Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06172/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 June 2019	**On 13 June 2019**

Before

UPPER TRIBUNAL JUDGE WARR

Between

SINDUJAN [C]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Spurling of Counsel instructed by Sriharans Solicitors
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Sri Lanka born on 31 July 1990. He entered the UK together with his mother clandestinely on 8 March 2007. The appellant's mother claimed asylum shortly after arrival with her son as her dependant. This application was refused on 10 April 2007 and the appeal against the decision was dismissed on 22 May 2007. Shortly after the appellant reached the age of 18 further representations were made on 28 August 2008. The case was moved to the older live cases unit under the legacy criteria. On 26 January 2016 the respondent sent a further submissions decision letter to the appellant's mother in which she concluded that she

did not qualify for leave on any basis. No direct mention of the appellant's inclusion as a dependant on his mother's initial claim was made. On 8 February 2016 the appellant's mother was granted discretionary leave to remain in the UK until 26 July 2018 but the appellant was not granted leave in line with his mother.

2. An asylum claim was lodged in his own right by the appellant on 18 April 2016. The claim was refused and certified on 16 October 2016. Judicial review proceedings were issued on 16 January 2017. The Home Office agreed to reconsider the matter. The application was again refused on 27 April 2018. The appellant gave notice of appeal on 14 May 2018. The appellant's appeal came before a First-tier Judge on 1 February 2019. At the outset of the hearing Counsel then representing the appellant informed the judge that the asylum claim would not be pursued. The appeal would proceed on the basis of Article 8 only both within and outside the Rules.

3. It is argued in the grounds that the appellant should have had the benefit of the same Asylum Policy Instruction (API) as applied to his mother and that he had been prejudiced by delay: The First-tier Judge dealt with these matters in the concluding paragraphs of her decision:

> "45. As previously noted, on 8 February 2016 Mrs [C] was granted Discretionary Leave to remain in the UK until 26 July 2018. A further grant of DL was made to Mrs [C] on 8 January 2019 and she now has limited leave to remain in the UK until 14 June 2021. Mr Gilbert drew my attention to the API *Dependants and former dependants* (May 2014) which states at paragraph 3.8:
>
> > 'Any dependant, who is currently under 18 and was included in the original asylum or human rights claim, should continue to be treated as a dependant until any further submissions are concluded.
> >
> > Any dependant included in the original asylum or human rights claim, who reaches 18 before the further submissions are decided, should normally continue to be treated as a dependant for the purposes of the further submissions application.'
>
> I am aware that in granting permission to apply for Judicial Review Upper Tribunal Judge Kekic said:
>
> > "It is arguable that given the wording of the respondent's policy on discretionary leave that the applicant should have been treated as a dependant when his mother's submissions were considered even though he was 18 at the time or that reasons should have been provided by the respondent for why he was not so treated. There is no reference in paragraph 3.8 of the policy guidance to a requirement that further submissions, in connection with an earlier asylum claim must be made whilst the dependant of the main applicant is still under 18. Arguably, the respondent failed to follow her policy. The absence of any enforcement action against the applicant when he was seen by an immigration officer in 2009 and the grant of permission to work in 2015 are matters which further suggest that the respondent was still treating him as his mother's dependant during that time."

However, with the utmost respect my view differs from that of Judge Kekic; I consider that the dependant in question needs to be under the age of 18 as at the date that the further submissions are lodged. The second paragraph of 3.8 refers to "the further submissions" not "any further submissions", and so must relate to the further submissions alluded to in the first paragraph, i.e. those submitted when the dependant was under 18. When Mrs [C]'s further submissions were lodged on 28 August 2008 [per Statement of Facts at AB page 183 and Counsel's skeleton argument at paragraph 6] her son had already attained the age of majority. In my judgment the Appellant did not fall within the ambit of the Respondent's policy.

46. In her Decision Notice Upper Tribunal Judge Kekic went on:

> "It is also arguable that the respondent failed to consider relevant matters when assessing whether the applicant's circumstances merited a grant of discretionary leave. Matters such as the seven-year delay in the respondent's decision making process which led to a grant of discretionary leave for his mother, his entry as a minor with his mother, his continued cohabitation with her, his birth and upbringing in Bahrain and not Sri Lanka, the absence of ties and familial support in Sri Lanka and his inability to read and write Tamil were not taken into account."

47. Counsel submitted that the Secretary of State's "egregious" seven-year delay in considering the further submissions made in August 2008, taken in conjunction with her failure to address the Appellant's status as an overstayer, permitted his client to develop deeper ties both to the UK and to his mother, and further distanced him from Sri Lanka (which was a country in which he had never lived in any event). He said that this was a factor mitigating against the weight to be attached to immigration control; it was pertinent that a person's presence had been tolerated for a lengthy period of time over which they developed strong family, social and cultural ties notwithstanding that for a large part of that period it was open to the authorities to remove them: **Jeunesse v Netherlands [2016] 60 EHRR 17** cited.

48. I note that in **Jeunesse v Netherlands** "exceptional circumstances" were found to exist because of a variety of factors, including the fact that the case involved a family with children, where the husband and children of the applicant were all Dutch nationals and had a right to enjoy their family life with each other in the Netherlands where they were "*deeply rooted*". Furthermore, the applicant had held Dutch nationality at birth but subsequently lost her nationality when Suriname became independent; '*Consequently, her position cannot be simply considered to be on a par with that of the other potential immigrants who have never held Netherlands nationality*.' As the court put it, in view of the particular circumstances of the case, it was questionable whether general immigration considerations could be regarded as sufficient justification for refusing the applicant residence in the host state [§121].

49. The European court's use of the phrase "exceptional circumstances" in this context was considered by the Court of Appeal in **MF (Nigeria) v SSHD**

[2013] EWCA Civ 1192. Lord Dyson MR, giving the judgment of the court, said at paragraph 42: *'In our view, that is not to say that a test of exceptionality is being applied. Rather it is that, in approaching the question of whether removal is a proportionate interference with an individual's article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be "exceptional") is required to outweigh the public interest in removal'*.

50. Delay is not determinative and is merely a relevant factor: **Strbac v SSHD [2005] EWCA Civ 848**. In **S, H & Q v SSHD [2009] EWCA Civ 142** the court found that arguments of 'unfairness' based on administrative delay *simpliciter* do not give rise to any jurisdiction in the court to intervene. The Secretary of State dealt with the Appellant's initial asylum claim in 2007 highly expeditiously. That initial asylum claim having been refused he had no justification in regarding himself as settled in the UK. Whilst his mother was ultimately granted DL, that was not put in place until February 2016 (despite the fact that on 26 January 2016 the Secretary of State had sent a Further Submissions Decision letter to Mrs [C] in which she concluded that she did not qualify for leave on any basis). There is some merit in the argument that the Respondent showed acquiescence in the Appellant's remaining in the UK when he was given permission to work in 2015. However, this permission was limited to shortage occupations. UT Judge Kekic refers to '*the absence of any enforcement action against the applicant when he was seen by an immigration officer in 2009*". However, in his skeleton argument Counsel notes that the Secretary of State "*has disclosed no evidence of the same*", and in her most recent witness statement Mrs [C] says that she is '*unable to remember the incident*' [WS §3]. Mr [C] has not suffered any specific detriment in consequence of the delay in making a decision on his mother's application (even assuming that he believed himself to be a dependant on that application). Whilst he entered into a relationship during this period (with DT), that was in full knowledge of the fact that his immigration position was precarious. That relationship has been over for some time, and the Appellant has no especially strong links of the kind that would create relationships that are hard to disrupt (such as that between parent and minor child or husband and wife).

51. In **Agyarko [2017] UKSC 10** Lord Reed emphasised that the critical issue will generally be whether, giving due weight to the strength of the public interest in the removal of the person in the case before it, the Article 8 claim is sufficiently strong to outweigh it [§57]. Taking account of all relevant considerations and weighing in the balance the public interest considerations, it has not been shown that there are in this case any 'very compelling reasons' [per **SSHD v SS (Congo) & Ors [2015] EWCA Civ 387**] outweighing the legitimate aim of maintaining economic well-being and the rights of others by applying a consistent immigration control."

4. There was an application for permission to appeal. Permission was refused by the First-tier Tribunal, however permission was granted by the Upper Tribunal on 7 May 2019. The respondent filed a response on 22 May 2019 concurring with the analysis of the API referred to by the judge and arguing that she had properly addressed all issues under Article 8. Counsel relied on his skeleton argument dated 3 June 2019 and on the submissions in the grounds of appeal on the two issues. The API

systematically dealt with different groups of dependants and the First-tier Judge's analysis could not be correct because the second paragraph dealt with exactly the same cohort as the first paragraph with the same consequences and on the judge's interpretation the second paragraph would be wholly otiose. In relation to delay the First-tier Judge had not taken full account of the effect of delay on the proportionality exercise and had dealt with the issue in an overly dismissive manner when stating "delay is not determinative and is merely a relevant factor". Reference was made to paragraph 52 of the decision in **Agyarko**.

5. At the hearing Counsel submitted that if there was any ambiguity it should be resolved in favour of the appellant. The letter granting the appellant permission to work predated the grant of discretionary leave to his mother. That seemed to indicate that the appellant was treated as a dependant of his mother's submissions. Both the grant of discretionary leave to the appellant's mother on 8 February 2016 and the further submissions letter in relation to the appellant's mother dated 26 January 2016 predated the "further submissions" policy version 9.0 published on 19 February 2016 and lodged by Mr Whitwell. It was not possible retrospectively to interpret a previous policy. The appellant had been granted permission to work on 25 August 2015 while his further asylum related representations were being considered. In relation to the delay issue Counsel relied on his skeleton argument. Although the grant of permission to work might mean that the appellant was economically dependent the issue was whether he was dependent on his mother's claim.

6. Mr Whitwell relied on the respondent's response. He pointed out that there were many APIs many of which were interrelated. He referred to the 19 February 2016 API which referred to dependency included in further submissions by coincidence also in the same paragraph as the previous 2014 policy – paragraph 3.8. That made the position crystal clear when it stated, "any dependant who is currently under 18 and was included in the original asylum or human rights claim, should continue to be treated as a dependant until any further submissions are concluded". Any lack of clarity could lead to inconsistent decision making. The judge had concluded correctly albeit via a different route. The appellant had not been treated as a dependant of his mother and had been dealt with in his own right and they had never been joined in a joint application on the Home Office database. It was clear that the appellant had been over 18 when the further submissions were made. The delay argument was made on the assumption that the appellant was tied to the further submissions. Any delay would arise after the asylum claim lodged on 18 April 2016 by the appellant had been certified in October 2016. There had been no delay. The mother's circumstances were different. It was an erroneous assumption that the appellant had been granted permission to work as a dependant of his mother.

7. In response Counsel submitted that the policy relied on in this case predated the 2016 policy and the policy relied on was contradictory or ambiguous and should be construed in favour of the appellant. The appellant had been entitled to rely on the policy. Page 4 of the 19 February 2016 policy showed that there had been changes

since the last version. The letter from the Home Office dated 25 August 2015 in relation to the appellant's employment suggested that the appellant was considered as part of the further submissions made. In relation to the delay issue Counsel referred to **EB (Kosovo) [2008] UKHL 41.** The delay did not depend on whether the appellant was the party to further submissions. The judge had dealt with the issue of suitability. The issues in dispute had not been properly dealt with and it would follow that it was disproportionate to refuse the appellant's claim on human rights grounds.

8. At the conclusion of the submissions I reserved my decision. I can of course only interfere with the judge's decision if it was materially flawed in law.

9. In relation to the policy, the First-tier Judge was in my view entitled to conclude as she did. It is accepted by Mr Whitwell that the policy could have been clearer but in the circumstances of this case it is apparent that the appellant's mother made an application with the appellant as her dependent when he was under 18 and this application was concluded on 22 May 2007 when the appeal was dismissed. By 28 August 2008 the appellant was no longer under 18. When writing to the appellant's mother as the judge notes no mention was made of the appellant's inclusion as a dependant on his mother's claim. While the policy could perhaps have been more clearly worded I am satisfied that it the First-tier Judge came to the right conclusion in this case notwithstanding the points made by Counsel. I reach this conclusion independently of the later policy as did the First-tier Judge. I reject the claim that the policy was ambiguous or that the later policy demonstrates that it was.

10. I am not satisfied that the judge erred in her careful consideration of the issue of delay in her decision at paragraphs 47ff set out above. She properly directed herself by reference to **Agyarko** and other relevant authorities. She reminded herself in paragraph 50 that delay was not determinative I do not find that her approach to the issue was unduly narrow or dismissive. While the judge acknowledged some merit in the argument that the Secretary of State showed acquiescence in the appellant's remaining in the UK when he was given permission to work in 2015 this permission was limited to shortage occupations. The judge also notes the reference by Judge Kekic to the absence of any enforcement action against the applicant when he was seen by an Immigration Officer in 2009 but the judge records what was said by Counsel in his skeleton argument and the fact that the appellant's mother stated she was unable to remember the incident in her most recent witness statement. It appears the point had not been established on the evidence before her. She had in mind all relevant matters including the appellant's relationship. She had in addition given full attention to the appellant's circumstances when considering his case under the rules.

DECISION

11. For the reasons I have given, this appeal is dismissed and the decision of the First-tier Judge shall stand.

ANONYMITY ORDER

The First-tier Judge made no anonymity order and I make none.

FEE AWARD

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

Signed Date: 12 June 2019

G Warr, Judge of the Upper Tribunal