "since the HL stated that where there has been substantial delay this is capable of being a determinative factor in Article 8 cases, [this] goes in favour of the applicant in the proportionality exercise. Hence the balancing exercise has not been carried out properly".

10. It is also said that voluntary work which the appellant was doing and the fact that he was still in education was not taken into account.

11. When setting out his reasons for granting permission to appeal, Judge Cruthers stated as follows:

> "1… At the hearing on 13 July 2012 the appellant's Counsel indicated that asylum grounds were not pursued – this appeal is pursued only on the suggestion that the decision under appeal represents a disproportionate breach of the appellant's rights pursuant to Article 8 of the [ECHR]. The judge explained her reasons for rejecting the appellant's case in her paragraphs 22 and 23.
>
> 2. I suspect that there is little substance in at least some of the complaints made in the grounds but it may be that the judge did err in some of the ways alleged. The way in which the judge dealt with the Home Office's delay here (from 21 May 2009 to 16 May 2012 – paragraphs 3 and 4) may be of particular concern:
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> - In summarising the appellant's case in her paragraphs 17 and 18 the judge did re-produce paragraphs regarding Home Office delay from *EB (Kosovo)* [2008] UKHL 0041.
>
> - But in her operative paragraphs 22 and 23, the judge did not explain what significance, if any, she attached to the delay in this case (as per ground 5).
>
> 3. There is, therefore, sufficient in the grounds to make a grant of permission appropriate."

12. However, at paragraph 4 of the Reasons for Decision, Judge Cruthers continued as follows:

> "The appellant should not take this grant of permission as any indication that his appeal will ultimately be successful. There seems to be no claim to the appellant having a family life in the United Kingdom. In the last analysis, having studied in this country, and having played cricket for various clubs, may be insufficient to establish a disproportionate breach of Article 8 (when weighed against the public interest in maintaining immigration control)."

13. It may be wondered, in light of this observation, how it was considered to be arguable that there was any material error of law in Judge McIntosh's determination, but in any event, this appeal was subsequently listed before me, following directions which I gave on 30 September 2013, for a hearing which should be conducted "on the basis that it will be confined to whether the determination of the First-tier Tribunal should be set aside for legal error and, if so, whether the decision in the appeal can be re-made without having to hear oral evidence; in which eventuality the Tribunal is likely to proceed immediately with a view to re-making the decision".

The Hearing

14. I heard submissions on behalf of both parties which I recorded contemporaneously. As these submissions are contained within the Record of Proceedings, I shall not set out below everything which was said to me during the course of the hearing. I have, however, had regard to all the submissions made as well as to all the material contained within the file, whether or not the same is referred to specifically below.

15. On behalf of the appellant, Mr Miah adopted the grounds, which had been drafted by other Counsel. In relation to paragraphs 22 and 23 of the determination, reliance was also placed on the observations of Judge Cruthers where he had stated that the judge had not explained what significance if any she attached to the delay. Looking at paragraphs 22 and 23, there had been no reference to the delay which had occurred.

16. It was accepted on behalf of the appellant that if the judge had considered the delay but had still reached the finding she did, there could have been no complaint about her decision. It was open to the judge to arrive at findings of fact, but because she had not considered the delay, this was a material error. It was a factor which might be significant because during that time, this was the first few years of the appellant's adulthood. He was being educated in this country and was developing here. This appellant had arrived in this country as a minor, he had claimed asylum, and when that was refused he was granted discretionary leave to remain until he was 17½, which was normal practice with regard to a minor. He then applied to vary that leave, before he was 18.

Application to amend Grounds

17. At the start of his submissions, Mr Miah asserted that if the respondent had dealt with the application in a "normal period", she would have considered paragraph 298 of the Immigration Rules, which essentially say that if an applicant has a relative in the UK – and in this case the appellant's cousin was here – and if that applicant was under the age of 18, which he was at the date of application, and if that applicant could show there were serious and compelling reasons why he should not be returned, then he would be entitled to indefinite leave to remain.

18. When Mr Wilding objected to this submissions being made, on the basis that there had been no application to amend the grounds of appeal, Mr Miah submitted first that this was an alternative submission, but then applied to vary the grounds to include this argument. This application was opposed by the respondent.

19. Essentially, Mr Miah's argument was that because during the period of delay, the appellant reached his 18th birthday, he was deprived of an argument which he could have run, under paragraph 298(i)(d). Therefore he had been prejudiced by the delay.

20. It is unnecessary to set out in any greater detail the way in which this argument was put, as in my judgment it is completely without merit. My reasons are as follows.

21. The relevant parts of paragraph 298 of the Rules provide as follows:

> "**Requirements for indefinite leave to remain in the United Kingdom as the child of a parent, parents or a relative present and settled or being admitted for settlement in the United Kingdom**
>
> **298**. The requirements to be met by a person seeking indefinite leave to remain in the United Kingdom as the child of a parent, parents or a relative present and settled in the United Kingdom are that he:
>
> (i) is seeking to remain with a parent, parents or a relative in one of the following circumstances:…
>
> (d) one parent or a relative is present and settled in the United Kingdom and there are serious and compelling family or other considerations which make exclusion of the child undesirable and suitable arrangements have been made for the child's care; and
>
> (ii) [he] has limited leave to enter or remain in the United Kingdom, and
>
> (a) is under the age of 18…
>
> (iv) can, and will, be accommodated adequately by the parent, parents or relative the child was admitted to join without recourse to public funds in accommodation which the parent, parents or relative the child was admitted to join, own or occupy exclusively; and
>
> (v) can, and will, be maintained adequately by the parent, parents or relative the child was admitted to join, without recourse to public funds…".

22. The first, and obvious point which must be made is that the respondent was not considering an application under paragraph 298 of the Rules, but an application for asylum or humanitarian protection. Accordingly, even if the decision had been made relatively quickly (and in argument Mr Miah accepted that if a decision had been given just after the appellant's 18th birthday he could not have then argued that there had been undue delay), the respondent would not have considered paragraph 298 of the Rules before the appellant's 18th birthday. Even if the respondent had been minded to trawl through the Rules to see if there was any conceivable reason why the appellant should be allowed to remain (after his solicitors had failed to advance such grounds on his behalf) in this case arguments had not been advanced on behalf of the appellant that the other requirements of the Rules had been satisfied, such as maintenance and accommodation. Although it may well be that had an application been made under paragraph 298, the maintenance and accommodation requirements

would not have presented a major difficulty, in circumstances where such an application had not been made, the respondent could not reasonably be expected to consider this, especially in the absence of properly structured evidence that the maintenance and accommodation requirements were satisfied.

23. In addition, of course, there remains the fact that it is hard to see, given that there were challenges made to the appellant's credibility with regard to his asylum claim, (and that the asylum claim was not even pursued on appeal), how an argument that there were such "serious and compelling reasons" why he should not be required to go back to his home country that he should be allowed to remain in the UK, could possible have succeeded.

24. Additionally, not only was this argument not advanced before the First-tier Tribunal, but it was not even contained within the grounds seeking permission to appeal to this Tribunal, and nor was it raised at all until the hearing.

25. In those circumstances, I refused permission to the appellant to amend his grounds. For the avoidance of doubt, I consider the suggestion that the appellant could have been prejudiced by not now being able to take advantage of an argument which could have been made before he was 18 as unarguable on the facts of this case.

26. Mr Miah appreciated, when making his submissions, that the grant of permission was narrow and that if the Tribunal had been correct to reject the arguments which he had just made regarding paragraph 298 of the Rules, the main argument he was left with was delay in itself. It was appreciated that in the grant of permission, Judge Cruthers had said that the appellant's sporting activities may in themselves be insufficient to establish a disproportionate breach of Article 8 when weighed against the public interest in maintaining immigration control.

27. Mr Miah appreciated that it would be argued that the proportionality exercise had been carried out at paragraphs 21 and 22 of the determination with specific reference to the *Razgar* test. However, there had been a significant delay between 2009 and 2012, a total of three years, which had not been the appellant's fault.

28. In answer to an observation from the Tribunal that it would appear that the appellant had chosen to stay, while knowing that his position was precarious, Mr Miah replied that those were his submissions.

29. On behalf of the respondent, Mr Wilding submitted there had been no material error in the judge's determination. The judge had at paragraphs 22 and 23 taken account of the totality of the appellant's private life case that was put before her, and had weighed this in the balance, but had found the respondent's decision was proportionate. From a summation of the appellant's grounds of appeal and the grant of permission, the entire basis of the appellant's case was in essence that delay was the determinative factor in this case. That was what was said at paragraphs 8 and 9 of the grounds.

30. The point that was made today was that delay as a factor had not been taken into account. In this regard the respondent would rely on the decision of the House of Lords in *EB (Kosovo)* [2008] UKHL 41 and of the Court of Appeal in *AZ (Bangladesh)* [2009] EWCA Civ 15, both of which were handed to the Tribunal. There were three categories of effect which a delay can have. The first was that this delay could lead to a strengthening of an applicant's Article 8 position. In the present case, this was plainly irrelevant, but the judge had taken into account the period of time in which the appellant had been in this country. The second category concerned circumstances where relationships had developed beyond a point at which they would have done had there not been the delay, because there had been an assumption that an applicant's precarious position had become less precarious. The third category was the prejudice point, broadly speaking. The example given in *EB (Kosovo)* was that in that case the applicant's cousin had been granted exceptional leave to remain but *EB* had not because of the delay. However, this was not applicable here.

31. In terms of the actual impact of the delay, therefore, the only relevant category which could be said to apply was the first, which was that the appellant had been able to establish and strengthen his private life in this country, but this had been considered by the judge. While it might be that in a finely balanced case the delay would tip the balance, that would only be so in a case very different from the circumstances of this case. There was no material error of law in this determination. The judge had considered fully everything put before her and the appeal should therefore be dismissed.

Discussion

32. I deal first with the Section 47 removal decision, which Mr Wilding conceded at the beginning of the hearing was not in accordance with the law in line with current jurisprudence, and I shall so find. However, the substance of this appeal is directed to the substantive decision.

33. It is clear that the judge considered all the factors (save delay as a stand alone factor) which were advanced as to why removal would be disproportionate, before deciding that the public interest in maintaining immigration control outweighed these factors. Notwithstanding the submissions advanced in the grounds, it is not, in my judgment, even arguable that by reason of the delay the appellant acquired any legitimate expectation that leave would ultimately be granted. Nor is it arguable that the appellant had established his life in this country knowing that if the respondent had wanted to remove him earlier she would have taken steps to do so. Mr Miah very sensibly did not seek to rely on these grounds, but argued rather that had appropriate weight been given to the delay, in this case this could have tipped the balance in the appellant's favour.

34. In my judgment, this argument cannot, on the fact of this case, succeed. As has been made clear both by the House of Lords in *EB (Kosovo)* and the Court of Appeal in the

subsequent case of *AZ (Bangladesh)*, delay in circumstances such as this can only assist an applicant's Article 8 claim in the ways set out in those cases. In this case, for reasons which I have already given above, it is simply not arguable that the appellant has suffered prejudice in the way asserted, by being unable to mount a claim he would otherwise have been able to mount under paragraph 298 of the Immigration Rules. Even if I had allowed the appellant to amend his grounds of appeal to argue this, this argument would have been bound to fail for the reasons I have given above, and it was mainly for this reason that I refused to allow such an amendment to be made.

35. The second category which is referred to in *AZ (Bangladesh)* is where relationships have built up during the period of delay, during a time when the appellant's position in this country would otherwise be precarious. On the facts of this case, this has not happened here.

36. Regarding the first category, the judge plainly took into account the length of time the appellant had been here, when considering whether it would be disproportionate to require him to leave. The judge had regard to such private life as the appellant now had in this country. She found, having considered the evidence, that the appellant had established a private life in the UK and that the decision to remove him from the UK would amount to interference with that private life such that his Article 8 rights were engaged. Having then considered that the interference would be lawful in the circumstances and that it would also be necessary (the third and fourth questions posited in *Razgar*) she then set out her reasons for finding that it would also be proportionate. In my judgment, the reasons she has given, at paragraphs 22 and 23 of her judgment, are unimpeachable and it would have been surprising if any other judge had found differently.

37. It follows, there being no material error of law in Judge McIntosh's determination, that the substantive appeal must be dismissed and I will so find.

Decision

I set aside the determination of the First-tier Tribunal as containing a material error of law insofar as it did not deal with the removal decision, and I substitute the following decision:

The appellant's appeal against the substantive decision to refuse to grant him asylum or humanitarian protection is dismissed.

The appellant's appeal is also dismissed under Article 8.

The appellant's appeal against the decision to remove him by way of directions under Section 47 of the Immigration, Asylum and Nationality Act 2007, which was made simultaneously with the decision to refuse his claim for asylum or humanitarian

protection, is allowed to the extent that that decision was not in accordance with the law.

Signed: Dated: 22 November 2013

Upper Tribunal Judge Craig