Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/09484/2016**

THE IMMIGRATION ACTS

Heard at: Field House	**Decision & Reasons Promulgated**
On: 28 September 2017	**On: 17 October 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

THE SECRETARY OF STATE FOR HE HOME DEPARTMENT

Appellant

and

MR GIZIM DAUTI
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr S Kotas, Senior Presenting Officer
For the Respondent: Mr J Collins of Counsel

DECISION AND REASONS

1. The appellant before the Upper Tribunal is the Secretary of State for the Home Department and the respondent is a citizen of Kosovo born on 17 January 1977. However, for the sake of convenience, I shall continue to refer to the latter as the "appellant" and to the Secretary of the State as the "respondent", which are the designations they had in the proceedings before the First-tier Tribunal.

2. The appellant appealed to the First-tier Tribunal against the decision of the respondent refusing his application for asylum and humanitarian protection in the United Kingdom and pursuant to Article 8 of the European Convention on Human Rights. First-tier Tribunal Judge Fletcher Thomas "allowed the appeal" without specifying the law under which he allowed the appeal.

3. First-tier Tribunal Judge Lambert gave permission for the respondent to appeal and found there was arguably an error of law in the decision as the Judge having found that the appellant understandably not having pursued the asylum application made in 2000 “with vigour” and is not now a refugee and that he did not meet the human rights requirements of the rules but stated that his return to Kosovo, after 17 years in the United Kingdom, was disproportionate under Article 8 outside the rules.

4. Thus, the appeal came before me.

5. The First-tier Tribunal Judge set out the appellant’s claim that he was 23 years old when he arrived in the United Kingdom and he is now 40 years old. He has forgotten Kosovo and considers the United Kingdom to be his home and he feels British. He has no criminal convictions and no involvement in antisocial behaviour. He has many close friends, who he considers to be his family. He has not been able to work because of his status and has relied on the Albanian community to help him.

6. The respondent’s case is that she has accepted the appellant’s identity, nationality and ethnicity. She stated that the appellant’s asylum claim was based on his fear of the absence of state protection and the unstable political situation in Kosovo in the year 2000. The respondent stated that law and background information, she accepts that the situation in Kosovo has been troubled in recent years, but does not accept that the appellant would be at risk solely because of his presence in the country. She stated that the appellant can relocate within Kosovo if he does not wish to return to his home country. The respondent further stated that the appellant does not have a partner and is not a parent. He does not meet the requirements for leave to remain under Appendix FM on family life grounds. She found that there are no very significant obstacles to the appellant’s integration into Kosovo and any skills he has obtained in the United Kingdom would benefit him in Kosovo. The respondent stated that the appellant does not meet the requirements of paragraph 276 ADE of the immigration rules. The respondent stated that the appellant has not raised any exceptional circumstances, and his application does not fall to be considered for leave outside the rules.

7. The Judge having considered all the evidence stated that the appellant’s claim for asylum was not pursued with vigour, understandably because it was made in 2000, and there is no evidence to prove that he faces a risk of persecution for a Convention reason on return to Kosovo now. I therefore find that the appellant is not entitled to international protection or humanitarian protection and is not a refugee under the qualifying Regulations.

8. So far it is abundantly clear that the Judge found that the appellant cannot succeed in his claim under the refugee Convention or for humanitarian

protection which he made in the year 2000 because the situation has changed and he can be safely returned. There is no ambiguity in these findings that the appellant is not a refugee and is not entitled to humanitarian protection in the United Kingdom.

9. The Judge then went on to consider, at paragraph 18, and stated that "the crux of this appeal lay in the appellant's claim on human rights grounds. He said that the appellant does not meet the requirements of Appendix FM for leave to remain on family grounds under the immigration rules".

10. The Judge found that there are no significant obstacles to the appellant's reintegration into Kosovo because of the fact that he was born there, speak the national language and as an adult in good health and can re-establish himself in his home country. The judge also found that the appellant does not meet the requirements of paragraph 276 ADE for leave to remain on private life grounds under the immigration rules. Once again there is no ambiguity in these findings that the appellant does not meet the requirements of the immigration rules. It is implicit in these findings that the Judge found that the appellant's appeal must be dismissed to the extent that the appellant relies on the immigration rules.

11. The Judge then went on to consider the appellant's appeal under Article 8 of the European Convention on Human Rights. He states that he has considered the appellant's appeal in line with the case of **Razgar [2004] UKHL 27** and **Hesham Ali (Iraq) v SS HD [2016] UKSC 60.** This indicates that the Judge is now considering the five steps in **Razgar** and finds that the appellant's private life deserves respect under Article 8 of the European Convention on Human Rights and the respondent's decision which although lawful amounts to interference with the appellant's right to a private life in the United Kingdom. The Judge was correct in his finding that the appellant having lived in the United Kingdom for 16 years, has established a private life in the United Kingdom.

12. The Judge then proceeds to consider whether the respondent's decision is proportionate. The Judge then in his proportionality assessment considers the respondent's interests set out in paragraph 117B of the 2002 Act. At paragraph 23 the Judge states that effective immigration control is in the public interest. He stated that he balances the appellant's private life which he has developed when his leave was precarious. He stated that while the appellant's leave has been precarious, it has not been unlawful because he made an asylum application on arrival in 2000 and would have been given temporary admission pending the outcome of his application.

13. The Judge considered in his proportionality assessment that the appellant has waited for 16 years for the resolution of his application and that his representatives have during that period consistently sought to regularise his status. He stated that the respondent accepts responsibility for the delay and has acknowledged that the appellant's details were confused

with those of another individual which resulted in an already late decision in 2014 being withdrawn. The Judge also stated that the appellant was not responsible for the delay in any manner or form.

14. The Judge was entitled to consider within the proportionality assessment, the respondent's admission of responsibility of a delay of 16 years in respect of the respondent's interests of an orderly and fair immigration control. The Judge also considered that had the respondent decided the appellant's application in 2000, soon after the war in Kosovo, his application for asylum may well have succeeded.

15. The Judge was entitled to find that the appellant has established and developing a private life in the United Kingdom and that he has developed deeper roots as is evident from his ability to speak English. He found that the delay caused by the respondent is inordinate and does not reflect a fair, firm and effective immigration control and that the appellant's interest must prevail over that of the respondent.

16. The Judge considered the case of **EB (Kosovo)**, **JL (Sierra Leone) [2006] EWCA Civ. 1713** to clarify the law on the effect of delay by the Secretary of State on claims that rely on Article 8 to resist removal from the United Kingdom. Buxton LJ summarised the law in relation to delay at paragraph 24 as follows:

> "i) Delay in dealing with an application may, increasing the time that the claimant spends in this country, increase his ability to demonstrate family or private life bringing him within article 8(1). That however is a question of fact, and to be treated as such.
>
> ii) The application to an article 8 case of immigration policy will usually suffice without more to meet the requirements of article 8(2) [*Razgar*]. Cases where the demands of immigration policy are not conclusive will be truly exceptional [*Huang*].
>
> iii) Where delay is relied on as a reason for not applying immigration policy, a distinction must be made between persons who have some potential right under immigration policy to be in this country (for instance, under marriage policy, as in *Shala* and *Akaeke*); and persons who have no such right.
>
> iv) In the former case, where it is sought to apply burdensome procedural rules to the consideration of the applicant's case, it may be inequitable in extreme cases, of national disgrace or of the system having broken down [*Akaeke*], to enforce those procedural rules [*Shala; Akaeke*]

v) Where the applicant has no potential rights under specifically immigration law, and therefore has to rely on his rights under article 8(1), delay in dealing with a previous claim for asylum will be a relevant factor under article 8(2), but it must have very substantial effects if it is to influence the outcome [*Strbac at para. 25*].

vi) The mere fact that delay has caused an applicant who now has no potential rights under immigration law to miss the benefit of a hypothetical hearing of an asylum claim that would have resulted in his obtaining ELR does not in itself affect the determination of a subsequent article 8 claim [*Strbac, at para. 32*].

vii) And further, it is not clear that the court in *Strbac* thought that the failure to obtain ELR on asylum grounds because of failure to make a timely decision could *ever* be relevant to a decision on the substance, as opposed to the procedure, of a subsequent article 8 claim. Certainly, there is no reason in logic why that fact alone should affect the article 8 claim. On this dilemma, see further para. 6 above.

viii) Arguments based on the breakdown of immigration control or of failure to apply the system properly are likely only to be of relevance if the system in question is that which the Secretary of State seeks to rely on in the present proceedings: for instance, where a procedural rule of the system is sought to be enforced against the applicant [*Akaeke*]. The same arguments do not follow where appeal is made in article 8 proceedings to earlier failures in operating the asylum system.

ix) Decisions on proportionality made by tribunals should not, in the absence of errors of principle, be interfered with by an appellate court [*Akaeke*].

17. I therefore find that the Judge who relied on these principles to find that the respondent's delay was so excessive and inordinate as to demonstrate a breakdown in the system of immigration control was within reason and there is no hint of perversity. He came to the legally correct decision on the evidence before him. No differently constituted Tribunal would find differently on the same facts.

18. I find that the Judge made an error of law by not specifying the law under which he allowed the appellant's appeal. It is however evident from the

reading of the full decision that he dismissed the appellant's appeal in so far as it related to the Refugee Convention and humanitarian protection grounds but allowed the appeal under Article 8 of the European Convention on Human Rights. Therefore, the error is not a material error.

19. I therefore dismiss the respondent's appeal and make it clear that the appellant's appeal was appropriately allowed pursuant to Article 8 of the European Convention on Human Rights and dismissed under the Refugee Convention and humanitarian protection grounds.

DECISION

The Secretary of State's appeal is dismissed.

Signed by

Mrs S Chana
A Deputy Judge of the Upper Tribunal Dated this 15th day of October 2017