Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/12026/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 May 2016	**On 1 June 2016**

Before

UPPER TRIBUNAL JUDGE WARR

Between

I L
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr I Maka, Counsel, instructed by Traymans Solicitors
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Albania born on [ ] 1986. He states he arrived in this country on 14 December 2001 and applied for asylum. This application was refused on 21 January 2002 but he was granted exceptional leave to remain until 6 December 2004 as an unaccompanied minor. The appellant made an in-time application for further leave to

remain on 16 November 2004 and this application was refused after a lengthy delay on 26 August 2015. The appellant appealed this decision and his appeal came before a First-tier Judge on 8 March 2016. The judge heard oral evidence from the appellant who claimed to be a member of a particular social group and feared persecution because of imputed political opinion. He claimed to have become a police informant who had reported on an Albanian criminal gang.

2. The judge rejected the appellant's claim to be a police informant and found his account neither to be truthful or credible. She found no real risk of the appellant being killed or suffering degrading treatment if returned to Albania.

3. Having so found she concluded her determination by considering Article 8 in the following terms:

> "47. I must first consider whether the appellant can meet the Article 8 requirements within the Immigration Rules. The burden is upon him to prove the same upon the balance of probabilities.
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> 48. The appellant acknowledges that he cannot meet the requirements of Appendix FM .
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> 49. As to his private life the appellant relies only on para 276ADE (1) (vi).
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> 50. He would have to show that 'there would be very significant obstacles' to his reintegration into Albania.
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> 51. He says that he entered the United Kingdom in 2001 when he was 15 years of age. He has thus spent some of his important teenage years living in the United Kingdom and he has been here for some time.
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> 52. The appellant relies on a number of letters which appear at C3, 4, 5, 6 and 7 in the bundle. In his oral evidence he said that he could not call witnesses to attend at court because they did not know his role as a police informant.
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> 53. His solicitors of course had requested previously that the matter be heard in a closed court and I acceded to this request. The witnesses could simply have given their evidence and then left the court without knowing about the appellant's claim to be an informer. If this was considered to be too risky the solicitors could have ensured that the witnesses provided evidence in statement form.
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> 54. I have placed limited weight on the letters because
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> (a) The witnesses did not attend for oral evidence.

(b) The evidence is not in the form of statement.

(c) Some of the letters are very difficult to read, the letter at C3 is illegible to me in parts.

55. At best the letters appear to confirm that the appellant is kind, friendly and trustworthy and a loyal customer.

56. The letters do not lead me to conclude that the appellant has established strong links with the community or anything more than would be expected for somebody who had lived in the United Kingdom for fifteen years.

57. It is reasonable for me to infer that the appellant speaks Albanian as he spent his formative years, and the time when he would have most of his education in Albania.

58. He said in his oral evidence that his father had been killed and that he had no close family left in Albania other than his mother. He described her as very old and very ill and that he was not in contact. He did not explain however how he knew his mother was very ill if he was not in contact with her or anybody else in Albania.

59. The appellant is a recovering alcoholic but does not complain of any present health problems.

60. He refers in his evidence to having worked in the United Kingdom (cleaning cars) and there is no evidence to suggest that he would be unable to undertake manual work were he to return to Albania.

61. Of course the appellant has lived in the United Kingdom for some considerable time but would this amount to the very significant obstacles required to grant leave to remain within the Immigration Rules?

62. I accept there would be challenges to the appellant in returning. However he is a relatively young man of good health who has the capability to find work and reintegrate. He has not shown me that there are very significant obstacles to his reintegration.

63. Although he says he fears criminal gangs I have not found his evidence credible with regard to his past involvement with either gangs or police informants. Accordingly he does not meet the requirements of paragraph 276ADE(6).

Article 8 Outside of the Rules

64. It is the appellant's case that if he does not meet the requirements of the Immigration Rules I should go on and make an Article 8 assessment outside of the Rules.

65. My starting point is to consider whether an assessment should in fact be made outside of the Rules and in considering the same I have had regard to **SS Congo and Others [2015] EWCA Civ 387** and whether there are "compelling circumstances" to support a claim for grant of leave outside of the Rules.

Compelling Circumstances

66. Appellant's Counsel submits that in this case there are compelling circumstances because of the delay in this case in the Home Office making a decision. The appellant's representative states that there has been an unacceptable period of delay between the application being made in 2004 and the decision being given in August 2015.

67. This is a lengthy and unusual period of delay. It is the Respondent's case that the delay in part has been due to the appellant who did not respond to letters in August 2005, March 2011 and October 2012 (A1). The appellant's representatives indicate that a response was made to the letter of 30th August 2005.

68. I find that the appellant at times did not cooperate with the Respondent's enquiries but nevertheless think the Respondent has not given an adequate explanation for the lengthy periods of delay.

69. However I have considered whether the delay is material and in considering the same I have had due regard to **EB (Kosovo).** Lord Bingham of Cornhill said "what (if any) bearing does delay by the decision making authorities have on a non-national's rights under Article 8?"

70. The judge concluded it may be relevant in one of three ways namely

    (1) The appellant may develop closer personal and social ties.

    (2) If in a relationship the sense of impermanence will fade.

    (3) It may reduce 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."

71. In this case it is for the appellant to cross the first hurdle in satisfying me that there are compelling circumstances.

72. I am not told that the delay in this matter has affected any relationships that the appellant has formed. He has not produced evidence to lead me to conclude that he has closer personal and social ties than he would have had had the decision been made some considerable time ago. The delay by the Respondent has not produced an unfair outcome.

73. Accordingly I do not find that the appellant has satisfied me that there are compelling circumstances such that I should make an Article 8 assessment outside of the Rules.

74. Even if the appellant had satisfied me that there were compelling circumstances then I would have looked at whether the Respondent had satisfied me that the decision was proportionate in all the circumstances. I would have been obliged to consider the Section 117B considerations such that

    (1) The maintenance of effective immigration controls is in the public interest.

    (2) I would have had due regard to the appellant being able to speak English.

    (3) I would have considered that the appellant was not financially independent. I would not have placed significant weight on this given the appellant's status as an asylum seeker.

    (4) As to the appellant's private life this was established at a time when his immigration status was precarious given that he had limited leave.

75. Taking matters in the round the respondent would have satisfied me that the decision was proportionate in the circumstances given the weight to be attached to the public interest.

76. However I have found that there are no compelling circumstances that require an Article 8 assessment to be made outside the Rules."

4. Accordingly the judge dismissed the appeal on all grounds. The appellant applied for permission to appeal and the application was considered by First-tier Tribunal Judge Simpson in a decision dated 13 April 2016. The judge did not grant permission in respect of the asylum issues and stated as follows in relation to Article 8:

> "As to Article 8 issues, the judge was aware that the appellant has lived in the United Kingdom for fifteen years i.e. for half his life. Moreover, whilst there has been inordinate delay from the date of application in 2005 and the decision in August 2015 the judge did

consider **EB (Kosovo)** and concluded that the appellant had not demonstrated that the delay had interfered with his social and personal ties or given rise to compelling circumstances. However, it is arguable that the judge erred in her approach to assessment of proportionality as the decision is silent in that regard."

5. The respondent in her response dated 4 May 2016 opposed the appellant's grounds. It was submitted that the judge had had regard to the delay and the other matters advanced by the appellant's representative and the judge had properly assessed matters in the light of **EB (Kosovo) [2008] UKHL 41** and had considered the proportionality of the decision and the public interest at paragraphs 74 and 75 of the decision. The grounds were a mere disagreement with the findings and outcome.

6. At the hearing Mr Maka lodged a skeleton argument requesting a witness summons and seeking to raise issues with the judge's findings about the appellant not being an informer as he had claimed. Issue was taken with the judge's approach to the evidence and there had been no proper assessment of the objective evidence.

7. I pointed out that permission had not been granted except on the proportionality point. No notice had been given of the intention to raise grounds on which permission had not been given. No application had been made to amend the grounds and the application for permission had not been renewed on the points on which permission had not been granted. In the exercise of my discretion and having regard to the overriding objective I could see no reason for widening the scope of the arguments in this case.

8. Mr Maka pointed out that the judge had given limited weight to the letters which the appellant had relied upon. He had not followed the approach identified in **Razgar** and although he initially submitted that there was no reference to proportionality he acknowledged that the judge had made reference to the respondent's decision being proportionate in her alternative findings. The judge had referred in paragraph 67 to the lengthy and unusual delay but it was not apparent that the letters referred to in that paragraph had been shown to the First-tier Judge. No consideration had been given to the fact that there had been no explanation for the delay. There had been a systemic failure in the decision making process. Mr Maka referred to **EB (Kosovo)**. The judge had erred in simply focusing on the first hurdle. That was just one aspect of the delay. The delay had been grossly disproportionate. He had been a minor, a vulnerable individual and only aged 17 when he made his re-application. There had been inadequate consideration in paragraph 72.

9. Mr Tarlow opposed the application to obtain a witness summons. He pointed out that he had not drafted the respondent's response and did not seek to develop it.

10. At the conclusion of the submissions I reserved my decision.

11. Permission to appeal was granted on a limited issue as I have pointed out. The only point on which permission was granted was that it was arguable that the judge had erred in her approach to the assessment of proportionality "as the decision is silent in that regard". As Mr Maka acknowledged, that was not entirely correct. The determination in relation to Article 8 needs to be read as a whole. The judge's approach was informed by the decision of the Court of Appeal in **SS (Congo)** - see paragraph 65 of her decision. She first considered whether there were compelling circumstances to support a claim for grant of leave outside the Rules. The judge then turned to consider whether there were such circumstances and fully acknowledged that there had been a lengthy and unusual period of delay.

12. Mr Maka argued that it was not established that the letter referred to in paragraph 67 of the determination had been shown to the judge. The appellant was represented at the hearing and the representative had stated as appears from paragraph 67, that a response had been made to one of the letters. The judge in my view was entitled to conclude that the appellant did not cooperate at times with the respondent's enquiries but nevertheless I am not satisfied that she underplayed the extent of delay in this case. She directed herself properly by reference to **EB (Kosovo)**. In paragraph 71 in referring to the first hurdle the judge was clearly referring back to the issue of compelling circumstances rather than the development of closer personal and social ties. She turned to the question of delay affecting relationships in paragraph 72 of her decision.

13. It is to be noted that at an earlier stage of her decision the judge had considered the letters that had been advanced on behalf of the appellant which did not lead her to conclude "that the appellant has established strong links with the community or anything more than would be expected for somebody who had lived in the United Kingdom for fifteen years." In this context I am not satisfied that paragraph 72 and indeed the judge's approach as a whole was insufficiently informed or reasoned. She gave all the evidence before her appropriate consideration.

14. It is important to bear well in mind that the judge having considered that there were no compelling circumstances was not required to go further. She makes this quite clear in paragraph 74 of the decision.

15. What follows from paragraph 74 is that her findings were made on the alternative basis that she had been satisfied there were compelling circumstances.

16. In those circumstances it is unsurprising that the judge's evaluation of proportionality was more succinct than it might otherwise have been. However it is not correct to argue, as Mr Maka fairly acknowledged, that there was no reference to proportionality.

17. In conclusion, the judge directed herself by reference to **SS (Congo)** and found there were no compelling circumstances to support a claim for grant of leave to remain outside the Rules. Her approach in this respect is not the subject of criticism in the grounds. Her consideration of Article 8 issues was accordingly in the alternative and not expressed at such length as it might otherwise have been.

18. For the reasons I have given, I am not satisfied that the point on which permission was granted gives rise to a material error of law in this case. The decision of the First-tier Judge stands. Appeal dismissed. I make no fee award.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Fee Award

The First-tier Judge made no fee award and I make none.

Signed Date 31 May 2016

G Warr
Judge of the Upper Tribunal