Upper Tribunal (Immigration and Asylum Chamber)

Appeal Numbers:
PA/00666/2021
HU/02366/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 November 2021	**On 22 November 2021**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

[H S]
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Burrett, instructed by Law Lane Solicitors
For the Respondent: Mr T Lindsay, a Senior Presenting Officer

DECISION AND REASONS

1. The appellant appeals, with permission granted by First-tier Tribunal Judge Haria, against First-tier Tribunal Judge Richardson's decision to dismiss his appeal against the respondent's refusal of his human rights claim.

Background

2. The appellant is an Indian citizen who was born on 1 January 1990. He entered the UK with entry clearance as a Tier 4 student on 5 August 2010. His leave to enter was valid until 31 May 2013. He was subsequently granted further leave to remain in that capacity, valid until 26 September 2016. That leave was curtailed in July 2015,

however, because the appellant had failed to enrol for the next semester of studies.

3. Whilst the appellant was in the UK as a student, he met and began a relationship with a Pakistani woman. On 19 October 2015, they claimed asylum together, relying on the difficulties they said they would encounter on return to their respective countries as a result of their interfaith relationship. The applications were refused on 14 April 2016.

4. The appellant's partner appealed against the decision to refuse her claim for international protection. Her appeal was heard by Judge Ripley, sitting at Hatton Cross on 23 November 2016. Judge Ripley accepted that she would be at risk on return to Pakistan because of her relationship with the appellant and her decision to change her religion from Islam to Sikhism. The judge concluded that she would be unable to relocate safely within Pakistan as a convert to Sikhism. The appeal was allowed accordingly. The respondent did not appeal against Judge Ripley's decision and the appellant's partner was granted asylum on 12 May 2017.

5. On 26 June 2018, it came to light that the appellant had not received the decision on his application for international protection. The respondent determined to reconsider his application. Then, on 6 December 2019, the appellant made a further application. This application was for leave to remain on family life grounds. The application was supported by a comprehensive letter from his current solicitors. It was submitted, in summary, that the appellant and his partner were in a genuine and subsisting relationship and that they could not relocate to India because his family did not approve of the relationship despite her conversion to Sikhism and because she would not be permitted to live in India as a Pakistani national. The appellant therefore maintained that refusal of the application would be contrary to Article 8 ECHR.

6. The respondent refused the appellant's human rights claim on 30 January 2020. She did not accept that there were insurmountable obstacles to the continuation of the appellant's family life in India and she did not consider there to be any exceptional circumstances which warranted a grant of leave to remain on Article 8 ECHR grounds outside the Immigration Rules. An additional decision refusing the appellant's asylum claim was made on 29 March 2021.

The Appeal to the First-tier Tribunal

7. The appellant appealed to the FtT and his appeal was heard by Judge Richardson ("the judge"), sitting at Taylor House, on 30 April 2021. The appellant was represented by counsel (not Mr Burrett), the respondent was represented by a Presenting Officer. The judge heard oral evidence from the appellant and his wife. He heard submissions from the representatives before reserving his decision.

8. In his reserved decision, the judge found there to be no risk to the appellant from his family: [13]. He did not accept that the appellant

would be at risk from the wider population as a result of his relationship: [15]. At [17] *et seq*, the judge considered the appellant's Article 8 ECHR claim. He did not accept that the appellant had shown that his partner would be unable to join him in India and he did not consider that the appellant had shown there to be very significant obstacles to his re-integration to India: [27]-[28]. At [29]-[32], the judge explained the basis upon which he concluded that the appellant's removal to India would not be in breach of Article 8 ECHR. Within that assessment, he demonstrably considered the fact that the appellant's wife is a refugee; the consequences of her joining him in India; and section 117B of the Nationality, Immigration and Asylum Act 2002. Due to its significance to the appeal before me, I should reproduce [30] of the judge's decision in full:

> In considering Article 8 [counsel for the appellant] accepted that I was duty bound to consider s117B of the Nationality, Immigration and Asylum Act 2002 and the public interest but submitted that I should factor into that consideration the respondent's failure to make a decision on his protection claim, which was made in 2015, until 2021 and that the delay should dilute the public interest in favour of removal. I also accept that the appellant speaks English and does not appear to have been a burden on public funds.

9. Having considered all of these matters, the judge decided that the appellant's removal would not bring about unjustifiably harsh consequences for the appellant or his partner: [31].

The Appeal to the Upper Tribunal

10. The grounds of appeal were settled by trial counsel. There were three grounds. The first was that the judge had failed to give adequate reasons for his finding that the appellant would not be at risk from his family. The second was that the judge had reached an irrational conclusion in concluding that there were no exceptional circumstances such that the appellant's removal would be contrary to Article 8 ECHR. The third ground was that the judge had failed to consider or to give adequate reasons for rejecting the submission that the public interest in the appellant's removal was negated or reduced by the significant delay in making a decision on his application for asylum.

11. In granting permission to appeal, Judge Haria noted that the third of these grounds was the most arguable but she did not restrict the grant of permission.

12. In submissions before me, Mr Burrett wisely made submissions on only the third of the grounds. He reminded me of what had been said by Lord Bingham in EB (Kosovo) v SSHD [2008] UKHL 41; [2008] Imm AR 713 and submitted that this was clearly a case in which the delay was relevant in each of the three ways considered at [14]-[16]. That submission had not been considered or resolved by the judge and what he had said at [30] was legally insufficient. It appeared that the respondent had intended to refuse the application for asylum in 2016 but that had not happened, for whatever reason, and it was only in

2018 that she determined to reconsider the case. The underlying Article 8 ECHR claim was a strong one – based as it was on the appellant's relationship with a refugee – and the judge's failure to come to grips with the EB (Kosovo) submission was a serious flaw in his proportionality assessment.

13. Mr Lindsay indicated that the appeal was resisted by the respondent. It was clear from [30] of the decision that the judge had taken proper account of the delay. It would be artificial to read that paragraph as anything other than an acceptance of the submission that the public interest in the appellant's removal had been diluted but not negated. The respondent's records appeared to show that the asylum decision from 2016 had been served on the appellant. The delay was not a significant one.

14. Mr Burrett had no reply. I reserved my decision.

Analysis

15. Since Mr Burrett sensibly declined to advance any argument on the basis of the first two grounds, I need say no more about them. As is clear from the summary of the submissions which appears immediately above, the sole complaint pursued by Mr Burrett was that the judge had failed adequately or at all to deal with the argument that the delay in resolving the appellant's asylum claim should reduce or negate the weight which is ordinarily attached to immigration control.

16. I agree with Mr Lindsay's submission that the judge demonstrably considered the argument advanced by the appellant in this respect. So much is clear from the first sentence of [30] of his decision, which I have reproduced in full above. When that sentence is read with the second sentence of that paragraph, it is equally clear that the judge actually accepted the submission that the public interest should be 'diluted' to some extent as a result of the delay in considering the appellant's asylum claim. Ultimately, however, the judge came to the conclusion that the public interest in immigration control, as underlined by s117B(1) of the 2002 Act, was not diluted sufficiently to avail the appellant.

17. I accept that the reasons could have been expressed in greater detail. The judge could have made reference, for example, to EB (Kosovo). He could have explained in greater detail why he did not consider the extent to which the public interest in immigration control was weakened by the delay to such an extent that it could be overcome by the appellant. But to require a first instance judge to develop their reasons to such an extent is, firstly, to require reasons for reasons and, secondly, to lose sight of what has consistently been said in cases such as AH (Sudan) v SSHD [2007] UKHL 49; [2008] Imm AR 289 and UT (Sri Lanka) v SSHD [2019] EWCA Civ 1095.

18. The FtT is a specialist tribunal with a heavy caseload and it is confronted with questions of proportionality such as this on a daily basis: UT (Sri Lanka) v SSHD, at [21], per Floyd LJ. Floyd LJ (with whom Coulson LJ agreed) underlined the importance of Baroness Hale's

statement in AH (Sudan) v SSHD that appellate courts should not rush to find misdirections simply because they could have expressed themselves differently. That, in my judgment, is precisely the situation in this appeal. The judge was cognisant of the submission, and accepted it. He factored his acceptance of that submission into the proportionality exercise which he undertook, and he resolved that exercise adversely to the appellant. The weight to be attached to the delay was a matter for the judge: EB (Kosovo) v SSHD, at [16]. There is no proper basis upon which to interfere with the resulting assessment, even though I might feel that it could have been expressed somewhat better.

19. Lest I am wrong in that conclusion, I have nevertheless asked myself the question which I put to Mr Burrett during his admirably concise submissions: what difference could it have made if the judge engaged with the submission at greater length? I come to the clear conclusion that the outcome in the appeal would inevitably have been the same even if the delay point had been more fully explored by the judge.

20. The appellant claimed asylum after he had been notified that he was liable for removal from the United Kingdom and, as noted in the letter of refusal, the facts upon which he based that claim had been in existence for some time. There is a cogent public interest in the removal of such a person. There are no insurmountable obstacles to the continuation of the appellant's family life in India, although there may be some difficulties for the appellant's wife, as was fully considered by the judge. This need not be a case, therefore, in which the respondent's decision brings about the separation of a man from his refugee wife. It is not clear what happened to the respondent's first decision on the appellant's asylum claim. Mr Lindsay was able to access a copy of that decision and to provide a Recorded Delivery number for it. For whatever reason, however, the respondent agreed to reconsider that application in 2018. She failed to do so before the appellant's human rights claim was made in 2019 and she then failed to progress the protection claim, again, until March 2021.

21. I accept Mr Burrett's submission that this was a delay which was relevant in two of the ways considered by Lord Bingham at [14]-[17] of EB (Kosovo). The appellant developed closer ties to his wife during the delay. The sense of impermanence felt by the appellant and his wife would probably have faded during the delay. In considering the third way, however, I accept that the delay was the result of a dysfunctional system but not that it yielded an unpredictable, inconsistent or unfair outcome. There is nothing to show, for example, that the appellant was in any way disadvantaged by the delay in that sense. Be that as it may, I accept that the public interest in the appellant's removal is reduced somewhat as a result of the delay.

22. Even taking full account of the appellant's particular circumstances and the relatively serious delay in the respondent's decision-making process, however, I am unable to see how the FtT could lawfully have reached any conclusion other than that the requirements of immigration control outweigh his family life in the UK. Even though his wife is a refugee from a third country and even though the respondent

delayed in reached a final decision on his protection claim, the public interest in his removal is not negated and must outweigh his family life. In the circumstances, and as an alternative to my primary conclusion, I do not accept that any error into which the judge fell as regards delay was an error which was capable of affecting the decision on the appeal. The only proper conclusion in this case was that the appellant's removal was a proportionate course.

23. The appeal is accordingly dismissed.

Notice of Decision

The appellant's appeal to the Upper Tribunal is dismissed and the decision of the FtT, dismissing his appeal on human rights grounds, shall stand.

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 his 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.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

16 November 2021