Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/06426/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6 October 2014	**On 15 October 2014**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR LIYAKATALI YASIN KAPADIA
(No Anonymity Direction Made)

Respondent

Representation:

For the Appellant: Mr T Melvin a Senior Home Office Presenting Officer
For the Respondent: Mr F Gaskin of counsel instructed by Chesham & Co

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the Home Department ("the Secretary of State"). The respondent is a citizen of India who was born on 27 May 1962 ("the claimant"). The Secretary of State has been given permission to appeal the determination of First-Tier Tribunal Judge A M Black ("the FTTJ") who allowed the claimant's appeal on Article 8 human rights grounds only against the Secretary of State's notice dated 30 January 2014 stating that he was considered to be a person to whom removal directions could be given as

an illegal entrant because he had admitted to having entered the UK using a counterfeit British passport on 21 October 2002.

2. The claimant claimed to have arrived in the UK on 15 June 1994 and to have lived here ever since. On 14 December 2010 he applied for indefinite leave to remain based on his length of residence. His application was refused on 15 February 2011. The Secretary of State concluded that there was no evidence of lawful entry and that he could not demonstrate 10 years continuous lawful residence. He had not provided evidence which established 14 years non-lawful residence.

3. The claimant appealed and the FTTJ heard the appeal on 9 July 2014. Both parties were represented, the appellant by Mr Gaskin who appeared before me. The FTTJ considered, as a preliminary issue, whether the claimant had an in country right of appeal. He concluded that there was such a right of appeal, a decision which is not now contested.

4. The FTTJ heard oral evidence from the claimant and three other witnesses. He found that the claimant had demonstrated that he had been continuously resident in the UK since October 1998. This was a period of 15 years prior to his being served with a notice of liability to removal in January 2014.

5. The FTTJ found that as the claimant's Article 8 claim was decided in 2011 the Article 8 issues fell to be decided under the provisions of paragraph 276ADE and Appendix FM of the Immigration Rules. The appellant did not meet the requirements in Appendix FM because he had no family here. He did not meet the criteria in paragraph 276ADE because he had not lived in the UK for a period of 20 years.

6. The FTTJ applied Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 640 (IAC). She found that there were arguably good grounds for granting leave to remain outside the Immigration Rules. This was "because the respondent's delay in making a removal decision and then doing so on the prompting of the appellant's solicitors suggested that the public interest in removal of this appellant is of less concern to the respondent than in other cases. The respondent made her decision to refuse the appellant's Article 8 claim in February 2011, yet it was not until three years later in January 2014 that she made the removal decision. In addition, had the respondent made a timely decision to remove the appellant his claim would have been considered under the Convention rather than the Immigration Rules."

7. The FTTJ considered the facts of the claimant's case in the light of Razgar [2004] UKHL 27. She reached the conclusion that the interference with his private life would not be proportionate to the public interest given the respondent's delays in taking enforcement action against him.

8. The Secretary of State applied for and was granted permission to appeal submitting that the FTTJ erred in law by failing to identify any compelling or

exceptional circumstances. There were no adequate reasons for a conclusion that the claimant's circumstances were either compelling or exceptional. At all times he would have been aware that he was not here legally, his position was precarious and he could be required to leave at any time. He had shown a blatant disregard for the immigration laws. His claim was no more than an ordinary private life claim. The Secretary of State acknowledged that there had been delay but argued that it should not be determinative. The FTTJ had failed to apply EB (Kosovo) UKHL 14 principles.

9. Mr Melvin relied on the grounds of appeal. The exceptional circumstances relied on by the FTTJ appeared to be no more than the delay on the part of the Secretary of State. He accepted that there was no explanation for the delay. Mr Melvin then alleged that the claimant had already been removed from the UK and had returned. Mr Gaskin objected. In reply to my questions, Mr Melvin accepted that there was no mention of this in the refusal letter and nothing about it in the grounds of appeal or the determination. I find that this is a new and unsubstantiated allegation which I do not take into account.

10. Mr Gaskin submitted that there was plainly three years delay by the Secretary of State. It could be argued that the delay was as much as six years. He accepted that delay by the Secretary of State should be considered in the light of EB Kosovo but argued that the FTTJ had done this, as appeared from paragraph 33. The claimant had suffered substantial prejudice because his claim had been considered under the Article 8 provisions in the new Immigration Rules. Otherwise he would have succeeded under the 14 year rule. In reply to my question, he accepted that the Article 8 claim was on private life grounds only. There was no family life. What the FTTJ said in paragraph 35 was a reasonable summary of the evidence and together with the delay these comprised the reasons for allowing the appeal on Article 8 human rights grounds outside the Immigration Rules. Mr Gaskin accepted that if I found that there was an error of law and set aside the decision I should remake the decision.

11. In his reply Mr Melvin accepted that the only refusal letter was that dated 15 February 2011. The 14 year point was dealt with in this letter. The new Article 8 provisions in the Immigration Rules came into effect in July 2012. The FTTJ found that the claimant had established continuous residence in the UK since October 1998. He had not been here for 14 years by July 2012 at which stage the requirement became 20 years. If I found that there was an error of law I was asked to remake the decision in the light of the requirements of sections 117 (4) and (5) of the Immigration Act 2014.

12. In EB Kosovo Lord Bingham said;

> "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"

13. I find that the FTTJ properly considered the Article 8 grounds under the Immigration Rules.

14. The summary of the effect of Gulshan, prepared by the author of that determination, Cranston J, states; "(b) After applying the requirements of the Rules, only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to consider whether there are compelling circumstances not sufficiently recognised under them: R (on the application of) Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin)"; and "(c) The term "insurmountable obstacles" in provisions such as Section EX.1 are not obstacles which are impossible to surmount: MF (Article 8 – new rules) Nigeria [2012] UKUT 393 (IAC); Izuazu (Article 8 – new rules) [2013] UKUT 45 (IAC); they concern the practical possibilities of relocation. In the absence of such insurmountable obstacles, it is necessary to show other non-standard and particular features demonstrating that removal will be unjustifiably harsh: Nagre."

15. The grounds do not argue that the FTTJ erred in law by failing to consider the first stage of whether there were "arguably good grounds for granting leave to remain" outside the Immigration Rules. The submission is that she failed to identify compelling circumstances not sufficiently recognised under them or, in a similar argument, she failed to provide adequate reasons why the claimant's circumstances were exceptional (or compelling).

16. The appellant never claimed to have a family life in this country. His human rights grounds were based on private life only. The FTTJ's findings in relation to private life are set out in paragraph 35 where she said;

> "I bear in mind the following facts about the appellant's private life. He has lived in this country for 15 years and 8 months. He entered the country illegally. He has had no immigration status here but sought to rectify this in 2008 by making a human rights claim. He has friends here. He has been employed as a domestic worker but has not paid tax or National Insurance contributions. He attends his local mosque on a regular basis. He has no criminal convictions. There is no evidence that the appellant has maintained contacts with family and friends in India."

17. The FTTJ addressed the question of delay in paragraph 36 in which she said;

> "36. There were a number of delays following the submission of the appellant's human rights claim. The appellant's solicitors sent various chasing letters to the respondent and even made a formal complaint. On one occasion the respondent lost his file. As a result of the delays, the appellant was required to complete two different application forms. The decision was eventually made three years after he had made his claim. There then followed a further three years delay before the removal decision was made. These delays are not consistent with the respondent considering the appellant's lack of immigration status and removal a matter of concern."

18. I find that the FTTJ erred in law by not applying the appropriate EB Kosovo principles to the consequences of delay by the Secretary of State, even though these are unexplained. It cannot be said that the claimant has to any substantial extent developed closer personal and social ties or established deeper roots in the community than he would have shown had it not been for the delay. He has not established any family life and his private life remains at a low level. The claimant has always known that his status in this country has been precarious. He has not developed any personal relationships which have become measurably closer during the period of delay. The delay has not been shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes. It was not open to the FTTJ to conclude that the delay made any significant difference to the weight otherwise to be accorded to the requirements of firm and fair immigration control.

19. I also find that no different outcome would have resulted from considering the claim before or after the Article 8 provisions in the Immigration Rules which came into effect in July 2012. After that date would have failed on the principles I have set out. Prior to that date it would have failed under the Strasberg jurisprudence and Razgar principles.

20. The new Article 8 provisions in the Immigration Rules came into effect in July 2012. The FTTJ found that the claimant had established continuous residence in the UK since October 1998. He had not been here for 14 years by July 2012 at which stage the requirement became 20 years.

21. Having erred in law in her assessment of the weight to be given to delay as a countervailing factor to the requirements of firm and fair immigration control I find that it was not open to the FTTJ to conclude that there were compelling circumstances not sufficiently recognised under the Article 8 provisions in the Immigration Rules or to allow the appeal on this basis.

22. Having found that the FTTJ erred in law I set aside the decision which I now remake.

23. I adopt the findings of the FTTJ that the claimant failed under the Article 8 provisions in the Immigration Rules. This has not been disputed by the claimant. I also adopt her findings of fact which have not been disputed. I find

that the claimant has not shown that there are arguably good grounds for granting leave to remain outside the Immigration Rules. Even if I had concluded that there were arguably good grounds I would have found that the claimant had not shown compelling circumstances not sufficiently recognised under the Immigration Rules.

24. The claimant has not established a family life in this country. He has established a private life to the extent recorded by the FTTJ in paragraph 35 which I have set out. The delay by the Secretary of State is material to the very limited extent to which the claimant's private life has become any better or more deeply rooted. There is a strong public interest in the preservation of immigration control which has not been reduced to any substantial degree by the delay on the part of the Secretary of State. The claimant arrived here illegally and has never had any leave to be here. He has worked illegally and been paid in cash to avoid paying tax and National Insurance. Until he thought that he had been here long enough to regularise his status he did his best to remain undetected.

25. I must now apply the provisions of paragraphs 117A and 117B of the Immigration Act 2014. I am required to find that the maintenance of effective immigration control is in the public interest. It has not been suggested that the claimant is not able to speak English. The claimant has not established that if he remained he would be financially independent. I give little weight to the private life which he has established whilst he has been in this country illegally and his immigration status has been precarious.

26. Taking all these factors into account I find that the claimant has not established that the Secretary of State's decision would infringe his Article 8 human rights. I would have reached the same conclusion even if I had not been obliged to take into account the provisions of paragraphs 117A and 117B of the Immigration Act 2014.

27. The FTTJ did not make an anonymity direction. I have not been asked to do so and can see no need for such a direction.

28. Having set aside the decision of the FTTJ I remake the decision and dismiss the claimant's appeal both under the Immigration Rules and on human rights grounds.

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Signed Date 7 October 2014

Upper Tribunal Judge Moulden