IAC-AH-SC-V1

**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: AA/09745/2013

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Determination Promulgated** |
|---|---|
| **On 9 October 2014** | **On 4 October 2014** |

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MCWILLIAM**

**Between**

**GAZMEND KURPALI**
**(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr B Hawkin, Counsel instructed by Nova Legal Services
For the Respondent: Mr T Wilding, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant is a citizen of Kosova and his date of birth is 26 August 1976.

2. The appellant entered the UK illegally on 12 September 1998 and claimed asylum. This application was, according to the Secretary of State, refused in a decision of 18 July 2000 and the appellant was invited by the Secretary of State to an interview relating to his asylum claim and he failed to attend.

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3. The appellant made further submissions to the Secretary of State dated 10 May 2010 enclosing a legacy questionnaire. He made additional submissions on 30 May 2013. The conclusion of the Secretary of State was that the submissions did not amount to a fresh claim in a letter of 15 October 2013. The respondent went on in the decision letter to refuse the appellant's application for asylum and humanitarian protection for the reasons which it gave in the original refusal letter of 18 July 2000 (which according to the respondent was served on the appellant by post on 7 May 2001). The Secretary of State considered the appellant's private life in the context of Appendix FM (paragraph 276ADE). The application was refused under paragraph 276ADE(iii) and (vi). The Secretary of State also considered the application in the context of family life in accordance with Appendix FM. The decision maker also considered whether there were exceptional circumstances to grant leave outside the Rules and concluded that there were not.

8. The decision maker also considered paragraph 353B of the Immigration Rules and decided that although the appellant did not have any criminal convictions he had failed to attend an asylum interview on 11 July 2000 and he absconded. Attempts to locate him were unsuccessful and the appellant only came to light when his representatives responded to a letter from the Home Office on 26 July 2010. It was not accepted by the decision maker that the appellant had only received the original asylum decision of 18 July 2000 on 17 May 2013 as put forward by the appellant.

9. The decision maker took into account the appellant had been in the UK for over fourteen years however it was concluded that for twelve of those years he decided to abscond from immigration control and that he had only been complying with the immigration law since he re-established contact in July 2010.

10. The appellant appealed against the decision of the Secretary of State and his appeal was dismissed by Judge of the First-tier Tribunal Callow in a decision dated 9 May 2014 following a hearing on 6 March 2014.

11. The appellant made an application for permission to appeal which was granted by Judge of the First-tier Tribunal Brunnen in a decision of 5 June 2014. Thus the matter came before me on 8 August 2014 when I adjourned the matter until 9 October 2014 and directed both representatives to prepare written skeleton arguments.

**<u>The Decision of the First-tier Tribunal</u>**

12. Judge Callow recorded that the appeal had been listed previously on 25 November 2013 by Judge Talbot who issued directions to the respondent to produce evidence in relation to the service of the refusal letter of 18 July 2000. In addition the appellant was directed to serve an additional witness statement setting out details of his places of residence between

his arrival in the UK and 2010. The respondent failed to comply with the direction.

13. At the hearing before Judge Callow the appellant's grounds of appeal were amended to include long residence pursuant to Rule 276B of the Immigration Rules.

14. The Judge made the following findings:-

> "13. While it was claimed in the grounds of appeal that the appellant was persisting with his claim for asylum, no evidence whatsoever was adduced in this regard. Equally when the appellant wrote to the respondent in 2010 he simply raised the question of being granted leave to remain under the respondent's Legacy Programme. He did not restate his claim for asylum. He sought leave to remain under the respondent's Legacy Programme and Article 8 of the ECHR. Furthermore no submissions were made by Mr Hawkin in support of this ground of appeal.
>
> 15. In assessing the credibility of the appellant's evidence I am minded that he has told the truth about some matters, but not all. Nonetheless it is accepted that he was unaware of the respondent's refusal of 18 July 2000 until 17 May 2013 when his current representatives obtained a copy of the refusal.
>
> 25. In the present appeal the appellant has been resident in the UK for over fifteen years. The tension in this appeal centres on the length of the appellant's residence in the UK and the adverse finding of the respondent that the delay in his case was due to his own evasion of immigration control and not due to delays on the part of the respondent. He was an absconder between 1998 and 2010.
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> 26. The respondent's refusal letter under appeal mentioned the appellant's long residence of fourteen years and which was considered as one of the factors under paragraph 353B. Lengthy residence is undoubtedly a weighty factor, but it is not in itself a decisive consideration. In the present appeal there was no delay by the respondent. The delay was a consequence occasioned by the appellant's own conduct. Between 1998 and 2010, a period of twelve years, the appellant put himself beyond the reach of the respondent by failing to follow up on his asylum claim and to keep the respondent informed as to his whereabouts. He held no leave to remain in the UK. He now seeks to profit from this twelve year period.
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> 29. A reading of the decision shows that the respondent exercised her discretion in arriving at her conclusion refusing the appellant leave to remain. On the face of it the decision is lawful.

However, the issue in this appeal is whether it should have been exercised differently.

30. An overall view of the essential facts, in the round, is that the appellant elected to abscond for a period of twelve years. By his own conduct he put himself beyond the reach of the respondent. He cannot now seek to profit from the lengthy twelve year period. Had this period arisen due to delays by the respondent, then the situation would be very different. Furthermore, with no leave to remain he has worked without permission. The fact that Mr Aroun, in **Geraldo**, (with an immigration history comparable with that of the appellant, if not worse) was granted discretionary leave by the respondent is in no way, as with the length of the appellant's residence, singularly conclusive. In all the circumstances it has not been shown that the respondent's discretion should have been exercised differently. In all the circumstances, after inordinate lengthy consideration, the respondent's decision is in accordance with the law. Accordingly the appellant's appeal fails."

15. The Judge went on to consider Article 8 of the ECHR in accordance with **R v Secretary of State for the Home Department ex parte Razgar [2004] UKHL 27**. The Judge went on to make the following findings:

"34. While the appellant lives with his cousin it has not been established that there exists any family life beyond normal emotional ties. The appellant works and is financially independent. Undoubtedly he has friends living in the UK. Nonetheless the appellant has been living in the UK for over fifteen years and in respect of which it is acknowledged that this is a significant factor of weight. However his parents, with whom he is in contact, live in Kosova. As does, so it is said, his wife and his 15 year old daughter.

35. Simply founded on the length of his residence in the UK, despite it being without leave and a low threshold of engagement, it will be assumed that the appellant's removal would 'have consequences of gravity' (Lord Bingham's question 2) engaging the operation of Article 8.

36. There is no dispute that the interference is in accordance with the law (question 3) and pursues a legitimate aim (question 4).

37. The issue that arises is one of proportionality, as was explained in **Huang and Anor v Secretary of State for the Home Department [2007] UKHL 11**. This shows the necessity to give full and appropriate weight to the interests of society generally in adherence to clear and fixed Immigration Rules and consistent enforcement of the same in the deterrence of

breaches of the same and of other potential harm to the community, and to prevent any particular harm that may present itself in any particular case. The upholding of the public interest must, however, be balanced against the rights of the individual not only to the extent that interference with rights should be avoided but also in that a person's natural affinity to and reliance upon family and immediate society ought to be respected. The protection afforded by Article 8 requires that acts lawfully taken in order to enforce immigration control, and which interference with private or family life to an extent sufficiently serious to engage Article 8, must do so only to the extent to which the interference complained of is proportionate to the legitimate end to be achieved. The question for the decision maker where removal of a person (who is not entitled under immigration laws to remain in the UK, and who could not reasonably be expected to enjoy a family and private life elsewhere) would affect the private and family life of that person is, whether the removal would prejudice the private and family life of the person affected in a manner sufficiently serious to amount to a breach of the fundamental right protected by Article 8. It is not necessary that a separate question be asked whether the case meets a test of exceptionality, although it is to be expected that only a minority of cases would disclose disproportionality such as engages the protection in question.

38. Adverse to the appellant is the general public interest in maintaining a consistent and effective policy of immigration control. The immigration history of the appellant shows him to have unlawfully remained in the UK and during which period he chose to be an absconder. Furthermore he worked without permission. While his lifestyle and network of friends, including family, will be different, his private life will continue in respect of all its essential elements. Beyond his lengthy residence no reasons were advanced as to why the appellant could not return to Kosova. It has not been shown to be unfair to attach weight to the length of the appellant's residence; even more so when most of this residence was unlawful. A consideration of all the factors does not make the decision under appeal one which constitutes a disproportionate interference with the appellant's right to respect for his private life in the UK. The appellant's life in the UK does not entitle him to remain by reference to a Convention which, in the words of Lord Bingham in **Razgar**, 'is directed to the protection of fundamental human rights, not the conferment of individual advantages or benefits'."

16. The Judge went on to address the issue of long residence and he found that the appellant would not satisfy the requirements of paragraph 276ADE. He went on to make the following finding:-

"41. By 9 July 2012 the appellant had not made an application for indefinite leave to remain under paragraph 276B(b) of the Rules. In any event he could not have done so as by 9 July 2012, mindful of his arrival on 12 September 1998, fourteen years had yet to run. The correct Rule which the appellant would have to satisfy would be 276ADE. There is no extant claim for long residence under the old paragraph 276B(b). However should I be in error no evidence has been produced to show that the appellant meets the requirements of subparagraph (iv) – sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom."

**The Grounds Seeking Permission to Appeal and Oral Submissions**

17. There are two separate documents entitled grounds of appeal. There is little between them, but Mr Hawkin's relied on the grounds that he had drafted. They can be summarised. The Judge found (at paragraph 30) that the appellant by his own conduct put himself beyond the reach of the respondent and therefore he cannot now seek to profit from the lengthy twelve year period. Ground 1 argues that it is not clear from this finding whether the Judge is simply adopting the position of the Secretary of State or making his own findings. In any event the Judge has failed to provide reasons for his finding. The Secretary of State failed to comply with directions of the FtT in relation to evidence of the service of the decision letter of 18 July 2000 or produce any evidence of non-compliance. The Judge accepted that the appellant had not received the decision until 17 May 2013.

18. Ground 2 argues that the Judge should have considered the appellant's appeal under the pre 9 July 2012 Immigration Rules. The Judge erred in finding that as the appellant had not made an application for ILR by 9 July 2012 paragraph 276B did not apply to him. In support of the argument the appellant relied on **Edgehill v SSHD [2014] EWCA Civ 402**. In any event the appellant's further submissions and legacy questionnaire in 2010 constitute an application for leave to remain. It is not in dispute that the Secretary of State did not decide the application until the appellant had lived continuously in the UK for over fifteen years and therefore fulfilled paragraph 276B (i)(b).

19. The only reason given by the Judge for not allowing the appeal under paragraph 276B is that the appellant had not produced evidence that he had satisfied the requirement in subparagraph (iv) (he had sufficient knowledge of the English language and life in the UK). In any event this was not raised by Counsel for the Secretary of State at the hearing.

20. Ground 3 argues that the Secretary of State's decision not to grant the appellant leave under the Legacy Policy was fundamentally flawed as no proper reasons were given why it was concluded that there had been non-compliance and the appellant had absconded. The Judge failed to resolve

the disparity between the treatment of the appellant's case and those of many Kosovan applicants who arrived in the UK in the same period as him and who have been granted indefinite leave to remain under the Legacy Policy. Evidence of this was before the Judge of the First-tier Tribunal and it was not challenged by the Secretary of State.

21. Ground 4 argues that the Judge's consideration of Article 8 is flawed for the reasons stated above. The Judge failed to factor in the evidence that the appellant was estranged from his wife and daughter in Kosova as a result of his very lengthy period of residence in the UK.

22. At the hearing before me on 8 August 2014 Mr Hawkin raised an additional ground of appeal. He argued that the Judge should have considered paragraph 276A1 and 276A2 of the Immigration Rules. These contain the requirements for an extension of stay on the ground of long residence in the UK. 276A1 and A2 read as follows:-

> "276A1. The requirement to be met by a person seeking an extension of stay on the ground of long residence in the United Kingdom is that the applicant meets each of the requirements in paragraph 276B(i)-(ii) and [and (v).]."
>
> "276A2. An extension of stay on the ground of long residence in the United Kingdom may be granted for a period not exceeding 2 years provided that the Secretary of State is satisfied that the requirement in paragraph 276A1 is met [and a person granted such an extension of stay following an application made before 9 July 2012 will remain subject to the rules in force on 8 July 2012.]]."

23. Mr Wilding responded to the grounds of appeal in the context of his skeleton argument. It was open to Judge Callow to find that the appellant elected to abscond for a period of twelve years. Even if it is accepted that the appellant did not receive the refusal of his asylum claim he has shown no evidence at all that he sought to pursue the respondent for a decision. He acquiesced to the delay. The skeleton refers to the case of **RU (Sri Lanka) v SSHD [2008] EWCA Civ 753** and asserts that in the present case the facts are similar. In any event Judge Callow was wrong to conclude that the appellant did not receive the July 2000 decision. The position of the respondent is that the decision was posted to the appellant and his representative by way of recorded delivery in 2001.

24. It was argued by Mr Wilding that the transitional provisions do not apply to the appellant because they were in place for applications for leave to remain made under the Immigration Rules before the Rules changed and that none of the representations made by the appellant before the respondent made her decision could be said to be an application for leave under the Rules. He made reference to the letters from the appellant to the respondent between 2010 and 2013 which refer to specific compassionate and compelling circumstances and private and family life.

This was not and is not an application for leave under the Immigration Rules.

25. The transitional provisions are found within the Immigration Rules at A277 which states as follows:

> "From 9 July Appendix FM will apply to all applications to which Part 8 of these rules applied on or before 8 July 2012 except where the provisions of Part 8 are preserved and continue to apply, as set out in paragraph A280."

26. The application in this case was not made under Part 8 of the Immigration Rules. The appellant relies specifically on the long residency provisions of paragraph 276B which is Part 7 of the Rules. It is asserted by Mr Wilding that where Article 8 is relied on the Rules do play a part and he relied on **Haleemudeen v SSHD [2014] EWCA Civ 558**. In any event the appellant was served with a decision refusing his asylum claim in 2001 which included an IS151B or section 10 decision and the clock had stopped preventing any reliance on the provisions of 276B.

27. If Judge Callow was wrong in relation to this point he went on to find that the appellant would not be able to satisfy the requirements of paragraph 276B because he would not meet subparagraph (iv). Paragraphs 276A1 and 276A2 relating to an extension of leave do not apply to the appellant who made no reference to wanting to stay in the UK for a limited period of time. Reliance is placed upon the judgment in **MU (Bangladesh) ("statement of additional grounds" – long residence – discretion) Bangladesh [2010] UKUT 442**."

28. Judge Callow did not need to go on to consider other "public interest" requirements of the Rules because he had decided that the appellant did not meet them. In any event, having found that the appellant had absconded for a lengthy period of twelve years and that he failed to attend an asylum interview it is highly likely that the appellant would not be deemed as desirable for the purposes of 276B.

29. There is no merit in the ground relating to the legacy issue. The Upper Tribunal in **AZ (Asylum – legacy cases) Afghanistan [2013] UKUT 270** makes it clear that the Tribunal does not have jurisdiction to consider this point.

30. The Judge did not make an error of law in relation to the decision under Article 8 of the ECHR in respect of the delay, this does not strengthen the appellant's case as any delay simply led to him strengthening his claim under Article 8. In any event the appellant did not seek to discover the progress of his asylum application between 2000 and 2010 and even then it was the Secretary of State who made contact with the appellant first and not the other way round.

**Conclusions**

31. At the hearing before me both parties served further evidence. The appellant served a further witness statement of 8 October 2014 responding to the further evidence relied on by the Secretary of State namely a document of 7 May 2001, indicating that the Reasons for Refusal Letter of was sent by first class recorded delivery to an address where the appellant was living and there is a recorded delivery number shown on the document. In addition a copy was sent to Chetty & Company Solicitors. I did not admit this evidence. It was not before the First-tier Tribunal.

32. Both parties provided me with a considerable amount of case law as follows. **EB Kosovo (FC) (Appellant) v SSHD [2008] UKHL 41**, **ZH (Bangladesh) v SSHD [2009] EWCA Civ 8**, **Haleemudeen [2014] EWCA Civ 558**, **Fatima Farhana Mohammed v SSHD [2012] EWHC 3091 (Admin)**, **AZ (Asylum -'legacy' cases) Afghanistan [2013] UKUT 270 (IAC)**, **RU (Sri Lanka) v SSHD [2008] EWCA Civ 53**, **Regina (Anufrijeva) v SSHD [2003] UKHL 36, MU ('statement of additional grounds' – long residence – discretion) Bangladesh [2010] UKUT 442 (IAC)** and **Edgehill and Bhoyroo v SSHD [2014] EWCA Civ 402**.

33. The Judge accepted that the appellant had not received the decision letter of 18 July 2000 until 17 May 2013 (paragraph 15), but he went on to find that he was an absconder. This was a conclusion open to the Judge on the basis that the appellant had effectively failed to make any contact with the respondent for a considerable period of time despite having made an application for asylum. It was clearly an issue which the Judge considered for himself whether or not he adopted the wording of the decision maker. This is clear having when considering paragraphs 13 and 26 of the determination. The Judge found that the appellant had not received the decision letter until 17 May 2013. However, the finding of the Judge that the appellant was an absconder is not inconsistent with this. It is not irrational or perverse.

34. The judgements in **Edgehill** and **Haleemudeen** are not consistent, but in my view I am bound by the latter. The *per incuriam* doctrine has no application where a lower court is faced with a decision of a higher court binding upon it (see **Cassell & Co Ltd v Broome [1972] AC 1027; [1972] 1 ALL ER 801**). In my view I am constrained to follow the more recent decision of the Court of Appeal. In these circumstances whether or not the legacy questionnaire was an 'application' is not material. In any event, whether the Judge should have applied the rules pre or post 9 July 2012 is not material in my view because the appellant could not satisfy the requirements 276B (iv) and therefore would not qualify for long residence. The appellant claims that 276B (iv) which is an English language requirement was not raised by the respondent at the hearing. The appellant had not made an application under 276B and therefore the decision maker did not consider it. It was a matter for the appellant to

establish that he met the requirement of the Rules including 276B (iv) and he failed to do so.

35. I do not accept Mr Hawkin's submissions relating to paragraph 276A1. The first obvious point is that the success of this argument relies on the premise that the Judge applied the wrong rules and in my view he did not. In any event, the issue was not raised before the FtT. Paragraph 267A1 requires the appellant to meet the requirements of 2767B (ii) which is a discretion within the rules which has not been exercised in this case because in the view of the Secretary of State the appellant's case should have been determined under the new 276B post July 2012 and the Judge found that this was the case. If the Judge was wrong about that it would then still fall to the Secretary of State to consider whether the appellant would satisfy the public interest criteria in 276B (ii) and it is far from obvious that he would. In any event, in the absence of such a decision (that the appellant satisfies the public interest criteria), 276A1 and A2 cannot apply. This was not considered by the decision maker as the appellant did not make an application for an extension of leave under paragraph 276A1 and it was not an issue raised before the FtT.

36. In relation to ground 3, I accept Mr Wilding's submissions that the UT jurisdiction is limited on this issue. In any event, the grounds seeking leave to appeal do not disclose that the Judge erred in finding that the decision was in accordance with the law. The Judge dealt with this very thoroughly at paragraphs 26, 29 and 30 cited in full above.

37. Ground 4 relates to Article 8. The challenge to the assessment is that the Judge did not take into account that the appellant was estranged from his wife and child. I do not accept this. At paragraph 34 the Judge found that the appellant had not established family life here in contrast to in Kosovo where his parents, with whom he has contact, reside. The Judge mentioned as a fact that the appellant's wife and 15 year old daughter live in Kosovo and there is no suggestion that the Judge was under the impression that he had contact with them. Obviously the Judge was aware that the appellant had not lived with them for a considerable period of time. In my view the Judge was merely comparing the lack of family life here in the UK with his family life in Kosovo. In relation to proportionality and the assessment at paragraphs 37-39, there is no reason to believe that the Judge factored the appellant's wife or child into the balancing exercise. The appellant's appeal rested on private life here in the UK and whether or not that should outweigh the public interest and the Judge found in favour of the Secretary of State.

38. For all of the above reasons I conclude that the Judge did not make an error of law and the decision to dismiss the appeal is maintained.

Signed Joanna McWilliam Date 2 November 2014

Deputy Upper Tribunal Judge McWilliam