Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/13116/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31 May 2019	On 17 June 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGEACHY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

NAVARATNARAJA [K]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer
For the Respondent: Mr R Singer, of Counsel instructed by Lawland Solicitors

DECISION AND REASONS

1. The Secretary of State appeals, with permission, against a decision of Judge of the First-tier Tribunal Sweet who, in a determination promulgated on 1 February 2019 dismissed the appeal of Navaratnaraja [K] against a decision of the Secretary of State made on 9 November 2018 to refuse to grant asylum but allowed his appeal on human rights grounds under Article 8 of the ECHR.
2. Although the Secretary of State is the appellant before me I will for ease of reference refer to him as the respondent as he was the respondent in the

First-tier. Similarly I will refer to Navaratnaraja [K] as the appellant as he was the appellant in the First-tier.

3. The appellant entered Britain on 23 April 2007 and attended a screening interview the following day and a full asylum interview on 4 May 2007. When his claim was refused in November 2018 he had therefore been in Britain for eleven years. The Secretary of State considered that the appellant was caught by the provisions of Article 1F(e) of the Refugee Convention and also found that he did not qualify for leave to remain under Article 8 of the ECHR.

4. The judge heard evidence from the appellant and submissions from both parties and in paragraphs 29 onwards set out his findings and conclusions. He found that the appellant's evidence, both oral and in the asylum interview, was ambivalent as to what assistance he had or had not given to the LTTE and stated:-

> "Even applying the lower standard of proof, I have not found his evidence to be sufficiently consistent for me to reach a different conclusion from that of the respondent, namely that the appellant is excluded from protection for a Convention reason due to Article 1F(e).".

He then went on to write:-

> "For the same reasons I am not persuaded that the appellant should succeed in respect of a claim for humanitarian protection, because there are no reasons to conclude that he is at risk on return – not least after the length of time which has elapsed since the alleged events which may place him at risk – and will not be able to seek the protection of the authorities."

5. The judge however went on in paragraph 37 to write:-

> "However, I am persuaded that the appellant should succeed under Article 8 ECHR, because of the length of time he has been in the UK and the fact that he is now married to another Sri Lankan (since 6 September 2009), albeit that neither of them has status to be in the UK, and he will have developed a private life in the UK. I have full regard to Section 117B of the Nationality, Immigration and Asylum Act 2002 that little weight should be given to someone's private life when their status in the UK has been precarious, but that is not to say that no weight should be given to the length of time which he has been in the UK. No explanation was given by the respondent as to why the decision had taken so long to provide and I am persuaded that the weight given to the public interest in controlling immigration should be give less weight due to the length of time the appellant has been in the UK.".

6. The judge therefore allowed the appeal under Article 8 of the ECHR.

7. The Secretary of State appealed that decision stating firstly that the judge when considering the Article 8 rights of the appellant should have taken into account when assessing the proportionality of the decision the fact that it had been found that the appellant had been involved in the commission of crimes against humanity. Moreover, the grounds argued that no exceptional circumstances had been shown and that the judge had erred in his application of the House of Lords decision in **EB (Kosovo) v**

SSHD [2008] UKHL 41. It was claimed that the judge had erred in stating that he placed weight on the fact that the appellant had a wife in Britain when her immigration status was precarious. Permission was granted on 26 April 2019.

8. On 11 March 2019 Resident Judge Zucker served notice under Rule 35 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 stating that he considered there was a clear material error of law in the determination and that it was appropriate that the appeal should be remitted to the First-tier. He stated that any representations to the contrary should be made within fourteen days. Within the fourteen day period a lengthy reply was served. This first stated that the Tribunal should place weight on the findings of the First-tier Tribunal, the First-tier being an expert Tribunal, and there was no requirement for the judge in the First-tier Tribunal to set out a formulaic approach to Article 8 of the ECHR. Secondly, the reply argued that the judge was correct to place weight on the delay referring to the judgment in **EB (Kosovo)** helpfully setting out paragraphs 13 through 16 thereof in the reply.
9. At the hearing before me Mr Jarvis relied on the grounds of appeal. Mr Singer stated that clearly the judge had taken into account the fact that the appellant was excluded under Article 1F and therefore must have had that in mind when he still allowed the appeal on human rights grounds because of the delay. He stated that there was some guidance that indicated that after six years a grant of leave to remain would be appropriate. He stated that the judge clearly had looked at all relevant facts as a whole. The respondent knew why he had lost and that was the primary requirement of the judge when drafting the determination.
10. I consider that there are material errors of law in the determination of the judge in his approach to Article 8 of the ECHR. The reality is that it is for a judge to carry out a proportionality exercise when considering the issue of an appellant's rights under Article 8 of the ECHR. The judge merely states that although he was taking Section 117B into account, the fact that it was stated therein that little weight should be placed on a private life built up when an appellant had no leave to remain, did not mean that no weight should be placed thereon. That assertion, of course, is correct but it does not mean that delay itself should be considered to be sufficient for the grant of permission. It is indeed clear from the determination in **EB (Kosovo)** that the effect of delay can lead to an appellant being able to build up a substantial private life in Britain and that that private life should be taken into consideration when a decision is made to remove. That is the effect of delay which should be considered by a judge rather than a mere mathematical exercise.
11. It is the case that the issue of proportionality requires the weighing up of a number of factors. No factors other than delay were cited by the judge. He does not detail in any way the private life which the appellant might have built up here and he does not take into account the fact that the appellant has never had leave to remain here. It is not merely that his leave has been precarious, but that he has only been able to remain pending the decision on the asylum claim. The judge does refer to the fact

that the appellant is married but the appellant's wife does not have status and the reality is that there is nothing to indicate from the findings of the judge that they could not return to Sri Lanka and carry on their family life there.

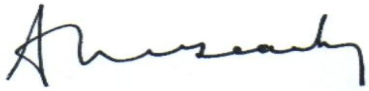
12. I can only conclude that the decision of the judge to grant the appeal on human rights grounds was a clear error of law and I therefore set aside that decision.
13. I note that there are no grounds of appeal challenging the judge's decision to dismiss the appeal under Article 1F and under the humanitarian protection provisions and Article 3. I consider, notwithstanding that there has been no cross-appeal that the decision of the judge on both these issues lacks appropriate reasoning. I do not consider it sufficient for the judge to say that there is nothing to unseat the conclusion of the respondent.
14. I therefore remit this appeal for hearing afresh on all grounds. It will be for the judge in the First-tier to make findings of fact and therefore make clear and reasoned conclusions as to whether or not the Secretary of State was correct to find that the appellant was caught by the provisions of Section 1F, to consider also in the light of his findings of fact what the appellant would face on return and whether or not the appellant's rights under Article 3 would be infringed by his removal, and of course also to properly assess the issue of the appellant's rights under Article 8 of the ECHR.

Notice of Decision

The appeal of the Secretary of State is allowed to the extent that this appeal is remitted to the First-tier Tribunal for a rehearing on all grounds.

Directions

1. The hearing will take place at Taylor House.
2. Tamil interpreter.
3. Three hours.
4. No anonymity direction is made.

Signed:  Date: 4 June 2019

Deputy Upper Tribunal Judge McGeachy